

# COMMENTARY

## The Constitution, the Supreme Court, and Creativity

By JEFFREY M. SHAMAN\*

[The Supreme Court is] a kind of Constitutional Convention in continuous session.

Woodrow Wilson<sup>1</sup>

We are under a Constitution, but the Constitution is what the judges say it is.

Charles Evans Hughes<sup>2</sup>

### Introduction

According to orthodox ideology, the Supreme Court's function in the constitutional process is essentially noncreative. Conventionally, it is considered highly illegitimate for the Court to "revise" or to "amend" the Constitution. It also is customarily believed to be extremely improper for the Court, when interpreting the Constitution, to engage in "judicial legislation" or "policymaking." These articles of faith are shared by several current members of the Supreme Court<sup>3</sup> as well as by a number of eminent constitutional scholars,<sup>4</sup> all of whom adamantly maintain that the Supreme Court's role is noncreative.

Acute examination of constitutional adjudication, however,

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1. E. CORWIN, *THE CONSTITUTION AND WHAT IT MEANS TODAY* 5 (14th rev. ed. H. Chase & C. Ducat 1978).

2. C. HUGHES, *ADDRESSES AND PAPERS OF CHARLES EVANS HUGHES* 139 (1908).

3. See *Hearing on Nomination of Warren E. Burger to be Chief Justice of the United States Before the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 5-7 (1969); Rehnquist, *The Notion of a Living Constitution*, 54 *TEX. L. REV.* 693 (1976).

4. See R. BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977); Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1 (1971); Kurland, *Government by Judiciary*, 2 *U. ARK. LITTLE ROCK L.J.* 307 (1979); Linde, *Judges, Critics, and the Realist Tradition*, 82 *YALE L.J.* 227 (1972); Monaghan, *Of "Liberty" and "Property"*, 62 *CORNELL L.J.* 405 (1977).

reveals a picture that differs fundamentally from the orthodox ideology. It is a picture that need not be approached apprehensively; though perhaps startling to those who have believed in the ideology, the picture is not necessarily an ugly one. It portrays reality, and the time is long overdue for a realistic understanding of the constitutional process.

### I. The Historical Foundation of Constitutional Creativity

Constitutional law is a dynamic process of creativity. Through the continual interpretation and reinterpretation of the text of the document, the Supreme Court perpetually creates new meaning for the Constitution. Although it is formally correct to state that we have a written Constitution, its words have been defined and redefined to the extent that, for the most part, we have an unwritten Constitution, the meaning of which originates in the Supreme Court.<sup>5</sup> Notwithstanding the orthodox protestation that it is illegitimate for the Court to "revise" or to "amend" the Constitution, this is in fact what the Court has always done by continually creating new constitutional meaning.

Much of the meaning that the Court creates for the Constitution derives neither from its language nor from the intention of its Framers. It has been observed that it is "a matter of unarguable historical fact" that the Court has developed a body of constitutional doctrine whose content cannot be ascertained from examining the language of the Constitution or investigating the intent of the Framers.<sup>6</sup> This has been so since the earliest days of our history. Consider, for example, *Chisholm v. Georgia*,<sup>7</sup> a 1793 case decided during the tenure of the Court's first Chief Justice, John Jay. In *Chisholm*, the Court ruled that the jurisdiction of the federal courts under the Constitution could extend to suits instituted against a state in its sovereign capacity. Given that the Constitution is silent concerning such jurisdiction, the source of the Court's decision in *Chisholm* could hardly be the language of the document. Moreover, the ruling was rendered despite the fact that "the vesting of any such jurisdiction over sovereign states had been expressly disclaimed and even resented by the great defenders of the Constitution, during the days of the contest over its adoption."<sup>8</sup> Thus,

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5. See Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975).

6. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 844 (1978); see also Grey, *supra* note 5; Miller, *The Elusive Search for Values in Constitutional Interpretation*, 6 HASTINGS CONST. L.Q. 487, 489-96 (1979); Perry, *Intpretivism, Freedom of Expression, and Equal Protection*, 42 OHIO ST. L.J. 265 (1981).

7. 2 U.S. (2 Dall.) 419 (1793).

8. 1 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 96 (rev. ed.

as early as 1793, the Supreme Court was using its own initiative to invest the Constitution with a meaning that previously could not be found in either the text or the intent of the Framers.

The meaning that the Supreme Court creates for the Constitution finds its predominant source in the personal beliefs and values of the individual justices who comprise the Court at any given time.<sup>9</sup> Deriving from neither the language nor the history of the document, a great deal of constitutional doctrine perforce has its roots in the personal convictions of the Supreme Court justices. Throughout the Court's history, the justices have employed their own beliefs and values as the foundation of their constitutional rulings.<sup>10</sup> From federal supremacy,<sup>11</sup> vested rights,<sup>12</sup> and commercial enterprise,<sup>13</sup> through racial equality,<sup>14</sup> personal autonomy,<sup>15</sup> and states' rights,<sup>16</sup> there is a long list of beliefs and values that the justices themselves have deemed to be worthy of constitutional shelter. Notwithstanding another orthodox protestation that it is improper for the Court to engage in "judicial legislation" or "policymaking," that in fact is what the Court has always done by formulating constitutional meaning based upon the personal convictions of the justices.

In the premodern period before the beginning of this century, the Court tended to effectuate the convictions of the justices beneath a

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1926). Warren also states, "[T]he right of the federal Judiciary to summon a State as defendant and to adjudicate its rights and liabilities had been the subject of deep apprehension and of active debate at the time of the adoption of the Constitution; but the existence of any such right had been disclaimed by many of the most eminent advocates of the new Federal Government, and it was largely owing to their successful dissipation of the fear of the existence of such Federal power that the Constitution was finally adopted." *Id.* at 91.

9. See Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75, 75-77; Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661, 665 (1960); Shaman, *The Rule of Reasonableness in Constitutional Adjudication: Toward the End of Irresponsible Judicial Review and the Establishment of a Viable Theory of the Equal Protection Clause*, 2 HASTINGS CONST. L.Q. 153, 161-72 (1975).

10. See note 9 *supra*.

11. See, e.g., *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

12. See, e.g., *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819); *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43 (1815); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810).

13. See, e.g., *Allgeyer v. Louisiana*, 165 U.S. 578 (1897); *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842); *Charles River Bridge v. Warren Bridge*, 36 U.S. (9 Pet.) 420 (1837).

14. See, e.g., *Hunter v. Erickson*, 393 U.S. 385 (1969); *Loving v. Virginia*, 388 U.S. 1 (1967); *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

15. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

16. See, e.g., *Trainor v. Hernandez*, 431 U.S. 434 (1977); *National League of Cities v. Usery*, 426 U.S. 833 (1976); *Younger v. Harris*, 401 U.S. 37 (1971).

cloak of natural law.<sup>17</sup> Not surprisingly, the Court was hardly immune from the heavy influence that the natural law tradition exerted upon early American legal thought.<sup>18</sup> Under this influence, the Court utilized an assortment of natural law concepts to proclaim constitutional doctrine, such as the divine ordinance,<sup>19</sup> the natural order,<sup>20</sup> the fundamental laws of government,<sup>21</sup> the lessons of history,<sup>22</sup> the norms of civilization,<sup>23</sup> the concept of ordered liberty,<sup>24</sup> and the sense of justice.<sup>25</sup> When employing these natural law concepts, the Court gave the impression that, rather than creating law, it was discovering or revealing pre-existing law. By resort to this artifice, the Court was able to constitutionalize the personal convictions held by the justices. Behind the facade of predetermination, the premodern Court constitutionalized personal values and beliefs held by the justices.

After the Civil War, the natural law tradition exerted little influence upon legal thought in this country, except in the field of constitutional law,<sup>26</sup> and even in that field its influence soon waned.<sup>27</sup> Shortly after the breakdown of the natural law tradition, the Court became more willing to shed the disguise of predetermination for its constitutional preferences. Throughout the present century, the Court typically has constitutionalized the convictions of the justices through the process of positive law,<sup>28</sup> which more openly manifests the Court's law-making function. Whether through the methodology of positive or natural law, however, the Supreme Court perennially has originated constitutional meaning that is rooted in the justices' own beliefs and values.

17. See B. WRIGHT, *AMERICAN INTERPRETATIONS OF NATURAL LAW* 330 (1931).

18. See Corwin, *The "Higher Law" Background of American Constitutional Law* (pts. 1 & 2), 42 *HARV. L. REV.* 149, 365 (1928-1929).

19. *Bradwell v. State*, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring, joined by Swayne & Field, JJ.).

20. *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896); *Bradwell v. State*, 83 U.S. (16 Wall.) 130, 141 (1872); *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43, 52 (1815).

21. *Terret v. Taylor*, 13 U.S. (9 Cranch) 43, 52 (1815).

22. *Muller v. Oregon*, 208 U.S. 412, 421 (1908); *Reynolds v. United States*, 98 U.S. 145, 164 (1878); *Bradwell v. State*, 83 U.S. (16 Wall.) 130, 141 (1872).

23. *Adamson v. California*, 332 U.S. 46, 60-68 (1947) (Frankfurter, J., concurring); *Reynolds v. United States*, 98 U.S. 145, 164 (1878).

24. *Moore v. City of E. Cleveland*, 431 U.S. 494, 537 (1977) (Stewart, J., dissenting, joined by Rehnquist, J.); *Id.* at 549 (White, J., dissenting); *Adamson v. California*, 332 U.S. 46, 54 (1947); *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

25. *Rochin v. California*, 342 U.S. 165, 169, 172-73 (1952); *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43, 50 (1815).

26. B. WRIGHT, *supra* note 17.

27. See J. ELY, *DEMOCRACY AND DISTRUST* 50-52 (1980).

28. See Grey, *supra* note 5, at 709.

The custom of finding constitutional meaning in the words of the document or in the Framers' intent, which has been referred to as "interpretivism,"<sup>29</sup> parallels the natural law tradition. First, interpretivism denies creativity in the judicial process. Second, it posits a neutral judiciary devoid of values and beliefs that finds law rather than makes it. Finally, it insists that the Supreme Court function as a disinterested medium revealing constitutional law that preexists in the language and history of the Constitution. By viewing the document's text and history as the only viable sources of constitutional meaning, interpretivism obscures the Court's creative role.

Under the guise of interpretivism, the Court frequently professes to ascertain constitutional doctrine strictly from the document's language or history, when in truth it is doing nothing of the sort.<sup>30</sup> Analysis of the written opinions of the Court often shows that its purported reliance upon the words of the Constitution or upon the Framers' intent is more pretense than reality. In the first place, the Court has faced few constitutional issues that can be definitively resolved by the text of the document. Moreover, the Court has not been above the use of forced readings of constitutional language as a means of concealing the fact that it is creating constitutional meaning from the justices' own beliefs and values. Two early instances of this technique can be observed in *Fletcher v. Peck*<sup>31</sup> and *Trustees of Dartmouth College v. Woodward*.<sup>32</sup> In *Fletcher*, the Court stretched the meaning of the contracts clause of article I to cover a state legislative grant of land. In the *Dartmouth College* case, the Court extended the meaning of the same clause to apply to a college charter granted by King George III prior to the Revolution. A more contemporary example is *United States v. Richardson*,<sup>33</sup> in which the Court held the article I requirement that "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time"<sup>34</sup> was not a specific

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29. J. ELY, *supra* note 27, at chs. 1 & 2. The term "interpretivism" is not entirely accurate to describe this school of thought, because "interpretivism" connotes creativity, whereas interpretivists deny creativity. However, since the term seems to be gaining currency, it will be used occasionally herein. A more accurate, though unwieldy, phrase is "textual-intentionalism."

30. Grey, *supra* note 5, at 706, 709. See also Alfange, *On Judicial Policymaking and Constitutional Change: Another Look at the "Original Intent" Theory of Constitutional Interpretation*, 5 HASTINGS CONST. L.Q. 603, 617 (1978); tenBroek, *Uses by the United States Supreme Court of Extrinsic Aids in Constitutional Construction*, 27 CALIF. L. REV. 399, 404 (1939).

31. 10 U.S. (6 Cranch) 87 (1810).

32. 17 U.S. (4 Wheat.) 518 (1819).

33. 418 U.S. 166 (1974).

34. U.S. CONST. art. I, § 9, cl. 7.

constitutional limitation on the congressional taxing and spending power. All three of these decisions strain the text of the Constitution so as to originate meaning for it.

There are further instances where the Court has engaged in a more complex manipulation of constitutional language to obscure judicial creativity. An illustration of this phenomenon can be seen in no less a case than *Marbury v. Madison*,<sup>35</sup> which, because it establishes the power of judicial review, is generally agreed to be the most important decision ever rendered by the Supreme Court. In *Marbury*, the Court declined to accept a grant of statutory jurisdiction on the ground that it was "repugnant to the Constitution."<sup>36</sup> Although the Court's decision purports to emanate directly from the text of the document, in truth, it does no such thing. Underlying the Court's professed reliance upon the constitutional text is a significant assumption—that the Court possesses the august authority to determine that a statute, duly enacted by Congress and approved by the President (or enacted over his veto), is nevertheless "repugnant to the Constitution."<sup>37</sup> By making this unspoken assumption, the Court was able to establish judicial review as the law of the land and thereby to direct the course of the nation's history. That judicial review is nowhere mentioned in the Constitution and finds, at best, questionable support in the Framers' intent<sup>38</sup> did not deter the Court from instituting it as a constitutional doctrine. Obtaining from neither the text of the Constitution nor its history, the power of judicial review was cut from whole cloth by the Supreme Court with the appearance that it was compelled by a plain reading of the document. The simplicity of the Court's announcement is deceptive, for judicial review is a Supreme Court creation.

Concealment of the Court's creativity also occurs under the mantle of history. The Court has been known to invent its own version of constitutional history with little or no inquiry into the actual past.<sup>39</sup> It has been observed that this practice, described as "the creation of his-

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35. 5 U.S. (1 Cranch) 137 (1803).

36. *Id.* at 176.

37. "The question," Marshall's opinion begins, "whether an act repugnant to the Constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest." Marshall's confidence that he could traverse the path ahead with ease is understandable, since he had already begged the question-in-chief, which was not whether an act repugnant to the Constitution could stand, but who should be empowered to decide that the act is repugnant." A. BICKEL, *THE LEAST DANGEROUS BRANCH* 3 (1962).

38. See Levy, *Judicial Review, History and Democracy: An Introduction*, in *JUDICIAL REVIEW AND THE SUPREME COURT* 1-12 (L. Levy ed. 1967).

39. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 122-25.

tory a priori by . . . 'judicial fiat,'<sup>40</sup> was introduced by John Marshall and has been used by the Court ever since.<sup>41</sup> Similarly, the Court devises its own rendition of history by selecting those portions of the historical record that are congenial to the justices' views, while conveniently overlooking those portions of the record that the justices find less palatable.<sup>42</sup> The Court also is prone to invoke the Framers' intent when it suits the purposes of the justices, but to ignore or deprecate it on other occasions.<sup>43</sup> An extreme instance of this occurred in the *Slaughter-House Cases*,<sup>44</sup> in which the Court went so far in ignoring the Framers' intent that it rendered the Fourteenth Amendment privileges and immunities clause superfluous.<sup>45</sup> When later confronted with its disregard for the intention of the Framers, the Court's deprecatory rejoinder was that "what is said in Congress [during the discussion of a proposed constitutional measure] may or may not express the views of the majority of those who favor adoption of the measure . . ." <sup>46</sup> By resort to these various devices, the Court uses history as a pretext for obfuscating its creative mode of operation.

To its credit, the Court is not always so disingenuous about its creative function. On several occasions, the Court has stated candidly that it is not necessarily bound to follow the Framers' intent. The Court's most well-known and perhaps strongest statement to that effect came in 1934 in *Home Building and Loan Association v. Blaisdell*,<sup>47</sup> the Court has made similar statements both before and after *Blaisdell*.<sup>48</sup>

40. *Id.* at 122.

41. *Id.* at 123-25. Kelly identifies three "notable instances of this sort of judicial history": *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873); *Hepburn v. Griswold* (the first Legal Tender Case), 75 U.S. (8 Wall.) 603 (1870).

42. Kelly, *supra* note 39, at 122, 125-32. Kelly identifies two "notable decisions" of this sort: *Pollack v. Farmers' Loan & Trust Co.* (The Income Tax Cases), 157 U.S. 429 (1895); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

43. See Alfange, *supra* note 30; Kelly, *supra* note 39; tenBroek, *supra* note 30.

44. 83 U.S. (16 Wall.) 36 (1873).

45. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 423 (1978); McGovney, *Privileges or Immunities Clause, Fourteenth Amendment*, 4 IOWA L. BULL. 219, 219-21 (1918).

46. *Maxwell v. Dow*, 176 U.S. 581, 601 (1900).

47. 290 U.S. 398 (1934). The Court said, "If by the statement that what the Constitution meant at the time of its adoption it means to-day, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning—"We must never forget that it is a *constitution* we are expounding." *Id.* at 442-43 (quoting *McCulloch v. Maryland*) (emphasis in original).

48. See *Runyon v. McCrary*, 427 U.S. 160, 191-92 (1976) (Stevens, J., concurring); *Abington School Dist. v. Schempp*, 374 U.S. 203, 237 (1963) (Brennan, J., concurring); *Brown v. Board of Educ.*, 347 U.S. 483, 492-93 (1954); *Olmstead v. United States*, 277 U.S. 438,

Additionally, there are many occasions when the Court engages openly in creativity, making no attempt to disguise the fact that justices' convictions are being employed to formulate new constitutional doctrine.<sup>49</sup> Probably the most forthright acknowledgment of the Court's creativity has come from Justice White; commenting upon the Court's decision in *Miranda v. Arizona*,<sup>50</sup> he wrote,

[T]he Court has not discovered or found the law in making today's decision, nor has it derived it from some irrefutable sources; what it has done is to make new law and new public policy in much the same way that it has in the course of interpreting other great clauses of the Constitution. This is what the Court historically has done. Indeed, it is what it must do and will continue to do until and unless there is some fundamental change in the constitutional distribution of governmental powers.<sup>51</sup>

As Justice White describes, the Court has had a long history of originating constitutional meaning. Critics who attack the Court's use of creativity in cases such as *Brown v. Board of Education*<sup>52</sup> and *Roe v. Wade*<sup>53</sup> on the ground that it amounts to unprecedented "activism"<sup>54</sup> are laboring under an historical misapprehension. Creativity is no more actively present in *Brown* than it was in many another case, including, it might be mentioned, *Plessy v. Ferguson*,<sup>55</sup> in which the justices' manifest antipathy toward "commingling" of the races led the Court to institute the "separate but equal" doctrine as constitutional law. As for *Roe*, creativity is no more present there than it was fifty years before in *Meyer v. Nebraska*,<sup>56</sup> in which the Court initiated the right of privacy as a constitutional principle. In whatever era one examines, it is evident that the Supreme Court has played an active role in creating constitutional law to cover a wide variety of interests and

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472-74 (1928) (Brandeis, J., dissenting); *Missouri v. Holland*, 252 U.S. 416, 433-34 (1920); *Weems v. United States*, 217 U.S. 349, 373-74 (1910).

49. See, e.g., *Trainor v. Hernandez*, 431 U.S. 434 (1977); *National League of Cities v. Usery*, 426 U.S. 833 (1976); *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Schenck v. United States*, 249 U.S. 47 (1919); *Lochner v. New York*, 198 U.S. 45 (1905); *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603 (1870); *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851). See also notes 47 & 48 *supra*.

50. 384 U.S. 436 (1966).

51. *Id.* at 531 (White, J., dissenting, joined by Harlan & Stewart, JJ.).

52. 347 U.S. 483 (1954).

53. 410 U.S. 113 (1973).

54. See, e.g., R. BERGER, *supra* note 4; Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973).

55. 163 U.S. 537 (1896).

56. 262 U.S. 390 (1923).



has even applied creativity to both sides of the same issue.<sup>57</sup> The sheer volume of constitutional doctrine can hardly be explained by mere reference to the wording of the Constitution or the intention of the Framers. Painting with both broad and narrow strokes, the Supreme Court has been a most prolific artist, trusting its own muses to create new meaning for the Constitution.

Although it would seem undeniable that the Court's creativity is an historic fact, there has been a persistent inclination to deny the Court's long standing creative role.<sup>58</sup> This proclivity intensifies in the wake of controversial decisions made by the Court.<sup>59</sup> Every epoch has its own controversial decision that is mistakenly condemned as the Court's first foray into creativity.<sup>60</sup> The denial of the Court's historic creativity operates as a means of rationalizing disapprobation of particular decisions rendered by the Court. By successively rejecting the Court's creativity, each generation finds it possible to attack new decisions that meet with some disapproval. The endurance of the disposition to deny the Court's creative role, however, has a deeper cause. Fundamentally, it is rooted in a nostalgia for the natural law tradition that portrayed the judiciary as an impartial vehicle through which preordained truth was revealed.<sup>61</sup> The natural law vision of the judicial process has a certain appeal in that it is comforting to believe that judges are altruistic oracles devoted to a search for justice. Unfortunately, the security provided by this vision is a false one. The natural

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57. Compare, e.g., *Rochin v. California*, 342 U.S. 165 (1952) with *Briethaupt v. Abram*, 352 U.S. 432 (1957).

58. See notes 3-4 *supra*.

59. See, e.g., A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 121 (1970) (discussing *Brown v. Board of Educ.*); 2 L. BOUDIN, *GOVERNMENT BY JUDICIARY* 433-42 (1932) (discussing *Lochner v. New York*); J. ELY, *DEMOCRACY AND DISTRUST* 221 (1980) (discussing *Griswold v. Connecticut*); 1 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 129-31 (1922) (discussing *Chisholm v. Georgia*); *id.* at 200 (discussing *Marbury v. Madison*); Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 *YALE L.J.* 920 (1973); Sacks, *Foreword: The Supreme Court, 1953 Term*, 68 *HARV. L. REV.* 96 (1954) (discussing *Brown v. Board of Educ.*). See generally 2 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 461-62 (1922).

At times this inclination to deny the Court's creative role even affects Supreme Court justices. Consider, for example, the remark made by Justice McReynolds after delivering his dissenting opinion in the Gold Clause Cases, 294 U.S. 330 (1935): "As for the Constitution, it does not seem too much to say that it is gone. Shame and humiliation are upon us now," reported in 2 W. SWINDLER, *COURT AND CONSTITUTION IN THE TWENTIETH CENTURY, 1932-1968*, at 37 (1970).

60. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973); *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Lochner v. New York*, 198 U.S. 45 (1945); *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603 (1870); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *Chisholm v. Georgia*, 2 U.S. 419 (1793).

61. See M. SHAPIRO, *LAW AND POLITICS IN THE SUPREME COURT* 19-20 (1964).

law conception of judicial process is considerably more fantasy than fact, as evidenced by the collapse of the natural law tradition under the weight of nearly unanimous repudiation by modern legal scholars.<sup>62</sup> The same fatal flaws that led to the demise of natural law also afflict its constitutional equivalent that disclaims the Supreme Court's creative role. As was the case with the natural law tradition, the belief that the constitutional process is noncreative not only ignores reality, but also, as will be seen next, is theoretically impossible.

## II. The Theoretical Foundation of Constitutional Creativity

As a theoretical matter, the Supreme Court's creative role is inevitable because it is the only practical way to interpret the Constitution. Interpretivist attempts to find meaning for the Constitution in its text or history are doomed to failure.<sup>63</sup>

It is obvious that the language of the Constitution requires a great deal of supplementation from extratextual sources. Indeed, as the Supreme Court once observed, "no word conveys to the mind, in all situations, one single definite idea."<sup>64</sup> The more general or abstract a word is, the less precise is its meaning, and the Constitution, designed "to endure for ages,"<sup>65</sup> necessarily is rife with generalities and abstractions. Even interpretivists admit that much of the Constitution is phrased in such broad and abstract language that it must be invested with meaning which simply cannot be found within the "four corners" of the document itself.<sup>66</sup> The utter necessity to look beyond the text of the Constitution is illustrated in a variety of contexts. For example, does article I authorize Congress to establish a federally chartered bank<sup>67</sup> or to issue paper money as legal tender?<sup>68</sup> Does the interstate commerce clause allow Congress to regulate moral aspects of commercial enterprise<sup>69</sup> or to regulate intrastate commercial activities that have

62. See J. ELY, *supra* note 27, at 50-52, and sources cited therein.

63. For illustrations of devastating criticism leveled at interpretivism in recent years, see J. ELY, *supra* note 27, at ch. 2; A. MILLER, *THE SUPREME COURT—MYTH AND REALITY* 25-31 (1978); Alfange, *supra* note 30; Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); tenBroek, *supra* note 30.

64. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 414 (1819).

65. *Id.* at 415.

66. See Rehnquist, *supra* note 3, at 694, 697.

67. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

68. See *Knox v. Lee* (the second Legal Tender Case), 79 U.S. (12 Wall.) 457 (1871); *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603 (1870).

69. See *Hammer v. Dagenhart* (The Child Labor Case), 247 U.S. 251 (1918); *Hoke v. United States*, 227 U.S. 308 (1913); *Champion v. Ames* (The Lottery Case), 188 U.S. 321 (1903).

an interstate impact?<sup>70</sup> Does the free exercise of religion clause give one the right to engage in polygamy<sup>71</sup> or to be exempt from compulsory education laws?<sup>72</sup> These questions and innumerable others can hardly be resolved by mere linguistic analysis of the Constitution. Given the generality and abstractness of the Constitution, it should not be surprising that its text is of little assistance in dealing with the vast majority of constitutional issues; at best the Constitution is a prelude or remote starting point for deciding cases or promulgating rules.

Reliance on the Framers' intent to find meaning for the Constitution also has serious theoretical drawbacks. In the first place, why should we be concerned only with the intentions of those individuals who drafted the Constitution, and not with the intentions of the people who ratified it or the succeeding generations who acquiesce in retaining it?<sup>73</sup> Even when finally framed, the Constitution remained a legal nullity until ratified by the people and would again be a nullity if revoked by the people. Why then should the Framers' intentions be taken as binding upon the people? The intent of the Framers does not express the will of the people<sup>74</sup> and therefore cannot be considered obligatory. What the Framers finally decided to express in the Constitution itself possesses the force of law; but the same cannot be said for what the Framers did not express therein, and therefore their omission "has no binding force upon us."<sup>75</sup>

Moreover, there are considerable difficulties in discerning what in fact the Framers intended. The *Journal of the Constitutional Convention*, which is the primary record of the Framers' intent, is neither complete nor entirely accurate.<sup>76</sup> The notes for the *Journal* were carelessly kept<sup>77</sup> and have been shown to contain several mistakes.<sup>78</sup> Even when the record cannot be faulted, it is not always possible to ascertain the

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70. See *Wickard v. Filburn*, 317 U.S. 111 (1942); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *United States v. E.C. Knight Co.* (The Sugar Trust Case), 156 U.S. 1 (1895).

71. See *Reynolds v. United States*, 98 U.S. 145 (1878).

72. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

73. Wofford, *The Blinding Light: The Uses of History in Constitutional Interpretation*, 31 U. CHI. L. REV. 502, 508 (1964).

74. J. ELY, *supra* note 27, at 411-12.

75. C. CURTIS, *LIONS UNDER THE THRONE* 2 (1947).

76. Wofford, *supra* note 73, at 504-06. The incomplete notes of James Madison comprise the primary record of what transpired at the convention. D. ROHDE & H. SPAETH, *SUPREME COURT DECISION MAKING* 41 (1976).

77. See 1 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* xii-xiv (Farrand ed. 1937).

78. *Id.*

Framers' intent. As might be expected, the Framers did not express an intention about every constitutional issue that would arise after the document was drafted and adopted. No group of people, regardless of their ability, enjoys that sort of prescience. When the Framers did address particular problems, often only a few of them spoke out. What frequently is taken to be the intent of the Framers as a group turns out to be the intent of merely a few or even of only one of the Framers, and it would be a mistake to suppose that those Framers who expressed their views always spoke for those who remained silent. There also are constitutional issues about which the Framers expressed conflicting intentions.<sup>79</sup> A collective body of fifty-five individuals, the Framers embraced a widely diverse and frequently inconsistent set of views.<sup>80</sup> It is anomalous, therefore, to ascribe a unitary intention to the Framers.<sup>81</sup> On several occasions, the Supreme Court has observed that it is untenable to attribute a unified intent to a multi-member group such as the one assembled at the Constitutional Convention.<sup>82</sup> The Framers' intent, at best, is inadequately documented, ambiguous, and inconclusive; at worst, it is illusory.

Even if these obstacles could be surmounted, it still might not be analytically valid to follow the path of the Framers. The Framers formed their intentions in the context of a past reality and in accordance with past attitudes, both of which have changed considerably since the Constitution was drafted.<sup>83</sup> To transfer those intentions, fash-

79. 7 C. WARREN, *supra* note 8, at 91.

80. In fact, the Framers of the original constitution are only those fifty-five delegates to the Constitutional Convention who were the most active in the proceedings. Delegates to state conventions who voted to ratify the Constitution as well as those people who selected them are not included. D. ROHDE & H. SPAETH, *supra* note 76, at 41.

81. See Bishin, *The Law Finders: An Essay in Statutory Interpretation*, 38 S. CAL. L. REV. 1 (1965); Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930).

82. "It is clear that what is said in Congress [during the discussion of a proposed constitutional measure] may or may not express the views of the majority of those who favor the adoption of the measure . . . . What individual Senators or Representatives may have urged in debate, in regard to the meaning to be given to a proposed constitutional amendment, or bill or resolution, does not furnish a firm ground for its proper construction, nor is it important as explanatory of the grounds upon which the members voted in adopting it." *Maxwell v. Dow*, 176 U.S. 581, 601-02 (1900).

"There is, too, a general acquiescence in the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body. . . . The reason is that it is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other . . . ." *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 318 (1897).

83. See P. BREST, *PROCESSES OF CONSTITUTIONAL DECISION-MAKING—CASES AND MATERIALS* 157-69 (1975).

ioned under past conditions and views, to contemporary situations may produce sorry consequences that even the Framers would have abhorred had they been able to foresee them. Consideration of intentions formulated in response to past conditions and attitudes is not very likely to be an effective means of dealing with contemporary issues. Adherence to the Framers' intent thus reduces the capacity of the Constitution to be used in response to the needs of modern society.

Professor Wofford takes this line of reasoning one step further. He maintains that the Framers' intent is locked into a past time and has no meaning at all for the present<sup>84</sup>—that is, because the Framers formed their intentions with reference to a reality and attitudes that no longer exist, it cannot be said that they had any intentions whatsoever concerning the future. If, as Professor Wofford believes, the Framers' intent is inextricably bound to the past, then it is senseless to attempt to transplant their intent to the present or future. What the Framers intended for their times is not what they may have intended for ours. Life constantly changes, and the reality and ideas that surrounded the Framers are long gone.

The theoretical pitfalls of attempting to extend the Framers' intent beyond its time are vividly apparent in a case such as *Abington School District v. Schempp*,<sup>85</sup> in which the Court held that prayer recitations and Bible readings in the public schools violate the establishment clause of the First Amendment. In *Abington*, the Court could have analyzed the intent of the Framers to support the opposite result. Though fairly ambiguous (as might be expected), the historical record can be read to say that the Framers did not intend the establishment clause to prohibit religious exercises in the public schools.<sup>86</sup> Even if we assume that the historical record strongly indicates the Framers' intent, honoring that intent in modern times would be to disregard mistakenly the changed conditions of reality. Education, in the days of the Framers, was conducted mainly by private sectarian schools, whereas in more recent times, education is primarily public and secular.<sup>87</sup> Additionally, our nation is more religiously heterogeneous than it was when the Constitution was framed and adopted.<sup>88</sup> To use the words of Justice Bren-

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84. See Wofford, *supra* note 73, at 511-23.

85. 374 U.S. 203 (1963).

86. See C. ANTIEAU, A. DOWNEY & E. ROBERTS, *FREEDOM FROM FEDERAL ESTABLISHMENT* 123-42 (1964); L. PFEFFER, *CHURCH, STATE, AND FREEDOM* 128-80 (rev. ed. 1967); Sky, *The Establishment Clause, the Congress and the Schools: An Historical Perspective*, 52 VA. L. REV. 1395, 1397-1427 (1966).

87. L. PFEFFER, *supra* note 86, at 321-38.

88. See *Abington School Dist.*, 374 U.S. at 240 (Brennan, J., concurring); STAFF OF

nan, "In the face of such profound changes, practices which may have been objectionable to no one in the time of Jefferson and Madison may today be highly offensive to many persons, the deeply devout and the nonbelievers alike."<sup>89</sup> Thus, we can see that the Framers' intent, cast in a bygone era, speaks to the past, but not necessarily to the present or future.

Let us turn our attention once again to *Brown v. Board of Education*,<sup>90</sup> which has been described by Raoul Berger as a case that unjustifiably departs from the Framers' intent. In his recent book,<sup>91</sup> Professor Berger argues that the Court's ruling in *Brown*, that racial segregation of public schools violates the equal protection clause of the Fourteenth Amendment, "upends" the Amendment "to mean exactly the opposite of what its framers designed it to mean."<sup>92</sup> Backing his argument with a substantial amount of evidence,<sup>93</sup> Professor Berger asserts that the Framers specifically considered and rejected the possibility of outlawing racial segregation in public schools.<sup>94</sup> Accepting *arguendo* that he is correct in his assertion, the fact remains that the Framers' intent was formulated under a very different reality and in a very different social and ethical climate than those which existed in 1954 when *Brown* was decided. In the *Brown* opinion itself, the Court explained that at the time of the Fourteenth Amendment's adoption, the movement toward free public schooling had not yet taken hold in the South, and that even in the North, public education standards did not approximate those existing in 1954.<sup>95</sup> Education of blacks in the South was practically nonexistent,<sup>96</sup> and the importance of an education was not close to what it was in 1954. What the Court also could have said—but perhaps was politic enough to leave unspoken—was that the Framers who adopted the Fourteenth Amendment were themselves laboring under an extremely racist attitude. Professor Berger admits that even most of the Framers who favored enactment of the Amendment believed that

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HOUSE COMM. ON THE JUDICIARY, 88TH CONG., 2D SESS., PRELIMINARY STAFF STUDY ON PROPOSED AMENDMENTS TO THE CONSTITUTION RELATING TO SCHOOL PRAYERS, BIBLE READING 11-14 (Comm. Print 1964).

89. 374 U.S. at 241 (Brennan, J., concurring).

90. 347 U.S. 483 (1954). See text accompanying notes 52-55 *supra*.

91. R. BERGER, *supra* note 4.

92. *Id.* at 245.

93. *Id.* at chs. 4, 10 & 13. Some historians have severely criticized his research methods. See, e.g., Kutler, *Raoul Berger's Fourteenth Amendment: A History or Ahistorical?*, 6 HASTINGS CONST. L. Q. 511 (1979); Soifer, *Protecting Civil Rights: A Critique of Raoul Berger's History*, 54 N.Y.U. L. REV. 651 (1979).

94. R. BERGER, *supra* note 4, at chs. 7, 10 & 13.

95. *Brown v. Board of Educ.*, 347 U.S. at 489-90.

96. *Id.* at 490.

blacks were inherently inferior to whites.<sup>97</sup> Except for a minority of extremists, those who supported the Amendment feared and despised blacks,<sup>98</sup> and their "obsessive preoccupation" was "not civil rights . . . but the dreaded take-over of the federal government by the South."<sup>99</sup>

In 1954, a very different situation prevailed. Virtual universal education had come into being and the intellectual abilities of blacks could no longer be denied. A high school diploma, not to mention a college education, had become the *sine qua non* of financial and professional success. While still present, racist attitudes had abated. Studies showed that a majority of whites no longer believed in the inherent inferiority of blacks.<sup>100</sup> A distinguished historian of race relations was able to say that public opinion outside the South was receptive and generally favorable to the *Brown* decision,<sup>101</sup> and there is additional evidence that racism was beginning to subside even in the South by 1954.<sup>102</sup> Given these sweeping changes in attitudes and conditions, it is difficult to comprehend how the Framers' intent could possibly be applied to 1954. As the Court cogently observed in *Brown*, "[W]e cannot turn the clock back to 1868 when the Amendment was adopted."<sup>103</sup>

The Framers of the Constitution may have been wise men, but not so wise that they could predict and plan for the future. That is not to say that the Framers' intent should be completely ignored; only a fool would suggest that there are not valuable insights to be learned from history. It is to say that the Framers' intent should not be used as an authoritative source to determine the meaning of the Constitution. We should allow the Framers to advise us, but not to rule us.<sup>104</sup>

Ironically, the Framers seemed to be wise enough to know their limitations in this regard, and therefore included in the Constitution open-ended provisions, such as the Ninth and Fourteenth Amendments, as invitations for future constitutional creativity. For interpretivists who insist upon strict adherence to the Framers' intent, this poses a fundamental dilemma: It seems that the Framers intended to authorize constitutional creativity that is not circumscribed by their intentions.

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97. See R. BERGER, *supra* note 4, at 10-15.

98. See *id.*

99. *Id.* at 15.

100. R. BURKEY, *RACIAL DISCRIMINATION AND PUBLIC POLICY IN THE UNITED STATES* 36 (1971).

101. C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 149 (2d rev. ed. 1966).

102. Wiebe, *White Attitudes and Black Rights from Brown to Bakke*, in *HAVE WE OVERCOME? RACE RELATIONS SINCE BROWN* 147-50 (M. Namorato ed. 1979).

103. 347 U.S. at 492.

104. See C. CURTIS, *supra* note 75, at 2-8; Wofford, *supra* note 73, at 530-33.

Given the theoretical deficiencies of the historical approach of relying upon the Framers' intent, it should not come as a surprise that this approach has been a failure when put into practice by the Supreme Court. Scholars who have closely studied the Court's use of the historical approach commonly agree that it has not been a satisfactory method of constitutional decisionmaking.<sup>105</sup> The Court has been criticized often for manipulating, revising, or even creating history when it purports to follow the Framers' intent.<sup>106</sup> A particularly studious analysis of the historical approach to constitutional law concludes that it is one of the Court's "fundamental doctrinal fallacies."<sup>107</sup> Neither the Framers' intent nor the words of the document are capable of providing much constitutional meaning. As a theoretical matter, then, meaning for the Constitution necessarily requires an act of creation by the Supreme Court.

### III. The Political Foundation of Constitutional Creativity

Interpretivists frequently inveigh against constitutional creativity on the ground that it is undemocratic.<sup>108</sup> It is argued that in a democratic system of government, Supreme Court justices—unelected officials who are unaccountable to the people—should not be able to create meaning for the Constitution. This theme echoes the criticism that was leveled during the Jacksonian era against the power of common law judges to make law.<sup>109</sup> Although the creative authority of common law judges is now accepted throughout the legal community, aversion still exists to judicial creativity in the constitutional arena.<sup>110</sup> That tort or contract rules are made rather than found by judges is today entirely acceptable; that constitutional rules should be no different has been a more bitter pill for some to swallow. It does not seem to comport with democratic theory to find that the least representative branch of our government, the Supreme Court, is creating no less than the supreme law of the land based on the personal convictions of the individual justices.

Ironically, the interpretivists' objection to the undemocratic traits of this process disregards some rather explicit constitutional language.

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105. See notes 30, 39, 63, 73-75 *supra*.

106. See notes 30, 39, 63 *supra*.

107. tenBroek, *supra* note 30, at 421.

108. See R. BERGER, *supra* note 4, *passim*; Bork, *supra* note 4, at 2-12; Kurland, *supra* note 4, *passim*; Rehnquist, *supra* note 3, at 704-06.

109. See Horowitz, *The Jurisprudence of Brown and the Dilemmas of Liberalism*, 14 HARV. C.R.-C.L. L. REV. 599, 601 (1979).

110. See notes 3-4 *supra*.



Article III of the Constitution states that there shall be a Supreme Court and, in combination with article II, decrees the Court's independence from the electorate.<sup>111</sup> By its very terms, article III establishes a countermajoritarian organ of government, the Supreme Court, in juxtaposition with the more democratic Congress and Presidency established by articles I and II. This scheme reflects one of the guiding principles that underlies the Constitution—the principle of separate powers that check and balance one another. The Supreme Court's constitutionally mandated independence functions as a check and balance on the more majoritarian branches of the federal and state governments. It thereby provides a means of maintaining constitutional boundaries on majoritarian rule.

It is the Court's role to enforce constitutional requirements upon the majoritarian branches of government, which otherwise would be completely unbridled. As dictated by the Constitution, majority control should be the predominant feature of our government subject to constitutional perimeters. The purpose of the Court's independence is to ensure that those perimeters will be honored by all branches of the state and federal governments. This was reaffirmed most forcefully by the Senate Judiciary Committee in its rejection of President Roosevelt's Court-packing plan:

We recommend the rejection of this bill as a needless, futile, and utterly dangerous abandonment of constitutional principle . . . . [I]t seeks to do that which is unconstitutional . . . . [I]ts practical operation would be to make the Constitution what the executive or legislative branches of the government choose to say it is—an interpretation to be changed with each change of administration. It is a measure which should be so emphatically rejected that its parallel will never again be presented to the free representatives of the free people of America.<sup>112</sup>

Constitutional constraint upon the majoritarian branches of government would be illusory if the Supreme Court did not possess the authority to create meaning for the Constitution. In the absence of a creative judicial review, the majoritarian branches of government would command unfettered discretion to determine the constitutionality of their own acts. Elimination of the Court's creativity would destabilize the system of checks and balances that has characterized our government since its inception and would permit even temporary ma-

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111. U.S. CONST. art. III, § 1; *id.* at art. II, § 2.

112. SENATE COMM. ON THE JUDICIARY, REORGANIZATION OF THE FED. JUDICIARY, ADVERSE REPORT, S. REP. NO. 711, 75th Cong., 1st Sess. 23 (1937).

majorities to rule at their own whim.<sup>113</sup> It would also reduce the Court to an impotent figurehead, perpetually deferring to the majority will on constitutional issues. Every act of the majority *ipso facto* would be constitutional and would be entitled to the Court's rubber stamp as such. Indeed, this is exactly what has occurred in the category of cases in which the Court abnegates its creative authority by using "minimal scrutiny"<sup>114</sup> to evaluate the constitutionality of legislative or executive action. Minimal scrutiny, it turns out, is virtually no scrutiny and furnishes a pretense of judicial review without the reality of it.<sup>115</sup> A more sweeping elimination of the Court's creativity would destroy by that much more its capacity to practice meaningful judicial review. Devoid of creativity, the Court would become a mere puppet, dancing to the tune of the other branches of government. Because the Court's creativity lies at the very core of its character, deprivation of its creativity would be tantamount to abolition of the Court itself.

Although the Court is the least democratic branch of our government, it is not entirely undemocratic. While it is true that the justices who comprise the Court are appointed rather than elected and that they may be removed from office only for improper behavior,<sup>116</sup> nevertheless, it is also true that they are appointed by a popularly elected President, and that their appointments must be confirmed by a popularly elected Senate.<sup>117</sup> Turnover of the Court's personnel, which sometimes occurs frequently, enhances this control through the recurrence of the appointment-confirmation procedure.<sup>118</sup> Popular control of the Court also may occur through the constitutional authority that Congress holds to regulate the jurisdiction of the Court.<sup>119</sup> Additionally, the Court's constitutional rulings are voidable by the people through constitutional amendment, which, though a difficult procedure, has been accomplished successfully on four separate occasions.<sup>120</sup>

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113. "[W]e must abandon the erroneous assumption that our constitutional tradition ever required that a temporary majority should be able to rule without constitutional restraint. If that is antidemocratic, so be it." Horowitz, *supra* note 109, at 603.

114. Under minimal scrutiny, the Court indulges in the presumption that legislative or executive action is constitutional unless the party challenging it proves that it completely lacks any reasonable basis whatsoever. For a more extensive description of minimal scrutiny, see Shaman, *supra* note 9.

115. See Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972); Shaman, *supra* note 9, at 163-66.

116. U.S. CONST. art. II, § 2; *id.* at art. III, § 1.

117. U.S. CONST. art. II, § 2, cl. 2.

118. L. TRIBE, *supra* note 45, at 50.

119. See U.S. CONST. art. III, § 2, cl. 2.

120. The Eleventh Amendment was contrary to the holding of *Chisholm v. Georgia*,

While thus not directly answerable to the people, the Court is not entirely immune to popular control.

The people also have the ultimate authority to abolish the Court. That they have not taken this step throughout almost two centuries of constitutional experience indicates popular acceptance of the Court's independence.<sup>121</sup> Admittedly, many particular decisions rendered by the Court have aroused considerable public outcry, but given the many controversial issues that the Court must decide, this is inevitable. More telling about the public attitude toward the Court is that the people have taken no action to curtail the Court's constant exercise of creativity. Indeed, the public has shown little, if any, inclination toward abolishing the Court or even toward restricting its powers. Despite President Roosevelt's overwhelming popularity, his "Court-packing plan" was a dismal failure;<sup>122</sup> the proposal to establish a "Court of the Union" composed of state court justices which would have the power to overrule the Supreme Court evoked such widespread public disapprobation that it was quickly abandoned;<sup>123</sup> the campaigns to impeach Earl Warren and William O. Douglas never got off the ground;<sup>124</sup> and although Congress has threatened to exercise its constitutional prerogative to retract the Court's jurisdiction,<sup>125</sup> it has rarely done so. These examples suggest that even in the face of controversial constitutional

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2 U.S. (2 Dall.) 419 (1793); the Fourteenth Amendment nullified, in part, the decision in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857); the Sixteenth Amendment nullified the holding of *Pollock v. Farmers' Loan and Trust, Co.*, 157 U.S. 429 (1895); the Twenty-sixth Amendment neutralized *Oregon v. Mitchell*, 400 U.S. 112 (1970). L. TRIBE, *supra* note 45, at 50-51 & n.8.

121. See Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 206 (1952).

122. "Not all the influence of a master politician in the prime of his popularity was quite enough to carry a program that would impair judicial review." R. McCLOSKEY, *THE AMERICAN SUPREME COURT* 177 (1960). The plan was rejected vehemently by the Senate Judiciary Committee. See text accompanying note 112 *supra*.

123. L. PFEFFER, *THIS HONORABLE COURT* 424-25 (1965).

124. Those who campaigned for Chief Justice Warren's impeachment were unable to have impeachment proceedings initiated against him. While impeachment proceedings were instituted against Justice Douglas, they never got beyond the subcommittee stage and were eventually forsaken. See SPECIAL SUBCOMM. ON H. RES. 920 OF THE HOUSE COMM. ON THE JUDICIARY, 91ST CONG., 2D SESS., FINAL REPORT, ASSOCIATE JUSTICE WILLIAM O. DOUGLAS (Comm. Print 1970).

125. "In the fifteen years between 1953 and 1968, over sixty bills were introduced in Congress to eliminate the jurisdiction of the federal courts over a variety of specific subjects; none of these became law." P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 360 (2d ed. 1973). Twenty bills are now pending in Congress that seek to limit the Court's jurisdiction. TIME, Sept. 28, 1981, at 93.

decisions, there has been an abiding public consent to the Court's independent role in our scheme of government.

Nevertheless, there are those who question the force of popular consent to the Court. They argue that the Court enjoys public acceptance only by concealing its creativity and by duping the people into thinking that its decisions are compelled by the text of the document or by the Framers' intentions.<sup>126</sup> On the one hand, this argument presumes that the public is aware of what the Court has to say in its written opinions and finds it persuasive; on the other, the argument ignores that in the last sixty years, the Court has been increasingly open about its creativity.<sup>127</sup> Even when the Court was less candid about its creative role, the people must have sensed that it was engaged in creating constitutional meaning. What was the public to think, for instance, when Andrew Jackson, proclaiming that "Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution,"<sup>128</sup> felt free to veto a bill rechartering the Bank of the United States on the ground that it was unconstitutional even though the Court had previously upheld its constitutionality?<sup>129</sup> What was the public to think about the *Legal Tender Cases*,<sup>130</sup> in which a change in the Court's personnel was the obvious cause of an abrupt about-face by the Court?<sup>131</sup> What was the public to think during the New Deal Court crisis about President Roosevelt's Court-packing plan and Justice Roberts' "switch in time that saved nine"?<sup>132</sup> Could the public witness these and other events, all highly publicized and momentous, and still be unaware that the Court was creating constitutional law?

Whether or not there is public comprehension of the Court's creativity, the fact remains that our constitutional system of checks and balances that sets perimeters on majority rule was adopted by the people and has been retained by them for these many years. That system, which is supported by popular consent, is dependent on the Court's creativity. Without creativity, the Court would be unable to fulfill the constitutional obligations prescribed for it by the people. In the final analysis, then, the Court's creative authority is derived from the people.

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126. See R. BERGER, *supra* note 4, at 319-20; Bork, *supra* note 4, at 3-4.

127. See text accompanying notes 47-51 *supra*.

128. Andrew Jackson, *Veto Message of July 10, 1832* in 2 MESSAGES AND PAPERS OF THE PRESIDENTS 576, 581-82 (J. Richardson ed. 1896).

129. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

130. *Knox v. Lee*, 79 U.S. (12 Wall.) 457 (1871); *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603 (1870).

131. C. WARREN, *supra* note 8, at ch. 31.

132. See L. PFEFFER, *supra* note 123, at 317.

## Conclusion

The Court's creativity effectuates its constitutional responsibility to enforce constitutional constraints upon the majoritarian branches of the federal and state governments. This creativity is necessary to furnish meaning for the Constitution, which cannot be adequately supplied either by the text of the document or by the intent of the Framers. Although from its very beginning the Court has continuously exercised creative authority, there are those who assert that its results have been mostly negative.<sup>133</sup> They argue that apart from the historical, theoretical and political foundations of the Court's creativity, more often than not it has yielded unsound decisions. Justice Rehnquist has written that the Court's creativity has resulted in several "disastrous experiences," most notably the decisions in *Dred Scott v. Sandford*<sup>134</sup> and *Lochner v. New York*,<sup>135</sup> and on balance "has done the Court little credit."<sup>136</sup>

Ironically, this belief has not deterred him on several occasions from utilizing strong doses of creativity in his own constitutional decisions.<sup>137</sup> More importantly, his disparagement of the efficacy of creativity is based on a quite discriminatory sampling of cases. To be fair, one cannot condemn the end product of the Court's creativity in *Dred Scott* while neglecting to praise it in *Brown v. Board of Education*.<sup>138</sup> Similarly, in condemning "Lochnerism" as wrongheaded creativity that misused the Fourteenth Amendment, one should not overlook the many Fourteenth Amendment cases in which creativity has been used to serve commendable purposes. The Court has used its creative au-

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133. See Kurland, *supra* note 4; Rehnquist, *supra* note 3.

134. 60 U.S. (19 How.) 393 (1857).

135. 198 U.S. 45 (1905).

136. Rehnquist, *supra* note 3, at 699-704.

137. In *Nevada v. Hall*, 440 U.S. 410, 432 (1979) (Rehnquist, J., dissenting), Justice Rehnquist sought to create an implied sovereign immunity among the states; in *Edelman v. Jordan*, 415 U.S. 651 (1974), he created the rule that the Eleventh Amendment shelters the states from being ordered by federal courts to make retroactive payments from their treasuries; in *Quern v. Jordan*, 440 U.S. 332 (1979), and *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), he created constitutional exceptions to the rule that the Eleventh Amendment shelters the states from being ordered by federal courts to make retroactive payments from their treasuries; in *National League of Cities v. Usery*, 426 U.S. 833 (1976), he created an exception to the federal commerce power in order to protect state sovereignty; and in *Sosna v. Iowa*, 419 U.S. 393 (1975), he created an exception to the previously established constitutional right to travel interstate.

138. 347 U.S. at 483.

thority to protect individuals from racial,<sup>139</sup> sexual,<sup>140</sup> and other forms<sup>141</sup> of unjust discrimination; to establish the "clear and present danger test" so as to prohibit the suppression of peaceful speech;<sup>142</sup> and to protect the rights of family members to live together,<sup>143</sup> to obtain a complete education for their children,<sup>144</sup> and to send their children to parochial schools if they so choose.<sup>145</sup> Unless one is prepared to dismiss these and other cases as wrongly decided, there simply is no basis to the claim that the Court's creativity has done it "little credit."

The Court has made its mistakes, including a few egregious ones, but so have the other branches of government. Possessed as they are of human fallibility, predictably, the Court and the other branches of government will make mistakes in the future. The time has come to face the Court's mistakes directly on their merits rather than to side-step them on the pretense that they are illegitimate excursions into creativity. Attacks on the Court's creativity are spurious and should be entirely abandoned. It is time to admit, once and for all, that the Court has always been creative; otherwise, it would be unable to provide meaning for the Constitution or to fulfill its constitutional responsibility.

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139. See note 14 *supra*.

140. See *Orr v. Orr*, 440 U.S. 268 (1979); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Reed v. Reed*, 404 U.S. 71 (1971).

141. See *Trimble v. Gordon*, 430 U.S. 762 (1977); *In re Griffiths*, 413 U.S. 717 (1973); *Sugarman v. Dougall*, 413 U.S. 634 (1973); *United States Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973); *Levy v. Louisiana*, 391 U.S. 68 (1968).

142. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Herndon v. Lowry*, 301 U.S. 242 (1937); *DeJonge v. Oregon*, 299 U.S. 353 (1937); *Fiske v. Kansas*, 274 U.S. 380 (1927); *Abrams v. United States*, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting); *Schenck v. United States*, 249 U.S. 47 (1919).

143. See *Moore v. East Cleveland*, 431 U.S. 494 (1977).

144. See *Meyer v. Nebraska*, 262 U.S. 390 (1923).

145. See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).