Original Intent

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An Apple of Gold In a Silver Frame:

The Inseparable Tie Between The Declaration of Independence & The United States Constitution

CHAIRMAN'S CORNER
Supreme Court Jurisprudence: An Amazing Metamorphosis

By way of design, the judiciary was intended as a non-policy-making arm of the government. Yet, by the late 1800s it was well on its way to becoming a highly politicized institution; and, by the middle of the 1900s, Supreme Court jurisprudence had undergone an amazing metamorphosis.

Dianne Gilbert

What is truth?

At the root of the Court's metamorphosis was a new idea called *positivism* founded by a 19th century French Sociologist named Auguste Comte (1798-1857). Comte insisted that truth was truth only if it could be scientifically tested in the laboratory or empirically proven to be true. Hence, since the principles of *liberty*, and *justice*, for example, cannot be scientifically tested in a laboratory, they have no *real* meaning. From here, it was but a short step for the disciples of positivism to conclude that the whole idea of natural law, a concept upon which American constitutionalism rests, does not exist.

To prove his idea of positivism, Comte "set forth a scheme that attempted to explain the development of mind and society through three successive stages." [1] The final and highest stage Comte called the *scientific* or the *positive* stage. He was also understood to have meant it to be the *factual* stage. In referring to the scientific stage as the *Positive* stage Comte was said to have "set forth what might be loosely called a religion of Positivism…[better] called a religion of the worship of humanity or humanis, to use one of his words."[2] His work would ultimately give rise to a *new religion* commonly referred to as *Secular Humanism*; however, Comte's effort to explain CHANGE in terms of successive stages of development turns out to be the heart and lungs of Positivism.

The Many Faces of Evolution…

Enter the age of *evolution*, an idea whose application was not limited to biology alone but "…applied in every direction, for many thinkers came to see everything through evolutionary lenses, so to speak. "[3] From here we proceed to pass through a series of *isms* to include: rela-

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Best Friends: *The Declaration of Independence and the United States Constitution*

By Dr. William B. Allen

The following speech was delivered as the keynote address before the New Hampshire Center for Constitutional Studies at its 2004 Constitution Day Celebration, Concord, New Hampshire, September 21, 2004.
Dr. Allen is a Professor of Political Science at Michigan State University

On this occasion I beat an old horse, just to prove that he is not dead. In this task I am not unlike the rhapsode, Ion, who kept Homer alive by memorizing Homer's entire poems and reciting them at every opportunity. Unlike Ion, however, I trust that I do not mistake the wisdom of the authors for the wisdom of the rhapsode.

The relation between the Declaration and the Constitution has a different affect today than it did in 1860, when enemies to the more perfect union could find no pillar bearing more weight – and thus to be dislodged – that what they called the "self-evident lie" that "all men are created equal." Those critics insisted that men indeed are not by nature made equal, nor should be. Today's enemies of the more perfect union believe that "all men" in 1776 only meant all white males and, moreover, that not even they were by nature made equal though they should be. These critics insist, however, that what nature and history refused to humankind law can create (and they would indeed have all men equalized, the Constitution notwithstanding).

Dr. William B. Allen

In 1860 nothing and no one so stoutly resisted the enemies of the Declaration than the Defender of the Constitution. Today nothing and no one so stoutly resists the enemies of the Constitution than the Defender of the Declaration. Abraham Lincoln established at Gettysburg that the nation "conceived in liberty" and confirmed "in the proposition that all men are created equal" must conduct its affairs through limited, constitutional union. Today we require to learn that limited, constitutional union can only be justified on the basis of the Declaration of Independence. What we mean, then, when we say that the Declaration of Independence and the Constitution are best friends, is that they are necessary and reciprocal supports for each other.

Two proofs are necessary to complete this argument: first, that the Declaration requires limited, constitutional union and, second, that the Constitution requires the principle of equality founded in laws of nature and creation.

The First Proof: Limited Constitutional Union Is Required

We may restate the first inquiry in the following form: is it true that the rebellion against British monarchy would have been unjustified on any grounds other than the grounds of natural rights, and that natural rights must disclose not only people's claims to justice but their capacities to realize those claims?

When stated thus, the first proof becomes, I believe, easily realizable. Let's start with the negative argument. The British constitution and laws in no way recognized a right of revolution. Accordingly, the act of revolution could not have been found on any positive authority. Moreover, Americans were not disproportionately harmed, relative to other subjects of the monarchy. Therefore, as far as the conceded rights of Englishmen went, the Americans could have had no

(Continued on page 3 William B. Allen)

What Would They Say...

"The voice of the people has been said to be the voice of God and however generally this maxim has been quoted and believed it is not true to fact. The people are turbulent and changing; they seldom judge or determine right."

_Alexander Hamilton

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Abbreviated List of Grievances of The Declaration of Independence Cross-Referenced with The Constitution

Best Friends: The Declaration and the Constitution

By Dr. William B. Allen

Declaration of Independence	Constitution	Declaration of Independence	Constitution
He has refused his assent to Laws the most wholesome and necessary for the public good.	Article. I. Section. 1. All legislative Powers herein granted shall be vested in a Congress of the United States ...	He has kept among us, in times of peace, Standing Armies without the Consent of our Legislatures.	Article 1. Section 8: The Congress shall have Power...To declare war... To provide and maintain a Navy...
He has forbidden his Governors to pass Laws of immediate and pressing importance unless suspended in their operation till his Assent should be obtained; and when so suspended he has utterly neglected to attend to them.	Article 1. Section 7: Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States...	He has affected to render the Military independent of and superior to the Civil power.	Article 2 Section 1: The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service...
He has refused to pass other Laws for the accommodation of large districts of people, unless those people would relinquish the right of Representation in the Legislature, a right inestimable to them and formidable to tyrants only.	Article 1. Section 2: The House of Representatives shall be composed of Members chosen every second Year by the People of the several States...	He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their Arts of pretended Legislation.	Article 6: This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; ..., shall be the supreme Law of the Land.
He has called together legislative bodies at places unusual, uncomfortable,, and distant from the depository of the public Records, for the sole purpose of fatiguing them into compliance with his measures.	Article 1, Section 4: The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.	For abolishing the free System of English Laws in a neighboring Province, establishing therein an Arbitrary government, and enlarging its Boundaries so as to render it at once an example and fit instrument for introducing the same absolute rule into these Colonies.	Article 6. ...no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States. [Counters the Quebec Act]
He has dissolved Representative Houses repeatedly, for opposing with manly firmness his invasions on the rights of the people.	Article 1. Section 5: Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, not to any other Place than that in which the two Houses shall be sitting...	For taking away our Charters, abolishing our most valuable Laws, and altering fundamentally the Forms of our Governments.	Article 4 Section 4: The United States shall guarantee to every State in this Union a Republican Form of Government,....
He has refused for a long time, after such dissolutions, to cause others to be elected; whereby the Legislative powers, incapable of Annihilation, have returned to the People at large for their exercise; the State remaining in the mean time exposed to all the dangers of invasion from without, and convulsions within.	Article 1. Section 4: The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.	He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary powers.	Article 3. Section 1: The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.
He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries	Article 3. Section 1: The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall,... receive for their Services a Compensation, which shall not be diminished during their Continuance in Office	He has abdicated Government here, by declaring us out of his Protection and waging War against us.	Preamble: We the People of the United States, in Order to form a more perfect Union,...
He has erected a multitude of New Offices, and sent hither swarms of Officers to harass our people, and eat out their substance.	Article 2. Section 2: [The President] ...shall nominate, and by and with the advice and consent of the Senate, shall appoint ... Judges of the Supreme Court...		

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beef against the Crown. Although *non tallagio non concedendo* ("no taxation without consent") was an established principle of positive right in Britain, it was honored more in the breach than in practice (given the pervasiveness of rotten borough representation). Americans were no less well represented than many a Briton. Nor could America make any secession claim, since the colonies could not affect an autonomous status conditioning their place in the empire. To have a right to secede, they would have had to begin the voluntary assimilation into the empire. Political forms, which are themselves artifices, cannot derive principles of their conduct from nature as opposed to their architecture.

If the Americans were justified at all, in other words, their justification had to be extra-judicial, extra-political, extra-historical. When we read the Declaration of Independence, we notice not only the broad language of the exordium ("When in the Course of Human Events…") and the universal principle of the enunciation ("We hold these truths to be self-evident…"), but we can especially notice the particular charges ("the long train of abuses and usurpations") leveled against the King. It has been frequently noted that the very form of the Declaration's indictment identifies the King rather than the Parliament as the enemy to America's liberty. Sometimes this is thought to be a ruse to avoid acknowledging Parliament's authority (the Americans claimed an interpretation of the British constitution that made them directly subject to the monarch without intervention of the Parliament). A careful reading, however, discloses a substantive and not merely rhetorical argument that highlights the Declaration as an initial charter of government.

Government for the Good of the People...

The first twelve charges against the King (all of them, that is, until the thirteenth, which associates him with the Parliament in opposition to the colonies) actually condemn the King foremost for ignoring the welfare of his subjects. The language of the very first charge is meant to characterize the particulars in all of those that follow: He has refused his Assent to Laws, the most wholesome and necessary for the public good.

Now, the laws invoked by the colonists here are the laws of their colonial legislatures, not any laws of Parliament. Thus, the substance of the charge is that the King, their sovereign, has declined to cooperate in their exertions of lawful and subordinate self-government with an eye to the public welfare. The implicit argument made here, clearly, is that persons are subject to government only for their good, and that argument is a principle that transcends any charter or act of government. It establishes a standard of judgment to which every government of whatever cast is subject, and in the name of which any people, any time, have the right, nay, the "duty, to throw off such Government, and to provide new Guards for their future security."

Else Legislative Powers Return to the People

Each of the remaining charges against the King reinforces this same principle, each as a particular proof of the universal truth contained in the Declaration's enunciation. Perhaps none does so, however, so centrally as that in which they accuse him of neglecting the necessary exercise of legislative powers in such a manner as to cause that "the Legislative powers, incapable of Annihilation, have returned to the People at large for their exercise." But this very observation is followed with the particular notice that the result is to expose the people, inadequately provided, "to all the dangers of invasion from without, and convulsions within." This observation, then, makes the necessary argument that although in general the purpose of government is to provide for the public welfare, in particular it is to accomplish such acts as the people, otherwise unprovided, cannot so well provide for themselves. And where the constituted government — limited by this purpose — fails, it falls to the people speedily to provide such a government as can respect these limits and accomplish these results.

Each of the charges against the King can be converted into a positive affirmation of the obligations of government. For example, government must respond to "immediate and pressing" needs, relying upon local necessities and judgments wherever delays in execution would be a necessary part of reserving judgment to the highest authority. The needs of people must be accommodated without the cost of them relinquishing "the right of Representation in the Legislature.' Legislatures must operate in such a manner as to remain readily accessible to the people and the recourse to public records. Dissent must be respected within the assemblies that conduct the public business. Free movement of persons into and out of the country is a fundamental part of the liberty of citizens. Judicial powers must be independent of executive will and be empowered to render justice to persons. Citizens should not be burdened with excessive requirements to support public officers. A military administration is incompatible with public liberty, and the military must be subordinate to and dependent upon the civil power.

Architecture of Government Founded in Universal Principles.

The architecture of government sought in these affirmations is founded in universal principles and not the English constitution. If there were any doubt about this, the doubt would be resolved not merely by comparing this to the actual English constitution of the day, but also by considering the weighty charge against the King concerning his activities in Canada. For there, the revolutionaries held, he abolished "the free System of English Laws in a neighbouring Province, establishing therein an Arbitrary government, and enlarging its Boundaries so as to render it at once an example and fit instrument for introducing the same absolute rule into these Colonies." Note that this produces a different picture of English laws operating in Canada. If Canada, previously French, were being anglicized along lines different from what obtained in the thirteen colonies, the thirteen colonies were not anglicized. Moreover, the demand for a clear-cut demarcation among the powers of government — executive, legislative, and judicial — derived not from English practice but from a universal principle.

This design of limited constitutionalism, further, was nothing less than imitating in human artifice the order of nature reflected in the powers of God affirmed in the Declaration. God held the three powers of effective order, legislative, executive and judicial. He legislated "the Laws of Nature and of Nature's God;" regarding humans he was the executor, for "they are endowed by their Creator with certain unalienable Rights;" and he was appealed to as "the Supreme Judge of the world for the rectitude of our intentions." God, in other words, united the three powers of effective order in his own person. He could do so precisely because he exists in an order above man and respecting which no "consent" to his rule could be demanded. No man is God's equal, while every man is any king's moral equal.

Therefore, no rule by men could assemble the three powers of effective order in the same man or body of men, without creating the presence of a power superior to man. The necessity of consent derives from the truth that "all men are created equal," meaning that no one man is by nature the ruler of any other. In that circumstance, just rule among men can eventuate only from consent. To be effective, however, such consent must be limited by prudential separations of power that will prevent god-like domination. Men will fail to obtain such good as God has ordained for them unless they gather together in effective political union, but effective political union requires limited, constitutional government.

The Declaration needs limited, constitutional union in order to realize its promise of goods ordained by God for men. The Constitution responds to that need. The most evident forms of Constitutional response are visible in the architecture itself. The powers of government are divided into legislative, executive, and judicial branches. Among these, the legislative takes pride of place, being elaborated in Article I and bearing the most careful delineation of powers and principles of representation. This satisfies the concerns of the Declaration, in which the particular enumeration of tyrannical oppressions lists fourteen specific legislative power violations, ten executive power violations, and one judicial power violation. The list of legislative powers in Article I, Section 8 serves as a template by which we may assess the charges against the King as mainly of one or the other tendency. The Constitution established bulwarks where the experience recorded in the Declaration identified dangers. This same pattern is evinced in the Bill of Rights, which opens with the powerful stricture, "Congress shall make no law…"

The Second Proof: The Principle of Equality

The most telling evidence of the Constitution's principles is provided in its architecture. Nevertheless, further, significant dimensions are contained in the language and tenor of the document. The Preamble has oft been noted as keynoting the document in its identification of "We the People" as the authorizing power of the government established under the Constitution. This responds, of course, to the Declaration's insistence that the public good is the aim of limited, constitutional union. Moreover, it furthers the claim that not artifi-

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Judicial Supremacy

By Myles Robinson

Editor's Note: Myles Robinson is a senior at the New Testament Christian School, Plymouth, MA. The following is a transcript of his oration delivered before the New Hampshire Center for Constitutional Studies (NHCCS) at its 2004 Constitution Day Celebration, in Concord, New Hampshire, September 21, 2004. Myles has spoken several times before Constitution Day audiences and has led several workshops on behalf of NHCCS at its annual event.

Perhaps the most misunderstood area of our nation's government has to do with the authority that is resident in the judicial branch of the government. When the founders composed the Constitution, they gave each branch of government certain powers. The legislative branch received many powers, ranging from the declarations of war, punishment of terrorism and the implementation of taxes on the populace of the nation, and most importantly, the power to write law. The executive branch was given the powers of action, being the branch that would execute, for lack of a better word, the laws that the legislative branch had constructed. Finally, we come to the subject of our discussion tonight. The judicial branch was given only the powers of interpreting the laws and applying them to specific cases. The powers that each governing branch were given were relevant to their significance in the outworking of the power flow of our government.

Today, many problems in our nation stem from a grossly incorrect concept called judicial supremacy. Many people, even Christians and so-called constitutionalists are ignorant of the discrepancies that are present in this philosophy. These people, if asked, would most likely say that the courts have the power to write law. However, this is the major problem with the concept of judicial supremacy. As clearly stated in the Constitution of the United States, Article I, Section 8, Paragraph 18, Congress has the power to "...make all Laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the United States, Or in any department thereof." This clearly delineates the fact that the power of writing law resides solely in the Congress, comprised of the Senate and the House of Representatives. The Supreme Court of the United States, is not a member of Congress. Therefore, the power to write law does not even remotely reside in that branch. The Judiciary branch has its own set of powers and area of jurisdiction. According to Article 3, Section 2, Paragraph 3, "the Supreme Court shall have appellate jurisdiction, both as to Law and to Fact, with such exceptions and under such regulations as the Congress shall make." Even in the Supreme Court's area of jurisdiction, they are still under any regulation that the Congress may impose upon them. The whole purpose of the judicial system is to provide a check upon the legislature and the executive body of this nation. They have the power to interpret the law and the Constitution as it applies to each specific case that is brought before them. However, one single ruling does not make a law, written in stone that must be followed by all the citizens of the nation. All that they can do is apply the laws already written, to the individuals that come under their jurisdiction. According to William Blackstone, the courts have only the power to discover, state and apply law. However, as the result of one single ruling in a Texas courthouse in early 1973, and the apathy and complacency of Constitutionalists across the nation, millions of abortions have been performed without the changing of the law by the legislatures. The court ruled in favor of a woman, allowing her to have an abortion. Then, the world assumed that abortion was automatically legalized, because, well, the courts said that it was. However, the court can say whatever it wants, Roe V. Wade only ever applied to Mrs. Roe. The Supreme Court's ruling only ever applied to that one instance. While judicial precedent has been set, and if another woman under the same circumstances as Mrs. Roe were to take the case to court, she might very well win her right to an abortion. Again, it would only apply to her. Until a law is written that legalizes abortion, every person that has or performs an abortion has broken the law, whether or not we agree with the moral aspect of the issue.

This is only one issue, but it illustrates the misconception that has gripped our nation. A Supreme Court rules for one individual and the rest of the country automatically assumes that they have the right to the same ruling as well. However, if we take the principles and even the actual text of the Constitution and apply it to the matter of abortion, those who propagate the idea have no ground to stand on, legally. It is like this in many areas. If we as Christians and constitutionalists would only apply the true meaning of the Constitution to the issues that we struggle with and are confronted with every day, we would have a much better platform. While some judges choose to ignore and misinterpret even the very words of the Constitution, we can, as Judge Roy Moore did, stand firmly on the truths of the Constitution and take faith in what our Founding Fathers, have worked out and put down in law with the "Father of Lights illuminating their understandings," as Ben Franklin so aptly stated. Their blood, sweat and tears have been poured into this nation, and the lives of thousands of men and women have been laid down in the obtaining and defense of liberty. Will we allow a common misconception to make a mockery and a waste of all that these men and women stood and died for? As Patrick Henry so aptly stated, "Forbid it Almighty God! I know not what course others may take, but as for me, give me liberty or give me death!"

How's Your Constitutional IQ?

1. Which state had the most signers of the Constitution: a) New York, b) Pennsylvania, c) Massachusetts?
2. The Constitution contains the rules of our government. What official document contains the philosophical underpinnings of that government?
3. The Declaration of Independence set forth a long list of complaints against a specific person. Who was that person?
4. Who has the responsibility to govern the District of Columbia, the seat of government?
5. What did the Constitutional Convention do with the new Constitution after it was approved and signed by the Delegates?
6. Which one of the signers of the Constitution had been born in the West Indies?

Answers: 1) b: Pennsylvania. 2) The Declaration of Independence 3) King George III of England 4) The Congress as provided for in Article I, Section 8, Clause 17. 5) It was sent to the Confederation Congress for its approval. After Congress approved it, it was sent to the states for ratification by the people. 6) Alexander Hamilton. He sailed to New York to further his education and never returned home.

Constitutional Minute

_Donald Conkey

"The belief in a God All Powerful wise and good, is so essential to the moral order of the World and to the happiness of man, that arguments which enforce it cannot be drawn from too many sources nor adapted with too much solicitude to the different characters and capacities to be impressed with it"

_James Madison 1825

Do You Need To Be Reconnected To The Roots of The American Republic?

(Continued from page 3 - William B. Allen)

cial, political entities create the United States of America, but the people, exercising a native, God-given right do so. Not less important, however, is the fact that the authorizing people are recognized within the document as fully entitled to serve in the government and to benefit from its ministrations. Those who are eligible to hold office on the Constitution's own terms are distinguished no further than by reasonable age and citizenship restrictions. No religious test is admitted. No race or gender is excluded. In short, in the vision of the Constitution, "all men are created equal."

Perhaps the most important affirmation of the Declaration's constitutionalism is the careful provision for re-balancing, re-forming, and re-directing the government that is contained within the Constitution. The amending provision is evidently the leading, though not the sole, source of this understanding. The constitution is careful to keep the door open to the formation of new political subdivisions within the Union, at the same time as providing guarantees against arbitrary or unwanted re-constitutions of the political subdivisions. In the vision of the Constitution the states are both permanent members of the Union and autonomous members of the Union. The sovereign without their consent may not alter them. Further, political decision making is constrained by a careful regard to establish broad consensus rather than the mere weight of numbers – or, in other words, as nearly as possible *all* the people must be comprehended in decisions for all and not merely a disproportionate number. Whether the concern is constitutional amendments (which must attract three-fourths of the states), the election of the president (which must attract dispersed majorities throughout the country rather than a merely numerical majority), or the election of representatives (which must work toward broad acceptance rather than merely ideological conformity), the Constitution is a Declaration-minded charter, eager to avoid ever again exposing one part of the empire to the willful neglect or oppression of another part.

The detailed ways in which the Constitution, rhapsode-like, echoes the Declaration are legion and, mercifully, will scarcely reward rehearsal in these premises. (An appendix is added to illustrate the relationship. See page 2) A notable example is the subordination of the military power to the civil power, and there are many others. Yet, I would insist that nothing so fully explains the Constitution as the Declaration.

What About Slavery

Now it will be reasonable for anyone to insist that the compromises of the Constitution be brought within the compass of these reflections – most notably, the compromises with slavery. Is not slavery the very denial of the Declaration that the Constitution is otherwise said to echoed? No, we cannot duck this important challenge, for it is certainly correct to say that, if the Constitution were a slave-holding Constitution, then it could not have been a Declaration Constitution. Benjamin Banneker argued as much when he appealed, in 1792, to the author of the Declaration to take up the work of vindicating that document by using his office (as Secretary of State) and reputation (as author of liberty's charter) to end the abuse that slavery was. Banneker believed that only by eliminating slavery could the Constitution be a true Declaration charter.

I would readily embrace Banneker's impassioned plea on behalf of the slaves, if I were not already persuaded that the reciprocal influences of the Declaration and the Constitution *alone* provided in this world any hope for the eventual renunciation of slavery as a lawful practice among men. Although Christianity long before the founding of the United States inseminated moral consciousness with repugnance for slavery, it is doubtless correct to observe that it was only when Christianity combined with the political architecture of liberty that any real opportunity arose to sustain that moral consciousness through the abolition of slavery.

The Constitution, then, compromised with slavery. But in what did the compromise consist? Could it be fairly said that the Constitution purchased its ratification at the cost of approving slavery? Or, was it rather that slave-holding purchased an extended lease at the cost of approving a Declaration charter? I believe the answer to this question is that the latter is nearer the truth than the former. We have not only the testimony of James Madison in the first Congress, who interpreted the slavery clauses in the Constitution as revealing an opposition to slavery albeit in consciousness of the inability to eliminate it at once. We also have the very language of the Constitution itself. The studious avoidance of the word, "slave" – thus to avoid staining the Declaration charter – testifies volubly. Moreover, the tendency of each of the slave-provisions is to provide direct testimony against slavery. At least some proportion of the slaves should be regarded as human beings, for purposes of representation and direct taxation (based on population numbers). That language, the three-fifths clause, was borrowed from a 1783 measure that dealt only with taxation (and therefore led slave-holders to resist the formula rather than support it) and also made plain that all *free persons* included black persons not slaves. This meant that it was not a comment on the human value of black persons; it was rather a practical measure of the degree of influence the respective sides of the controversy exercised in making the decision. The slave-trading language ("the migration or importation of such persons") again affirmed the personhood of the slaves. And it did more; it identified the trade as a thing eventually to be ended rather than an option for the future. And the last compromise, the fugitive slave clause, conceded that general laws regarding property should be enforced without exception (thus preserving comity among the states) while yet speaking of "persons held to service," which included a class larger than slaves.

The slave compromises passed the Constitution, to be sure. But the slave power took the greater risk in doing so. For the other provisions of the Constitution constantly fostering and even encouraging a spreading democratic sentiment could fairly have been expected to deepen the modulated criticism of slavery contained with the compromise language itself. The fact that changing economic and demographic facts in subsequent decades rendered this a more problematic expectation cannot be employed to discount the initial prospects. Nor can it be fairly denied that Lincoln's valiant and successful effort to recapture the original perspective owed everything to the prior existence of the Declaration charter. When Lincoln and Douglas debated whether the Constitution could apply to black people, and Lincoln reverted to the "standard maxim of a free society" ("that all men are created equal") to explain the nature of the constitutional principles, we beheld in purest form the sustained, reciprocal interplay of the Declaration and the Constitution. Such a view should persuade us that they are friends never to be separated, best friends in the cause of liberty.

A Christmas Blessing For Our Troops

Thank You, Lord, for the men and women of our armed forces. Protect them as they protect us. Defend them as they defend us. Encourage and strengthen them in spirit soul and body in the execution of their duties. Enable them to curtail hostile actions before they start. Give our leaders wisdom and insight in all decisions. Thank you, Lord, for providing America with the best trained, equipped and led military force in the world. Fill them with Your saving grace and the gospel of peace that they may be shining witnesses of Your love. Amen.

_Anonymous
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Judicial Supremacy:
An Abuse and Misuse of Power
By Allison Akeley

Editor's Note: Allison Akeley attends the 10th grade at the New Testament Christian School, Plymouth, MA. The following is a transcript of her oration delivered before the New Hampshire Center for Constitutional Studies at its 2004 Constitution Day Celebration, in Concord, New Hampshire, September 21, 2004.

Judicial tyranny and judges run amuck? Or perhaps, evenhanded interpretation of historical law and its proper application to today's circumstances? These are often the justifying cries heard throughout society as one surprising, and sometimes shocking, judicial edict after another flows from judicial benches across our land.

The Judicial branch was originally meant to be one of the weaker branches of our federal government, but that seems to have drastically changed throughout the years. A majority of judges act like kings or monarchs, ruling over their courtroom as a kingdom and think they can do as they please. It was never meant to be so. The Judicial branch was originally bestowed with four basic powers. These powers were

1.) First, to use appellate jurisdiction,
2.) Secondly, to rule in cases of law and equity,
3.) Thirdly, to rule [on] the law and the facts of a case, and
4.) Lastly, to insure the power of the jury.

Using these powers correctly, we should expect the courts would rule according to the Constitution and give their opinion of what the law says, and that their opinion is binding only on the cases brought before it. We should expect that judges' verdicts would not become the law of the land.

Unfortunately, the ignorance of our culture has led to the predominant belief that what the judges' say affects legislation rather than the legislation effectively limiting what judges can say.

The founders of our nation predominately based the civil government they formed on the governing principles God gave to Israel in the Old Testament. The overwhelming majority of our founders and the framers of the Constitution believed the God of the Bible is the ultimate Judge, and that He allowed earthly judges to be appointed for a time and a season. Common law, the British system that all law is common to all people regardless of who or what they are, is rooted in the Ten Commandments. Common law is common sense and should appeal to our instincts and conscience. The government cannot change common law as it is instinctively put into our conscience as evidenced by our desire for fair and equal treatment. If common law is in us, we should be ruled and judged by it. In 1772, George Mason said, "The laws of nature are the laws of God, Whose authority can be superseded by no power on earth." Judges should rule according to civil law as well as by what civil law is based upon. The clear basis for all of our laws was, is, and must remain, revealed law, such as the Ten Commandments.

The Judicial branch is one of our three major governmental branches, of which the other two are the legislative branch (the Congress), and the executive branch (the President, his cabinet and their departments). In the Constitution of the United States, the judicial branch is explained in Article III. In this article, the basic four powers granted to the judiciary are explained in more detail.

The judicial branch, as well as the other two branches of the federal government, has built-in checks and balances. However, today we often see these checks and balances ignored or misused. Many people hold the false belief that judges are in their position for life. However, a judge's term of office can technically be held only while they exhibit good behavior or as long as they rule constitutionally. Judicial power was further limited on February 7th, 1795, when Amendment 11 was added to the Constitution.

Judicial tyranny is currently allowing unconstitutional practices to be carried out in our land. For example, Amendment 6 [says that criminal and civil cases are to be speedy, public, economical, and impartial. However, trials are now slow, overly sensationalized or often particularly secretive, costly, and stacked or excessively influenced. The average person cannot easily have a trial because of how our courts do business despite Amendment 6. The not-so-average person has their case tried in the court of public opinion before they receive a jury trial.

Another example is the use of case law. Case law, the precedent set by prior rulings, is very prominent and crucial to the judicial branch. The practice of case law, however, must apply common law standards to ensure stability of future rulings. Civil law, and the common law that supports civil law, must always be used as the foundation of our judicial rulings. Many case laws of history are being loosened or restricted by current rulings that make neither judicial nor common sense. Presently, we are not making sure our judges rule correctly; and, when they don't, we often do nothing except to allow them to continue. Once there is movement away from a law's original intent, much like the proverbial hole in the dyke that grows larger and larger, a cascading flood follows that is very difficult to correct.

In order to correct tyranny within the judicial branch we must fully relearn and reinstate the checks and balances that were given to Congress. We must take measures to enforce these checks and balances.

The Constitution clearly states, *"The Judges, both of the supreme and inferior Courts, shall hold their Offices during good behavior."* If we remove or impeach judges for their unconstitutional rulings or poor personal or professional behavior, we could take a huge step in the right direction; that is, having a judicial branch that maintains the content of and operates under the United States Constitution.

We must teach our children about the Constitution, its principles and from where those principles come. A big difference would take place if the change in government started from the bottom up because leaders would be held accountable or would be removed from office.

We must also teach personal self-government and restraint, individual responsibility, and stewardship; so that once the proper form of government is restored, it may be safeguarded and maintained.

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tivism, pragmatism, socialism, and communism, to name but a few, which when applied to the discipline of law yields "legal positivism." It would invade, in a most pernicious sense, long-standing, well-established American institutions; over-turn long-standing, legal precedent and seriously undermine the core principles, which undergird our personal liberties and American constitutional government: "The Founders' Biblical natural law philosophy remained the unquestioned standard for law and government until the turn of this century [20th]. At that time, a different philosophy was beginning to gain strength among judges and educators. By the mid-twentieth century, this competing philosophy, often termed "relativism" (or "pragmatism"), had become mainstream in a number of academic disciplines."[4]

At this point, the reader is reminded of the basic tenets of relativism and its propinquity to positivism. According to the *Encyclopedia of Religion*, relativism requires that all views or so-called cultural norms "...be evaluated relative to the societies or cultures in which they appear and are not to be judged true or false, or good or bad, based on some overall criterion but are to be assessed within the context in which they occur. Thus, what is right or good or true to one person or group may not be considered so by others... there [are] no absolute standards... *'Man is the measure of all things,'* and...each man [can] be his own measure...[C]annibalism, incest, and other practices considered taboo are just variant kinds of behavior, to be appreciated as acceptable in some cultures and not in others...[Relativism] urge[s] suspension of judgment about right or wrong." [5]

The Cart Before The Horse

Eventually, legal positivists would make their way onto the High Bench, some as early as the turn of the 20th century; and thus, Court decisions began to reflect the views of these judicial evolutionists even if limited to dissenting opinion. In reality, they were a bellwether of things to come, for as more legal positivists came to occupy a seat on the Court, its decisions would be rooted less and less frequently in the plain text of the Constitution, as its authors intended, and more and more in the ideology of positivism. The prevailing will of the Court, the makeup of its political ideology, would now become the basis upon which matters of constitutional question would be decided. To deliver the positivist's coup de grace, America's educational institutions, public and private with few exceptions, would be used to propagate the lie that the Constitution is *dynamically amended* by Supreme Court decisions. In this way, the Constitution could be made to align with the *changing* and *felt* needs of society, a clear case of the tail wagging the dog.

Although legal positivism was not practiced in Jefferson's day, he predicted this turn of events with prophetic accuracy: "It has long... been my opinion, and I have never shrunk from its expression (although I do not choose to put it into a newspaper, nor like a Priam in armor [to] offer myself [as] its champion), that the germ of dissolution of our federal government is in the constitution of the federal judiciary; an irresponsible body (for impeachment is scarcely a scarecrow), working like gravity by night and by day, gaining a little today and a little tomorrow, and advancing its noiseless step like a thief over the field of jurisdiction...." [6]

That was in 1821; two years later, Jefferson went on to say this: "At the establishment of our constitutions, the judiciary bodies were supposed to be the most helpless and harmless members of the government. Experience...soon showed in what way they were to become the most dangerous; that the insufficiency of the means provided for their [judges] removal gave them a freehold and irresponsibility in office; that their decisions, seeming to concern individual suitors only, pass silent and unheeded by the public at large; that these decisions nevertheless become law by precedent, sapping...the foundations of the Constitution, and working its change by construction, before anyone has perceived that that invisible and helpless worm has been busily employed in consuming its substance."[7]

And the Court Says...

Some two hundred years would pass before Jefferson's greatest fears would fully materialize. But, we are long past the point where the judiciary's assault upon the Constitution can be ignored: "Jefferson was exactly right. It took a while before the Supreme Court assumed the power he feared it would, but it finally happened, and on a scale that would have astounded even Jefferson."[8] Our personal liberties, once secured "in the possession of a written Constitution," are now secured by little more, in Jefferson's parlance, than a Constitution made "a blank paper through construction." [9] For judges today, especially those of the legal-positivist ilk, hold no reservations whatsoever as to whether they have the authority to impress their own mind upon the meaning of America's founding documents in order to accommodate what one early positivist, Supreme Court Justice Oliver Wendell Holmes,[10] characterized as "the felt necessities of the times."

In Justice Holmes' view, the Court is obliged to jettison well-established precedent if it gets in the way of achieving a preferred social agenda: "T]he justification of a law for us cannot be found in the fact that our [fore] fathers always have followed it." No, Holmes said, the justification of a law " must be found in some help which the law brings toward reaching a social end."[11]

Activist Judges... The Onslaught of the Positivists

Justice Holmes served on the Court for some twenty-nine years before stepping down at age 91 in the face of failing health. But he left behind a legacy of close to 1000 opinions for others of his political ideology to pick up and advance. As Holmes ascended the High Bench in 1902, the Court held to a *laissez-faire*[12] interpretation of the law. But Holmes' opposing opinions ultimately became "that of a new dispensation which wrote itself into American public law."[13] They were, as history has now shown, the dawning of a new era.

Following in lockstep came Justice Louis Brandeis, a 1916 Woodrow Wilson appointment to the Supreme Court. "[M]any of the positivistic concepts in use by courts today were introduced or popularized by Justice Brandeis, including the application of the Bill of Rights to the States via the Fourteenth Amendment, a constitutional right to privacy, and the evolution of legal standards and principles."[14] Among the Brandeis claims to fame are the celebrated *Brandeis Brief*, and his *fact-emphasis technique* of presenting legal argument. Taken together, they define the *Brandeis method*, which is accredited with "herald[ing] the end of the turn-of-the-century concept of law."[15] Moreover, according to some who rate the performances of Supreme Court Justices, we are to be eternally grateful to Brandeis for his concerted efforts that enabled American society to move from a philosophy of *laissez-faire* to the welfare state: "The Brandeis method on the bench was used for a particular purpose: to reject the prevailing notion that the laws were to be '*equated with theories of laissez-faire'*...Instead, the law has come to believe...that *'[r]egulation...is necessary to the preservation and best development of liberty.'* "[16]

Enter Benjamin Cardozo, a positivist appointed to the Supreme Court in 1932. "Cardozo's major contribution...was his use of traditional judicial techniques to adapt the law to society's changing requirements... It was Cardozo who, next to Holmes, most marked the TRANSITION from the concept of law that prevailed a century ago."[17]

Indicative of Cardozo's jurisprudence is his approval of the opinion rendered in *Home Building & Loan Association v. Blaisdell,* a 1934 case dealing with the impairment of contracts. In an undelivered concurrence regarding moratory law, Cardozo said that while the law may be inconsistent with the Framers' intent, "their beliefs to be significant must be adjusted to the world they knew. It is not...inconsistent with what they would say today." [18]

At bottom, Cardozo "openly refused to be bound by any concept of transcendent laws or fixed rights and wrongs...[he] also encouraged the Court to eliminate the use of its foundational precedents... [and] condoned the prospect of the Court departing from its traditional role and instead assuming the role of lawmaker: *'I take judge-made law as one of the existing realities of life.'* "[19]

"Like a Thief In The Night..."

By no means was the assault upon the Constitution limited to the work of these judicial evolutionists. Others would come and go throughout the 20th century; to wit, Supreme Court history for that period is replete with many examples such as Chief Justice Charles Evan Hughes who is said to have presided over two very different Courts in his eleven year tenure (1930-1941) on the Bench. Herein we refer to the New Deal judicial coalition, which came into being as a powerful bloc in 1932 and would remain as such to dominate American

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politics for the next three and a half decades culminating in what has been called a constitutional revolution respecting the change that occurred in Supreme Court jurisprudence.

On March 29, 1937 the conversion became evident: "[T]he spectacle of the Court that day frankly and completely reversing itself and striking down its opinion but few a months old was a moment never to be forgotten."[20] New Dealers could hardly contain themselves: "Well could a leading New Dealer chortle, *'What a day! To labor, minimum-wage laws and collective bargaining; to farmers, relief in bankruptcy; to law enforcement, the firearms control. The Court was on the march!'* "[21]

Still, for the positivists, the best was yet to come: "Although prominent educators and individual Justices faithfully endeavored to advance this philosophy in the first half of the [20th] century, it was not until the late 1940s that their movement had gained the sufficiently widespread number of adherents to produce radical societal change."[22] President Dwight D. Eisenhower would play a major role toward reinforcing the positivist assault upon constitutional government in his appointment of two radical judges to the High Bench: Chief Justice Earl Warren in 1953, thought to be an Eisenhower Progressivist and William J. Brennan Jr. in 1956, a re-election year political appointment, who "believed that the Constitution's meaning should evolve to fit the changing standards of society; he struck down school prayer, upheld flag desecration, and upheld abortion." [23]

After a brief introductory spell, the Warren Court would begin by dropping one bombshell after another on an already moribund Constitution. David Barton writes that, "The overall change in direction of the Court became especially visible after 1953, when Earl Warren… became Chief Justice of the Court. Warren's words in *Trop v. Dulles (1958)* foreshadowed what was soon to become standard practice in American jurisprudence." [24]

Then and there, the Warren Court decided that the 8th Amendment's proscription against cruel and unusual punishment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Per the ruling elite of the Warren Court, the constitutional procedure for amending the Constitution, as laid out in Article V, was a dead letter.

Others would pick up on the Warren Court's pragmatism as evidenced by this quote from a 1986 case: "As [our] prior cases clearly show…this Court does not subscribe to the simplistic view that constitutional interpretation can possibly be limited to the 'plain meaning' of the Constitution's text or to the subjective interpretation of the Framers." [25]

How did Ike respond to the Warren Court's activism? When asked if he had made any mistakes during his term as President, Ike responded, "Yes, two, and they are both sitting on the Supreme Court." By both, Eisenhower meant Earl Warren and William Brennan Jr.[26]

Positivism in Retrospect

The philosophy of positivism was given its legs in the 1870s as it was introduced into the Harvard Law School by Christopher Columbus Langdell, an American Jurist born in Hillsborough County in the Town of New Boston, New Hampshire. As a professor of law at Harvard, Langdell applied "...Darwin's premise of evolution to jurisprudence. [He] reasoned that since man evolved, then his laws must also evolve; and judges should guide both the evolution of law and the Constitution. Consequently, Langdell introduced the case-law study method under which students would study judges' decisions rather than the Constitution [itself]."[27] Now the only stumbling block between an outright hijacking of the Framers' beliefs and the Constitution itself was the time needed to raise up a generation or so of judges fully immersed in the new philosophy.

David Barton explains: "Under the case-law approach, history, precedent, and the views and beliefs of the Founders not only became irrelevant, they were even considered hindrances to the successful evolution of a society. As explained by a leading relativist (John Dewey) in 1927: *'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 directed change.'* [As] Langdell's case-law approach was gradually embraced by other law schools ... the result was a diminishing belief in absolutes. In fact, within a few short years (by the 1930s), Blackstone's Commentaries on the Law[28] had been widely discarded. Blackstone was deemed to present an outdated approach to law since [he] taught that certain rights and wrongs—particularly those related to human behavior—did not change."[29]

The Spirit of Innovation

The men of the *truly great* generation produced what has often been called the most perfect political document ever struck by the hand of man, our nation's Constitution. They rested the protection of our personal liberty in its *written* text and made *We The People* its final keeper. Out of self-interest, we were to remain vigilant as to any innovations upon it from any source; we were to find every violation or encroachment upon it reprehensible; we were to defend, protect and uphold it to prevent its being reduced to a mere "parchment barrier." President Washington advised the people accordingly in his farewell address to the nation: "Towards the preservation of your government and the permanency of your present happy state, it is requisite, not only that you steadily discountenance irregular oppositions to [the Constitution's] acknowledged authority, but also that you resist with care the spirit of innovation upon its principles, however specious the pretexts."

Few students over the last half-century have seen or read Washington's *Farewell Address* much less read or study the nation's founding documents. Today, it is all too common for young Americans to become adults who are totally ignorant of their roots. We shouldn't wonder then that today our judiciary, originally designed as the weakest branch of government, operates like "a beast without a head" and whose decisions blatantly usurp our constitutionally protected rights and weaken the philosophical pillars upon which the Constitution rests. Their tortured interpretations of the Constitution must not stand; or, the American Republic will cease to be.

Ben Franklin also warned against replacing proven fundamental principles with new political theories. He said, "take the advice of the prophet: *'Stand in the old ways, view the ancient paths, consider them well, and be not among those that are given to change.'* " It is imperative that we return to the old paths such that the ideas and philosophies of the Framers' be made dominant once again.

_Dianne Gilbert

1. The Growth of America: Naturalistic Outlook; Chapter 3, P. 33-34, Clarence B. Carson
2. Ibid
3. Ibid. P. 32
4. Original Intent: David Barton, P. 227
5. Ibid
6. The Real Thomas Jefferson, P.500, Berg 15:331 (1821);
7. Ibid. P. 501-502; Bergh 15:486 (1823)
8. *A Blank Paper*, Joe Sobran's Washington Watch: , Sept. 18, 2003
9. Ibid, Op. cit. Note 6, P.382; Bergh 10:418 (1803);
10. Justice Oliver Wendell Holmes, Republican, served on the Supreme Court from 1902-1932. He was appointed by President McKinley.
11. Collected Legal Papers (NY: Harcourt, Brace and Company, 1920), P.225, "The Law in Science – Science in Law"; Op. cit. Note 4, P. 229,
12. Laissez-faire, Expresses a political-economic philosophy of the government allowing the marketplace to operate relatively free of restrictions and intervention; Black's Law Dictionary, 6th Ed. - abridged
13. The History of the Supreme Court, Bernard Schwartz, P. 221
14. David Barton, Op. cit. Note 4, Appendix C: P. 380
15. Bernard Schwartz, Op. cit. Note 13 P. 216
16. The Words of Justice Brandeis, 154 (Goldman ed. 1953); Ibid, P.216
17. Schwartz, Op. cit. Note 13 at Pgs. 229-230
18. Mason, Harlan Fiske Stone: Pillar of the Law 406 (1956) at 362; Ibid
19. Barton, Op. cit. Note 4, P. 229
20. Jackson, Struggle for Judicial Supremacy 174 (1941); Ibid, Op. cit. Note 13, P.236
21. Ibid.
22. Barton, Op. cit. Note 4, P.230
23. Barton; Op. cit. Note 4, Appendix C: P. 379,
24. Ibid
25. Thornburgh v. American College of Obstetricians, 476 U.S. 747, 789 (1986);
26. Justices,, Presidents and Senators, Henry J. Abraham, P. 200
27. Ibid, P. 228
28. Sir William Blackstone (1723-1780); Attorney, jurist and political philosopher, professor of law at Oxford, author of Blackstone's Commentaries on the Laws of England, Four Volumes; primary law books used by the Founding Fathers and through most of the 20th century by law schools.

29. Ibid; [emphasis added]

Editor's note: Over the next four years, President George W. Bush could be called upon to make as many as four appointments to the Supreme Court. He has espoused a preference to appoint judges who would strictly interpret the Constitution. This is good news for every American who values his rights, his personal liberties and wishes to see them preserved and passed on to future generations. The next four years may well determine whether the sun will rise each day over an America protected by the Framers' Constitution or an America governed by an oligarchy of nine black-robed judges. I pray for your sake, for your posterity's sake, and mine, that it will be the former.