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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 initio versus that which simply came first, ab initio. Dr. Allen argues that the ab initio 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.museu.org. Reprinted and edited with permission.)

Philadelphia 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 Revolutionary War was not yet over.1 When Rush emphasized at the end of his essay, “The Revolution is not over!” (H)[1] he meant then that the specific intent or design of the revolution remained to be accomplished. That perspective or attitude toward the Revolution 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 revolution against the present forms and prospects of American life—is easily the most interesting and important question in the entire original intent debate. [Endnote 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.

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 ascribed or derived, which permits the authorial stance. The “iframed proposition” 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… 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 as it was understood by the ratifiers is the only correct interpretation.”2

Original intent is the only correct approach thereby of discerning its necessity.

William B. Allen differentiates between original intent based upon long running tradition and principle, ab initio versus that which simply came first. ab initio. Dr. Allen argues that the ab initio 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.museu.org. Reprinted and edited with permission.

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

(Continued on page 4 - Dr. W.B. Allen)
John Marshall 1755–1835

John Marshall was born on September 24, 1755, the eldest 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 few in national affairs which made it the duty of a citizen to forego his private interest [for] the public interest...that the last 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 from the completion of this tour of public duty, Marshall returned to Richmond to once again take up the practice of private law.

**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.”

That said, Marshall is justifiably credited with elevating an otherwise moribund court to the level of the other two branches. “His power of reason, opulence 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 per curiam 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, they would not support many of his 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.”

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 duty were stymied under the watchful eyes of successive Jeffersonian and Jacksonian administrations that followed a policy of strict construction.

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.
5. Marbury v Madison (1803), 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.”

**Landmark Decisions**

**Chronology: Life Achievements:**

1. 1775: Birth, the eldest of 15 children
2. 1775 - 1781: Soldier in Revolution
3. 1782-1784: Served on VA Executive Council
4. 1782-1788: A Burgess
5. 1788: Delegate to Virginia Ratification Convention
6. 1797-1798: Commissioner to France (XYZ Affair)
7. 1799: Elected to Congress
8. 1800: Appointed Secretary of State under John Adams
9. 1803-1835: Chief Justice United States Supreme Court
10. 1835: Died

**Landmark Decisions**

1. Marbury v Madison (1803), said to have established the doctrine of judicial review.
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John Marshall revered the Constitution. He believed that the American people were one; he believed in Constitutional Supervision. 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 Supervision should give way to Judicial Supervision as is practiced today.
But, "that gloomy malignity," 17 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...as it may be a check upon both, as both should be checks upon the judiciary." 18

**II Will or Fear of Considation**

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]f truth, there is no danger I apprehend so much as the consolidation of our government by the nuisance and therefore unaccountability of the Supreme Court." 19

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." 20

**Guarding the Guardians**

To Jefferson that "subtle corps of sappers and miners" would prove to be the "gern of dissolution of the federal government." Once comfortable in their power, they would work day and night "to undermine the foundations of our confederated republic." 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..." 21

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! 22

**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 Federalists reign of terror: "The storm through which we have passed has been tremendous indeed. The taunts of our enemy 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 in her republican tack, and she will now show by the beauty of her manner the skill of her builders. A just and sound republican government maintained here will be a standing monument and example for the aim and imitation of the people of other countries." 23

With that, Jefferson put Chief Justice John Marshall on notice that he was hardly disposed to impose his will on the executive or legislative branches. 24

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 capriciousness of the case, although they then went on to say what would have been their opinion had they had cognizance of it. This...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 no 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." 25

**Political Will Revisited**

Jefferson's administration meant business and as part of that business the Democratic-Republicans meant to restore legislative supremacy. A second Court confrontation involving portions of the 1802 Democratic-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 arrest them for the abuse of their authority at the proper tribunal...judicial supremacy may be made to bow before the acknowledged authority of the Legislative authority. We shall discover who is master of the ship. Whether men appointed for life or the
Original Intent

(Continued from page 1 - Dr. W.B. Allen)

ment to execute. The power of the Court, repos-
ing 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 di-
rectly constrained by any ordinary institutional considerations. This seems to have been the im-
portant point of argument in Marshall’s original elaboration of the notion of judicial review, (Emphasis added) which suggests that the Chief Justice also laid out the limits of the power.

By the Constitution of the United States, the President is invent with certain significant political powers; in the exer-
cise of which he is to use his own discretion, and is account-
able only to his country in his political character...The sub-
jects are political. They respect the nation’s, not individual rights... the decision of the executive is conclusive... where the heads of departments are the political or confi-
dential 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 politi-
cally accountable.”

Marshall’s account of judicial review de-
scribes it as law bound, subject to the Constitu-
tion. He notes the perils of a “cavea blanche constitutional” approach to the latter 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... to decide on the rights of individuals,” which is not to say “injuries.” Thus, when it came to the question of original intent Marshall could affirm rather than devise a different view than pre-
vails today:

“...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 their future government, such principles as in their opinion, could affirm rather a different view than pre-
came to the question of original intent Marshall.

Revolution Undermining & Principals

The consequence of taking this distinction se-
riously will be to undermine the prevailing un-
derstanding of this particular question, one that has been much on the minds of many people in recent years and part of an academic de-
bate in the legal community stretching back at least thirty years. In discussing the interpreta-
tion of the Constitution, we are forced to choose whether we wish to discuss the spec-
cific and limited role assigned to the Court or the broader question of the structure and op-
eration 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. Chaudha... By insisting on a rigorous interpre-
tation 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 cen-
tury instance the Court acknowledged dimen-
sions of governmental power beyond its reach.

Beware Specious Innovations

In Chaudha, form outweighed substance, meaning therefore that substantive decisions
remained to be made in forums and in a man-
ner 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 Madi-
son to his defense, but not Madison’s most explicit statement on the question:

“I am not aware that my belief, not to say knowledge, of the views of those who opposed 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 law, may be exposed to an equal one in their anxiety to find in its true author-
ity for a particular measure of great apparent utility.”

Serious danger seems to be threatened to the genuine sense of the Constitution, not only by an unmentionable longitude 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 Con-
gress, and been signed by the Executive at a midnight hour, in the midst of a group scarcely admitting personal, and under a wariness of mind as little admitting a vigilant at-
tention.

Another, and perhaps a greater danger, is to be appre-
hended from the influence which the usefulness and popu-
larly of measures may have on questions of their constitu-
tiality. (Emphasis added) Madison’s view, as in the Chaudha opin-
ion, then, the key to constitutional jurispru-
dence is a careful segregation of legislative intent and constitutional intent, the former being the last, 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 in-
tent have inverted the argument, for they be-
hold a Court which is able to hold the govern-
ment’s feet to the fire of constitutional structure not by virtue of its own subordinate role but rather by virtue of its superordinate judg-
ment.

The clearest example of this inversion ap-
pears in the writings of Judge Robert Bork, who reasons that it is sufficient for jurists to begin with a “premise” rooted in the Constitu-
tion in order to fulfill the function of preserv-
ing 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 we know it now 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 tyr-
anny 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 constitutional 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?”

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
“What’s Wrong With Socialism?”
By NH Representative Dan Itse

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 rebuff 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 Annias 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 re- paired, 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 Chris- tians) sold their possessions and goods and di- vided them among them all as anyone had need. But, the phrase “from 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 quickly abandoned that experiment, and of charity. There is no virtue in giving what you did not earn. For those of you who ascribe to Christian- ity, Jesus directed us to love our neighbor as ourselves. 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 of all we seek liberty? I often wonder whether 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 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 which has never been, and which may never be; nay, which will never 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 aspira- tions 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)

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 activ- ist judges will inform everyone what it is the legislators really meant, or what the Constitution really says.

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in fact the case. Judge Bork attributes to the United States Constitution attributes which Madison specifically attributed only to sys-
tems 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 ex-
tended republic (representative democracy). Majority ties not only are not allowed to rule in the latter “simply because they are majoritarians,” 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 if the people.”

Thus, the arrangement which Madison de-
fended 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 solu-
tion to the Madisonian problem—namely, the exclusion of 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 argu-
ment which Justice Thurgood Marshall of-fered in Hawaii in May of 1987: “...the government they [the Framers] devised was defec-
tive from the start, requiring several amendments, a civil war, and momentous social transformation to attain the...”

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 constitu-
tional interpretation must demonstrate that it has the ca-
pacity 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 inter-
pret 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 it dead and gone,” in Justice Brennan’s words, they cast off their constitu-
tional robes and stand nakedly before us, as-
serting 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. 18 And Justice [Thurgood] Marshall made the point clear in his 1976 Bakke opinion. 17 [In discussing the earth shaking 1973 abortion de-
cision, 18 Powell declared “there’s nothing in the Court opinions to make a deci-
sion because, as Powell expressed it “the liberty to make certain highly personal decisions [is] terribly im-
portant to people.” Similarly, the Court says what the Constitution means, according to Powell, without relying on the intent of either Con-
gress 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 con-
side whether they would accept a Supreme Court decision declaring slavery lawful throughout the United States, he meant for them to remem-
ber 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 deci-
sion how far they are willing to permit the Court to go. In the Saffree decision on school prayer in Alabama, 19 the Court went so far as to mandate gov-
ernmental neutrality between religion and irreligion. It is in-
relevant whether it were dicta or law, in these premises, for in doing so they did more than merely to depart from the un-
derstanding of the founders’ 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 Foun-
ders intended two hundred years ago. The more serious question, however, is what the American citizens of the founding era in-
tended, 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 Constitu-
tion was intended as it stood to accommodate the needs of changing circumstances. By changing the Constitution we only make our-
sons more vulnerable to changing circum-
stances. As drafted the Constitution was in-
tended to convey power sufficient to cope with transient problems without changing con-
stitutional fundamentals. The theory was that thus Americans would remain free; whereas in other states people change their consti-
tutions as they change their under garments. By Bren-
nan’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 con-
ceded “requires a much modified view of the proper rela-
tionship 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 autonomies of that very majoritarian process.” Brennan, like Judge Bork, believes that the Founders intended to create a simply majori-
tarian political order. Judging such an order unwise, he assumes the power and authority to...
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 pro-
tect 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 lev-
eled against... the highest prerogative of power... the body of the people, operating by the majority against the minor-
ity.” 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 oper-
ates outside the so-called majoritarian proc-
es.

Educating to a Standard of...Ab Principio

Madison reminded us that what he had already said in defending the Constitution earlier, that the “rights of individuals, or of the minor-
ity, will be little danger from” the government it-
self. The beauty of this design was precisely that it made a government which did not have to create special categories of citizenship, di-
viding 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 vi-
sion of the Founding, Americans would be forced to make the Court do again what Mad-
sion originally depended on it to do, “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 - leg-
islation with which it merely happens to dis-
agree.

Laying out the problem thus prepares us at last for the necessary conclusion. A knowl-
edge 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 by the Court but the legal system entire.

Judicial deference is based, not on relative fact finding by the Court but the legal system entire: that could perhaps re-
store 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 defer-
ence, on the one hand, or a righteous legisla-
tive 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 it-
self. 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 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) malady,” counsels us to pursue other means. This consideration brings us nearer to the relevance of the idea of self-
government in this discussion. Justice Bren-
nan repeats no other phrase with such fre-
compactness as he repeats, without apparently un-
derstanding, “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 as-
sertion of its claims over and against the institutions of the government, including the Court. That, in turn, will call upon the purely political as opposed to a legal speech. This more than anything else could convey to us the im-
jurys possible irony of seeking sal-
vation in the Courts...
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 agents.” 

History has proven Jefferson’s concerns to be well founded: “[T]he Chief Justice of Chief Justice Marshall became Chief Justice in 1802, [the judiciary] has tended to be much more assertive of its powers than the Framers had expected.” And, just as Jefferson feared, these “daydreamers in judicial robes,” “these activist judges have led the nation away from constitutional supremacy, as the Constitution arrangements 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 in his name in choosing to make his 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” 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 ‘dictum’ could go. And, given the undue influence and power exercised by the Supreme Court today, it is safe to say, did Jefferson’s name in choosing to make his spokesperson?

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 Review, 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.

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 to be their responsibility to educate the public about 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 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 you will join us to commemorate this year as we once again rekindle the spirit of the American Founding. Please refer to the insert for more information.

Jefferson Prevails Over Marshall

Jefferson viewed the court as the ultimate arbiter of constitutional rights according to the wisdom of the American republic.

To the great democrat, control of the validity of legislation is a “misnomer.” In 1802, the Supreme Court ruled that the Constitution gives this ultimate authority.

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to remove Associate Justice Samuel Chase. 

Blasphemy; then, in 1804 an attempt was made to remove Associate Justice Samuel Chase.

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 outstanding from the bench. The record also shows that: “The Senate would not act merely for opinions held, and the courts were safe.” Mr. Jefferson had proved no muster; after all, an amiable and attractive gentleman, graceful in conversation, and apparently honest in his desire to serve the whole country, in spite of what was said against him.

The Federalist... 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 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.” 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 outstanding from the bench. The record also shows that: “The Senate would not act merely for opinions held, and the courts were safe.” Mr. Jefferson had proved no muster; after all, an amiable and attractive gentleman, graceful in conversation, and apparently honest in his desire to serve the whole country, in spite of what was said against him.

The Final Keepers... We The People

Nevar, 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 agents.” History has proven Jefferson’s concerns to be well founded: “[T]he Chief Justice of Chief Justice Marshall became Chief Justice in 1802, [the judiciary] has tended to be much more assertive of its powers than the Framers had expected.” And, just as Jefferson feared, these “daydreamers in judicial robes,” “these activist judges have led the nation away from constitutional supremacy, as the Constitution arrangements 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 in his name in choosing to make his spokesperson.

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