

The Difference Between the Supreme Court Interpreting the Law and Making Law

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The perspective of whether an action by the Supreme Court is interpreting the law or making it is often based on one's opinion of the outcome. The truly objective test comes from the limitation of the phrase "interpret the law". Anything beyond that responsibility is making law, and thus beyond the powers of the Supreme Court. Justice Marshall stays within the responsibility to interpret by making the Constitution the foundation of his careful and elaborately detailed explanation for the Supreme Court's decision.

The etymology of interpret comes from the Latin word *interpretari* which means to explain, expound, or understand. Merriam-Webster gives the modern definition of interpret as to explain or tell the meaning of, as to present in understandable terms. The Merriam-Webster definition is a modern interpretation of the long established language. "It is often forgotten that (dictionaries) are artificial repositories, put together well after the languages they define." from Jorge Luis Borges, prologue to "El otro, el mismo." The established language is the established law, which by definition is a constitution (Merriam-Webster). It is the charge of the Supreme Court to explain this law in an understandable way for the times.

The argument for the Supreme Court's need to interpret for the implied powers, is given by Justice Marshall's logical analysis of the nature of the constitution. He writes, "A constitution, to contain an accurate detail of all subdivisions of which its great powers will admit, and all of the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public." This derives a need for the Supreme Court to interpret the constitution in understandable terms.

In 1816 Congress incorporated the Second Bank of the United States. Maryland enacted a tax on any bank not chartered by the state. This brought the controversy over if the federal bank was subject to the states tax and even if Congress had the power to establish such a bank. The resulting case of *M'ulloch v. Maryland* led the Supreme Court to rule that the federal bank was constitutional and not subject to state tax. Justice Marshall supports this decision with argument based on the constitution, with careful and elaborate detail. One point he makes is the supremacy of the federal government over the states. Justice Marshall states, "The nation, on those subjects on which it can act, must necessarily bind its component parts." He then gives the following passages of the constitution in support of this **explanation**: "this constitution, and the laws of the United States, which shall be made in pursuance thereof," "shall be the supreme law of the land."

Justice Marshall further parallels the definition of interpret in this quote: "It is also, in some degree, warranted by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget, that it is *a constitution* we are **expounding**." Justice Marshall understood well what he was doing and he built his decision on the framework of the limited power of the Supreme Court to interpret.

A classic example of the court's argument being rooted in the explanation of the text of the constitution is the use of the "necessary and proper" clause. Justice Marshall lays out the interpretation as this: "But the argument on which most reliance is placed, is drawn from the peculiar language of this clause. Congress is not empowered by it to make all laws, which may have relation to the powers conferred on the government, but such only as may be 'necessary and proper' for carrying them into execution. The word 'necessary,' is considered as controlling the whole sentence, and as limiting the right to pass laws for the execution of the granted powers, to such as are indispensable, and without which the power would be nugatory." Justice Marshall breaks down the language of the Article I, § 8, clause 18 and then justifies this interpretation with the explanation after. He goes through great lengths in the rest of his opinion to give the reasons for this **explanation** as the proper interpretation, including addressing the counter arguments to this interpretation.

From the other side, to make a law is simply a decree of what the requirements or rules will be. In no place of Justice Marshall's opinion does he create new rules. Every piece of his argument is rooted in existing fact. It is always tied to the text of the Constitution. To help understand the words, the history surrounding the writing and initial application of the constitution is applied. From Justice Marshall's opinion, for example, "the power now contested was exercised by the first Congress elected under the present constitution." Further justification of the interpretation is given by Marshall, "The men who drew and adopted this amendment had experienced the embarrassments resulting from the insertion of this word in the articles of confederation, and probably omitted it to avoid those embarrassments" All of these are pre-existing facts being used to help **understand** what the constitution is to mean. No part of the decision is made on the opinion of what ought to be, but based on what has already been done.

Marshall's decision is not the sort that should be criticized as judicial law-making, because of the discipline shown in his argumentation and **explanation**. This method of supporting the decision demonstrates the court's adherence to limitation of interpretation and not making law. Every point of Justice Marshall's opinion is justified by text already in the constitution. Nothing is created, except for movement towards an understanding of how that text applies to the case at hand. Justice Marshall's opinion is exemplary of the framework of interpretation. His opinion is explained, by setting forth in careful and elaborate detail, supporting evidence, constitutional citations, and logical analysis. Thus well inside the components of interpretation's definition: explain, expound, and understand.

Bibliography

The Constitution of the United States (1787)

M'Culloch v. Maryland, 17 U.S. (4 Wheat) 316, 4 L.Ed. 579 (1819)

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