Book Review

Consensus and Objectivity in Early Constitutional Interpretation: An Unproven Thesis

THE RISE OF MODERN JUDICIAL REVIEW: FROM CONSTITUTIONAL INTERPRETATION TO JUDGE-MADE LAW. By Christopher Wolfe.† New York, New York: Basic Books, 1986. Pp. x, 392. $24.95.‡

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I. Introduction

The plot of Christopher Wolfe's *The Rise of Modern Judicial Review* is both familiar and powerful: It is the great archetypal story of the fall from grace, the loss of Edenic innocence.[1] The subjects of this story, however, are neither our first parents in the Garden nor the soul of an individual caught in a web of moral complexities; rather they are the Justices of the United States Supreme Court during its almost two centuries of existence.

The main theme of this story is that what the Court does now is not what it did originally and that this shift is unfortunate. This suggestion, of course, is not original with Professor Wolfe. A great deal of contemporary "New Right" constitutional argument takes as a premise the novelty and invalidity of the modern Court's dominant forms of constitutional interpretation.[2] In *The Rise of Modern Judicial Review*,

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1. There is a perhaps unconscious irony in the title Professor Wolfe chose, for he most assuredly does not view the emergence of "modern judicial review" as a "rise" in the sense of an improvement. The sense of a falling away from the constitutional virtues of the founders permeates the book.

2. *See, e.g.*, R. BORK, TRADITION AND MORALITY IN CONSTITUTIONAL LAW 2-3 (1984) (arguing that constitutional law has little theory of its own, making it susceptible to "an infusion of extraconstitutional moral and political notions"); Address by Attorney General Edwin Meese III before the American Bar Association (July 19, 1985) *reprinted in* 27 S. TEX. L.J. 455, 458 (1986) (arguing that the Court's decisions are unprincipled, ad hoc, and therefore flawed). The most recent

however, Wolfe sets himself the task of going beyond assumption: he attempts to show that this premise rests on a solid foundation by tracing the methods of interpretation employed by the Court from its origins until the present.[3]

In the beginning, Wolfe argues, the Justices practiced "serious constitutional interpretation"[4] rather than judicial lawmaking. Their exercise of "moderate judicial review"[5] was characterized by obedience to interpretive rules that constrained the Court from substituting the Justices' own views of social policy for the results of the political process. The following "transitional"[6] era, roughly the last decade of the nineteenth century through the 1930s, witnessed a gradual drift away from the Court's early fidelity to the Constitution. But even as they were abandoning the founders' practices, the Justices of the *Lochner*[7] era remained faithful in their own minds to the judicial obligation of interpreting the Constitution rather than making law.

Ironically, indeed from Wolfe's point of view tragically, the great opponents of the "activist" decisions of the Court—jurists like Holmes and Cardozo, scholars like Woodrow Wilson and Charles Beard—were not advocates of a return to the "traditional" form of judicial review.[8] Their opposition to the Court's actions was rooted not in agreement with the founders' practices, but in a radical loss of faith in the Constitution's objective meaning. Viewing the text as devoid of significant and determinable content, the Court's critics could conceive of no specifically *judicial* role in constitutional disputes. If judges were to play a part nonetheless, it must be as legislators carrying out their own vision of the social welfare—precisely what the *Lochner* Justices were doing in practice. Judicial review as the Court now practices it thus is the child of a union between the methods of economic substantive due process and its critics.[9]

Wolfe does not conceal his own view of the results of modern constitutional adjudication: the Court, he repeatedly insists, has moved "from constitutional interpretation to judge-made law,"[10] from enforcement of

succinct description and critique of the position espoused by Judge Bork and Attorney General Meese, among others, is S. MACEDO, THE NEW RIGHT V. THE CONSTITUTION (1986).

3. *See* pp. ix, 11.

4. P. 323.

5. P. 101.

6. P. 119.

7. Lochner v. New York, 198 U.S. 45 (1905).

8. *See* pp. 162 (Holmes), 205-16 (Wilson), 217-18 (Beard), 239-40 (Cardozo).

9. "Modern judicial review came into being when Supreme Court justices not only engaged in judicial activism, but did so on the basis of this theoretical understanding of judicial power that legitimized judicial legislation." P. 327.

10. Indeed, this is the subtitle of the book. *See* p. iii.

a "fixed Constitution"[11] to "judicial legislation."[12] What the Court now does in the name of the Constitution "should at least be recognized for what it is. It is not a mode of interpretation; it is not a way of being faithful to the framers' intent; it is not a way of showing that judges are effecting the will of the Constitution rather than their own."[13] The elaborate attempts of the Justices (and their defenders) to tie the Court's decisions to the constitutional text are merely a "useful rhetorical link"[14] that legitimizes modern judicial review by concealing its true, legislative nature. Modern constitutional law, in other words, is apostasy from the founders' views and rests on a continuing deception of the people.

In this book, Wolfe is primarily concerned not with elaborating or defending his critique of "modern era" judicial review, but rather with presenting its historical alternative, the "early or traditional approach to constitutional interpretation and judicial power,"[15] and with describing how that "traditional approach" gave way to modern judicial "activism."[16] The foundation of Wolfe's argument is his claim that during the "traditional era" there existed a form of judicial review that was interpretive without being creative and that rested on assumptions and proceeded by methods shared by the Justices and their critics.[17] If this historical claim is untenable, Wolfe's story loses its cogency, for it is by reference to the founders' orthodoxy that Wolfe identifies the contemporary Court's fall from grace.

In this Review I address the historical validity of Wolfe's description of "traditional era" constitutional interpretation. I describe and then criticize Wolfe's presentation first by focusing on his claim of consensus. I contend that his description of an original consensus on the objects and methods of interpretation is unconvincing. I then address Wolfe's attempt to distinguish "interpretation" as practiced by John Marshall and other "traditional" constitutionalists from the "legislative" activism of the modern Court. Again, I suggest that Wolfe's argument fails to persuade. If I am correct, then the historical premise of Wolfe's attack on modern judicial review remains unproven.

11. P. 240.
12. P. 327.
13. P. 277.
14. *Id.*
15. P. 14.
16. P. 11
17. *See* p. 324.

II. The Founders and Constitutional Interpretation: Professor Wolfe's Account

The heart of *The Rise of Modern Judicial Review* is a historical assertion about American constitutional discourse. "Both the theory and practice of early American judicial review demonstrated the possibility of a nonlegislative form of judicial review."[18] According to Wolfe, the founders[19] shared an ideal of "judicial objectivity"[20] that was characterized by a good-faith effort to abide by "norms of interpretation"[21] which enabled them to apply the Constitution's principles in specific cases "without interposing their own divergent political preferences."[22] The exercise of judicial review was rendered compatible with republicanism because in its "traditional" form it sought only "to interpret the document 'faithfully'—adhering to the meaning intended by its writers (and ratifiers)."[23] An occasional flirtation with " 'natural-justice' judicial review" notwithstanding,[24] the founders therefore rejected what Wolfe sees as the modern notion that judges are authorized to flesh out broad or vague constitutional generalities by an essentially free and creative exercise in policy making.[25]

A. The Unproven Consensus

Crucial to Wolfe's argument is the claim that the founders, as a matter of historical fact, agreed on the objectives and rules of interpretation. Wolfe recognizes that this claim is an ambitious one. He rightly stresses the necessity of a detailed and comprehensive examination of the sources.[26] Yet, surprisingly, Wolfe's treatment of the historical evidence is quite narrow. Although he is certainly aware that most early constitu-

18. *Id.*

19. Wolfe does not limit the "traditional era" to the founding generation per se; indeed, Wolfe thinks that the Taney Court and its nineteenth-century successors remained for the most part within the world of "traditional" judicial review. *See* pp. 64-71. The weight of Wolfe's argument, however, rests on his discussion of the founding generation's debates and practices. At the risk of a slight oversimplification, I shall refer to the constitutionalists whose views we are discussing as "the founders."

20. P. 14.

21. *Id.*

22. P. 323.

23. *Id.*

24. For a description of " 'natural-justice' judicial review," see pp. 108-13.

25. Wolfe acknowledges that a strand of early judicial rhetoric seemed to accept nontextual natural rights as a basis for judicial review, but regards this as an aberration. *See* pp. 108, 112.

26. Wolfe describes his methodology as follows:

> My attempt to describe the traditional approach to interpretation involves rather extensive presentation of particular examples of such interpretation. This is so for several reasons. First, I am trying "to prove a negative," that is, to show that something (judicial legislation) is *not* there. The only way to do that is to give a fairly comprehensive account of what *is* there, pointing out that it is something very different from judicial legislation.

tional debate occurred in state courts or in nonjudicial settings, those important materials are slighted in his discussion. The only state court opinion that Wolfe discusses is John Gibson's famous attack on judicial review in *Eakin v. Raub*,[27] and the only nonjudicial sources he uses are the *Federalist*[28] and the 1791 debate in Congress and cabinet over a national bank.[29] Those materials, and the judicial opinions of Chief Justice John Marshall, are the sole objects of Wolfe's study. Consequently, his description of a broad societal agreement on the meaning and methods of constitutional interpretation is simply a decontextualized recounting of a discussion among four men: Hamilton, Jefferson, Madison, and Marshall. The possibility that those four extraordinary individuals might not be wholly representative of the founders' thought is passed over, as is the opportunity to place their arguments in their original intellectual setting.[30] This type of tunnel vision in research is not unknown in constitutional history written by lawyers; but it is especially disappointing that someone with Wolfe's training—he is a political scientist—is unable to transcend the limits of "law office history." More importantly, Wolfe's failure to follow his own call for a broad historical survey undercuts the credibility of his conclusions.

The "essential assumption" of the founders' constitutional thought, according to Wolfe, was that the Constitution, although at times "broad or general . . . was not merely 'vague' or 'ambiguous.' "[31] Wolfe states that "traditional" interpreters therefore strove for "objectivity,"[32] by which he means neither mechanical jurisprudence nor invariably uncontroversial decisions, but rather a consistency of interpretive method and a pattern of fidelity to principles "actually" to be found in the Constitution. The founders and their immediate successors were able to achieve this goal, we are told, because they agreed on a set of rules for interpreting the Constitution, rules that significantly limited the freedom of the interpreter and provided an objective standard by which they could decide, say, that "by and large Marshall was right and Jefferson was

> Second, my own experience suggests that one only gets a good "feel" for traditional interpretation by doing it, by immersing oneself in specific instances of it.

P. 14 (emphasis in original).

27. 12 Serg. & Rawle 330, 343 (Pa. 1825) (Gibson, J., dissenting).

28. THE FEDERALIST (J. Cooke ed. 1961).

29. *See* 1 ANNALS OF CONG. 1945-52 (1834) (debates, 1791).

30. Wolfe's discussion of "traditional era" ideas about the legitimacy of judicial review rests on a similarly narrow base: Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); Gibson's dissent in Eakin v. Raub, 12 Serg. & Rawle 330, 343 (Pa. 1825); THE FEDERALIST No. 78 (A. Hamilton); and a few other familiar chestnuts. *See* pp. 73-96.

31. P. 323.

32. *See, e.g.*, p. 41 (stating that Marshall's ideal was one of objectivity).

wrong."[33]

It should be stressed that Wolfe is making a sweeping historical claim here. His claim is that "at the time of the Constitution's framing, the rules for interpreting a constitution were so generally agreed upon that they were more or less noncontroversial or taken for granted,"[34] and that after ratification, even "the bitter struggles of the 1790s" were conducted by people who "agreed on the rules of interpretation."[35] What were these rules of interpretation that Federalists and Republicans alike accepted? They were, essentially, the rules that English common lawyers had evolved for construing documents. The Constitution itself, Wolfe remarks, includes no self-referential rules of interpretation.[36] It was natural, therefore, to borrow the common-law interpretive tradition with which virtually all American lawyers were familiar.[37] That tradition called on the interpreter to ascertain the intent of the document's makers through reading its words in context and by considering the evident purposes of the document.[38] Wolfe admits that the traditional rules did not automatically produce correct or uncontroversial interpretations and, furthermore, that the founders recognized that construing many parts of the Constitution required the exercise of "political prudence."[39] But he denies that this means the founders accepted judicial legislation, or even what Holmes called interstitial lawmaking,[40] as part of the interpretive task.[41]

33. P. 61.

34. P. 17; *see* pp. 19, 37.

35. P. 25; *see* pp. 37-38.

36. *See* p. 17. This conclusion is not quite correct, of course, at least with regard to the Constitution as amended. The ninth and eleventh amendments plainly state rules of construction, and various founders also treated the preamble, the language in art. I, § 8 about "common Defense and general Welfare," the necessary and proper clause, and the tenth amendment, as interpretive guidelines rather than substantive provisions. *See, e.g.*, THE FEDERALIST NO. 33, at 155-56 (A. Hamilton) (G. Wills ed. 1982) (arguing that the necessary and proper clause is logically superfluous and that the operation of the government would be the same if the clause were omitted); THE FEDERALIST, No. 41, at 209-10 (J. Madison) (arguing that the language about "common Defense and general Welfare" merely indicates the purpose of the specific powers immediately following).

37. Although I agree with Wolfe that the common law was an extremely important influence on early American thought about the methods of constitutional interpretation, I think that an adequate account of the founders' views would have to examine other possible influences, such as political, religious, literary, and philosophical influences. I briefly explore some of these in Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 889-94 (1985).

38. *See* pp. 18-24 (drawing on Blackstone and THE FEDERALIST); pp. 41-51 (discussing Marshall's rules of interpretation). Wolfe correctly notes the common law's and the founders' rejection of the kind of speculative reconstruction of "framers' intent" that modern intentionalists claim to require of the interpreter. *See* pp. 24, 35-37, 49-50; *see also* Powell, *supra* note 37, at 915 (noting Hamilton's rejection of what modern intentionalists would consider evidence of intent).

39. Pp. 37, 71.

40. *See* Southern Pacific Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).

41. For example, Wolfe argues that although Chief Justice Marshall's jurisprudence was "political" and took note of "policy" in the broadest sense of those terms, his decisions "reflected not his

Wolfe's first and most richly detailed examination of the "traditional" rules in practice concerns the debate in Congress and in President Washington's cabinet over the constitutionality of a national bank. After recounting the arguments that Madison and Jefferson made against, and Hamilton in defense of, the bank bill, Wolfe asks whether their disagreement over the proper construction of Congress' powers stemmed from a disagreement over the applicable rules. "The answer is, I think, no. None of the rules of construction cited or employed on either side was denied by the other side, although different conclusions were drawn from them or different weight given to them."[42] Constitutional disagreements that led Jefferson to conclude that Hamilton was an antirepublican monarchist and Hamilton to decide that Jefferson was disloyal to the federal union were due, contends Wolfe, merely to a "subtle difference of emphasis given to certain general considerations forming the framework of constitutional interpretation."[43]

This explanation of the differences over a national bank is a quite implausible reading of the constitutional disagreement between Hamilton and the Republican leaders that the bank debate brought into the open. Indeed, it requires us to reject the participants' own understanding of what they were debating. Hamilton, Madison, and Jefferson thought they were arguing over what Madison called "[t]he essential characteristic of the Government."[44] For the Republicans, the fundamental attribute of the federal government was its possession of "limited and enumerated powers" only.[45] Hamilton's bank bill was not objectionable simply because of a "subtle difference of emphasis" in the application of a shared interpretive framework. What Madison and Jefferson protested was an approach to construing Article I that would transform the very essence of the Constitution as "it had been understood by its friends and its foes."[46] The enumerations and omissions of the document agreed upon by the states set absolute and explicit limits on federal authority, limits that could not be legitimately exceeded even with the argument that an omitted power was "necessary and proper for the Government or Union."[47] To transgress those limits, even by "a single step," would be

own merely personal political views, but the political view of the Constitution itself." P. 88. Wolfe, to be sure, does not claim that Marshall (or any other founder) always interpreted the Constitution correctly; rather, he claims that the founders shared a desire, and agreed upon a method, to do so and that in the case of the Marshall Court, they generally succeeded. *See* pp. 59, 360 n.63.

42. P. 31.

43. P. 33.

44. 1 ANNALS OF CONG. 1947 (1834) (remarks of Rep. James Madison, 1791).

45. *Id.*

46. *Id.* at 1945.

47. *Id.* at 1950. Many years later, Madison explained that his alienation from Hamilton re-

"to take possession of a boundless feild [sic] of power, no longer susceptible of any definition."[48] Madison and Jefferson were deadly earnest in their claim that no federal power "could be inferred from the general nature of Government."[49] Madison, for example, suggested that if the 1787 text had failed to authorize the President and Senate to make treaties, "however necessary [that power] might have been, the defect could only have been lamented, or supplied by an amendment of the Constitution."[50]

This image of a polity lacking powers essential for the social welfare because its original founders had failed clearly to authorize their exercise was fundamental to the constitutional vision of Jefferson and Madison. Near the beginning of his opinion on the bank act's constitutionality, Jefferson stated that he thought "the foundation of the Constitution" rested on the principle, embodied in the tenth amendment, that the federal government possessed only delegated and specifically limited powers.[51] For Jefferson, and to a lesser extent Madison, American recognition of the danger posed to liberty by centralized power had led to the adoption of a federal charter of narrowly defined powers and precise limitations. The interpreter's most fundamental task was to police and preserve those limits to federal authority. From that task flowed Jefferson's belief that the tenth amendment expressed a standing presumption against the existence of federal power and Madison's insistence that congressional action always be justified by strict textual exegesis of Article I.[52]

The approach to constitutional interpretation put forward by Jefferson and Madison—close textual argument informed by a powerful concern to cabin federal power—was wholly alien to Hamilton and his allies.

sulted from their radical disagreement over the proper approach to interpreting the Constitution. Hamilton thought it proper, in Madison's opinion, "to administer the Government . . . into what he thought it ought to be; while, on my part, I endeavored to make it conform to the Constitution as understood by the Convention that produced and recommended it, and particularly by the State conventions that *adopted* it." Memorandum by N.P. Trist of Conversation with James Madison (Sept. 27, 1834), *reprinted in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 533, 534 (M. Farrand ed. 1937) (emphasis in original).

48. T. Jefferson, Opinion on the Constitutionality of the Bill for Establishing a National Bank (1791), *reprinted in* 19 PAPERS OF THOMAS JEFFERSON 276 (J. Boyd ed. 1974).

49. 2 ANNALS OF CONG. 1950 (1834) (remarks of Rep. James Madison, 1791).

50. *Id.*

51. T. Jefferson, *supra* note 48, at 276.

52. For an example of Jefferson's use of the tenth amendment, see his Opinion on the Constitutionality of the Bill for Establishing a National Bank, *supra* note 48, and his original draft of the Kentucky Resolutions of 1798. *See* E. WARFIELD, THE KENTUCKY RESOLUTION OF 1798: AN HISTORIC STUDY 152 n.2 (1887). A good example of Madison's textualism, apart from his contributions to the bank debate, is his attack on proposed legislation to provide federal subsidies for the American cod-fishing industry. *See* 3 ANNALS OF CONG. 385-89 (1834) (remarks of Rep. James Madison, 1792).

The very point of the constitutional enterprise for Hamilton was "to vest in congress all the powers requisite to the effectual administration" of national affairs.[53] The Constitution's very purpose being to establish a federal government adequate to the nation's needs, its grants of power ought to receive a liberal construction. On this view, interpreters ought to give an expansive reading to the express powers, exercise generosity in recognizing implied powers, and display a willingness (completely repudiated by Jefferson and Madison) to acknowledge "resulting powers" derived from "the whole mass of the powers of the government and from the nature of political society" rather than from either the express or the implied powers.[54]

Hamilton, no less than Madison or Jefferson, viewed their disagreement as involving the fundamental nature of constitutional interpretation. The "principles of construction" Jefferson espoused in his bank opinion "would be fatal to the just [and] indispensable authority of the United States."[55] Hamilton thought it "essential to the being of the National government" that the Republican approach to construction "be exploded."[56] The dispute over the bank act was a dispute about the very nature of the Republic, one that involved a fundamental disagreement about the proper mode of interpreting the Constitution.

In a formalistic sense, Wolfe may be correct when he says that the interpretive "rules" employed by Hamilton and the Republicans were not "flatly contradictory."[57] Hamilton, for example, did not deny that the tenth amendment principle on which Jefferson relied was valid. What he did was transform its significance. For Hamilton, the amendment stated "nothing more than a consequence of [the] republican maxim" that all governmental power ultimately derives from the people.[58] Therefore, although the principle was "not to be questioned,"[59] it was irrelevant to deciding whether the people had in fact delegated a particular power to Congress. Hamilton completely disagreed with Jefferson's understanding of this amendment as a substantive presumption against the existence of unenumerated powers. Hamilton and Jefferson

53. A. Hamilton, Opinion on the Constitutionality of an Act to Establish a National Bank (1791), *reprinted in* SELECTED WRITINGS AND SPEECHES OF ALEXANDER HAMILTON 274 (M. Frisch ed. 1985). Written with specific reference to "the finances of the United States," this expression succinctly states Hamilton's general understanding of the Constitution's delegations of power. *Id.* at 274.

54. *Id.* at 250-51 (emphasis omitted).

55. *Id.* at 248.

56. *Id.* at 252 (referring specifically to the Republican interpretation of the necessary and proper clause).

57. P. 32.

58. A. Hamilton, *supra* note 53, at 250.

59. *Id.*

"agreed" that the tenth amendment expressed a rule for construing federal power; but because they held radically divergent constitutional visions, this agreement was—and was known by them to be—vacuous.

At one point Wolfe writes that Madison and Hamilton "both admitted that constitutional interpretation must be carried out with a view to the *nature* of the government established by the Constitution [but that] they seemed to emphasize somewhat different aspects of that nature."[60] But Madison and Hamilton did not hold a common view of the federal government's nature with somewhat different emphases; instead, they started from radically opposed understandings of that nature that were neither reconciled nor concealed by their shared use of common-law argumentative techniques.

When Wolfe addresses the obvious objection that his "traditional" rules of interpretation, even if they existed, must have been "so broad as to provide little real guidance,"[61] his primary response is to assert that the rules limited "the range of possible legitimate interpretations" by providing "a general standard" for evaluating divergent viewpoints.[62] Such a "general standard," however, is precisely what the constitutional disputes of the 1790s lacked. For the supporters of national power, the general rule of interpretation was that "Congress may do what is necessary to the end for which the Constitution was adopted," as long as it did not violate express limitations or "the natural rights of man."[63] Their opponents vehemently denounced this interpretive standard as calculated to "convert the Government from one limited, as hitherto supposed, to the enumerated powers, into a Government without any limits at all."[64] Unlike Wolfe, the constitutionalists of the 1790s recognized that they were in fundamental disagreement over the substantive standards of constitutional interpretation, not over specific applications of a shared interpretive framework.

My purpose in this Review is not to "prove" that the founders did not share a common understanding of constitutional interpretation, but to argue that Wolfe has failed to establish his claim that they did. Wolfe rests his thesis on his reading of the bank bill dispute, a reading that I believe is flatly wrong. Equally damaging to his argument is his failure to address other apparent examples of fundamental disagreement during the "traditional era." In what way were the 1798 Jeffersonian state-com-

60. P. 33 (emphasis in original).
61. P. 37.
62. P. 38.
63. 1 ANNALS OF CONG. 1956 (1834) (remarks of Rep. Fisher Ames, 1791).
64. 3 *id.* at 387 (1834) (remarks of Rep. James Madison, 1792).

pact theory of the Constitution and the High Federalist vision of a unitary national polity "subtle" variations on a common understanding? Is it possible to reconcile the interpretive approaches of *Martin v. Hunter's Lessee*[65] and *McCulloch v. Maryland*[66] with those of the decisions' Virginia critics?[67] Did Jackson and Calhoun, Story and Taney, Lincoln and Davis, really agree on the premises and objectives of interpretation? Perhaps they did, but that conclusion needs demonstration rather than mere assertion. *The Emergence of Modern Judicial Review* does not offer such a demonstration.

B. The Failed Distinction

Wolfe focuses on John Marshall in his attempt to distinguish "traditional" constitutional "interpretation" from "modern" judicial "legislation." Unlike those of contemporary Justices, Marshall's decisions, Wolfe asserts, "cannot be dismissed as an imposition of his own political preferences on the law;"[68] Marshall's greatness lay "not in shaping an ambiguous document but in reading a great document faithfully . . . in effecting not his own will but the will of the law."[69]

Like his discussion of early interpretive consensus, Wolfe's analysis of Marshall's thought is methodologically flawed. One problem is that Wolfe simply assumes that he stands at an Archimedean point from which he can decide whether Marshall's conclusions were faithful interpretations of the Constitution or legislative modifications of it. Thus, Wolfe *knows* that Marshall was usually right and Jefferson usually wrong,[70] that Marshall cannot "be shown to have misinterpreted the Constitution,"[71] and that Marshall's exercise of political prudence and judicial discretion was not "a substitute for the will of the people as embodied in the Constitution, but a choice in the means of defending it."[72] But how Wolfe knows these things is nowhere specified.

The second problem with Wolfe's analysis lies in the disproportionate emphasis he places on Marshall's self-conscious invocation of common-law rules of construction. In a twenty-page discussion of Marshall and interpretation, ten pages[73] are spent demonstrating that Marshall

65. 14 U.S. (1 Wheat.) 304 (1816).
66. 17 U.S. (4 Wheat.) 316 (1819).
67. *See, e.g.*, JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND (G. Gunther ed. 1969) (collecting contemporaneous essays criticizing the Marshall Court).
68. P. 59.
69. P. 41.
70. *See* p. 61.
71. P. 59.
72. P. 88.
73. Pp. 41-51.

considered the words of the text to be the "starting point for interpretation,"[74] that he believed it necessary to "attend to the implications of words as well as to the immediate or obvious meaning,"[75] that he took into consideration the nature of the document and the requirements of effective government,[76] and so on. Marshall's invocation of these commonplaces does serve to place him within the common law's rhetorical tradition, but Marshall's "rules" do little, despite Wolfe's assertion to the contrary, to "suggest the seriousness of his attempt to conform his interpretation to the meaning of the document itself"[77] in a way that distinguishes him from any "modern" Justice.

A third problem with Wolfe's analysis of Marshall's thought is his failure to set Marshall's opinions in any kind of chronological or cultural setting. Professor Wolfe's flattened and ahistorical account forgets or overlooks Marshall's interaction with the changing political and intellectual context of his work, the work of contemporaries against whose thought Marshall's views can be measured, and the possibility that Marshall's thought underwent change or development.

Wolfe gives his closest attention to Marshall's contracts clause decisions, which he describes as probably the most controversial of Marshall's tenure as Chief Justice.[78] Wolfe concedes that Marshall's interpretation of the clause is not beyond criticism: "in fact, Marshall may have stretched the Constitution somewhat in this area."[79] Wolfe recognizes that Marshall's application of the contract clause to land grants, corporate charters, and prospective bankruptcy laws was not directed to specific evils that "the framers had in mind as they wrote the provision."[80] He even admits that "[w]ith respect to *some* of these, *some* framers probably would have said that the general principle of sanctity of contracts ought not to be legally enforceable."[81] But to Wolfe this admission does not invalidate Marshall's interpretive approach, which gave controlling weight to "the principle the framers established, rather than the particular instance that they had in mind,"[82] because the full implications of the Constitution's principles were not immediately apparent to the framers and ratifiers.[83] As a result, the appropriate question to ask of

74. P. 42.
75. P. 43.
76. P. 46.
77. P. 42.
78. P. 54.
79. P. 57. However, Wolfe himself does not believe that Marshall was in error. *See* p. 59.
80. P. 57.
81. *Id.* (emphasis in original).
82. P. 55.
83. *See* p. 58.

Marshall's contracts clause decisions is not whether the ratifiers prophetically agreed with them, but instead whether, after mature reflection on the principle of the clause, they would have done so.[84] Apparently, "stretching" the Constitution is acceptable to Wolfe when done by John Marshall.

This analysis of Marshall's interpretation of the contracts clause, which Wolfe essentially repeats (in lesser detail) with respect to other areas of constitutional law, may be correct. But it is indistinguishable from Wolfe's critical description of the modern Court's jurisprudence of constitutional rights. Wolfe excoriates the Warren Court for its belief that when the text or original intent is "too narrow" to effectuate "the broad purposes of the rights" enumerated in the Constitution, the Court ought to "give effect to [those] broad purpose[s] by extending the meaning or application of the provision."[85] This approach amounts, he writes, to the invention and implementation of a "judicial 'necessary and proper' clause."[86] Such judicial lawmaking is illegitimate, he adds, because "to *extend* or *add to* the Constitution in light of its purposes is in fact to go beyond them, to add a new purpose not in the Constitution itself."[87] But why this same criticism does not apply to Marshall as well as to the Warrren Court is unclear. In criticizing the Warren Court, Wolfe's recognition of the need to explicate principles embodied, although not made explicit, in the Constitution[88] seems to have disappeared. Apparently, Marshall's reliance on "broad considerations"[89] and his use of "theory" not found in the text[90] were privileges of the founding generation only. Yet, if it were permissible to evolve a general principle from a specific text when interpreting Article I and the contracts clause in the early nineteenth century, why has it become illegitimate to apply the same method to the Bill of Rights in the mid- to late-twentieth century? Wolfe does not tell us.

84. *See id.* Perhaps recognizing the quite ahistorical and indeed wholly speculative nature of that inquiry, Wolfe reformulates it: "Can Marshall show why, on the basis of the principle embodied in the contract clause, and consistent with the Constitution as a whole, the [ratifiers] *ought to have* wanted that principle employed" as Marshall used it? P. 58 (emphasis in original).

85. P. 276.

86. P. 275.

87. P. 277 (emphasis in original). For instance, Wolfe asserts that "[t]he purpose of the right to retain counsel . . . was to prevent government from prohibiting a person to retain a lawyer, *not* a vaguer and more general principle that 'a fair trial without counsel is impossible.' " *Id.* (emphasis in original). "If the framers had meant that," Wolfe concludes, "they could have and would have done more than merely guarantee the right to retain counsel." *Id.*

88. *See* pp. 55, 58.

89. P. 62.

90. *See* p. 52.

III. Conclusion

The Emergence of Modern Judicial Review fails to substantiate Professor Wolfe's claim that the founders shared an understanding of constitutional interpretation or that John Marshall's interpretive methods differed in principle from Earl Warren's. One of the causes of Wolfe's failure to convince is his failure to carry through his own methodology. An "interpretive history"[91] of judicial review and constitutional interpretation that, in the early period, ignores, among other things, state court developments, the 1795 Jay Treaty debates, the Kentucky and Virginia Resolutions of 1798, Madison's Report of 1800 and the responses to it, the controversy over the repeal of the Midnight Judges Act, the disputes over the constitutionality of Jefferson's embargo and post-1815 congressional legislation, the revival of states rights theory after 1819, and the new era that began with Jackson's election to the Presidency, has so narrowed its object of interpretation that it lacks much interpretive power.

But the problem with Wolfe's book goes deeper than a failure of execution. Reading *The Emergence of Modern Judicial Review* left me with the sense that Wolfe's historical claim about "traditional" constitutionalism was so necessary to his ultimate goal of demonstrating an alternative to modern constitutional practice that he could not do otherwise than find the claim to be true. If this is the case, it is a fault not only of this particular book, but of a great deal of modern constitutional writing, on the political left as well as on the right. The imprimatur of history that enlisting the founders provides is so rhetorically powerful and the costs of abandoning a claim of fidelity to the founders are so high that an almost irresistible force is brought to bear on the constitutional writer who seeks, as Wolfe no doubt sought, "to do good history" as well as to score debating points against those with whom she or he disagrees. It is, I suspect, enormously disquieting to New Right constitutionalists to be told that the founders may have disagreed radically over the very nature of their enterprise, just as liberal scholars and judges probably find disturbing suggestions that the founders had little concern for free speech and much concern for vested property rights. But the fact that these historical claims are difficult to accomodate in our contemporary constitutional theories says nothing about their validity as history. If we are to use the history of the founding in our constitutional discussions, we must reckon with the fact that what the founders have to say we often will not wish to hear.

91. P. 329.