

Paul N. Goldstene
1214 Bucknell Drive
Davis, California 95616
(530) 758-1008

HOW THE COURT STOLE THE CONSTITUTION

It is a very dangerous doctrine to consider the judges as the ultimate arbiters of all constitutional questions. . . . The Constitution has erected no such single tribunal, knowing that to whatever hands confided, with the corruptions of time and party, its members would become despots.

Thomas Jefferson

Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law.

Associate Justice
John Paul Stevens,
dissenting in
Bush v. Gore

American politics compose a strange configuration. Populated by liberals who think they are democrats, the nation is, in fact, happily dominated by an institution which represents historical tribute to the self-assured elitism of conservative imagination. Thus does rule prevail. Thus is reality hidden. From the perspective of those anxious to run things, all in America is as it should be.

This is a condition that begins with popular sovereignty. The notion, invariably mouthed, endlessly admired, seldom understood, that an abstraction known as "the people" is the necessary source of all authority which might be claimed by an apparatus considered to be a government, is the starting point of all political discourse in America. Only a government of this kind is a real government. Only it can command loyalty. Anything else merely represents the pretensions of power, and power commands nothing but revulsion and revolution.

Such an abstraction is, in itself, not democracy, although there exists no shortage of this delusion. Neither is it liberalism--nor conservatism. In political form, it is nothing. But in political sentiment, it is a great deal. Popular sovereignty becomes the pervasive *Grundnorm* of modern politics and, given the political history of man, a rather healthy one, at least from the point of view of those not in charge and who look to some conception of human limitation on the authority of the state.

In the hands of the most successful of American political thinkers, popular sovereignty leads to the United States Constitution, and it is the Constitution which becomes a major theme of American ideology, and which must be understood in its own terms if the current realities of the American system are to be comprehended. Within every nuance and dimension, the Constitution expresses an attempt to prevent what its writers most fear--the arrival of democratic rule. On the foundation of popular sovereignty, the framers of the Constitution construct an order safely guarded against government by the incompetent who, it is abundantly obvious, are most people.

For James Madison and his compatriots in Philadelphia, "the many" is a nasty formulation, worse even than "faction," and far more frightful when combined with that dire possibility. Although the propaganda of the war against Britain had emanated from the thoughts of writers like

Thomas Jefferson and Thomas Paine, and attention to "the people" was, as a result, politically required, great care was taken that such attention did not extend beyond the first few words of the Preamble. Nothing is worse than rule by the majority faction, a concoction which must induce the tyranny of the many, wherein the tyrants, deficient in rational capacity, and unduly subject to the demands of the appetites and the passions, are so plentiful in number as to comprise a situation that is beyond the capability of sensible men to allow. In a regard for their own liberty, the people must be protected from themselves. The Constitution must become what it does become, an elaborate attempt to render political equality impossible, and it must do this in the name of the sovereign people who are rational enough to know they are not rational enough to rule.

The fear of mass authority was nothing unique, or even new, despite pressures for popular government in a proportion never before confronted. What makes the Constitution historically significant is that it stands for more than this. Those who devise its stipulations are not merely antidemocrats--they are liberal antidemocrats. That they do not trust majorities is plain. That they do not trust anyone else, including themselves, is less plain, but ultimately more important. The history of all previous governments is factional control, and the nature of factional control is tyranny. A tyranny by the faction of the one, the few, or the many are each possibilities; each is repugnant; and, given the nature of the human personality, which is dual in its essential characteristics, and within which the emotions persistently threaten to subvert the workings of the reason, the emergence of one tyrannical form or another is all too probable, and the emergence of the tyranny of the many is even more so.

Thus, regardless of the enormous differences in rational capacity between the few and the many, between the members of qualified elites--those who transform their inherently superior rational capacity into an immediate ability--and the average person, the generic inclination of any

who possess political authority is toward tyranny. Whether the dictator, the oligarchy, or the mob, all are destructive of liberty, especially that liberty which derives from individual property ownership. In the realm of liberty, no government can be trusted. Yet the desire to refine and protect liberty, to translate natural rights into civil liberties and civil rights, makes the state an unfortunate necessity. That governments only become operational when they are run by human beings, and the assumption that human beings, no matter how superior their capacity for reason, and how advanced the development of that capacity, cannot be trusted with the authority of the state, are the formulating elements of the liberal dilemma. For the writers of the Constitution, the problem becomes one of instituting a government run by a stratum of elites that cannot be trusted, and the constraints of the "parchment barriers" of the constitutional idea alone are not enough to satisfy the insistent demands of liberal perception.

Still, among those present at Philadelphia, there are some who have no problem trusting themselves, and others sufficiently like themselves. These men adopt the contention which is the foundation of the conservative tradition since Plato and before, the contention that a supremely qualified elite does not have to be guarded against. Indeed, from this perspective, any who can check the elite are, by natural talent, less than elite, and to seriously entertain such nonsense is impressive confirmation of common status. Within this argument, the Romantic epistemology of the conservative tradition in Europe becomes decidedly American through the premise that the necessary attribute of those who are proper rulers is not superior feeling or intuition, but an unusual quantity, and even quality, of inner reason.

Herein is the position of Alexander Hamilton, John Marshall, and John Randolph. But those of their persuasion lose the battles at the Philadelphia Convention to the forces of Madison and, importantly, to the implicit threat of a Jeffersonian veto which appears a not unlikely outcome

of the ratification process. For the conservatives, as well as, finally, for the liberals, the democratic pretensions of the War of Independence are coming home to roost. Out of the jumbled claims and counterclaims of the independence movement, which somehow affirm that the people is the political sovereign, also comes the conviction that state governments are legal sovereigns that can be dictated to by no other government, but only by those who inhabit their several jurisdictions. Accordingly, the ratification procedure, as everything else in early American politics since the injection of John Locke into the New World must, reluctantly for many Federalists, find its final justification in a state-by-state conception of popular sovereignty.

With the victory of Madison and, by indirection, John Adams, the Constitution becomes a liberal triumph. Its complex arrangement of ordered liberty discovers its inspiration in the very terms of the liberal dilemma: a view of man which "knows" that a few are qualified to govern, and which is equally certain that these few are patently unworthy of political trust. Yet to clarify rights and protect them, to transform rights from a philosophical abstraction into an actuality of human existence, a certain risk has to be taken. Government is required, and the appropriate elites must rule, their members cloaked with the authority of the public offices which they will occupy. This is to be done in compliance with the republican principle, wherein political authority is conceived of as vesting in offices, not in men, who are separate of them, and who are accountable for their personal actions which cannot be immunized by the screen of authority that, by historical agreement, precludes prosecution. The holder of the office must, in some way, be elected to it by others, and is allowed to wield the specified political authority of the office only for a delineated, and preferably short, tenure. For the liberals at Philadelphia, the lessons of history mandate distrust.

Nevertheless, to the minds that produce the Constitution, the danger to liberty remains enormous and unacceptable. It must be mitigated by the contractual relationships among those offices which constitute the functional authority of the state. For this reason, legal power is separated into four operative departments, the executive, the judicial, the Senate, and the House of Representatives wherein, following Plato, one is grounded in the form of monarchy and the virtue of honor; two are based on the form of aristocracy and the virtue of deliberation; and one is predicated upon the form of democracy and the virtue of equality. They are then set in opposition by being partially reconnected, a contrivance which--while imposing the greatest restraints on a little-admired even though aristocratic judicial department, and paying particular attention to assuring that the probable excesses of a democratic House will be immediately stymied by an aristocratic Senate--introduces part of the checking apparatus for which the Constitution is known.

Here, along with the division of authority between general and state governments, is a distribution of authority among fourteen legal sovereigns within two divided and contending systems, producing fifty-six agencies of government, many arrayed against each other, and the totality of which, if instituted properly, eventuates in a mechanical tension of systemic balance. In its structure, the Constitution articulates an attempt to avert tyranny through the establishment of a "dynamic equilibrium"; a condition that quivers but does not go anywhere, which creaks and groans but stays essentially the same; a commitment to the status quo that students of politics now typify as an order of "competing elites." The entirety is subsumed within the overriding constraints on political authority which are the very purpose of a constitution--the notion of the revocable authority of a state that is limited to the expressed stipulations of the contract, stipulations that can never be finally ascertained by the state itself. A felt need for government, and a reflexive wariness of those who will run it, yields the United States Constitution, a formulation which ramifies from

the liberal commitment to popular sovereignty, but which is not the only possible doctrinal consequence of that ubiquitous pronouncement.

So much is obvious. However, within the presumed constitutionalism of modern America there dwells a wondrous world of doublethink; an arena wherein shared illusion and empirical reality are categorically distinct; wherein logic is suspended as an archaic annoyance not deserving of serious consideration. Cynicism in politics is a product of being lied to by others frequently and on a regular basis. But those who lie about the fundamental character of the American arrangement do so most effectively to themselves. Hence, in America, there are few cynics and many enthusiasts. The lie in which the nation most consistently indulges, and which dominates the mind of American politics by defining its pivotal ideas and vocabulary, is that there is a Constitution when, in reality, throughout most of American history, none exists.

As convinced as Madison is that the tendency toward faction will destroy the constitutional configuration, as sure as Adams is that the passions of man will subvert the Newtonian Constitution so carefully wrought by the most advanced of human reason, each still hopes that the document they inspire will survive a generation. That both these dour philosophers are not dour enough is tribute to the internal delicacy of a political order that reflects the intricate necessities of the liberal perspective.

The Constitution prevails for fourteen years, exhausting its noble effort in 1803. With the implementation of judicial review as the official doctrine of the United States Supreme Court, and with the successful infusion of this doctrine into American ideology and politics, the constitutional experiment culminates in historic failure. What Chief Justice Marshall propounds in *Marbury v. Madison* is a new system, a system of "effective," as opposed to constitutional, government.

Nonetheless, the terms of the debate established at Philadelphia need to be respected. The Constitution must be abolished in the name of preserving it, as well as in the name of the will of the sovereign people which creates it.

At issue in *Marbury v. Madison* is the nature of the federal union: whether the American order is to be unitary, a confederation, or patterned on the federalism of a Madisonian Constitution--an approach which attempts to avoid the dangers and exploit the advantages of each of the others. Beyond this lurks the impulse of some, including a majority of the Court, to determine which agency of what government shall, under the unitary system actually being promulgated, regulate the developing contours of American politics. Needless to say, Marshall will not talk about these matters, as he also will not really talk about the content of the case. Setting the format for judicial history in the America that follows, he prefers to talk about the Constitution.

In the Judiciary Act of 1789, Marshall expounds, Congress conveys to the Supreme Court authority to uphold pleas for writs of mandamus in particular cases that originate in that Court, and it is on this basis that William Marbury, et al., postulate their suit. Ignoring the Anglo-American legal tradition, wherein courts have long been authorized to serve such writs, Marshall goes on to contend that the authority of the Supreme Court is enunciated in Article III of the Constitution and, while the authority for mandamus in cases on appeal is found therein, the authority to sustain requests for writs of mandamus in every case of original jurisdiction is not. Clearly, Marshall argues--behold the lawyer who employs "clearly," "therefore," or "thus," the shell game is on--clearly, if the writers of the Constitution intended this authority for the Court, they would have said so. Since they did not say so, this was not their intention.

Under the doctrine of constitutional supremacy, Marshall continues, a law not pursuant to the higher law cannot be a law. Section Thirteen, Clause C, of the Judiciary Act is repugnant to

Article III, Section 2 of the United States Constitution and is, accordingly, null and void and not enforceable in the courts of the United States. That which Congress so generously bestowed cannot, despite our deep gratitude and humility, be accepted by this Court because to do so would be to comply with an action which is "unconstitutional."

Madison plainly knew that, beneath the guise of constitutional supremacy, Marshall had abolished the Constitution. Yet, given the situation, there was no way to politically react. Marshall had proceeded with an acumen worthy of the best of Machiavelli. By instructing Madison that Marbury and others deserve their commissions, and then claiming that the Constitution prohibits the Court from issuing a writ ordering the Secretary of State to deliver them because the law which grants such authority is unconstitutional, the Marshall Court usurps the American system--not through a coup d'état, that is too simple--but through a profound revolution in political substance and form.

The selection of mandamus in a class of original cases as the legal foundation upon which to destroy the Constitution is a tribute to the political genius of Marshall, and as about as uncalculated as the outcome. So is the fact that it is Marshall, as Secretary of State under Adams, who "forgets" to deliver the commissions to the plaintiffs in the first place. It is, after all, on the basis of such a triviality that one system of government is abolished and a new one brought into existence. If the historical outcome is unplanned, its correspondence to the ambitions of the Hamiltonian wing of the Federalist Party--within which Marshall was a major figure--is one of those amazing coincidences about which succeeding generations are at least entitled to wonder.

It is precisely because no one cares about the legal point that Marshall is able to win the political point with an absolute minimum of disruption. Marshall does not even afford Madison the courtesy of ordering the commissions delivered to Marbury and his fellow petitioners, whereupon

Madison can refuse and thus embarrass a judiciary already wanting in public esteem. With little furor, indeed, the Marshall Court ensures that Madison is immobilized on the immediate controversy of the case and, more significantly, on the greater controversy of the actual composition of the union. If Madison now awards the commissions, that will be a generous, but private, act. If, as expected, he does not, then he will fulfill Marshall's personal, and publicly proclaimed, view regarding his fundamental lack of decency. It matters not at all. The hands of the Court are "tied" by its stated obligation to the Constitution.

Judicial review has arrived, and the Court's authority to employ mandamus in specific cases of original jurisdiction is not exactly a consideration which will catapult the forces of constitutionalism into fervent and frenzied resistance. Marshall surrenders mandamus in certain cases of original jurisdiction--for a while. In exchange, as history will slowly make clear, he gains the Constitution. The only thing the Madisonians can do is hope that judicial review will atrophy from disuse, but this is not to be. Jefferson, a democrat who comes to embrace the liberal Constitution as the best chance of restraining a government which has to become tyrannical, because the empire over which it has jurisdiction is so vast that the general government must become removed from any semblance of popular control, will note that after the decision in *Marbury v. Madison* every ruling of the Supreme Court represents a constitutional convention. This, of course, is the essential point. For constitutionalists, the will of the sovereign people has been stolen. But, for Marshall, it has merely been placed in the proper hands and, apparently, the Court's penchant for "strict construction" in respect to writs of mandamus will not interfere with its subsequent affection for "loose construction" when it comes to its own "constitutional" responsibilities.

Despite contrary rumblings by the Court that can be traced back to 1796, it is well-known that the authority of judicial review is not found in the Constitution, but rather in the dicta with which Marshall precedes his own opinion--and it is the content of these dicta which achieve an alien yet pervading acceptance within the ideology of an otherwise liberal people. The judges, Marshall declares, are the guardians of the Constitution, defending it against violations by the Congress, however inadvertent such violations may be. Inferentially, the Court must equally protect the Constitution against errors of the President, although this is not mentioned by a politically shrewd Marshall, since it was George Washington who signed the Judiciary Act and, along with it, the supposedly unconstitutional section and clause, into law, and the continuing respect for Washington is a phenomenon not to be ignored. The Court is reluctantly forced into this role, Marshall explains, because its members take a solemn oath to preserve and defend the Constitution of the United States, suggesting that Congress and the President do not or, since they do, that, in some mystical sense, the oath of the Court is higher and more binding than the oath of those in other departments of government.

Every court, Marshall elaborates, in hearing cases, frequently must place a construction on the law. "Therefore," the highest court must place a construction on the higher law or, more tangibly, on the Constitution. To assert that such a transition from judicial construction to judicial review involves a difference only in degree and not in kind, is to employ analogy to move from truth to falsehood. What the assertion avoids, as it must avoid, is that law is a creation of government, while government is a creation of the Constitution, and that law and constitutional law differ not in quantity, but in the intrinsic qualities of what they are. It also denies the glaring fact that the Court is an agency of the state, and that what Marshall is really proposing, with great historical success, is that a self-selected agency of government possesses the authority to

conclusively interpret the will of that which has created it, the will of the sovereign people, of which the Constitution is a foundational expression.

There is no suggestion that Marshall finds any audacity in this remarkable claim. For him it is obvious that there exist elites which, by virtue of an inborn superiority of reason, and through the proper development of this natural capacity, are most capable of comprehending the laws of nature and, thereby, the rational, the true, and the moral which, by accepted assumption, are each part of the other and, in their totality, are that of which natural law consists. It is equally obvious that surpassing these elites there exists a supreme elite, those combining innate talent with judicial temperament and training, and who, apparently not subject to the influence of the passions are, among the qualified, the most qualified to determine matters of rationality, truth, and morality, to determine, that is, justice and, hence, the essential concerns of constitutionality. Because it is but an extension of reason that a progressively improving understanding of natural law must be incorporated into the constitutions and governments of man, and that this is always the desire of the sovereign people, those best able to perceive the laws of nature are those best able to rule. In a rational order, that which "is" instructs what "ought" to be. The preeminent judicial elite not only can rule, it should.

What results is a historic love affair with the Supreme Court, the guardians sitting high on the mountain, undoubtedly Mount Olympus, plucking down the natural truths of the universe and translating these truths into the controlling proclamations of constitutional law. There is, to be sure, a cloud cover between those on the Court and the rest of the human species, lesser elites and otherwise, who are at various places lower on the mountain and who, unable to penetrate the concealing mist, cannot exactly perceive what it is the Court does. Yet, as the Wizard of Oz well knew, incomprehensibility is impressive, and duly admired, as long as Toto does not pull back the

curtain. Apparently, in America, Toto does not. At least since the Civil War, the "constitutionality" of judicial review is rarely even questioned. Objections do develop to individual justices, but these simply reveal the suspicion that a wrong priest has attained the bench, and it is the pretender, not the priesthood, which demands remedy. Even the assault on the Court in the 1950s and 1960s was against Chief Justice Earl Warren, never against judicial review.

It is the dicta of *Marbury v. Madison* which cogently illuminates the pivotal distinction between the constitutional supremacy of Madison and the judicial supremacy of Marshall although, in what becomes an American tradition, the supremacy of the judiciary is characteristically defended in terms of protecting the supremacy of the Constitution. Within a constitutional system every agency of government is subject to the plenary control of the contract which establishes the state. The authority and, as a consequence, the existence, of any instance of government is thus subject to the will of a human force that exceeds it, a force that comprises the very mechanism of limitation.

In this sense, a legal sovereign--a government which is never legitimately answerable to any other government--is always legitimately answerable to, and can be changed or even abolished by, that which created it, the political sovereign which, in the constitutional formulation, is the people. The political sovereign may delegate all the authority it naturally contains, and reserve none, an improbable event in the parlance of constitutional expression. Nevertheless, it always maintains primacy over the state which it wills into existence because it cannot delegate away its own sovereignty--or, in Lockean terms, the sovereign people cannot delegate rights which, by definition, are inalienable and, among these rights, the right to revolution is self-evident and invariable.

Now, however, one agency of one of the several governments established by the Constitution, becomes unrestrained and unlimited except, in the dubious language of Associate Justice Felix Frankfurter, through "judicial self-restraint," a tacit admission that, constitutionally, there is no restraint. But this arrangement of authority is not compatible with a constitutional order. It exemplifies, instead, a judicial oligarchy or, at best, and as Marshall was convinced it would, rule by a judicial aristocracy.

Gone is the elaboration of separation and checks so carefully wrought, and which renders the Constitution a tribute to the liberal imagination. Also gone is the division of authority, the federalism which eventuates in two autonomous and balanced systems of legal sovereigns, since a Court which prevents constitutional violations by the general government must, by inference, also prevent possible incursions by the governments of the several states, an inference that, sixteen years later, *McCulloch v. Maryland* will make explicit.

The decisive conceptions within the Constitution derive from the specific delegations of authority it enunciates, delegations beyond the ability of any governmental agency to change or regulate. Yet, with the imposition of judicial review, the authority of every public office in the United States comes under the suzerainty of the United States Supreme Court which, accordingly, delegates its own authority as well. This presumably includes the authority to rule on the "constitutionality" of any legislative attempt to restrict this authority or to bring an impeachment or conviction against one or more of its members. The same would apply to amendments that might limit or even abolish the role of the Court as the presiding custodian of the Constitution.

Following *Marbury v. Madison*, a new political order materializes in America. The sovereign people, in constitutional fact, if not in general belief, now transfers all of its authority into the Supreme Court which, in turn, and as it sees fit, distributes this authority to the various

agencies of the various governments that compose the enormous complexity of the American system. In contemporary America, such a configuration is eagerly accepted. One thing that is not on everyone's political lips is judicial review, its position so entrenched it is no longer thought about. Most people are satisfied with the view that the Constitution provides for it or, for the more sophisticated, intended it, although its vast usurpation of authority plainly constitutes a revolution in the actualities of American politics. There is no longer a Constitution. There is, however, a Court.

The conservatives at Philadelphia did attempt to write a review agency into the Constitution, a Council of Revision to be made up of members of the Supreme Court and the President. But to preserve constitutional supremacy, Madison ultimately surmises, no agency of government can be allowed to definitively interpret the Constitution, because that agency which so interprets becomes supreme, and where an agency of the state is supreme the Constitution is not. This applies to state governments as well as the general government, regardless of the early assurances of a few state courts that they were qualified to delineate the intentions of state constitutions. Governmental review and constitutional government are in essential conflict with each other. The only conclusive interpreter the Constitution permits is that whose will the Constitution is, the sovereign people of the several states.

Thus does the cumbersome apparatus of the amending article, however fictional its alleged relationship to the will of the people, and replete with the liberal penchant for checked elites, become a tribute to the idea of constitutional supremacy and, not surprisingly, the single method provided to constitutionally change the Constitution. In contrast to the avidly vaunted "flexibility" of the document, the Constitution is highly inflexible, changeable through no procedure other than that which Article V provides, and even this is void in respect to a federal prohibition of the slave

trade and federal implementation of anything other than per-capita taxation, at least before 1808, as well as in reference to the basis of representation in the United States Senate. The real flexibility of the Constitution is achieved only when the Constitution is discarded. What then emerges is a "Constitution" that is totally flexible because it does not exist.

A Court now declares upon the meaning of a supposed Constitution which, it must be remembered, is the expressed will of the sovereign people. The Court is the final enunciator of that will. In the conventional wisdom, the people remain sovereign. Yet the government they bring into being has clearly escaped sovereign control.

All of which raises serious questions about the purported sovereignty of the people. More than a few years ago Dick Tracy confronted his new nemesis, a character known as "Mumbles." Surrounded by his mob, Mumbles would periodically issue orders which were patently binding on those he led. But Mumbles could not be understood. All he could do was mumble. When he did, one of those around him would inevitably ask, "What did Mumbles say?" With equal inevitability, someone else would inform the others what it was that Mumbles said, an authorized command which, with great dispatch, was carried out.

What Mumbles actually said can, of course, never be known. All that is ascertainable is what his interpreter, however inexplicably selected, says he said. Whose will dominates? Who is sovereign, Mumbles or the interpreter? The people mumble and the Court, possessing the last word on the subject about which they presumably mumbled, tells them not only what they said, but also what they intended and, indeed, if they really mumbled in the first place. An interesting system. Yet not one which can be categorized as constitutional, because the interpreter is an agency of the state and, in relationship to that agency, there is no constitutional restraint.

If Dick Tracy is too prosaic, there is always Hitler. The premier will of the Reich is the blood genius of the Aryan race, the modern form of the archaic notion of *das Volk* or, in more familiar terms, the sovereign people. This premier will resides most perfectly in the person of *der Führer*, whose expression of it accords it direction and is the concrete manifestation of its mission in history. Without this articulation by the *führer*, the sovereign will remains hordelike and historically aimless. In the unusual event that disagreement develops between the paramount leader and *das Volk* as to what the will of the people is, the *führer*, through his intuitive genius for feeling the organic truth of the nation, is invariably correct.

Although the contentions of the Nazis are rooted in a Romantic "theory" of knowledge, whereas the epistemology which grounds judicial review reflects an a priori rationalism, the analogy is sound. The rampant elitism of the Nazi position is blatant. To the American mind, the rampant elitism of judicial review is less so. Strangely, those who are egalitarian in other matters seem to lose their political bearings when it comes to the Court. Still, a system wherein the *führer* authoritatively speaks for the will of the Aryan race, and a system wherein the Supreme Court authoritatively speaks for the will of the sovereign people are, in grandiose presumption and interior logic, identical. Within each are found gradations of elites, with the elite of elites performing the crucial function of pronouncing the ruling dictates of the sovereign will. Whenever *der Führer* feels--whenever the Court decides--a convention of a self-authorizing elite has occurred. If the analog of Nazism is disturbing, the Fascists are available. The claim is the same.

It is exactly because claims of this type are not empirically defensible that Madison argues for constitutional supremacy. If disagreement occurs about what the will of the sovereign people is, let every jurisdiction, as they ramify from the separation and division of authority, proceed according to the perceptions of those who currently hold this array of offices. In short, let there be

politics. If confusion must be resolved, the people can always do so through the amending process. While confusion is not always desirable, a certain amount is certainly preferable to tyranny. Herein is the price--if it is a price--of constitutional government.

A state is constitutional or it is not. It is restrained by a human force beyond government, or it is not. The political purpose of the philosophical construct known as the sovereign people is, plainly, to establish the aggregate of the population as a constraining force. When the people are effectively co-opted by the government, the government, inescapably, becomes authoritarian, since it is no longer constitutional and, with the exclusion of anarchy, there is no other possibility. Hence, in the name of the Constitution, an authoritarian system comes to be insinuated into America.

But logic does not end here. Judicial review produces an order wherein one agency of government defines the authority of all other agencies and, most importantly, its own authority as well. Because a definition of authority is, in fact, a delegation, that which finally determines the location and content of authority is, in fact, the political sovereign. Or, when that which is limited stipulates its own limitations, there is no limit. The legal sovereign and the political sovereign are one. The state becomes the source of its own authority, a de facto inference of all authoritarian formulations in the history of political thought. Under the doctrine of judicial review, the legal sovereign or, more accurately, one agency of the range of legal sovereigns that the Constitution creates and acknowledges, is actually transformed into the political sovereign. Not only does that which was constitutional become authoritarian, but the sovereign people is abolished as a political force.

Logic notwithstanding, it remains an abiding American conviction that the United States is a constitutional system, and that the review function of the Supreme Court works to keep it so. "If

no one is above the law, then the law itself is supreme."¹ Within this archetypical expression of the accepted ideology can be discerned the notion that America is a nation of laws, not of men, a notion reassuringly reiterated in introductory textbooks and, with sophisticated fervor, by pundits versed in the subject. It implies that the law is subject to the Constitution. However, the Court absorbs this arcane conception. As Chief Justice Charles Evans Hughes, in a moment of unguarded honesty, noted, "the Constitution is what the judges say it is" or, more directly, the Court is the Constitution, as well as the law that is supposedly pursuant to it.

The larger impulse of the constitutional perspective indisputably informs the Lockean contract. This is a contract between the sovereign people, or Dr. Frankenstein, the superior party, and the state, for all liberals the monster, and always conceived of as the inferior party. The premise of the contract is that the monster can never get loose because it is always dissolvable by Dr. Frankenstein through the fundamental act of revoking the contract. Indeed, the sovereign ability to do so is precisely what defines the superior party to the agreement.

But now the monster is loose, unnoticed in its domination of the order because it has assumed the cloak of the contract itself. Among the influential, it is increasingly popular to blame the vast problems of American public policy on the "reality" that "democracy" has gone too far; that people in general do not possess the political capacity necessary to deal with the enormous difficulties of the modern world; that what is most required is the benevolent guidance of the qualified few. This is not exactly a new idea. Still, few notice that this is precisely what exists; that people in general have nothing to do with policy; that, in terms of constitutional law, the people in general have been constitutionally dissolved.

All this may be beneficial, and those closest to the judicial vocation are reassuring on the point. Legal scholars approximate near universality in pointing out that judicial review is a critical safeguard against the tyrannical dispositions of the majority. The very idea of a constitution "turns on the concept that governmental action may be unjust even if willed by most of the people" and that, in the United States, judicial review evolves from "the . . . practical dilemma involved in finding means to constrain a majority to a course it finds distasteful. Our thought is devoted to devising mechanisms of government--presently our Supreme Court--which can defer the effectiveness of hasty, intemperate, and arbitrary acts of rule until they are replaced by more settled and more just policy."²

Fulfilling the aspirations of Edward Coke and Sir William Blackstone for England--as the English never have--this is a view that is accorded great and learned respect. Marshall would, no doubt, applaud its assumption that most people are intemperate and not to be trusted, and that only a wisdom which emanates from judges can yield a reasoned result. It is a position, popular in America, deriving from the proposition that, in one way or another, the majority actually rules, or threatens to, a proposition which is empirical nonsense. Yet the thrust of the position goes further. It equally denies the liberal value of factional conflict and the pluralistic configuration of competing elites which the Constitution intricately mandates. Only the American analog of the Philosopher King, those who populate the judicial department, released from even the implicit constrictions of the republican principle regarding a circumscribed term of office, are capable of identifying the much-desired general welfare.

In the United States, any acclaim for conservative rule is most efficiently promoted through classical liberal terms relating to the protection and improvement of natural rights. Nevertheless, aside from the unique episode of the Warren Court, nothing in judicial history supports this claim,

except for the judicially protected rights of the few who enjoy the appropriate relationships to productive property. As Edmund Burke would have it, all are equal in their possession of rights, however what they have a right to is not the same. Those who struggle to extend the dimensions of liberty, and to equalize the idea of who is entitled to it, typically come from elsewhere in the American order. There are judges who have championed an expanded equality of rights--usually a minority on the Supreme Court--but the American tradition is far more generous in offering examples of members of the judicial department as caught by the reactionary hysteria of the moment as those who elitists habitually portray as the eminently impressionable "masses."

There is no evidence that democracy, which is as unchecked and authoritarian as judicial supremacy, and which, in any event, never pertains to America, or to any other nation-state, would be less amenable to individual liberty than the current system. The same is true of an actual constitutional government. "If one defines 'constitutional justice' as that condition in which citizens may trust their government to uphold certain rights considered inviolable, it is clear that judicial review of statutes is only one way of attaining this happy state. In fact, in a given country political factors may perhaps provide a better check than the courts on attempts to establish majoritarian tyranny."³

Separate of the inference that courts are not "political," Madison would agree. Liberty for Madison is only possible where there is constitutional supremacy, and where the tyrannical disposition of each faction is countervailed by the similar disposition of opposing factions. The essential support for and promotion of liberty is found not in courts, but in the proper organization of power and authority. If, for practical reasons, an ultimate governmental interpreter of the Constitution must be invented, a consideration Madison never really allows, then let it be the most popular department, wherein the diversity of factional differences is best reflected, not that agency

most removed from the competition of interests. Moreover, as with the British, let no elitist claim to definitive interpretation attend the act of interpretation.

To be sure, this is a proposal which is highly unacceptable to the American people who are deeply enamored of the absolute necessity of judicial review and who direct to its institutional presence an enormous amount of psychological authority. Yet a people so enamored cannot be democrats. More relevant to American sensibilities, they cannot even be liberals who, after all, trust no one with unbridled authority. What is remarkable is that a people who pride themselves on their democratic commitments, and who, in conflict with this, are liberals who reflexively distrust not only majority authority, but political authority of any kind, have thoroughly digested the conservative dicta of *Marbury v. Madison*, transforming it into a core ingredient of their ideology and civic identification. This can only be accomplished when the Court is perceived, as Marshall would have it perceived, as existing above politics. But Americans are, in the final analysis, precisely liberals who do comprehend the judicial function as "above" politics and, thereby, above the probability of tyranny, a comprehension based on a conditioned distinction between "mere" matters of "politics" and "fundamental" matters of "constitutionality."

The impact of judicial review on the operative processes of American government is apparent. Still, its consistent purpose may have less to do with concerns about competence and the enhancement of liberty and the attainment of justice than with financial and technological considerations. It could be, as Marshall strongly believed, that judicial review is reasonable because the Constitution is too cumbersome and constraining to support the manifest destiny of the American economic empire. If the historical meaning of a nation is colonial and imperial, power and authority must be concentrated, not pluralized. If the Newtonian atomization of authority and the checking apparatus which epitomize the Constitution interfere with the financial centralization

implicit within the Hamiltonian vision of a "commercial republic" rooted in a corporate "promotionalism," such an order must be abolished and the system brought into line with the conglomerated unity of "the national will."

As might be suspected, the significance for policy is profound. The causal connection between the decision by Chief Justice Roger Brooke Taney in *Dred Scott v. Sandford* and the end of any chance of Congress averting the Civil War is instructive. So is the effective interference by the Court with the New Deal, an effectiveness that materialized from a general acceptance of the propriety of judicial review, and without which the economic programs of the Roosevelt administration would have worked much better, and the subsequent dependence of American business on war and war preparations avoided. Nonetheless, throughout the 1930s, while people starved, they applauded the Court as it employed its supposedly constitutional authority to discover the true principles of economics, much as it did in the late-nineteenth and early twentieth centuries in reaction against previous official efforts to render wealth distribution more equal. It imperiously persisted, as attempts to influence its actual power, even within the parameters of judicial review, were labeled as "Court-packing" and dismissed as a "political" campaign to sabotage the perceived requirements of the Constitution itself. The notion that the restraining role of courts was intended to reside in their authority to decide cases, and not in declaring upon the "constitutionality" of laws deemed relevant by the parties to a dispute, was rapidly becoming a defunct artifact of history.

In their politics, Americans are liberals. Yet the delusion, grounded in a salient liberal distrust of politicians, that constitutional law is a realm separate from politics, permeates. Thus, in reference to the Constitution, Americans are unwitting conservatives, impervious to their immersion in contradictory ideologies, and to the understanding that an order wherein the

"political" is controlled by the "constitutional" is authoritarian when ruled by an elite which has taken charge of the Constitution.

Certainly, in terms of their immediate ramifications, other forces have clear policy importance in America. However, over any substantial period of time, the Court prevails. It picks its cases and propounds the public agenda, and those privy to the conceptions and language which devolve from the presiding influence of judicial review, and through which the population is manipulated, those trained in the law, come to define the style and substance of the national experience. As judicial review becomes entrenched and unquestioned, the formulation and implementation of public policy more frequently takes place in a greater panorama of courts, those agencies of the state which are most removed from either popular or factional control, a constellation which demands an increasingly elaborate expertise to even comprehend.

Americans despise lawyers and love judicial review. But they cannot have it both ways. They cannot insist that a judicial oligarchy, or even aristocracy, not speak the dialect of the law. They cannot insist that a complex apparatus of graduated political and legal elites, culminating in a paramount constitutional elite, represents a "democracy" that, somehow, has fallen into the hands of the legal profession. They equally cannot insist that all of this is "constitutional." What the American system is, in fact, is a judicially dominated unitary structure, wherein the will of the judges rules, but wherein it finds articulation as the will of the sovereign people.

Such is the form. The reality is a concentration of authority and a uniformity of control which accompanies the centralizing power that attends an emerging order of corporate feudalism or, more accurately, dynasty, and no institution is more suited to govern this reality than that which is predicated upon the traditional principle of aristocracy, an institution which attains a politically

necessary consent by expressing itself in the permutations of popular sovereignty. Here is a central clue to the dominance of judicial review, and to the forces behind its successful subversion of what, for a short time, was a constitutional republic.

NOTES

1. Jerrold K. Footlick, "With Bureau Reports: Too Much Law?" *Newsweek*, January 10, 1977, p. 43.
2. Arthur E. Sutherland, *Constitutionalism in America: Origin and Evolution of Its Fundamental Ideas* (New York: Blaisdell Publishing Co., 1965) pp. 3, 43.
3. Mauro Cappelletti, *Judicial Review in the Contemporary World* (Indianapolis: The Bobbs-Merrill Co., 1971), p. 1.