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Evaluating Judicial Nominees: Will A Nominee Respect and Protect The Amendment Process and the Right of the People to Participate?

*By Charles W. Pickering**

Article II, Section 2, of the Constitution provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint… judges." What is the appropriate role of the Senate in discharging its constitutional responsibility of "Advice and Consent" to the President's nominations to the Judiciary? How should the United States Senate evaluate nominees to the federal bench? In today's extremely partisan political atmosphere, that is a hotly debated question. For an appropriate answer, it is necessary to review history, analyze why confirmation of judges is now such a mean-spirited fight, how we reached this point, and carefully consider how we should proceed in the future.

The framers of our Constitution saw the Senate's role of "Advice and Consent" as limited to the prevention of "the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity."[1] As Madison wrote in *Federalist* 51, "The primary consideration [for the confirmation of judges] ought to be qualifications."[2] The limited role of the Senate in the confirmation process was noted by historian Joseph Harris, who wrote, "the debates of the Convention indicate that 'advice and consent' was regarded simply as a vote of approval or rejection. The phrase was used as synonymous with 'approbation,' 'concurrence,' and 'approval,' and the power of the Senate was spoken of as a negative on the appointment by the President."[3]

The Democratic leadership today sees "Advice and Consent" as a much broader power of the Senate, as legislative license at the expense of the executive branch to increase its power over judicial nominees. In August 2001, as the unprecedented and unconstitutional obstruction of Bush appellate nominees was taking shape, Joseph Califano wrote a guest opinion column for the *Washington Post* titled "Yes, Litmus-Test Judges." He argued:

> In considering presidential nominees for district and appellate judgeships, professional qualification alone should no longer be considered a ticket to a seat on the bench. For years partisan gridlock and political pandering for campaign dollars have led to failures of the Congress and the White House, whether Democratic or Republican, to legislate and execute laws on a variety of matters of urgent concern to our citizens. As a result, the federal courts have become increasingly powerful architects of public policy, and those who seek such power must be judged in the spotlight of that reality.… What's new is the growing role of federal courts in crafting national policies once considered the exclusive preserve of the legislature and executive… concerned citizens have gone to court with petitions they once would have taken to legislators and executive appointees. As the federal courts have moved to fill the public policy vacuum, conservatives, liberals and a host of special interests have developed a sharp eye for those nominated to sit on the bench. So should the Senate.… Environmentalists, prison reformers and consumer advocates have learned that what can't be won in the legislature or executive may be achievable in a federal district court where a sympathetic judge sits.… Who sits in federal district and appellate courts is more important than the struggle over the budget, the level of defense spending, second guessing the tax bill and whose fingers are poised to dip into the Social Security and Medicare cookie jars.…
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> Both sides know that many of the individuals who fill these seats will have more power over tobacco policy, prison reform, control of HMOs, the death penalty, abortion, environmental issues, the constitutionality of redistricting for House elections, gun control and the rights of women and minorities than the president or congressional leaders, and for a longer period of time.… That's why professional qualifications should be only the threshold step in the climb of judicial nominees to Senate confirmation.… the Senate must take enough time to give these men and women the kind of searching review their sweeping power to make national policies deserves.[4]

Califano's guest editorial is a clear acknowledgment that the Court is now making policy decisions which the Constitution delegates to either the legislative or executive branches. His main concern seems to be that since the Reagan years liberal ideology has not been winning at the ballot box. Reacting to Califano's article, Roger Pilon with the Cato Institute wrote that for many Democrats the Supreme Court is now "something akin to another legislative branch." He points out that the Democrats are looking not for a "judge applying the law, but a 'sympathetic judge.' That's politics, not law." I agree with Pilon that we need justices who know "the difference between politics and law—and respect it."[5]

If the practice of litigants scourging the countryside, researching the record of individual judges (to find where a judge sits who is sympathetic to the theory of their case) becomes the norm, we will have lost something basic and fundamental about our system of justice. We will not have equal rights under our Constitution. The law will be different in New York, as compared with Oklahoma, or Virginia, or Ohio, because the result will depend on whether a case is heard by a "sympathetic judge." As Justice Curtis wrote in his dissent in the *Dred Scott* case:

> When a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power

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> to declare what the Constitution is according to their own views of what it ought to mean.[6]

Justice Curtis, distressed at the outcome of the case and the activism of the majority, resigned from the Supreme Court on principle, the only person ever to do so for that reason. During the last fifty to sixty years, Curtis' pronouncement that "when a strict interpretation of the Constitution… is abandoned… we have no longer a Constitution; we are under the government of individual men," has unfortunately become a reality in far too many areas of the law.

How did we reach the point where the Judiciary has become politicized as acknowledged by Califano? Consistent with the desire of certain liberals that judges make political policy decisions and create new rights, there has evolved over the years a theory of interpreting the Constitution as a document that changes meaning over time, referred to by those who support or utilize this theory as a "living Constitution." They reject the notion that we are a government of laws, not of men; they reject the notion that the Constitution means what it says and says what it means; and they reject the notion that our Constitution is a contract between the government and its people. What they have created is a "mystery Constitution," the meaning of which is unknown to average citizens and can only be revealed by a majority of the Supreme Court. Interpreting the Constitution as an evolving document to be changed and altered by a majority of the Supreme Court has transferred the fight over hot button social issues from the election of state legislators, congressmen, and senators to the confirmation of federal judges.

Judges who interpret the Constitution as a changing, evolving, "living," "mystery" document exercise their "independent judgment" to determine the "sense of decency" of a modern evolving society. Unable to justify their decisions with the text or original understanding of the Constitution as ratified, they look to whatever trend in state law—or foreign law—currently comports with the "in vogue" political view. These judges look to Sweden or to France or Zimbabwe and interpret our laws according to foreign decisions. Most Americans do not want to be governed by the laws of Europe or any other continent; they want to be governed by the rule of law as established by duly elected representatives in America. That was the foundational reason for the American Revolution: to be governed by the rule of law as established by "We the People" and not laws from across the ocean.

Judges are individuals just like others—they make mistakes and face the problems of every day life. Frequently, individuals get off on the wrong track. I saw it often as a trial judge. When this happens, it can be disastrous for that individual and for that individual's family. But when that individual happens to be a judge, the impact is greater and the consequences far-reaching, a real danger when a judge does not recognize that his power is limited by something outside of himself.

Nations also frequently get off on the wrong track. When nations get off on the wrong track, it can have even more devastating effect, it can be disastrous for millions of people. Consider two nations that experienced revolution and got off on the wrong track. Though near in time, the French Revolution diverged far from our American experience. The "essential difference between the American Revolution and the French Revolution is that the American Revolution… was a religious event, whereas the French Revolution was an antireligious event."[7] The French Revolutionists submitted to no faith outside of themselves. They possessed no moral constraints to curb their vengeance, and blood ran like a river through the streets of Paris with Napoleon Bonaparte emerging to devastate Europe. The French Revolutionists established no rule of law, no checks and balances. Their failure bred a disaster.

Likewise, in 1917, the Communists—the Bolsheviks—revolted in Russia. Their philosophy espoused materialism and atheism. They rejected the rights of individuals and derided the importance of the human spirit. They instituted a totalitarian regime, murdering millions of Soviet citizens. Like the French, the Soviets created no checks and balances for their leaders and thus established no rule of law. Their imprudence spawned a catastrophe.These examples illustrate the importance of moral constraints woven into a system of government, the necessity of a clearly established rule of law, and the wisdom of checks and balances among the three branches of government. We Americans are fortunate indeed that our Founders got us off on the right track. Unlike the leaders of England or ancient Rome, our Founding Fathers gave us a written Constitution so we would not be compelled to rely on the sense of justice, or the sense of decency of a particular judge, or even five judges, for our life, liberty, or property. Instead, we could rely on our Constitution as written and ratified by the people through their duly elected representatives.

It was wrong when judges on the Right ignored the text of the Constitution in cases such as *Dred Scott*[8] and *Plessy v. Ferguson*.[9] It is wrong today when far-left secularist groups seek to win in a court of law that which they cannot win in the court of public opinion, at the ballot box. They seek new rights never contemplated by our Founders and not sanctioned by the Amendment Process. The Framers of our Constitution gave us a government deeply committed to the "rule of law." The "rule of law" requires first that the law be clearly understood and second that those bound by the law know in advance what the law requires.[10] The reason for these two requirements is quite simple: those who are bound by the law need to know in advance what is expected. The concept of an evolving Constitution violates both of these fundamental principles. One cannot "clearly understand" that which is still undetermined. One cannot know "in advance" what has yet to be articulated. A "living," "mystery" constitution does not conform to the rule of law and provides little assurance of consistency—no more than that of a king or a dictator.

Our Founders formed our government based on two premises: the worth of each individual person—"all Men are created equal"—and the imperfection of man, even kings. The tyranny of King George III taught them what Lord Acton would verbalize years later: "Power tends to corrupt and absolute power corrupts absolutely."[11] They recognized the necessity of checks and balances to prevent the three independent and co-equal branches of our government from engaging in excesses.

The Founders carefully limited the powers of each branch. To allow the judicial branch to cross over into the jurisdiction of the legislative and executive branches increases the power of judges, but violating the separation of powers over time will erode confidence in the courts and thus ultimately weaken the Judiciary—indeed it will undermine the power of all branches of our government. A violation by any branch of this carefully crafted system of checks and balances threatens the stability and vitality of the system.

The structure of governance given to us by our Founders is more important than the Bill of Rights. Without the structure, without the safeguards, the Bill of Rights is an illusion, not a reality. When the Court exceeds the structure given the Judiciary, and goes beyond the Constitution, it threatens the Bill of Rights—and all our rights. The constitution of the now-defunct Soviet Union promised grandiose rights, but they did not exist because they had no carefully crafted system of checks and balances, no "rule of law."

About the time I graduated from law school, I heard the story of a Supreme Court justice who was hearing arguments in a case. A young lawyer was arguing strenuously that the Court had to rule in his favor based on stare decisis. The justice leaned forward and asked the young lawyer, "But is it right?" There was a time when I might have thought this a great question: a judge concerned about what is right rather than the niceties of the law. But who will we give—for the rest of their life and regardless of how they might decide—the power to determine what is right or wrong for America? Will it be a Democrat or a Republican? A conservative or a liberal? Will it be a Christian, someone of the Jewish faith, someone of another belief, or an atheist? Will it be someone from the Christian Coalition, or will it be a member of the ACLU or People for the American Way? These rhetorical questions answer themselves. We should fight to uphold the principle that we have: "A government of laws, and not of men."

Allowing courts to make political decisions is extremely bad policy. Courts are ill-equipped to make such decisions. Their debate is private, not public. Judges cannot develop a consensus, cannot compromise, and have no way to receive public input and analyze data. Judges simply have no process to formulate public policy as do legislative bodies. Courts are not an appropriate branch of government to make political decisions. When judges start exercising their "independent judgment" to determine the meaning of the Constitution, rather than following the text and precedent, they cease being judges and move into the arena of policy. They are making political decisions. They are creating law rather than interpreting law. They have politicized the Judiciary.

The legislative resolution of controversial political issues usually creates unity, while judicial resolution of controversial political issues only increases division. For example, Congress passed the Civil Rights Act of 1964, extremely controversial at the time, but did so only after compromise, broad consensus, and the working of the democratic political process. Within three decades of its passage, we lived in a different America where the vast majority of Americans view the denial of equal rights to anyone based on race as wrong and intolerable. The Civil Rights Act today has almost universal acceptance. Many Americans, likewise, opposed abortion when the Supreme Court in 1973 decided *Roe v. Wade*.[12] Judges reached the decision in secret through private debates with no public input or participation. Now, more than three decades later, abortion divides our nation even more than in 1973. What is the difference between the acceptance of the Civil Rights Act of 1964 and *Roe v. Wade*? The Civil Rights Act was adopted by the correct political process by the appropriate branch of government. Conversely, *Roe v. Wade* was decided and handed down by judicial decree, by an inappropriate branch of government, inappropriately deciding a political issue.

Because the federal judiciary has entered the political arena, thus inappropriately becoming a political branch of government, confirmation of a federal judge can become election to one of the most important offices in the land, insofar as hot button social issues are concerned. Americans care deeply about these issues, and they deeply divide our nation. The elections to these important positions take place in the United States Senate and hold civility, comity, and collegiality in that body hostage, thus impairing the ability of the Senate to discharge its constitutional responsibilities. Politicizing the Judiciary weakens both the Judiciary and the Senate. When one views the Judiciary as do Joseph Califano and some other liberals, as a political branch of government, it is understandable that they want to litmus-test nominees to determine their position on hot-button social issues. I respectfully suggest there is a better way to evaluate judicial nominees.

Certainly, the place to begin in evaluating judicial nominees is qualifications: is a nominee qualified by education and experience to be a judge; does a nominee have legal ability and an understanding of the law; and most importantly, does a nominee have integrity? If a nominee is otherwise qualified, a nominee should then be evaluated to determine if the nominee will respect and protect the Amendment Process and the right of the people to participate when the Constitution is to be changed.

Our Constitution is going to change over time, as it should. The only question is who will bring about the change. Will it be the people acting through their duly elected representatives (through the amendment process), or will it be five judges reacting to their own biases, predilections, and preferences trying to determine what they perceive to be the sense of decency of our nation and the entire world. Judge Robert Bork pointedly said, "the truth is that the judge who looks outside the Constitution always looks inside himself and nowhere else."[13] Although we must not have a "dead Constitution," neither should we have a cancerous "living Constitution" that grows unwanted and invades and intrudes into every niche and cranny, into every part and organ of the body politic. A "living Constitution," conceived only in the minds of five judges, leaves the American people disillusioned and dismayed that their fundamental, basic law, the Constitution, has been altered and changed, not by their act and will, but by the limited vision of five determined judges who seek to change and mold the Constitution into what they perceive it should be.

Protecting the amendment process and allowing the people to participate in changing the Constitution to meet the needs and understandings of an advancing and more compassionate civilization will assure a healthy Constitution, one that is strong, robust and vibrant. Protecting the amendment process will provide a Constitution that is healthy because the people participate; a Constitution that is strong because it binds all three branches of government; a Constitution that is robust because the people are involved in changing it as they, and they alone, determine it should be changed; and a Constitution that is vibrant because it is respected by the American people as the permanent and paramount law of the land.

From 1789 until 1971, the amendment process was honored. The Constitution was amended twenty-six times for an average of one amendment every seven years (seven times from 1933 to 1971, for an average of once every five years). These amendments dealt with hot-button social issues. These amendments abolished slavery; guaranteed the privileges and immunities of citizenship, due process, and equal protection of the law to the citizens of all states; provided for the direct election of senators; brought about prohibition and the abolition of prohibition; established the right of women to vote; provided term limits for the President; granted suffrage to the citizens of D. C. in presidential elections; abolished poll taxes; and extended the right to vote to eighteen year olds. During this time, our Constitution was healthy, strong, robust, and vibrant. It was the expression of the people's will, remaining so until changed by the people and the people alone.

Liberals rely on *Marbury v Madison*[14] as the seminal case that established the doctrine of judicial supremacy for interpreting the Constitution, that is that the Courts will determine what is and what is not constitutional.[15] But liberal judges who seize upon *Marbury's* holding of judicial supremacy to interpret the Constitution as the basis for changing the meaning of the Constitution completely ignore the other pronouncements of *Marbury*. If judges today will follow all of the *Marbury* holdings, then we will once again have a healthy and strong Constitution.

While the *Marbury* Court held "[i]t is emphatically the province and duty of the judicial department to say what the law is," the *Marbury* Court did not find that the Judiciary had the power to change the Constitution or the power to create law. To the contrary, the Court ruled that the judicial branch—just as the legislative and executive branches—was bound by the Constitution. Judges who apply *Marbury* as precedent for the principle of judicial supremacy to interpret the Constitution should also follow the rest of the *Marbury* decision. In *Marbury*, the Supreme Court exercised considerable judicial restraint not to exercise power it did not have. The Court had before it an act of Congress that gave the Supreme Court original jurisdiction in instances not specifically mentioned in the Constitution. Since the Constitution gave the Supreme Court original jurisdiction as to certain cases, did that negate original jurisdiction for the Supreme Court in all other situations, including the ones then authorized by Congress?

The Court reasoned, "it cannot be presumed that any clause in the constitution is intended to be without effect.…" The Court concluded, "affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them or they have no operation at all." The Court then held that Congress overstepped its authority and violated the Constitution in granting the Supreme Court original jurisdiction over areas not designated by the Constitution. The Court declined to exercise that jurisdiction, and expressed great respect, deference, and appreciation for the Constitution. Writing for the Court, Chief Justice John Marshall recognized as a "well established" principle "the people have an original right to establish for their future government, such principles as, in their opinion, shall most conduce to their own happiness" and that this was "the basis on which the whole American fabric has been erected. The exercise of this original right [adopting the Constitution] is a very great exertion;… The principles, therefore, so established, are deemed fundamental." These principals were derived from the supreme authority—the people—"they are designed to be permanent." Likewise, Marshall found, the Constitution was meant to be permanent, not an evolving document. He extolled the Constitution as "superior, paramount law, unchangeable by ordinary means," saying that if the Constitution "is alterable when the legislature shall please to alter it… then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable. Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation" and it is "to be considered by this court" as such.

Those "who controvert the principle that the constitution is to be considered, in court, as a paramount law," Marshall continued, "would subvert the very foundation of all written constitutions" and reduce "to nothing what we have deemed the greatest improvement on political institutions—a written constitution."

> [I]t is apparent that the framers of the constitution contemplated that instrument, as a rule for the government of c*ourts* as well as of the legislature. Why otherwise does it direct the Judges to take an oath to support it?… How immoral to impose it on them, if they were to be used as the instruments… for violating what they swear to support?… Why does a Judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rules for his government?… c*ourts*, as well as other departments, are bound by that instrument [the Constitution]." (emphasis original)

Marshall clearly recognized the Supreme Court is bound by the Constitution, as a "permanent" and "paramount" document, not one that evolves and morphs, depending on who is on the Court.

Marshall respected the separation of powers principle, stating that his Court would not consider questions "which are, by the constitution and laws, submitted to the executive." "Questions," he wrote, "in their nature political… can never be made in this Court." The Supreme Court should not, and could not, address political issues or enter the political arena. Yet, that is exactly what some members of the Court are doing today, making political decisions in determining the "sense of decency" not only of the United States, but also of the world,

and imposing those views on all Americans. In such cases, a majority of the Court seizes upon the *Marbury* pronouncement of judicial supremacy to interpret the Constitution, while ignoring its declaration that the Constitution is a permanent written document, side-stepping its pronouncement that the Court is not to enter the realm of politics, failing to heed its unequivocal recognition that the Judiciary is bound by our written Constitution, disregarding its proclamation of the separation of powers doctrine, and leaving in shambles the system of checks and balances carefully crafted by our Founders. When the Court travels outside its judicial role, it voyages into spheres of responsibility given by the Constitution to the legislative and executive branches. It legislates by changing the Constitution, adjudicates on the change the Court itself has made, and then requires obedience to its fiat. Our Founders never intended one branch of government to exercise judicial, executive, and legislative powers.

Over the years judicial supremacy to interpret the Constitution has been widely accepted. But only during the last half century has the Court openly, plainly, and on a wide-scale basis declared that it also has the power to change, add to, or alter the Constitution, when a majority of its members exercise their "independent judgment" to determine that the Constitution no longer comports with their determination of the "sense of decency" of an evolving world. Under this power, five judges now claim for themselves the right to do something even the American people themselves cannot do by majority vote, or by super majority vote. Congress alone cannot change our written Constitution, not by majority vote, not by super majority vote, or even by unanimous consent. No president—not George Washington, Abraham Lincoln, Franklin Roosevelt, John Kennedy, or Ronald Reagan—could alter the Constitution. Nevertheless, some judges now assume for themselves this awesome power. James Madison argued in Federalist No. 51,

> If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.[16]

Madison recognized that requiring the government to exercise restraint, "to control itself," was "a great difficulty." He was right. Some members of the Supreme Court do not now feel obliged to "control" the power of the court consistent with Madison's view, nor, to exercise restraint as did the *Marbury* Court.

In *Marbury*, Chief Justice Marshall declared that the grant by the Constitution of original jurisdiction to the Supreme Court in certain instances negated the power of Congress to delegate or the Court to exercise original jurisdiction in other areas, as already noted. Marshall's reasoning is likewise applicable to changing or amending the Constitution. The Constitution explicitly provides the Constitution may be changed by amendment. This explicit process for changing or altering the Constitution negates any other method for altering or changing the Constitution.

If our Founders intended that five judges should be able to change the paramount and permanent law of the land embodied in our Constitution, they were perfectly capable of inserting such language, and would have done so. If they had, without question, our Constitution would not have been ratified. The founding generation, skeptical to the core of excessive power, would never have granted such unlimited power to any of the three branches of government. And such unbridled unlimited power should not be exercised today, not by any branch of government. Article V of the Constitution provides a perfectly logical and reasonable method by which to change or alter our Constitution—the amendment process. The Constitution provides no other, and the people have agreed to none. However, some judges have ignored the implicit requirement of the Constitution that the only way to change the Constitution is through the amendment process. Consequently, in *A Price Too High: The Judiciary in Jeopardy*, I propose and develop the case for a constitutional amendment to specifically mandate that the only way the Constitution can be changed is through the amendment process, that in the future judges will interpret the Constitution according to the common understanding of the relevant provision at the time such provision was adopted.

How then should nominees to the federal judiciary be evaluated? They should be evaluated on their legal ability and whether they have integrity. Beyond that, they should be evaluated as to whether they will respect and protect the Amendment Process and the right of the people to participate when the Constitution needs to be changed. Nominees should be evaluated as to whether they will follow all the pronouncement of *Marbury v Madison*, not just the doctrine of judicial supremacy to interpret the Constitution. Will they respect our written Constitution as the "paramount" and "permanent" law of the land, "unchangeable by ordinary means," changeable only by the method set out in the Constitution? Will the nominee honor the "separation of powers" and not intrude into matters delegated by the Constitution to the executive or legislative branches? Will a nominee do as did the *Marbury* Court, exercise judicial restraint and not exercise power not given by the Constitution to the courts? Does a nominee know the difference between politics and the law, and respect it? Will a nominee, as did Chief Justice John Marshall follow the pronouncement that "questions, in their nature political… can never be made in this Court"? Will a nominee recognize as was recognized in *Marbury* that the judiciary is bound by our written Constitution just as are the other two branches? If a nominee agrees to follow all of the *Marbury* precedents, there will be no need to "litmus-test" such a nominee on all the hot button social issues.

If judicial nominees are evaluated and confirmed on the basis of following all of the *Marbury* teachings, and in the future if judges will apply all of *Marbury*, then the judiciary will be depoliticized, the battles over hot-button social issues will be returned to the political branches of government where they belong, and confirmation of judges will once again become a process that is respectful and civil. A nominee who will respect and protect the amendment process and the right of the people

to participate in changing the Constitution when it is to be changed should be confirmed.

Endnotes

1 The Federalist No. 76 (Alexander Hamilton) 386 (1982).

2 *Id*. at 262.

3 Joseph P. Harrison, The Advice and Consent of the Senate 376 (1968).

4 Joseph A. Califano, Jr., *Yes, Litmus-Test Judges*, Wash. Post, August 31, 2001.

5 "Senate Battle Over Justices Begins Monday," Fox News, 10 November, 2003.

6 60 U.S. 393, at 621 (1856).

7 Paul Johnson, A History of the American People 117 (1998).

8 60 U.S. 393 (1856).

9 163 U.S. at 555, 556, 16 U.S. Court cp. 1138 (1896).

10 David F. Forte, *The Rule of Law and the Rules of Law*, 38 Cleveland State L. Rev. 97 (1990).

11 John Emerich Edward Dalberg Acton ("Lord Acton"), Later Professor of Modern History at Cambridge, to Bishop Mandell Creigton, 5 April 1887.

12 410 U.S. 113 (1973).

13 Speech by Edwin Meese, III before the D.C. Chapter of the Federalist Society Lawyer's Division, November 15, 1985, *printed in The Great Debate: Interpreting Our Written Constitution*, The Federalist Society (reprinted 2005) (citing Robert H. Bork, Traditions and Morality in Constitutional Law (1984)).

14 1 Cranch 137, 5 U.S. 137 (1803).

15 The Constitution itself does not give the third branch of government this power. The Constitution is silent on the issue of which of the three co-equal branches of government gets to make this call, or whether all three get to make this decision in their separate spheres of responsibility. The declaration by the *Marbury* Court of judicial supremacy to interpret the Constitution is viewed by some as an act of judicial activism. Others contend that the Federalist papers make it clear that construing the Constitution was to be the prerogative of the Judiciary (Federalist No. 78).

Regardless, the holding of *Marbury v. Madison* that the Judiciary is the final arbiter of what the Constitution means has been precedent since 1803 and not challenged in any meaningful way since the Civil War. It is extremely unlikely that the theory of judicial supremacy in resolving Constitutional issues will be displaced.

16 The Federalist No. 51 (James Madison) 261-2 (1982).