Journal of Christian Legal Thought

VOL. 9, NO. 1 (2019)

Journal of Christian Legal Thought

VOL. 9, NO. 1 | 2019

PUBLISHED BY

The Institute for Christian Legal Studies (ICLS), a Cooperative Ministry of Regent University School of Law and Christian Legal Society.

The Mission of ICLS is to train and encourage Christian law students, law professors, pre-law advisors, and practicing lawyers to seek and study biblical truth, including the natural law tradition, as it relates to law and legal institutions, and to encourage them in their spiritual formation and growth, their compassionate outreach to the poor and needy, and the integration of Christian faith and practice with their study, teaching, and practice of law.

STATEMENT OF PURPOSE

The mission of the *Journal of Christian Legal Thought* is to equip and encourage legal professionals to seek and study biblical truth as it relates to law, the practice of law, and legal institutions.

Theological reflection on the law, a lawyer's work, and legal institutions is central to a lawyer's calling; therefore, all Christian lawyers and law students have an obligation to consider the nature and purpose of human law, its sources and development, and its relationship to the revealed will of God, as well as the practical implications of the Christian faith for their daily work. The *Journal* exists to help practicing lawyers, law students, judges, and legal scholars engage in this theological and practical reflection, both as a professional community and as individuals.

The *Journal* seeks, first, to provide practitioners and students a vehicle through which to engage Christian legal scholarship that will enhance this reflection as it relates to their daily work, and, second, to provide legal scholars a peer-reviewed medium through which to explore the law in light of Scripture, under the broad influence of the doctrines and creeds of the Christian faith, and on the shoulders of the communion of saints across the ages.

Given the depth and sophistication of so much of the best Christian legal scholarship today, the *Journal* recognizes that sometimes these two purposes will be at odds. While the *Journal of Christian Legal Thought* will maintain a relatively consistent point of contact with the concerns of practitioners, it will also seek to engage intra-scholarly debates, welcome inter-disciplinary scholarship, and encourage innovative scholarly theological debate. The *Journal* seeks to be a forum where complex issues may be discussed and debated.

EDITORIAL POLICY

The *Journal* seeks original scholarly articles addressing the integration of the Christian faith and legal study or practice, broadly understood, including the influence of Christianity on law, the relationship between law and Christianity, and the role of faith in the lawyer's work. Articles should reflect a Christian perspective and consider Scripture an authoritative source of revealed truth. Protestant, Roman Catholic, and Orthodox perspectives are welcome as within the broad stream of Christianity.

However, articles and essays do not necessarily reflect the views of the Institute for Christian Legal Studies, Christian Legal Society, Regent University School of Law, or other sponsoring institutions or individuals.

To submit articles or suggestions for the *Journal*, send a query or suggestion to Mike Schutt at mschutt@clsnet.org.

LAWYERS, CLIENTS, AND THE COST OF PROFESSIONAL DEDICATION

By Michael P. Schutt, Editor in Chief

In the 2016 film *The Unknown Girl*, a young woman is found dead under suspicious circumstances near Doctor Jenny Davin's clinic. Jenny (played by Adèle Haenel) is tormented by the thought that she might have prevented the woman's death. The young woman had rung the bell at the clinic the night before, seeking help, but it was very late, the office was closed, and Jenny, with mixed motives, did not answer the ring.

As Jenny seeks the identity of the woman and some sense of closure, we watch her daily interactions with patients, her pursuit of the truth, and her longing for forgiveness. It is a sparse, simple movie, and yet it speaks to professionals on a variety of levels.

As I watched Dr. Jenny (as her low-income patients call her) make career decisions, care for patients, and play detective, I was reminded that my identity as a "professional" is not compartmentalized from my identity as a human being. Jenny's compassion for patients, her dogged obsession over her errors, and her determined service to those in need are all part and parcel of who she is — and the movie's directors (Jean-Pierre and Luc Dardenne) do a great job of exploring how her "doctorliness" informs her human-ness.

It is a great movie to provoke some self-examination for us as lawyers, as there are many parallels between doctors and lawyers in their relationships with clients/patients, including the duty of confidentiality, the costliness of professional errors, and the dangers of personal involvement in clients and causes.

As Jenny obsesses over her mistake, we see the toll it takes on both her personal and professional lives, but we understand the cost of being dedicated to a cause and to the truth. When she serves as both confessor and accuser to a patient, we know the emotional tension of having to minister to a client when that client has harmed others. When she makes a difficult career decision in the middle of a personal crisis, we relate to the dangers and joys of being so connected to our work that it informs our every move, both in beneficial and harmful ways.

Early on, as prelude to and foreshadowing of her mistake, Jenny tells her intern: "A doctor has to control his emotions. Don't let patients tire you or you won't make a proper diagnosis." Lawyers can relate, and we know that this is good advice. Yet, as Jenny discovers, it is easier said than done. Both lawyers and docs serve human beings, not abstract legal or medical problems.

The Dardenne brothers' *The Unknown Girl* reminded me of the challenges facing lawyers of integrity — those whose identity is in Christ, yet still wrapped in the gifts that He gives us and the specific neighbors we are called to love. The melancholy tone of the resolution to Jenny's dogged quest is rooted in the question of whether one can ever really experience forgiveness for one's mistakes. For Christians, we have that assurance in the blood of Christ. Yet the struggle to experience that forgiveness — by forgiving others and ourselves and by accepting the forgiveness of Christ and our neighbor — is a real one.

As we seek to live "uncompartmentalized" lives, may the Lord give us the wisdom to pursue our duties as whole men and women, seeking and speaking the truth in love, with compassion for our clients and a commitment to their well-being as we help them to flourish in the world.

Mike Schutt is the director of Law Student Ministries for Christian Legal Society and Editor in Chief of the Journal of Christian Legal Thought. *Through June 2019, he is Principal Lecturer and Global Recruiter for Regent University School of Law. He is the author of* Redeeming Law: Christian Calling and the Legal Profession *(IVP 2007).*

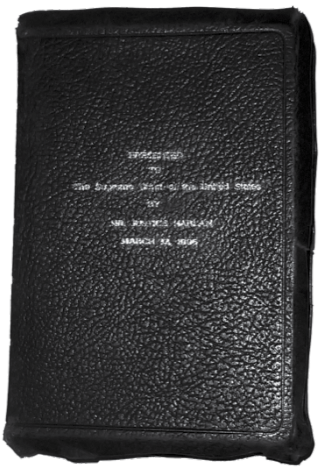
The Unknown Girl *(2016) was written and directed by Jean-Pierre Dardenne and Luc Dardenne and was released as* La Fille Inconnue. *Mike's discussion guide to the film for lawyers and law students is available at https://www.christianlegalsociety.org/small-group-tools-law-students.*

AN EXCEPTIONAL GIFT

BY JUDGE DARRELL WHITE (RETIRED)

Assume there is a forced evacuation of a building. If there is one object of lasting value that you were to rescue on your way out, what would it be? If the Supreme Court's stately quarters in Washington, D.C., ever required a hasty exodus, no doubt one prominent volume on the *DO NOT LEAVE BEHIND* list is the little-known, but highly esteemed, "Harlan Bible."

Donated in 1906 by Justice John Marshall Harlan (1833-1911), the namesake Bible's well-preserved flyleaf pages chronicle — in serial fashion — the signatures of every Supreme Court justice since it was dedicated! Yet, little is known of this venerable tradition.



Retired Justice David Souter (1939 –) told a New Hampshire State Bar Association audience in 1991 that signing the Harlan Bible was "the most humbling thing [he] had ever done in [his] life." And Justice Samuel Alito (1950 –) acknowledged that signing the Harlan Bible was "a thrilling and awe-inspiring moment."

For years now, the Harlan Bible has been carefully and quietly preserved — safeguarded at taxpayers' expense — in the Supreme Court curator's office. Traditionally, unlike the restored chair once belonging to Chief Justice John Marshall (1755-1835), which has been used in connection with Supreme Court oath ceremonies since 1972,[1] the Harlan Bible has been called into action only when a new justice is presented with it for signature purposes shortly after taking the Constitutional (5 U.S. Code 3331) and Judicial (28 U.S. Code 453) Oaths of Office. Lately, however, the Harlan Bible has begun to be used for ceremonial purposes as well. For example, Justice Sonia Sotomayor (1954 –) recently confided to a C-Span reporter following her August 8, 2009 Oaths of Office:

> One question that you probably wouldn't know to ask was, "What was the most symbolically meaningful moment for me during my public investiture?" And, it was sitting in Justice [John] Marshall's chair and taking the oath with my hand on Justice [John Marshall] Harlan's Bible. It was like history coursing through me….[2]

The Harlan Bible is not on public display at the Court, and neither is its existence prominently featured in Supreme Court publications. Curiously, it is not mentioned in any of the four biographies of Harlan's life[3] or in the many law review articles written about him. Moreover, Harlan's widow, Malvina, failed to mention the gift in her memoirs.[4]

Who is this Justice Harlan? And, many might wonder, how is it that the Bible continues to enjoy such longstanding, unique, beneficent stature at the Court? In a sense, the Harlan Bible likely represents the lengthiest and most ubiquitous, unanimous "Opinion" ever issued by the Supreme Court of the United States! Nine hundred and ninety-three pages from start

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1 http://www.supremecourt.gov/about/oath/supremecourtoathfirstsandtrivia2009.pdf.

2 C-SPAN interview of U.S. Supreme Court Justice Sonia Sotomayor by Susan Swain, September 16, 2009.

3 Latham, Frank B., *The Great Dissenter: Supreme Court Justice John Marshall Harlan, 1833-1911* (New York: Cowles Book Company, 1970); Beth, Loren P., *John Marshall Harlan: The Last Whig Justice* (Lexington: University Press of Kentucky, 1992); Yarbrough, Tinsley E., *Judicial Enigma: The First Justice Harlan* (New York: Oxford University Press, 1995); Przybyszewski, Linda, *The Republic According to John Marshall Harlan* (Chapel Hill: University of North Carolina Press, 1999).

4 Harlan, Malvina Shanklin, *Some Memories of a Long Life, 1854-1911*. Originally published in *Journal of Supreme Court History*, 2001, vol. 26, no.1.

(Genesis 1:1) to finish (Revelation 22:21), the Bible's flyleaf pages have been signed ("joined?") by every justice since 1906, shortly after taking Oaths of Office. That represents more than half of the justices who have ever served on the Supreme Court!

JOHN MARSHALL HARLAN was born in Boyle County, Kentucky, in 1833, into a politically-prominent, slave-holding family. Nearby Harlan County was named for his great uncle Silas, who died during America's last battle in the War for Independence. While still a teenager, Harlan was appointed Adjutant General of the Commonwealth of Kentucky, a position he held for eight years.

Harlan completed a law degree from Kentucky's Transylvania University in 1852 and served as Frankfort City Attorney from 1854-1856, then as Franklin County Judge from 1858-61. Having married in 1856, Harlan gained his wife's blessing in September of 1861 to join the war to preserve the Union that his namesake — Chief Justice John Marshall — had devoted himself to create and nurture. The young judge organized the 10th Kentucky Infantry Volunteers for the Union Army and served as its commander with the rank of Colonel until his resignation in 1863, when he assumed his father's law practice following the elder Harlan's sudden death.

"Nine hundred and ninety-three pages from start (Genesis 1:1) to finish (Revelation 22:21), the Bible's flyleaf pages have been signed ("joined?") by every justice since 1906, shortly after taking Oaths of Office. That represents more than half of the justices who have ever served on the Supreme Court!"

The regiment's soldiers held their young commander in high esteem, bragging that he could outrun, outjump, and outwrestle any of his men. They also respected the way he pitched in to help with unpleasant but necessary unit chores. Such was Harlan's valor that, at the time of his resignation, President Abraham Lincoln had placed Harlan's name in nomination to Congress for promotion to Brigadier General.

Partly from practical political considerations and partly from revulsion at the Jim Crow laws and vicious acts of ethnic violence committed in the aftermath of the Civil War, Harlan ultimately did an about-face altogether on the slavery issue and spoke out boldly in opposition to the execrable institution he had once defended. In one such speech in 1871, he proclaimed:

> I have lived long enough to feel and declare that … the most perfect despotism that ever existed on this earth was the institution of African slavery…. With slavery it was death or tribute…. It knew no compromise, it tolerated no middle course. I rejoice that it is gone…. Let it be said that I am right rather than consistent.

A longtime leader in Washington, D.C.'s New York Avenue Presbyterian Church, Harlan went on to bear genuine fruit of a changed heart. He was the only justice to dissent in two pivotal Supreme Court cases concerning ethnic relations. The first came in 1883, when constitutionality of the Civil Rights Act of 1875 was at issue. Harlan, then a junior justice, dissented alone as his colleagues on the Supreme Court nullified important federal legislation guaranteeing everyone, regardless of ethnicity, color, or previous condition of servitude, entitlement to the same treatment in public accommodations (i.e., inns, public conveyances on land or water, theaters, and other places of public amusement). Harlan wrote that "the court has departed from the familiar rule requiring that full effect be given to the intent with which [constitutional provisions] were adopted."

Ironically, in penning his courageous dissent, Harlan reportedly used the same ink well with which Chief Justice Roger Taney had authored the now-reviled 1857 *Dred Scott v. Sandford* decision, which held that blacks were "so far inferior that they had no rights which the white man was bound to respect."

Slightly over a dozen years later, when Harlan's Supreme Court colleagues ruled in the infamous 1896 *Plessy v. Ferguson* case that "separate-but-equal" passenger facilities on railroads were constitutionally justified, Harlan defiantly stood alone, dissenting in language that is still quoted today:

> In view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is colorblind, and neither knows nor tolerates classes among citizens.

For over fifty years following its issuance, that derelict *Plessy v. Ferguson* precedent upheld racial segregation, justifying laws that mandated separate accommodations on buses and trains and in hotels, theaters, and schools. While the Court's majority opinion denied that legalized segregation connoted inferiority, Harlan's vigorous dissent argued that segregation in public facilities smacked of servitude and abridged the principle of equality under the law. It was not until the landmark 1954 *Brown v. Board of Education* case that the Supreme Court unanimously adopted Harlan's "color-blind Constitution" reasoning.

Justice Harlan served on the Supreme Court for thirty-three years, earning a reputation as the "Great Dissenter," with one contemporary pejoratively accusing him of suffering from "dissentery." At six feet, two inches tall, Harlan was a man of athletic vigor who enjoyed competition. Supreme Court historical records recount that Harlan took up the brand-new game of golf, a sport at which he became a skilled enthusiast and catalyst for other justices to join. His grandson, John Marshall Harlan II (also a signatory of the Harlan Bible), became the only direct descendant of a previous justice ever to serve on the Court (1955-1971).

WHAT DOES HARLAN TEACH US?

Justice Neil Gorsuch has said that the Great Dissenter's portrait hangs in his chambers as a reminder of the sometimes lonely, but always important, work of the judge. In addition to Harlan's now-famous stand for ethnic equality in *Plessy v. Ferguson,* he warned against abuses of "judicial legislation." In the landmark 1905 case, *Lochner v. New York,* the Supreme Court, for the first time, nullified a state law on the grounds that it violated the Due Process Clause of the 14th Amendment. Harlan criticized his colleagues for using the Constitution's Due Process Clause as a blank check to insert their own political views, regardless of their philosophical merit. In dissent, he warned:

> No evils arising from ... [state] legislation could be more far reaching than those that might come to our system of government if the judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation, and upon grounds merely of justice or reason or wisdom annul statute that had received the sanction of the people's representatives.

Harlan's last dissent, written shortly before his death in 1911, observed that "illegitimate and unconstitutional practices get their first footing by silent approaches and slight deviations from legal modes of legal procedure." He continued:

> After many years of public service at the national capital, and after a somewhat close observation of the conduct of public affairs, I am impelled to say that there is abroad in our land a most harmful tendency to bring about the amending of constitutions and legislative enactments by means alone of judicial construction.

Standard Oil v. United States (1910).

A CURIOUS EVENT

Though the Supreme Court's curator offers no official explanation concerning Harlan's March 1906 gift of his King James Version "Sunday School Teachers' Edition" Holy Bible, an explanation may be causally related to a fascinating last-minute appeal in a notorious case from Tennessee. In the very month of the Bible's dedication, Justice Harlan, as the Circuit Justice for Tennessee, was presented with an emergency writ to halt the impending execution of the death penalty sentence levied against a black man named Ed Johnson.

It was apparently at Harlan's insistance that a majority of the U.S. Supreme Court met on a Sunday morning in March of 1906 at the home of Chief Justice Melville Fuller to discuss irregularities in the case and approve Harlan's proposed stay of execution. Yet, only a day later, and while this now-federal prisoner's case was awaiting formal review by the Supreme Court, Johnson was forcibly abducted from custody in the county jail and lynched by a Chattanooga mob. That lawless action prompted the Supreme Court to convene criminal contempt-of-court proceedings, which resulted in the local sheriff and five other malefactors serving time in jail for their misconduct.[5]

AN EXCEPTIONAL GIFT

It was in the midst of this 1906 March mayhem that John Marshall Harlan dedicated his own Bible to the Court, prompting each of his fellow justices to sign the inside flyleaf. Justice Harlan was dead serious about the Bible's importance to America's system of civil government. It was in that same year when he clearly set forth his views:

[5] The book, *Contempt of Court: The Turn-of-the-Century Lynching That Launched a Hundred Years of Federalism*, by Mark Curriden and Leroy Phillips, Jr., (Faber and Faber, 1999) chronicles this sad episode from America's history.

> I fully believe in both the Bible and the Constitution…. I believe that the Bible is the inspired Word of God. Nothing which it commands can be safely or properly disregarded; nothing it condemns can be justified. No civilization is worth preserving which is not based on the doctrines or teachings of the Bible. No nation that habitually ignores or violates the rules prescribed by it for the conduct and government of the human race, can long last.[6]

Regarding accountability, Harlan once remarked in a speech that "no one could live in this world, and escape responsibility for doing that which he ought not to have done, or for failing to do that which he ought to have done." Harlan's strong Christian faith and his judicial worldview were inseparable. His contemporary, Justice David Brewer, once remarked that Harlan "goes to bed every night with one hand on the Constitution and the other on the Bible, and so sleeps the sweet sleep of justice and righteousness."[7]

Just how valuable is the Harlan Bible to America?[8] No other single document in the world contains the original signatures of every Supreme Court justice since 1906. For something as special as the Harlan Bible and the tradition behind it, there really are no "comparables" from which its value might be ascertained. It is truly one of a kind.

A LEGACY EXPANDED

American Judicial Alliance (AJA), a 501(c)3 nonprofit organization whose mission is to "awaken the conscience of One Nation under God," dedicates carefully personalized commemorative Bibles to America's courts and other public agencies following the tradition of the Harlan Bible. One grateful chief judge, upon receiving his court's Bible, remarked that the book had already become an "heirloom" from the very moment it was dedicated. Some courts have erected special pedestals to publicly display their commemorative Bibles. Still others report using their Bibles in everyday court proceedings, as well as during installation oath ceremonies like Justice Sotomayor did. As the original formulation of the Federal Rules of Evidence requires that, before testifying, every witness must take an oath or affirmation "administered in a form calculated to awaken the witness' conscience and impress upon the witness' mind the duty to [testify truthfully],"[9] it is truly a fitting manner of use. AJA believes that every court in America deserves a personalized signatory Bible like the Supreme Court has.

CLS members — like no other group of citizen-activists — can help spread the Harlan Bible tradition by remembering that we are still "under oath" as lawyers to support the Constitution and maintain the respect due the courts and judicial officers. Imagine the impact should CLS members — strategically dispersed throughout the United States — partner with AJA and accept an assignment to see that commemorative "Harlan Tradition" Bibles are placed in every court in America. Contact your writer at AJAToday.com for further instructions. Prayers and support are most welcome.

Darrell White is the founder and president of American Judicial Alliance, whose mission is to "awaken the conscience of One Nation Under God." The nonprofit organization dedicates Harlan Tradition Bibles to America's courts and other public entities. Judge White is a 1971 graduate of LSU Law School. He is a former president of the Louisiana City Judges' Association (1983-84) and has served on numerous national, state, and local judicial organizations. He retired in 1999 following 20 years of elective service on the Baton Rouge City Court, though continues to accept special judicial assignments from Louisiana Supreme Court. Judge White also retired as a Lieutenant Colonel in the Louisiana National Guard in 1998, where he had served as a military judge for courts-martial from 1985-98. Serving on Army active duty as an intelligence officer during the Vietnam Conflict era (1971-73), Judge White was assigned to Headquarters, U.S. Army Intelligence Command, where he participated in the "Operation Homecoming" repatriation of POWs. He is a member of First Presbyterian Church of Baton Rouge and a Gideon. Judge White has been married to the former Fran Boudreaux of Jennings, Louisiana, since 1970, and together they have seven children, ranging from 48 to 23 years of age. They also have twelve grandchildren.

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[6] Interview by James B. Morrow with John Marshall Harlan, *Washington Post*, February 25, 1906, in John Marshall Harlan Papers, Library of Congress.

[7] Yarbrough, Tinsley E., *Judicial Enigma: The First Justice Harlan* (New York: Oxford University Press, 1995), viii.

[8] Consider reports that a Bible once owned by abolitionist Frederick Douglass was recently valued at $19,000.

[9] This language, taken from the original Federal Rules of Evidence 603, became the pattern for numerous state codes/rules of evidence. *See, e.g.*, Louisiana Code of Evidence, Article 603; Louisiana Code of Civil Procedure Article 1633; Louisiana Code of Criminal Procedure Article 14.

THE BROAD REACH OF IN-DE-DUCTIVE REASONING

How the Kavanaugh Battle Exposes Fault-lines of Interpretation Ranging from the Constitution to the Bible, to Science and Sex

BY F. LAGARD SMITH

The most contentious disagreements often have little to do with the immediate controversy and everything to do with more fundamental assumptions lying unseen beneath the surface. Particularly is this true of legal and religious controversies, typically springing from marked differences in hermeneutical approaches to interpreting foundational documents. Two contemporary streams in law and religion not only serve to illustrate the problem, but surprisingly end up converging together in, of all places, the realm of science.

Turning first to current events in the legal arena, consider the frenzied political furor over the appointment of Associate Justice Brett M. Kavanaugh to the United States Supreme Court. There were, of course, the allegations of sexual misconduct to be weighed carefully prior to confirmation. But those charges were never the bee in the bonnet of those who objected to Kavanaugh's appointment. Even the most squeaky-clean, eminently-qualified nominee with a similar judicial philosophy would have been equally objectionable. If perhaps the public was distracted by the raucous side-show, those "in the know" were keenly aware of the high-stakes proxy war going on.

The hush-hush elephant in the Kavanaugh hearing room was the single pivotal question: How should the original founding documents be interpreted — strictly or dynamically? Should judicial decisions be drawn from the words actually used by the framers (originalism), or by language never found within the original text, merely "discovered" or judicially created to accommodate some desired outcome? On that single, crucial question hang all the emotionally-charged issues such as abortion and gay rights that divide public and political opinion. Hence, the rallying cry of pro-choice protestors who sensed that another originalist on the Court could spell the demise of *Roe v. Wade*.[1]

Of course, the binary juxtaposition of "strictly or dynamically" belies a far more nuanced landscape in which multiple questions are embedded. For example, does interpreting the Constitution "strictly" preclude making practical application of the original text (perhaps by analogy) to circumstances unknown to the framers? Even "originalists" find themselves making pragmatic judgments as the case demands (and not always agreeing with each other regarding how the original language ought to be applied). And how should the original language itself be understood? Are the terms "plain meaning" or "common sense" helpful, or might it be that what's *plain* to one interpreter makes no *common sense* to another?

"Should judicial decisions be drawn from the words actually used by the framers (originalism), or by language never found within the original text, merely 'discovered' or judicially created to accommodate some desired outcome?"

The crucial difference between the two interpretive approaches, therefore, lies mostly in the starting point. Should interpreters begin with the actual words within the text or is there liberty, prior to the application phase, to dynamically introduce novel terms and concepts that everyone would agree are not actually found within the text?

Because the Constitution itself does not provide any particular hermeneutic by which it is to be interpreted, one is left with making a judgment call as to the better, preferred, or perhaps more legitimate approach. In aid of that judgment call, this article attempts to address three questions: (1) In what ways do the two approaches differ?; (2) What are the underlying reasons for those differences?; and (3) where do these competing approaches lead in terms of outcomes? Yet, because this article is intended to

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

move the conversation beyond mere constitutional interpretation, the discussion that follows will take a rather unpredictable, circuitous path.

A TELL-TALE CASE

That *Roe v. Wade* should be considered at such grave risk in the hands of an originalist is telling. If the rationale of *Roe* rests on a solid constitutional foundation, there should be no risk of its ever being overturned, most especially by an originalist. When pro-choice advocates panic at the thought of this landmark ruling meeting its demise, they are unwittingly acknowledging what objective observers in the legal community have said all along: that *Roe* is but a judicial contrivance, never having anything approaching constitutional legitimacy.

From the very beginning, legal commentators across a broad spectrum have decried the legislative nature of Justice Harry A. Blackmun's opinion, not the least being its flagship trimester framework. The controversial opinion prompted Watergate prosecutor Archibald Cox to comment that "[n]either historian, nor layman, nor lawyer will be persuaded that all the prescriptions of Justice Blackmun are part of the Constitution."[2]

In his widely-cited 1973 *Yale Law Journal* article, Professor John Hart Ely offered a broader, more scathing assessment, saying that the *Roe* decision "is not constitutional law and gives almost no sense of an obligation to try to be."[3] Ely specifically objected that "this super-protected right is not inferable from the language of the Constitution, the framers' thinking respecting the specific problem in issue, any general value derivable from the provisions they included, or the nation's governmental structure."[4]

Even Harvard Professor Laurence Tribe joined in the critical chorus, saying, "One of the most curious things about *Roe* is that, behind its own verbal smokescreen, the substantive judgment on which it rests is nowhere to be found."[5] While originalists have no need to indulge in "verbal smokescreens," those who take a dynamic approach to constitutional interpretation cannot survive without them. By some irony, those who reject originalism are inevitably forced to come up with something original to obscure the original. The more clever, erudite, and imaginative the better, but by all means it must obfuscate the otherwise obvious. No matter how astutely couched in language sounding like constitutional verbiage, it is all the difference between deferential *interpretation* and cavalier judicial *innovation.*

The reason is a longer story, but there is no denying an almost direct nexus between those disparate approaches to constitutional interpretation and corresponding polar political viewpoints. While conservative stances on social issues thrive on deferential interpretation of original language, constitutional support for liberal social issues invariably requires creative, extra-constitutional innovation. It should have been no surprise, then, that advocates of liberal social issues were so vociferous in their opposition to a nominee committed to deferential interpretation. For them, it is not just *Roe v. Wade* and abortion that are at risk, but potentially any other liberal social cause not embraced by the constitutional text set forth by the framers.

Who knows, of course, what case might trigger a major broadside against *Roe v. Wade*? Not even originalist justices would gratuitously dredge up *Roe* with the specific intention of overturning it.[6] Whatever judicial adjustments might eventuate, one thing is certain: any originalist opinions will be written with deference to the original text of the Constitution, not some smoke-and-mirrors reasoning conjured up to achieve a given result one wishes to bathe in constitutional legitimacy.

THE SUBTLE SUBTERFUGE OF IN-DE-DUCTION

Smoke-and-mirrors reasoning has a name. It is what Notre Dame's Gerard Bradley insightfully has called

[2] Archibald Cox, The Role of the Supreme Court in American Government 113-14 (Oxford Univ. Press 1976).

[3] John Hart Ely, *The Wages of Crying Wolf, 82* Yale L.J. 920, 947 (1973).

[4] *Id.* at 935-936.

[5] Laurence H. Tribe, "The Supreme Court, 1972 Term." Foreword: "Toward a Model of Roles in the Due Process of Life and Law," Harvard Law Review 87, no. 1, 7 (1973).

[6] Reading between the lines, some observers have suggested that Chief Justice John Roberts, although generally in the originalist camp, might hesitate to overturn *Roe* for fear that the Court as an institution would be diminished.

"in-de-duction."[7] Whatever the application, the process is always the same: Take the original document, pledge undying allegiance to it, then blatantly ignore what seems to be its natural meaning and—drawing from any parts of it that are helpful to the cause—inductively expand it to accommodate whatever results you would like to achieve. Once the now-greatly-expanded document is securely overlaid on the original (thereby obscuring the original), deductively reason your way to all the beneficent applications now possible within the newly-enlarged borders of the document.

Roe v. Wade, of course, is the poster child for in-de-ductive reasoning. Through a virtually unnoticed process of creeping incrementalism, a novel "right of privacy" developed via a string of seemingly-benign cases, beginning with *Griswold v. Connecticut*[8] (contraception for married couples) and *Eisenstadt v. Baird*[9] (contraception for unmarried couples). From there, it was but a hop, skip, and a jump to *Roe's* sweeping back-stop for dealing with any unwanted pregnancy in the event the protections afforded by *Griswold* and *Eisenstadt* happened to fail.

Alongside the newfound "right of privacy" came yet more language foreign to the Constitution, as in *Stanley v. Georgia*[10] (involving the possession of pornography), wherein Justice Thurgood Marshall declared an amorphous "right to be let alone." Search high and low in the Constitution, and neither an untethered "right of privacy" nor some felicitous "right to be let alone" is anywhere to be found.

"The process of implausibly stretching the Constitution beyond recognition reached its zenith in Planned Parenthood v. Casey, *where progressive Justices dared to declare that "at the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."*

Emboldened by such inductive fictions, the process of implausibly stretching the Constitution beyond recognition reached its zenith in *Planned Parenthood v. Casey*,[11] where progressive Justices dared to declare that "at the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." Such fanciful philosophical ruminations may warm the hearts of criminal gang members but are not even remotely suggested in the Constitution. Indeed, by elevating subjective personal autonomy over communal norms, and hence over the very concept of law itself, those vacuous philosophical notions are *definitionally* unconstitutional.

The "extra-textualism" or "supra-textualism" blithely created in this high-handed process of in-de-duction is pure fabrication, aborting not just the unborn, but any legitimate notion of constitutionalism.

BIBLICAL INTERPRETATION: SAME SONG, DIFFERENT VERSE

Perhaps surprisingly, the pivotal issues regarding constitutional interpretation shed light on a far more important matter of textual interpretation. By no coincidence, the question of judicial interpretation is precisely mirrored in how the Bible ought to be interpreted, particularly the opening chapters of Genesis. Should the Creation narrative be understood as a natural reading would indicate, taking the words at face value; or, rather, by some

[7] "In 1965, Griswold set the standard for this kind of analysis, which I call the "in-de-ductive" method of constitutional lawmaking. 'Induction' refers to a general analytical technique that first investigates all relevant phenomena and seeks in them a common principle. 'Deduction' starts from an intuited or self-evident principle and proceeds to derive implications. Griswold did both. First, it surveyed the entire Constitution, particularly the Bill of Rights, and decided that 'privacy' was a common element, following which a 'general' right to privacy was dubbed an autonomous principle. From this principle certain desired conclusions—like use of contraceptives or abortion-on-demand—are confidently drawn. The special virtue of in-de-duction is that neither contraception nor abortion could persuasively be drawn from a single constitutional clause. Loosed from all moorings in the now-transcended text, the visionary jurist is free to pursue his extraneous commitments." Gerard V. Bradley, *The Constitution and the Erotic Self*, First Things, October 1991.

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

[9] *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

[10] *Stanley v. Georgia,* 394 U.S. 557, 564 (1969).

[11] *Planned Parenthood v. Casey,* 505 U.S. 833, 851 (1992).

dynamic theological approach informed by modern scientific knowledge?

In his widely-read book, *The Lost World of Genesis One*, Wheaton College's John Walton posits a way of understanding the Genesis account that de-materializes the Creation story altogether.[12] Walton's thesis, which he calls the "cosmic temple inauguration" view, is all about theology, having nothing to do with "creation" at all. Instead, the *seven days* describe the inauguration of the cosmos whereby "the cosmos is being given its functions as God's temple, where God takes up his residence and from where he runs the cosmos." Accordingly, "on day one God created the basis for time; day two the basis for weather; and day three the basis for food," and so on.

The key word is *function*, not *creation*.[13] "As an account of functional origins, it offers no clear information about material origins."[14]

Walton's view generally assumes that prior to the seven-day "temple inauguration" the initial stages of the material universe had already occurred, whenever and by whatever method God may have chosen. Because "creation" details are not relevant to the point being made by the writer of Genesis, says Walton, it is no use arguing one way or the other about how God may have implemented his Creation. All we need to know is that God did it. Except, of course, for Walton's revealing follow-up that, in the absence of any clear biblical explication of God's particular *method* of creation, we are free to accept scientific consensus on how humankind came to be. Read: Life was divinely created by a process of microbe-to-man evolution.

Taking a page from Walton's book, British theologian N.T. Wright warns against a natural reading of the Creation narrative in Genesis. Rather than being a factual, historical account of how God created the universe, the Creation narrative, says Wright, is meant to teach us about how God has made the earth his temple.[15] Astutely avoiding any definitive acceptance of an historical Adam and Eve, Wright carefully nuances his words to say that "something like a primal pair getting it wrong did happen," but reading Genesis as a "clunky, historical account" robs it of its mythological power.

Interpreting the Bible, of course, is not always as straightforward as one might hope. Given the various kinds of literary genre in Scripture, from poetry and prophecy to Job's unique narrative and the apocalyptic language of Revelation, there is scope for understanding the Creation account in Genesis as historical narrative never intended to be taken with wooden literalness.[16] Depending on the particular genre being read and interpreted, a figurative or perhaps metaphorical reading of Scripture might be more appropriate than anything resembling "strict construction."

That said, why all the glib, theological mumbo-jumbo flying in the face of the most natural reading of Genesis? What prompts so obvious a smoke-and-mirrors approach to create the illusion of legitimate biblical interpretation? Simple. By whatever means, Genesis must somehow be interpreted in such a way as to accommodate Walton's and Wright's acceptance of "evolutionary creation" — the idea touted by a growing number of evangelical and Catholic scholars that

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[12] John H. Walton, The Lost World of Genesis One (Downers Grove, IL: InterVarsity Press 2009).

[13] *Id.* at 58, 161-162.

[14] Considering that such a radical, novel interpretation has only recently surfaced after millennia of general consensus regarding the nature of the Genesis narrative (ancient Near Eastern "creation narratives" notwithstanding), are we to believe that ours is the first generation of biblical scholars to be so enlightened?

[15] https://www.youtube.com/watch?v=3BP1PpDyDCw.

[16] The long-standing debate regarding the length of the "six days" of Creation — whether 24-hour days or some longer period of time (as with: "In that day and age") — highlights a crucial question of interpretation: Does "strictly" necessarily mean *literally?* Given the two senses in which the English word "day" may be used, not even a common-sense reading, taken alone, could definitively resolve the "day" issue.

What common sense *can* tell the reader is (1) that the Genesis account is addressing the creation of the material universe, not some theologically-imagined "temple inauguration" scenario; (2) that God did not employ the random, Darwinian-style process of evolution held by scientific consensus that just as easily might never have produced humans; (3) that, regardless of time-frame, God's creative acts — biological and otherwise — were characterized by instantaneous divine command; and (4) that God created Adam *ex dust* and Eve *ex Adam,* not as highly-evolved hominids in whom the image of God was infused at some mysterious point in evolution history.

God created humankind through the gradual process of Darwinian-style evolution accepted by the scientific community.[17]

COMING FULL-CIRCLE

This tortured transformation of the Genesis text is eerily reminiscent of how the Court in *Roe* shrewdly cobbled together a ruling based upon a constitutionally-suspect "right of privacy" — all sheer smoke and mirrors creating the illusion of legitimate judicial interpretation. For those who desire an unwarranted outcome, whether in law or in theology, the controlling text is only a pesky speed-bump, not a barrier.

Much could be said about the oxymoronic, cake-and-eat-it-too notion of "evolutionary creation."[18] Of immediate concern, however, is an intriguing connection that N.T. Wright makes between religion and politics. Wright warns against what he perceives to be a uniquely American linkage between a strict-creationist interpretation of Genesis and various political issues — as if to delegitimize a natural reading of Genesis by sheer force of association with conservative political causes, specifically including abortion and gun laws.

"By no coincidence, the question of judicial interpretation is precisely mirrored in how the Bible ought to be interpreted, particularly the opening chapters of Genesis. Should the Creation narrative be understood as a natural reading would indicate, taking the words at face value; or, rather, by some dynamic theological approach informed by modern scientific knowledge?"

While lumping permissive gun laws with a straightforward interpretation of Genesis is a stretch (not unlike Obama's infamous slam against conservatives who "cling to guns or religion"), Wright is on safer ground linking traditional creationists with moral issues like abortion that have political implications.

If a person were to survey political progressives who support abortion and oppose gun rights, would they most likely be creationists or evolutionists? Even the "origins" divide between Democrats and Republicans is revealing. While large numbers of Republicans accept human origins via evolution, a far higher percentage of Democrats would reject divine Creation in any form. At base, the culture wars are not about raw politics, as such, but about worldview paradigms, the most crucial fork in the road being the question of origins.

It comes as no surprise, then, that the same philosophical fork in the road leads to a marked divide between, on one hand, the call of political progressives for a dynamic, innovative reading of the Constitution and, on the other hand, the insistence of political conservatives on an originalist interpretation.

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[17] In sophisticated Christian circles, "evolutionary creation" (more traditionally known as "theistic evolution") has virtually won the day among Christian scholars. Of particular note is The BioLogos Foundation, which has become the most prestigious and evangelistic proponent of evolutionary creation. Founded by famed geneticist Francis S. Collins, former head of The Genome Project and now director of the National Institutes of Health, BioLogos is endorsed by such luminaries as Tim Keller, N.T. Wright, Philip Yancey, Os Guinness, Mark Noll, John Ortberg, Richard Mouw, and John Walton.

The following BioLogos affirmations (*see* www.biologos.org) are a good summary of "evolutionary creation":

- We believe that God created the universe, the earth, and all life over billions of years.
- We believe that the diversity and interrelation of all life on earth are best explained by the God-ordained process of evolution with common descent. Thus, evolution is not in opposition to God, but a means by which God providentially achieves his purposes. Therefore, we reject ideologies that claim that evolution is a purposeless process or that evolution replaces God.
- We believe that God created humans in biological continuity with all life on earth, but also as spiritual beings. God established a unique relationship with humanity by endowing us with his image and calling us to an elevated position within the created order.

[18] *See* F. LAGARD SMITH, DARWIN'S SECRET SEX PROBLEM: EXPOSING EVOLUTION'S FATAL FLAW — THE ORIGIN OF SEX 203-296 (Bloomington, IN: WestBow Press 2018).

GOING TO THE TOP OF THE WATERFALL

For many faith-based people, the question of origins does not spark the same level of interest as, say, religious liberty. Solely on First Amendment grounds, one can focus on how the Constitution ought to be interpreted regarding any number of questions pertaining to religious expression. For example, whether public school students may pray in groups on school grounds or at football games. Or whether teachers may silently read their own Bible in front of students. Or whether public school facilities may be used by religious organizations, or any number of other faith-related matters. With such issues, the question of Evolution versus Creation does not readily appear to enter the picture. But if Richard Weaver was right about ideas (particularly secularist, non-religious ideas) having deleterious social consequences,[19] no idea has had more profound consequences than the idea of human origins by gradual, naturalistic evolution.[20]

"With God no longer in the picture, generations of students have become fully-fledged secularists enjoying the self-focused benefits of a materialist worldview. No prizes for guessing where that mindset leads in choices about abortion, divorce, and sexual identity and lifestyles."

Is it possible that too sharp a focus on religious liberty has blinded us to the larger, seminal problem? When prayer in public schools was first prohibited, Christians remonstrated loudly that God was being removed from the classroom. Banning school prayers may have raised serious issues about the free exercise of religion, but their removal was penny ante compared with what was happening, largely unnoticed, down the hall from homeroom. Proof of this proposition lies in a similar dynamic occurring even in parochial schools where classroom prayers were still being observed. Whether public or parochial, it was in the science class where God was quietly being nudged out of education, soon to be evicted from the public square and any meaningful protection for religious freedom.

With God no longer in the picture, generations of students have become fully-fledged secularists enjoying the self-focused benefits of a materialist worldview. No prizes for guessing where that mindset leads in choices about abortion, divorce, and sexual identity and lifestyles. Is nothing sacred? Not any longer, not even life itself — which science confidently assures us is merely an accident of Nature, the outcome of natural forces acting haphazardly over time. No meaning, no destiny, no afterlife accountability, only each individual making of life (and life in the womb) whatever one wishes.

And, so, it's back to *Roe v. Wade*, where cultural acceptance of abortion (consistent with evolution's devalued view of human existence) demanded an innovative, dynamic interpretation to give it constitutional legitimacy. Yet, for all its notoriety, the issues addressed in *Roe* regarding life in the womb are philosophically downstream from more seminal perspectives on the origin of life itself. At the top of the philosophical waterfall, the more wide-sweeping, pivotal, and socially-impacting cases[21] are *Epperson v. Arkansas* (regarding the banning of Evolution teaching),[22] *McLean v. Arkansas Board of Education* (regarding a balanced treatment of "creation science"),[23] and *Edwards v. Aguillard* (regarding secular versus religious purpose).[24] These and other similar cases, banishing from the public classroom all reference to divine Creation, bizarrely enlist the First Amendment in squelching the Bible's Creation story, thereby ensuring that Evolution's "creation story" is the only view of human origins being taught.

THE DODGY LOGIC "ESTABLISHING" EVOLUTION

In *Epperson*, the Supreme Court's holding was unanimous, with seven justices agreeing that the statute barring the teaching of Evolution in Arkansas public

[19] Richard Weaver, Ideas Have Consequences, (Chicago: Univ. of Chicago Press 1948).

[20] Note for reader: Lower case "evolution" is generally used herein to denote the *process* of evolving, whereas capitalized "Evolution" is generally used to denote the *Grand Theory* put forward by Darwin that all organisms have evolved over vast periods of time from the lowest to the highest forms.

[21] Most of which cases follow *Roe v. Wade* chronologically.

[22] *Epperson v. Arkansas,* 393 U.S. 97, 37 U.S. Law Week 4017, 89 S. Ct. 266, 21 L. Ed 228 (1968).

[23] *McLean v. Arkansas Board of Education,* 529 F. Supp. 1255, 50 U.S. Law Week 2412 (1982).

[24] *Edwards v. Aguillard,* 482 U.S. 578 (1987).

schools was a violation of the Establishment Clause of the First Amendment because the law had been based solely on the beliefs of fundamentalist Christians who contended that Evolution contradicted the biblical account of Creation. Speaking for the Court, Justice Abe Fortas wrote, "The State's undoubted right to prescribe the curriculum for its public schools does not carry with it the right to prohibit, on pain of criminal penalty, the teaching of a scientific theory or doctrine where that prohibition is based upon reasons that violate the First Amendment."[25]

"Reasons that violate the First Amendment"? How, by any means, did the Establishment Clause ever come to the point of weighing in on the teaching of Evolution or Creation? Only by ignoring the explicit language used by the framers, who (in a pragmatic political concession to antifederalist sentiment) added the Establishment Clause to assure the ratifiers that none of the then-established churches in the federation-wary states could become the official, established religion of the fledgling nation.[26] Neither nonestablishment nor disestablishment at the *state* level was ever the import of the Establishment Clause. Clearly, the Clause directs that "*Congress* shall make no laws" setting up any sect preference. Not a word commanding the *states* to "make no laws" regarding sect preferences, nor about abandoning their widely-accepted public religious involvement.

For the framers, the Establishment Clause was specifically crafted to safeguard the right of individual states to maintain whatever religious stance they chose, whether Congregational (in Connecticut, Massachusetts, and New Hampshire), Church of England (in Georgia, Maryland, the Carolinas, and Virginia), or no official religion (as in Pennsylvania, New Jersey, Delaware, and Rhode Island).[27] In that last category, beware the temptation to equate *nonsectarian* with *non-religious*. Even states without official church establishment typically required office-holders to be of a certain religion, if nothing more than generically Christian or Protestant. They also gave tax-supported financial aid to religious institutions and enacted "blue laws" for Sabbath observance.

If "religious entanglement" is an evil, the early American states — both established and nonestablished — were awash in evil. Is it to be believed, then, that any of the establishment states (or even nonestablishment states) would have voted to ratify the Establishment Clause if today's judicial-babble about nonestablishment (anti-religious to the core) is what the Clause was meant to achieve?

By the time the First Amendment was adopted in 1791, individual states were already losing a taste for maintaining sect preference. One after another, previously established churches were being disestablished. Yet even though the establishment song gradually ended through individual state constitutional amendments, by law within those self-same states the melody lingered on, continuing a long-standing intimate relationship between faith and state. As a striking example, it was not until 1876 that New Hampshire dropped its requirement that members of the legislature be of the Protestant faith. For well over a century, legal consensus unequivocally acknowledged that the Establishment Clause was never understood to prohibit any particular religious expression on the state level.

In time, with the aid of the Court's selective amnesia regarding the history of ratification, the Court's doctrine of incorporation, extending individual rights from the federal Bill of Rights to the states through the Due Process Clause of the Fourteenth Amendment, was applied as well to the Establishment Clause, in *Everson v. Board of Education* (1947).[28] Did no one stop to think that incorporation thereby undermined the whole point of the Establishment Clause — to prevent the imposition on the states of any national stance on matters pertaining to religion?

As it happens, that point was not at all lost on progressive jurists. To get around the explicit language of the Establishment Clause standing in the way of federalizing their progressive agenda, the Establishment Clause would have to be radically redefined and repurposed. How best to do that? First, cast indignant aspersion on any "narrow interpretations" (as in "clunky, historical account"?) that would strictly limit the Clause's obvious purpose in prohibiting sect preference on a national level. Second, completely gloss over the normative, fully-accepted entanglement of state and religion extant both before and after ratification of the Establishment Clause, including most especially the granting of state aid. Third, conveniently read into the text an imagined intent on the part of the framers to harness the "evil" of religious sectarianism by means of nonestablishment. (As every progressive knows, religion is notoriously

[25] *Epperson,* 393 U.S. 97, 107.

[26] *See* GERALD V. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA 69-81 (Westport, Conn: Greenwood Press 1987).

[27] *Id.* at 19-57.

[28] *Everson v. Board of Education,* 330 U.S. 1 (1947).

divisive and causes all sorts of headaches when it sticks its nose into civil affairs….)[29]

That imaginative reading of history was made up out of whole cloth, of course, but was sufficiently seductive to turn the meaning of the Establishment Clause on its head, creating a federal wedge with which to penetrate into state actions previously protected from intrusion by that very Clause. Having magically transformed the *Establishment* Clause into a constitutional *Santa* Clause, it took but a jolly finger to the side of the nose to deductively pull out of Santa's bulging bag the three prongs of *Lemon v. Kurtzman*[30] and all sorts of other delightful restrictions on religious freedoms. Naughty or nice, the mystical, magical repurposing of the Establishment Clause was the joyous progressivist gift that keeps on giving.

Never does in-de-ductive interpretation get more bedazzling than when it comes to teaching about human origins in the public classroom. Flying in the face of both the explicit language of the First Amendment and the laws, customs, and practices supporting and encouraging religion in the nascent states, modern Establishment-Clause doctrine now prohibits the government from preferring religion over non-religion. Hence, the ruling in *Epperson* (with the framers spinning in their graves).

In the larger picture, *Epperson* was not simply a judicial ruling upholding scientific consensus, but was tantamount to judicial endorsement of a particular philosophical (parareligious) framework. Little noticed is that, with *Epperson* and its progeny, any thought of "benevolent neutrality"[31] has long since been left in the dust. Indeed, no longer is it a matter of religion being preferred over non-religion, but non-religion (the secularism fostered by evolutionism) being preferred over religion.

Established science has now given birth to an *established worldview*, hostile to religion in profound ways (and, ironically, to the very rights championed by progressives[32]). Thanks to *Epperson* and its progeny, Evolution-driven secularism is fast becoming America's established "irreligious religion" whose militant dogma is every bit as intolerant of dissent as the most intolerant sects formerly established in any given state. And *that* — coming full circle — in violation of the obvious, crystal-clear spirit of the Establishment Clause.

WHEN FACTS RUIN BEAUTIFUL THEORIES

Whether it be interpreting the Constitution or the Bible, neither originalists nor advocates for more dynamic, innovative interpretations are likely to win the argument on theory alone. Which is why *facts* become so important, particularly on the issue of human origins.

If *in fact* humans are the product of microbe-to-man evolution, then a natural reading of Genesis makes little sense, and constitutional arguments supporting the right to life lose much of their gravitas. But if in actual scientific fact humankind is *not* the product of microbe-to-man evolution, then evolutionary creationists have no reason for their theologically-innovative interpretations subtly crafted to shoehorn evolution theory into the Genesis narrative, and pro-life concerns are legitimate, natural outcomes of originalist constitutional interpretation.

So, what are the facts of the matter? Before one hastily assumes that the scientific community could not possibly be wrong in its acceptance of microbe-to-man evolution, one might at least consider an argument that the Grand Theory of Evolution is fatally flawed on its own terms, having nothing to do with any interpretation of the Creation narrative in Genesis.

It was Charles Darwin himself who set the terms of invalidation, saying, "If it could be demonstrated that any complex organ existed, which could not possibly have been formed by numerous, successive, slight modifications, my theory would absolutely break down."[33]

Such a "complex organ" can be demonstrated. Putting it as succinctly as possible, natural selection could not possibly have provided a gradual, haphazard evolutionary bridge between genderless, asexual replication (mitosis) and fully-gendered male/female sexual reproduction (requiring meiosis). Without this bridge,

[29] There are two glaring ironies here. First, the whole point of the Establishment Clause was to ensure religious tolerance, allowing the states to establish whatever religion they desired (or no particular religion) and to protect religious freedom as they deemed warranted. More sinister is the irony that this zeal for ensuring religious tolerance has become the vehicle used to promote progressive intolerance of religion, whatever its stripe.

[30] *Lemon v. Kurtzman,* 403 U.S. 603, 612-615 (1971).

[31] *Walz v. Tax Commission of the City of New York,* 397 U.S. 664 (1970).

[32] Rights-obsessed progressives who demand an endless list of human and animal rights fail to see the disconnect when they insist that only Evolution be taught in the classroom. One thing is sure: neither natural selection nor, more certainly, survival of the fittest could possibly provide a moral foundation for "rights" of any kind, the "right to choose" included.

[33] Charles Darwin, Origin of Species 176.

the popularized, romanticized, politicized, and now even theologized Evolution narrative is a non-starter.[34]

Nor could natural selection have provided simultaneous, on-time delivery of the first compatible male/female pair of each of millions of sexually-unique species, precluding any possibility of Evolution's bedrock theory of common descent. (Merely consider the *sexual* transition necessary between major phyla, such as from amphibians to reptiles; or how sexual reproduction possibly could have bridged — step by gradual, random step — between the animal kingdom and the plant kingdom; or how a partial penis or partial vagina possibly could have advanced the evolutionary ball toward the first-ever penile/vaginal reproductive process.)

INTERPRETING THE AVAILABLE EVIDENCE

Although not exactly on all fours with constitutional and biblical interpretation, yet another problem of interpretation plays into the already-crowded field of interrelated issues surrounding *Roe* and *Epperson*, particularly *Epperson*. While *Roe* is all about a personally-problematic *outcome* of sex, *Epperson* is threatened by the scientifically-problematic *origin* of sex. For if natural selection could not possibly have bridged between asexual replication and sexual reproduction, and could not possibly have provided species-unique sexual reproduction when and how it would have been absolutely necessary along the supposed chain of progression from lower to higher species, then *Epperson* has given judicial legitimacy to bad science. Forget so-called "creation science," or creationism in any form or guise. Simply put, *bad science* has evolved into *bad law*.

"Whether it be interpreting the Constitution or the Bible, neither originalists nor advocates for more dynamic, innovative interpretations are likely to win the argument on theory alone. Which is why facts *become so important, particularly on the issue of human origins."*

Despite its being bad science, the teaching of microbe-to-man evolution is even more deeply entrenched in culture than *Roe v. Wade*. After all, isn't the fossil record clear and convincing? Isn't homology (with its picture-perfect similarities between, for example, whale fins and the human hand) compelling evidence of evolution? Don't DNA correspondences between organisms provide indisputable evidence of common descent? Could PBS, *National Geographic*, and all the other ponderously-narrated "Nature" documentaries, citing billions of years of evolution, be so wrong?

To lend a modicum of perspective, there was a time when similar questions might well have been asked. For example, could Aristotle's and Ptolemy's geocentric view — held to be unassailable science for centuries — possibly have been wrong about the earth being the center of the universe? Could the consensus of the entire scientific community upholding the geocentric view conceivably be bad science? But, of course, it *was* bad science. (As a cautionary tale for today's evolutionary creationists, it must not be forgotten that the Church, not wishing to be out-of-step with scientific consensus, lent its imprimatur to the false scientific notion, providing dubious prooftexts to baptize it with theological legitimacy.)

Space does not permit a full discussion, but from Darwin onward the Grand Theory of Evolution is fundamentally a glorified extrapolation, from observable, "bounded" evolution to unobservable, "unbounded" evolution of the lowest life forms to the highest. The operating premise is that, if anything evolves, surely everything must have evolved. Despite there being a kind of logic to that extrapolation, in the end it is "logical" enough, but wrong.[35] Subverting its legitimacy, the Grand Theory is a thinly-fabricated notion that depends on multiple levels of equivocal, if not outright dubious, evidentiary interpretation.

Are the supposed "missing links" in the fossil record, for example, actually *transitional*, or simply similar in some degree to other known species? Here again, there is an interpretation problem, with evolutionists drawing conclusions based upon an assumed meta-narrative. Behind the headlines, honest admissions by card-carrying evolutionists acknowledge the endless, often wishful, suppositions

[34] *See Smith, supra,* xi-200.

[35] When police radar detects a car traveling 90 mph, one might logically reason that, an hour before, the car was 90 miles away. The greater likelihood is that the driver pulled onto the highway only a few miles back and pushed it up to 90. In that case, the reasonable calculation is logical enough, but wrong. By their very nature, extrapolations from the observable to the unobservable are particularly vulnerable to the "police radar fallacy."

(invariably confirmed by even more imaginative full-color illustrations). And then there is the equivocality of interpreting similar traits like the bone structure in the whale's fin and the human hand. Does similarity suggest common descent, or common design? Even today's highly-touted DNA comparisons assume that correspondences between genes in apes and humans (or perhaps similar "missing genes") must surely prove common descent, when they could just as reasonably point to common design.

In the realm of scientific inquiry, one's conclusions are as subject to hermeneutical differences and in-de-ductive reasoning as constitutional or biblical interpretation. Just as "beauty is in the eye of the beholder," so too is "scientific fact." Once the Evolution story is firmly embraced from A to Z, it seems not to matter if a crucial "G" here or a critical "P" there is missing, or that an indispensable link from "B" to "C" (as with the origin of sex) could not possibly ever have happened by natural selection.

"Once the Evolution story is firmly embraced from A to Z, it seems not to matter if a crucial 'G' here or a critical 'P' there is missing, or that an indispensable link from 'B' to 'C' (as with the origin of sex) could not possibly ever have happened by natural selection."

Even when solid evidence is plainly lacking — indeed, when it is *most* lacking — evolutionists (especially the more popular, militant writers) have no qualms about presenting creative conjuring to bolster fictional assumptions presented as undeniable fact. Yet, listen closely to their actual words: "Could have been," "possibly was," "not inconsistent with," and — what should be most alarming — "one can imagine."

THE IN-DE-DUCTION OF EVOLUTION THEORY

In terms of science, how did evolution theory itself — now commanding such a lofty, constitutionally-protected status — ever arise in the first place? Curiously, by the self-same process of in-de-duction. Hypothesizing from the observable to the unobservable, Darwin inductively provided a bold, new scientific "supra-text" — a grand, overarching theory purporting to explain life's origins through random, unguided, naturalistic forces.[36] With the widespread acceptance of that "supra-text," invariably every DNA correspondence and headline-grabbing discovery of exciting fossil remains is duly interpreted in line with the sacrosanct "supra-text."

Using further deduction on a grand scale, virtually every question of life has been made to fit the popular narrative, whether in evolutionary psychology, evolutionary sociology, or even evolutionary economics. Nothing, it seems, is exempt from its reach — of late including the Scriptures, once viewed as incontrovertibly explaining life's origins by purposeful, instantaneous acts of divine Creation.[37] Hence, today's fashionable "evolutionary creation" theology, doing obeisance to the Evolution "supra-text" by inductively liberating the original Creation narrative in Genesis from its "clunky, historical" confines and transforming it into a theologically-capacious "supra-text."[38]

THE TERMINOLOGY SHELL GAME

Given the subtle process of in-de-duction, one has to be particularly careful about terminology. That which progressive jurists deem to be "constitutional" (or, as it suits, *unconstitutional*) is nowhere

[36] The Grand Theory of Evolution in biology has become such a predominant "supra-text" that few stop to consider the myriad phenomena that it does not even begin to address, including the origin of light, gravity, water, weather, chemicals, color, solar movements, seasons, and on and on. Each of these constituent elements of the universe must first be explained independently, then in functional concert with all other working parts of the universe without which biological life itself would not be possible. Despite audacious claims, no scientific "supra-text" — whether evolution or sophisticated physics — is remotely capable of "a theory of everything." Only one "supra-text" can reasonably do that.

[37] Which is not to say that original, specially-created organisms were forever fixed and incapable of evolutionary change within certain boundaries (paired sexual uniqueness being the most important of those boundaries). Only that original life forms did not come into existence via a long, haphazard process that, given different contingencies, might never have evolved into the plethora of life forms extant today, most crucially human beings.

[38] Shades of the rabbinical Midrash and Talmud, notorious for inductively transforming the original Laws of Moses into a theological "supra-text" from which endless ceremonial and other onerous rules for daily living were deduced.

to be found in the actual Constitution, only in their expanded version of it. Likewise, what is deemed by progressive theologians to be *biblical* (or, as it suits, *unbiblical*) is nowhere to be found in the Bible, only in their theologically-modified version of it.

Not even evolution is immune from this linguistic doublespeak. Of first importance is the indiscriminate, Janus-like use of the word itself. Are we talking about "little-e" evolution, meaning undeniable, observable change within species? Or, rather, the Grand Theory of merely-hypothesized, microbe-to-man, "Big-E" Evolution? Evolutionists look with disdain on anyone claiming not to believe in "evolution," often wrongly assuming that the objection extends to both kinds of evolution. In each case, the word may be the same, but a failure to draw such a crucial distinction between observable evolutionary processes and the highly-conjectured Grand Theory of Evolution leads to unhelpful misunderstandings.

Consider, as well, another confusing conflation. Once Evolution is inductively elevated to being nothing short of *science itself*, any denial of Evolution is, by deduction, *unscientific*. Anyone daring to challenge the Grand Theory of Evolution is pejoratively said not to believe in *science* (which, of course, definitively proves one's ill-informed, narrow-minded ignorance).

Indeed, yet another form of in-de-duction arises when the definition of science is inductively expanded to include the insistence that, to be legitimate science, a proposition must be objectively testable. The obvious logical deduction is that any notion of supernatural Creation, being incapable of standard scientific evaluation, must certainly be unscientific — and thus, by force of purely-naturalistic thinking, untrue.

UNDERMINING THE CONTROLLING DOCUMENT

Beyond the deception involved in similar-sounding terminology, consider the striking linkage between constitutional and biblical interpretation. The same dynamic hermeneutic allowing expansionist jurists to find constitutional protection for homosexual expression (and now even same-sex marriage) finds its natural counterpart in the dynamic hermeneutic of a growing number of expansionist theologians who insist that the clear biblical censure of homosexual expression[39] is (per their innovative biblical "supra-text") *unloving, intolerant, and unjust*, and therefore, by deduction, *unbiblical*.[40]

Whatever the issue, the key to one's conclusions begins and ends with one's particular view of interpretation. Or might that be the other way around, with one's prior conclusions dictating which method of interpretation one finds most useful in justifying those conclusions?[41]

At the end of the day, in-de-ductive reasoning reflects a low view of the controlling text, whether it be the Constitution or the Bible. That observation is true no matter how fervently those who employ such reasoning genuinely believe in, and affirm their loyalty to, the founding text. This is not to judge anyone's motives, or — where biblical interpretation is the issue — to question their personal faith, but simply to highlight the logical implications of their arguments.

Such head/heart schizophrenia is not new. The Pharisees may sincerely have honored the Scriptures with their lips, and even with their minds, but their own humanly-conceived pronouncements were far removed from the divine Scriptures they claimed to revere. Jesus' stinging excoriation highlights the dangerous enterprise of in-de-ductive thinking: "Their worship is a farce, for they teach man-made ideas as commands from God."[42]

If only isolated innovations were the sole concern. Unfortunately, once today's innovators, whether in law or in theology, erode the founding documents by their

[39] LEVITICUS 18:22; 20:13; ROMANS 1:26-27; 1 CORINTHIANS 6:9; JUDE 7.

[40] By means of an inductive approach to Scripture, the virtues of love, tolerance, and justice — bundled together — have become the new "supra-text" from which, deductively, any original text deemed to be intolerant (e.g., restraints on sexual conduct) must be rejected as unbiblical. Inductively, sexual expression is, therefore, accorded a biblical "right of privacy," by which homosexual expression is deductively given biblical legitimacy. In this instance, in-de-duction becomes dramatically more egregious, not just creatively adding to Scripture, but blatantly repudiating explicit prohibitions (an unauthorized expungement about which Deuteronomy 4:2 ought to be cautionary).

[41] Then again, one's default approach is not always applied consistently. Originalists, for example, seem from time to time to be as results-oriented as their more progressive counterparts, inviting the potential for being thought hypocritical. Not to mention that jurists of whatever stripe have been known to write opinions inconsistent with other opinions which they, themselves, have penned. Yet, despite those occasional departures, constitutional and biblical interpreters rarely stray far from either their ideological assumptions or corresponding hermeneutics.

[42] MATTHEW 15:8,9 (NLT).

use of in-de-ductive reasoning, a whole series of unintended textual consequences inexorably follow.

Consider, for example, the disturbing implications flowing from an artfully-theologized Creation narrative accommodating microbe-to-man evolution. What then becomes of Adam and Eve? Are they historical figures or not? Evolutionary creationists are all over the board in answering that crucial question, with many, if not most, viewing the biblical proto-couple as merely literary, archetypal figures, not historical.[43] Quite incredibly, that novel approach in turn leads to: (1) repudiation of the historicity of Genesis 1-11 (including Noah and the Flood); (2) deft dismissal of the genealogies in both Old and New Testaments; (3) deconstruction of Romans 5 (Adam being the first man); and (4) making even Jesus's own words in Matthew 19 problematic.

Once on the deductive downslope, it becomes all too easy to dismiss Paul's Creation-based arguments, such as Romans 1 regarding homosexual practices (turning the created order of sexual relations on its head) and 1 Corinthians 11 regarding gender roles (with the nub of the argument being that woman was created both *for* man and *from* man).[44]

"Once today's innovators, whether in law or in theology, erode the founding documents by their use of in-de-ductive reasoning, a whole series of unintended textual consequences inexorably follow."

A similar tangled web presents itself in constitutional analysis. As noted previously, the innovative incorporation of the Establishment Clause, far from safeguarding religious practice as originally intended, has had the opposite effect, increasingly impinging on the Free Exercise Clause. And then there's the Pandora's box opened by the judicial sanction for same-sex marriage. What compelling constitutional principle could now proscribe polygamy, polyandry, or any other social arrangement no matter how bizarre? And what constitutional limitations remain now that privacy rights are to be determined personally and subjectively? Already, the walls are tumbling around trendy transgender issues. How, logically, could the government constitutionally respond to a right-of-privacy argument in the case of personal drug use, prostitution, or any number of other so-called victimless crimes?

A CULTURAL HOUSE OF CARDS

In ancient times, the prophet lamented, "They say, 'peace, peace', but there is no peace."[45] Today, one might well lament, "They cry 'Constitution, Constitution,' but there is no Constitution." What passes today as "constitutional" is often little more than the artful imagination of progressive thinking camouflaged in traditional black robes. Change the venue to biblical interpretation, and the results will be the same . . . for the exact same reason. Whether in law, religion, or even science, in-de-ductive reasoning has had a profound impact on virtually every aspect of our lives.

Thanks to in-de-ductive reasoning on multiple levels, ours has become a house-of-cards culture. One thin card (evolution theory) leaning precariously against another thin card (the innovative theology of evolutionary creation), atop other thin cards (the "establishment" of Evolution teaching in the classroom via unwarranted incorporation of a reimagined Establishment Clause) leaning precariously on still other shaky cards (the inductive expansion of the Constitution through judicially-fabricated notions of "right of privacy" and "the right to be let alone") has left us vulnerable to the possibility of an entire social order crashing down at the slightest breeze.

Little wonder so many folks are nervous about *Roe v. Wade*. No case has shakier foundations, and Justice Kavanaugh — together with other originalists on the Court — is now perfectly positioned to rectify the fraud. More yet, to staunch the bleeding of a moribund Constitution across a broad swath of legal, political, and social issues.

The good news for political progressives, ironically, is that not even the staunchest originalists are likely to overturn decisions ensuring exclusive classroom access for the teaching of classic, textbook Evolution. Why, in particular,

[43] *See, e.g.,* Dennis Venema and Scot McKnight, Adam and the Genome 146 (Grand Rapids: Brazos Press 2017).

[44] Were evolutionary creationists to protest that they, too, believe in divine Creation — simply by a method other than instantaneous creation — Paul's gender-role argument certainly defies evolutionary explanation. Could natural selection have produced a fully-formed man from which a fully-formed woman then emerged? Nor would Paul's argument regarding homosexual practice fit well with even a supernatural version of evolution, as Nature rarely gives witness to non-reproductive sex, which itself would be abhorred by both natural selection and survival of the fittest.

[45] Jeremiah 6:14.

should a Catholic justice take issue with either current scientific consensus or Pope Francis himself, who has been the most outspoken among the last three Popes in bestowing the Church's blessing on evolutionary origins?[46]

The stakes couldn't be higher. Until the bad science of microbe-to-man evolution is seen for what it is, *Roe v. Wade* might conceivably be overturned on originalist grounds, but the Evolution-supported philosophical basis for freely taking life in the womb will remain undisturbed.[47]

A POSSIBLE BALANCING ACT

Whatever Supreme Court decisions lie ahead, there are other ways to bring much-needed balance to the origins discussion in the public classroom. States are perfectly entitled to challenge the teaching of Evolution on strictly scientific terms. In *Edwards v. Aguillard*, the Court gave that very nod, saying, "We do not imply that a legislature could never require that scientific critiques of prevailing scientific theories be taught." The Court went even further, saying that "teaching a variety of scientific theories about the origins of humankind to school children might be validly done with the clear secular intent of enhancing the effectiveness of science instruction."[48]

Of course, one can only wonder. If a bill requiring a discussion of Evolution's crucial "sex problem" was introduced by any party accepting divine Creation (no evolutionist is going there!), would such sponsorship be *ipso facto* evidence of non-secular intent? Never has the requirement of "clear secular intent" so clearly exposed the tyranny of secularist "establishment." Never has a stacked deck been so subtly disguised as liberal objectivity.

Every theory has its weaknesses. It is no secret that virtually every scientific proposition has undergone revision over time, in some cases even to the point of being discredited and superseded. (Merely consider "spontaneous generation," or Einstein's static universe, or, closer to home, Lamarck's misguided transmutation of species.) Though somewhat lost in obscurity today, in the early twentieth century Darwin's own Grand Theory was languishing in scientific circles (described by Julian Huxley as "the eclipse of Darwinism"[49]) before being artificially propped up by the Modern Synthesis, popularly known as neo-Darwinism. Why, then, should current evolution theory be exempt from close scrutiny?[50]

A case in point is the problematic origin of sex, quietly acknowledged by evolutionists themselves to be the "Queen of evolutionary problems."[51] What possible constitutional objection can be raised against exposing students to that legitimate, unresolvable conundrum?

The answer, of course, is that if too many hard questions are asked of evolution theory, bright young minds might actually begin to wonder if the Grand Theory of

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[46] In a 1996 address to the Pontifical Academy of Sciences, Pope John Paul II reiterated the Church's position regarding evolution:

> In his encyclical Humani generis (1950), my predecessor Pius XII has already affirmed that there is no conflict between evolution and the doctrine of the faith regarding man and his vocation, provided that we do not lose sight of certain fixed points.... Today, more than a half-century after the appearance of that encyclical, some new findings lead us toward the recognition of evolution as more than a hypothesis.

Just prior to his becoming Pope Benedict XVI in 2005, then-Cardinal Joseph Ratzinger was president of the International Theological Commission which, in a July 2004 statement, concluded:

> Since it has been demonstrated that all living organisms on earth are genetically related, it is virtually certain that all living organisms have descended from this first organism. Converging evidence from many studies in the physical and biological sciences furnishes mounting support for some theory of evolution to account for the development and diversification of life on earth, while controversy continues over the pace and mechanisms of evolution.

[47] Witness the current push in state after state to provide greater protections for even late-term abortions. In a move to preempt any potential reversal of *Roe v. Wade,* progressives are now pushing at the state level for expanded abortion rights, including what potentially in some fetal deformity cases would amount to outright infanticide — giving new meaning to "survival of the fittest."

[48] *Edwards v. Aguillard*, 82 U.S. 578, 594.

[49] JULIAN HUXLEY, EVOLUTION: THE MODERN SYNTHESIS (New York: Harper and Brother Publishers 1942). Huxley's book (the title of which provided the moniker for the "modern synthesis" movement) highlighted, by way of a section heading, "The Eclipse of Darwinism," at least the "Darwinism" of Darwin.

[50] It is unscientific *not* to question current science. As Judith Hooper puts it in *Of Moths and Men:* "For the record, I am not a creationist, but to be uncritical about science is to make it into a dogma" (p. xix).

[51] The phrase was coined by Graham Bell in his book, THE MASTERPIECE OF NATURE: THE EVOLUTION OF GENETICS AND SEXUALITY 19-26 (Berkeley: Univ. of California Press 1982). It's important to note that, on the rare occasions when this troublesome "Queen" is spoken of openly (virtually never in textbooks), the question of HOW natural selection possibly could overcome the problem of evolutionary sex invariably turns into a WHY question: Why would sex be advantageous in the process of evolution? But if the HOW question is inherently thwarted by the combined nature of how fully-gendered sexual reproduction works and the way in which natural selection itself *doesn't work*, then asking WHY is a distracting red herring.

Evolution is on as solid scientific footing as they have been led to believe. More dangerous still, should reasonable doubt arise, what alternative explanation is there but some kind of supernatural process? Which raises an interesting constitutional question: Does the sheer specter of logical inference run afoul of today's dynamic constitutional interpretation? Or, to put it simply: Is critical thinking now unconstitutional?

It's scientific inquiry we're talking about here. No exclusion of evolution theory, no mandated creationist perspective, not even necessarily the mention of Intelligent Design (ID), which a federal court in *Kitzmiller v. Dover* declared unconstitutional for being little more than creationism in camouflage.[52] (The court's problem with ID, of course, is that intelligent design unavoidably implies the existence of an intelligent designer, and everybody but everybody knows the only qualified candidate for that job.[53] But if the scientific mind concludes that the best (or perhaps *only*) explanation for a particular phenomenon is design, why — on this basis alone — should that scientific observation be excluded from the classroom?)

IS THERE A WAY BACK?

Reaching far beyond the Evolution-Creation controversy, if committed originalists should ever be courageous enough to turn back the clock on the widespread damage done by unwarranted in-de-deductive reasoning, such a measured, purely-scientific approach to the teaching of origins would be a perfect opportunity for restoring order to all the chaos caused along a broad front. Start that ball rolling, and who knows? In-de-ductive constitutional reasoning might just have had its day. Where precedent from the highest Court has been set by artificially-contrived, in-de-ductive reasoning flying in the face of explicit constitutional language, that precedent can, and should, be overturned, as Justice Clarence Thomas has urged regarding "demonstrably erroneous decisions."[54]

It may be, of course, that we have traveled too far down the progressive road to expect that even the most zealous originalists can put Humpty Dumpty back together again. But that should not preclude best efforts to do so. Given the broad-sweeping implications flowing from in-de-ductive reasoning, it is time for a serious reexamination, especially on the part of believers, as to how foundational, authoritative texts ought to be handled.

The Constitution, of course, is subject to amendment by its own specifically-delineated procedures. Hence, imperious judicial in-de-duction is both unnecessary and inappropriate. By contrast, not a jot or tittle of Holy Writ is subject to human amendment, least of all through smoke-and-mirrors reasoning that transforms a text with obvious meaning into a novel "supra-text" ripe for exploitation. In view of what is at stake, dare one even remotely entertain the insolence of theological in-de-duction in the face of the Creator's inspired, divine revelation?

> *For we did not follow cleverly devised myths when we made known to you the power and coming of our Lord Jesus Christ… And we have the prophetic word more fully confirmed…knowing this first of all, that no prophecy of Scripture comes from someone's own interpretation. For no prophecy was ever produced by the will of man, but men spoke from God as they were carried along by the Holy Spirit.*[55]

F. LaGard Smith, retired professor of law and compiler and narrator of The Daily Bible *(NIV and NLT in chronological order), is the author of over thirty books, the most recent being* Darwin's Secret Sex Problem: Exposing Evolution's Fatal Flaw — The Origin of Sex.

[52] *Kitzmiller v. Dover Area School District*, 400 F. Supp. 2d 707 (M.D. Pa. 2005).

[53] If the issue in *Kitzmiller* had been about product liability, the court would not have thought twice about admitting evidence of design or exploring legal implications regarding the designer. Why should credible evidence of design be thrown out of court (and the classroom) simply because obvious design logically indicates a non-human designer? Whether we're talking about designer clothes, designer babies, or — most crucial of all — a designer universe, design is design is design, invariably pointing to a creative, designing intelligence.

[54] *Gamble v. United States,* 587 U.S. _____ (2019).

[55] 2 Peter 1:16-21 (ESV).

THE DO NO HARM ACT'S ASSAULT ON ALL AMERICANS' RELIGIOUS FREEDOM

By Kim Colby

November 16, 2019, marks the 26th anniversary of President Bill Clinton signing the Religious Freedom Restoration Act (RFRA)[1] into law. A classic photograph shows President Clinton signing RFRA, surrounded by its obviously pleased supporters: liberal New York Democratic Representative Chuck Schumer (now Senate Minority Leader), liberal California Representative Don Edwards, liberal Ohio Senator Howard Metzenbaum, Vice President Al Gore, conservative Republican Utah Senator Orrin Hatch, and moderate Republican Senator Mark Hatfield. Liberal Massachusetts Senator Ted Kennedy who led the Senate effort to pass RFRA with Senator Orrin Hatch is not pictured, but RFRA remains a significant piece of his legislative legacy.

The photo captures a time when religious freedom enjoyed overwhelming bipartisan support, long before liberal special interest groups decided to make RFRA a political punching bag. RFRA's bipartisan support was seen in the fact that it passed the Senate 97-3 and the House by a unanimous voice vote. The coalition of organizations that supported RFRA's passage comprised 68 diverse organizations from across the religious and political spectrum — from Christian Legal Society to Americans United for Separation of Church and State, from the ACLU to the National Association of Evangelicals, from the Baptist Joint Committee to the American Jewish Committee, and five dozen more organizations.[2]

RFRA was Congress' response to the Supreme Court's decision in *Employment Division v. Smith,*[3] which left the Free Exercise Clause in tatters. In *Smith,* the Court abandoned the "compelling interest" standard that government had previously had to show if its action violated a person's religious conscience. Instead, *Smith* held that a religious person had to obey any law that violated her core religious beliefs if the law was neutral and generally applicable — no matter how strong her religious claim to an accommodation and no matter how weak the government interest served by forcing her to violate her religious beliefs.

"RFRA remains the single most important federal protection for religious freedom. And it has done a good job of protecting Americans of all religious faiths."

As heretical as it may sound, RFRA, not the Free Exercise Clause, has been the primary guarantor of an American's religious freedom against federal government overreach for the past quarter century.[4] RFRA remains the single most important federal protection for religious freedom. And it has done a good job of protecting Americans of all religious faiths.

Even if the Roberts Supreme Court revitalizes the Free Exercise Clause, RFRA will remain an essential bulwark defending religious freedom against federal regulation. This is so because, by its terms, RFRA requires that concrete criteria to protect religious freedom be applied to every action that the federal government takes. As the Attorney General's *Memorandum on Federal*

1 Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb *et. seq.*

2 For a list of the 68 groups and other information about RFRA, see CLS' short handout, "How the Religious Freedom Restoration Act Benefits All Americans," https://www.clsreligiousfreedom.org/sites/default/files/site_files/Center%20Legislation/How%20RFRA%20Benefits%20All%20Americans%202015-02-12%20(002).pdf.

3 *Employment Division v. Smith,* 494 U.S. 872 (1990).

4 For a fuller explanation of why RFRA is the primary protector of religious freedom after the *Smith* decision, see Kim Colby, "The Religious Freedom Restoration Act: A Complicated Legacy for Justice Antonin Scalia," *Outcomes Magazine,* Summer 2016, p. 32, https://outcomesmagazine.com/app/uploads/2017/08/OC_Summer-2016.pdf.

Law Protections for Religious Liberty,[5] issued October 6, 2017, makes clear, these criteria are to be applied proactively by federal officials in the executive departments and administrative agencies to all of their actions. The Attorney General directed all agencies and departments to apply RFRA, both proactively and retroactively, to every regulation, policy, guidance, or interpretive position they take. That is, the federal agency must be prepared to articulate a compelling governmental interest not achievable by a less restrictive alternative for every action it takes.

Because it is the linchpin of religious freedom, RFRA has been the target of liberals' ire. Upset that RFRA might sometimes protect religious individuals and institutions from government coercion in controversial areas like abortion or LGBT interests, liberal groups that were part of the original RFRA coalition, like Americans United for Separation of Church and State and the ACLU, have decided that all religious exemptions must be rescinded, including RFRA. But an attack on RFRA is an attack on all Americans' religious freedom.

The most recent direct attack on RFRA comes in the guise of the deceptively misnamed "Do No Harm Act,"[6] which would exempt huge swaths of federal law from RFRA's protection of religious freedom. Specifically, the "Do No Harm Act" would subordinate Americans' religious freedom to every federal law, regulation, and policy regarding:

- discrimination or the promotion of equal opportunity;
- wages, benefits, collective bargaining;
- child labor, abuse, and exploitation;
- healthcare items and services (which would include abortions and gender transition surgeries);
- government contracts, grants, and cooperative agreements; and
- any government good, service, benefit, facility, privilege, and advantage.

The "Do No Harm Act" is sheer liberal triumphalism. Its proponents fail to acknowledge that certain conservatives also have their own list of pet causes to exempt from RFRA. Just last Congress, the Department of Homeland Security tried to exempt building the border wall from RFRA's protections. The Department of Defense would love to evade RFRA's application to the military, such as its requirement that Jewish and Sikh servicemen be allowed to wear religious headgear. In the past, the Drug Enforcement Agency has sought to exempt drug laws from RFRA's scope.

"As the RFRA coalition recognized, once one exception was made to RFRA's coverage, other exceptions would follow and would quickly render RFRA a nullity. This is precisely what will happen should the 'Do No Harm Act' become law."

In the original negotiations of RFRA's provisions, the RFRA coalition agreed that there would be no carveouts from RFRA. Pro-life organizations held up RFRA's passage by demanding a carveout regarding abortion, but the coalition said, "No special interest exceptions to RFRA's protection of all Americans' religious freedom." The historic preservationists' demand for a carveout was likewise rejected. State officials' demand that RFRA not protect prisoners' religious freedom was answered by the coalition's insistence that religious freedom for all Americans, even those in prison, must be protected.

As the RFRA coalition recognized, once one exception was made to RFRA's coverage, other exceptions would follow and would quickly render RFRA a nullity. This is precisely what will happen should the "Do No Harm Act" become law.

Such damage to religious freedom is completely needless. *Exceptions or carveouts to RFRA are not needed because RFRA itself is a balancing test.* Under RFRA, a federal judge balances the government's interest against the individual's or institution's religious interest. If the government's interest is compelling — for example, protecting a child from abuse — then the religious claimant

[5] Attorney General, *Memorandum on Federal Protections for Religious Liberty,* 82 Fed. Reg. 49668 (Oct. 26, 2017), https://www.federalregister.gov/documents/2017/10/26/2017-23269/federal-law-protections-for-religious-liberty.

[6] H.R. 1450, https://www.congress.gov/116/bills/hr1450/BILLS-116hr1450ih.pdf; S. 593, https://www.congress.gov/116/bills/s593/BILLS-116s593is.pdf.

loses. Wholesale exemptions to RFRA are not, therefore, needed because RFRA itself allows federal judges to determine whether a government interest should outweigh a citizen's religious exercise in a specific context.

RFRA does not require that a federal judge rule in favor of religious freedom. The reality is that federal judges rule in favor of the government much more frequently than they rule in favor of religious claimants.

In striking contrast, the "Do No Harm Act" would bar the courthouse door against all Americans' religious claims on a broad spectrum of controversial issues. The "Do No Harm Act" predetermines that the government wins, and religious freedom loses, *every single time.* On the other hand, RFRA does not predetermine whether the government or religious freedom wins. It simply provides religious claimants with access to the courthouse. After a hearing, a federal judge applies RFRA's balancing test to determine whether religious freedom or the government wins on the merits of the particular case. To be sure, RFRA requires the judge to give significant deference to the religious claimant, but that is as it should be in a country whose unique contribution to humankind has been the recognition that religious freedom is an unalienable right to be protected from government interference.

The proponents of the "Do No Harm Act" claim that their actions will not harm minorities but only adherents of "majority" faiths. But this is false.

First, by its very terms, RFRA *protects* persons of all faiths. But the "Do No Harm Act" would *remove* RFRA's protection from persons of any and all faiths. Adherents of "minority" faiths would actually suffer more from efforts to weaken RFRA because they lack the political clout that adherents of faiths with greater numbers of adherents typically have. RFRA restores a level playing field to religious minorities.

Second, the Establishment Clause does not allow the government to favor some religions over other religions. Protection that is available to persons belonging to "minority" faiths must also be available to persons belonging to "majority" faiths, and vice versa.

The folly of the "Do No Harm Act" was on full display during a hearing held by the House Committee on Education and Labor on June 25, 2019.[7] Despite the fact that it has no chance of passage in the Senate during the 116th Congress, the "Do No Harm" legislation must be taken seriously as it steadily accrues support in the House, adding an average of 3 new co-sponsors a week.[8] To date, only Democrats have co-sponsored the "Do No Harm Act." To the great peril of religious freedom, the bipartisan support for religious freedom exemplified by President Clinton and Senate Minority Leader Schumer in 1993 has been supplanted by a partisan targeting of RFRA — and, through RFRA, a targeting of all Americans' religious freedom.

Kim Colby has worked for the Center for Law and Religious Freedom since graduating from Harvard Law School in 1981. She has represented religious groups in numerous appellate cases, including two cases heard by the United States Supreme Court, as well as on dozens of amicus briefs in federal and state courts. She was involved in congressional passage of the Equal Access Act in 1984.

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7 United States House of Representatives Committee on Education and Labor, *Do No Harm: Examining the Misapplication of the Religious Freedom Restoration Act (RFRA),* June 25, 2019, https://edlabor.house.gov/hearings/do-no-harm-examining-the-misapplication-of-the-religious-freedom-restoration-act. Video of the hearing is at https://www.youtube.com/watch?v=M7C17DN4_Js.

8 The list of co-sponsors for H.R. 1450 is at https://www.congress.gov/bill/116th-congress/house-bill/1450/cosponsors?q=%7B%22search%22%3A%5B%22HR+1450%22%5D%7D&r=1&s=3. The list of co-sponsors for S. 593 is at https://www.congress.gov/bill/116th-congress/senate-bill/593?q=%7B%22search%22%3A%5B%22S+593%22%5D%7D&s=5&r=1.

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