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Essay: Assorted Canards of Contemporary Legal Analysis

Antonin Scalia

40 Case Western Reserve Law Review 581 (1989)

Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 Case Western Reserve Law Review 581 (1989).

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this. Since he undoubtedly considered himself a great soul rather than a little statesman, *etc.*, there is no reason to believe that what he thought yesterday has anything to do with what he might think today.

Now all of this would not have been worth commenting upon if Emerson had not been inflicted upon the law. I think it generally sound policy to leave poets alone if they leave you alone. But the fact is that Emerson's aphorism — which, as I have observed, is even inaccurate in its more general application — has been re-

ularly and repeatedly applied to the law, where its message is de-

the rule of law. If you go through our Bill of Rights, I daresay it

with modern notions of what good government ought to be, we do
not need a constitution, but only a ballot box and a legislature. But

never mind that dispute. What I am addressing here is not whether the "evolutionary" theory of the Constitution is correct, but whether it is shown by the above quote to be endorsed by as orthodox an authority as John Marshall himself. The answer is not only "Not at all," but "To the contrary."

Marshall's words, you will recall, were written in the course of considering whether Congress had the constitutional power to incorporate a Bank of the United States. Establishing a bank or creating a corporation were not among the powers *expressly* con-

