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# The Tradition of Interpretavism In Constitutional Interpretation

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# BOOK REVIEW

## THE TRADITION OF INTERPRETAVISM IN CONSTITUTIONAL INTERPRETATION

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*The Rise of Modern Judicial Review: From Constitutional Interpretation to Judge-Made Law*, by Christopher Wolfe. New York, N.Y.: Basic Books, Inc., 1986. Pp. 356.

In 1977, Raoul Berger published *Government by Judiciary*,[1] an extended analysis of the Supreme Court's modern approach to judicial review and, in particular, its interpretation of the fourteenth amendment. It was Berger's thesis that the Due Process and Equal Protection Clauses had been interpreted by the Supreme Court in disregard of the original legislative intent of the fourteenth amendment and that the modern Supreme Court, in general, had formulated a mode of judicial review that was guided not by any faithful interpretation of the Framers' intent but by the Justices' notions of good public policy.[2] Berger's thesis had considerable force, as evidenced by the strong and widespread reaction it sparked in many judges and academics[3] and by the concessions it evoked from commentators and

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1. R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977).

2. *See generally* R. BERGER, *supra* note 1, at 3. *See also* R. BERGER, DEATH PENALTIES: THE SUPREME COURT'S OBSTACLE COURSE (1982).

3. *See, e.g.*, McAfee, *Berger v. The Supreme Court — The Implications of His Exceptions-Clause Odyssey*, 9 U. DAYTON L. REV. 219 (1984); Dimond, *Strict Construction and Judicial Review of Racial Discrimination under the Equal Protection Clause: Meeting Raoul Berger On Interpretavist Grounds*, 80 MICH. L. REV. 462 (1982); Soifer, *Protecting Civil Rights: A Critique of Raoul Berger's History*, 54 N.Y.U. L. REV. 651 (1979); Symposium, 6 HASTINGS CONST. L.Q. 403-635 (1979); Nathanson, Book Review, 56 TEX. L. REV. 579 (1978); Alfange, *On Judicial Policymaking and Constitutional Change: Another Look at the "Original Intent" Theory of Constitutional Interpretation*, 5 HASTINGS CONST. L.Q. 603 (1978); Lynch, Book Review, 63 CORNELL L. REV. 1091 (1978); Murphy, Book Review, 87 YALE L.J. 1752 (1978); Monaghan, *The Constitution Goes to Harvard*, 13 HARV. C.R.-C.L. L. REV. 117 (1978); Perry, Book Review, 78 COL. L. REV. 685 (1978); Kay, Book Review, 10 CONN. L. REV. 801 (1978); Kommers, Book Review, 40 REV. OF POL. 409 (1978); Cover,

critics that Berger had proved his case.[4]

Almost by itself, *Government by Judiciary* spawned an ongoing reexamination of the function and legitimacy of the Supreme Court's modern approach to judicial review.[5] The two primary conceptions of judicial review that have occupied the field in this debate were labeled "interpretavism" and "noninterpretavism" by Dean John Hart Ely.[6] Interpretavism posits that constitutional interpretation, in order to have political and moral legitimacy in a democratic republic with a written constitution founded on majority rule and the rule of law, must take as its guidepost the faithful application of the original legislative intent of the Constitution or its amendments, because the constitutional provisions are established by the representatives of, and ratified by, the people.[7] Noninterpretavism, on the other hand, maintains that the original purpose (intent) of constitutional provisions is not binding on the Supreme Court and that the Justices may adopt a number of different approaches to constitutional interpretation, as long as that interpretation advances certain notions of moral philosophy — for example, equality, democracy, liberty, human dignity, minority rights, or political representation.[8] If this description of noninterpretavism seems vague, it is because noninterpretavism is identifiable more by its rejection of the original intent of the Constitution as a binding rule of law than by any quantifiable content. While noninterpretavists agree in rejecting interpretavism, they widely disagree among themselves as to the proper, alternative approach to constitutional interpretation.[9]

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Book Review, NEW REPUBLIC, Jan. 14, 1978, at 26; Pangle, Book Review, 50 PUB. INT. 157 (1978).

4. *See, e.g.*, Tushnet, *Following the Rule Laid Down: A Critique of Interpretavism and Neutral Principles*, 96 HARV. L. REV. 781, 800 (1983); Perry, *Interpretavism, Freedom of Expression & Equal Protection*, 42 OHIO ST. L.J. 261, 285 n.100 (1981); Alexander, *Modern Equal Protection Theories: A Metatheoretical Taxonomy & Critique*, 42 OHIO ST. L.J. 3, 4 (1981); Gangi, *Judicial Expansionism: An Evaluation of the Ongoing Debate*, 8 OHIO N.U.L. REV. 1 (1981); Bridwell, *The Scope of Judicial Review: A Dirge for the Theories of Majority Rule?*, 31 S.C.L. REV. 617 (1980); Perry, Book Review, 78 COL. L. REV. 685, 694 (1978); Nathanson, Book Review, 56 TEX. L. REV. 579, 581 (1978).

5. It may be impossible to attribute the initiation of the ongoing debate entirely to Berger, but one measure of his impact may be seen in the Symposium devoted by the Hastings Constitutional Law Quarterly to Berger's GOVERNMENT BY JUDICIARY. *See* Symposium, 6 HASTINGS CONST. L.Q. 403 (1979). *See also* Gangi, *supra* note 4, at 1.

6. *See* J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 1 (1980); Bork, *The Struggle Over the Role of Court*, NATIONAL REVIEW, Sept. 17, 1982, at 1137. Thomas Grey, however, thinks that he may have first penned the labels. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 1 n.1 (1984).

7. *See* J. ELY, *supra* note 6, at 1.

8. *Id.*

9. *See, e.g.*, Bork, *Styles in Constitutional Theory*, 26 S. TEX. L.J. 383, 386-87 (1985) ("The groves of legal academe are thick with young philosophers who propose various systems of morality that judges must use to create new constitutional rights."); Brest, *Who Decides?*, 58 S. CAL. L. REV. 661 (1985); McArthur, *Abandoning the Constitution: The New Wave in*

The noninterpretavists have formulated many attacks against interpretavism. For example, noninterpretavists deny that the Framers' intent is discernable.[10] They deny that the Framers themselves envisioned a constitutional interpretation that adheres to the original legislative intent.[11] Some assert that the Framers formulated constitutional provisions in an "open ended" manner, in order for future judges to apply the Constitution according to evolving principles of morality or political philosophy.[12] Others assert that interpretavism requires judges to be amoral or nihilistic.[13] Some contend that interpretavism would foster a rigid, sterile Constitution that becomes obsolete and unresponsive to change in society.[14]

Although interpretavists, including Berger, have demonstrated with considerable support, that individual Supreme Court decisions contravene the Framers' intent,[15] until recently none has endeavored to comprehen-

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*Constitutional Theory*, 59 TUL. L. REV. 280, 305 (1984); Davis, *Judicial Review and the Constitution — The Text and Beyond*, 8 U. DAYTON L. REV. 443 (1983); Maltz, *Murder in the Cathedral — The Supreme Court as Moral Prophet*, 8 U. DAYTON L. REV. 623 (1983); Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1065, 1067, 1089 (1981).

10. *See, e.g.*, Address by Justice William Brennan, Text and Teaching Symposium, Georgetown University (Oct. 12, 1985).

11. *See, e.g.*, Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

12. *See, e.g.*, J. ELY, *supra* note 6, at 19.

13. *See, e.g.*, S. MACEDO, THE NEW RIGHT V. THE CONSTITUTION (1986); Barber, *The New Right Assault on Moral Inquiry in Constitutional Law*, 54 GEO. WASH. L. REV. 253 (1986). The exact opposite — that noninterpretavism leads to constitutional nihilism — seems to be true, however. *See* Bork, *Styles in Constitutional Theory*, 26 S. TEX. L.J. 383, 387 (1985).

14. *See, e.g.*, Brennan, *supra* note 10; Peebles, *A Call to High Debate: The Organic Constitution in Its Formative Era, 1890-1920*, 52 U. COLO. L. REV. 49 (1980).

15. *See generally* Berger, *Some Reflections on Interpretivism*, 55 GEO. WASH. L. REV. 1 (1986); Berger, *"Original Intention" in Historical Perspective*, 54 GEO. WASH. L. REV. 296 (1986); Berger, *McAfee v. Berger: A Youthful Debunker's Rampage*, 22 WILLAMETTE L. REV. 1 (1986); Berger, *New Theories of "Interpretation": The Activist Flight from the Constitution*, 47 OHIO ST. L.J. 1 (1986); Berger, *G. Edward White's Apology for Judicial Activism*, 63 TEX. L. REV. 367 (1984); Berger, *Lawyering v. Philosophizing: Facts or Fancies*, 9 U. DAYTON L. REV. 171 (1984); Berger, *Death Penalties and Hugo Bedau: A Crusading Philosopher Goes Overboard*, 45 OHIO ST. L.J. 863 (1984); Berger, *Mark Tushnet's Critique of Interpretavism*, 51 GEO. WASH. L. REV. 532 (1983); Berger, *A Study of Youthful Omniscience: Gerald Lynch on Judicial Review*, 36 ARK. L. REV. 215 (1982); Berger, *Ely's "Theory of Judicial Review,"* 42 OHIO ST. L.J. 87 (1981); Berger, *Paul Brest's Brief for an Imperial Judiciary*, 40 MD. L. REV. 1 (1981); Berger, *Incorporation of the Bill of Rights in the Fourteenth Amendment: A Nine Lived Cat*, 42 OHIO ST. L.J. 435 (1981); Berger, *Soifer to the Rescue of History*, 32 S.C.L. REV. 427 (1981); Berger, *"Government By Judiciary": Judge Gibbons' Argument Ad Hominem*, 59 B.U.L. REV. 783 (1979); Berger, *Government By Judiciary: John Hart Ely's "Invitation,"* 54 IND. L.J. 277 (1979); Berger, *The Scope of Judicial Review: An Ongoing Debate*, 6 HASTINGS CONST. L.Q. 527 (1979); Berger, *The Scope of Judicial Review and Walter Murphy*, 1979 WIS. L. REV. 341 (1979); Berger, *Government By Judiciary: Some Countercriticism*, 56 TEX. L. REV. 1125 (1978).

sively define interpretavism itself, explain its historical validity, its mode of reasoning, or its application to the Constitution. Although it is possible to glean a body of interpretavist principles by studying Supreme Court opinions from the 1790 to the 1986 Term,[16] it is necessary to go back 150 years to Joseph Story's *Commentaries on the Constitution*[17] in order to find a comprehensive treatise on an interpretavist application of the Constitution.[18]

The gap has been partially filled by Christopher Wolfe, Associate Professor of Political Science at Marquette University, in his recent book, *The Rise of Modern Judicial Review*.[19] Wolfe sets out to describe what he sees as "the transformation of constitutional interpretation and judicial power in America,"[20] and he intentionally confines his book to a description, rather than an explicit approval or disapproval, of that transformation. His stated purpose is to establish "a better framework" for the continuing debate about the nature and scope for judicial review. Wolfe endeavors to "make the Founders' views . . . better understood, so that they can be taken seriously."[21]

*The Rise of Modern Judicial Review* begins with an indepth description of the traditional principles and practice of judicial review, as evidenced in the legal culture of the Founding Era, *The Federalist*, and the opinions of the Marshall and Taney Courts. Wolfe calls this period, from 1789-1890, the "Traditional Era." The second part is an analysis of the period in Supreme Court history from the late 19th century to the "constitutional revolution" of 1937, a period which saw the rise of substantive due process, which was primarily limited to economic cases. Here, Wolfe concentrates on the development of constitutional doctrine in due process, commerce, and freedom of speech. Wolfe calls this the "Transitional Era." The third part focuses on the modern use of substantive due process that arose in the Transitional Era. Substantive due process, in conjunction with chang-

16. *See, e.g.*, Liquor Corp. v. Duffy, 107 S. Ct. 720, 730 (1987) (O'Connor, J., dissenting); Tashjian v. Republican Party of Connecticut, 107 S. Ct. 544, 557 (1986) (Stevens, J., dissenting); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 678 (1966) (Black, J., dissenting); Hostetter v. Idelwild Bon Voyage Liquor Corp., 377 U.S. 324, 338 (1964) (Black, J., dissenting); Ware v. Hylton, 3 U.S. (3 Dall.) 199, 239 (1796).

17. 1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 400, at 295 (1873 ed.).

18. *But see* J. MCCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION (1971). Berger has more recently attempted to explain interpretavism itself, its origins and principles. *See* R. BERGER, FEDERALISM: THE FRAMERS' DESIGN (1987) (Appendix); Berger, *Some Reflections on Interpretivism*, 55 GEO. WASH. L. REV. 1 (1986); Berger, *"Original Intention" in Historical Perspective*, 54 GEO. WASH. L. REV. 296 (1986).

19. C. WOLFE, THE RISE OF MODERN JUDICIAL REVIEW: FROM CONSTITUTIONAL INTERPRETATION TO JUDGE-MADE LAW (1986).

20. *Id.* at ix.

21. *Id.* at ix-x.

ing notions of the Constitution and the judicial function, established the basis for a fundamental revision in the theory and practice of judicial review. Wolfe calls this the "Modern Era." Finally, Wolfe concludes by summarizing the three eras he describes and by briefly analyzing alternative noninterpretavist theories of judicial review recently formulated by John Hart Ely,[22] Ronald Dworkin,[23] and Jesse Choper.[24] In all, Wolfe analyzes these eras in Supreme Court history — the decisions and doctrines — with considerable skill, understanding, and wisdom.

Surely one of the great merits of *The Rise of Modern Judicial Review* is the first section on the Traditional Era in constitutional interpretation. As Wolfe says, "the first step in recognizing the radical character of modern judicial review is to recognize that there once was a very different form of judicial review in the United States."[25] This section, which describes the mode of constitutional interpretation inherited from the Founding Era and followed by the early Supreme Court, is unprecedented in the legal literature and is well worth the publication of the book alone.

Wolfe explains that the founding generation and the early Supreme Court applied familiar rules of legal interpretation, inherited from the English legal tradition, to the new, federal constitution. The basic rule of construction of written instruments in the Founding Era was that the interpreter must seek to discern and apply the intent of the framers, drafters, or author of the document. Wolfe shows that the task of discerning and applying the intent of the document is undertaken through a set of complex rules of construction that have evolved over the course of the common law. The basic rule is that the plain language used by the authors in the document is the most authoritative guide to the authors' intention and thus controls the meaning of the document, absent a defect in the language. If the plain language is defective (e.g., ambiguous), the interpreter may consult various *intrinsic* aids, which include the context or subject matter, or *extrinsic* aids, which include the purpose for which the provision was adopted, the legislative history, or contemporaneous expositions on the meaning. Actually, legislative history may be seen as merely one type of contemporaneous exposition. The importance of each rule of interpretation is ranked by the degree of authority that may be assigned to each type of evidence of the legislative intent. Thus, the first rule of construction is to consult the plain language because it is primarily through the use of certain language that legislators, framers, and ratifiers convey their purpose in creating the law, and in fact, the language is generally the most reliable evidence. Likewise, intrinsic evi-

22. J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

23. R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

24. J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS — A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT (1980).

25. C. WOLFE, *supra* note 19, at 14.

dence is more reliable than extrinsic evidence.

Wolfe explains that the application of the rules of interpretation had "a common purpose agreed upon by all, namely, ascertaining the will of the legislator."[26] The application of the rules "should be done with a view to the evident intent of those who framed it."[27] All the rules of interpretation, in effect, reflect different evidence of legislative intent. Since the legislative body drafts and enacts the law, that intention may be referred to as the intention "of the Legislature," "of the legislators," or "of the Framers." The early Supreme Court repeatedly referred to the intent of "the Framers" or "of the Convention."[28] In all cases, however, the task is to discern the legislative purpose of the law, because the legislature represents the people in the lawmaking branch of government. Likewise, the delegates represented the people in the Constitutional Convention and in the state ratifying conventions. The rules of interpretation are only the means to that end. In other words, the end of interpretation is to discern and apply the intention of the law, and the rules of interpretation are the time-honored means to that end.

If Wolfe's analysis of the colonial and English heritage is abbreviated, as one review has contended,[29] it is nevertheless accurate. Wolfe primarily relies upon Blackstone for his description of legal interpretation at common law. But his argument that the purpose of interpretation was to discern and apply the intent of the makers of the law, and that this was achieved through the application of a hierarchy of rules, is supported by a large body of scholarship.[30]

In any case, as Professor Wolfe convincingly demonstrates, these rules of interpretation were followed by Hamilton, Madison, and Jefferson in their debate on the constitutionality of the National Bank in the 1790s.[31] In arguing against the Bank, Madison contended that, in interpreting the Constitution, "in controverted cases, the meaning of the parties to the instrument, if it be collected by reasonable evidence, is a proper guide. Contem-

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26. *Id.* at 17-18.

27. *Id.* at 24.

28. *See, e.g.*, Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 721 (1838); Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 250 (1833); Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 203 (1819); Ware v. Hylton, 3 U.S. (3 Dall.) 199, 239 (1796).

29. *See* Powell, Book Review, 65 TEX. L. REV. 859 (1987).

30. *See, e.g.*, R. BERGER, *supra* note 1, at 363-72; R. BERGER, FEDERALISM: THE FOUNDERS' DESIGN (1987) (Appendix); 1 J. GOEBEL, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801 128 (1971); Berger, *Some Reflections on Interpretivism*, 55 GEO. WASH. L. REV. 1 (1986); Berger, *"Original Intention" in Historical Perspective*, 54 GEO. WASH. L. REV. 296 (1986); Corwin, *The "Higher Law" Background of American Constitutional Law* (pts. 1 & 2), 42 HARV. L. REV. 149 (1928), 42 HARV. L. REV. 365 (1928).

31. C. WOLFE, *supra* note 19, at 25-37.

porary and concurrent expositions are a reasonable evidence of the meaning of parties."[32] Madison held that, in controverted cases, resort could be had to the debates of the federal convention and to "the statements of those who defended the Constitution in public debate and in the state ratifying conventions."[33] Madison concluded that the bank was unconstitutional, as evidenced "by expositions of friends of the Constitution while depending before the public . . . by the apparent intention of the parties which ratified the instrument."[34] As an example of extrinsic aids, Madison cited the Journal of the Convention in the debate over the Bank. Hamilton cited the Journal in the debate over the Jay Treaty. Jefferson, in arguing against the Bank, looked to the ordinary meaning of the Necessary and Proper Clause and narrowly interpreted "necessary." Jefferson contended that a narrow interpretation was intended by the Constitution. Hamilton argued in favor of the Bank. He also looked to the ordinary meaning of the Necessary and Proper Clause, but argued that a broad interpretation of "necessary" was "the intent of the Convention." Hamilton accepted the rule of construction that the intent of the parties to the Constitution is the proper guide, but contended that "that intention is to be sought for in the instrument itself, according to the usual and established rules of construction."[35] In other words, discerning and applying the intention of the parties or framers is the end, and the rules of construction are the means to that end. Each of these Founders agreed upon the rules of interpretation, although in their debate they emphasized different rules and reached different results. But each based his interpretation upon a common body of principles of interpretation.

To the facile objection that the debate between Madison, Hamilton, and Jefferson proves the ambiguity of the Constitution and the worthlessness of interpretavist rules, Wolfe responds that, given the diversity in human nature and intellect, there will obviously be differences in interpretation; the rules of construction do not resolve all problems of interpretation. Interpretavists have never contented that rules of interpretation are a panacea or that they invariably lead to one clear, absolute interpretation. Wolfe acknowledges that "[i]nterpretation is obviously not a mechanical process."[36] Still, as Wolfe writes, rules nevertheless "narrow the range of differences greatly and provide a common standard for deciding issues."[37] They confine judicial power within certain limits and enforce a common starting point for individual interpretation. They thus promote stability in the law and preserve the rule of law. Most importantly, by guiding judges

32. *Id.* at 26.
33. *Id.* at 27.
34. *Id.*
35. *Id.* at 30.
36. *Id.* at 37.
37. *Id.*

to effectively apply the legislative intent, the rules preserve democratic rule by the application of the will of the people through their representatives.

One of the most important parts of Wolfe's book is his thorough and perceptive analysis of the rules of constitutional interpretation followed by the Marshall and Taney Courts. Wolfe convincingly shows that the early Supreme Court consistently applied the rules of statutory construction, inherited from English legal culture, to the interpretation of the Constitution. Wolfe seeks the answer to what may seem a simple question: what was the mode of constitutional interpretation utilized by the early Supreme Court and Chief Justice Marshall? The strength of Wolfe's analysis is based on his premise that the way to learn constitutional interpretation is to analyze in depth the decisions and process of interpretation of the Marshall and Taney Court. The body of rules established in the common law, adopted by the Founders, and followed by Hamilton, Jefferson, and Madison, were employed by the early Supreme Court.

Wolfe points out the fallacy of those who would make of Marshall a noninterpretavist by this statement, in *McCulloch v. Maryland*,[38] that "we must never forget, that it is a constitution that we are expounding."[39] As Wolfe shows, this statement is taken completely out of context if used to support a broad power in the Supreme Court to alter the Constitution's principles beyond the original legislative intent. Rather, the context of Marshall's statement is the interpretation of the Necessary and Proper Clause — whether the word "necessary" means "absolutely necessary" or, more broadly, "appropriate." In his discussion of Congress' power, Marshall reasoned that the Constitution was only intended to set forth a basic set of principles and that Congress' powers could not be listed in detail. But Congress must have "discretion to choose appropriate means to give effect to the powers granted by the Constitution."[40] By stating that "it is a constitution that we are expounding," therefore, Marshall meant to emphasize that the Necessary and Proper Clause must be interpreted broadly to allow *Congress* to effectuate the powers granted to *Congress*, since the Constitution could not set forth Congress' powers in detail. There is a fundamental difference between the Constitution's "intrinsic adaptability" by the legislative branch and its "extrinsic adaptation" by the judicial branch.[41]

Marshall followed the rules of construction by looking first to the

38. 17 U.S. (4 Wheat.) 316 (1819).

39. *Id.* at 407; C. WOLFE, *supra* note 19, at 215. It is even more incredible that this now "standard" interpretation should be foisted upon Marshall's words when Marshall himself rejected such an interpretation of *McCulloch*. *See* JOHN MARSHALL'S DEFENSE OF MCCULLOCH v. MARYLAND 91-105, 184-85 (G. Gunther ed. 1969).

40. C. WOLFE, *supra* note 19, at 41.

41. *Id.* at 215.

words themselves, the plain language. In *Brown v. Maryland*,[42] Marshall wrote that, in interpreting the Constitution, "it is proper to take a view of the literal meaning of the words to be expounded, of their connection with other words, and of the general objects [purpose, intention] to be accomplished by the prohibitory clause, or by the grant of power."[43] In *Ogden v. Saunders*, Marshall wrote:

> To say that the intention of the constitution must prevail; that this intention must be collected from its words; that its words are to be understood in that sense in which they are generally used by those for whom the instrument was intended; that its provisions are neither to be restricted into insignificance, nor extended to objects not comprehended in them, nor contemplated by its framers; is to repeat what has been already said more at large, and is all that can be necessary.[44]

To ascertain the meaning of words (like "commerce" or "necessary"), Marshall looked to the practice of the American government, prior congressional acts, approved authors, the common usage of the words, and their usage in other places in the Constitution. Likewise, in *Sturges v. Crowninshield*,[45] Marshall relied upon the basic principle that the plain langauge controls when the words are clear:

> It would be dangerous in the extreme to infer from extrinsic circumstances, that a case for which the words of an instrument expressly provide, shall be exempted from its operation . . . if in any case the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case would be so monstrous that all mankind would without hesitation, unite in rejecting the application.[46]

Marshall recognized, however, that words could be ambiguous or defective, due to the "imperfection of human language."[47] In *Dartmouth College v. Woodward*,[48] Marshall held that a case falling within the plain language of the Constitution must be controlled by that language "unless there

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42. 25 U.S. (12 Wheat.) 419 (1827).
43. C. WOLFE, *supra* note 19, at 42 (*citing Brown*, 25 U.S. (12 Wheat.) at 437).
44. *Id.* at 42 (*citing* Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 332 (1827)).
45. 17 U.S. (4 Wheat.) 122, 202 (1819).
46. C. WOLFE, *supra* note 19, at 47 (*citing Sturges*, 17 U.S. (4 Wheat.) at 202).
47. C. WOLFE, *supra* note 19, at 43 (*citing* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 189 (1824)).
48. 17 U.S. (4 Wheat.) 518, 645 (1819).

be something in the literal construction so obviously absurd, or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the constitution in making it an exception."[49] Interpretation should then be guided by *intrinsic* aids, including those "objects for which [a power] was given."[50] In construing a word, Marshall said in *McCulloch*, "the subject, the context, [and] the intention of the person using [the words], are all to be taken into view."[51] Marshall looked to the immediate context of the phrase. A phrase can be construed within the context of an article of the Constitution or within the context of the Constitution as a whole. Among the intrinsic sources to which Marshall looked was "the intention of the convention, as manifested in the whole clause."[52] Marshall appealed to intrinsic sources in giving the Necessary and Proper Clause, following Hamilton, a broad reading. He emphasized that the clause was included in the powers granted to the Government and not in the restrictions or limits placed on the Government. Moreover, the clause itself is a grant, not a restriction, of power.

Marshall resorted to *extrinsic* aids when the words were not clear, as in *Sturges*:

> [W]here words conflict with each other, where the different clauses of an instrument bear upon each other, and would be inconsistent unless the natural and common import of words be varied, construction becomes necessary, and a departure from the obvious meaning of the words is justifiable.[53]

Among the extrinsic sources that Marshall referred to was the history of the times in which the Constitution was formed.[54] For example, in confining the Bill of Rights to a restriction on the national government alone in *Barron v. Baltimore*,[55] Marshall asserted that at the time of the convention, the people were concerned with "abuses of power by the national government."[56] Note that Marshall did not inquire into whether the Bill of Rights "needed" to be applied to the states in 1833, or whether the people in 1833 were concerned about abuses of power from the states. Nor did Marshall "balance" state interests in being free of restriction by the Bill of Rights against the interests of the people in subjecting the states to the Bill of

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49. C. WOLFE, *supra* note 19, at 46 (*citing Dartmouth College*, 17 U.S. (4 Wheat.) at 645).
50. C. WOLFE, *supra* note 19, at 48 (*citing Gibbons*, 22 U.S. (9 Wheat.) at 188).
51. C. WOLFE, *supra* note 19, at 44 (*citing* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819)).
52. *Id.* at 48 (*citing McCulloch*, 17 U.S. (4 Wheat.) at 419).
53. *Id.* at 47 (*citing* Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 202 (1819)).
54. *Id.* at 49.
55. 32 U.S. (7 Pet.) 243 (1833).
56. C. WOLFE, *supra* note 19, at 49 (*citing Barron*, 32 U.S. (7 Pet.) at 250).

Rights. In *Fletcher v. Peck*,[57] in construing the Contract Clause, Marshall contended that:

> the framers of the constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the States are obviously founded in this sentiment.[58]

Marshall also relied on the extrinsic source of treatises on law and politics which were followed by the Framers for the principles established in the Constitution. In *Ogden v. Saunders*,[59] Marshall held that "we must suppose that the framers of our constitution took the same view of the subject [as these treatises] and the language they used confirms this opinion."[60]

In both cases — where the words are clear and the plain language controls, and where the words are ambiguous and intrinsic or extrinsic aids may be resorted to — the intention of the Framers is the end to be sought and those rules are only a means to that end. The rules of interpretation seek that end and the use of one rule or another is dictated, depending on the context, because circumstances indicate that one rule or another is the more reliable means to that end. In all, Wolfe shows that the Marshall and Taney Courts consistently took as their fundamental guide to constitutional interpretation the intention of the Framers.

The balance of Wolfe's book attempts to explain how judicial review in theory and practice has been fundamentally altered from the interpretavist judicial review practiced by the Marshall and Taney Courts. Wolfe suggests that the change in the practice of judicial review began in the latter part of the nineteenth century, that the change was slow, and that its growth was veiled, being confined primarily to the area of economic substantive due process. Wolfe sees the shift evolving not just in the changing American philosophy of law but in the social sciences more generally — in Woodrow Wilson's *Congressional Government*[61] and *Constitutional Government in the United States*,[62] wherein Wilson suggested that "the courts must 'make' law for their own day."[63] The shift is also apparent in J. Allen

57. 10 U.S. (6 Cranch) 87 (1810).
58. C. WOLFE, *supra* note 19, at 49 (*citing Fletcher*, 10 U.S. (6 Cranch) at 138).
59. 25 U.S. (12 Wheat.) 213 (1827).
60. C. WOLFE, *supra* note 19, at 50 (*citing Ogden*, 25 U.S. (12 Wheat.) at 353).
61. W. WILSON, CONGRESSIONAL GOVERNMENT (J. Hopkins U. Press ed. 1981).
62. W. WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES (1921).
63. C. WOLFE, *supra* note 19, at 209.

Smith's *The Spirit of American Government*,[64] Charles Beard's, *An Economic Interpretation of the Constitution of the United States*,[65] and in Vernon Parrington's *Main Currents in American Thought*.[66] These authors serve to undermine "the profound . . . respect for the founders that was characteristic of nineteenth century America."[67] Wolfe suggests that the attacks on the substance of the Constitution, and on the Founders, by Smith, Parrington, and Beard, combined with the new view of judicial interpretation developed by the devotees of legal positivism, legal realism, and sociological jurisprudence, to undermine traditional, interpretavist review.[68]

Part Three of Wolfe's book consists of an analysis of what he calls "The Modern Era" in constitutional interpretation.[69] The modern approach to constitutional interpretation, according to Wolfe, is characterized by "its tendency to seek freedom from the Constitution and that intention," and by a "[d]issatisfaction with the Constitution — either because its prescriptions are wrong, or, more often, because they do not go far enough."[70] Professor Wolfe notes that one common theme of the modern approach to judicial review is a disregard of the specific language of the Constitution in favor of an abstract generalization of its terms. The words "equal protection of the laws" in the fourteenth amendment are replaced by a notion of "equality of opportunity" or merely "equality." Thus, the fourteenth amendment does not guarantee equal protection but equality of result. Likewise, the Contract Clause does not prohibit "impairing the Obligation of Contracts," but merely "safeguards credit" or "insures economic stability."[71] The plain language is simply disregarded. As Justice Stevens recently noted in his dissent in *Tashjian v. Republican Party of Connecticut*,[72] the Qualification Clause of article I, section 2, no longer means that federal voters "shall have" the qualifications of state voters, as the plain language provides, but only that they "may but need not have" the qualifications of state voters.[73]

A related theme of modern judicial review, Wolfe argues, is that con-

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64. J. SMITH, THE SPIRIT OF AMERICAN GOVERNMENT (1911).

65. C. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913). *See also* A. BLOOM, THE CLOSING OF THE AMERICAN MIND 29 (1987). Beard's thesis has been thoroughly and severely criticized in F. MCDONALD, WE THE PEOPLE: THE ECONOMIC ORIGINS OF THE CONSTITUTION (1958), and in R. BROWN, CHARLES BEARD AND THE CONSTITUTION (1956).

66. V. PARRINGTON, MAIN CURRENTS IN AMERICAN THOUGHT (1927).

67. C. WOLFE, *supra* note 19, at 217.

68. *Id.* at 222. Wolfe's thesis is supported by evidence presented in Peebles, *supra* note 14.

69. *Id.* at 203.

70. *Id.* at 205.

71. *Id.* at 221.

72. Tashjian v. Republican Party of Connecticut, 107 S. Ct. 544 (1986) (Stevens, J., dissenting).

73. *Id.* at 557.

stitutional provisions are viewed as having no inherent, substantive content. They are treated as abstractions, or "great generalities," in Cardozo's words, "a collection of broad and rather vague principles that require judicial specification."[74] Content is to be given to the provisions by the judiciary.[75] As Wolfe says, the modern court believes that the purpose of judicial review is to "take vague constitutional generalities and give them a specific content appropriate to the time and circumstances by balancing the different considerations of social welfare involved."[76]

A third common theme that characterizes modern judicial review is the use of a balancing test in many areas of constitutional law, by which interests of different groups are balanced against each other and an accommodation is reached not by resort to the text or purpose of the constitutional provision, but by the Justices' determination of what is best for American society. Interpretation is "not so much a matter of finding the meaning of the text; it is balancing different social interests against each other and choosing what is best for society."[77] It is not the Constitution which has balanced social interests by its purposes and principles, but the judges, according to their notion of good public policy. "The fact that balancing requires a judge to decide questions of degree for which there is little constitutional guidance was one reason earlier judges had tried to avoid such questions."[78] The effect of the balancing test is to "expand[] the scope of judicial policy making" and maximize the legislative character of modern judicial review.[79]

A fourth theme that Wolfe identifies is that constitutional provisions are treated not as binding grants of or limitations on power but as "*presumptions* in favor of a policy."[80] All constitutional provisions are viewed as "essentially matters of degree."[81] The result is that, for example, the Contract Clause forbids "impairment of the obligation of contracts," unless the Court determines that it is good public policy to allow "reasonable" impairments. Or, the first amendment protects free speech, unless the Court finds good reason to allow restrictions. In this way, all distinctions between the common law (as judicial decisions in the absence of legislation) and the Constitution (as a binding rule of legislation) are eliminated. The absence

74. C. WOLFE, *supra* note 19, at 233.
75. *Id.* at 234.
76. *Id.* at 276.
77. *Id.* at 226.
78. *Id.* An intriguing parallel to Wolfe's argument can be found in R. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 29, 53, 73 (1978). There, Judge Bork describes the early years of antitrust law, when judges refused to balance interests because it "provided no discernible standards for judging."
79. C. WOLFE, *supra* note 19, at 247.
80. *Id.* at 229.
81. *Id.*

of this distinction, as Wolfe points out, is exemplified in both Holmes' writing and Cardozo's *The Nature of the Judicial Process*.[82]

Fifth, constitutional principles are not applied in their nature to new particulars as historical circumstances change, in accordance with traditional judicial review. Rather, the principles themselves are changed in their very nature. This distinction is seen in *Home Building & Loan Assoc. v. Blaisdell*.[83] The plain language of the Contract Clause prohibits "impairing the Obligation of Contracts" by the states. In *Blaisdell*, the Court conceded that the state statute impaired the contract but permitted it as a "reasonable" impairment.[84] Thus, the clause no longer prohibits impairment of the obligation of contracts, as the plain language provides, but only "unreasonable" impairments, and it is for the judiciary to decide what is "unreasonable." Since the clause incorporates no standard of "reasonable," that standard is completely divorced from the Constitution, its text or purpose, and left entirely to the discretion of the judiciary.

The Warren Court, Wolfe argues, expanded, extended, and made explicit the Court's legislative approach to judicial review. Here, Wolfe's analysis becomes abbreviated. He covers several areas of constitutional law in an effort to show that the Court molded the Constitution in its own image without regard to the designs of the Constitution. But, for the sake of brevity, he does not attempt to show what an interpretavist alternative would be. Wolfe provides a brief historical analysis to show that the Constitution's intentions were different from various Warren Court decisions, but he largely defers to previous studies for support. The result is primarily a good introduction to the Warren Court's jurisprudence.

Lastly, in light of his analysis of traditional judicial review, Wolfe examines current, noninterpretavist theories of judicial review. Wolfe fairly describes Ronald Dworkin's analysis of judicial policy-making in *Taking Rights Seriously*[85] and then critiques it. Wolfe does the same with Jesse Choper's *Judicial Review in the National Political Process*[86] and John Hart Ely's *Democracy and Distrust*.[87] In each case, Wolfe's analysis is abbreviated, although the points he makes are thoughtful and incisive. In light of these alternative theories of interpretation, Wolfe concludes by asking whether a return of the judiciary to a more limited, interpretavist approach to judicial review is realistic. He suggests that while it is not impossible (Holmes' expansive notion of judicial review would have been thought im-

82. B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921); C. WOLFE, *supra* note 19, at 232, 239.

83. 290 U.S. 398 (1934).

84. *Id.* at 438.

85. R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

86. J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980).

87. J. ELY, DEMOCRACY AND DISTRUST (1980).

possible in 1890, but won out by 1940), it would take a long time for such reform to come about. Whether such reform can be accomplished will ultimately depend on the education of the American people and their decision on the kind of judiciary they desire. The recent confirmation hearings for Robert Bork provide such a civics lesson.

As a book evidently intended for a scholarly audience, *The Rise of Modern Judicial Review* is sometimes sparse in its supporting evidence and documentation. What notes exist are placed inconveniently at the end of the book, and the reader must constantly flip back and forth from text to notes. Furthermore, since this is a book intended to contribute to an on-going, vigorous debate, Wolfe would have been well advised to mount evidence upon evidence. In addition, while *The Rise of Modern Judicial Review* is very readable, some passages are choppy, with underdeveloped ideas. Considering Wolfe's exceptional analysis elsewhere, it is disappointing that some themes were not further developed. I imagine that Wolfe's publisher did not think that an 800 page book would sell as well. And finally, some of Wolfe's points are not entirely convincing. For example, is it necessarily true that "questions of degree" are always incompatible with interpretavist review, as Wolfe seems to imply? Might not an "impairment" of the obligation of a contract, for example, sometimes involve a question of degree? At least one interpretavist, Paul Bator, has suggested that such questions are not inherently incompatible with interpretavism.[88]

These shortcomings, however, are minor in comparison with the substantial merits of *The Rise of Modern Judicial Review.* Wolfe's analysis is quite sophisticated and thoughtful. He does not simply reiterate vague phrases like "adhering to the Framers' intent," but explains in great detail what that means, how such intent is verified, and how it is applied. Wolfe describes and defines interpretavist judicial review fully and accurately, and he does so within the broader context of a thorough understanding of the political philosophy of the Founding Fathers. He concedes that there are "hard cases" in which the application of general langauge to specific circumstances may make it difficult to ascertain and apply the Framers' intent. But, at the same time, he explains why and how it is still the duty of judges to adhere as faithfully as possible to the original purpose of the Constitution. Wolfe's considerable learning in political philosophy adds a special dimension to the book that might well be absent from the same book if written by a lawyer. Writing with a wisdom gained from the knowledge of broader principles of political philosophy, Wolfe writes with a deep understanding of and appreciation for the Founder's political culture. He shows an equal understanding of the theories — the strengths and weaknesses —

88. *See* Address by Paul Bator, Federalist Society Symposium, Northwestern University (Nov. 15, 1986).

of modern noninterpretavists. Throughout the book, Wolfe demonstrates a rich and broad understanding of constitutional doctrine and cases.

In setting out to establish "a better framework" for the ongoing debate between interpretavism and noninterpretavism, Wolfe combines substantial historical evidence with learned and sober reasoning to indirectly refute the many arguments raised by noninterpretavists against interpretavism. In separating and weeding out these arguments, Wolfe isolates the fundamental issue of the debate — the comparative moral, political, and constitutional legitimacy of interpretavism and noninterpretavism. In this, Wolfe establishes the only legitimate framework for a debate that will determine the survival of American constitutionalism and the rule of law.