Constitutional Interpretation and the Question of Lawful Authority*

JEFFREY A. AMAN**
AND
H. WAYNE HOUSE***

"There's glory for you!" [said Humpty Dumpty].

"I don't know what you mean by 'glory,' " Alice said.

Humpty Dumpty smiled contemptuously. "Of course you don't—till I tell you. I meant 'there's a nice knock-down argument for you!' "

"But 'glory' doesn't mean a 'nice knock-down argument,' " Alice objected.

"When I use a word," Humpty Dumpty said, in a rather scornful tone, "it means just what I choose it to mean—neither more nor less."

"The question is," said Alice, "whether you can make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master—that's all."

Lewis Carroll, *Through the Looking Glass*

The last few years have witnessed a growing awareness of, and involvement in, the political processes of our government by the religious and conservative community. Unfortunately, many who share similar concerns are not coherent in their requests for change. The same groups that urge Congress to censure or restrict the Supreme Court on the subject of abortion (a majoritarian move) also

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* This article was originally published in RESTORING THE CONSTITUTION: ESSAYS IN CELEBRATION OF THE BICENTENNIAL (H. House ed., 1987).

** Practicing attorney in Tampa, Florida. B.S. in Business Administration, B.A., J.D., University of Florida; M.A., Dallas Theological Seminary. Member of the Florida Bar, American Bar Asociation, American Trial Lawyer's Association, Christian Legal Society, and associate member of the Evangelical Theological Society. Along with H. Wayne House, Mr. Aman is producing a legal handbook for pastors and other church leaders.

*** Assistant Professor of Systematic Theology, Dallas Theological Seminary; B.A., Hardin-Simmons University; M.A., Abilene Christian University; M. Div. and Th.M., Western Baptist Seminary; Th.D., Concordia Seminary; J.D., O.W. Coburn School of Law. Member of the American Bar Association, American Trial Lawyer's Association, Evangelical Theological Society and Society of Biblical Literature.

want the Court to overturn legislative enactments that restrict religious concerns (a counter-majoritarian or anti-democratic maneuver). Moreover, some who want to conform the Constitution to some higher law—be they liberal or conservative—fail to realize that the democratic nature of the document is largely incongruent with a pervasive higher law position that enforces such law not contained *within the document itself* against the will of the majority. Such a state of affairs, to say the least, demonstrates a confused understanding of the role of the judicial system in a constitutional democracy and the tension between fundamental rights and democratic power.

This essay will seek to set forth the various perspectives constitutional theorists posit on the nature of constitutional adjudication. The polar theories of interpretivism and non-interpretivism will be presented and the issues of natural law and the Framers' intent will be discussed. The purpose is to address two main issues: namely, the scope of the Supreme Court's authority in exercising its judicial review function, and the nature of constitutional interpretation itself.

I. "Interpretive" vs. "Noninterpretive" Judicial Review

When the Supreme Court decides a case, it is faced with the task of determining what the Constitution "says" concerning the issue before it.[1] This judicial review function was originally embraced in John Marshall's historic opinion in *Marbury v. Madison*,[2] and since *Marbury* it has become firmly embedded in our constitutional jurisprudence. Although some discussion still takes place concerning the legitimacy of judicial review itself (especially in first-year constitutional law classes), the legitimacy issue is largely defunct. Therefore, the writers will assume the legitimacy of review and focus more narrowly on its scope. That is, given that the Court is responsible for construing and applying the Constitution in "cases or controversies" arising under it, what is the nature of the responsibility to the constitutional text?

Much of the academic discussion on this issue takes place in terms of "interpretive" and "noninterpretive" review. And while

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1. The word "says" is used very loosely here to mean that the Court must at least in some sense base its decisions on the Constitution.

2. 5 U.S. (1 Cranch) 137 (1803).

at least one commentator rejects this distinction altogether,[3] the terms are useful for the purpose of classifying positions as to the Court's role in reviewing the Constitution.[4] Interpretive review may be described as follows:

> The Supreme Court engages in *interpretive* review when it ascertains the constitutionality of a given policy choice by preference to one of the value judgments of which the Constitution consists—that is, by preference to a value judgment embodied, though not necessarily explicitly, either in some particular provision of the text of the Constitution or in the overall structure of government ordained by the Constitution.[5]

In other words, the interpretivist insists "that the only norms used in constitutional adjudication must be those inferable from the text—that the Constitution must not be seen as licensing courts to articulate and apply contemporary norms not demonstrably expressed or implied by the Framers."[6]

By contrast, noninterpretive review occurs when the Court "makes the determination of constitutionality by reference to a value judgment other than one constitutionalized by the framers."[7] In support of his constitutional model, the noninterpretivist argues that the search for the Framers' intent is "misconceived."[8] He is skeptical of the existence of any "original intent," and even if such an intent could be discovered, the Court should not be straightjacketed by the ideas of those who were not faced with (and may not have addressed) many of the issues the Court deals with today. The noninterpretivist also argues that the Framers actually did intend for the Court to interpret so-called "open-ended" terms like

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3. *See* Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 471-500 (1981). Professor Dworkin's criticism of the interpretive/noninterpretive distinction is a result of his distinction between the "concepts" and "conceptions" of the Framers of the Constitution.

4. The interpretivist and noninterpretivist positions are roughly equivalent to the more popular characterizations of individual Supreme Court Justices, "strict constructionist" and "activist," respectively.

5. M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS 10 (1982) (emphasis in original) (citing J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 2-3 (1980)).

6. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 706 n.9 (1975). An "interpretivist" is one who believes that only interpretive review is legitimate. *See* M. PERRY, *supra* note 5, at 11.

7. M. PERRY, *supra* note 5, at 11.

8. *See* Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980).

"due process" and "equal protection" in a progressive fashion. Finally, at least one commentator argues that regardless of the Framers' intent, noninterpretive review is legitimate because the Supreme Court is the proper forum in our constitutional government for the espousal of "public morals."[9]

The first objection to noninterpretivism in political terms is that it is undemocratic and violates the notion of a separation of powers.[10] The Supreme Court Justices are not elected and serve for life, which arguably renders them politically unaccountable. Therefore, when they decide a case on the basis of a value not contained in the constitutional text (as derived from the Framers' intent), they have stepped out of the judicial role into a legislative one, but without the political accountability constitutionally required of legislators. Second, the interpretivist argues that interpretive review, as contrasted with noninterpretive review, accords with what is typically done by courts—interpreting legal documents and statutes.[11] Third, interpretive review has a great deal of historical support, dating back to John Marshall's opinion in *Marbury v. Madison*.[12] Fourth, even if one were to assume that the Court ought to incorporate "public morals" into its decisions, the risk that the Justices would instead impose their own sense of morality on the people is ample justification for restricting them to the values of the Framers.[13] Finally, the interpretivist may argue that when the Justices interpret the Constitution, they are ethically bound to the intent of the drafters.[14]

The foregoing is an attempt to summarize the issues that come into play in a consideration of the Supreme Court's role in constitutional interpretation; a detailed analysis of each is clearly beyond the scope of this article. The question of lawful authority, however, strikes at the heart of the problem of the scope of review.

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9. Perry, *Abortion, the Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 UCLA L. REV. 689, 723 (1976).

10. "The chief virtue of [the interpretive] review is that it supports judicial review while answering the charge that the practice is undemocratic." Grey, *supra* note 6, at 705.

11. *See* Burger, *The Scope of Judicial Review: An Ongoing Debate*, 6 HASTINGS CONST. L.Q. 527, 543-44 (1979).

12. *See* Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 696 (1976). *See also* Grey, *supra* note 6, at 705.

13. *See* Perry, *supra* note 9, at 732.

14. Noninterpretivists do not (and indeed cannot) reject the "writtenness" of the constitutional text. The interpretivist then says that the use of the text involves an ethical obligation to its drafters. *See* E. HIRSCH, JR., THE AIMS OF INTERPRETATION 85-92 (1976); *infra* notes 76-79 and accompanying text.

The question may be posed, by what authority does the Supreme Court act as policy-maker in applying the Constitution to the cases it decides? Or, to put it another way, given the written nature of the constitutional text, are the Justices ever warranted in abandoning the task of determining what the Constitution means by reference to what its drafters intended? If not, is not any appeal to an "original intent" objectionable because such a reliance on historical fact is misplaced, since there is no "historical fact"? Finally, if it is determined that the "original intent" must count in constitutional interpretation, how does the Court deal with issues the Framers did not specifically address or whose answers no longer seem appropriate today?

It is our thesis that interpretivism is the best theory of constitutional adjudication. This theory would recognize the Framers' intent as historically objectifiable, at least in broad terms. Also, higher law principles[15] which stand behind much of the Constitution (but probably not all) may serve both as narrative to understand the Framers' intent and also as a means to bring functional equivalents to our setting that represent the same type of meaning the Framers intended.

II. The Nature of the Constitution

The United States Constitution is paradoxical in that, although it is a majoritarian document, it establishes a limitation on the majority for the benefit of the minority in society. The document grants power to Congress (a republican body) to make law, and yet provides for a judiciary to interpret that law, often against majority wishes and in respect to individual rights enumerated in its amendments. Before dealing with the question of lawful authority, then, the problem of the nature of the document must be addressed.

A. The Constitution: Fundamental Law or Reflection of Moral Theory?

Should the Constitution be viewed as a legal document, as fundamental law, or should it instead be joined to moral theory?

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15. When we speak of higher law or natural law in referring to the Framers, we mean the specific values that stand behind some of the constitutional provisions that recognize the need, for example, for limitations on government due to man's nature and individual rights. This is different from asserting higher law today of which a plethora of examples could be given that the Framers may not have deemed legitimate. *See* S. Krason, Abortion: Politics, Morality, and the Constitution 230-46 (1984).

Alexander Bickel, in his early work, *The Least Dangerous Branch*, argued that the Court should function in the latter mode by being teachers of the nation (a role never given to the Court in the Constitution), to "mold the people's view of durable principles of government."[16] In his later works, however, Bickel became disillusioned with the Warren court, stating that the judges were inevitably too "principle-prone and principle-bound" to be effective agents for formulating public policy.[17] A significant reason for his turn against an activist court was Bickel's discovery of Edmund Burke. This move was from theoretical rights to a real society with "human nature as it is seen to be."[18]

Burke faced a similar dilemma with the English constitution between the push for natural law theory rather than the recognition of fundamental law. Until the War for Independence, the colonists had based their argument on their rights as Englishmen.[19] With the Declaration of Independence came a claim to rights based in Nature and Nature's God. This phrase was reminiscent of the statements of Blackstone and Locke.[20] With the Constitution, though, came the abandonment of abstract natural rights and a return to the British constitutionalism modeled after the thinking of Montesquieu[21] and Blackstone (in his non-natural law statements):[22]

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16. A. BICKEL, THE LEAST DANGEROUS BRANCH 235 (1962) (quoting Wyzanski, *Constitutionalism: Limitation and Affirmation*, in GOVERNMENT UNDER LAW 473, 486 (A. Sutherland ed. 1955)). *See also* G. MCDOWELL, THE CONSTITUTION AND CONTEMPORARY CONSTITUTIONAL THEORY 3 (1985).

17. A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 20 (1970).

18. A. BICKEL, MORALITY OF CONSENT 4 (1975).

19. These rights, which they took unto themselves, were based upon the writings of Blackstone, *et al.* WICKERSHAM (cited in DAVID A. LOCKMILLER, SIR WILLIAM BLACKSTONE 257 (1938)).

20. The phrase "Laws of Nature and Nature's God" particularly reminds one of Blackstone's emphasis on this two-fold view of law. Following Burlamaqui and Pufendorf, Blackstone saw that nature had in it certain laws established by God which expressed His will and were superior to any contrary law made by men. 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 38, 42-43 (9th ed. 1783). *See* P. SIGMUND, NATURAL LAW IN POLITICAL THOUGHT 98-109 (1971).

21. MONTESQUIEU, THE SPIRIT OF LAWS (n.d.)

22. There is inconsistency in Blackstone on the authority of Parliament and the authority of natural law. Sigmund offers two possible resolutions:

> One might make a distinction between moral and legal validity, ascribing Blackstone's assertions about the superiority of the natural law to the moral sphere while maintaining his belief that, legally, Parliament must be supreme. A second and more likely solution of the problem is to assume that properly constituted parliaments, will observe natural law, and if they do not, will correct themselves when their error is brought to their attention by the courts.

P. SIGMUND, *supra* note 20, at 100-01.

> The political theory of the Declaration of Independence which dwelt upon the equality of men, their unalienable rights to life, liberty, and the pursuit of happiness, and their right to resist a tyrannical government, retired into the background. The founders of the American constitution recognized with Burke that such theories, however well they might be suited to a period of revolution, were of very little help in a period of reconstruction. They therefore abandoned the democratic theories of Paine and Rousseau, and went for inspiration to that eighteenth-century British constitution with which they were familiar.[23]

If the Constitution is fundamental law, it should be interpreted as other legal documents with the interpreter giving special heed to the "four corners" of the document. This position is rejected by many scholars as being much less than the real intention of the Framers. According to Dworkin they intentionally wrote the Constitution in vague terms so as to leave room for the development of human rights.[24] Restraints against the government, then, "could be justified by appeal to moral rights which individuals possess against the majority."[25] This view, however, does not provide necessary limits on the judiciary and seems to defy the focus of the document as being by consent of the people.

A proper understanding of this tension between fundamental law and moral theory or "natural law" can be seen in some of the recent opinions of the Supreme Court. In *Bowers v. Hardwick*,[26] decided in 1986, the Court upheld the constitutionality of a Georgia statute that criminalized sodomy. Justice White noted in his majority opinion that the case "calls for some judgment about the limit of the Court's role in carrying out its constitutional mandate."[27] In the course of its decision, the Court ruled that even though contemporary notions of morality may change, the role of the Court in interpreting the Constitution is limited to that of giving principled expression to the text of the Constitution.

> The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the

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23. 11 HOLDSWORTH, THE HISTORY OF ENGLISH LAW 137 (1938).
24. *See* Dworkin, *supra* note 3, at 494-95.
25. G. MCDOWELL, *supra* note 16, at 7.
26. 106 S. Ct. 2841 (1986).
27. *Id.* at 2843.

> Constitution. . . . There should be, therefore, great resistence to expand the substantive reach of [the Due Process] Clauses, particularly if it requires *redefining* the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further to govern the country without express constitutional authority.[28]

The Court went on to note that in interpreting and applying the Constitution, it cannot sit in moral judgment over every policy choice made by legislatures. "The law . . . is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process clause, the courts will be very busy indeed."[29] In his concurring opinion, Chief Justice Burger noted that the State's proscription against sodomy "is firmly rooted in Judeo-Christian moral and ethical standards . . . . This is essentially not a question of personal 'preferences' but rather of the legislative authority of the State."[30]

It is clear from the Court's analysis in *Bowers*, then, that at least some of the Justices feel that the Court, in interpreting the Constitution, does not have the authority to sit in moral judgment over the policy choices of states as reflected in their laws.

B. Higher Law in a Democratic Society

The structure of government, as intimated above, is one that recognizes a government by popular consent, but not one in which the wishes of the majority are unbridled. This Madisonian model allows rule by the majority in the broader areas of life. A countermajoritarian principle, however, is also existent; for there are areas of life—fundamental liberties—that the majority should not be able to proscribe or demand. Coercion in these questions would be tantamount to tyranny.

In this constitutional model the tyranny of the majority occurs only when legislation invades areas that are properly left to individual freedom. The minority exercises tyranny only when it inhibits areas properly in the domain of the majority. The problem arises, obviously, in determining which areas belong to the majority and which to the minority. The Supreme Court's interpretation of the Constitution, based on some theory, is intended to help resolve

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28. *Id.* at 2846 (emphasis added).
29. *Id.*
30. *Id.* at 2847.

this dilemma.[31] Judge Bork describes the problem when the Court, in trying to solve the dilemma, imposes its own values:

> But this resolution of the dilemma imposes severe requirements upon the Court. For it follows that the Court's power is legitimate only if it has, and can demonstrate in reasoned opinions that it has, a valid theory, derived from the Constitution, of the respective spheres of majority and minority freedom. If it does not have such a theory but merely imposes its own value choices, or worse if it pretends to have a theory but actually follows its own predilections, the Court violates the postulates of the Madisonian model that alone justifies its power. It then necessarily abets the tyranny either of the majority or of the minority.[32]

The intellectual climate of 18th century America was markedly different from that of today. In the Founding Fathers' time, a belief in absolutes was common among the people, including the leaders of the Revolution and the Constitutional Convention. The Declaration of Independence explicitly espouses a belief in God-given absolute rights: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights." These historic words sounded an affirmation of principles that were not to be transgressed by any government, and the three-branch system of checks and balances established in the Constitution was designed to curb unlawful (in this absolute sense) governmental power. Professor Grey explains:

> For the generation that framed the Constitution, the concept of a "higher law," protecting "natural rights," and taking precedence over ordinary positive law as a matter of political obligation, was widely shared and deeply felt. An essential element of American constitutionalism was the reduction to written form—and hence to positive law—of some of the principles of natural rights. But at the same time, it was generally recognized that written constitutions could not completely codify the higher law. Thus in the framing of the original American Constitution it was widely accepted that there remained unwritten but still binding principles of higher law.[33]

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31. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 2-3 (1971).

32. *Id.* at 3.

33. Grey, *supra* note 6, at 715-16. *See also* Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843 (1978).

While it is clear that the Founders believed in the existence of a "higher law," it is not so clear whether they intended the judiciary to give expression to it where it was not reflected in the constitutional text. Raoul Berger concludes they did not:

> The Founders were deeply committed to positivism, as is attested by their resort to written constitutions—positive law. Adams, Jefferson, Wilson, Madison, and Hamilton . . . "were seldom, if ever, guilty of confusing law with natural right." For them a constitution represented the will of the people "that would determine explicit . . . allocations of power and its corresponding limits."[34]

Professor Ely notes a significant difference between the purpose of the Declaration of Independence, which explicitly avowed the existence of natural rights, and the constitution, which he feels did not. He characterizes the Declaration as a "brief," an argument for independence, whereas the Constitution, on the other hand, had as its purpose the establishment of a form of government. "Since the earlier impetus that moved the Declaration, the need to 'make a case,' was no longer present, these [natural law] doctrines were omitted, at least in anything resembling explicit form, from the later document."[35] Finally, Justice Black concludes that "any broad, unlimited power to hold laws unconstitutional because they offend what this Court conceives to be the '[collective] conscience of our people' . . . was not given by the Framers, but rather has been *bestowed on the Court by the Court*."[36] Most theorists today would characterize natural law as something akin to this "conscience of the people."

A further problem with the Court applying an "unwritten Constitution" to decide cases today is that "natural law" can easily become whatever the Court says it is, which is illegitimate judicial policy-making. This would not be a problem were the Court to adhere to a written fundamental law, as revealed in the Bible. In our pluralistic, relativistic society, however, one can hardly expect the Court to take biblical absolutes as authority for its decisions. That is, even assuming the Founders envisioned judicial review in

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34. R. BERGER, GOVERNMENT BY JUDICIARY 252 (1977) (quoting R. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 29 (1975)).

35. Ely, *Foreword: On Discovery Fundamental Values, 92* HARV. L. REV. 5, 25 (1978).

36. Griswold v. Connecticut, 381 U.S. 479, 520 (1965) (Black, J., dissenting) (emphasis added).

the context of an absolute higher law, can we realistically expect the Court to faithfully incorporate such law into its decisions? Professor Grey aptly poses the issues:

> Conceding the natural-rights origins of our Constitution, does not the erosion and abandonment of the 18th-century ethics and epistemology on which the natural-rights theory was founded require the abandonment of the mode of judicial review flowing from that theory? Is a "fundamental law" judicially enforced in a climate of historical and cultural relativism the legitimate offspring of a fundamental law which its exponents felt expressed rationally demonstrable, universal, and immutable human rights?[37]

The answers to Grey's questions must be "yes" and "no" respectively. This is because a "natural law" which is not "demonstrable" readily becomes a cloak for judicial legislation. " '[A]ll theories of natural law have a singular vagueness which is both an advantage and disadvantage in the application of theories.' The advantage, one gathers, is that you can invoke natural law to support anything you want. The disadvantage is that everybody understands that."[38]

It is the view of the authors that there are areas of higher law or fundamental individual rights that must be maintained, even in the face of a substantial majority, and that the Court has a duty to uphold those rights. These rights, however, must find their basis in the higher law foundation of the Framers themselves, not in the changing notions of whichever Justices happen to be on the Court at any given time. This procedure ensures that the Court adheres to the text of the Constitution, while at the same time acknowledges that there are areas in which the Constitution stands as a meaningful check on the will of the majority. Unlike noninterpretivism, though, it discourages the Court from making decisions based on nothing more than the Justices' personal predilections.

III. Lawful Authority and the Intent of the Framers

A. Role of the Court in the Separation of Powers

The preamble to the Constitution of the United States begins with the words, "We the people" and closes with "do ordain and

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37. Grey, *supra* note 6, at 718.

38. Ely, *supra* note 35, at 28 (quoting C. Haines, The Revival of Natural Law Concepts vi-vii (1930)). Ely notes that natural law "was, indeed, invoked on both sides of the slavery question." 92 Harv. L. Rev. 5, 28 & n.103 (1978).

establish this Constitution for the United States of America." The Framers of this document, as representatives of the American people, sought to charter a government that would be defined by and limited to a three-branch system. The scheme of "checks and balances" among the legislative, executive, and judicial branches was designed to guard against an arrogation of power by any one branch, thereby circumscribing governmental power vis-a-vis the people. Justice Rehnquist describes this idea as articulated by John Marshall in *Marbury v. Madison*:[39]

> The ultimate source of authority in this Nation, Marshall said, is not Congress, not the states, not for that matter the Supreme Court of the United States. The people are the ultimate source of authority; they have parceled out the authority that originally resided with them by adopting the original Constitution and by later amending it. . . . As between the branches of the federal government, the people have given certain authority to the President, certain authority to Congress, and certain authority to the federal judiciary.[40]

Whenever any one branch steps outside the bounds of its "certain authority," then it has gone beyond its constitutional sanction.

The role of the Supreme Court in our constitutional scheme is judicial as opposed to legislative, i.e., the Court is to decide cases rather than make law. In deciding cases it must look to the Constitution and determine whether the challenged conduct or legislation is prohibited by it. Justice Rehnquist clarifies this point:

> When these branches [state legislatures, the Congress, and the Presidency] overstep the authority given them by the Constitution, in the case of the President and the Congress, or invade protected individual rights, and a constitutional challenge to their action is raised in a lawsuit brought in federal court, the court must prefer the Constitution to the government acts.[41]

This means that the Supreme Court is charged with the task of interpreting and applying the constitutional provisions in a given case. The Justices do not represent prevailing contemporary notions of justice and equity; on the contrary, federal judges were insulated from such majoritarian pressures by being unelected and serving for life. Such popular representation was authorized to occur only

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39. 5 U.S. (1 Cranch) 137 (1803).
40. Rehnquist, *supra* note 12, at 696 (1976).
41. *Id.*

through the legislative branch, or constitutionally, by an amendment. Professor Raoul Berger notes that this is a "question of power": "[W]ho is to govern in our democracy, who is to make policy choices for the nation—a group of unelected and virtually unaccountable Justices or the elected representatives of the people, indeed, the people themselves?"[42] The Constitution requires the latter.[43]

Given the Court's judicial role, then, is there any textual justification for a decision such as *Roe v. Wade*,[44] wherein the Court divided a woman's term of pregnancy into three distinct periods, with the state's interest growing in each successive period? Professor Ely describes *Roe* as a "very bad decision": "It is bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be."[45] Rather than limiting itself to ascertaining the meaning of any relevant constitutional provision and determining what significance that meaning had for the issue *sub judice*, the Court promulgated what it felt was the best solution to the problem. It was without constitutional authority in doing so. Professor Ely concludes:

> [The Court] is under an obligation to trace its premises to the charter from which it derives its authority. A neutral and durable principle may be a thing of beauty and a joy forever. But if it lacks connection with any value the Constitution marks as special, it is not a constitutional principle and the Court has no business imposing it.[46]

But the question still remains, how is the Court to determine what these "constitutional principles" are? How may the Court derive meaning from the Constitution without moving from a judicial role (which is within its lawful authority) to a legislative role (which is outside its lawful authority)? The answer is that the Court must look only to the intent of the Framers of the document in ascertaining its meaning.[47]

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42. Berger, *The Role of the Supreme Court*, 3 U. ARK. LITTLE ROCK L.J. 1, 2-3 (1980). *See also* Grey, *supra* note 6, at 705.

43. When referring to the "Constitution" as authority for an assertion, the reference is to the text and constitutional government delineated therein.

44. 410 U.S. 113 (1973).

45. Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 947 (footnote omitted; emphasis in original).

46. *Id.* at 949. Unfortunately, Professor Ely would have voted "for a statute very much like the one the Court ends up drafting." *Id.* at 926.

47. This assertion may seem to imply that our Constitution would therefore become

B. The Intent of the Framers as the Source of Meaning

It is common practice whenever one reads a book to ask what the author is trying to say. What idea(s) did he or she intend to convey? This would be described as purposeful as opposed to nihilistic reading. Similarly, when a court has before it an issue involving the meaning of a statute, for example, it considers legislative history in deciding what the legislature intended the statute to mean. Then, in applying the statute in a given situation, the court looks more broadly at what principle was embodied in it to arrive at the statute's significance (as distinct from its meaning).

The Constitution is also a written document, a "fundamental law," which should be subject to the same general principles of interpretation as a statute. Indeed, the Framers envisioned that the Constitution would be construed by the courts just as any other piece of legislation. Thomas Rutherforth wrote his *Institutes of Natural Law* in 1756, and his work was common knowledge to the colonists. "Rutherforth assimilated the interpretation of statutes and that of contracts and wills and stated that '[t]he end, which interpretation aims at, is to find out what was the intention of the writer, to clear up the meaning of his words.' "[48] Many of the prominent spokesmen at the constitutional convention, such as Justice James Wilson and Thomas Jefferson, also stated their belief that the proper method of interpretation was to get at the intent of the authors.[49] Soon after being inaugurated as President, Jefferson promised to administer the Constitution "according to the safe and honest meaning contemplated by the plain understanding of the people at the time of its adoption—a meaning to be found in the explanations of those who advocated . . . it."[50] Professor Berger concludes, "Plainly the Founders viewed the task of constitutional construction as subject to the same limits as that of statutory interpretation. And surely it would be unreasonable to maintain that while courts must give effect to the intention of the

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a frozen and indeed "dead" document, with no answers to new but related constitutional questions. The response to this charge is that once the Court ascertains *meaning*, it must then determine what *significance* that meaning has for today's constitutional problems. The meaning/significance distinction is discussed *infra*.

48. R. BERGER, GOVERNMENT BY JUDICIARY 366 & n.15 (1977) (quoting 2 T. RUTHERFORTH, INSTITUTES OF NATURAL LAW 307, 309 (1754-56)).

49. *See id.* at 366-67.

50. 4 J. ELLIOTT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 446 (1836) (quoted in R. BERGER, *supra* note 48, at 366-67).

legislature they are free to disregard the clearly discernable intention of the sovereign people."[51]

The notion that constitutional meaning should be sought in the Framers' intent is not one merely of historical significance—the Supreme Court in modern times continues to pay lip service to it.[52] Justice Harlan wrote concerning the Court's role:

> [W]hen the Court gives the language of the Constitution an unforeseen application, it does so, whether explicitly or implicitly, in the name of some underlying purpose of the Framers. . . . [T]he federal judiciary . . . has no inherent general authority to establish the norms for the rest of society. . . . When the Court *disregards the express intent* and understanding of the Framers, it has invaded the realm of the political processes to which the amending power was committed, and it has violated the constitutional structure which it is its highest duty to protect.[53]

But, unfortunately, the Court does in fact depart from the Framers' intent, as it did most notably in *Roe v. Wade*.[54] Justice Blackmun, writing for the majority in *Roe*, conceded that "[t]he Constitution does not explicitly mention any right of privacy."[55] Justice Rehnquist also noted the majority's error in his dissenting opinion: "To reach its result, the court necessarily has had to find within the scope of the Fourteenth Amendment a right that was apparently completely unknown to the drafters of the Amendment."[56]

While *Roe* is an example of disregarding the original intent, the *Marsh v. Chambers*[57] decision reflects a proper deference to the Framers' intent in interpreting the Constitution. In *Marsh*, a taxpayer brought an action challenging the constitutionality of the

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51. Berger, *supra* note 11, at 527, 544.

52. Even though the Court regularly fails to abide by the intent of the Constitution, it attempts to give that appearance in order to maintain the legal legitimacy, but this merely is to give "comfort to the public and a sense of repose to the profession." G. LEEDES, THE MEANING OF THE CONSTITUTION 15 (1986). Judge R. Neely describes those who believe the Court seeks to derive the Framers' intent: "Lawyers . . . who take seriously recent U.S. Supreme Court historical scholarship as applied to the Constitution also probably believe in the Tooth Fairy and the Easter Bunny. The truth of the matter is that judges do not say these things with a straight face; they are talking in code which most of the bar understands." *Id.* at 14 (quoting R. NEELY, HOW COURTS GOVERN AMERICA 18 (1981)).

53. Oregon v. Mitchell, 400 U.S. 112, 202-03 (1970) (emphasis added).

54. 410 U.S. 113 (1973).

55. *Id.* at 152.

56. *Id.* at 174.

57. 463 U.S. 783 (1983).

Nebraska legislature's practice of opening each session with a prayer by a chaplain who was paid with public funds. This practice, the taxpayer alleged, violated the establishment clause of the first amendment. In a six to three decision, the Court upheld the constitutionality of the state's practice.

After noting that all federal courts open with the pronouncement, "God save the United States and this Honorable Court,"[58] Chief Justice Burger, writing for the majority, emphasized the importance of original intent in deciding the case under the first amendment.

> Clearly the men who wrote the First Amendment Religion Clauses did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress.[59]

Thus we see in this 1983 opinion an encouraging analysis by the Court which gives proper expression to the intent of the Framers in handling an issue presented under the Constitution.

There are two main reasons why the Court should limit itself to the "original intent." The first is, as has been discussed *supra,* that its role in our constitutional government is limited to applying the Constitution to the cases arising under it. Whenever the Court assumes a policy-making role (as opposed to one of interpretation and application), it is legislating, which constitutionally reposes in Congress. A second, and related, reason was stated by James Madison: If "the sense in which the Constitution was accepted and ratified by the Nation . . . be not the guide in expounding it, there can be no security for a consistent and stable [government], more than for a faithful exercise of its powers."[60]

C. A Case for Historical Objectivism[61]

The question considered in this section is not what did the Framers intend as an historical matter; but is it possible, as a

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58. *Id.* at 786.

59. *Id.* at 788. In his later years, Madison rejected such an interpretation, but there is no evidence this was true at the passing of the first amendment. Cord, *Original Intent Jurisprudence and Madison's "Detached Memoranda,"* 3 BENCHMARK 79, 79-85 (1987).

60. 9 THE WRITINGS OF JAMES MADISON 191 (G. Hunt ed. 1900-1910).

61. The writers are indebted to Professor Norman L. Geisler for the flow of the argument in this section. *See* N. GEISLER, *Objectivism and History*, in CHRISTIAN APOLOGETICS 285 (1976).

philosophical matter, to know what that historical intent was? For if we cannot know what their intent was, any attempt to rely upon it would be dishonest at best. If there were no such thing as objective historical fact, there would be no way to verify one proposal for the Founder's intent as opposed to another.

At the outset, several objections may be raised to the notion of objective historical fact. These will be briefly described and then analyzed for their validity.

First, the subject matter of history is not directly observable. In contrast to the classical scientific model, where events may be repeatedly observed, history is comprised of events which by definition occurred in the past and are therefore not repeatable. The Court, then, in seeking to find what the Framers intended in a given provision, would be using historical documents[62] which are merely statements *about* what was intended; the Justices cannot move themselves back into time and observe what was taking place.

Second, there is a problem with the fragmentary nature of the historical accounts. Historical records are the product of the writer selecting what he feels is important from the complete events. His account is, therefore, merely his interpretation of what transpired and cannot be relied upon as an objective account.

Third, every historian is a product of his own time. That is, "[i]t is impossible for the historian to stand back and view history objectively because he too is part of the historical process. . . . Since the historian is part of the historical process, objectivity can never be obtained."[63] The "historian" in this context is the Court, which is attempting to look back and ascertain the historical intent.

Finally, the selection and arrangement of materials is subjective to the historian. In other words, the historian himself will pick and choose among available historical sources to substantiate his preconceived notions concerning the result.[64] Professor Geisler describes this entire process:

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62. An excellent summary of the types of documents that can have been used by the Court in ascertaining the Framers' intent may be found in C. ANTIEAU, *Construction According to the Intent of the Framers*, in CONSTITUTIONAL CONSTRUCTION 71 (1982). Among these are accounts of the utterances of delegates in the Constitutional Convention, accounts of the evils of conditions leading to the adoption of a clause or amendment, and the records of the state conventions or legislatures called to ratify the Constitution.

63. N. GEISLER, *supra* note 61, at 289.

64. This statement strikingly resembles the legal realist theory of jurisprudence, wherein a judge decides the case first and then looks for case law to support his or her desired result.

> Once the historian takes his fragmentary documents, which he must view indirectly through the interpretation of the original source, and takes his selected amount of material from the available archives . . . then he not only understands it from the relative vantage point of his own generation, but he must select and arrange the topic of history in accordance with his own subjective preferences. In short, the dice are loaded against objectivity before he picks up his pen.[65]

Although the above objections seem convincing, a case can be made for the possibility of objective historical fact. First, we must clarify what is meant by "objectivity." "If by 'objective' one means *absolute* knowledge, then of course no human historian can be objective. . . . On the other hand, if 'objective' means a *fair but revisable* presentation that reasonable men should accept, then the door is still open to the possibility of objectivity."[66] This assertion is no different than the theory underlying the law of evidence, wherein facts are ascertained based on the probability that these events did occur. If we are willing to allow alleged murderers to incur the death penalty based on this method, surely we should be willing to have the Supreme Court use it in interpreting the Constitution.

Second, the mere fact of only fragmentary accounts does not destroy objectivity. Geologists rely upon fragmentary fossil remains and fill in gaps in accordance with what fits best into their view of the complete fossil record. Similarly, the historian takes all the fragments and fills in any gaps in a way that accords with his perspective of how the facts fit together. Again, the test is not absolute certainty but "systematic consistency," i.e., the position that "best fits the facts into the overall system."[67]

Third, although the historian is a product of his own time, this does not mean that his historical conclusions have to be. "Simply because a person cannot avoid a relative place in history does not mean that his *perspective* cannot attain some meaningful degree of objectivity. The criticism confuses the *content* of knowledge and the *process* of attaining it."[68] Furthermore, it is self-defeating for one to argue that the historian cannot come to objective historical conclusions, for in doing so one is attempting to state an objective

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65. N. GEISLER, *supra* note 61, at 289-90.
66. *Id.* at 290 (emphasis in original).
67. *Id.* at 293.
68. *Id.* at 296 & n.19 (emphasis in original).

historical conclusion, namely, that such conclusions cannot be made. This defeats the argument.

Finally, because the historian chooses among all available historical data, he does not thereby render his conclusions subjective. He must be honest and draw from the data in accordance with his purpose. For example, when the Court seeks to interpret the first amendment it must look at the historical records bearing on what was intended and come to a conclusion as to the amendment's significance in the case before it. "Arranging the facts in accordance with the way things really were is being objective. It is neglecting important facts and twisting facts that distorts objectivity."[69] Therefore, objectivity is possible in the process of historical research. Professor Geisler concludes:

> Absolute objectivity is possible only for an infinite Mind. Finite minds must be content with systematic consistency, that is, fair but revisable attempts to reconstruct the past based on an established framework of reference which comprehensively and consistently incorporates all the facts into the overall sketch provided by the frame of reference.[70]

The Supreme Court, then, in construing the Constitution may confidently consider all relevant sources bearing on the Framers' intent and come to reasonable, verifiable conclusions as to what that intent actually was.

IV. Meaning and Significance in Constitutional Interpretation

A discussion of constitutional interpretation would be incomplete without some treatment of the nature of the process of interpretation itself. Having established that the only legitimate source for ascertaining the meaning of the Constitution is the historic intent of the Framers, we must now consider how the Supreme Court may give effect to that intent in a given case.

Just as historical relativists have attacked the possibility of historical objectivity, so have literary scholars expressed doubt as to the existence of any objective interpretation. The philosophical problem in each case is very similar: How can the interpreter truly

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69. *Id.* at 297.

70. *Id.* at 298. The "framework of reference" Geisler refers to here is the theistic world view. Without an ultimate reference point all things would indeed be relative, and therefore subjective. *See id.* at 296.

know what the author(s) intended when he is physically and, in the case of constitutional interpretation, culturally and intellectually removed from the author(s)? Does not the meaning of the Constitution change as society changes, as new problems arise, and as judicial interpreters of differing intellectual mindsets seek to ascertain that meaning?[71] Munzer and Nickel conclude that constitutional meaning does change: "The Constitution has remained vital largely because its provisions have proved adaptable to the changing needs of a developing society. It does not mean what it always meant."[72]

The problem with this assertion is that it fails to recognize a crucial distinction between *meaning* and *significance*. There is only one meaning to a given constitutional provision, and it must be ascertained by consulting the historical data bearing on that meaning. The next step is to determine what significance the meaning has for the new problem before the Court. The significance may reach the problem, in which case the Court is free to decide the case under the provision; or it may not, in which case the only constitutional remedy for the problem is a constitutional amendment.[73]

A good example of the meaning/significance distinction can be seen in the 1983 decision of *Marsh v. Chambers*.[74] In his majority opinion, Chief Justice Burger states, "In this context, historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to *mean* [*meaning*], but also on how they thought that practice *applied* [*significance*] to the practice authorized by the First Congress—their actions reveal their intent."[75] The Court in *Marsh* indeed relied on the meaning and significance of the Establishment Clause in rendering its decision.

Professor E. D. Hirsch, Jr., has extensively argued the case for the meaning/significance distinction.[76] He describes the distinction as follows:

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71. *See* Munzer & Nickel, *Does the Constitution Mean What It Always Meant?*, 77 COLUM. L. REV. 1029 (1977). *Cf.* Rehnquist, *supra* note 12, at 693.

72. Munzer & Nickel, *supra* note 71, at 1029.

73. Professor William Van Alstyne notes that the amendment process is, perhaps ironically, more difficult because of a fear that the Court will not interpret the amendment as intended: "The Constitution is increasingly difficult to modify by amendment. The difficulty is partly the consequence of mistrust [or] uncertainty, a mistrust to which the judiciary has itself contributed by its endless, shifting quest among special theories of constitutional review." Van Alstyne, *Interpreting This Constitution: The Unhelpful Contributions of Special Theories of Judicial Review*, 35 U. FLA. L. REV. 209, 218 (1983).

74. 463 U.S. 783 (1983).

75. *Id.* at 790 (emphasis added).

76. *See* E. HIRSCH, JR., VALIDITY IN INTERPRETATION (1967) [hereinafter cited as E.

> It is not the meaning of the text which changes, but its significance to the author. This distinction is too often ignored. *Meaning* is that which is represented by a text; it is what the author meant by his use of a particular sign sequence; it is what the signs represent. *Significance*, on the other hand, names a relationship between that meaning and a person, or a conception, or a situation, or indeed anything imaginable.[77]

Professor Hirsch sought to reverse a trend of thought, which is still active today, wherein it is asserted that a search for objective meaning is both unnecessary and wrong. He refers to these theorists as "cognitive atheists," and correctly points out that if the existence of a stable, determinant meaning is rejected, the possibility of knowledge and learning is threatened.[78]

The sort of objectivity Hirsch argues for is not absolute, which is unattainable for a finite mind, but is an objectivity which allows for one interpretation being more probable than another in light of the evidence:

> Of course, the reader must realize verbal meaning by his own subjective acts (no one can do that for him), but if he remembers that his job is to construe the author's meaning, he will attempt to exclude his own predispositions and impose those of the author. . . . The interpreter's goal is simply this—to show that a given reading is more probable than others. In hermeneutics, verification is a process of establishing relative probabilities.[79]

A further problem with any argument against objective meaning is that the argument itself is self-defeating. Professor Stanley Fish, whom the writers would characterize as a non-objectivist, states that "the reader's response is not to the meaning; it is the meaning. . . . Interpretation is not the art of construing but the art of constructing."[80] But Fish's assertion is itself a statement which he would have his readers understand and agree with. But if we understand what he intended, we must reject his assertion!

HIRSCH, VALIDITY]; E. HIRSCH, JR., THE AIMS OF INTERPRETATION (1976) [hereinafter cited as E. HIRSCH, AIMS.

77. E. HIRSCH, VALIDITY, *supra* note 76, at 8 (emphasis in original).

78. E. HIRSCH, AIMS, *supra* note 76, at 3.

79. E. HIRSCH, VALIDITY, *supra* note 76, at 236. Hirsch then lists four categories of criteria for establishing the probability of a given interpretation: legitimacy, correspondence, generic appropriateness, and coherence. By applying these criteria to a given interpretational problem, the possibility remains open for one interpretation that best fits all the data.

80. S. FISH, IS THERE A TEXT IN THIS CLASS? 3, 327 (1980) (emphasis in original).

Professor Levinson, also a non-objectivist, clearly recognizes the implications of his relativist position. He states concerning constitutional writing that "[a]ll such writing (and readings) is a supreme act of faith."[81]

There is a final problem with rejecting objective meaning and, in constitutional interpretation, dismissing the search for the Framers' intent: It is the issue of an ethical obligation to the author. The relativist and the constitutional "noninterpretivist" would say that we cannot and ought not be bound by the values of the Framers, whose society was very different from ours. The Supreme Court should have the freedom to reject or modify those values which are seemingly inapplicable today. Clearly this position would threaten the security of a "stable and consistent" government,[82] and would take the Court out of its judicial role into a legislative or policy-making one.

Additionally an ethical norm prohibits the use of language outside of its intended meaning. Hirsch explains: "When we simply use an author's words for our own purposes without respecting his intention, we transgress what Charles Stevenson in another context called 'the ethics of language,' just as we transgress ethical norms when we use another person merely for our own ends."[83] As the Justices would disapprove of lower courts and the American people intentionally departing from the Court's meaning as expressed in their written opinions, so should they not depart from the meaning intended by the Framers.[84] This obligation to the original constitutional meaning is in effect a continuing obligation to the American people, whose will the Constitution is intended to contain. Any

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81. Levinson, *Law as Literature*, 60 TEX. L. REV. 373, 402 (1982). Professor Levinson ends his piece with the following quote from Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229, 1249: "As things now stand, everything is up for grabs." Levinson at 403 n.123. For an excellent critique of the theories of Professors Fish and Levinson, see White, *The Text, Interpretation, and Critical Standards*, 60 TEX. L. REV. 569 (1982).

82. *See supra* text accompanying note 60.

83. E. HIRSCH, AIMS, *supra* note 76, at 90. Hirsch recognizes that there are some instances when there may be overriding value which would warrant an "anachronistic" meaning. *Id.* But such an instance ought never arise in constitutional interpretation, since the constitutional provision for "overriding values" is in the amendment process, not in the Court's misinterpreting the Constitution.

84. The writers recognize that in spite of lower courts' disapproval of Supreme Court opinions there is an institutional coercion to follow them. The point is made to illustrate the self-defeating nature of the argument that the interpreter is not ethically bound to the author's intent. *See* E. HIRSCH, AIMS, *supra* note 76, at 91. The proponents of this argument "show an inconsistency amounting to a double standard—one for their [readers], another for themselves." *Id.*

departure from that meaning and significance is to take place only via an amendment to the Constitution.

V. Conclusion: Interpreting "This" Constitution

John Marshall's famous statement in *McCulloch v. Maryland* has become the "rock of ages"[85] for noninterpretivists: "[W]e must never forget that it is *a constitution* we are expounding . . . a constitution intended to endure for ages to come, and, consequently to be adapted to the various crises of human affairs."[86] But if this means that the Supreme Court is free to alter the meaning of the Constitution, wherefore the provision in article V for constitutional amendment by the people? Ours is, in theory, a self-governing nation, and the Constitution is the expression of the people as to how we shall be governed. The only provision for change is through an amendment, not by a loose judicial reading of the Constitution.[87]

Raoul Berger notes that Marshall in fact retreated from his statement in *McCulloch*: "When the decision came under attack, Marshall unequivocally disclaimed any intimation that the *powers* of Congress could be expanded by construction. And he specifically repudiated the notion that the Court enjoyed a 'right to change' the Constitution."[88] Berger concludes: "As Professor Gerald Gunther commented, it is time to discard 'ritual invoking of Marshall's authority' for 'unlimited . . . discretion.' "[89]

The only way to maintain the legitimacy of judicial review while answering the charge that such review is undemocratic is by a faithful interpretation of the Constitution's meaning as derived from the Framers' intent. Any constitutional interpretation that is not in accord with that intent is without constitutional sanction and is a judicial arrogation of governmental power. The Supreme Court must remember that it is indeed expounding "a constitution," namely "this" one, and not a constitution the Justices may prefer. As Professor William Van Alstyne has stated: "Noninterpreting the only Constitution we are in fact expounding, namely *this* Consti-

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85. *See* Berger, *supra* note 42, at 11.

86. 17 U.S. (4 Wheat.) 316, 407, 415 (1819) (emphasis in original).

87. *See* Berger, *supra* note 42, at 11-12.

88. Berger, *id.* at 11 (emphasis in original) (citing R. Berger, Government By Judiciary 376-77 (1977), where Berger cites John Marshall's Defense of Mcculloch v. Maryland (G. Gunther ed. 1969)).

89. Berger, *supra* note 42, at 11 (quoting John Marshall's Defense of McCulloch v. Maryland 20-21 (G. Gunther ed. 1969)).

tution, whether because one is disgruntled with its limited wisdom or because some provisions are genuinely intractable, is not an impressive enterprise. . . . Give the document its due, and do not fear so much for the rest."[90]

90. Van Alstyne, *supra* note 73, at 232, 235 (emphasis in original).