

his readers take the book on those terms and then perform the Socratic experiment he recommends.

**THE MARSHALL COURT AND CULTURAL CHANGE, 1815-1835.** By G. Edward White.<sup>1</sup> New York and London: Macmillan Publishing Company. 1988. Pp. xxi, 1009. Cloth, \$95.00.

**JOHN MARSHALL'S ACHIEVEMENT: LAW, POLITICS, AND CONSTITUTIONAL INTERPRETATIONS.** Edited by Thomas C. Shevory.<sup>2</sup> Westport, Connecticut: Greenwood Press. 1989. Pp. x, 232. Cloth, \$12.95.

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Over two decades ago Robert Faulkner, in *The Jurisprudence of John Marshall* (1968), belatedly demolished the progressive interpretation of the "Great Chief Justice" and, it might be argued, prophetically resolved the debate over republican and liberal influences on the founding fathers and Marshall before it even began. Progressive scholarship had long depicted Marshall as a conservative defender of property rights and national authority who impeded the progress of democratic states' rights doctrines. In the years after Faulkner's study, scholarly controversy focused on whether the founders—and John Marshall as the preeminent expositor of the constitutional ideas of the founding—were civic-minded virtuous republicans, or property-minded possessive individualists. Faulkner viewed Marshall as a liberal or modern republican who wrote the principles of constitutional democracy into our fundamental law. Faulkner did not anticipate, however, the controversy over the nature of constitutional interpretation that was to develop and that is now one of the major issues in Marshall scholarship.

These two books are significant contributions to Marshall historiography. By focusing on the problem of constitutional interpretation, they supplement Faulkner's work. Both books address the question of republican and liberal tendencies in the thought of Chief Justice Marshall. White and Shevory also examine Marshall in relation to the issues of judicial activism and public policymaking. In

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the language of contemporary jurisprudence, they ask us to consider whether Marshall was a restraint-minded interpretivist or an activist-minded, quasi-legislative noninterpretivist.<sup>4</sup>

A volume in the Oliver Wendell Holmes Devise History of the Supreme Court, White's book is a monumental work in the sense defined by that series. He begins by discussing the cultural and legal sources of Marshall Court jurisprudence, the working life of the Court, prominent lawyers who appeared before it, and the Justices and reporters. There follow chapters on admiralty jurisdiction; sovereignty and Union; property, vested rights, and the contract clause cases; cases involving slaves and Indians; nonconstitutional cases dealing with real property, contracts, federal court jurisdiction and procedure, and international law; and a concluding discussion of the theories of law and history that influenced constitutional adjudication in the early nineteenth century. Demonstrating impressive historical and legal erudition, White covers these topics while pursuing three principal interpretive themes: the adaption of republican ideology to cultural change, the nature of the Union, and the scope of judicial discretion and policymaking under Marshall's leadership.

## I

In his discussion of republicanism, White employs the concept of ideology as a cultural system which provides the matrix and determines the structure and content of the thought of an age. He argues that the United States was a republican society that lacked a historicist theory of cultural change and faced the prospect of inevitable decay. Yet Americans believed they could break the cycle of decay that had afflicted all previous societies by "recasting" revolutionary first principles, thereby making possible the perpetuation and perfection of their exceptional ideas and institutions. One way to do this was through judicial interpretation of the Constitution and the common law.

According to White, recasting of the nation's defining principles was necessary because cultural changes were occurring, intro-

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4. Recent works which address this issue include C. WOLFE, *THE RISE OF MODERN JUDICIAL REVIEW: FROM CONSTITUTIONAL INTERPRETATION TO JUDGE-MADE LAW* (1986) (arguing that Marshall was an interpretivist who generally applied the principles of the Constitution according to the framers' intent); Snowiss, *From Fundamental Law to Supreme Law of the Land: A Reinterpretation of the Origins of Judicial Review*, 2 *STUDIES IN AM. POL. DEVELOPMENT* 1-67 (1987) (arguing that Marshall was decisive in the shift to legalistic, text-based judicial review that paved the way for policymaking judicial activism); L. LEVY, *ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION* (1988) (arguing that Marshall was the first and greatest judicial activist in Supreme Court history).

ducing what would later be called "liberal" social, economic, and political practices and institutions. The means by which judicial recasting of fundamental principles in the areas of constitutional and common law took place was through the use of "consensual surrogates." This is White's shorthand term for concepts such as property, commerce, and Union that were sufficiently broad and amorphous to reconcile tensions resulting from the conflict between republicanism and emergent liberalism. The republican principles that the Marshall Court in particular recast or restated included representative government, property rights, commerce, liberty, virtue, divided sovereignty, distrust of partisanship, and suspicion of mass democracy.

White's treatment of republicanism and liberalism in the revolutionary period conforms to current historiographical orthodoxy. He regards republicanism as the ideology of the Revolution which encountered—and accommodated—the ideology of liberalism in the late eighteenth and early nineteenth century. His account of the legal manifestations of this cultural-ideological conflict, as seen in judicial decisions involving real property, contracts, and negotiable instruments, also reflects the viewpoint of the law and economics school of legal history.

White's interpretation of these matters is informative and unproblematic except for one basic issue. Like the historians of the republican synthesis whom he follows, White erroneously views the ideology of the Revolution as *classical* republicanism. In fact the ideology was that of modern or liberal republicanism which accepted liberty, individual natural rights, and market exchange, despite the contradiction between these and the classical concept of virtue.<sup>5</sup>

Two essays in *John Marshall's Achievement* are pertinent in this connection. In "John Marshall as Republican: Order and Conflict in American Political History," Thomas C. Shevory, while accepting Faulkner's view of Marshall as essentially a Lockean liberal, calls attention to allegedly classical republican elements in his political outlook. Focusing on his historical writings, Shevory says that Marshall viewed the Constitution as an antidemocratic force that prevented the popular will from threatening the virtuous order. Like White, Shevory writes under the misapprehension that American republicanism was authentically classical in nature.

Richard A. Brisbin, in "John Marshall on History, Virtue, and Legality," provides a more satisfactory analysis of the republican-

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5. See T. PANGLE, *THE SPIRIT OF MODERN REPUBLICANISM: THE MORAL VISION OF THE AMERICAN FOUNDERS AND THE PHILOSOPHY OF LOCKE* (1988).

ism of the Founding, which he recognizes as possessing distinctly liberal characteristics. Brisbin argues that despite the acceptance of the classical republican paradigm in colonial political culture, a liberal democratic political organization took shape in the united colonies from the outset of the revolutionary era in 1765. The reason was that the emergent polity was too large for classical republican forms. The purpose of liberal republican government, and the role of law in such a regime, was to regulate interests rather than express community morality and educate citizens in public virtue. Brisbin points out that Marshall as a liberal republican approved of commerce as a civilizing and virtuous force as well as a source of national power to defend liberty and a means of distributing economic power in the society. More clearly than White, Brisbin describes the convergence of liberal self-interest and republican civic virtue in the development of private commercial virtues that had public ramifications.

## II

Unionism offers a second interpretive focus for studying the Marshall Court. White views Marshall as a proponent of the popular sovereignty theory of the creation of the Constitution and the Union, in contrast to the compact theory of the Union asserted by states' rights advocates. White presents Marshall not simply as a nationalist, however, but as a "consolidationist" whose decisions on the nature of the Union vindicated the worst fears of the Virginia Republican states' rights coterie.

According to White, the instrument of Marshallian consolidation was the coterminous power theory, which held that federal legislative and judicial powers were coextensive. The theory of coterminous power also regarded the three branches of federal government as sharing an identity of interest that caused them to act with unity in a partisan or policymaking sense. Employed by the Antifederalists in their analysis of the Constitution during the ratification controversy, coterminous power theory was a principal doctrinal basis of Republican opposition to Federalist judges' exercise of a federal criminal common law jurisdiction in the 1790s.

The Jeffersonian Republicans' imputation of consolidationist or centralizing ambitions to the Federalists in the party struggles of the early national period is familiar. What distinguishes White's account of this matter is his argument that the states' rights men were correct in their belief that the Federalist party and the Supreme Court under John Marshall really did aim at consolidating authority in the national government through the use of coterminous

nous power theory. White contends that the theory of coterminous power was a "political axiom" recognized by both Federalists and Republicans as inherent in the nature of government. He proceeds to explicate the Marshall Court's national sovereignty decisions—*Martin*, *McCulloch*, *Cohens*, and *Osborn*—as significant mainly for their assertion of coterminous power theory. In a subsequent article, White has elaborated his argument that this coterminous power theory explains some of the fears of the states' rights men.<sup>6</sup>

This thesis raises several questions. White states that the Marshall Court's acceptance of the coterminous power theory presented the prospect of unlimited federal jurisdiction and sovereignty. White thus seriously qualifies, if he does not wholly reject, the generally accepted view that although John Marshall insisted on national supremacy with respect to the ends or objects for which the federal government was created, he approved the principle of divided sovereignty and hence was not a consolidationist. White observes that Marshall's nationalism was not interventionist, legislative, or proto-regulatory in a twentieth century liberal reform sense. Marshall did not use coterminous power theory to make the Union an omnipresent force or take an expansive view of the functions of the federal government. On the contrary, White says that the Court under Marshall used the doctrine of coterminous power defensively to preserve indispensable federal powers and protect the Union against centrifugal attacks. From a nationalist standpoint, the Court's espousal of the doctrine produced modest or negligible policy results. White shows, furthermore, that starting with *Houston v. Moore* (1820), a jurisdictional case involving the power of Congress over the state militia, the Court fashioned the doctrine of concurrent sovereignty and retreated from coterminous power theory out of deference to rising states' rights sentiment.

The question arises, then, what is the historical significance of the coterminous power theory that figures so prominently in White's account? His treatment of this issue is not intended to illuminate the twentieth century problem of bureaucratic regulation as a threat to limited government and the federal-state balance. Nor does White interpret the nationalism of the Marshall Court as a direct threat to the slavery interest, the fear that was most immediately disturbing to Marshall's states' rights critics. Rather, in White's analysis coterminous power theory is historically relevant to the rise of modern judicial review. The doctrine of coterminous power, pressed to its logical conclusion, became in Marshall's opinions a rationale for judicial discretion. "The great significance of

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6. White, *Recovering Coterminous Power Theory*, 14 NOVA L. REV. 155 (1989).

coterminous power theory in the Court's decisions," White declares, "was as a rationale for unlimited federal judicial power . . ."

### III

In *The Marshall Court and Cultural Change*, as in his other writings, White deals centrally with the nature of law and the relationship between law and politics. Can law properly be reduced to political partisanship, expediency, interest or ideology? Or does it consist of objective principles and rules that possess intrinsic validity? In the early nineteenth century, White argues, this issue assumed the form of the problem of judicial discretion. It was the question of judicial discretion, he observes, and "the related problem of distinguishing the judicial declaration of legal principles from partisan political activity" that was "foremost in the minds of Marshall and his contemporaries."

As a historian, White seeks to understand the Justices of the Marshall Court through their own eyes, as they understood themselves. "Reconstructing the jurisprudential universe of the Marshall Court," he notes, "requires abandoning several of the premises governing modern analyses of the Court's actions." A basic assumption of early nineteenth century jurisprudence was that legal decisions and doctrines are not political or ideological in nature. As a modern scholar, however, White assumes "that the formation of legal doctrine can . . . be read as an ideological exercise." A major methodological problem thus appears: "How does one assess the ideological posture of a court whose members try to conceal their belief structures and to suggest that their judgments have nothing to do with ideology?" The answer to this problem is that the critical historian must take what Supreme Court judges say about the nature of judicial decisionmaking at a discount, and White does this. Yet fair-minded scholar that he is, he is able to overcome modern prejudices and assumptions to the extent necessary to present early nineteenth century ideas about law, adjudication, and judicial discretion as worthy of respectful consideration. Indeed, White even concedes that the concept of neutral legal principles and legal as opposed to political discretion may be essential to the rule of law. These issues warrant more detailed consideration.

In addition to consolidation, supporters of states' rights in the early nineteenth century feared judicial discretion. Discretion referred to the opportunities for federal judges to make partisan decisions or unwritten decisions without having to account for their actions. When federal decisions usurped the prerogatives of state courts or legislatures, judicial discretion had consolidationist effects.

Attacked by states' rights critics for exceeding the limits of judicial power, Marshall and Justice Joseph Story countered with the argument that the Justices exercised "mere legal discretion," consisting only of finding and declaring appropriate legal authorities and applying the language and spirit of the Constitution. In practice, the problem of judicial discretion arose most frequently with respect to two matters: the determination of jurisdiction and the declaration of substantive rules. Justices of the Supreme Court believed a court could properly find and declare substantive rules drawn from several sources—the Constitution, the common law, the law of nature or of nations, the civil law, equity, the law merchant, admiralty and maritime law, federal and state statutes. A court then applied the rules to a case where it had jurisdiction. In doing so the court did not, in the view of early nineteenth century jurists, engage in law making. According to Justice Story, once jurisdiction had been granted by the national legislature to a court, the power to determine the nature and extent of that jurisdiction was part of the court's substantive rule making authority.

How can a limited theory of federal jurisdiction, White asks, be reconciled with an open-ended conception of the nature and sources of the law? Believing such a reconciliation to be impossible, he concludes that the Supreme Court's "mere legal discretion" was really a broad political discretion that allowed the judiciary to make policy as a partisan political body. The Court was careful, however, to avoid being *perceived* as a partisan agency. At the same time, White explains, the Marshall Court blurred the distinction between law and politics by adhering to a conception of the Constitution as embracing politics and political theory. In *Cohens v. Virginia*, for example, Marshall employed a political conception of the Constitution. A principle of law—the supremacy of the Union—was embodied in the Constitution, yet the principle was also one of politics. Moreover, in the event of a conflict between a state and the national government, the arbiter was assumed to be the Supreme Court. White states that under this theory of a political Constitution it was hard to know how the federal judiciary would be limited in its constitutional interpretations except by politics. He goes on to elaborate a view of Marshall as a judicial activist who professed to invoke the will of the law, while in fact enforcing the "will of the Court."

In White's account, the Marshall Court's approach to constitutional interpretation forms another dimension of its judicial activism. In the *Dartmouth College* case, for example, the Court did not interpret the contract clause in accordance with the intent of the framers. White says the Court "reconstituted" the contract clause,

“packing” it with extra-constitutional arguments such as the takings and vested rights concepts. Fusing “general principles” with specific constitutional language, Marshall adhered to the constitutional text while giving the words an ideological meaning. To use the terms currently in vogue, the Court employed a noninterpretivist rather than an interpretivist method of constitutional adjudication. In other cases, such as *Gibbons v. Ogden*, White similarly sees the Court “recasting” the commerce power and providing a “restatement of first principles.” In nonconstitutional or common law cases, where the Justices were not bound by a text, the limits on judicial discretion were even less visible and the scope of judicial activism all the greater.

The Supreme Court fostered the impression, White contends, that its decisions were above politics, embodied the will of the law, and involved mere legal discretion. In White’s opinion, however, the fact that the Court chose among competing doctrines that had political implications proves that the Justices failed to separate law from politics. Their attempt to distinguish law from politics and their rejection of overt partisanship were tactical moves in a strategy aimed at securing the legitimacy of their decisions. Although some jurists and commentators saw through this maneuver and criticized the Court’s policymaking discretion, White says the strategy was regarded as a respectable intellectual proposition by the Court’s contemporaries. Acceptance of the idea that judicial decisions were not discretionary in the strict partisan sense, White observes, was not confined to defenders of the Marshall Court.

Implicit in *The Marshall Court and Cultural Change* is the thesis that the distinction between law and politics assumed in declaratory jurisprudence is a basic feature of American constitutionalism. In a recent article, White asserts that American culture has made a profound investment in the ideal of the rule of law as a body of neutral principles administered by disinterested judges. Arguments advanced by judges in support of this ideal, he writes, are “excusable.” We may even believe, he continues, that such arguments “are ultimately necessary in a culture in which the rule of law ideal is deeply embedded and in which trust and justice are elusive goals.”<sup>7</sup> But since the separation of law and politics is only a myth, says White, it is naive for a commentator or historian to subscribe to it. He adds that jurisprudential axioms, reflecting the prevailing culture and ideology, are no more permanent than the judges who declare them.

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7. White, *supra* note 6, at 194.



## IV

In *The American Judicial Tradition* (1976), White depicted Marshall as the founder and preeminent exemplar of a method of constitutional decisionmaking that “retained an oracular style but grounded decisions on appeals to the first principles of American civilization.”

In that book, while recognizing the political importance of Marshall’s decisions,<sup>8</sup> White basically viewed the great Chief Justice as an interpretivist and a source of the tradition of judicial restraint in American jurisprudence. In his most recent work, however, White emphasizes Marshall’s activist and noninterpretivist tendencies. He now contends that Marshall “recast” the framers’ first principles and “packed” the text of the Constitution. Moreover, White deems it paradoxical that legal observers in the early nineteenth century could grasp the fact that particular Supreme Court decisions were political without the benefit of the modern theory which regards courts as inevitably political and policymaking bodies.

White thus appears to have moved closer to a legal realist or positivist view of the constitutional order and the process of constitutional adjudication. Yet he is unwilling to embrace this outlook in a clear and straightforward manner. Ambivalence appears, for one thing, in the full and fair-minded description of the declaratory theory of law that White presents. His detailed and faithfully rendered historical exposition raises the question of whether the Marshallian theory of legal discretion and the distinction between law and politics might be valid in some enduring sense, rather than merely strategic, functional, pragmatic and reflective of the ideology and culture of the time. Notwithstanding the modernist assumptions that lead him to emphasize Marshall’s activism, White prompts us to ask whether not only jurists, but scholars and commentators as well might be justified on historical and philosophical grounds in describing the declaratory theory of law as consisting of legal axioms that define any genuine or legitimate legal order.

White has elsewhere observed that modernist epistemology, the dominant intellectual orthodoxy since the New Deal, is under attack. The term “modernism” here refers to the idea of an unstable and unpredictable universe in which human beings must be satisfied with only partial and transient knowledge, and *a priori* value

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8. For example, White wrote: “In Marshall’s hands the judiciary, . . . allegedly deciding legal, not political questions, . . . became a political force comparable in stature to the other branches of government.” *THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES* 33 (1988).

systems are believed to be illusory. Legal realism rested on modernist assumptions; it promoted a relativistic, experimental, and pragmatic approach to legal and constitutional problems. According to White, this outlook is now questioned and there is widespread searching for a stable reference point from which to ground the primacy of substantive values.<sup>9</sup>

Neither by precept nor by example does *The Marshall Court and Cultural Change* cast light on what White has called "our current epistemological predicament," or indicate a way out of it.<sup>10</sup> On the contrary, White avoids the question of the existence of a stable reference point for substantive values by seeking refuge in historicism. The historicist assumptions of the book are most plainly apparent in the contention that the jurisprudential views of the early nineteenth century were not those of the late twentieth century, and that the Supreme Court accordingly was a completely different institution. White states that it was "a Court of a different century, with a character fundamentally different from its modern counterpart." Emphasizing "the uniqueness, the 'differences,' and the time-boundedness" of the Marshall Court, he says it is anachronistic for moderns to criticize the Justices of the early nineteenth century for their political interventions, conflicts of interest, and judicial arrogations of power, all of which stemmed from radically different conceptions of law and judging. From this perspective, no judgment can be made about the validity of different theories of law. The only reasonable conclusion to be drawn is that the legal order in each age operates on theories and assumptions that reflect the dominant culture and ideology.

White's radical historicism is unsatisfactory for several reasons. In the first place, there would be no point in studying early nineteenth century judicial history if the Supreme Court and the constitutional system of that time were as different from the late twentieth century Court and Constitution as he contends. In fact there are strong elements of institutional and theoretical continuity in the constitutional order that infuse constitutional history with practical importance. White recognizes this in a recent article in which he reflects on some of the themes in *The Marshall Court and Cultural Change*. He asserts, for example, that although the issue of consolidation raised by coterminous power theory may not be pertinent today, the issue of judicial discretion is less "time-bound." The history of judicial discretion is relevant, in other words, because judicial review not only exists today, but plays an even more

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9. White, *Recapturing New Deal Lawyers*, 102 HARV. L. REV. 499, 510 (1988).

10. *Id.*

significant role in American government. White notes further that the Marshallian concept of judicial discretion lasted until the early twentieth century, and comments that we may be closer to the world of the framers than we think.<sup>11</sup> The implication is that we live under the same Constitution as the founders, and that the ideas and actions of that era are not time-bound but are pertinent to contemporary constitutional problems.

There is, to use White's term, other "unfinished business" on the constitutional agenda that leads me to reject his thesis of radical discontinuity between the Marshall Court and the Court in our time. A major issue for Americans in the early nineteenth century was whether the principles of the Revolution could be preserved. Law was a way of maintaining the nation's first principles in the face of cultural change and preserving republican government. The role of the judiciary was to reconcile republicanism with cultural change, and in order for the courts to accomplish this purpose it was necessary for them to have legal as opposed to political discretion. This discretion, however, was potentially political and tyrannical. Therefore it needed to be depoliticized, made cognizant of the limitations of federal sovereignty, and based on reason that was compatible with republican values.

Are not the same issues present in our time? Is there not need today of the same distinction between law and politics in order to limit the political and policymaking discretion of the courts and prevent government by a will independent of the society, a danger warned against by Madison in *Federalist* No. 51? Although he apparently does not intend to, White shows through his historical exposition how the Marshall Court dealt with issues that, far from being unique, were inherent in American constitutionalism: the role of the judiciary in a republican government, the nature of sovereignty in a federal system, and the protection of property rights against government encroachment. His radical historicism notwithstanding, White makes clear the continuing relevance of the theory of legal discretion, the idea of law as embodying neutral principles based on reason for the common good, and the idea of the Constitution as comprising fundamental political principles rather than simply a legal text to be interpreted according to the techniques of legal positivism.

In conclusion, we may consider Michael Zuckert's essay, "Epistemology and Hermeneutics in the Constitutional Jurisprudence of John Marshall," in the Shevory volume. Zuckert explicates and seeks to recover the political conception of the

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11. White, *supra* note 6, at 193.

Constitution as the embodiment of fundamental principles, not merely a time-bound reflection of the founding period, as White suggests. Zuckert identifies Marshall as an interpretivist, rejecting the theory that he was a political judge and an activist. According to Zuckert, Marshall interpreted the text in the light of an overall conception of the nature and purpose of the Constitution, which Zuckert refers to as the "pantext." This is the key to Marshall's jurisprudence.

In an analysis that in many respects parallels Sylvia Snowiss's interpretation of the origins of judicial review, Zuckert explains how political and legalistic concepts of the Constitution were combined in the framing of the document, and in the exercise of judicial power by Marshall. Furthermore, the trend of constitutional development was toward a more legalistic instrument of government, as seen in the addition of the Bill of Rights, the rise of judicial review, and the eventual adoption of the Reconstruction amendments. Nevertheless, Zuckert argues, these legalistic elements were grafted onto a Constitution that "in chief inspiration and dominant character remained political."

Unlike White, whose historicist assumptions cut him off from the founding and align him ultimately with noninterpretive realism and positivism, Zuckert holds out the possibility of recovering the political dimension of the Constitution intended by the framers. Other scholars raise the same issue.<sup>12</sup> Their purpose, like Zuckert's, is to restore both limited constitutional government and republican self-government. If the goal of such a constitutional renewal is not good government in the sense of classical virtue, it is nevertheless a better government than that which can be provided by judges exercising a will independent of the society. For guidance in this project, we do well to reflect on the jurisprudence of John Marshall and the history of the Marshall Court.

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12. See, e.g., Kristol, *They Disdain to Conceal Their Views and Aims: The New Candor in the Law Schools*, 1 BENCHMARK 13 (1984); Bryden, *Politics, the Constitution, and the New Formalism*, 3 CONST. COMM. 415 (1986); Nagel, *Interpretation and Importance in Constitutional Law: A Re-Assessment of Judicial Restraint*, 25 NOMOS 181 (1983).