

Another seductive alternative is Judge Richard Posner's pragmatism. Like Judge Wilkinson himself, Posner is an opponent of constitutional theories. The principal virtues of pragmatism are its flexibility and its candor about the institutional capabilities of the judiciary. Those qualities may sometimes lead courts to exercise restraint in displacing the judgments of elected officials, but the approach ultimately fails because it "invites judges to cast aside restraint whenever practical exigencies suggest that they do so." (p. 103)

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In order to see the weakness of Judge Wilkinson's anti-theoretical position, it is helpful to focus on its relationship to originalism. He does not criticize the principle of originalism, which is treating the Constitution as law. Nor does he reject its goal of constraining judicial discretion. Instead, he denounces it solely because it is a theory, on the ground that theories of adjudication always lead to perverse results.

Judge Wilkinson's specific criticisms of originalism are not entirely baseless. He rightly says that the Constitution's text and relevant history are often vague or ambiguous, as virtually all originalists recognize. And he rightly says that some originalists succumb to a temptation to overstate the certainty of the conclusions they reach. He may even be right to claim that a commitment to originalism encourages such overconfidence. But these can only be *fatal* flaws if there is a superior alternative to originalism. His candidate is judicial restraint.

That alternative, however, proves to consist of empty bromides. On the last page of *Cosmic Constitutional Theory*, the author claims to offer "only a set of worn and ordinary observations." (p. 116) Let's examine these observations one by one:

• "There is nothing novel in the idea that judges should pay attention to the text, structure, and history of the Constitution and not go creating rights out of whole cloth." No originalist could disagree, and this observation might even be taken as a succinct statement of originalist theory.³

• "Or that judges should appreciate 'otherness'—the other branches of government, the other sovereign that is state government, the other institutions, professions, and trades that comprise the private sector." I don't think anyone at all could dispute this proposition, and certainly none of the disparaged "cosmic theories" does so.

• "Or that liberty is best safeguarded when the allocation of authority to those others is respected by the courts." Once again, who could disagree? But how will judges know what that allocation of authority is? By "pay[ing] attention to the text, structure, and history of the Constitution"? If so, we're back to originalism. If not, then how?

• "There is nothing new in the thought that life tenure provides the occasion not for expanding power but for appreciating its limitations." This is exactly why originalist theory was developed in opposition to living constitutionalism, as

Judge Wilkinson had acknowledged earlier. (pp. 37-38)

• "There is nothing remarkable in believing the highest virtues of judging—and of life—are a measure of self-denial and restraint." If you replaced the word *are* in this sentence with the word *include*, the claim would be almost incontestable. No originalist would dispute it, and I doubt that many others would either.

As written, however, Judge Wilkinson's statement does not add up. In context, the term *a measure* implies that self-denial and restraint are part of something, not the whole of it. Unless you knew what the other parts are, what sense would it make to describe these parts as "the highest virtues"? Presumably, they can't be the *only* virtues because that would mean that nobody should ever do anything, either in judging or in life. So we're left to wonder what the other virtues are, namely the ones that should cause judges to do something rather than nothing.

Originalism provides an answer to that question. Judges should diligently and dispassionately strive to ascertain and apply the original meaning of the written law. This undertaking is not always easy or foolproof, and it is not without some deep inner tensions. But it does say what judges should try to do, not just what they should try to stop themselves from doing.

Does Judge Wilkinson offer an alternative account of what judges should actually do in constitutional cases? I think he does, though the answer has to be pieced together from a variety of clues in his book. Some detective work is required because the book contains very little legal analysis. There are occasional allusions to traditional legal methods, but almost no discussion of what these methods entail.⁴ Many judicial opinions are offered as examples of the failure of various "cosmic theories," but Judge Wilkinson seldom confronts the legal arguments at issue in the cases. The author is more like a jury than a judge, issuing verdicts rather than reasoned opinions. Unlike a jury, however, he comments on many cases, and from those comments we can infer something about what he thinks courts should do.

Much of *Cosmic Constitutional Theory* points toward an underlying theory often associated with the work of James Bradley Thayer, who is repeatedly quoted in the book: a court should never invalidate a statute unless its unconstitutionality is so clear that it is not open to rational doubt.⁵ On this principle, insistence on finding the original meaning of the Constitution is bad because it often "sows the seed of interventionism." (p. 47) Thus, for example, *Alden v. Maine*⁶ and *U.S. Term Limits, Inc. v. Thornton*⁷ could not be decided on originalist grounds because the majority and the dissent both presented historical evidence in support of their positions.⁸ "Originalism thus offers *no guidance* on the issue, setting judges adrift." (p. 48, emphasis added) Similarly with the Second Amendment,⁹ better just to defer to the decisions of political bodies.

Judge Wilkinson does not even consider the possibility that either the majority or the dissent in these cases had a much stronger originalist argument, and that originalism therefore offers very considerable guidance. I suppose one can escape the need to examine originalist arguments on their merits if one assumes that originalism fails whenever a large number of words

can be piled up on each side of a disputed issue. But that is a very strange assumption for anyone to make, let alone a judge.

One example shows how far Judge Wilkinson goes in his hostility to originalism. Citing the dissent in *Home Building & Loan Association v. Blaisdell*,¹⁰ he says that a textualist judge could “ride the word ‘contract’ over many forms of social welfare legislation.” (p. 36) As anyone who has read the case should know, the dissent did not take the word “contract,” or the text of the Contract Clause, on some wild ride. On the contrary, Sutherland’s opinion for four Justices showed with overwhelming evidence that this clause was put into the Constitution in order to prevent exactly the kind of debtor relief laws that were at issue in *Blaisdell*. The majority did not dispute this, but instead declared that an appeal to the original meaning of the Constitution “carries its own refutation.”¹¹ Thus, it seems, originalism is presumed to fail even when the original meaning is indisputably clear.

Judge Wilkinson’s implied endorsement of *Blaisdell* suggests that he adheres to an extreme version of Thayerism. That would be a theory, and one that might be defended with rational arguments. But it turns out that this is not his position after all:

Major activist decisions of the Warren Court—“*Brown v. Board of Education*,¹² *Gideon v. Wainwright*,¹³ *Reynolds v. Sims*,¹⁴ and *Miranda v. Arizona*¹⁵—have rightly stood the test of time Decisions like *Brown*, *Gideon*, and *Miranda* represent success stories because they vindicated foundational principles essential to the functioning of our nation. But I doubt there are now *Browns* and *Gideons* waiting to be born.” (p. 111)

Was the nation really unable to function before the Warren Court handed down all these “major activist decisions”? That is simply contrary to fact. Would it stop functioning now if some of them, for example *Miranda*, were overruled? That’s not easy to believe.

More important, perhaps, all of these decisions do have one thing in common: they reflect the cosmic theory of living constitutionalism. Judge Wilkinson’s unqualified praise for them, an honor that his book bestows on few other decisions, makes it unmistakably clear that his notion of judicial restraint is really just one of selective judicial activism. It is indistinguishable from living constitutionalism, notwithstanding the author’s disagreement with particular choices made by some of his fellow living constitutionalists.

It is hard to know just how frequently Judge Wilkinson would disagree with other defenders of judicial activism, though we are told that “[n]ot all activism is equal.” (p. 114). The book’s most prominent example of bad activism is *Roe v. Wade*,¹⁶ a decision that Judge Wilkinson himself had previously endorsed.¹⁷ He does not explain why he has changed his mind, which is unfortunate because an explanation might shed some light on how he distinguishes good activism from bad. Nor is he clear about whether activist decisions fall into two categories (good and bad) or along some kind of sliding scale. Thus, for example, he says that *Roe v. Wade* was “wrong,” while *Swann v. Charlotte-Mecklenburg Board of Education*¹⁸ was only “suspect,”

and *Boumediene v. Bush*¹⁹ was merely “problematic” and “dubious.” (pp. 111-12). Meanwhile, *Bush v. Gore*²⁰ “cannot be hailed as a model of judicial restraint,” (p. 79) notwithstanding the fact that the Court *struck down* a judicial ruling that had overturned decisions made by Florida’s elected officials.²¹

Cosmic Constitutional Theory’s unrelenting reliance on *ipse dixit* leaves a lot of questions unanswered. So does its inattention to *stare decisis*. One would expect any advocate of judicial restraint to focus heavily on the role of this doctrine in providing legal stability and discouraging judges from ill-considered activism. But aside from a patently incorrect reference to “the Supreme Court’s rejection of *stare decisis* in constitutional cases” (p. 89),²² Judge Wilkinson has remarkably little to say on this subject. Most conspicuously, he never says which, if any, of the numerous decisions he condemns should be overruled.

This gap in Judge Wilkinson’s explication of judicial restraint is particularly unfortunate because the doctrine of *stare decisis* is the source of a plausible criticism of originalism. All originalists on the Court have accepted some version of this doctrine, as they should.²³ Respect for precedent, but not unquestioning obedience, was a well-established feature of the judicial power conferred on federal courts by the Vesting Clause of Article III.²⁴ Now that the record of the Supreme Court’s decisions consumes more than 500 volumes, originalists are frequently confronted with precedents whose consistency with the original meaning of the Constitution is at best extremely dubious. That means that originalist justices are forced to be selective in relying on the Constitution’s original meaning. That, in turn, inevitably opens them to the accusation that they follow original meaning when it favors their policy preferences and follow the precedents when it does not.²⁵ That is a genuine problem for originalism, which deserves more attention than it has received from the friends of judicial restraint. Unfortunately, *Cosmic Constitutional Theory* is bereft of useful analysis.

In order to illustrate how I think the problem might usefully be approached, I will conclude with an example that begins where Judge Wilkinson and I stand on common ground. What is now called substantive due process is the purest form of judicial activism. It was made up out of some very thin air, and it has no basis in the Constitution.²⁶ But a great many important substantive due process precedents are on the books, and an originalist needs an account of how to deal with them. Here is my suggestion:

Most incorporation precedents applying substantive provisions of the Bill of Rights to the states should be preserved.²⁷ First, there is a colorable argument that the original meaning of the Privileges or Immunities Clause protects these rights against the state governments. The evidence may not be compelling, but it is not implausible. Second, incorporation began over a hundred years ago, there has been hardly any popular opposition to its most important features for at least fifty years, and there is essentially zero opposition to those features among elected officials today. When you put these two factors together—a colorable argument about original meaning and extremely widespread and longstanding public acceptance—it seems to me that incorporation passes the

most stringent test for the application of stare decisis. If the precedents are labeled as due process decisions, that is now a rather harmless error.

What about unenumerated rights? On this issue, I think *Washington v. Glucksberg*²⁸ reflected judicial restraint properly understood. The opinion in that case read the Court's precedents to mean that substantive due process protects "those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition.'"²⁹ That does not explain all of the existing precedents,³⁰ but it pretty well captures what the Court thought it was doing in most of them. If taken seriously, the *Glucksberg* formulation would prevent significant new forays into substantive due process adventurism.

I would go one step farther and suggest a way to make the *Glucksberg* test more precise. Since the Court has well established precedents holding that the economic rights fitfully protected by the Court during the so-called *Lochner* era are *not* fundamental for purposes of substantive due process, it follows that a right can meet the *Glucksberg* test only if it can be demonstrated by objective evidence that the right is *more* deeply rooted in our history and tradition than those repudiated economic rights.³¹ The Court would have a hard time finding many laws to invalidate under that test, and the result would be real judicial restraint, with no cosmic theory required.

Judge Wilkinson might find this proposal agreeable. On a related issue, however, we part company. He believes that the meaning of the Privileges or Immunities Clause has always been a mystery. Furthermore, he seems to endorse the majority opinion in *Slaughter-House*³² because the Court granted only "a small list of relatively benign rights" rather than a more expansive list that admittedly has support in the historical record. (pp. 49-50)

I disagree. The Privileges or Immunities Clause is actually in the Constitution, and the framers of the Fourteenth Amendment thought it was really important. The majority opinion in *Slaughter-House* effectively deleted a significant provision of the Fourteenth Amendment from constitutional law, and it did so on the basis of untenable arguments.³³ A demonstrably false interpretation that makes a virtual dead letter of an important constitutional provision should not be immune from reconsideration. Judge Wilkinson is certainly right to note that there are real ambiguities in the language and legislative history of the Privileges or Immunities Clause, but it does not follow that the Supreme Court should treat the provision as though it did not exist.³⁴

If the Justices ever made a diligent and dispassionate effort to ascertain the original meaning of the Privileges or Immunities Clause, they would have to do a lot of hard work. And they might not succeed in getting it right. But judicial restraint should not mean restraining oneself from thinking, or from making hard decisions. Chief Justice Marshall famously declared that "[i]t is emphatically the province and duty of the judicial department to say what the law is."³⁵ Neither an aversion to hard work nor the possibility of making a mistake should allow judges to exempt themselves from that duty.

Judge Wilkinson is not an advocate of laziness or judicial paralysis, so his notion of proper action within the bounds of

judicial restraint must have some content. What is it? Perhaps this: "[I]t may well be impossible to reconcile judicial review and democracy fully; the best we can do as judges is simply attempt to harmonize the tensions as cases arise." (pp. 67-68) But that gives judges at least as much opportunity to read their own preferences into the law as the cosmic theories do. *So Judge Wilkinson's alternative to those theories fails the same test that he uses to condemn them.*

Perhaps that is why Judge Wilkinson's alternative to interpretive theories is sometimes cast in almost mystical terms: "[The trait of self-denial] is an inner sense that judges must come to recognize as the essence of their calling." (p. 105) If this sentence means anything, one should at least be able to point out model judges whose work product resulted from the "inner sense." *Cosmic Constitutional Theory* does point admiringly to several judges, but these models don't get him or us very far. "Some of the greatest judicial proponents of restraint have had their activist moments, *and often rightly so.*" (p. 109, emphasis added). Indeed, Judge Wilkinson criticizes Felix Frankfurter, "whose commitment to restraint was, if anything, too severe." (*Id.*) Once someone says that activism is sometimes right, that judicial restraint can go too far, and that it's all a matter of an inner sense through which one resolves tensions as cases arise, it's hard to avoid concluding that we're lost in the land of question-begging rhetoric.

Cosmic Constitutional Law is a valuable addition to the large modern literature on constitutional interpretation. Its most signal contribution may be to illustrate how difficult it is to articulate a defensible account of judicial restraint that is not founded on originalist principles. This contribution is not the one the author meant to make, but that need not prevent the reader from appreciating what the book can teach us.

Endnotes

1. J. HARVIE WILKINSON III, *COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE* (2012) [hereinafter WILKINSON, *COSMIC CONSTITUTIONAL THEORY*].
2. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).
3. This is not the only place where Judge Wilkinson sounds like an originalist. At one point, for example, he refers to "the textual, structural, and historical methods that should guide" judicial decisions. (p. 27) Because he denounces originalism so strongly and so often, however, these "methods" that he approves must be something other than originalism. Exactly what they are is shrouded in mystery.
4. See, e.g., WILKINSON, *COSMIC CONSTITUTIONAL THEORY*, *supra* note 1, at 28, 80, 89-90, 101. Lest one think that he might be referring to the methods we all learned about in the first year of law school, Judge Wilkinson cautions against "transplanting the methodology and vision of common law adjudication into the inhospitable soil of modern constitutional law." *Id.* at 97.
5. See James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893).
6. 527 U.S. 706 (1999) (Congress lacks authority to abrogate states' sovereign immunity in their own courts).
7. 514 U.S. 779 (1995) (invalidating a state constitutional provision that had the effect of imposing term limits on members of Congress from that state).
8. Judge Wilkinson does not say how either of these cases *should* have been decided. From his many statements about the importance of deferring to the political branches of government and against judicial interference with state governments, it seems fair to infer that he would have voted with the dissenters

in the *Term Limits* case. But one can only guess how he would have chosen between deferring to Congress or to the state government in *Alden*.

9. See WILKINSON, COSMIC CONSTITUTIONAL THEORY, *supra* note 1, at 57–58 (condemning *District of Columbia v. Heller*, 554 U.S. 570 (2008) (invalidating federal handgun ban in the District of Columbia), and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (invalidating state-law handgun ban)). For an earlier colloquy on the Second Amendment, see J. Harvie Wilkinson III, *Of Guns, Abortion, and the Unraveling Rule of Law*, 95 VA. L. REV. 253 (2009), and Nelson Lund & David B. Kopel, *Unraveling Judicial Restraint: The Faux Conservatism of J. Harvie Wilkinson III*, 25 J. L. & POLITICS 1 (2009). *Cosmic Constitutional Theory* adds the novel claim, which is also false, that the *Heller* majority “ignore[d] the [Second] Amendment’s preamble.” (p. 58)

10. 290 U.S. 398 (1934) (upholding a state statute impairing obligations arising from certain home mortgage contracts).

11. “If by the statement that what the Constitution meant at the time of its adoption it means to-day, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation.” *Blaisdell*, 290 U.S. at 442–43.

12. 347 U.S. 483 (1954).

13. 372 U.S. 335 (1963).

14. 377 U.S. 533 (1964).

15. 384 U.S. 436 (1966).

16. 410 U.S. 113 (1973) (establishing a constitutional right to abortion).

17. See J. Harvie Wilkinson III & G. Edward White, *Constitutional Protection for Personal Lifestyles*, 62 CORNELL L. REV. 563, 611 (1977):

In *Griswold* and *Roe* the Court sensed that lifestyle values deserved constitutional protection but failed to articulate persuasively an analytical basis for conferring it. . . . Although lifestyle freedoms are not expressly safeguarded, we believe that the spirit of the Constitution operates to protect them. . . . Notwithstanding textual and institutional difficulties, judicial recognition of lifestyle freedoms as due process liberties better serves the basic purposes of the Constitution than dismissal of them.

18. 403 U.S. 912 (1971) (federal courts have broad remedial powers to eliminate all vestiges of state-imposed segregation in public schools).

19. 128 U.S. 2229 (2010) (federal statute providing limited judicial review of decisions affecting aliens detained at Guantanamo Naval Base base in Cuba does not provide an adequate and effective substitute for the writ of habeas corpus and thus violates the Suspension Clause).

20. 531 U.S. 98 (2000) (selective recount ordered by a state court in presidential election dispute violated “one person, one vote” rule established in prior equal protection cases).

21. Judge Wilkinson says that a “theory that encourages courts to weigh in on such matters as who should be our next president . . . is no friend of self government.” (p. 79) It was the Florida Supreme Court that “weighed in” on who should be our next president, in a ruling that *Bush v. Gore* reversed. Why would a friend of self government object to the reversal of a lower court decision that had overturned decisions by elected officials? *Bush v. Gore*, moreover, applied the existing precedents without relying on any of the cosmic theories that Judge Wilkinson attacks. For a detailed argument explaining why *Bush v. Gore* should indeed be “hailed as a model of judicial restraint,” see Nelson Lund, *The Unbearable Rightness of Bush v. Gore*, 23 CARDOZO L. REV. 1219 (2002).

22. Although this sentence occurs in a discussion of Judge Posner’s views, the part I quoted in the text clearly reflects Judge Wilkinson’s own view. The sentence reads in its entirety as follows: “Precedent’s restraint is further weakened by constitutional law’s unruliness (which Posner notes⁵⁰) and by the Supreme Court’s rejection of stare decisis in constitutional cases.⁵¹”

Note 50 cites Posner. Note 51 cites as examples *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833 (1992), and *Citizens United v. FEC*, 130 S. Ct. 876 (2010). The citation to *Casey* is quite peculiar because the Court relied almost entirely on stare decisis as the rationale for reaffirming the central holding in *Roe v. Wade*. In any event, examples of cases in which the Court has overruled prior decisions could not possibly show a rejection by the Court of stare decisis. That doctrine has never involved an absolute rule against overruling prior decisions.

23. A small handful of academic originalists have argued that courts should never rely on precedent in constitutional cases. See, e.g., Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL’Y 23, 31–32 (1994); Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMM. 289 (2005).

24. For a review of the evidence, see John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803, 809–25 (2009).

25. The accusation is briefly noted in *Cosmic Constitutional Theory* at p. 55. For a more detailed discussion, see Nelson Lund, *Stare Decisis and Originalism, Judicial Disengagement from the Supreme Court’s Errors*, 19 GEO. MASON L. REV. 1029 (2012).

26. See Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555, 1558–60 (2004); Nelson Lund, *Two Faces of Judicial Restraint (Or Are There More?)* in *McDonald v. City of Chicago*, 63 FLA. L. REV. 487, 517–20; WILKINSON, COSMIC CONSTITUTIONAL THEORY, *supra* note 1, at 27–28.

27. The Establishment Clause of the First Amendment may be an exception. If this provision was originally meant to protect state decisions about religious establishments from federal interference, it makes no more sense to incorporate the Clause against the states than it would to incorporate the Ninth and Tenth Amendments.

28. 521 U.S. 702 (1997) (rejecting substantive due process right to assisted suicide).

29. *Id.* at 720–21 (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion), and citing *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) (“so rooted in the traditions and conscience of our people as to be ranked as fundamental”), and *Palko v. Connecticut*, 302 U.S. 319 (1937) (“implicit in the concept of ordered liberty,” such that “neither liberty nor justice would exist if they were sacrificed”)).

30. The most obvious exception at the time was *Roe v. Wade*, 410 U.S. 113 (1973), which *Glucksberg* treated as having been reaffirmed in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), largely for reasons of stare decisis. See 521 U.S. at 721–22 n.17. One should probably treat the entire line of cases beginning with *Griswold v. Connecticut*, 381 U.S. 479, 510 (1965), and now including *Lawrence v. Texas*, 539 U.S. 558 (2003), as exceptions from the *Glucksberg* principle. Because they do not meet the *Glucksberg* test or any originalist test, and because they have not become sufficiently settled in our law and culture, I believe they should all be overruled.

31. This suggested refinement might be seen as a substitute for *Glucksberg*’s vague demand for “a careful description” of the asserted fundamental liberty interest.” 521 U.S. at 721 (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993), and citing *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992), and *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 277–78 (1990)).

32. *Slaughter-House Cases*, 83 U.S. 36 (1873) (Privileges or Immunities Clause protects only those rights that owe their existence to the federal government, its national character, its Constitution, or its laws).

33. As Justice Field pointed out in his dissent for four Justices, the majority’s interpretation rendered the Privileges or Immunities Clause “a vain and idle enactment” because it protects no rights that were not already protected by the Supremacy Clause of Article VI. *Id.* at 96 (Field, J., dissenting). Modern critiques of the majority opinion are legion. See, e.g., DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: 1789–1888* 347–50 (1985); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1414–16 (1992); Saenz v. Roe, 526 U.S. 489, 521–28 (1999) (Thomas, J., dissenting); *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3084–86 (2010) (Thomas, J., concurring in part and concurring in the judgment).

34. See ROBERT H. BORK, *THE TEMPTING OF AMERICA* 166 (1990) (applauding the Supreme Court for treating the Privileges or Immunities Clause like an inkblot that has no discernable meaning); WILKINSON, COSMIC CONSTITUTIONAL THEORY, *supra* note 1, at 49–50 (endorsing Bork’s view).

35. *Marbury v. Madison*, 5 U.S. 137, 178 (1803).

