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Applying Scriptural Exegesis to the Interpretation of Article III of the Constitution

Maria L. Ciampi*

I. INTRODUCTION

In 1987, the United States will celebrate the two hundredth anniversary of the writing and signing of the Constitution. Yet even in this bicentennial year, the community of constitutional scholars remains sharply divided over both the meaning of many of the document’s provisions and the appropriate method of interpreting the constitutional text. One major schism in constitutional scholarship is that between interpretivism and noninterpretivism. The interpretivist espouses constitutional interpretation limited to the original intention of the framers, which can be derived solely from the constitutional text and its history. The noninterpretivist, on the other hand, applies extratextual norms in ascertaining constitutionality when the document itself provides little or no guidance.

The conflict between interpretivism and noninterpretivism is essentially a battle over the appropriate scope of judicial review. For the interpretivist, judicial review is limited to an analysis of “the text, the history, and their fair implications” for two reasons. By injecting extratextual values into its interpretation of the Constitution, the interpretivist believes that the noninterpretivist appropriates the role of legislator thereby destroying the carefully delineated and constitutionally mandated separation of powers. Furthermore, the noninterpretivist subordinates the will of the electorate to the will of the non-elected judiciary which endangers the representative republican form of government. The noninterpretivist rebuts both of the interpretivist’s contentions by first noting that the judge applies society’s values, not his own.2 As a result, the judiciary, representing the voice

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of society, acts as a check and balance on the legislature, just as the framers envisioned. In addition, the noninterpretivist argues that the court will be the representative of the minority "electorate, frequently underrepresented in a majority-rule legislature and lacking access to the super-majority amendment process."

The proper sphere of judicial review cannot be determined unless the role that the framers intended for the judiciary in the constitutional system established in 1787 is ascertained. Several constitutional scholars have contended that the original intention of the framers is impossible to discover. Justice William Brennan, for example, has argued that the "original intent" is unattainable because of the "problematic nature of sources" and the "distance of two centuries." If the interpretivist-noninterpretivist debate is ever to be resolved and if the meaning of any provision of the Constitution is to be learned, an attempt must be made to ascertain the original intent of those who authored the Constitution.

The principal weakness of existing schools of constitutional interpretation is that, while each school pledges allegiance to original intent, each in reality merely pays lip service to the constitutional text which embodies that intent. Few theorists have developed a systematic methodology of textual exegesis to support their constitutional analysis. An appropriate methodology must examine the historical, philosophical, and literary background of a constitutional text which confers on the provision its true meaning.

Modern literary theory provides the tools for textual exegesis. Literary analysis utilizes principles which systematically unfold the historical, philosophical, political, and literary forces which determine the authorial intent of a legal document. The Constitution, as all law and literature, is the product of the time in which it was written.

3. Id. L. Pollak, THE CONSTITUTION AND THE SUPREME COURT: A DOCUMENTARY HISTORY 154-155 (1966). It is through the judiciary that the rights of the minorities will be protected because the popular electorate has traditionally refused to afford protection to minority rights. L. Pollak, supra, at 155. Thus, for example, every right which has been attained for one minority, the homeless, has been obtained through the judiciary and not through the electoral process. See Note, BUILDING A HOUSE OF LEGAL RIGHTS: A PLEA FOR THE HOMELESS, 59 ST. JOHN'S L. REV. 530 (1985).

4. Taylor, supra note 2.

5. Hutchinson, From Cultural Construction to Historical Deconstruction, 94 YALE L.J. 209, 220-21 (1984). The full meaning of a text cannot be learned if the text is considered to be historical. In a recent Harvard Law Review article, Robert Cover eloquently discussed the relationship between historical-literary circumstances and the legal text. See Cover, "Nomos" and Narrative, 97 HARV. L. REV.
Most legal scholars would find this statement self-evident. Undoubtedly,

[t]o offer this as an exciting and new foundation for critical inquiry is to run the real risk of being dismissed as trite. Yet mainstream legal and literary theorizing has managed to flourish through a studious avoidance of this insight, contriving to maintain that the production and reception of texts occur in a social vacuum, drained of political and economic matter. Contemporary theorizing has all but ignored the ideological dimension of language even though all interpretation assumes an entire structure of values. . . . Politics is inscribed within language. Authors, readers, and critics exist within a complex web of private and institutional relations and values.

While often paraded as scholarship's highest ambition and achievement, the constant refusal to historicize represents the tragedy and not the triumph of modern scholarship.6

While several constitutional scholars employ modern literary theory in constitutional analysis, none have utilized principles of literary analysis to ascertain the original intent of the framers. For example, critical legal studies utilize modern literary theory to foster the reader's, rather than the author's, role in giving meaning to a text. Proponents of critical legal studies assert that, in both law and literature, the "authorial intention" defines the meaning of the text. The primacy of the author's intention creates a hierarchical relationship in which the reader is dependent on the author for guidance as to the text's meaning. Yet the reader also controls the author since the reader is the final arbiter of the author's intention. Critical legal scholars argue that the reader's control over authorial intent must be fostered particularly in the area of law. For the law is "the

We inhabit a nomos—a normative universe. We constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void . . . No set of legal institutions or prescriptions exists apart from the narratives that locate is and give it meaning. For every constitution there is an epic, for each decalogue a scripture. Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.

In this normative world, law and narrative are inseparably related. Every prescription is insistently in its demand to be located in discourse—to be supplied with history and destiny, beginning and end, explanation and purpose . . . History and literature cannot escape their location in the normative universe, nor can prescription, even when embodied in a legal text, escape its origin and its end in experience, in the narratives that are the trajectories plotted upon material reality by our imagination.

Id. at 4-5.

6. Hutchinson, supra note 5, at 220-221.
product of—and vehicle for creating—"[society's] political and moral values. Critical legal scholars accurately assess the problem of rendering the Framers' original intention meaningful to future generations of readers whose problems and values have changed since 1787. Nonetheless, this school of constitutional interpretation has failed to set forth the principles of textual analysis by which critical legal studies have determined that the constitutional framers did not provide for constitutional accommodation of society's political and moral values in each generation.

The principles of literary analysis which this article maintains should be applied to interpret the Constitution are those developed by scriptural exegetes and are collectively known as "redaction criticism". Several reasons exist for this choice of analysis. First, biblical scholars utilize principles basic to the analysis of any form of literature. Second, these principles are well-developed and have enjoyed wide acceptance over a considerable period of time. Third, scriptural theologians have successfully applied these tenets in solving several of the same problems of interpretation which constitutional scholars face. The latter's problems include, for example, the identity of the framers, the meaning of vague provisions, and the function and meaning of the amendments. Finally, the similarities and differences between the scripture and the Constitution have been recently discussed by such constitutional theorists as Thomas Grey, Robert Perrin, What Is Redaction Criticism? (1970).

7. N.Y. Times, Feb. 9, 1986, Book Review Section, col. 1, at 1. Critical Legal Studies fails to recognize the text as a valid starting point for adapting to society's changing needs from generation to generation because the critical legal scholar does not understand how to read the text. The critical legal scholar reads the text and finds internal inconsistencies, convincing the scholar that the authorial intention is therefore unimportant. The reader's interpretation as a result is really all that matters since the text can offer little guidance.

The "deconstructionist" tendencies of present legal scholarship are dismaying. They unveil a fundamental misunderstanding of critical analysis. Certainly every text has a number of levels of meaning. That was the author's intention. Where these levels contradict, it would be presumptuous of the modern legal scholar to think that only he could see the inconsistencies and not the very author of the text. Instead the scholar should ask herself why the author embodied such inconsistencies. The scholar will probably find that this is precisely what the author intended the reader to ask herself and that the author had a particular reason for incorporating the inconsistency into the text.


9. Grey, The Constitution as Scripture, 37 STAN. L. REV. 1 (1984). In his article, Grey rejected theories of constitutional interpretation which relied on the constitution-scripture analogy to support an expanded role for the court. Grey recognizes that, in accord with both modern Catholic and Protestant biblical scholarship, the Bible is not a "divine lawbook or encyclopedia" but, rather, a literary work. The Constitution, on the other hand, is a legal instrument, and not a literary work. Id.
Burt and Sanford Levinson. Misguidedly focusing on the constitution-scripture analogy, however, these scholars have overlooked the true contribution of scriptural scholarship: a wealth of exegetical principles.

Redaction criticism employs four basic exegetical steps in interpreting a given text. The historical, philosophical, and political background of a particular provision is examined. According to one early nineteenth century constitutional scholar, Henry Baldwin, the meaning of a specific provision of the Constitution can be accurately attained only if, "[t]he circumstances under which the Constitution was formed, the history of the times, the mischief of the [Articles of] Confederation, and the motives which operated on the statesmen of the day" are discovered. Secondly, the literary genre, or form,
of the work must also be ascertained because the literary genre is essential to discovering the meaning of the text, "[f]or the correct understanding of what the . . . author wanted to assert, due attention must be paid to the customary and characteristic styles of perceiving, speaking, and narrating which prevailed at the time of the . . . writer," that is, to "contemporary literary forms." The third step in the exegetical process is to explore the structure and unity of the work for this will reveal the meaning of a provision, not only in its particular context, but also in relation to the rest of the document. Lastly, the text is compared with prior drafts or earlier forms. This comparison highlights changes in the language of the provision which reveals, in turn, changes in the author's purpose or emphasis.

The purpose of this article is to determine whether the framers intended the judiciary to have the power of judicial review and, if so, whether the power was to be broadly or narrowly construed. This determination is important because it will answer the question of whether future generations, and minorities in particular, are relegated to the legislative and amendment processes for the protection or attainment of rights and privileges. The scope of the judiciary's power under the Constitution, will be ascertained by applying the principles of redaction criticism. Each of the four fundamental exegetical steps will be applied to an examination of Article III of the Constitution which defines the scope of federal judicial power.

II. Step One—The Historical-Political Background of the Federal Judiciary and the Judicial Power

A. The Historical-Political Background of the Federal Judiciary

The doctrine of judicial review is consistent with the framers' intention to create an independent judiciary with the power to enforce
constitutional mandates in face of federal and state legislative resistance. Prior to 1787, the existence of an independent judicial power was virtually unknown in America.\textsuperscript{15} Under British rule, the colonists had no power to establish a judiciary. As the Declaration of Independence makes clear, "[the King] obstructed the Administration of Justice by refusing his assent to Laws for establishing Judiciary powers."\textsuperscript{16} At the same time, the judicial system which the British set up in the colonies was not well-developed and independent from the legislature\textsuperscript{17} and had limited power. The British judiciary in the colonies consisted of the vice-admiralty courts, the colonial tribunals, and the Privy Council. The vice-admiralty courts governed cases of prizes and captures and were presided over by the royal governor or his judge-appointee.\textsuperscript{18} Colonial tribunals decided domestic disputes.\textsuperscript{19} Unlike the vice-admiralty courts and the colonial tribunals, the Privy Council was not a court but was an arm of the British legislature which acted as an intermediary between the king and the royal governor.\textsuperscript{20} Nonetheless, in the colonies, the Privy Council exercised judicial power by hearing appeals from the colonial tribunals\textsuperscript{21} and deciding boundary disputes between the colonies.\textsuperscript{22}

With the outbreak of the Revolutionary War, the British judicial system in the colonies collapsed.\textsuperscript{23} The states, now free to institute their own judicial systems, were quite reserved in so doing. In the state constitutions, the judicial branch was separate from, but "decidely subordinate" to, the legislative and executive branches.\textsuperscript{24} The only courts of any real and independent power in the states were the prize courts. The rash of privateering which accompanied the out-

\begin{itemize}
\item \textsuperscript{15} H. Hockett, The Constitutional History of the United States 154 (1939).
\item \textsuperscript{16} The Declaration of Independence para. 8 (U.S. 1776).
\item \textsuperscript{17} H. Hockett, supra note 15, at 172.
\item \textsuperscript{18} J. Jameson, Essays in the Constitutional History of the United States in the Formative Period 4-5 (1899).
\item \textsuperscript{19} See H. Hockett, supra note 15, at 52-53.
\item \textsuperscript{20} Id. at 52.
\item \textsuperscript{21} Id. at 53.
\item \textsuperscript{22} Id. at 2, 154-55.
\item \textsuperscript{23} J. Jameson, supra note 18, at 5-6.
\item \textsuperscript{24} H. Hockett, supra note 15, at 118; P. Smith, The Constitution: A Documentary and Narrative History 70 (1978). While the state constitutions provided for a separate judicial branch and vested the judicial power in this branch, there was no "clear definition of the relationship between the legislature and the courts." P. Smith, supra at 70.
\end{itemize}
break of the Revolutionary War required that the states establish their own vice-admiralty courts.\textsuperscript{25}

With the end of the Revolutionary War, the need for the prize courts decreased and the weakness of the state judicial system became clear. However, the Articles of Confederation, ratified in 1781, instituted an even weaker judiciary than that incorporated in the state constitutions by failing to make any provisions for an independent judiciary.\textsuperscript{26} The Articles contained "the germ, but only the germ, of a judicial system in the power [of Congress] to provide courts for the trial of piracies and felonies committed 'on the high seas', for 'determining final appeals in all cases of captures' and for' the settlement of disputes among states.'"\textsuperscript{27} Proposed amendments to create a federal court with the authority "to try and punish federal officers for misconduct, to hear cases on appeal from state courts involving treaties, law of nations, regulations of commerce, collection of federal revenues, and cases in which the United States is a party" were rejected in the debates on the Articles.\textsuperscript{28} In short, as finally adopted, the Articles of Confederation provided for a judiciary with a minimum of authority.

The framers of the Constitution recognized that one of the principal defects of the Articles of Confederation was its failure to provide a peaceful means to assure state and individual compliance with the Articles' mandates.\textsuperscript{29} Military power was the only method of compliance provided for in the Articles.\textsuperscript{30} Through the creation of a judicial branch, the Convention believed it could accomplish peaceful submission to constitutional mandates:

It may be done by the application of military power, without adjudication; or it may be done through the agency of a tribunal, which adjudicates, ascertains the guilty parties, and applies to them the coercion of civil power. This last is the peculiar function of the

\begin{itemize}
  \item \textsuperscript{25} J. Jameson, \textit{supra} note 18, at 4-5. Succumbing to congressional impetus, the states created federal prize courts following a Massachusetts model. H. Hockett, \textit{supra} note 15, at 156. Appeals from these courts were initially heard by a five-member committee appointed by Congress; in 1780 Congress established a more permanent and authoritative tribunal, the Court of Appeals in Cases of Capture. \textit{Id.} at 157.
  \item \textsuperscript{26} H. Hockett, \textit{supra} note 15, at 146-47.
  \item \textsuperscript{27} \textit{Id.} at 146.
  \item \textsuperscript{28} M. Farrand, \textit{The Documentary History of the Ratification of the Constitution} 166-67 (M. Jensen ed. 1976).
  \item \textsuperscript{29} G. Curtis, \textit{Constitutional History of the United States} vol. 1, 351-56 (1896).
  \item \textsuperscript{30} \textit{Id.}
\end{itemize}
judiciary; and, in order that it may be discharged effectually, the judiciary that is to perform this office must be a part of the government whose laws it is to enforce. It is essential to the supremacy of a government that it should adjudicate its own powers and enforce its own laws.\textsuperscript{31}

State tribunals could not be relied on to ensure the state's obedience to constitutional law,\textsuperscript{32} for the power of state legislatures was steadily growing and state constitutions did not provide either a clear separation of powers or a means for the judiciary to act as a check on the legislature.\textsuperscript{33} The Convention, therefore, provided for an independent federal judiciary to be composed of "one Supreme Court, and . . . such inferior courts as Congress may from time to time ordain and establish."\textsuperscript{34}

The federal judiciary's power under the Constitution is a great deal more far-reaching than that under the Articles of Confederation. The judiciary retains jurisdiction over admiralty and maritime cases and over disputes between the states,\textsuperscript{35} and additional judicial jurisdiction extends to "Cases affecting Ambassadors, other public Ministers and Consuls."\textsuperscript{36} Most notably, however, the new Constitution conferred jurisdiction on the judiciary over "all Cases, in Law and in Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which will be made, under their Authority."\textsuperscript{37} In short, the federal judiciary has the authority to enforce compliance with the laws of the nation.\textsuperscript{38}

The Convention specifically denied the federal judiciary one power: the revisionary power. Proposed by Charles Pickney, James Madison, Gouverneur Morris and James Wilson, the revisionary power was a topic of great debate by the framers.\textsuperscript{39} The revisionary power was

\begin{itemize}
\item 31. \textit{Id.} at 352-53.
\item 32. \textit{Id.} at 352.
\item 33. H. \textsc{Hockett}, \textit{supra} note 15, at 175.
\item 34. U.S. Const. art. III, § 1.
\item 35. \textit{Id.} at § 2.
\item 36. \textit{Id.}
\item 37. \textit{Id.}
\item 38. G. \textsc{Curris}, \textit{supra} note 29, at 354. By extending the jurisdiction to "all Cases in equity and law, arising under the Constitution, the laws of the United States and the Treaties . . . " the Convention made the federal judicial power coextensive with that of the national legislature. \textit{Id.} H. \textsc{Hockett}, \textit{supra} note 15, at 236. In short, "[under] the scheme of distributive powers its authority on the judicial side should extend to all cases arising under the legislature resulting from the powers assigned to it." \textit{Id.} at 213.
\item 39. P. \textsc{Smith}, \textit{supra} note 24, at 118-19, 129-30, 203.
\end{itemize}
the power of the President, together with the members of the national judiciary, to veto any legislation proposed by the national legislature. The purpose of this power was to guard against ""legislative usurpations"" which threatened ""public liberty."" The revisionary power proponents argued that only the combined executive and judicial veto power ""could withstand Congressional assault."" However, the majority of the Convention refused to extend this right to the judiciary. Several of the framers feared that judges, having participated in the formation of federal laws, would be biased in their interpretation of those laws. Additionally, the Convention wanted to assure the separation of powers between the judicial and legislative branches.

In the Constitution, the framers clearly established a separate and independent judiciary with power to enforce constitutional mandates. Independence was achieved, not only by not making the judiciary an arm of the legislature, as it had been in the Privy Council and the Articles of Confederation, but also by denying the judiciary the power to legislate through the power of revision. By giving the judiciary authority over cases "arising under the Constitution, the Laws of the United States, and Treaties," the Convention intended to provide the Constitution with enforcement power markedly absent in the Articles of Confederation. The revisionary power, however, was expressly denied because it usurped the legislature's power to make the law. Yet, to truly enforce the Constitution's provisions, it would be necessary to invalidate any federal or state law violating the Constitution. Whether the framers intended the judicial power to include the power of judicial review cannot be clearly discerned from such a broadly worded provision, and the Constitution's silence is difficult to explain. Nonetheless, this doctrine of judicial review had its historical roots in both Great Britain and America prior to 1787 and was well-recognized by the framers at the time of the convention.

B. The Historical-Political Background of the Doctrine of Judicial Review

The doctrine of judicial review is said to be the contribution of the prominent seventeenth century English legal authority, Lord

40. M. Farrand, supra note 28, at 169-70; P. Smith, supra note 24, at 97-98.
41. M. Farrand, supra note 28, at 238.
42. Id. P. Smith, supra note 24, at 129-30.
43. P. Smith, supra note 24, at 118-19, 129-30, 203.
44. Id. at 119, 130.
45. Id. at 130.
Edward Coke. In 1610, in his decision in *Dr. Bonham's Case*, the then Judge Coke stated that an act of Parliament is void if it "is against common right and reason, or repugnant or impossible to be performed."46 Later, in a work entitled *Second Institute*, Coke asserted that any parliamentary act which contradicts "the great charter," the Magna Carta, "shall be holden for none."47 Although some scholars have argued that Coke's proposition in *Dr. Bonham's Case* and in *Second Institute* is merely a principle of statutory construction and not a mandate for judicial review,48 Coke's statement gradually became the basis in America for the doctrine of judicial review.49

As early as 1761, Coke's statement was recited in the colonies to argue that an act of Parliament was unlawful.50 Up to that time the British were permitted writs of assistance, or search warrants, to search colonists' houses for contraband.51 The colonists disdained these writs which "required no oath by the person seeking the writ as to what he expected to find; they were not limited to any particular premises or goods but were general in nature."52 Before the Crown's judges in the Superior Court in Boston, James Otis, representing Boston Merchants, argued that the writs of assistance violated fundamental law.53 Although his argument was rejected by the British court, it was precedential for the establishment of the doctrine of judicial review in America.54 Citing Coke, Otis contended that legislative power must succumb to constitutional limitations and that the judiciary's function was to enforce legislative obedience to these limitations.55

47. Id.
48. Id. at 121 n.26; H. Hockett, *supra* note 15, at 75-76 (doubtful Coke's quote accurately represented English law in the seventeenth century).
50. H. Hockett, *supra* note 15, at 77 & n.13 (no cases "before 1761 in which colonial court set aside act of colonial legislature on the ground of unconstitutionality").
52. Id.
53. Id. at 135.
54. Id.
55. Id. Otis argued that there were three possible checks on parliamentary acts: public opinion, colonial representation and judicial determination of invalidity. H. Hockett, *supra* note 15, at 79-80. Otis' argument is important because it presents the doctrine of checks and balances which would become a focal point in the debates of the Convention of 1787. See id.
Apart from the British influence of Edward Coke, British rule through the Privy Council exposed the colonists to the doctrine of judicial review.\textsuperscript{56} One purpose of the Privy Council was to assure that the laws of the British dependencies were consistent with those of the motherland.\textsuperscript{57} Where incompatibility existed, the colonial law was invalidated.\textsuperscript{58} Thus, for example, in 1677 the Privy Council "annulled three acts of the Virginia legislature on the ground that it had exceeded its powers."\textsuperscript{59} In addition the Council exercised judicial review by hearing appeals in cases in which a colonial statute allegedly violated the colony's royal charter.\textsuperscript{60}

As a result of the influence of Coke and the colonial experience of the Privy Council, it was not surprising that the newly declared independent states would show signs of the acceptance of the doctrine of judicial review. Indeed, even during the colonial period at least one colonial tribunal had pronounced the doctrine by declaring a British act, the Stamp Act, unconstitutional.\textsuperscript{61} Between 1776 and 1787, the state courts increasingly suggested that they possessed the power of judicial review.\textsuperscript{62} For example, in 1782, while validating the Treason Law of 1776, Judge George Wythe of Virginia stated that "if the whole legislature . . . should attempt to overleap the bounds, prescribed to them by the people, I in administering the public justice of the country, will meet the united powers, at my seat in this tribunal; and, in pointing to the Constitution, will say to

\begin{footnotes}
\item[56.] A. Howard, \textit{supra} note 46, at 279 & n.58.
\item[57.] H. Hockett, \textit{supra} note 15, at 52.
\item[58.] \textit{Id.}
\item[59.] \textit{Id.}
\item[60.] A. Howard, \textit{supra} note 46, at 279 & n.58.
\item[61.] \textit{Id.} at 146; E. Corwin, \textit{supra} note 49, at 141. According to Corwin, "[i]n 1765 the royal government recognized that the prevailing argument against the Stamp Act was that it contravened the Magna Carta and the natural rights of Englishmen and therefore according to Lord Coke" was "null and void." \textit{Id.} Indeed, at the time of the First Continental Congress the doctrine of judicial review was already taking shape; the Pennsylvania resolutions had determined that many statutes were unconstitutional because they violated fundamental law. A. Howard, \textit{supra} note 46, at 177-79.
\item[62.] S. Goldman, \textit{Constitutional Law and Supreme Court Decisionmaking} 4 (1982); accord P. Smith, \textit{supra} note 24, at 118- 89. According to Goldman, "there is some evidence that even before the Constitution of the United States came into being, some state courts may have been hinting that they had the definitive say in interpreting their state constitutions." S. Goldman, \textit{supra}. Goldman notes that there has been an ongoing debate in constitutional law over precisely to what extent state courts expected to exercise the power of judicial review. \textit{See id.} As an example of this debate, Goldman compares the book \textit{Congress Versus the Supreme Court} by Rauol Berger with \textit{Government by the Judiciary} by Louis Boudin. \textit{See id.}
\end{footnotes}
them, here is the limit of your authority; and hither shall you go, but no further."\(^6\)

Several state courts actually exercised this judicial power.\(^4\) For example in the *Ten Pound Case* and in *Bayard v. Singleton*, the New Hampshire and North Carolina courts respectively declared a state legislative act unconstitutional.\(^5\) In the few cases in which state courts exerted this power prior to the ratification of the Constitution, state judges frequently alluded to Coke's statement concerning the supremacy of the Magna Carta as fundamental law.\(^6\)

The state tribunals' gradual acceptance of the doctrine of judicial review reflected the need to halt the unchecked growth of state legislatures beyond constitutional limitations.\(^7\) The state constitutions incorporated the idea of the separation of powers, but not the means by which to enforce this separation, the doctrine of checks and balances.\(^8\) Furthermore, the Articles of Confederation did not contain any means of checking the power of legislatures.\(^9\) Invoking the doctrine of judicial review, state courts could cripple unconstitutional legislative advances.\(^10\)

\(^6\) A. Howard, *supra* note 46 at 281.
\(^5\) H. Hockett, *supra* note 15, at 176-77; L. Levy, *supra* note 64, at 31. The seminal authority for the notion that the state courts exercised the power of judicial review prior to the ratification of the Constitution is *The American Doctrine of Judicial Supremacy* by Charles Grove Haines. Haines argues that the state court use of the review power influenced the framers to incorporate the doctrine into the judiciary's power in Article III. The author cites, however, only seven state cases to support his argument. What makes Haines' argument more problematic for authors like Leonard Levy is that many of these cases are arguably apocryphal. See L. Levy, *supra* note 64, at 30.

At least two cases have been deemed genuine precedents for state court exercise of judicial review between 1776 and 1787, the *Ten Pound Case* and *Bayard v. Singleton*. In the *Ten Pound Case*, a New Hampshire court declared an act of the state legislature to be unconstitutional. In *Bayard*, "*[t]he court took jurisdiction of a case contrary to a state directing dismissal."

\(^6\) A. Howard, *supra* note 46, at 280.
\(^7\) H. Hockett, *supra* note 15, at 174-75.
\(^8\) *Id.* at 172-76, 277.
\(^9\) *See supra* note 29.
At the time of the Convention, the framers were fully aware of the growing power of state legislatures. In addition, there was a realization that the judicial system of the states and the system embodied in the Articles of Confederation was too weak to stop legislative usurpations. The authors of the Constitution also foresaw possible unbridled growth of Congressional power if a system of checks and balances was not incorporated into the new government’s framework. The Convention proposed the Council of Revision to act as the watchdog of the national legislature. However, this proposal was rejected because it would destroy the separation of powers by giving the judiciary the power to legislate. As an alternative to the power of revision, several members of the Convention offered the power of judicial review. John Marshall and Patrick Henry argued that this authority was necessary to prevent congressional infringements of the Constitution; W.R. Davie and Charles Pickney contended that this prerogative was essential to impede state legislative usurpations. Several of the framers, however, including Dickinson, Mercer and Richard Dobbs Spaight, voiced opposition to judicial exercise of the review power. According to Dickinson, “‘[t]he justiciary of Arragon . . . became by degrees the lawgiver.’” In its final form, the Constitution is silent as to a judicial power of review of legislation.

Constitutional quietude is not unnatural in light of the fact that the members of the Convention were sharply divided over the validity of this judicial power. On the other hand, the absence of an express

71. See supra notes 31-33.
72. See H. Hockett, supra note 15, at 177-78. One way in which Congress had acted outside constitutional limitations by the time of the Convention was “‘by adopting ordinances for the national domain,” such as the Northwest Ordinance. M. Farrand, supra note 28, at 63.
73. See supra notes 39-42.
74. See supra notes 43-45.
75. G. Curtis, supra note 29, at 594.
76. H. Hockett, supra note 15, at 277-78. Charles Pickney introduced a draft of the Constitution at the Convention in which he argued for a federal judiciary which would watch over the legislature. Id. at 186.
77. L. Pollak, supra note 3, at 153.
78. L. Levy, supra note 64, at 24.
79. L. Pollak, supra note 3, at 153.
80. A. Howard, supra note 46, at 276-83; see H. Hockett, supra note 15, at 213-15, 277-79. According to Pollak, although the question of judicial review was not fully decided at the Convention, “the weight of numbers seems to have been on the side of those who anticipated courts would exercise such a power.” L. Pollak, supra note 3, at 156.
empowerment is significant for several reasons. At least one of the framers stated that the revisionary power should not be given to the judiciary "as they will have a sufficient check against encroachments on their department by their exposition of the laws, which involved a power of deciding their constitutionality." Even those members of the Convention who objected to judicial review recognized the necessity of some judicial check on legislative powers. Second, in the Federalist Papers, written immediately after the constitutional convention, Hamilton and Madison argued that "the power of judicial review was a central feature of the [proposed] constitutional scheme." Third, the letters of Louis Guillaume Otto and James Madison, written immediately after ratification, suggest that the federal judiciary possessed review power, at least in regard to state legislation. Finally, the very purpose of a separate and independent judiciary was to give sanction power to constitutional mandates presumably against both the state and federal legislative encroachments. One sanction would have to be the power to declare legislative acts unconstitutional.

Several reasons have been offered to explain constitutional silence concerning judicial review. The first and most obvious reason is that the framers did not intend to confer this power on the judiciary. A second possible explanation is that the framers themselves, although aware of its existence, did not fully understand the doctrine. On the other hand, the possibility exists that the delegates to the Convention were completely aware of the doctrine and "just assumed the power as innering in courts under a written constitution."

The original intention of the framers in the creation of an independent judicial branch was to check and balance the possible unconstitutional encroachments of the federal and state legislatures. If the delegates intended to achieve this result then the only viable

81. P. Smith, supra note 24, at 118-19.
82. L. Pollak, supra note 2, at 159. During the Convention Dickinson voiced his opposition to the doctrine of judicial review, but "was at the same time at a loss as to what expedient to substitute." Id.
83. Id. at 156.
85. Id. at 444.
86. See supra note 31.
87. L. Levy, supra note 64, at 31. Levy poses the central question, "If the framers intended judicial review, would they have omitted a provision for it, allowing it to rest on so precarious a foundation?" Id.
89. Id. at 213, 277-79.
explanation for the absence of an express judicial review power is that the framers understood that the written constitution is not the final pronouncement of judicial power. However, only an examination of constitutional “genre” and “language” can prove these assumptions correct.

III. Step Two—The Literary Genre of the Constitution and Article III

A. Introduction

In order to ascertain the meaning of a particular constitutional provision, the scholar cannot confine herself to the words of the text but must also examine the literary background of the text. The language of a work mirrors the time in which the author lives: language reflects the mind and heart of both the writer and the reader, and, beyond that, the political, cultural and sociological life of the audience for whom the author writes. Indubitably, one of the major flaws of present constitutional scholarship is the failure to recognize the Constitution as a literary work. The constitutional scholar analyzes the text but can find no meaning there because she refuses to discover and explain the relationship between the language of the text and the time, mind and audience of the author.

90. Hutchinson, supra note 5, at 209.

91. J. White, When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character, and Community (1984). In his book, James White explores the relationship between language and community. He does so through an examination of several major classical writings from different periods of history. One chapter discusses three major documents from America’s early history: the Declaration of Independence, the Constitution, and McCulloch v. Maryland.

Through an analysis of these classical works, White hopes to exemplify the manner in which traditional language was creatively employed by the author to revitalize both self and community. His thesis is an attempt to counteract the deconstructionist movement in present constitutional scholarship which renders the text meaningless. A pivotal piece for his argument is McCulloch v. Maryland because it illustrates how the language of the Constitution was revitalized through Marshall’s interpretation of the text.

White’s work has been criticized, however, because of its failure to incorporate into its methodology of interpretation the historical background of the writing. See Hutchinson, supra note 5, at 223. According to Hutchinson, although he characterizes writing as a pivotal mode of social action, White fails to consider the historical situation of particular acts of writing and reading. He ignores the socio-economic determinants of the texts he interprets. Indeed, with revealing honesty, he states that “[i]deology has figured largely
In speaking to her audience, an author uses the language with which her audience is familiar, that is, "the customary and characteristic styles of perceiving, speaking, and narrating which prevailed at the time." Through the use of contemporary literary forms or "genres," the author expresses an idea to an audience in a manner which she knows will be understood. The literary genre is a silent agreement between writer and audience for the conveyance of a particular truth. An example of this in biblical scholarship is the literary form of the parable. A parable was a literary genre well-recognized at the time of Jesus through which, in story form, a speaker taught the listener a lesson. The audience of Jesus' time knew that, when Jesus spoke in parables, the story was not to be taken literally, but only the lesson. Without awareness of the existence and purpose of the literary form of the parable, contemporary biblical scholars would be unable to fully understand the messages Jesus proclaimed through the parables.

In interpreting a literary work, therefore, the genre must be ascertained. At the same time, the structure and unity of the work must be analyzed. A particular text is not an isolated unit, but rather, a part of "the pattern and movement of the work as a whole." The precise placement of the provision in the entire piece suggests certain meaning. In addition, a provision is part of the authorial plan of the entire work, deriving meaning from that which came before and that which follows. Finally, the language of the particular provision must be examined. The author's choice of language in the present text uncovers her meaning.

Moreover, White overlooks the historical specificity of his own interpretive strategies. Rather than remain true to his declared view of language as social action, he reads into his major "transhistorical" texts the basic tenets of humane pluralism. White's work, however, is brilliant as an answer to deconstructionism. In addition, it supports one central thesis of this article, that is, the constitutional authors injected real meaning into the document which revitalized an Articles of Confederation "community meaning" and which can be found through the use of biblical exegetical principles.


93. Teachout, Worlds Beyond Theory: Toward the Expression of an Integrative Ethic for Self and Culture, 83 Michigan L. Rev. 649, 855 (1985). An author, as any writer, has an authorial plan for her entire work. She organizes her piece in accordance with that plan and each portion of the text is given a role in setting out this plan by its placement within the structure of the writing.
B. The Literary Genre of the Constitution

In addition, language from earlier "drafts" of the present text suggest connotations the author wished to emphasize or de-emphasize. The Constitution of 1787 is a distinct literary genre.\(^{94}\) The Constitution is a written manifestation of the intention of a people to be bound, by their sovereign will, in community with one another through the establishment of a government which will promote that community. The language of the Constitution makes clear that the unity is not that of a mere confederation or social compact. First, the preamble states that the document is a constitution.\(^{95}\) Second, by declaring that "We the people . . . do ordain and establish this constitution," the document cannot be a confederation because a confederation "is a mere treaty or league between independent states, and binds no longer, than during the good pleasure of each."\(^{96}\) Nor can the Constitution be a social compact or contract. A contract suggests that two or more parties are distinctly, and for possibly different reasons, acting for a common goal; however, in this instance, the people are acting collectively for the same reasons and for the same goal.

The "literary" Constitution has several salient characteristics. By its very terms the Constitution is the supreme law of the land.\(^{97}\) The

\(^{94}\) The Constitution of 1787 is a distinct literary genre but is not the typology for all future constitutions. See H. Van Maarseveen and G. Van der Tang, Written Constitutions (1978). Van Maarseveen and van der Tang state that there is no universal type of constitution since all different political systems have constitutions. See id at 241-42. I agree that the 1787 constitution is not a prototype of all future constitutions. Typology, however, is not the same as literary genre.

Van Maarseveen and van der Tang's work is a striking example of comparative constitutional methodology. However, because of the breadth of the work, the authors are unable to arrive at any useful explanations to explain differences in structure and language of various constitutions. Furthermore, some of the rare conclusions which the authors present are misguided. For example, van Maarseveen and van der Tang suggest that:

[j]f, on the other hand, the constitution is old, one can achieve little by using the historical-legal method of interpretation. Neither the events leading up to the constitution's introduction nor the intentions of the framers provide much guidance any longer; the constitution as it is stands separate from the past. The same applies to the grammatical method of interpretation: it is difficult to interpret an old text literally. Id.

Nonetheless, the field of comparative constitutional study is not only interesting, but is also useful in the exegesis of the constitutional text.

\(^{95}\) U.S. Const. preamble; cf. MA Const., VA Const., and Articles of Confederation.


\(^{97}\) U.S. Const. art. VI.
binding force of the constitutional mandates is evidenced by the frequent use of the word "shall." The terms of the document are politically neutral although the document mirrors the creation of a socio-political community. The Constitution displays three additional striking characteristics. First, while often the provisions are specific, sometimes the provisions are vague and general. For example, section two of article four states that "[t]he citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." Second, in certain instances the constitutional mandate is clear but the means of carrying out that mandate are not stated. Thus, the supremacy clause states that "[t]his Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land." No provision, however, "is expressly included for enforcement of the supremacy of the Constitution. Finally, the Constitution employs a unique literary convention—"we the people."

The American Constitution is possibly the first written national constitution. However, there did exist several predecessors of the Constitution of 1787 which influenced its formation. These predecessors include the Magna Carta, the colonial charters, and the state constitutions. The Magna Carta, or "Great Charter," became part of English law in 1215. The document was essentially a demand of the barons to the English Crown for a restoration of limitations of authority on the king. At the time the document was written, the British King, King John, had caused unrest because of "the heavy financial burdens imposed upon the realm by King John's unsuccessful wars on the Continent, abuses perpetrated upon all ranks of men by royal officials, the spoilage of church property, [and] John's harsh use of debts and other devices to secure political discipline among his subjects." While virtually in permanent written form by 1225, the Charter was revised throughout the centuries in order to adapt to the changing circumstances of each generation.

98. H. HOCKETT, supra note 15.
99. U.S. CONST. art. IV.
100. Id. art. VI.
101. H. VAN MAARSEVEEN AND G. VAN DER TANG, supra note 94, at 261-62. Among the "archetypes" of the American Constitution, as suggested by van Maarseveen and van der Tang, are the Union of Utrecht of 1579, the Fundamental Orders of Connecticut, and the colonial charters. See id.
102. A. HOWARD, supra note 46, at 6.
103. Id. at 8-9, 83-84, 147, 150, 168, 299, 373.
Magna Carta was reconfirmed throughout British history as the law in Britain not only because of its adaptability, but also because the Great Charter was considered fundamental or supreme law. As fundamental law, the Magna Carta determined the validity of other English laws.

The Great Charter played an important role in early American history as well as in British history. The Charter was carried across the ocean through the influence of Edward Coke and through the intellectual leaders of the American colonies, including William Penn, James Otis, and John Adams. Colonial America believed and articulated that the Magna Carta was fundamental law. In presenting grievances against British rule, the colonists relied on their rights, as Englishmen, guaranteed by the specific provisions of the Great Charter. In so doing, however, the early Americans frequently stretched the document’s actual provisions. Thus, for example, the colonists argued that the Stamp Act violated the right to trial by jury and the right to consensual taxation secured by the Magna Carta. Indeed,

[it] took a fair amount of evolution and interpretation for the requirement . . . that no scutage or aid be imposed save by “common counsel” of the kingdom (a provision omitted in the reissue of the Charter of 1216) to become the right to being taxed only by consent. Similarly it was some time after 1215 before chapter 39’s guarantee of judgment by peers became equated with trial by jury. Yet over and over the American colonists rested these rights in the Magna Carta, as in the resolutions against the Stamp Act and in their resolutions in 1774.

Despite the Magna Carta’s prominence in early American history, its provisions were not incorporated into the Constitution of 1787. One reason for this is that the document was a more useful tool for pre-independence arguments of the rights of individuals than it would have been for providing a framework for a new government. Nonetheless, in 1789, when the Bill of Rights was added to the

104. Id. at 8-9, 78, 81-82.
106. A. How ard, supra note 46, at 570.
107. Id. at 78, 81-82.
108. Id. at 372.
109. Id. at 373.
110. Id. at 371. At the Convention, the delegates did not even discuss the Magna Carta or its influence on the new constitution. Id.
111. Id.
Constitution, it incorporated many provisions from the Magna Carta.112 Perhaps the most significant influence of the Great Charter, however, was the colonial acceptance of a written document as fundamental law, capable of being expanded beyond the written word to meet the changing needs of future generations.

The rights enunciated in the Magna Carta were specifically "granted to colonial Americans in the colonial charters. The charters were promulgated in England for the purpose of instituting the administrative, executive, legislative and judicial mechanisms in the colonies."113 Beyond this, however, the colonists considered the charters to be a compact between the king and his subjects and, therefore, fundamental law.114 As such, the colonists invoked the protection of the charters against acts of Parliament which violated their rights as Englishmen.115 Thus, when the First Continental Congress convened to set down colonial grievances against Great Britain, the colonial charters "serve[d] as an example as to how the rights of colonists are to be expressed."116 Furthermore, not only were the colonial charters an additional example of written instruments embodying fundamental law, but, after 1776, these documents were also more influential than the Magna Carta in the actual formation of state constitutions. The colonial charters incorporated all of the basic provisions for the structure of the government as well as the guarantees of "rights of Englishmen."117

In the formation of their constitutions, the states utilized the form and substance of the Magna Carta and of the colonial charters. Like the Great Charter and the colonial charters, the state constitutions were the embodiment of fundamental law in a written document.118 The state constitutions also incorporated "the rights of Englishmen" espoused by the Magna Carta and the colonial charters. In fact, eight of the state constitutions included a Bill of Rights relying heavily on the earlier documents.119 For the states, the guarantee of these rights was of primary importance in the formulation of their constitutions. "Law and order there must be [in a constitution]. A
frame of government there must be. But a bill of rights: that came first.\textsuperscript{120} Finally, particularly from the colonial charters, the constitutions borrowed the framework of government—the legislative, executive and judicial branches—although the constitutions provided for a greater separation of powers.\textsuperscript{121}

One characteristic of the state constitutions, however, differentiated them markedly from the Magna Carta and the colonial charters. The states clearly enunciated in their constitutions that the government derived its power solely from the people and not from the rulers of the people. For example the Virginia Bill of Rights began: "[A]ll power is vested in, and consequently derived from, the people; that magistrates their trustees and servants, and at all times amenable to them."\textsuperscript{122} That the state governments obtained their power solely from the people is supported by the fact that these constitutions were drawn by convention and not by the legislative body.\textsuperscript{123}

In writing the Constitution, the Convention relied to a great extent on the literary works familiar to its audience. The core of the governmental structure contained in the colonial charters and particularly in the state constitutions was borrowed, and developed, by the framers in 1787. From the state constitutions, the framers adopted the central notion of the Constitution: that the government derives its power solely from the governed. The delegates made use of a literary convention which was prominent in both the state constitutions\textsuperscript{124} and the Declaration of Independence.\textsuperscript{125} "We . . . the

\begin{itemize}
\item \textsuperscript{120} A. Howard, supra note 46, at 203.
\item \textsuperscript{121} H. Hockett, supra note 15, at 118.
\item \textsuperscript{122} A. Howard, supra note 46, at 57. The preamble of the Massachusetts constitution illustrates that the government of the newly formed United States of America derived its power from the people. The preamble states:
\begin{quote}
The body politic is formed by a voluntary Association of individuals; it is a social compact, by which the whole people covenants with each citizen, and each with the whole people, that all shall be governed by certain laws for the common good.
\end{quote}
H. Hockett, supra note 15, at 120.
\item \textsuperscript{123} H. Hockett, supra note 15, at 113. When the Massachusetts Charter was suspended by Great Britain and the colony decided to set up its own government, the original plan for constructing the government was rejected because a group called the constitutionalists argued that "there was no legitimate basis for the government of Massachusetts since the people had not had any say about the kind of government there should be." A. Howard, supra note 46, at 208. Subsequently a constitutional convention was convened which fashioned the Massachusetts Constitution. Id. at 209.
\item \textsuperscript{124} See, e.g., VA. CONST. § 2.
\item \textsuperscript{125} Declaration of Independence (U.S. 1776)
\end{itemize}
representatives" of the people was reformulated to clearly highlight that the people are the source of the government's power, thus "we the people."

The framers borrowed not only the central ideas and language of the charters and state constitutions; the delegates also appropriated the literary form. For, based on their knowledge of the charters, the constitutions and even the Magna Carta, the American people were intimately acquainted with written documents which embodied fundamental law and expressed the will of the people to establish a government. Most importantly, however, the framers' audience was well acquainted with the expansiveness of written fundamental law beyond the four corners of the document. For, in their interpretation of the Magna Carta, the colonists moved clearly beyond the words or fair implications of the text in order to meet their changing needs. Indeed, the structure and language of article three of the Constitution evidences the framers' intention to allow for expansion of the doctrine of judicial power to meet the needs of future generations.

IV. STEPS THREE AND FOUR—THE STRUCTURE, UNITY AND LANGUAGE OF THE CONSTITUTION OF 1787

The structure of the Constitution is simple, clear, and well-organized. Prior to 1789 the document's structure was as follows:

Preamble (people united to form government)
Legislative Branch
Executive Branch
Judicial Branch
State Governments in the Federal System
Amendment Power
Supremacy Clause
Ratification

The framework of the Constitution of 1787 differs from most of the original thirteen states' constitutions because a majority of the early state constitutions included a Bill of Rights. Indeed, in some state constitutions, the Bill of Rights preceded the provisions for the state's governmental structure. This difference in structure between the

126. See supra note 119 and accompanying text.
127. See A. Howard, supra note 46, at 205. In some state constitutions, the Bill of Rights preceded any provisions for a governmental framework. In such cases, the convention was apparently more concerned with assuring that the rights of the state's citizens were protected than with establishing a government. The reason for this priority was that the state already had sufficient precedent from the colonial governments to continue their own, but did not have the precedent for the guarantee of individual rights. See id.
state constitutions and the 1787 Constitution can be explained in several ways. The framers' failure to include a Bill of Rights may suggest that the Convention believed that the states would provide sufficient protection of individual rights. At the same time the state conventions were convened around the time of the Declaration of Independence and, therefore, evidenced a greater concern with declaring their rights and freedom than with constructing a new government. Ten years later and after winning a war against Great Britain, the framers wanted to unify the people under one government. As a result, the original Constitution did not contain a Bill of Rights.

The Constitution and the Articles of Confederation also differ greatly in structure, again suggesting a shifting concern of the framers. A preliminary note is that the Articles are not as clearly organized as the Constitution. The Articles were organized as follows:

- Preamble (greetings from the states)
- Article I Confederacy as United States of America
- Article II Declaration of State Independence
- Article III States as League of Friendship
- Article IV Privileges and Immunities Clause, Provision for Treason, Full Faith and Credit Clause
- Article V State Representation in Congress
- Article VI Restriction on State Treatymaking
- Article VII Troop Selection by States
- Article VIII Disbursement of Cost of War to States
- Article IX Congressional Powers
- Article X Powers of Committee of States
- Article XI Admission of Canada to the Union
- Article XII Payment and Satisfaction of Debts
- Article XIII Requirement of State Adherence to Mandates of Congress and Articles Ratification

Several of the provisions in the Articles of Confederation, such as the privileges and immunities clause, the full faith and credit clause, and congressional powers, were included, with modification, in the Constitution. Unlike the Constitution, however, the Articles focused primarily on the role of state governments in the formation of a national government. From the preamble and article three, it is clear that the Confederation derives its power, not directly from the people, but instead from the states. In addition, the core of the Articles discusses the division of power, rights and duties between the state and federal government. Thus, whereas the Constitution refers to the states only in article four, the Articles of Confederation speaks about the states in every article except article nine (congressional powers) and article eleven (admission of Canada to the Union). The
structure of the Articles of Confederation reveals a second major distinction from the Constitution. The Confederation designated a separate article for only one branch of government—the legislative branch. In fact, the Articles do not provide for an independent judicial branch or for any executive branch. From their emphasis on state government and failure to provide for more than one branch of the federal government, it may be inferred that the authors of the Articles of Confederation were far less concerned with establishing a well-developed federal government than were the framers of the Constitution.

The structure of the Constitution of 1787, on the other hand, reveals the framers' intention to create a well-developed government composed of three separate, independent, and equally powerful branches. Three of seven articles, constituting two-thirds of the document's length, are devoted to a discussion of the framework of the federal government. The first three articles set forth the legislative, executive and judicial branches respectively. In stark contrast to the Articles of Confederation, in the Constitution each branch is given its own article. In addition, each branch is examined in great detail, although more attention is given to the legislature, less to the executive, and still less to the judiciary. Finally, the structure of the first three Constitutional articles is strikingly similar.

Each of the first three articles begins with a statement as to where the branch's power is vested. Following this designation is a provision concerning the requisite qualifications for office, the term of office, and the compensation for officers of that specific branch. Furthermore, each article explores the extent of the power of the particular branch. Thus, the legislature's power extends to the making of laws, the presidential power incorporates that of commander-in-chief of the armed forces, and the judicial power extends "to all Cases, in Law and Equity, arising under this Constitution...." However, one notable difference exists among the three articles. While the powers of the legislative and executive branches are specifically defined, the power of the judiciary is not. In section eight of article one, the Constitution states, "[t]he Congress shall have power to ...."; in section two of article two, the document reads "[the president] shall have the power to ...." No such parallel provision, however, defines the judicial power.

The power of the federal judiciary is not defined in article three or in any other provision of the Constitution. The first section of article three states that the judicial power shall be vested in certain courts and that federal court judges shall hold office “during good behavior” and shall be compensated for their services.\textsuperscript{130} Section two delineates the federal judiciary’s subject matter, original and appellate jurisdiction.\textsuperscript{131} The last section defines the crime, proof and method of punishment for treason.\textsuperscript{132} Since a definition of judicial power is not demarcated in the Constitution, the question arises as to where a definition of the power can be found. The Articles of Confederation did not discuss the judiciary’s power except to state that the power would extend to cases of prizes and capture and to disputes between the states.\textsuperscript{133} The state constitutions provided for a separate judicial branch, but did not explain its power. The prior drafts of the Constitution, likewise, do not contain a definitional provision. However, an important change takes place between the early and later drafts which suggests that the framers wanted to extend judicial power to constitutional issues but would not place limits on the judicial power.

\textsuperscript{130} U.S. Const. art III, § 1.

\textsuperscript{131} U.S. Const. art, III, §2. Section two provides:
The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and Maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;— between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects. In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.
The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may be Law have directed.

\textit{Id.}

\textsuperscript{132} U.S. Const. art. III, § 3.

\textsuperscript{133} Articles of Confederation art. IX. In the Articles, the Congress had the power to appoint “courts for the trial of piracies and felonies committed on the high seas and establishing for receiving and determining finally appeals in all cases of captures, provided that no member of Congress shall be appointed a judge of any of the said courts.” \textit{Id.} Congress would also appoint commissioners or judges to hear disputes between the states. \textit{Id.}
The earliest drafts of the Constitution, that is, the Virginia Plan, the New Jersey Plan, and the Alexander Hamilton Plan, extended judicial jurisdiction only to cases involving captures, national revenue, interstate disputes, impeachments, national peace and harmony, ambassadors, and treaties. The later drafts of the Committee of Detail extended judicial jurisdiction to questions "arising under laws passed by the National Legislature." Finally the Committee of Style

134. See M. FARRAND, supra note 28, at 243-45, 247-50. The Virginia Resolutions were proposed on May 29, 1787 by Edmund Randolph. See id. Amendments to the Virginia Plan were made by the Convention on June 13-19, 1787. The Virginia Plan originally required:

That a National Judiciary be established to consist of one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature, to hold their offices during good behaviour; and to receive punctually at stated times fixed compensation for their services, in which no increase or diminution shall be made so as to affect the persons actually in office, at the time of such increase of diminution. That the jurisdiction of the inferior tribunals shall be to hear and determine in the first instance, and of the supreme tribunal to hear and determine in the dernier resort, all piracies and felonies on the high seas, captures from an enemy; cases in which foreigners or citizens of other states applying to such jurisdictions may be interested, or which respect the collection of the National revenue; impeachments of any National officers, and questions which may involve the national peace and harmony. Id. The amended plan differs in omitting jurisdiction over cases of piracies and captures, cases involving foreigners or citizens of other states, and impeachments of officers. See id. at 249-50. A significant addition of the amended version is the statement that "it is the opinion of this Committee that a national government ought to be established consisting of a Supreme Legislative, Judiciary, and Executive." See id. at 248.

135. M. FARRAND, supra note 28, at 250-53. The New Jersey Plan was proposed by William Paterson on June 15, 1787. These amendments represented "the views of the delegates from the small states and of those delegates who were opposed to a national government or who at least insisted that the central government must retain some of the federal character of the Articles of Confederation. Nevertheless, they agreed that the central government needs more power and the proposed amendments provided for such power." Id. at 250. The New Jersey Plan made a few changes in the jurisdictional powers of the federal judiciary, the plan extended the judicial power to "cases touching the rights of Ambassadors," "in all cases . . . in the construction of any treaty or treaties, or which may arise on any of the Acts for regulation of trade." Id. at 252.


The Supreme judicial authority of the United States to be vested in twelve judges, to hold their offices during good behaviour with adequate and permanent salaries. This Court to have original jurisdiction in all causes of capture and an apppellative jurisdiction (from the Courts of the several states) in all causes in which the revenues of the general government or the citizens of foreign nations are concerned.

Id. at 254.

137. M. FARRAND, supra note 28, at 256-69. On July 24 and 26, resolutions
incorporated, and placed first, the judicial power to hear cases involving the Constitution. The clear act of the framers in extending the judicial power to constitutional questions stands in stark contrast to the clear failure to define the judicial power and suggests that the Convention did not intend to define the judiciary's power, but did intend such judicial power to extend to questions of constitutionality.

It is clear from the structure of the Constitution that the framers intended to create a strong and well-developed federal government. Furthermore, the delegates planned that the judicial branch would be as supreme as the legislative and executive branches. Yet, while the Convention specifically demarcated the power of the executive and legislature, it did not do so to the judiciary. At the same time, the delegates were careful to define the jurisdiction of the courts and to extend this jurisdiction to cases arising under the Constitution.

were submitted to the Committee of Detail which the committee incorporated into an actual draft of the Constitution on August 6. The resolutions made use of much of the amended Virginia resolutions. See id at 256. The July 24 resolutions maintained the amended Virginia resolution provisions with the important exception of the jurisdiction of the national judiciary. According to the resolutions of July 24, the authority of the judicial branch extended only to cases “arising under laws passed by the general Legislature, and to such other questions as involve the National peace and harmony.” Id. at 259. The July 26 resolution contained a property and citizenship requirement for members of the three branches, but this was not included in the draft submitted on August 6.

Article XI of the Draft Constitution by the Committee of Detail contained the provision for the federal judiciary. This article contains virtually all of the elements of Article III of the Constitution. Section one designates where the judicial power shall be vested. The second section discusses requirements for holding office and compensation. These sections mirror the prior drafts as well as the Constitution's provisions. Sections four and five examine the “trial of criminal offences” and impeachment. While the earlier drafts referred to impeachment, the actual constitutional provision deals only with treason. Section three, the jurisdiction of the Supreme Court and includes the jurisdiction conferred on the court in the Virginia Plan, the New Jersey Plan and in the July 24 resolution. See id. at 267. Thus, the draft of the committee made clear that the federal judiciary's power would be coextensive with that of the legislature.

138. M. FARRAND, supra note 28, at 270-96. An amended draft constitution was submitted to the Committee of Style on September 10, 1787. The amended draft was the product of the Convention's revision throughout August of 1787. Article XI once more contained the provision for the federal judiciary. Two striking changes were made by the Committee: the addition of jurisdiction to “treaties made or which shall be made under their authority” and to cases “arising under this constitution . . . of the United States.” Id. at 281. This draft was basically unchanged by the Convention, and the Draft of the Committee of style submitted during September 12-17 was left intact in the present text of the Constitution. The only major change made by the Committee between the twelfth and seventeenth of September was consolidating the prior forty-one articles into seven articles; article III became the provision for the federal judiciary.
The conclusion which can be drawn from this analysis is not that the Convention intended to assign to the judiciary the power of judicial review in article three of the Constitution. Instead, the structure, unity and language of article three reveals that the framers of the Constitution of 1787 intended to leave the definition of the judicial power to its own, as well as future, generations. Moreover, this analysis is consistent with the literary genre of the Constitution; the framers and their audience understood that the Constitution was fundamental law in written form capable of being expanded beyond the written words to meet the changing needs of future generations.

V. Conclusion

An ongoing battle in constitutional scholarship is raging over the propriety and scope of the federal judiciary’s power of judicial review. In order to determine the legitimacy and scope of the review power, it is necessary to examine article three of the Constitution. At present, however, no school of constitutional scholarship has engaged in a critical analysis of article three. The reason for this failure is that no current school of constitutional interpretation has developed principles of textual interpretation by which such an examination can be made.

The exegetical principles necessary for the thorough analysis of any text are those applied by biblical scholars. Scriptural theologians examine the historical and literary background in order to ascertain the meaning of a particular work. The text does not exist in a vacuum, but is replete with historical and literary influences. The historical analysis focuses on the historical, political, philosophical, and sociological forces that affected the author of the passage. The literary genre, structure, unity and language of a provision comprise its literary background.

Through the application of scriptural exegetical principles, the scope of the judicial power in article three of the Constitution becomes clear. At the time of the Convention the delegates recognized the weakness of the state and federal judiciaries. This weakness was particularly highlighted in view of unchecked legislative usurpations of power beyond constitutional limitations. To exert a check and balance system over the legislature, the Constitution, in marked contrast to the Articles of Confederation, incorporated a separate and independent judiciary into the federal government’s framework. However, the Convention could not agree to the means by which judicial check would be achieved. The revisionary, or veto, power was clearly unsuitable. The power of judicial review, familiar to the
framers because of its British and colonial roots and because of its exercise by state judges, was the subject of great debate among the delegates. However, this power was never explicitly incorporated into article three, which left the judicial power undefined. This failure to delineate the judicial power is in marked contrast to the careful demarcation of legislative and executive powers and of the subject matter jurisdiction of the federal courts. Therefore, the only conclusion which can be drawn from the historical and literary background of article three is that the framers intentionally did not define the judicial power. The Convention recognized the importance of the judicial power, but could not agree to the extent of this power. The framers, therefore, left the role of the judiciary to be defined by future generations.

Generations of federal judges have accepted the invitation of the framers to define the judicial power by exercising judicial review. When a judge exercises judicial review, applying intra or extra-textual norms, the judge is acting within constitutional parameters and fulfilling the authorial intent of the framers to act as a check on the legislative branch.