Original Intent

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The United States Constitution: The World's Most Perfect Political Document

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CHAIRMAN'S CORNER

Jefferson v. Chief Justice John Marshall

A Test of Executive Will

Dianne Gilbert

Despite their lifelong antagonism for one another, Thomas Jefferson and John Marshall, cousins once removed, held much in common. Both men cherished the Constitution and considered the *primary* purpose of government to be the protection of the people's rights. Where they differed was in how to use the law to achieve the kind of nation that each envisioned: "...both the great Chief Justice and his lifelong antagonist cousin looked at the law as an instrument to serve the needs of the new nation." [1] To Marshall the overriding end to be served by America's public law was "nationalism in the broad sense of that term." [2] His seminal dictum in McCulloch v. Maryland: "We must never forget that it is a constitution that we are expounding" spoke volumes about his nationalistic leanings. He saw greatness for America by way of a strong, stable national government.

Jefferson, on the other hand, was a *States Rightist*. Where Marshall saw implied powers attached to those enumerated in the Constitution, Jefferson pretended no such thing. As a strict constructionist, he viewed Marshall's jurisprudence with great apprehension "fearing that the practice of loose construction would set dangerous precedents and weaken the States." [3] In matters of construction, he advocated a return "back to the time when the Constitution was adopted [to] recollect the spirit manifested in the debates" and rather than invent or squeeze new meaning out of the text, "conform to the probable one in which it was passed." [4]

Constitutional scholars who argue in defense of the great John Marshall insist that he never intended to enlarge the powers of the national government beyond those enumerated. Nevertheless, it is Marshall's legacy of judicial precedents to which activist judges turn to justify expanding government power.

Marshall's jurisprudence greatly troubled Jefferson; to the degree that, he publicly proclaimed it as proof of "the rancorous hatred that [Marshall] bears to the government of his country." [5] At

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The Constitution: Not Just A Law: A Dissent from Mis-spelled Original Intent

_ By Dr. William B. Allen

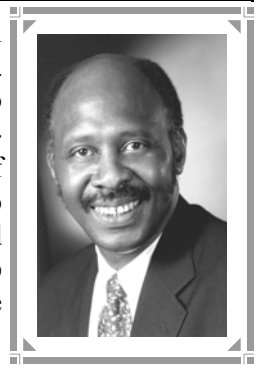
[Editor's Note: The following essay has been edited to fit within the space constraints of this newsletter. It has been reduced from a much larger document in which Dr. William B. Allen differentiates between original intent based upon long running tradition and principle, *ab principio*, versus that which simply came 'first,' *ab initio*. Dr. Allen argues that the *ab principio* basis for determining original intent is the only correct approach thereby offering the "correct spelling" of original intent. The entire essay is available at www.msu.edu. Reprinted and edited with permission.]

Philadelphian Benjamin Rush had cause to worry early in 1787, and he shared his worries with his countrymen. Writing appropriately enough in a new journal entitled *The American Museum*, Rush speculated whether his country might become a relic before consummating the promise of its Revolution. The war ended long before the Revolution, for the Revolution had no end but "to establish and perfect our new forms of government, and to prepare the principles, morals, and manners of our citizens, for these forms of government..." [1] When Rush emphasized at the end of his essay, " The Revolution is not over!" [H]e meant then that the specific intent or design of the revolution remained to be accomplished.

That perspective or attitude toward the Founding was not unique to Rush. It characterized the Founding, and many of the Founders, in general. Because of that original attitude, Americans since have confronted a special difficulty—namely, how to acquire or preserve a metric whereby to test fidelity to the purpose the Founders believed to have realized. That question poses a special difficulty because it entails a logical corollary—namely, whether the Constitution itself is adequate? Or, should a revolution begin?

Prospect of Revolution

The question of revolution—the *contemporary prospect of a rebellion* against the present forms and prospects of American life—is easily the most interesting and important question in the entire original intent debate. [Emphasis Added]. To raise the question is to threaten to withdraw consent (or, submission, if the stolid persist), to de-legitimize established authority. From that step there remains only one progressive direction: revolution.



Dr. William B. Allen

We cannot contemplate such a possibility in ignorance. We require to master both the objective conditions which counsel rebellion and the principles, which enable us to discern its necessity.

Discovering True Original Intent

A rule in literary exegesis is to discover authorial intent. A like rule can apply to statutes, for a legislature acts on authority, whether assumed or derived, which permits the authorial stance. The "informal propositions" of a constitutional convention are surely authored but possess no authority. Thus, [Thomas] Cooley commented:

"Every member of [a constitutional] convention acts upon such motives and reasons as influence him personally, and the motions and debates do not necessarily indicate the purpose of a majority of a convention in adopting a particular clause... And even if it were certain we had attained to the meaning of the convention, it is by no means to be allowed a controlling force, especially if that meaning appears not to be the one which the words would most naturally and obviously convey. For as the Constitution does not derive its force from the Convention which framed [it], but from the people who ratified it, the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding..." [2]

Original intent is neither self-executing nor falls to any of the other branches of govern-

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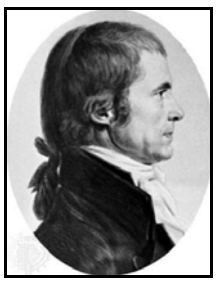
What Would They Say...

"...It is unquestionably true that the great body of the people love their country and wish it prosperity; and this observation is particularly applicable to the people of a free country, for they have more and stronger reasons for loving it than others."

_John Jay—Address to the People of New York—1787

Biographical Sketch: John Marshall ~ *4th Supreme Court Chief Justice*



John Marshall
1755–1835

John Marshall was born on September 24, 1755, the oldest of fifteen children. He was raised as a boy in the Blue Ridge Mountains on the Virginia frontier, the son of Thomas Marshall, a Planter, and Mary Keith. He was distantly related to Thomas Jefferson on his mother's side through the Randolph family line. They were cousins once removed.

Marshall was educated at home under the tutelage of his father who, from John's "infancy," saw his son as being "destined for the bar." Marshall's lifelong goal was to practice private law; however, his call to public service would take precedence.

On his return to civilian life from the military, he ran and was elected to the Virginia State legislature in 1782. In the fall of that same year, he was chosen to serve as a member of Virginia's Executive Council. Then in 1783, he married Mary Willis Ambler and in the following year, 1784, resigned his seat on the Executive Council and "came to the bar."

Marshall remained in the Virginia Legislature but declined all other offers to hold public office until becoming a delegate to the Virginia Ratification Convention in 1788. Then, in 1797 he would accept an appointment as Envoy to France along with General Charles C. Pinckney of South Carolina and Elbridge Gerry of Massachusetts. Their mission would later become known as the 'XYZ Affair.' At the completion of this tour of public duty, Marshall returned to Richmond to once again take up the practice of private law.

But this would not last long for Marshall's friends began to press him to run for Congress. He refused their urgings; but then George Washington impressed his thoughts upon him. Washington confided to Marshall that "there were crises in national affairs…which made it the duty of a citizen to forego his private [interest] for the public interest…that the best interests of our country depended on the character of the ensuing Congress." Considering the many times that Washington had come out of retirement to serve the nation, Marshall felt it his duty to follow suit.

Public Service

He was elected to Congress in 1799 and in 1800 was appointed Secretary of State by President John Adams. Then in 1801, he was next appointed Chief Justice of the Supreme Court, one of the last appointments to come out of the lame-duck Adams' administration. Although Marshall fulfilled John Adam's personal and 'preeminent requirement' that nominees to the Court be of a strong Federalist persuasion, interesting in its own right was Marshall's lack of formal preparation for the Supreme Court. He had exactly zero years of experience as a judge at any level; moreover, his formal law training was extremely limited, at most a week or two at the College of William and Mary and a few months of tutoring by Law Professor George Wythe.

In fact, the larger part of Marshall's law training came from self-study. His father had purchased the first American edition of William Blackstone's *Commentary on the Laws* for just this purpose. It is said that Marshall accepted Blackstone "as the best of guides in the labyrinth of the law." [1]

The rest of Marshall's training for the bench came from his experience as a Revolutionary War soldier and as a State Legislator: "I partook largely of the sufferings and feelings of the army, and brought with me into civil life an ardent devotion to its interests. My immediate entrance into the state legislature opened to my view the causes which had been chiefly instrumental in augmenting those suffering, and the general tendency of state politics convinced me that no safe and permanent remedy could be found but in a more efficient and better organized general government…"[2]

Nonetheless, John Marshall is said to have left his imprint on American constitutional law; as such, he is the only American represented among 18 others on the marble walls of the Supreme Court building in Washington. As Chief Justice, he led and ruled over the other justices with an iron hand. With only rare exception did his associate justices openly object to where Marshall wanted to take the Constitution. He served on the Supreme Court until his death in 1835.

> "When I recollect the wild and enthusiastic democracy with which my political opinions of the day were tinctured, I am disposed to ascribe my devotion to the union, and to a government competent to its preservation, at last as much to casual circumstances as to judgment." (1827 – at 72 years old)

Marshall Leadership

When Marshall ascended to the seat of Chief Justice, the Court was said to be of no significance. It was held in low esteem and initially forced to hold court in the basement of the House of Representatives. In fact, it was not until 1933 when the Supreme Court was finally given its own building. Up to that point, any logistical improvements granted to the judicial branch was the result of improvements made to accommodate an expanding Legislature. "When Marshall came to the central judicial chair in 1801 the Court was but a shadow of what it has since become. [By the time] he died in 1835, it had been transformed into the head of a fully coordinate department, endowed with the ultimate authority of safeguarding the ark of the Constitution" [3]

That said, Marshall is justifiably credited with elevating an otherwise moribund court to the level of the other two branches. "His power of reason, expositive of the law and insistence upon the Court speaking in one voice dominated the Court for three decades." Marshall did away with the meting out of *seriatum* opinions, the practice of each justice giving his own opinion. Marshall insisted that the Court speak through a single voice.

Marshall Misconstrued

Although those favoring loose construction of the Constitution often quote Marshall, he would not support many of their views. For example, the contemporary view of a "living" Constitution that is effectively amended by Supreme Court opinion: "The Constitution is a written document which changes only by amendment; the common law evolves, changes, and grows with decisions of the courts." Marshall understood that "judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing." [4]

Yet he did believe that the judiciary was the sole branch of government capable of acting as final arbiter of all constitutional questions. But, his attempts to push this doctrine were stymied under the watchful eyes of successive Jeffersonian and Jacksonian administrations that followed a policy of strict construction.

Landmark Decisions

Marshall delivered 519 opinions out of a total of 1,215 cases heard between 1801-1835. Of these he wrote 36 of 62 constitutional questions. The following cases are among those heard by the Marshall Court and which have come to be heralded as *landmark decisions*:

1. *Marbury v Madison* (1803), said to have established the doctrine of *judicial review*.
2. *McCulloch v. Maryland* (1819), said to have established the doctrine of *implied powers,* the *reaffirmation of the supremacy of the Constitution, federal immunity from involuntary state taxation,* the firm establishment of the Constitution as a government of the people, *not of the States*, from whom the *federal government… derives its powers.* Herein lies the source of his seminal dictum: *"We must never forget it is a Constitution we are expounding."*
3. *Dartmouth College v Woodward* (1819), said to have established the *inviolability of contracts*, and for corporations to be viewed as *persons*.
4. *Gibbons v. Ogden* (1824), said to have established *plenary federal authority over interstate and foreign commerce.*

John Marshall revered the Constitution. He believed that the American people were one; he believed in Constitutional Supremacy. He believed the Framers of the Constitution had one objective, and that was to build a strong central government. But at no time, did Marshall ever believe that *Constitutional Supremacy* should give way to *Judicial Supremacy* as is practiced today.

Chronology: Life Achievements:

- 1755: Birth, the oldest of 15 children
- 1775 – 1781 Soldier in Revolution
- 1782-1784: Served on VA Executive Council
- 1782-1788: A Burgess
- 1788: Delegate to Virginia Ratification Convention
- 1797-1798: Commissioner to France (XYZ Affair)
- 1799; Elected to Congress
- 1800: Appointed Secretary of State under John Adams
- 1801-1835: Chief Justice United States Supreme Court
- 1835: Died

1. Kirk, Roots of American Order, P 373
2. Marshall's Own Autobiography
3. History of the Supreme Court, Bernard Schwartz, P 33
4. Osborn v United States, 9 Wheaton 739 (1824) at 865 – Quoted in Henry J. Abraham P 63

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one point, Jefferson felt compelled to call for an amendment to reign in the Court: "...I deem it indispensable to the continuance of this government that [the opinions of the Supreme Court] should be submitted to some practical and impartial control; and this, to be impartial, must be compounded of a mixture of state and federal authorities...I do not charge the judges with willful and ill-intentioned error; but honest error must be arrested where its toleration leads to public ruin." [6]

Safe Government

Both Jefferson and Marshall sought to secure the safety of the people through government. But they looked to divergent sources to secure that safety; their respective choices reveal their dominant political philosophies.

Jefferson felt the greatest threat to freedom would ultimately come from the central government. Hence, he looked to state government to safeguard the people's rights. Marshall, on the other hand, did not trust state government. Having served as a soldier in the American Revolutionary War, he experienced the effects of recalcitrant state government. Then, as a State legislator, he had seen enough political gamesmanship to convince him that the people needed higher protection from the arbitrary abuses he saw meted out by state government. He sought safety in a uniform interpretation of the Constitution, a task he thought fit only for the judiciary: "To what quarter will you look for protection from an infringement on the Constitution, if you will not give the power to the judiciary? There is no other body that can afford such a protection." [7] Hence, to Marshall, judicial review was a constitutional imperative: "The question, whether an act repugnant to the Constitution, can become the law of the land is a question deeply interesting to the United States." The Constitution is "a superior paramount law;" it may not be changed through ordinary legislation. This means that a "legislative act contrary to the Constitution is not law." [8]

As to the last account, Marshall would get no argument from Jefferson. He would readily agree that *any* law repugnant to the Constitution was not law at all! "Whensoever the general government assumes undelegated powers, its acts are unauthoritative, void, and of no force." [9] But as to whether all authority to determine the constitutionality of any law should be entrusted solely to the judiciary, Jefferson adamantly disagreed: "The question [as to] whether the judges are invested with exclusive authority to decide on the Constitutionality of a law has been heretofore a subject of consideration with me in the exercise of official duties. Certainly there is not a word in the constitution which has given that power to them more than to the executive or legislative branches." [10]

Consequently, Marshall accused him of looking "with ill will at an independent judiciary." [11] He found it implausible: "That in a free country any intelligent man should wish a dependent judiciary, or should think that the constitution is not a law for the court...." [12]

But, "that gloomy malignity," [13] as Jefferson sometimes referred to the Chief Justice, misunderstood. For Jefferson had explained himself on this point at least two decades earlier: "...the judicial power ought to be distinct from both the legislative and executive, and independent [of] both,... so it may be a check upon both, as both should be checks upon [the judiciary]." [14]

Ill Will or Fear of Consolidation

Properly understood, Jefferson's greatest fear was not an independent judiciary, but one that was unaccountable to the people. For, what if the Supreme Court decided to impose *its* will contrary to the *expressed* written will of the people? Jefferson already had the answer: "[I]n truth, there is no danger I apprehend so much as the consolidation of our government by the noiseless and therefore unalarming, instrumentality of the Supreme Court." [15]

Hence, what Marshall saw as a stand against an independent judiciary, was really a concern as to whether the new Constitution sufficiently protected the people against judicial tyranny. That is, the unconstitutional actions of an unelected corps of judges: "Our judges are as honest as other men, and not more so. They have with others, the same passions for party, for power, and the privilege of their corps...Their power [is] the more dangerous as they are in office for life, and not responsible, as the other functionaries are, to the elective control." [16]

Guarding the *Guardians*

To Jefferson that "subtle corps of sappers and miners" would prove to be the "germ of dissolution of [the] federal government." Once comfortable in their power, they would work day and night "to undermine the foundations of our confederated fabric." Indeed, Jefferson considered it " a very dangerous doctrine to consider the judges as the ultimate arbiters of all constitutional questions...one which would place us under the despotism of an oligarchy..." [17] All three branches must interpret the Constitution for themselves. Otherwise, the members of two of the branches were not taking an oath to uphold the Constitution. Under that construction, their oaths would amount to little more than an oath to obey the directives of the Court!

A Test of Political Will

So, it was in 1801 with these opposing views of government that Chief Justice Marshall would administer the oath of office to that "violent Democrat" the Federalists warned all Americans had reason to fear. Once in office, President Jefferson wasted no time unraveling what he called the Federalist reign of terror: "The storm through which we have passed has been tremendous indeed...The tough sides of our argosy have been thoroughly tried. Her strength has stood the waves into which she was steered with a view to sink her. We shall now put her on her republican tack, and she will now show by the beauty of her motion the skill of her builders...A just and solid republican government maintained here will be a standing monument and example for the aim and imitation of the people of other countries." [18] With that, Jefferson put Chief Justice John Marshall on notice that he was hardly disposed to extending the general government beyond its constitutional limits. The first of his actions as Chief Executive would bring him into direct confrontation with Marshall in the celebrated case of *Marbury v Madison*.

Marbury v Madison (1803)

Hailed as the landmark case to establishing judicial review, all Marshall really accomplished in Marbury was to skillfully dismiss the case! He did so on the grounds that Plaintiff, William Marbury, had sought relief in the wrong court. After admitting that the Court had no jurisdiction in the matter, Marshall went on *extrajudicially* to find Section 13 of the 1798 Judiciary Act, the law cited in Marbury, unconstitutional. But he used the *obiter dictum* portion of the Marbury opinion to declare it so!

The clever Marshall knew he could not force President Jefferson to act. Hence, by taking the course that he did, he effectively denied Jefferson the opportunity to publicly discredit the Court. More interesting is the fact that Marshall never again attempted judicial review of congressional legislation for the remainder of his term on the high bench. It would be 1857 before "the authority to invalidate a Federal statute was next exercised by the Court." [19] The successive Jeffersonian and Jacksonian administrations, which were in power throughout Marshall's tenure, had proved an effective check on the Court.

A President That Walks His Talk...

As for President Jefferson, he publicly ignored the Marbury opinion while continuing to privately scold Marshall for undermining the separation of powers doctrine, the central principle upon which the Constitution rests. But Jefferson wasn't finished with the matter; he would bide his time waiting for a more public opportunity to discredit the Marbury decision. That opportunity arrived with the public attention given the Aaron Burr trial in 1807: "I observe that the case of *Marbury v. Madison* has been cited [in the trial], and I think it material to stop at the threshold the citing that case as authority, and to have it denied to be law...Because the judges in the outset disclaimed all cognizance of the case, although they then went on to say what would have been their opinion had they had cognizance of it. This, then was confessedly an *extrajudicial* opinion and as such of no authority... I have long wished for a proper occasion to have the gratuitous opinion in *Marbury v Madison* brought before the public, and *denounced as not law*, and I think the present a fortunate one because it occupies such a place in the public attention. I should be glad, therefore, if in noticing that case you could take occasion to express the determination of the executive that the doctrines of that case were given *extrajudicially and against law,* and that their reverse will be the rule of action with the executive." [20]

Political Will Revisited

Jefferson's administration meant business and as part of that business the Democrat-Republicans meant to restore *legislative supremacy*. A second Court confrontation involving portions of the 1802 Democrat-Republican sponsored Judiciary Act would provide the next test (Stuart v Laird, 1803). Founding Father Caesar Rodney of Delaware fired this warning shot across the Court's bow: "The Supreme Court will proceed with caution...If...the Judges of the Supreme Court... do assert unconstitutional powers, I confidently trust there will be wisdom and energy enough in the Legislative and Executive branches to resist their encroachments and to arraign them for the abuse of their authority at the proper tribunal...*Judicial supremacy* may be made to bow before the strong arm of *Legislative authority*. We shall discover who is master of the ship. Whether men appointed for life or the

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ment to execute. The power of the Court, reposing as it does on Justice John Jay's 1793 ruling on advisory opinions, which insisted that the Court must have the last word, cannot be directly constrained by any ordinary institutional considerations. This seems to have been the import of the argument in Marshall's original elaboration of the notion of *judicial review*, [Emphasis Added] in which most commentators usually neglect that the Chief Justice also laid out the limits of the power.

"By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character... The subjects are political. They respect the nation's, not individual rights, and... the decision of the executive is conclusive... where the heads of departments are the political or confidential agents of the executive ... to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more clear than that their acts are only politically examinable..." [3]

Marshall's account of judicial review describes it as law bound, subject to the Constitution and not as a *carte blanche* constitutional oversight. The reason is that the Constitution provides not only for legislative but for political judgment. In that context, he held, the "province of the Court is, solely, to decide on the rights of individuals," which is not to say "minorities." Thus, when it came to the question of original intent Marshall could affirm rather a different view than prevails today:

"That the people have an original right to establish for their future government, such principles as in their opinion, shall most conduce to their happiness, is the basis on which the whole American fabric has been erected... as the authority from which [the principles] proceed is supreme, and can seldom act, they are designed to be permanent."[4]

Original "original intent," in other words, focused not on the absence of referenda but on the presence of the original authoritative act. Thus, Justice Joseph Story could maintain that the *Court could construe only the powers of the Constitution* [Emphasis Added] and not "the policy or principles which induced the grant of them," precisely because the "Constitution has proceeded upon a theory of its own."[5] Contemporary jurists have been known to echo similar sentiments, though seldom to stick by them. Justice Powell, for example, *and whom we shall see explicitly rejecting the restraint on the judicial creation of rights* [Emphasis Added] nevertheless held in 1973 that "it is not the province of this Court to create substantive constitutional rights."[6] The last Justice Harlan [II], [7]on the other hand, sounded much like his original namesake[8] in 1970:

"... when the Court disregards the express intent and understanding of the Framers, it has invaded the realm of the political process,... and it has violated the constitutional structure which it is its highest duty to protect."[9]

Contrasting with Harlan, however, is the dissenting opinion of Justice Brennan, which more nearly approximates the professional consensus on the question of original intent in the contemporary world:

"[The] historical record left by the framers of the 14th Amendment, because it is a product of differing and conflicting political pressures and conceptions of federalism, is thus too vague and imprecise to provide us with sure guidance in deciding... We must therefore conclude that its framers understood their Amendment to be a broadly worded injunction capable of being interpreted by future generations in accordance with the vision and needs of those generations." [10]

On such terms as these, original intent would refer to the structures of government and the original authority of the people last of all!

Misspelled Original Intent Undergirds Judicial Activism

To repeat: *misspelled original intent* [Emphasis Added] does not constrain the Court beyond the willingness of justices to operate within what is essentially the framework of a *hypothetical* construct… [Hence] let me restate the cause of the central error in the prevailing reading of original intent.

Original intent has been confused with the doctrine of legislative intention…By contrast, the correct understanding of original intent would not pretend to lift substantive decisions on particular facts whole from some founding record. Unlike legislative intention, which may guide the Court, original intent operates to constrain the entire American political system with respect to processes and ends. *The substance of the principle is republicanism—self-government.* [Emphasis Added].

Revolution: Undermining Ab Principio

The consequence of taking this distinction seriously will be to undermine the prevailing understanding of this particular question, one that has been much on the minds of many people in recent years and part of an academic debate in the legal community stretching back at least thirty years. In discussing the interpretation of the Constitution, we are forced to choose whether we wish to discuss the specific and limited role assigned to the Court or the broader question of the structure and operation of the American political system. [Emphasis Added] A palpable example of the effect such a distinction would have on the Court was offered in the majority opinion in *INS v. Chadha* [11] By insisting on a rigorous interpretation of the separation of powers, focusing on the presentment clauses, the Court found itself unable to reach the policy question (despite the vigorous objection of Justice White). More importantly, however, in a rare twentieth century instance the Court acknowledged dimensions of governmental power beyond its reach.

Beware Specious Innovations

In *Chadha*, form outweighed substance, meaning therefore that substantive decisions remained to be made in forums and in a manner beyond the power of the Court to impose. Not utility, but constitutional design decided the question, *and in constitutional matters original intent can mean nothing less*. [Emphasis Added] To maintain his point, the Chief Justice [Warren E. Burger] summoned James Madison to his defense, but *not* Madison's most explicit statement on the question:

"I am not unaware that my belief, not to say knowledge, of the views of those who proposed the Constitution, and what is of more importance, my deep impression as to the views of those who bestowed on it the stamp of authority, may influence my interpretation of the Instrument. On the other hand, it is not impossible that those who consult the instrument without a danger of that bias, may be exposed to an equal one *in their anxiety to find in its text an authority for a particular measure of great apparent utility.* "[12] [Emphasis Added]

"Serious danger seems to be threatened to the genuine sense of the Constitution, not only by an unwarrantable latitude of construction, but by the use made of precedents which cannot be supposed to have had in the view of their Authors the bearing contended for, and even where they may have crept through inadvertence into acts of Congress, and been signed by the Executive at a midnight hour, in the midst of a group scarcely admitting perusal, and under a wariness of mind as little admitting a vigilant attention.

Another, and perhaps a greater danger, is to be apprehended from the influence which the usefulness and popularity of measures may have on questions of their constitutionality."[13]

In Madison's view, as in the *Chadha* opinion, then, the key to constitutional jurisprudence is a *careful segregation of legislative intent and constitutional intent*, the former bowing to the latter even where utility pleads its case. [Emphasis Added]

The Court is able to apply this rule only in the circumstance where it preserves its own power in a properly subordinated role. In that sense, the defenders of misspelled original intent have inverted the argument, for they behold a Court which is able to hold the government's feet to the fire of constitutional structure not by virtue of its own subordinate role but rather by virtue of its superordinate judgment.

The clearest example of this inversion appears in the writings of Judge Robert Bork, who reasons that it is sufficient for jurists to begin with a "premise" rooted in the Constitution in order to fulfill the function of preserving constitutional intention. Judge Bork sets forth the peculiar problem which confronts the Court in unmistakable terms, terms which convey far more than the limited, subordinate role envisioned in this essay. I quote at length:

"The problem for constitutional law always has been and always will be the resolution of what has been called the Madisonian dilemma. The United States was founded as what we now call a Madisonian system, one which allows majorities to rule in wide areas of life simply because they are majorities, but which also holds that individuals have some freedoms that must be exempt from majority control. The dilemma is that neither the majority nor the minority can be trusted to define the proper spheres of democratic authority and individual liberty. The first would court tyranny by the majority; the second tyranny by the minority.

Over time it came to be thought that the resolution of the Madisonian problem—the definition of majority power and minority freedom—was primarily the function of the judiciary and, most especially, the function of the Supreme Court. That understanding, which now seems a permanent feature of our political arrangements, creates the need for constitutional theory. The courts must be energetic to protect the rights of individuals but they must also be scrupulous not to deny the majority's legitimate right to govern. How can that be done?" [14]

Before entertaining Judge Bork's response to this most important question, we must note how far his account of the Madisonian problem and system depart from what was

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"What's Wrong With Socialism?"

_By NH Representative Dan Itse

[Editor's Note: The following speech was given on the floor of the NH House of Representatives—June 16, 2004]

I sought this consent today to apologize. To apologize for not having a ready answer. For the record, I will be mentioning the Bible, but only because someone else brought it up first. Back when we were debating SB 302, I commented to a fellow representative that I would probably vote for it if only because I saw it as a chance to roll back socialism, at least a little bit. He challenged me with words to the effect of, "What's wrong with socialism, doesn't society have an obligation to take care of those in need?" On another prior occasion, yet another a representative said to me that [the practice of] Christianity was socialist. In neither case did I rebut these as I ought to have; so, it is at least partially in penance that I am here before you today.

First, **NO,** Christianity is not socialist. It is based entirely upon personal responsibility. While first century Christians often lived in a communal manner, it was **voluntary**. When Aninias and Sophira were struck down, it was not for holding back a portion of the proceeds from the sale of their property, but for pretending that they had not. Peter said, "When it remained, was it not your own? And after it was sold was it not in your own control? Why have you conceived this thing in your heart? You have not lied to men, but to God." (Acts 5:4)

The Bible does say that they (the early Christians) sold their possessions and goods and divided them among them all as anyone had need. But, the phrase "from each according to his ability, to each according to his need," although it sounds lovely and even scriptural, does not come from the Bible. It comes from the "Communist Manifesto" by Karl Marx; a man whose chief aim was not to promote or glorify God, but [to] supplant God with government.

Like it or not our nation has its origins in Christianity and the Bible. Some of the first to come to these shores, the Pilgrims, formed at first a socialist government. It was an abject failure. They discovered that instead of inspiring selflessness, it appealed to the worst of human nature, inspiring laziness and indolence.

They quickly abandoned that experiment, and created something similar to that created in our constitutions. James Madison, a devout Christian and principal author of our national constitution, stated that the primary purpose of government is to protect private property. Alexander Tyler through historical study determined that the redistribution of wealth by government was the very cause of the demise of every great civilization.

The purpose of our government was not to redistribute wealth, but to prevent involuntary redistribution. We have forgotten a founding principle: no man, king or common, has a right to, or is entitled to another man's wealth.

The Bible does direct us to care for the widows, but only the widows indeed. Those who are too old to remarry and have no children and no family. That same Bible states, "If anyone will not work, neither shall he eat." (2 Thes. 3:10). Whether, it is Deuteronomy 15:7-11 or 1 John 3:17 the directive to help the poor is personal not societal.

Yes, we here in this room do have a responsibility to the poor; but, it is as individual citizens, not as legislators, nor the legislature. You see the Bible is a book of virtue and of charity. There is no virtue in giving what did not and does not belong to you. There is no charity in giving what you did not earn.

For those of you who ascribe to Christianity, Jesus directed us to love our neighbor as ourselves. If you love your neighbor as yourself, and he is in need, you will do whatever you can to meet his need. But just as certainly, if you love your neighbor as yourself, you will not steal his money only to give it to someone else, for any purpose. There is no difference between stealing at the point of a gun or a knife and stealing at the point of a pen, especially when that pen is backed up by the power of the sword.

The Definition of Liberty

"What do we mean when we say that first of all we seek liberty? I often wonder whether we do not rest our hopes too much upon constitutions, upon laws, and upon courts. These are false hopes; believe me, these are false hopes.

"***Liberty lies in the hearts of men and women***; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. ***While it lies there it needs no constitution, no law, no court to save it***.

"And what is this liberty which must lie in the hearts of men and women? ***It is not the ruthless, the unbridled will; it is not freedom to do as one likes***. That is the denial of liberty, and leads straight to its overthrow. A society in which men recognize no check upon their freedom soon becomes a society where freedom is the possession of only a savage few; as we have learned to our sorrow.

"The spirit of liberty is the spirit which is not too sure that it is right; ***the spirit of liberty is the spirit which seeks to understand the minds of other men and women***; the spirit of liberty is the spirit which ***weighs their interests alongside its own without bias***; the spirit of liberty remembers that not even a sparrow falls to earth unheeded; the spirit of liberty is the spirit of Him who, near two thousand years ago, taught mankind that lesson it has never learned, but has never quite forgotten; that ***there may be a kingdom where the least shall be heard and considered side by side with the greatest***.

And now in that spirit, that spirit of an America which has never been, and which may never be; nay, which ***never will be except as the conscience and courage of Americans create it***; yet in the spirit of that America which lies hidden in some form in the aspirations of us all; in the spirit of that America for which our young men are at this moment fighting and dying; in that spirit of liberty and of America I ask you to rise and with me pledge our faith in the glorious destiny of our beloved country."

Judge Learned Hand
P. 190-191, *The Spirit of Liberty (1944)*

How's Your Constitutional IQ?

1. Why did Jefferson oppose Chief Justice John Marshall's position regarding the Court as final arbiter of all Constitutional questions?
2. What two basic powers were originally held by common law jury?
3. Which four amendments deal primarily with the rights of accused persons in criminal cases?
4. Who was the first Chief Justice of the U.S. Supreme Court?
5. Who has the authority to set up new courts should the federal courts become overburdened?
6. Where does the Constitution place the judicial power of the United States?

Answers: 1) Jefferson felt that the legislative and the executive were both equally entitled to pass on the constitutionality of a law as it applied to their area of administering the government. 2) The power to determine the facts (guilt and innocence of the accused) and the power to determine the law (meaning and constitutionality of the law). 3) Amendments 4,5,6 and 8. 4) John Jay 5) The Congress 6) In the Supreme Court and any lower federal courts which the Congress establishes.

Poor Roy's Almanac

Activist judges are essentially the same as the gambler in ***Guys and Dolls*** who gives Nathan Detroit a pair of dice without any spots on them, and then forces Nathan to throw them, saying the dice doesn't need spots, for the gambler will tell Nathan what he has thrown. In the same way, no matter what laws legislators make, the activist judges will inform everyone what it is the legislators really meant, or what the Constitution really says.

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(Continued from page 4 - Dr. W.B. Allen)
in fact the case. Judge Bork attributes to the United States Constitution attributes which Madison specifically attributed only to systems not vested with the safeguards of the Constitution. *Federalist* number ten spells out at great length the difference between mere majority rule (simple democracy) and the extended republic (representative democracy). Majority ties not only are not allowed to rule in the latter "simply because they are majorities," but only *just majorities* are allowed to rule (*Federalist* 51). Further, not only can the just majority be trusted to "define the proper spheres of democratic authority," but they *alone* may be trusted to do so. Any other arrangement would vest power and authority in a "will independent of the society."[15]

Thus, the arrangement which Madison defended as avoiding both tyranny and anarchy, Judge Bork regards as courting tyranny whether by the majority or the minority. This is the context in which it is then alleged that evolved circumstances have produced a solution to the Madisonian problem—namely, the exclusive power of the judiciary to determine questions of rights and power in the United States. At bottom, therefore, the argument means that the original Constitution failed, and the recourse to the Supreme Court has been a second line of defense, the very argument which Justice Thurgood Marshall offered in Hawaii in May of 1987:

"... the government they [the Framers] devised was defective from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional government..."

Judge Bork Understood

This essay does not maintain that Justice [Thurgood] Marshall and Judge Bork would entertain the same results as fulfilling their shared vision of constitutional government. Further, Justice Marshall has never uttered a word of the principle which Judge Bork went on to affirm, that "any defensible theory of constitutional interpretation must demonstrate that it has the capacity to control judges." I do suggest, however, that the control Judge Bork finally settled on is precisely no control at all. "The only way in which the Constitution can constrain judges is if the judges interpret the document's words according to the intentions of those who drafted, proposed, and ratified its provisions and its various amendments." I submit that what this means is that there is no constraint whatever, for the "only way" is a way which leaves original intent jurisprudence no less open to the subjective opinion of the judge than is the jurisprudence of evolutionary utility. … Constitutional government, by contrast, must be based on actual limitations on the power of the Court, for, among other reasons, the fact that we all know only too well the fallibilities of human reason.

Original Intent By Principle

Original intent spelled correctly would limit the power of the Court, and that is the missing element in the contemporary original intent debate. We grew up to believe that our judges, above all Supreme Court Justices, were clothed in the robes of the Constitution. Whether they wore anything beneath was of no importance. What counted was that they accept, as we believed, that our Constitution formed a government limited in *all* its branches and powers and that interpretation of that document would always start from the conceptions of its architects. When our judges cast off "a world that is dead and gone," in Justice Brennan's words, they cast off their constitutional robes and stand nakedly before us, asserting their own authority, independent of any limitations, to shape society as they will

We have known for some time that *some* judges thought their power unlimited. Indeed, Justice Powell made it explicit enough in a 1979 interview with Professor Harry Clor. [16] And Justice [Thurgood] Marshall made the point clear in his 1976 *Bakke* opinion. [17] [In] discussing the earth shaking 1973 abortion decision,[18] Powell declared, "there's nothing in the Constitution about privacy." Nevertheless, the Court invented a right of privacy to make their decision because, as Powell expressed it, "the liberty to make certain highly personal decisions [is] terribly important to people." Similarly, the Court says what the Constitution means, according to Powell, without relying on the intent of either Congress or the Founding Fathers.

What this means is that our judges now stand in relation to the people of the United States where the judges of Abraham Lincoln's day stood in relation to the people of that era. When Lincoln challenged the people to consider whether they would accept a Supreme Court decision declaring slavery lawful throughout the United States, he meant for them to remember that that was their decision and not the decision of their judges. So, too, is today's American challenged by the tendency of contemporary Court opinions to make a decision how far they are willing to permit the Court to go. In the *Jaffree* decision on school prayer in Alabama,[19] the Court went so far as to mandate governmental neutrality between religion and irreligion. It is irrelevant whether it were dicta or law, in these premises, for in doing so they did more than merely to depart from the understanding of the founding generation. They forced people to wonder, what if they take the next step; what if the Court insists that Americans cannot teach religion to their young, whether in public or in private, because that has the effect of restricting what must be regarded as a highly personal decision which young people have a right to make for themselves? Would Americans abide a decision which would put their churches out of business and their faiths out of society?

Justice Brennan assumed just such a power in his speech of the fall of 1985.[20] That is at least a natural conclusion from his reason that there is no way for us to know what the Founders intended two hundred years ago. The more serious question, however, is what the American citizens of the founding era intended, just as it is important to ask what Americans intend today.

The Constitution...Changeable As Dirty Underwear?

The Constitution does not need to change in order "to cope with current problems and needs"[21] As all the Founders so frequently said, the Constitution was intended as it stood to accommodate the needs of changing circumstances. By changing the Constitution we only make ourselves more vulnerable to changing circumstances. As drafted the Constitution was intended to convey power sufficient to cope with transient problems without changing constitutional fundamentals. The theory was that thus Americans would remain free; whereas in other states people change their constitutions as they change their under garments. By Brennan's view, Americans should always regard the Constitution of the past generation as just so much dirty underwear.

Like Powell, Brennan defended the Court's decision to stand as a protector of the few against the many. In order to serve this role, the Court had to assume an independent power in the society, a position which Brennan conceded "requires a much modified view of the proper relationship of individual and state." In particular, the so-called "majoritarian process cannot be expected to rectify claims of minority rights that arise as a response to the outcomes of that very majoritarian process." Brennan, like Judge Bork, believes that the Founders intended to create a simply majoritarian political order. Judging such an order unwise, he assumes the power and authority to

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change it.

It is characteristic in Brennan's argument that, when he makes his most radical claims, he reaches for the authority of the past to protect himself. Here, again, he appealed to Madison. Here, again, he abused Madison. Drawing from Madison's contribution to the debate on the Bill of Rights in 1789, he quoted that "the prescriptions in favor of liberty ought to be leveled against ... the highest prerogative of power... the body of the people, operating by the majority against the minority." Thus, Brennan used Madison to design a Constitution against the people…Thus, where Brennan found the idea of a Constitution against the people, we see in fact a description of those areas in which public opinion operates outside the so-called majoritarian processes.

Educating to a Standard of...Ab Principio

Madison remained consistent with what he had already said in defending the Constitution earlier, that the "rights of individuals, or of the minority, will be in little danger from" the government itself. The beauty of this design was precisely that it made a government which did not have to create special categories of citizenship, dividing the society into legally created factions one against another, as our Court has done with whites and blacks, men and women, and other like divisions.

The founders *intended* a color-blind, class-blind Constitution [Emphasis Added]. Our Court today intends the opposite. To restore the vision of the Founding, Americans would be forced to make the Court do again what Madison originally depended on it to do, "to declare all acts contrary to the *manifest* tenor of the Constitution void." If the word manifest means anything at all, Madison must have understood that it is *not* the task of the Court to declare void - legislation with which it merely happens to disagree.

Laying out the problem thus prepares us at last for the necessary conclusion. A knowledge of the Constitution sufficient to assure familiarity with its "manifest tenor" would exceed by far a literal rendering of its terms; it would reach to its principles as they were adopted and including the principles of the Declaration of Independence. [Emphasis Added] Coupled with the demonstration that present-day jurists frequently miscomprehend the Constitution both in its terms and its principles, the likelihood emerges that the prospects for correctly spelled original intent depend on a complete renewal of the Court or something more still.

This statement is not entertained lightly. We are tutored by present justices and judges themselves. Justice Brennan's abilities are clear in this regard. Similarly, Justice [Thurgood] Marshall's disparagement of the Constitution bespeaks an unfriendliness to the understanding of republicanism articulated at the Founding. One might add that it also bespeaks an unfamiliarity with the Founding, for it is based on an erroneous reading of the attitudes toward slavery and blacks at the Founding. The general problem all of this raises is this: how far can we rely on the judgments of jurists who are neither well-affected toward nor particularly knowledgeable about the Constitution. If the principle constraint on the Court, subordination to the mechanisms and purposes of republicanism, are unknown to the justices, they cannot be expected to perform a function compatible with the political order. *That is the real subject at the heart of the original intent debate* **[Emphasis Added].**

It would be a mistake to rely on our Courts to fulfill the promise of original intent, since to do so would confirm in them a power far beyond anything originally intended. If such power in fact exists today, the American people would find themselves faced with no alternatives (to reclaim their due authority) but a constitutional limitation on the judiciary, on the one hand, or, failing which, a revolution in their government. But it would be difficult indeed to imagine a constitutional limitation on the Courts, other than that in the original constitution, which would be compatible with a government of laws.

Could we recover a firm sense of the constitutional order, in which the separate authorities were regarded as properly independent where they were designed to be so, without having to appeal to a specific ruling of the Court for the purpose, that could perhaps restore the health of our polity. Fifty years of legislative complicity in judicial usurpation does not foster confidence in that possibility, however. Thus, for all practical purposes it would seem that an appropriate judicial deference, on the one hand, or a righteous legislative and/or executive defiance of the Court, on the other hand, are well beyond our reach.

What we can be most certain of is that this restoration cannot proceed from the Court itself. Justice Harlan's warning in *Oregon v. Mitchell* has gone all but unheeded not only by the Court but the legal system entire:

"Judicial deference is based, not on relative fact finding competence, but on due regard for the decision of the body constitutionally appointed to decide."

Accordingly, Justice Frankfurter's insight, "there is not under our Constitution a judicial remedy for every (political mischief),"[22] counsels us to pursue other means. This consideration brings us nearer to the relevance of the idea of self-government in this discussion. Justice Brennan repeats no other phrase with such frequency as he repeats, without apparently understanding, "self-government." Since the original intent of the Constitution was to preserve self-government, however, it is most likely that the recovery of that heritage must involve the assertion of its claims over and against the institutions of the government, including the Court. That, in turn, would call upon a frankly political as opposed to a legal speech. This more than anything else could convey to us the impossible irony of seeking salvation in the Courts…

Can we conceive some judge, attempting to refocus our constitutional deliberations, reminding the people that we don't need sniveling investigators and their pimps to tell us what our Constitution means? But such is the raw language of politics. He would continue: The people of this country are entirely capable themselves of insisting upon the due order of their Constitution. What we need are presidential candidates, for example, who can carry directly to the people the question of our Constitution—even to pose anew the question of their vote for the Constitution, whether the Constitution of Thurgood Marshall and Joe Biden or the Constitution of George Washington and James Madison.

We need rather an executive who will lay down the general rule, that Congress can carry out its appropriate authority to create policies, but the President will carry out his authority to enforce its legislation—that the oversight responsibility of Congress is not only appropriate but encouraged, but that it does not consist in the right or authority of any Congressman to sign checks.

We need an executive who will remind Congress that no individual Congressman has a constitutional existence in this country—that congressmen come to light only as part of a constitutional majority, and that means a majority in the sense prescribed by the processes outlined in the Constitution. When they are deliberating and passing legislation, then they are invested with the full dignity of our republican system. As mere individuals expressing their likes and dislikes they are just other Americans. It would take more than ordinary imagination to conceive of the Supreme Court opinion that would speak thus.

Yet, the restoration of the original intent hinges far more on such language than on the arcane disputes about the legislative records of the Founding era...In that event, Americans must face the cold reality that their options have been painfully narrowed to one only. Correctly spelled original intent may well demand original exertions.

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1. "An Address to the People of the United States," The American Museum, January 1787.
2. T. Cooley, A Treatise on Constitutional Limitations, 66-67 (2d ed. 1871), quoted in John H. Ely, Democracy and Distrust: A Theory of Judicial Review (Cambridge: Harvard University Press, 1980), pp. 18-19.
3. Marbury v. Madison, 1 Cranch 137, 2 L. Ed. 60 (1803).
4. Ibid
5. Martin v. Hunter's Lessee, 1 Wheat. 304 (1816).
6. San Antonio Ind. School Dist. v. Rodriquez, 411 U. S. 193 (1973)
7. John Marshall Harlan II – Served on the Court: 1955-1971
8. John Marshall Harlan I - Served on the Court: 1877-1911
9. Oregon v. Mitchell, 400 U. S. 112 (1970).
10. Ibid
11. 33 Daily Journal D. A. R. 1657 (1983)
12. 3 Works, 53-54, Letter to Henry St. George Tucker, Dec. 23, 1817.
13. 3 Works 54-57, Letter to President Monroe, December 27, 1817.
14. The Great Debate: Interpreting Our Written Constitution, speech reprinted by The Federalist Society, 1986, p. 44.
15. Cf., Allen, "Justice and the General Good: Federalist 51," in C. Kesler, Saving the Revolution (New York: The Free Press, 1987), 131-149.
16. Printed in the Kenyon College Alumni Bulletin, Summer, 1979, p. 14.
17. Regents of the University of California v. Bakke, 438 U. S. 265 (1978)
18. Roe v. Wade, 410 U.S. 113 (1973)
19. Wallace v. Jaffree, 472 U. S. 38 (1985)
20. Justice Brennan Address," to the Text and Teaching Symposium, Georgetown University, October 12, 1985

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immediate representatives of the people agreeably to the Constitution are to give laws to the community...I sincerely hope that they may take wit in their anger..." [21]

Jefferson Prevails Over Marshall

Wishing not to confront Jefferson a second time, and having already heard the case in Circuit, Chief Justice Marshall stepped down. As one historian put it: "He was too cagey to confront Congress and the President at this juncture...he was hardly of a mind to confront Mr. Jefferson in a way to allow Jefferson the opportunity to ignore or disobey the Supreme Court." [22]

Despite its anathema for the 1802 Judiciary Act, the Court voted unanimously to uphold the law. And to their credit the justices followed the Constitution rather than to assert their own will.

Impeachment...A Constitutional Means

The statesman Jefferson urged the people to remain vigilant. He cautioned us not to wait until the wolf was at the door to guard against government encroachments upon our personal liberties. But as President, he would use impeachment as a reasonable means of keeping the courts in reasonable harmony with the will of the nation. He found it a proper means for checking the actions of federal judges who had chosen to make "themselves most obnoxious to attack." Moreover, the grounds for deploying its use need not be any crime or legal misdemeanor. A decision declaring an act of Congress unconstitutional would be reason enough; that is, the practice of *judicial review*.

Hence, in the same year as *Marbury v. Madison* was decided, federal judge John Pickering was brought up on charges of issuing an order in contradiction of an act of Congress, for judicial high-handedness, and for drunkenness and blasphemy; then, in 1804 an attempt was made to remove Associate Justice Samuel Chase. Chief Justice Marshall protested the action: "The present doctrine seems to be that a judge giving a legal opinion contrary to the opinion of the legislature is liable to impeachment." [23]

But Marshall's statement was anything but fair. For the record shows that Judge Pickering was removed from office because of gross irregularities of conduct; while, Judge Chase was acquitted despite his violent partisanship outspoken from the bench. The record also shows that: "The Senate would not oust merely for opinions held, and the courts were safe... Mr. Jefferson had proved no monster, after all, but an amiable and attractive gentleman, graceful in conciliation, and apparently honest in his desire to serve the whole country, in spite of what was said against him." [24]

The Final Keepers...WE THE PEOPLE

As noted earlier, Jefferson viewed Marshall's jurisprudence as dangerous to the safety of the nation. "To the great democrat, control of the validity of governmental acts by non-elected judges 'would place us under the despotism of an oligarchy.' He never really appreciated the need for *judicial review* as the true safeguard of constitutional rights against the power of government." [25]

Neither, did he accept the idea of the Court as sole and final arbiter of Constitutional issues: "The Chief Justice [John Marshall] says, 'There must be an ultimate arbiter somewhere.' True there must... The ultimate arbiter is the people of the Union, assembled by their deputies in convention at the call of Congress or of two-thirds of the states. Let them decide to which they mean to give an authority claimed by two of their organs." [26]

History has proven Jefferson's concerns to be well founded: "[E]ver since John Marshall became Chief Justice in 1801, [the judiciary] has tended to be much more assertive of its powers than the Framers had expected." [27] And, just as Jefferson feared, these "daydreamers in judicial robes," [28] these activist judges have led the nation away from *constitutional supremacy* as the Constitution arranges toward *judicial supremacy,* which it does not!

They have ignored the original intent of the Constitution's Framers and of the people who accepted it; they have mis-interpreted the Constitution to accomplish their will socially, economically and politically. But most unfortunately, they have sullied the Great John Marshall's name in choosing to make him their spokesperson.

A Word About Judicial Review

Although it is claimed that judicial review has its roots in the 1803 Marbury decision, it did not become "an important practical factor in the polity" [29] of the nation until nearly a century later. Therein, one has to admire Jefferson's intellectual prowess in having the foresight to understand the long range implications of where the crafty Chief Justice's *obiter dictum* could go. And, given the undue influence and power exercised by the Supreme Court today, it is safe to say, did go!

Herein, it is appropriate to set the record straight as to the original meaning of judicial review, a practice requiring that *all* legislation be reviewed, for example by a Council of Revision, before becoming law. As one historian puts it, its use per the 1803 Marbury decision is a "misnomer." As it happens in American government, "Courts do not *review* legislation. Rather, they deal with such cases as come before them involving criminal and civil law...It is settled practice that they neither review nor pronounce upon the constitutionality of any law until it comes before them in an actual case. It is the exercise of *this power* that is commonly referred to as 'judicial review,' but the phrase is not very apt." [30]

As it stands today, most Americans view the Court as final arbiter in matters of law. Were they not so disconnected from their roots, they would understand it is they to whom the Constitution gives this ultimate authority.

Patriots Gather To Celebrate Their Heritage

Having said that, our readers should be aware of an upcoming opportunity to reconnect themselves with the roots of the American republic. On September 19, at the Grappone Center in Concord, NH, the New Hampshire Center for Constitutional Studies will host its 8th annual celebration commemorating the 217th anniversary of the signing of our nation's Constitution. This year's theme focuses on the history of the Supreme Court—in particular judicial activism. Our keynote speaker, Dr. William B. Allen, is a highly respected expert on original intent; that is, what the Framers said the Constitution means. The event is designed to be educational, entertaining and patriotic. We hope to see you among those in attendance this year as we once again rekindle the spirit of the American Founding era. Please refer to the insert for more information.

_Dianne Gilbert—Chairman

1. A History of the Supreme Court, Bernard Schwartz, p. 68.
2. Ibid, p. 45. emphasis added.
3. Liberty, Order and Justice – James McClellan, p.498.
4. The Real Thomas Jefferson, p.. 497; Bergh 15:449 (1823)
5. A History of the Supreme Court, Bernard Schwartz,p. 68.
6. Quoted in The Making of America, W. Cleon Skousen, p. 579; The Real Thomas Jefferson, National Center for Constitutional Studies, Inc., p. 502 – Autobiography, Bergh 1:120.
7. Virginia Ratification Convention, June 10, 1788.
8. Marbury v Madison, 1 Cranch, 137 (1803).
9. 1798 Kentucky Resolutions, Bergh 17:380; The Real Thomas Jefferson, p. 382.
10. The Real Thomas Jefferson, pgs 497-98; Ford 9:517 (1815).
11. A History of the Supreme Court, Bernard Schwartz, p. 67; Marshall, letter headed "Washington, November 27, 1800," no addressee, Marshall Papers, Library of Congress.
12. Declaration to Story, quoted p. 67, A History of the Supreme Court, Schwartz.
13. Justices, Presidents and Senators, Henry J. Abraham p 61.
14. Letter to George Wythe, Real Thomas Jefferson; p 499; Bergh 4:258 1776.
15. To Justice William Johnson; A History of the Supreme Court, Bernard Schwartz p 64.
16. Bergh 11:50, p 277; quoted Making of America, W. Cleon Skousen, p. 574.
17. The Real Thomas Jefferson, Pg. 639; Ford 10:160 (1820).
18. Ibid, Thomas Jefferson to John Dickinson (6 Mar 1801), p. 213; Bergh 10:217.
19. A History of the Supreme Court, Bernard Schwartz, p 41; Dred Scott v. Sanford, 19 How. 393 (U.S. 1857; "It is true that a section of the Judiciary Act was declared unconstitutional in Hodgson v. Bowerbank, 5 Cranch 303 (U.S. 1800). But the opinion there was essentially unreasoned, attracted no notice at the time, and has been virtually ignored by commentators.
20. The Real Thomas Jefferson, pgs. 536-537; Bergh 11:213 (1807).
21. Basics of American Government - Carson p. 281; "The Supreme Court in United States History, Vol I, pgs 228-29; emphasis added.
22. Ibid.
23. Quoted: History of the Supreme Court; B. Schwartz, p. 67; Library of Congress, The Marshall Papers, To Samuel Chase, Jan. 23, 1804.
24. Woodrow Wilson, History of the American People, Vol.3, p.185; 2
25. A History of the Supreme Court, Bernard Schwartz. P. 57
26. The Real Thomas Jefferson, National Center for Constitutional Studies, Inc., p. 639; Bergh 15:541 (1823).
27. Liberty, Order and Justice – James McClellan, p 337.
28. Christianity and The Constitution: The Faith of Our Founding Fathers, John Eidsmoe, p 385.
29. A History of the Supreme Court, Bernard Schwartz, p 30.
30. Basics of American Government, Clarence Carson, pgs 266-67;

Constitutional Minute

_Donald Conkey

"The God-given right to govern is vested in the sovereign authority of the whole people."

Happy Birthday America - 228 years old.