

Summer 2000

Classical Legal Naturalism and the Politics of John Marshall's Constitutional Jurisprudence, 33 J. Marshall L. Rev. 935 (2000)

Robert Lowry Clinton

Follow this and additional works at: <https://repository.law.uic.edu/lawreview>



Part of the [Constitutional Law Commons](#), [Judges Commons](#), [Jurisprudence Commons](#), [Law and Society Commons](#), [Legal History Commons](#), and the [Litigation Commons](#)

Recommended Citation

Robert Lowry Clinton, Classical Legal Naturalism and the Politics of John Marshall's Constitutional Jurisprudence, 33 J. Marshall L. Rev. 935 (2000)

<https://repository.law.uic.edu/lawreview/vol33/iss4/12>

This Article is brought to you for free and open access by UIC Law Open Access Repository. It has been accepted for inclusion in UIC Law Review by an authorized administrator of UIC Law Open Access Repository. For more information, please contact repository@jmls.edu.

CLASSICAL LEGAL NATURALISM AND THE POLITICS OF JOHN MARSHALL'S CONSTITUTIONAL JURISPRUDENCE

ROBERT LOWRY CLINTON*

INTRODUCTION

For many scholars, John Marshall has been a great puzzle. Although Marshall is venerated as the "Great Chief Justice" by almost everyone; his jurisprudence has not been regarded as highly, or as thoughtfully, as it ought to have been by most contemporary judges and commentators. Christopher Wolfe stated the problem bluntly almost a decade-and-a-half ago, noting that the "almost unchallenged understanding of Marshall today"¹ is comprised in a view "which dismisses his own statements as words 'well and finely said' but not to be taken seriously."² Happily, the appearance of excellent Marshall studies by such scholars as Charles Hobson and Herbert Johnson during the past few years has ameliorated the situation somewhat.³ Still, I think a fair assessment of Marshall's position today would nonetheless confirm the lingering truth of Wolfe's observation.

The main thesis of this essay is that a sea-change took place in the attitudes of intellectuals toward law and government during the last half of the nineteenth-century; and our immersion in the twentieth-century jurisprudence that followed from this transformation has taken us so far from Marshall's world that the ability of contemporary intellectuals to understand the constitutional jurisprudence of antebellum courts has been seriously compromised. In the second section of the essay, I will describe some of the most important elements of the nineteenth-century transformation. In the third section, I will attempt to reconstruct the main features of the world view that was scuttled in the transformation. In the final section, I will call upon some

* Professor of Political Science, Southern Illinois University.

1. CHRISTOPHER WOLFE, *THE RISE OF MODERN JUDICIAL REVIEW: FROM CONSTITUTIONAL INTERPRETATION TO JUDGE-MADE LAW* 41 (1994).

2. *Id.*

3. For a discussion of John Marshall as Chief Justice, see generally CHARLES F. HOBSON, *THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW* (1996); HERBERT A. JOHNSON, *THE CHIEF JUSTICESHIP OF JOHN MARSHALL, 1801-1835* (1997).

examples to suggest that a clear understanding of Marshall's decisions depends crucially upon a clear understanding of his jurisprudence—not as we understand it, but as he understood it.

I. NINETEENTH-CENTURY INTELLECTUAL HISTORY

A number of reasons for Marshall's anomalous reputation exist, most of them having little to do with Marshall himself, his Court, or his work as a jurist. They all derive in one way or another from late-nineteenth century intellectual history, from the era in which the foundations of twentieth-century American political and jurisprudential thought were laid.

A. *Progressive Era Revisionism*

First, there was the Progressive Revision of American constitutional history that was accomplished by a group of prominent historians that included J. Allen Smith, Charles Beard, Vernon Parrington, and Edward Corwin.⁴ This revision carried not only a new view of American politics, law, and the Constitution; but a new view of John Marshall as well. Whereas the Founders were re-cast by the progressive historians as a dominant socio-economic elite bent on safeguarding wealth and social position; Marshall was re-cast as a "proto-Federalist," the archetypical judicial representative of the dominant class bent on constructing legal safeguards for its members. This view of Marshall was initially contrived in the late-nineteenth century by leaders of the American bar and business communities who claimed Marshall's authority to support emergent Gilded Age, laissez-faire jurisprudential doctrines such as dual federalism, substantive economic due process, and substantive equal protection of the law.⁵

Central to this new view of Marshall was the *Marbury* Myth, a by-product of controversies during the progressive era about the role of the courts. According to this "reinterpreted" *Marbury*, a cynical, perhaps unethical, and certainly politically-motivated Chief Justice Marshall deviously outfoxed and defeated President Thomas Jefferson in a high-stakes political game, winning nothing less than constitutional judicial supremacy for his hitherto weak and beleaguered third branch of government.⁶ Marshall's most

4. See ROBERT LOWRY CLINTON, *MARBURY V. MADISON AND JUDICIAL REVIEW* 176-91 (1989) [hereinafter CLINTON, *MARBURY V. MADISON*]. See also J. ALLEN SMITH, *THE SPIRIT OF AMERICAN GOVERNMENT* (1965); CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (1986); VERNON L. PARRINGTON, *MAIN CURRENTS IN AMERICAN THOUGHT* (1927); EDWARD S. CORWIN, *JOHN MARSHALL AND THE CONSTITUTION* (1919).

5. See generally CORWIN, *supra* note 4, at ch. 10.

6. See generally CLINTON, *MARBURY V. MADISON*, *supra* note 4; Robert

prominent progressive era biographer summed up this version of *Marbury v. Madison*⁷ by calling Marshall's actions "a coup as bold in design and as daring in execution as that by which the Constitution had been framed."⁸ The view suggested by this reading of Marshall's *Marbury* opinion holds the Great Chief Justice to have been more a clever politician (even a revolutionary!) than a jurist.

B. Behavioralism

Second, there is "behavioralism," a methodological orientation that has been the chief contribution of my own discipline—political science—to the prevailing climate of skepticism that has permeated American intellectual life throughout much of the twentieth-century. Conceived as a research program in social science, the origins of behavioralism may be found in the call for a "value-free" social science in the late-nineteenth century.⁹ According to Eric Voegelin:

The terms "value-judgment" and "value-free" science were not part of the philosophical vocabulary before the second half of the nineteenth-century. The notion of a value-judgment. . . is meaningless in itself; it gains its meaning from a situation in which it is opposed to judgments concerning facts. . . And this situation was created through the positivistic conceit that only propositions concerning facts of the phenomenal world were "objective," while judgments concerning the right order of the soul and society were "subjective." Only propositions of the first type would be considered "scientific," while propositions of the second type expressed personal preferences and decisions, incapable of critical verification and therefore devoid of objective validity.¹⁰

Since the 1950's, behavioralism has been the dominant research paradigm in the social sciences. As currently practiced, it is a reductionist enterprise that attempts to understand human activity via observation, quantification, and aggregation of discrete instances of "behavior" without reference to the presumed ends or purposes of such behavior. Ostensibly appropriating the methods and assumptions of the natural sciences in order to create a "value-free" social or political science, the behavioralist carves up socio-political reality and examines it in a piecemeal, directionless

Lowry Clinton, *Game Theory, Legal History, and the Origins of Judicial Review: A Revisionist Analysis of Marbury v. Madison*, 38 AM. J. POL. SCI. 285, 285-302 (1994). See also DONALD O. DEWEY, *MARSHALL VERSUS JEFFERSON: THE POLITICAL BACKGROUND OF MARBURY V. MADISON* (1970).

7. 5 U.S. (1 Cranch) 137 (1803).

8. 3 ALBERT J. BEVERIDGE, *THE LIFE OF JOHN MARSHALL*, 142 (1916).

9. See ERIC VOEGELIN, *THE NEW SCIENCE OF POLITICS: AN INTRODUCTION* 1-26 (1952) (outlining the origins and development of behavioralism).

10. *Id.* at 11.

fashion. Research is conducted in the blind hope that something important will “turn up” of its own accord.

The problem is that, in research as in other endeavors, things usually do not simply emerge unless someone is looking for them. When trying to understand the causes of human action, the things one looks for will most often be either conscious purposes or unconscious motives. The classical world view, in virtually all its dimensions from Aristotle down through the ages, regards conscious ends or purposes to be the well-spring of human activity. In classical ethics and political science, human nature is oriented or inclined to the *summum bonum*—the moral and intellectual goods of the virtuous and contemplative life.¹¹ Returning briefly to the “scientific-subjective” or “fact-value” distinction noted above, Voegelin observes that:

This classification made sense only if the positivistic dogma was accepted on principle; and it could be accepted only by thinkers who did not master the classic and Christian science of man. For neither classic nor Christian ethics and politics contain “value-judgments” but elaborate, empirically and critically, the problems of order which derive from philosophical anthropology as part of a general ontology. Only when ontology as a science was lost, and when consequently ethics and politics could no longer be understood as sciences of the order in which human nature reaches its maximal actualization, was it possible for this realm of knowledge to become suspect as a field of subjective, uncritical opinion.¹²

Thus, classical jurisprudence is, at bottom, a teleological jurisprudence. However, since behavioralists rule out teleology, they cannot really look to conscious purposes for orientation of the research enterprise—this would imply a “value” orientation. Hence, the incessant drive of public law scholars in political science is to discover lurking “baser” motives that are the presumed undergrowth of all judicial behavior.

An interesting contemporary example of this effort in political science may be found in the recent efforts of political scientists to discredit the idea of precedent as a basis for constitutional decisions in the United States Supreme Court. In the November 1996 issue of the *American Journal of Political Science*, Jeffrey A. Segal and Harold J. Spaeth announced that *stare decisis*, “the fundamental principle on which judicial decision making is supposed to rest” was dead.¹³ The basis of this claim was their finding that, in the vast preponderance of modern cases decided by

11. See, e.g., ARISTOTLE, *THE ETHICS OF ARISTOTLE* (1998). See also THOMAS AQUINAS, *ON HUMAN NATURE* (1999).

12. VOEGELIN, *supra* note 9, at 11-12.

13. Jeffrey A. Segal & Harold J. Spaeth, *The Influence of Stare Decisis on the Votes of the United States Supreme Court Justices*, 40 *AMERICAN JOURNAL OF POLITICAL SCIENCE* 971, 971 (1996).

the Supreme Court, Justices who dissent from precedents announced by the Court in landmark cases continue to dissent from those precedents in subsequent progeny cases, rather than switching their votes in the progeny cases in order to conform to the newly-established precedents.

The Segal-Spaeth methodological setup is premised on the idea that the only way we can know for certain whether judges are deciding on the basis of *stare decisis* is to look at subsequent decisions of judges who dissent in precedent-making cases to see if they honor those precedents once they are established. For a judge who voted with the Court in the establishment of a precedent, and continued to uphold the precedent in progeny cases, we simply can never know for sure whether he or she upheld the precedent merely because it had been “established” or because the Justices agreed with the ruling, “preference-wise,” in the first place and continued to agree with it later.

The trouble with this approach is that it is based on what logicians call “the fallacy of negating the antecedent” in a conditional statement. In plain English, the fact that landmark dissenters who “switch” to the Court’s side in progeny cases are showing respect for precedent does not imply that landmark dissenters who *fail* to switch in progeny cases are showing *disrespect* for precedent. The common sense reason for this is that judges in the second category may have dissented in the first place because of their respect for long-standing precedents which landmark cases frequently overturn. A thoroughgoing *stare decisis* judge should not be expected to give up an older precedent until the newer one has gathered normative weight sufficient to override the earlier standard.

Now, much can be, and has been, said about the efforts of Segal, Spaeth, and other social scientists in this vein. However, this venue is not the place to rehash it all. The point most worthy of notice here is the length to which “attitudinalist” public law scholars will go in order to prove that judges are mostly disingenuous when deciding constitutional cases. In other words, court decisions are not really based on the jurisprudential doctrines announced in written judicial opinions. Rather, these doctrines are merely a “cover” for the true bases of decision: the personal preferences or predilections of judges that are themselves the product of murky unconscious or semi-conscious forces in the human *psyche*. If the approach is problematic when used to study the modern Supreme Court—which, after all, is at least a post-Freud, post-Marx, post-Weber, post-Beard Court—how much more problematic must it be when applied to an antebellum Court, the judges of which would have regarded the doctrines of all the above-mentioned luminaries as flatly absurd.

C. Legal Positivism

Third, the Progressive Revision, the *Marbury* Myth, and skeptical behavioralism all found jurisprudential support in the legal positivism of such jurists as Oliver Wendell Holmes, Jr., who regarded the law as always and inevitably "progressing," aiming toward some "future state" which would embody the "interests" of a dominant social elite.¹⁴ Although the roots of positivism are certainly much older, its formulation as a comprehensive jurisprudential theory was accomplished by the English legal philosopher John Austin only in the 1830s, and became generally acceptable in the United States only in the late nineteenth and early twentieth centuries, thanks largely to the influence of Holmes and his later disciples in the American legal realist movement.¹⁵

Although Austin formulated his analysis as a jurisprudence of positive law, without denying the existence or importance of other categories of legal experience (e.g., divine law or natural law),¹⁶ Austin's philosophical descendants have tended to advance legal positivism as a hardened ideological position denying the name of law to any rule of non-immanent origin. This denial truncates legal experience by ruling out all legal categories save those containing rules merely "posited" as commands of a temporal sovereign with power to visit evil upon disobedient subjects.¹⁷ Since under this approach, law is no longer conceived as resulting from a deliberate quest for social order rooted in human nature, the positivist program of the command theorists and the behavioralist methodological approach of the social scientists fall into sync precisely at the point at which teleology is dismissed as the chief orienting feature of legal reality.

D. Materialism

Fourth, progressivism, behavioralism, and positivism found additional support in the monistic materialism of the Gilded Age, which saw the ultimate triumph of Hobbesian legal and political thought, and ensured that the dominant social interests of the twentieth-century would be primarily economic. As Holmes put it, the "man of the future" was destined to be the "man of statistics

14. See generally OLIVER WENDELL HOLMES, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

15. See generally JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE* (1998); JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* (2d ed. 1921).

16. See AUSTIN, *supra* note 15, at Lecture II.

17. For a good discussion by an early-twentieth century positivist and a list of comrades-in-arms, see Felix S. Cohen, *Transcendental Nonsense and the Functional Approach* (1935), reprinted in WILLIAM W. FISHER III, MORTON J. HORWITZ, & THOMAS A. REED, *AMERICAN LEGAL REALISM* 212-27 (1993).

and the master of economics."¹⁸ Though materialism—the view that all is matter and that everything explicable must be explained by physical causes—is an ancient world view held by Ionian Greek thinkers in the fifth and sixth centuries before Christ, its modern formulation originated in the philosophy of Thomas Hobbes in the mid-seventeenth century.¹⁹ According to David M. Rosenthal, in Hobbes' view:

All objects of whatever sort are no more than complex collections of moving particles, and all their properties are more or less complicated motions of these component particles. Hobbes urged that sensations of living things are no more than motions in the sense organs caused by some chain of movements initiated by the object perceived. Mental events of other kinds, such as thoughts and memories, were regarded by Hobbes in a similar fashion. The relations of cause and effect that mental events have to other events are to be explained on the same mechanical principles that govern all movements of adjacent bodies.²⁰

Whatever their influence two centuries later, Hobbes' views nonetheless were anathematized contemporaneously by the English legal profession. Their influence on the English legal system is arguably invisible prior to the Judicatory Reform Acts of 1873 and 1875.²¹ The reception of Hobbesian ideas on this side of the Atlantic was even less favorable. Early American common law lawyers, trained largely, and often solely, by the reading and re-reading of Blackstone's *Commentaries*, shared the view of their English counterparts that the basis of law was immemorial custom: cumulative tradition developed and refined by habitual exercise, discoverable by the use of reason, and pointing to a more comprehensive legal reality that transcends particular societies and legal cultures. In short, both the English common lawyers and the American Founders they influenced so strongly were—at least in legal matters—inveterate immaterialists.

All this changed, however, with the publication of Charles Darwin's *Origin of Species* in 1859.²² The profound relation between Darwin and Hobbes has been largely ignored by modern

18. AUSTIN, *supra* note 15, at 260.

19. See THOMAS HOBBS, *LEVIATHAN* 3-30 (1975).

20. MATERIALISM AND THE MIND-BODY PROBLEM 8 (David M. Rosenthal ed. 1987).

21. See, e.g., Sir Matthew Hale, *Reflections by the Lrd. Chiefe Justice Hale on Mr. Hobbes his Dialogue of the Lawe*, reprinted in 5 SIR WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 500-13 (3d. ed. 1945) (1929) (reflecting contemporaneous views of Hobbes' legal thought). On the Judicature Acts and their relation to the common law tradition, see generally FREDERIC WILLIAM MAITLAND, *THE FORMS OF ACTION AT COMMON LAW: A COURSE OF LECTURES* (1936).

22. CHARLES DARWIN, *THE ORIGIN OF SPECIES BY MEANS OF NATURAL SELECTION* (Greg Suriano ed., Grammercy 1998) (1859).

historians; yet it was Darwin that made good Hobbes' promise of a mechanistic political science by specifying the mechanism of natural selection accompanied by random variation to account for the rise and development of biological organisms. As much as Hobbes had tried to account for the movements of the human *psyche* by positing a random motion of particles in the brain, Darwin tried to account for biological diversity by positing undirected natural physical processes as the basis for evolutionary change. Since human beings are biological organisms, it is but a short step from the evolution of individual organisms to the evolution of human societies—Hobbes' primary concern. At last, Hobbesian social thought seemingly could move from the realm of metaphysical speculation to the realm of empirical science.

The price of this move to materialism, much as in the moves to progressivism, positivism, and behavioralism described earlier, is the rejection of teleology. This rejection further entails a fundamental change in our view of human nature and human society. Human beings are no longer seen as creatures imprinted with the image of a creator, as beings possessing a "nature" or an "inclination" to seek and to know the author of their being, or as beings who act in accordance with behavioral precepts or virtues that are implied by the existence and action of that author. Such beings have no "final cause," no *telos*, end or purpose. Instead, humans are regarded as "products" of an unguided developmental process that is material in origin and thus essentially mundane.

The implications of such a view for social organization and for legal institutions are immediate and devastating. For example, in American law, biological Darwinism would soon be complemented by an embellishment usually denoted "social Darwinism," a world view that regards society as an organized competitive struggle for economic survival.²³ Those most "fit" for the struggle both cause and reap the benefits of their unrestrained economic activity, while those less fit flounder or perish. In the late-nineteenth and early-twentieth centuries, the Supreme Court's adoption of this theory uprooted much of the jurisprudence of Marshall and the Founders—a jurisprudence that had been firmly supported by common law and natural law foundations; substituting in its place a truncated natural law that is perhaps best described as a "law of the jungle."

The temporary capture of the Court by the jurisprudence of *laissez-faire* at the turn of the century illustrates the important point that adoption of the complex of ideas discussed above carries weighty implications for constitutional interpretation. Although progressivism, behavioralism, positivism, materialism, and their

23. See, e.g., Justice Holmes' dissent in *Lochner v. New York*, 198 U.S. 45, 65 (1905), see also FISHER, *supra* note 17, at 25-26.

offshoots came to be widely accepted—even fashionable—during the twentieth century, these ideologies did not exist in Marshall's world. Thus, the effort to understand Marshall's constitutional jurisprudence from the perspective of a legal culture that has been quite literally transformed since the close of the antebellum era is a project calling for extreme care. Caution, however, has often been the exception rather than the rule in Marshall scholarship. Many have not always paid attention to the fact that Marshall and his brethren simply did not, and could not have, believed many of the things that are now believed about the way in which the world and the laws that govern it work.

Particularly, we seem to have so thoroughly lost touch with any traditional (pre-twentieth century) idea of a constitution or of constitutional interpretation that it has become difficult, if not impossible, to understand what Marshall and his Court were doing, or at least what they thought they were doing, when deciding the famous landmark cases that breathed life into the Constitution at its most critical points. Perhaps this is why modern scholars have had such trouble reaching any consensus on what Marshall's jurisprudence really was. Everyone wants to claim Marshall's authority, but we cannot agree on what that authority is. These difficulties have been reinforced and further exacerbated by contemporary literary fashions, which deny that texts can be understood in relation to their authors' intended meanings, often pushing this denial so far as to eliminate the interpretive enterprise altogether. Anomalous results have followed.

For instance, one Marshall Court opinion—*Gibbons v. Ogden*²⁴—has been dubbed by some the harbinger of an exclusivistic nationalism in Commerce Clause cases, and by others the foundation of the late-nineteenth century doctrine of “dual federalism.”²⁵ Another Marshall opinion, *McCulloch v. Maryland*,²⁶ stands for some as representative of the doctrine of “loose

24. 22 U.S. (9 Wheat.) 1 (1824).

25. See generally Robert Lowry Clinton, *Judicial Review, Nationalism, and the Commerce Clause: Contrasting Antebellum and Postbellum Supreme Court Decision Making*, 47 POL. RES. Q. 857-76 (1994); Howard Gillman, *The Struggle Over Marshall and the Politics of Constitutional History*, 47 POL. RES. Q. 877-86 (1994); Robert Lowry Clinton, *John Marshall's Federalism: A Reply to Professor Gillman*, 47 POLITICAL RESEARCH QUARTERLY 887-890 (1994); Wallace Mendelson, *John Marshall and the Sugar Trust—A Reply to Professor Gillman*, 49 POL. RES. Q. 405-13 (1996); Howard Gillman, *More on the Origins of the Fuller Court's Jurisprudence: Reexamining the Scope of Federal Power Over Commerce and Manufacturing in Nineteenth-Century Constitutional Law*, 49 POL. RES. Q. 415-37 (1996); Wallace Mendelson, *Nullification via Dual Federalism: A Second Response to Professor Gillman*, 49 POL. RES. Q. 439-44 (1996).

26. 17 U.S. (4 Wheat.) 316 (1819).

construction” of the Constitution and a corresponding unwarranted enlargement of national power; for others, it is an authoritative statement of the Court’s power to “strike down” acts of Congress that invade state prerogatives (e.g., Marshall’s statement about the Court’s “painful duty”).²⁷ In *Marbury v. Madison*²⁸—arguably the Supreme Court’s most famous opinion—Marshall is thought by some to have gone “out of his way” to create judicial review *ex nihilo* and then used the power as an “activist” judge; by others, he is thought to have held and acted on a very limited or restrained view of judicial power.²⁹ Is it not tempting to conclude from such confusion that Marshall either was a schizophrenic or was up to something? It may be, for some, but I believe that the problem lies not in Marshall, but in ourselves.

The stakes are very high. The cost of the confusion has been not merely to have lost focus on Marshall’s jurisprudence, but rather to have lost our understanding of an entire era—and one that is hardly of minimal importance for understanding ourselves. If we believe that constitutions and laws are mere tools of powerful political or economic interests, then it will be hard not to read Marshall’s opinions as if they were apologies for such interests. If we believe that laws are merely the “commands” of a sovereign, then we will think it either naive or disingenuous for a judge like Marshall to run on about the majestic generalities of the Constitution as if they could be thought about apart from the concerns of the moment. If we think that all is matter, then we will think that Marshall’s “real” concerns were material. If we think of constitutional cases as political “games” rather than principled controversies, then we will have difficulty taking seriously the high-toned discussions in many of Marshall’s most famous opinions. If we do not believe that objective truth exists, then it is not likely that we will end up believing that there is any such thing as “correct” constitutional interpretation; indeed, in the end, we will probably stop thinking about “interpretation” at all, and start thinking about “creativity” instead. If we believe that novelty is the measure of creativity, then we will find a way to regard Marshall’s opinions as either creative or “anachronistic.” If we think that judges don’t “discover” law—but instead “make” it—then we will read Marshall’s judicial opinions as legislation; some will find that he legislated well, and others will find that he legislated badly. If we believe that judges make decisions based

27. Mendelson, *supra* note 25, at 439-44.

28. 5 U.S. (1 Cranch) 137 (1803).

29. See, e.g., CLINTON, *MARBURY V. MADISON*, *supra* note 4. See also, MATTHEW J. FRANCK, *AGAINST THE IMPERIAL JUDICIARY: THE SUPREME COURT VS. THE SOVEREIGNTY OF THE PEOPLE* (1996); William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 1-47 (1969); DEWEY, *supra* note 6.

not on law—but rather on the basis of non-legal “preferences,” then we will look for—and no doubt “find” other, “baser” motives lurking between the lines of Marshall’s opinions.

What I am suggesting is this: believing the things that we now appear to believe has seriously compromised our ability to understand the jurisprudence of the Marshall Court. Indeed, the whole enterprise of constitutional adjudication as Marshall and his colleagues saw it has become invisible to us because we have, by now, scuttled almost entirely the interpretive tradition—and the system of beliefs that grounded and accompanied it—within which they lived and worked. We are guilty of trying to understand Marshall’s judicial decisions via application of contemporary jurisprudential notions that Marshall and his contemporaries would have regarded as nonsensical. Because we have ignored for at least a century the most important interpretive traditions and conventions that Marshall (and just about everyone else in his day) took for granted, we cannot read his opinions with a measure of clarity sufficient to forge a scholarly consensus on their meaning.

II. CLASSICAL LEGAL NATURALISM AND THE INTERPRETIVE TRADITION

The modern version of the interpretive tradition we have ignored has been called a “moderate Enlightenment” tradition by Carl Dibble.³⁰ This world was inhabited by such thinkers as Grotius, Pufendorf, Vattel, Rutherford, and Blackstone; and it contrasts sharply with more “extreme Enlightenment” traditions like skepticism, positivism, and utilitarianism—all of which came into prominence in the United States only *after the Civil War*. I think that this interpretive tradition is much older, and that some of its elements are traceable to the jurisprudence of the ancient Greeks and Romans. I also believe that the jurisprudence of Grotius and the others was an attempt to save classical legal naturalism from the incendiary effects of the “revolutionary” Enlightenment; and that Marshall’s appropriation of their jurisprudential thought was an effort to save American constitutional law from those same effects. Accordingly, I propose to read Marshall’s constitutional decisions through Grotian lenses in the hope of gaining greater clarity about their historical meaning for American constitutionalism. Before such a re-reading can be accomplished, however, it will be necessary to expound the main principles of classical legal naturalism.

Classical legal naturalism—or, in its modern guise, the

30. Carl M. Dibble, *The Lost Tradition of Modern Legal Interpretation* (1994) (unpublished essay prepared for delivery at the 1994 Annual Meeting of the American Political Science Association) (on file with author).

“moderate Enlightenment” tradition in legal interpretation—is summarized briefly below. I shall rely heavily in this discussion upon Professor Dibble’s work, supplemented by other materials whenever appropriate. The affirmations comprising this tradition constitute the main reasons why constitutional and legal interpretation are both possible and necessary. Marshall’s theory of interpretation, and that of the framers, was based on this tradition; but according to Dibble, the model disappeared from the American scene and from American law writing after the works of Francis Lieber, Theodore Sedgwick, and the abolitionist writers of the Civil War period.³¹ Contemporary legal historians and commentators have since largely ignored this model. This disappearance has had an enormous impact on our contemporary understanding of Marshall and other jurists of his time. Thus, a project of historical reconstruction will be necessary in order to bring the constitutional jurisprudence of antebellum courts into proper perspective.

A. Naturalism as an Interpretive Tradition

The first thing to note is that interpretive naturalism, as Grotius, Blackstone, Marshall and the others understood it, was a “tradition” in the full sense of the term. As Dibble puts it: “people of one generation considered their honored predecessors as their teachers, acknowledging their authority even as they modified the received teaching.”³² As the word ‘tradition’ signifies, they carried across the generations the ideas and presuppositions of those who came before.³³ In other words, it was not a “theory of interpretation;” which is why the works of Grotius and the others do not usually set forth catalogs of interpretive “rules,” as nineteenth-century writers like Story and Cooley were prone to do.³⁴ The traditional aspect of interpretive naturalism also serves to note a sharp contrast between Grotius and his disciples, on the one hand, and nineteenth and twentieth-century law writers, on the other—the latter of which were, and still are, devoted to making their works appear highly original and even novel. This modern characteristic has apparently caused leading academic thinkers in law and social science:

- (1) to focus critical attention on the thinking of only their immediate predecessors, rather than on any long intellectual tradition or on more original and fundamental progenitors of tradition; and (2) to criticize the opinions of those immediate predecessors as too ‘traditional,’ in contrast to their own thinking, which is presented as

31. *Id.* at 1-2.

32. *Id.* at 1.

33. *Id.*

34. *Id.* at 9.

novel—as not only different but as decisively new and improved. . . .³⁵

Second, according to interpretive naturalism, there is an existent *ratio legis* (reason of the law) that is best conceived as the law's participation in an "ordered structure of right reason."³⁶ Since this *ratio legis* transcends the law and constitutes its main ground and justification, it follows that all law has a transcendent source (i.e., a source outside itself). This observation has the important consequence that law cannot be regarded as self-justifying or self-contained. As Eric Voegelin once stated, the legal order is not a closed normative system or a self-contained aggregate of rules.³⁷ Or as Dibble suggests, legal formalism is wrong; law is not merely a body of formal rules. Formalists regard "explicit, fully cognizable, definitely bounded rules. . . as the *sufficient* condition for the existence of law. . . . Blackstone and the Enlightenment tradition regard formal rules as a necessary but *insufficient* condition for law."³⁸

Nor does a legal order become self-contained when organized under a constitution articulating an authoritative power structure in society. Voegelin cites—disapprovingly—the "pure theory" of his teacher Hans Kelsen, in which:

the lawmaking process acquires the monopoly of the title 'law.' . . . Kelsen's hierarchy culminates in a hypothetical basic norm that orders the members of society to behave in conformity with the norms deriving ultimately from the constitution. The power structure articulated in the constitution is the origin of the legal order. . . . The law and the state, then. . . are two aspects of the same normative reality. . . . Whatever power establishes itself effectively in a society is the law-making power. . . whatever rules it makes are the law. The classic questions of true and untrue, of just and unjust order do not belong in the science of law or, for that matter, in any science at all.³⁹

The "pure theory" of Kelsen is a sophisticated variant of what has come to be known as "analytical legal positivism," a theory of law developed by Austin's disciples in the late nineteenth and early twentieth centuries and unknown—except perhaps in a highly embryonic form—in Marshall's time. In the form of legal pragmatism or "instrumentalism," it has arguably become the dominant view of law in the twentieth-century. According to Dibble:

35. Dibble, *supra* note 30, at 16.

36. *Id.* at 7.

37. Eric Voegelin, *The Nature of the Law and Related Legal Writings*, in 27 THE COLLECTED WORKS OF ERIC VOEGELIN 28 (Robert Anthony Pascal et al. eds. 1991).

38. Dibble, *supra* note 30, at 10.

39. Voegelin, *supra* note 37, at 28.

[P]revailing twentieth-century legal theory, in its revolt against formalism, has moved toward denying that formal rules are even a *necessary* condition of law. Law becomes *something used*, an instrument of hegemonic power or acquisitive self-interest, or a function of social and economic forces, a mask covering political or psychological realities.⁴⁰

However, if law cannot be plausibly conceived as *merely* an instrument of political power, self-interest, or socio-economic forces, *without more*, then legal instrumentalism is simply wrong; and Marshall would surely have considered it so.

Third, if the questions of true and untrue, of just and unjust *do* belong in the science of law, as all classical legal naturalists believe, then law is fully subordinate to justice or equity—defined as Aristotle defined it in *Nichomachean Ethics*: “the correction of that, wherein the law (by reason of its universality) is deficient.” William Blackstone, after quoting this passage, continues:

[f]or since in laws all cases cannot be foreseen or expressed, it is necessary, that when the general decrees of the law come to be applied to particular cases, there should be somewhere a power vested of defining those circumstances, which (had they been foreseen) the legislator himself would have expressed. And these are the cases, which, according to Grotius, ‘*lex non exacte definit, sed arbitrio boni viri permittit.*’⁴¹

Blackstone’s purpose in using Aristotle and Grotius in the passage above is to argue that fixed rules of equity or natural justice would destroy the essence of law by reducing all law to merely positive law. Thus, law has an “essence” that is comprised in its “nature.” Although that nature is “fixed,” it cannot be reduced to a set of fixed *rules* that overcome the necessity for correct interpretation and sound judgment in its application by the virtuous person who is also the learned judge.

This suggests that the main purpose of legal interpretation, the main reason calling forth the need for interpretation in the law, is ethical or political—not linguistic. The idea of interpretation as an enterprise primarily devoted to resolving linguistic uncertainties and ambiguities has resulted from twentieth-century literary fashions, and was essentially unknown to Marshall and his contemporaries. For Grotius, Blackstone, and Marshall, the reason that laws must be interpreted is not that language is uncertain or ambiguous; it is that corrupt, duplicitous persons will “treat the law in a sophistical manner” in order to advance their own individual interests.⁴² But as Thomas Aquinas

40. Dibble, *supra* note 30, at 10.

41. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 62, (1979). Trans.: [such cases] ‘do not define the law exactly, but permit the good man to choose.’

42. Dibble, *supra* note 30, at 5.

said, all true law is common. That is, it is consensual and always based on public—not private—good. Thus, the need for, and the character of, “valid and reasoned interpretation arises out of the political and social life of civil society.”⁴³ Good interpreters “take on the role of enlightened or in some sense philosophic defenders of public life against its sophisticated subversives, just as Socratic philosophers (and also some dramatists, historians and a few rhetoricians like Socrates and Cicero) did battle with sophistry in ancient Greece and Rome.”⁴⁴ As an example, one might consider the “ordinary meaning” rule in which, according to Dibble, “ordinary” in the traditional sense means “normative” and “consensual”—not merely “routine” or “familiar.”⁴⁵

Matthew Hale addresses a similar theme when addressing the need for stable legal conventions founded on a *consensus iure* in the administration of justice:

In Moralls and Especially with relation to Lawes for a Comunitie, tho the Comon Notion of Just and fitt are comon to all men of reason, yett when Persons come to particular application of those Comon Notions to particular Instances and occasions wee shall rarely find a Comon Consent or [agreement] between men tho' of greate reason . . . [By agreeing] upon Some certaine Lawes and rules and methods of administration of Comon Justice' [the following advantages are gained]: (1) [avoidance of] the greate Instabilitie of the [judgments] and reasons of Judges. . .;(2) [avoidance of] that greate oppertunitie that Judges had, when they had noe other rule for their [Judgment] but their own reason, to be Corrupt and partiall. . .;(3) [avoidance of] that jangling and Contradiction that would happen upon the unstable reason of Men when they once came to particular Decisions.⁴⁶

In place of “rules of interpretation,” the “moderate Enlightenment” interpreters talk of “sources of information” that interpreters are entitled to consult. Grotius and Pufendorf down through Blackstone and Marshall all agree that interpreters must first consult the text, and enforce the “plain meaning” (i.e., the “natural sense” or “ordinary meaning” in the sense of consensual and normative meaning) if this is available. Failing that, interpreters must look into the “subject-matter,” “effects and circumstances,” and the “broad and/or narrow context” of the law. These rules are conceived not as “set in stone” but rather as “rules of thumb” to guide or aid interpretation—the purpose of which is to “find” or “discover” the “true” sense of the law, the consensual, ordinary, normative force deriving from the “*ratio legis*” or the presumed participation of the law in the cosmic structure of

43. *Id.*

44. *Id.*

45. *Id.*

46. Hale, *supra* note 21, at 502-03.

rational order.

Finally, the declaratory theory of law implied by all of the above observations and conclusions formed the horizon within which Marshall and his colleagues understood the judicial function and its limitations. The declaratory theory—usually stated (somewhat misleadingly) as the idea that judges “find” or “discover” rather than “make” law—has its origin in the belief that the substance of the law *pre-exists* its immanent articulation or “declaration” by courts or other authoritative interpreters. The declaratory theory ascribes to the law an underlying essence or unity that transcends any and all particular applications. According to Lord Coke, legal rules are many but legal reason is one.⁴⁷ Blackstone too adopts this concept of the law’s unity, holding that *lex non scripta*, the unwritten substance of the common law, is knowable by the application of reason to legal experience as recorded in prior judicial decisions; and that precedents found to be “absurd” or “unjust” are not merely “bad law”—they were never “law” at all.⁴⁸ Blackstone also clearly distinguishes between laws “declaratory of natural rights and duties” and laws “determinative of things indifferent;” adding that for acts *mala in se* (acts that are “wrong in themselves”), the municipal or positive law adds *nothing* to the obligation stemming from natural or divine law.⁴⁹

Speaking of the “reason of the common law,” Chief Justice Hale also appeals straightforwardly to the classical and scholastic ideas of reason and law upon which the declaratory theory is based. For Hale:

Reason. . . may be found in thinges that are destitute of the faculty of Reason and is or may be antecedent to any Exercise of any humane [Reasonable] facultie: thus the Connexion of Effects to their Causes, the Consequences of Propertyes to their Formes or Essences, the Exertions of Acts by their Powers, the ordination and disposition of Naturall thinges in their severall places, and Orders: the Connaturall tendencyes and motions of thinges in Nature to their Preservation and Conveniences have a reasonableness that is a Decorum, Congruitie, and Consequention though they were noe man in the world to take notice of itt. . . . And in Moralls though the objects thereof are more obscure, and not soe open to a distinct and Cleare Discoverie, yett there is a Certaine Reasonableness and Congruitie, and Intrinsick Connexion and Consequence of one thing from an other antecedent to any Artificiall Systeme of Moralls or Institution of Laws.⁵⁰ [sic]

47. JAMES R. STONER, JR., COMMON LAW AND LIBERAL THEORY: COKE, HOBBS, AND THE ORIGINS OF AMERICAN CONSTITUTIONALISM 54 (1992)

48. 1 BLACKSTONE, *supra* note 41, at 70.

49. *Id.* at 54.

50. Hale, *supra* note 21, at 500-01.

Neither the reason of Hale, nor the law and rights that follow from it, can be circumscribed by definitions or axioms; rather, “[t]he rights of men are in a sort of middle, incapable of definition, but not impossible to be discerned.”⁵¹ However, discernment, unlike definition, requires experience conditioned by practice and habit. Employing Plato’s favorite method of arguing to form from function, Hale strongly suggests the affinity of the common law with Aristotelian practical reason, noting that:

[Reason] is taken complexedly when the reasonable facultie is in Conjunction [with] the reasonable Subject, and habituated to it by Use and Exercise, and it is this kind of reason or reason thus taken that Denominates a Man a Mathematician, a philosopher, a Politician, a Phisician, a Lawyer; yea that renders men excellent in their [particular] Acts as a good Engineer, a good Watchmaker, a good Smith, a good Surgeon.⁵²

The most important thing to note about these conceptions is that they resemble those of Cicero and St. Thomas more than they resemble those of Bentham or Austin. Their affinity is with classical rather than modern sources in their complete subordination of politics to law in the manner of the ancients. If law commands what is “useful and necessary,” it does so only because what is useful and necessary is also “just” and “right.” However, what is useful and necessary is just and right only if the law is a unity, only if the legal rules that are “many” are fully subordinate to, and fully explicable in terms of, the legal reason that is “one.”⁵³

They are reminiscent of Socrates’ effort in *Minos* to answer the question: “What is law, for us?”⁵⁴ Denying that law can be merely “the things that are lawfully accepted”⁵⁵ (because bad things can be accepted), or “the official opinion of the city”⁵⁶ (because official opinions can be false), Socrates argues that law is (or tends to be) “the discovery of what is.”⁵⁷ Though the expression is perhaps curious, its import is clear enough. The things that may be “lawfully accepted” and the ideas that may become “official opinions” are, like Coke’s manifold of legal rules, so “many” *appearances*. The law that embodies Coke’s legal reason, thus pointing to the discovery of “what is,” is both “one” and *real*. Any

51. *Id.* at 502 n.1.

52. *Id.* at 501-02.

53. ROBERT LOWRY CLINTON, *GOD AND MAN IN THE LAW: THE FOUNDATIONS OF ANGLO-AMERICAN CONSTITUTIONALISM* 100 (1997) [hereinafter CLINTON, *GOD AND MAN IN THE LAW*].

54. PLATO, *MINOS*, or *ON LAW*, in *THE ROOTS OF POLITICAL PHILOSOPHY: TEN FORGOTTEN SOCRATIC DIALOGUES* 53 (Thomas L. Pangle trans., 1987).

55. *Id.* at 53-54.

56. *Id.* at 54-55.

57. *Id.* at 56.

rule, however useful or seemingly necessary, that is at loggerheads with either the law's unity or its' reality is not merely bad law; it is, as with Blackstone, no law at all.⁵⁸

B. *The Common Law and Natural Law*

By presupposing the intelligible reality of the *objects* of legal experience, the ideas that comprise the law's substance, the "reason of the law" renders legal experience fully normative. Without this objectivity, which defines the sense in which judges "discover" or "find" the law rather than simply making it, law loses its focus and becomes a mere instrument of power. The common law inherited by the American founders came with this set of presuppositions; and was, thus, fully grounded in natural law. The naturalized common law constitutionalism of Coke, Hale, and Blackstone in turn helped to determine the shape of the American Constitution and the Bill of Rights by tempering the institutional project of the founders with the experience of a living legal tradition.⁵⁹

The relationship between common law, natural law, and the judicial function in the attitudes of eighteenth-century Anglo-American lawyers has been well-described by William R. Casto in an excellent recent account of the Supreme Court under the chief justiceships of John Jay and Oliver Ellsworth:

Today virtually all American attorneys are more or less legal positivists, but eighteenth-century Americans were natural lawyers. . . . The most influential written example of natural-law thinking in the Founding Era was Blackstone's *Commentaries*, published in 1765. . . . Blackstone, Ellsworth, and late-eighteenth-century common lawyers believed the common law existed independently from the state. Neither kings nor legislators nor even judges were necessary to create the common law. Instead, it was part of the law of nature. But by 'nature' they did not mean a godless system organized by Darwinian striving. Nietzsche's announcement of God's death was more than a century into the future. In eighteenth-century America, virtually everyone still believed that nature was God's creation and was ordered by him. This vision was especially strong in the case of Calvinists like Ellsworth who believed that God had absolutely and minutely predestined human existence. . . .

. . . Consistent with this vision of God's nature, Blackstone wrote that God had ordained a system of 'external immutable laws of good and evil.' Human laws—especially the common law—'derive all their force, and all their authority' from this universal natural law and are invalid if they are contrary to it. Turning specifically to England, Blackstone defined the common law as a body of unwritten

58. See CLINTON, GOD AND MAN IN THE LAW, *supra* note 53, at 100-01.

59. See *id.* at 101. See also STONER, *supra* note 47, at 215.

customs that receive 'their binding power, and the force of laws, by long and immemorial usage, and by their universal reception throughout the kingdom.'

Under this theory, judges do not make laws. They are not legislators. They are, to use Blackstone's phrase, 'the living oracles' of a common law that preexists in nature. Reasoning in humans was a process bestowed by God that enabled them to detect the subtleties of the preexisting natural law; judges, through their talent, experience, and wisdom, were supposed to use their reasoning to discern the law in the cases that came before them. . . . Under this almost Platonic vision of the common law, a particular judicial determination was proper only to the extent that it approximated natural law that had an existence outside and independent of the court.⁶⁰

The common law presupposes an underlying legal order discoverable by the use of reason aided by experience that necessitates the development of methods and procedures for use in the ongoing effort to discover the essentials of that order (i.e. "interpretation"). These essentials, then, may be justly applied, via mediating rules and principles, to the diverse panoply of disorders and injustices confronted by the law. The need for interpretation arises because the "reason of the common law," in presupposing a uniform, discoverable, substantive legal reality underlying the manifold of legal rules and principles, confronts legal theory with one of the most ancient and intractable philosophical problems: the problem of unity and plurality, or "one versus many;" a problem that is closely related to, if not often identical with, the problem of identity and difference and that of whole versus part.⁶¹

Legal interpretation is, in the widest sense, the activity of traveling back and forth between the whole and the parts, between the law's underlying unity and its superficial diversity. In the narrow sense, the use of the term "interpretation" is generally confined to those situations in which the point of departure in the movement described above is a written instrument with determinable meaning; and when the interpretation is being done by a court, interpretation is joined with "application."⁶²

Yet, it should not be forgotten that no legal order can be fully encompassed by written instruments (e.g., by formal contracts, deeds, or statutes) and, therefore, must be elaborated by reference to its underlying historical dimensions. Nor can a constitutional order be fully elaborated in a constitutional text, so that such an order must be understood historically as well. The problem is that

60. WILLIAM R. CASTO, *THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH* 34-35 (1995).

61. CLINTON, *GOD AND MAN IN THE LAW*, *supra* note 53, at 104.

62. *Id.*

of reconciling the underlying uniformity of law with particular differences in its application, and renders necessary the development and use of legal conventions. Since the legal order, as experienced, is a historical reality, the methods and procedures used in the process of discovery must themselves be fully attuned to the historical dimensions of legal experience.⁶³

The most important conventions for legal interpretation developed by naturalistic common lawyers embody various mixtures of text, tradition, and logic. The most important of the English rules of interpretation are rules of statutory construction designed to assist courts in the ascertainment of legislative will. In other words, they are "intentionalist," in that they are all premised on the idea that there is a "true" meaning underlying any written legal text; and that this meaning is founded on the historical "intentions" of the makers of that text. As attested by Madison and others, such rules were, in the founding era, readily available and fully applicable to constitutional interpretation.⁶⁴ According to Christopher Wolfe, the rules were all premised on the belief that the "best way to interpret law is to explore the intention of the law-giver at the time the law was made."⁶⁵ In the words of Blackstone, one must interpret the law "by signs the most natural and probable."⁶⁶ In one of Blackstone's formulations, these signs include:

(1) The *words*, "understood in their usual and most known signification; not so much regarding the propriety of grammar, as their general and popular use."⁶⁷

(2) The *context*, in which:

[I]t may be of singular use to compare a word, or a sentence, whenever they are ambiguous, equivocal, or intricate . . . Of the same nature and use is the comparison of a law with other laws, that are made by the same legislator, that have some affinity with the subject, or that expressly relate to the same point.⁶⁸

(3) The *subject-matter*, in which "words are always to be understood as having a regard thereto; for that is always supposed to be in the eye of the legislator, and all his expressions directed to that end."⁶⁹

(4) The *effects and consequences*, in which "the rule is, that where words bear either none, or a very absurd signification, if

63. *Id.*

64. See CHARLES A. LOFGREN, THE ORIGINAL UNDERSTANDING OF ORIGINAL INTENT? in INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT 135-41 (Jack N. Rakove ed., 1990).

65. WOLFE, *supra* note 1, at 18.

66. *Id.*

67. 1 BLACKSTONE, *supra* note 41, at 59.

68. *Id.* at 60.

69. *Id.*

literally understood, we must a little deviate from the received sense of them."⁷⁰

(5) The *reason and spirit of the law*, "or the cause which moved the legislator to enact it. For when this reason ceases, the law itself ought likewise to cease with it."⁷¹

It is important to note here that these rules are classical in origin and appear to have been agreed to by all the commentators comprising the "moderate enlightenment" tradition of legal interpretation. In the five-part formulation just noted, Blackstone relies upon Pufendorf and the Twelve Tables of Roman Law in the exposition of paragraph (1), the canon law in paragraph (2), Pufendorf again in paragraph (4), and Cicero in paragraph (5).⁷² We have already observed his reliance on Aristotle and Grotius in the definition of equity.⁷³ A brief look at the formulations of Grotius and Vattel shows that they are not distinctively "common law" rules at all. Rather, they are universal rules agreed to by civilians and common lawyers alike from the dawn of civilized legal order in the West. In a formulation almost identical with Blackstone's, Grotius says that "[t]he measure of correct interpretation is the inference of intent from the most probable indications."⁷⁴ Thus, conceptualizing the interpretive process as one of discovery aimed at detecting the designs of the lawgiver in a trail of probable indications, Grotius then lists the indications:

These indications are of two kinds, words and implications; and these are considered either separately or together. If there is no implication which suggests a different conclusion, words are to be understood in their natural sense, not according to the grammatical sense which comes from derivation, but according to current usage. . . . It is necessary to resort to conjectures when the words or sentences are 'interpreted in different ways', that is, admit of several meanings. . . . The elements from which are derived conjectures as to meaning are especially the subject-matter, the effect, and the connection.⁷⁵

Vattel regarded the rules of interpretation as fully derivable from the natural law. Recalling the moral motive in legal interpretation discussed earlier, Vattel bases the necessity of legal interpretation on the need to frustrate "the views of him who acts with duplicity," announces several maxims "calculated to repress fraud, and to prevent the effect of its artifices."⁷⁶ He then

70. *Id.*

71. *Id.* at 61.

72. 1 BLACKSTONE, *supra* note 41, at 59-61.

73. *Id.*

74. 2 HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES* [THE LAW OF WAR AND PEACE IN THREE BOOKS] 409 (Francis W. Kelsey trans., 1925).

75. *Id.* at 409-11.

76. 2 EMMERICH DE VATTEL, *THE LAW OF NATIONS, OR, PRINCIPLES OF THE*

articulates, among others, the following rules of interpretation:

(1) In the interpretation of treaties, compacts, and promises we ought not to deviate from the common use of the language, unless we have very important reasons for it. Words are only designed to express the thoughts; thus the true signification of an expression, in common use, is the idea which custom has affixed to that expression.⁷⁷

(2) We ought always to affix such meaning to the expressions, as is most suitable to the subject or matter in question. For, by a true interpretation, we endeavour to discover the thoughts of the persons speaking, or of the contracting parties in a treaty.⁷⁸

(3) Every interpretation that leads to an absurdity, ought to be rejected; or, in other words, we should not give to any piece a meaning from which any absurd consequences would follow. . . . We call absurd not only what is *physically impossible*, but what is *morally* so. . . . The interpretation, therefore, which would render a treaty null and inefficient, cannot be admitted. We may consider this rule as a branch of the preceding; for it is a kind of absurdity to suppose that the very terms of a deed should reduce it to mean nothing. It ought to be interpreted in such a manner, as that it may have its effect, and not prove vain and nugatory.⁷⁹

(4) We must consider the whole discourse together, in order perfectly to conceive the sense of it, and to give to each expression, not so much the signification which it may individually admit of, as that which it ought to have from the context and spirit of the discourse.⁸⁰

(5) The interpretation ought to be made in such a manner, that all the parts may appear consonant to each other,—that what follows may agree with what preceded,—unless it evidently appear, that by the subsequent clauses, the parties intended to make some alteration in the preceding ones.⁸¹

(6) The reason of the law, or of the treaty—that is to say, the motive which led to the making of it, and the object in contemplation at the time,—is the most certain clue to lead us to the discovery of its true meaning. When once we certainly know the reason which alone has determined the will of the person speaking, we ought to interpret and apply his words in a manner suitable to that reason alone.⁸²

(7) Good-faith adheres to the intention; fraud insists on the terms,

LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS, 244 (4th ed. 1811).

77. *Id.* at 248-49.

78. *Id.* at 251.

79. *Id.* at 252-53.

80. *Id.* at 254-55.

81. VATTEL, *supra* note 76, at 255.

82. *Id.* at 256.

when it thinks that they can furnish a cloak for its prevarications.⁸³

(8) In unforeseen cases, that is to say, when the state of things happens to be such as the author . . . has not foreseen, and could not have thought of, we should rather be guided by his intention than by his words, and interpret the instrument as he himself would interpret it if he were on the spot, or conformably to what he would have done if he had foreseen the circumstances which are at present known.⁸⁴

Summarizing the formulations of Blackstone, Grotius, and Vattel, we can say these things:

- (1) For all three commentators, the will, or intention, of the lawgiver is the law;
- (2) All three assert that discernment of intent must begin from a consideration of the words used by the lawgiver to express the law;
- (3) All assert that general custom and common usage are the standards to be employed for resolving ambiguities in the meaning of the words used by the lawgiver;
- (4) All declare or strongly suggest that the context of that portion of the law being interpreted—its relation to other parts of the same law—is relevant for determination of its meaning; that laws should be harmonized;
- (5) All emphasize that the object, end, or purpose of the law—the “mischief” that it was enacted to overcome—is crucial for determining its meaning;
- (6) All allow consideration of effects or consequences of the law only when its terms, as commonly understood, would yield an absurdity in its application.

Let me expound a bit further on the jurisprudential world view captured in these six principles. First, legal interpretation is conceived as a process of *discovery*. Second, the method of discovery consists in looking for *signs*. Third, the signs looked for are signs of *conscious purpose*. Fourth, the conscious purposes are the *designs of lawgivers* revealed either in words or in acts from which meanings reasonably may be inferred. Fifth, the conscious lawgiving purposes that are discovered by interpreters are constrained or limited purposes enmeshed or embedded within a pre-existent *corpus juris* and which must be *harmonized* with the discoveries of other authoritative interpreters of the legal tradition. This harmony must exist with respect both to the internal structure of the law and to its external moral, or equitable, basis. In sum, the law is explicitly conservative, rational, just, and real: a set of conscious purposes revealed by a trail of authoritative signs reflecting more-or-less successful

83. *Id.* at 258.

84. *Id.* at 262.

attempts by lawmakers to capture an essential legal reality that finds its source beyond the law. As such, it constitutes a wholesale negation of the contemporary world view described in the previous section of this essay, which regards law as a semi-coherent train of commands articulating the largely unconscious or half-conscious drives of dominant ruling passions and material interests, albeit perhaps “progressing” toward some yet unknown future state.

Returning now to the formulations of Blackstone, Grotius, and Vattel, assuming that the will (intent) of the lawgiver is the law, we can assert the following three rules as a brief or summary formulation of most of those listed above:

(1) The “plain meaning” or “literal” rule, according to which the best indication of what the makers intended consists in what they wrote; the words themselves, to be understood, according to Blackstone, “in their most usual and most known signification . . . their general and popular use.” Here context—in the sense of the “text around the text”—may need to be considered, broadly or narrowly. Likewise, the subject-matter, to which “words are always to be understood as having a regard thereto,” will weigh heavily on the interpreter.

(2) The “mischief” rule, which authorizes reliance upon the “evils” which the law was designed to remedy (i.e., its “purpose” or “object” or “end”); or in Blackstone’s phrase, “the cause which moved the legislator to enact it.” Sometimes this cause is referred to as the “spirit” or “reason” of the law.

(3) The “golden rule,” a rule of consistency, which authorizes departure from literal interpretation even when the language is unambiguous, where, in Blackstone’s phrase, “the words bear either none, or a very absurd signification, if literally understood.” Here the “effects” or “consequences” of the law may be considered—but only here.

The rules considered above, when combined with a few additional complementary ones of somewhat lesser importance, carefully developed over a period of several centuries by the judicial representatives of Dibble’s “moderate enlightenment” tradition both on the Continent and in England, and “subsequently adapted to American conditions well before the adoption of the Constitution, were plainly rules that the Framers, the ratifiers, the people generally, and early American judges expected would be applied in the process of constitutional adjudication.”⁸⁵ James Madison regarded all this as beyond question at least as early as 1830, as is shown clearly in the following passage from a letter to M. L. Hurlbert. Joining together a version of the mischief rule with intentionalism and the idea of *stare decisis*, Madison says that:

[I]n a Constitution, so new, and so complicated, there should be

85. CLINTON, GOD AND MAN IN THE LAW, *supra* note 53, at 116.

occasional difficulties & differences in the practical expositions of it, can surprise no one; and this must continue to be the case, as happens to new laws on complex subjects, until a course of practice of sufficient uniformity and duration to carry with it the public sanction shall settle doubtful or contested meanings. . . . As there are legal rules for interpreting laws, there must be analogous rules for interpreting constitutions and among the obvious and just guides to the Constitution of the U.S. may be mentioned—1. The evils & defects for curing which the Constitution was called for & introduced. 2. The comments prevailing at the time it was adopted. 3. The early, deliberate & continued practice under the Constitution, as preferable to constructions adopted on the spur of occasions, and subject to the vicissitudes of party or personal ascendencies.⁸⁶

Concerning Madison's reference to "early, deliberate & continued practice under the Constitution," it is obvious that, by 1830, virtually all of the Marshall Court's leading constitutional decisions had been straightforwardly based upon one or more of the rules of interpretation discussed above. The Court's crucial holding in *Marbury v. Madison*⁸⁷ that Congress could not enlarge its original jurisdiction was based on a literal reading of both Article III of the Constitution and Section 13 of the Judiciary Act of 1789.⁸⁸ The famous rulings in *Fletcher v. Peck*⁸⁹ and *Dartmouth College v. Woodward*,⁹⁰ that public contracts fell within the ambit of the Contract Clause, were based on a version of the plain meaning and mischief rules mentioned above.⁹¹ The holding in *Cohens v. Virginia*,⁹² that Congress could enlarge the Court's appellate jurisdiction, as it had allegedly done in Section 25 of the Judiciary Act, was based partly on the mischief rule and partly on the golden rule.⁹³ The landmark decisions in *McCulloch v. Maryland*,⁹⁴ that a state may not levy destructive taxes upon federal instrumentalities, and in *Gibbons v. Ogden*,⁹⁵ that "commerce" extended to any commercial activity which affected more than one state, were classic applications of the mischief rule.⁹⁶

III. JOHN MARSHALL'S CONSTITUTIONAL JURISPRUDENCE

As suggested above in the introduction, in my opinion scholarly neglect of the naturalistic interpretive tradition has

86. Lofgren, *supra* note 64, at 141.

87. 5 U.S. (1 Cranch) 137 (1803).

88. CLINTON, *MARBURY V. MADISON*, *supra* note 4, at 87.

89. 10 U.S. (6 Cranch) 87 (1810).

90. 17 U.S. (4 Wheat.) 518 (1819).

91. CLINTON, *MARBURY V. MADISON*, *supra* note 4, at 145-46.

92. 19 U.S. (6 Wheat.) 264 (1821).

93. CLINTON, *MARBURY V. MADISON*, *supra* note 4, at 95-97.

94. 17 U.S. (4 Wheat.) 316 (1819).

95. 22 U.S. (9 Wheat.) 1 (1824).

96. CLINTON, *MARBURY V. MADISON*, *supra* note 4, at 194-96.

made it much more difficult—if not, for some, impossible—to understand the jurisprudence of the Marshall Court as Marshall and his colleagues would have understood it. It is not uncommon nowadays to find constitutional commentators analyzing and critiquing the early Court's opinions and decisions from the perspectives of a contemporary jurisprudence that is foursquare against the beliefs and approaches outlined in the preceding section. In the final section of this essay, I will take note of some of the main areas in which such misreadings commonly occur.

Before going any further, let me make clear, perhaps at the risk of some redundancy, what I think it means to apply the notions of contemporary constitutional jurisprudence to Marshall's decisions. It means that we read the opinions in cases such as *Marbury*, *McCulloch*, *Gibbons*, or *Cohens* as if they were exercises in judicial lawmaking rather than attempts to discover and declare a pre-existing constitutional *consensus iure*. It means to read these cases as if they had been decided by judges who believed—or should have believed—that the normative force of law is derived from the command of a sovereign rather than from a dictate of reason grounded in a natural order that transcends any humanly-instituted sovereignty. It means to read the cases as if they had been decided by judges who believed—or should have believed—that the Constitution can be plausibly interpreted entirely apart from the historical intentions of its makers; as if they thought that the constitutional text *was* the Constitution, *per se*; or, even worse, as if they thought that the Constitution was whatever they said it was.

It is to read the decisions as if they were made by judges who believed—or should have believed—that the written Constitution could be interpreted without reference to the underlying unwritten traditions which it presupposes; the most important of which stem from the British Constitution and the common law. It is to read the cases as if they had been decided by judges who believed—or should have believed—that society was inevitably and continually “progressing” to a better state and that their role as judges was to help society get there as fast as possible. It is to read the cases as if they had been decided by judges who were monistic materialists and thus believed—or should have believed—that the social good was quantitative in character and that economic motives determined the law of the Constitution.

One of the most common tendencies traceable to such misunderstandings is the tendency of contemporary commentators to brand Marshall as a “textualist,” or a “literalist” in constitutional interpretation.⁹⁷ It is certainly true that many of

97. See, e.g., LESLIE FRIEDMAN GOLDSTEIN, IN DEFENSE OF THE TEXT: DEMOCRACY AND CONSTITUTIONAL THEORY (1991) (discussing various

Marshall's constitutional decisions were based upon seemingly straightforward readings of constitutional language. In at least one instance—his reading of Section 13 of the 1789 Judiciary Act in *Marbury v. Madison*⁹⁸—Marshall has even been criticized by some commentators as having used a “hyperliteral” approach. However, Marshall was no “textualist” in the sense meant by most contemporary scholars, who use the term to denote the idea that a constitutional text can (or should) be read by reference to the text alone, without reference to the construction that would have been given it by its framers. This contemporary “deconstructionist” idea is expressed succinctly by William Harris:

[O]nce written, a work leaves the control of its drafter. The words of the Constitution, once they began their work of bringing a polity into force, lost their bond with the thoughts of the framers and established a bond with the political order. Because the polity develops as a fulfillment of its form, in accordance with the logic incorporated in it, the regulative link with the framers' thoughts about specific constitutional contents could not plausibly endure. More important, the maintenance of such a bond—as well as judicial autopsies on the framers' minds—would militate against the rule of law itself. The homage paid to intent, moreover, obscures the fundamental dynamics of the constitutional enterprise: the continuing ratification that occurs in the process of mutually adjusting the linguistic and political texts, assuring their evolving readability with respect to each other, as an appeal to the Constitution's normative author, the lively People of the United States.⁹⁹

Harris' extreme view appears to deny any role whatever for intentionalist approaches, even when these are tied closely to textual considerations. Blackstone and the moderate enlightenment tradition, on the other hand, followed closely by Marshall and other early American jurists, regarded textual literalism to be the best point of departure in the judicial interpretation of written legal instruments, but only because the words of an enactment are often the best guide to the “will of the lawgiver.”¹⁰⁰ Indeed, as we have seen, Vattel goes even farther in an apparent condemnation of textual literalism for its own sake, holding that “Good-faith adheres to the intention; fraud insists on the terms, when it thinks that they can furnish a cloak for its prevarications.”¹⁰¹ According to Marshall:

commentator's labeling of Marshall based on his decisions and correspondence).

98. 5 U.S. (1 Cranch) 137 (1803).

99. WILLIAM F. HARRIS II, *THE INTERPRETABLE CONSTITUTION* 160-61 (1993).

100. BLACKSTONE, *supra* note 41, at 58-62.

101. VATTEL, *supra* note 76, at 258.

[T]he principles of construction which ought to be applied to the [C]onstitution of the United States [are well known]. . . . To say that the intention of the instrument 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.¹⁰²

Marshall's alleged "textualism" is sometimes used to highlight the distinction between the "written" United States Constitution and the "unwritten" British Constitution, with the implication that the difference between the two is the key to understanding Marshall's approach to constitutional interpretation as some variant of "textualism." The passage most often singled out is found in Marshall's opinion for the Court in *Marbury v. Madison*.¹⁰³ Addressing the issue of whether a legislative act repugnant to the Constitution is void, Marshall says that the purpose for which constitutional limitations are committed to writing is to ensure "that those limits may not be mistaken, or forgotten."¹⁰⁴ Answering the question as to whether the courts are obligated to enforce a constitutionally invalid law, Marshall then declares that an affirmative response "would subvert the very foundation of all written constitutions."¹⁰⁵

Though commentators have sometimes used Marshall's remarks to suggest that "writteness" is somehow essential to the constitution of any society governed by a written constitutional instrument, it is more than doubtful that the Great Chief Justice was making a theoretical statement of this kind.¹⁰⁶ Marshall does not say that constitutional limits are committed to writing in order to create such limits *ex nihilo*; rather, he says that the limits are penned so that they will not be "mistaken" or "forgotten," suggesting that the limits are *pre-existent*.¹⁰⁷ "Similarly, Marshall's argument against an alleged obligation of courts to enforce concededly unconstitutional laws is aimed at showing that, if judges are not allowed to treat a written constitutional instrument as law while deciding cases, they would be put in the position of violating their oaths of office because the Constitution is law, and courts are entitled only to decide cases according to law."¹⁰⁸ According to Sylvia Snowiss, "one of Marshall's most significant contributions to

102. *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 332 (1827).

103. 5 U.S. (1 Cranch) 137 (1803).

104. *Id.* at 176-77.

105. *Id.* at 177-80.

106. CLINTON, GOD AND MAN IN THE LAW, *supra* note 53, at 58-59.

107. *Id.*

108. *Id.*

American constitutionalism was his successful effort to assimilate the written constitution to a *pre-existing* body of law in such a way as to make it amenable to the traditional rules of interpretation used in the analysis of other legal instruments.¹⁰⁹

Though Marshall has often been dubbed a textualist in matters of interpretation, his textualism is almost always circumscribed by intentionalism; that is, by an assertion that—usually—written constitutional language is merely the best *indicia* of what the framers intended. Such a view implies that the “real” or “essential” constitution is comprised not in its written language, but in the underlying predispositions of its authors conditioned by historical experience.¹¹⁰ Such a view is, in fact, compelled by the declaratory theory of law which, as we have seen, is premised on the idea that what judicial interpreters “discover” and “declare” is the law’s intelligible reality—its real essence or form. Put the other way, if the essence of a written constitution could be fully comprised in its writtenness, then such a constitution could not be “real” at all in any meaningful sense; it would be merely “nominal,” a constitution in name only. “The only constitutions the mere writtenness of which comprise their essence thus are empty abstractions, window dressings that fail to reflect the underlying real constitutions of the societies from which they spring.”¹¹¹

Etienne Gilson, following Aristotle and St. Thomas Aquinas, has provided a useful description of the constitution of being as a composite of formal essence and actual existence.¹¹² “Essence, a category that comprises the formal qualities of a being, consists in the attributes that render its actual existence logically possible and without which its real existence would be impossible.”¹¹³ The two most fundamental requirements of any being’s essence are those of self-identity and the absence of inner contradiction among the primary constituents of that being.¹¹⁴ For example, the essence of a round square renders impossible the actual existence of such a being; whereas the essence of an equilateral triangle, the primary constituents of which are threeness and equality, renders the existence of that kind of being logically possible.¹¹⁵

However, fullness of being requires more than the purely formal attributes of a merely possible existence.¹¹⁶ It requires that a being actually exist as well; and the question of the actual existence of any being is entirely separate from the question of that (or any other)

109. *Id.*

110. *Id.*

111. CLINTON, *GOD AND MAN IN THE LAW*, *supra* note 53, at 59.

112. ETIENNE GILSON, *BEING AND SOME PHILOSOPHERS* ch. 4 (2d ed. 1952).

113. CLINTON, *GOD AND MAN IN THE LAW*, *supra* note 53, at 59.

114. *Id.*

115. *Id.*

116. *Id.*

being's defining characteristics.¹¹⁷ The possible existence of an equilateral triangle does not guarantee the actual existence of any particular triangle.¹¹⁸ Existence adds to essence a radical "givenness" that is not reducible to the purely formal primary constituents of any actually existing being; and the fact that no combination of essences is fully sufficient to guarantee the real existence of any being whatever makes this givenness appear so radical as to constitute the fundamental mystery of existence as we experience it.¹¹⁹

The constitution of any polity is a being that reflects the dominant underlying decisional predispositions of that polity's citizenry. The constitution of a polity is thus a composite of that polity's formal essence and its actual existence. Since the essence of any being is that which ensures that being's self-identity and lack of internal contradiction, the essence of a constitution, whether of a polity or of an individual, is that which ensures the self-identity and internal coherence of that polity or individual. As such, the essence of a constitution is no different than the essence of any other being, for "constitution" is just a name for that which imparts to an existing society continuous political representation in historical time.¹²⁰ Much as the essence of any being's constitution is that which enables us to ascribe formal identity to it, and to regard it as self-consistent over time; so the essence of any polity's constitution is that which enables us to identify it and to recognize it as an identifiable, self-consistent polity over time.¹²¹

Essence does not guarantee existence for a constitutional polity any more than for any other being. A "nominal" or "paper" constitution that bears no relation to the underlying constitutional predispositions of the polity would have no actual existence, since the constitutional symbols in such a text would not correspond to the constitutional experience of the relevant society, and thus would not be "given" in reality. On the other hand, a real constitution, as distinct from a paper constitution, is, by definition, that by which existing things are really "constituted," in which things really cohere, by which things are made really continuous and thus receive their real identity from one moment to the next. It is what binds together you yesterday, you today, and you tomorrow in such a way as to make it meaningful (not absurd) for me to refer to you at those three times by the same name. It is what ties Americans in their political and legal capacity in 1992 to Americans in their political and legal capacity in 1792.¹²²

Any truly viable constitutionalism presupposes the above-

117. *Id.*

118. CLINTON, GOD AND MAN IN THE LAW, *supra* note 53, at 59.

119. *Id.* at 59-60.

120. See VOEGELIN, *supra* note 9, at chs. I-II.

121. CLINTON, GOD AND MAN IN THE LAW, *supra* note 53, at 60.

122. *Id.*

discussed idea of constitutional being as a composite of formal essence and actual existence. Thus the true value of any written constitutional instrument is comprised in the extent to which it represents adequately the continuous, identifiable historical existence of its corresponding polity: its “adequation” to constitutional reality.¹²³ Since this adequation is a long-term affair, involving beings both “in” and “not in” actual existence (e.g., citizens who have died and citizens yet unborn), any viable constitutionalism must be grounded in constitutional history; and thus any viable theory of “how to interpret” such a constitution must be “intentionalist.” Textualism distorts this constitutional metaphysics by over-emphasizing the internal coherence of our constitutional symbolism (witness the present dominance of “coherence epistemology” in constitutional theory) while under-emphasizing the importance of the Constitution’s role in preserving our polity’s self-identity and historical continuity (which—in the last analysis—mean the same thing).

The kind of viable constitution just described is also a binding, not a freeing force; an ordering, not a liberating force. There are those who will object that a constitution also embodies change—not merely continuity, difference—not merely identity; perhaps citing another oft-quoted statement by Chief Justice Marshall: the famous *dictum* in *McCulloch v. Maryland*¹²⁴ that “[i]t is a constitution we are expounding.”¹²⁵ However, to use Marshall’s statement this way is both a mistake of logic and a misinterpretation. Marshall meant that constitutional purposes are large, not that such purposes are subject to the continuing variability of judicial sentiments. Marshall knew very well that change will occur with or without a constitution; but that legal continuity, social cohesion, and national identity will not. We do not need a constitution to bring about “change;” we need a constitution to confine change within acceptable bounds. That is what Marshall’s *McCulloch dictum* is about.¹²⁶ It is useful here to recall Dibble’s earlier point that, under the moderate enlightenment interpretive tradition, interpretation is, in part, the act of discovering the *consensus iure*—that which binds the polity together and forges unity out of apparent diversity. Marshall’s greatest political achievement was to find this *consensus iure* and to employ it in a largely successful effort to forge national unity out of the localism of colonial America.

Marshall also knew that if a written constitutional text cannot fully articulate a polity’s underlying constitutional principles, then a judicial decision that interprets language in a constitutional text cannot do so either. It is then likely that such an interpretation, if

123. *Id.* at 60-61.

124. 17 U.S. (4 Wheat.) 316 (1819).

125. *Id.* at 407.

126. CLINTON, GOD AND MAN IN THE LAW, *supra* note 53, at 60.

freed from the shackles of historically-honored rules that circumscribe interpretive innovation, will be farther off the mark than an interpretation constrained by such rules. The history of judicialized constitutionalism in the United States provides many examples of zealous judges abandoning both traditional rules of interpretation and underlying constitutional *consensi* in order to dictate results that are preferred by those judges on grounds other than legal or constitutional ones.¹²⁷ Marshall's jurisprudence was fundamentally conservative—in contrast with the jurisprudence of, say, Holmes, in which the law was always and inevitably “progressing,” aiming toward a future state as the embodiment of the “interests” of a dominant social elite. For Marshall, the law must temper change by consolidating and conserving the best traditions of society. Though for Marshall, the Constitution is designed for “ages to come,” his constitutionalism looks to the past—not to the future—for its interpretive principles.

If Marshall was no “textualist,” he was certainly no “extra-textualist” either; yet some contemporary commentators have leveled precisely this charge at Marshall and many of his contemporaries. Suzanna Sherry, for instance, has made the strong claim that:

from 1789 to 1820 all of the influential or significant Supreme Court Justices, except Iredell, wrote opinions that contained at least some references to extra-textual principles, *not merely as a method of interpreting the written constitution itself, but in order to judge the legality of the challenged statute or other governmental action.*¹²⁸

If the discussion of the moderate enlightenment interpretive tradition above is anywhere close to the mark, this is simply impossible. That tradition consisted of a carefully-developed, universally-adhered-to set of interpretive guidelines for the application of written legal instruments. In every formulation, the first principle states that the words used by the lawgiver are the best *indicia* of the lawgiver's intention—that intention being the law. As we have seen, Marshall himself warned that constitutional language cannot be extended to objects not comprehended in that language or contemplated by its authors. In the face of such a tradition, it would be surprising to discover that the early Supreme Court had applied (or even tried to apply) extra-textual natural law in constitutional cases, as some commentators have urged. Happily, Matthew J. Franck, in a painstakingly thorough exegesis of the relevant cases, has indeed confirmed that the Court did no such thing.¹²⁹ Franck's analysis

127. *Id.* at 61-62.

128. Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1175 (1987), quoted in GOLDSTEIN, *supra* note 97, at 20.

129. See FRANCK, *supra* note 29, at 113-69.

demonstrates that what commentators have mistaken for “natural law” or “natural rights” applications in these early cases are really a bevy of other poorly-understood things.

In *Van Horne’s Lessee v. Dorrance*, for instance, what commentators have mistaken for an extratextual application of natural rights by Justice William Paterson is really a literal application of a state constitutional provision declaring that property is “natural, inherent, and inalienable.”¹³⁰ In *Calder v. Bull*¹³¹ and *Wilkinson v. Leland*,¹³² commentators have found natural law in the *obiter dicta* of Justices Samuel Chase and Joseph Story, respectively, stating that courts have no right to *presume* that a legislature has enacted laws that contravene the “great first principles of the social compact.”¹³³ In *Terrett v. Taylor*,¹³⁴ a straightforward application of traditional equity jurisprudence by Justice Story, which supplies a “correction of the law’ whenever the strict law is defective by reason of its universality,” is mistaken for an application of natural law.

In *Ogden v. Saunders*,¹³⁵ Chief Justice John Marshall’s literal reading of the Contract Clause as related to the distinction between rights and remedies is misread as a foray into natural rights. In *Fletcher v. Peck*,¹³⁶ another literal reading of the Contract Clause by Marshall, accompanied by a concessionary remark about “general principles” made in order to forge a unanimous decision, is used to show that Marshall was willing to “go beyond the text” of the Constitution. Finally, in the only really plausible example of explicit extra-textual constitutional interpretation according to natural law, Justice William Johnson’s famous remark in *Fletcher* concerning “a principle which will impose laws even on the Deity,”¹³⁷ at which Marshall’s above-mentioned “concession” had been directed, the Justice himself all but explicitly rescinded the position seventeen years later.¹³⁸

In sum, there does not appear to be even a single, non-rescinded instance of explicit extra-textual judicial application of

130. 2 U.S. (2 Dall.) 304, 311 (1795) (Patterson, J.); FRANCK, *supra* note 29, at 114.

131. 3 U.S. (3 Dall.) 386, 388 (1798) (Chase, J.); FRANCK, *supra* note 29, at 119.

132. 27 U.S. (2 Pet.) 627, 657 (1829) (Story, J.); FRANCK, *supra* note 29, at 146.

133. *Calder*, 3 U.S. (3 Dall.) at 388 (Chase, J.).

134. 13 U.S. (9 Cranch) 43 (1815) (Story, J.); GARY L. MCDOWELL, EQUITY AND THE CONSTITUTION: THE SUPREME COURT, EQUITABLE RELIEF, AND PUBLIC POLICY 75 (1982), *quoted in* FRANCK, *supra* note 29, at 142.

135. 25 U.S. (12 Wheat.) 213, 332 (1827) (Marshall, C.J.); FRANCK, *supra* note 29, at 136-37.

136. 10 U.S. (6 Cranch) 87, at 139 (1810) (Marshall, C.J.).

137. *Id.* at 143, (Johnson, J., dissenting).

138. *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 290 (1827) (Johnson, J., dissenting); FRANCK, *supra* note 29, at 134-35, 138.

natural law or natural rights during the entire antebellum period. This applies to individual judicial opinions, not collective decisions of the Court. Professor Franck shows that the present prominence of these "examples" of the use of natural law by the early Supreme Court resulted from postbellum efforts by a small group of lawyers, judges, and politicians in the era of the greenback controversy to enlist the opinions in support of the oncoming laissez-faire jurisprudence of the Gilded Age.¹³⁹ The whole matter reveals poignantly the consequences of the modern failure to take seriously the historical traditions outlined above.

CONCLUSION

I would like to close this essay with a final example of how Marshall's constitutional jurisprudence may be clarified by paying more attention to the moderate enlightenment interpretive tradition. It is widely thought that Marshall "went out of his way" in *Marbury v. Madison*¹⁴⁰ to declare a statutory provision unconstitutional so as to establish a precedent for court review of congressional acts. I think this impression has been caused because Marshall chose to read Section 13 of the Judiciary Act and Article III, Section 2 of the Constitution in a literal manner; thus producing a collision between statute and constitution, and apparently violating a modern maxim of judicial restraint that counsels avoidance of constitutional questions wherever possible.

It has also been charged that Marshall went out of his way to deliver an advisory opinion—or a judicial lecture—to the Executive Branch of government, suggesting that the conduct of the President and Secretary of State had violated the law. The case is so encrusted with modern commentary as to constitute a marvelous example of what I referred to earlier in this essay as our tendency to read the perspectives of late-twentieth century jurisprudence into analyses of antebellum Court decisions. There is the attribution of "base" motives to Marshall—some of them "political." There is an unwillingness to take seriously the arguments made by Marshall himself in the opinion; substituting instead explanations of Marshall's decision in terms of federalist-anti-federalist economic and political conflict; and so on.

Yet all the controversial elements of the *Marbury* decision are explicable within the terms of the moderate enlightenment interpretive tradition. All we need do is call upon two rules of interpretation; and recall that, for moderate enlightenment interpreters, the law is ultimately grounded in equity. The two rules are from the work of Vattel, and they were two of Marshall's favorites:

139. FRANCK, *supra* note 29, at 163-69.

140. 5 U.S. (1 Cranch) 137 (1803).

(1) [I]nterpretation ought to be made in such a manner, that all the parts may appear consonant to each other,—that what follows may agree with what preceded,—unless it evidently appear, that, by the subsequent clauses, the parties intended to make some alteration in the preceding ones.¹⁴¹

(2) The interpretation, therefore, which would render a treaty null and inefficient, cannot be admitted. We may consider this rule as a branch of the preceding; for it is a kind of absurdity to suppose that the very terms of a deed should reduce it to mean nothing. It ought to be interpreted in such a manner, as that it may have its effect, and not prove vain and nugatory.¹⁴²

Rule (1) above requires an interpreter's effort to harmonize the separate parts of a written instrument; leaving, if possible, "no surplusage" in the instrument. Rule (2) requires that no part may be interpreted so as to defeat the intentions of the author(s). If we apply these rules—combined with the "literal" or "plain meaning" rule—to Marshall's reading of Section 13 of the 1789 Judiciary Act, which operationalizes Article III's distribution of the original and appellate jurisdiction of the Supreme Court; then it becomes plausible to think that Marshall may have viewed the situation as follows: Interpret plain language in a literal manner, unless doing so would (1) render some other provision in the same document meaningless, or (2) defeat the intention of the drafters in some obvious way.

Section 13 reads as follows:

And be it further enacted, that the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction. And shall have exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics or domestic servants, as a court of law can have or exercise consistently with the law of nations; and original, but not exclusive jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul or vice consul, shall be a party. And the trial of issues in fact in the Supreme Court, in all actions at law against citizens of the United States, shall be by jury. The Supreme Court shall also have appellate jurisdiction from the circuit courts and the Courts of the several states, in the cases hereinafter specially provided for; and shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction, and writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed or persons holding office under the authority of the

141. VATTEL, *supra* note 76, at 255.

142. *Id.* at 253.

United States.¹⁴³

Article III, Section 2 reads as follows:

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the Laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party;—to controversies between two or more States;—between a State and citizens of another State;—between citizens of different States;—between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States citizens or subjects. In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and to fact, with such exceptions, and under such regulations as the Congress shall make.¹⁴⁴

Since Section 13 is, overall, about the Court's *original* jurisdiction and since reading the fourth sentence in Section 13, as pertaining to original jurisdiction does no violence to the remainder of the section in the sense of either of Vattel's rules noted above, the Court would be fully justified in adopting literalism as its rule of construction. This makes questionable the familiar conclusion that the *Marbury* Court "reached out" to invalidate Section 13 in order to accomplish some other underlying, unstated objective. Indeed, one might still criticize the Court for failing to adopt a *strained* construction of the provision in question in order to avoid declaring it unconstitutional. But this would be to read a fully-developed modern constitutional jurisprudence back into a time when that jurisprudence was non-existent.

On the alleged "advisory opinion" in *Marbury*, it should be recalled that the moderate enlightenment interpretive tradition regarded interpretation as essentially a *moral* or *ethical* activity; and that law was ultimately grounded in equity or "natural justice." As we have seen, this did not mean that courts in Marshall's time felt entitled to decide cases solely on grounds of natural law or natural justice. But since their view of law presupposed the existence of such grounds for all law, it follows that they must have regarded natural law principles as already embodied in written legal instruments. Given the executive's behavior in the *Marbury* situation—a situation in which the relief

143. 1789 Judiciary Act, 1 Stat. 73, at 80-81 (1789). CLINTON, *MARBURY V. MADISON*, *supra* note 4, at 91-92.

144. U.S. CONST., Art. III, § 2; CLINTON, *MARBURY V. MADISON*, *supra* note 4, at 94.

requested by the plaintiffs was equitable in nature, the common law maxim that wrongs are not to be without remedies must have caused the Court to believe that simple justice required—at a minimum—a statement of the law of the case. And despite Jefferson's protestations, the opinion was certainly not "advisory" in the sense in which the doctrine proscribing *ex cathedra* pronouncements on constitutional questions has since been developed. That is another facet of modern constitutional law that simply did not exist in Marshall's day.

The point here is not to rehash *Marbury* or any other particular case. It is to suggest that, in my opinion, most—if not all—of Marshall's decisions could be explained as straightforward applications of interpretive rules that virtually no one questioned in his era. Marshall—unfortunately to his detriment—did not always make these rules explicit. But if I am close to the mark, then much contemporary commentary on Marshall and his Court appears to me to be called into question. At the very least, some renewed application of historical jurisprudence to early American constitutional law would not be a bad idea.

