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SOME ENDURING MISCONCEPTIONS OF AMERICAN CONSTITUTIONAL HISTORY

SAMUEL KRISLOV†

H. L. Mencken has bequeathed us a savagely brilliant account about his fathering a history of the bathtub in the United States. To relieve the strain of the war days he concocted "a tissue of absurdities" detailing such events as the alleged first use of the bathtub in the White House by Fillmore. These patent fabrications were to his amazement quickly canonized to fact, and to this day, in spite of repeated exposures of the hoax, standard works often cite these figments as reproductions of reality.¹ Mencken's experience assuredly was not unique; the experiences of Benjamin Franklin, particularly with regard to his account of Polly Baker, were so similar as to exclude coincidence.² Basic human characteristics are involved in man's creation of a fictional universe.

The process of mythology is, in short, a never-ending and an inevitable one. It has a close analogue in the mechanisms of diffusion of rumor, and this has been closely studied so that we can understand the motivations behind the process. These mechanisms have been analyzed as basically involving a drive toward simplification of elements and the creation of an image consistent with the total structure of the rest of "reality" as experienced by the individual. So, as Gordon Allport has shown in his familiar study, a picture of a white man shaving on a subway in the presence of a Negro is transferred in the course of successive transmission into the stereotyped and "simplified" situation of a Negro threatening the white man with a razor.³

That these processes are both basic and non-trivial seems to be borne out by their replication in higher intellectual forms of endeavor. Thus the well-known scientific principle of "Occam's Razor" insist on the utili-

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1. MENCKEN, *THE GREAT BATHTUB HOAX* (1958). As to the remarkable history of the hoax see the advertisement of the World Book Encyclopedia Company, *Saturday Rev.*, June 13, 1953, which reports over fifty references found by its researchers to the Fillmore "incident."

2. See M. HALL, *BENJAMIN FRANKLIN AND POLLY BAKER* (1960); and see also *X WRITINGS OF THOMAS JEFFERSON* 121 (Ford ed. 1899).

3. ALLPORT & POSTMAN, *THE PSYCHOLOGY OF RUMOR* 71-73 (1947). Compare Scheerer, *Cognitive Theory* in *HANDBOOK OF SOCIAL PSYCHOLOGY* (Lindzey ed. 1954). Allport discusses three basic processes; "leveling," "sharpening," and "association." These compare with the two concepts of "simplification" and "striving after meaning," which are to be found in the gently honest and brilliant study by BARTLETT, *REMEMBERING* (1937), and which serve as the point of departure for Allport.

zation of the "simplest" explanation in scientific work, as well as the concept that embraces the most data consistently: "do not multiply entities without reason." Similarly, it is the basic insistence upon and the necessity for interrelationships in the form of abstract theories which is probably the dominant characteristic of modern science.⁴

In the face of these seminal drives and processes, it is nonetheless the function of scholarship to attempt to cut through myths, to present the past in its complexity, eschewing oversimplification where possible, and constantly re-examining its findings and conclusions. The constitutional historian, in particular, faces severe problems in serving this aim:

American constitutional history has always been the product of political struggles and scholarship aimed at vindicating some past or present ideological issue. In this sense, it is the heir of repeated and cumulative error. No doubt we remain victims of present-day illusions every bit as limiting and mischievous in their effects as those of former years, but perhaps some of those which have burdened us in the past can be re-examined and discarded. It is the purpose of this article to examine several such historical claims in their genetic backgrounds, with some hope of clarification of the issues involved.

I. THE MYTH OF THE NON-DEMOCRATIC CONSTITUTIONAL REPUBLIC

For most of the twentieth century, it has been fashionable for both Progressives and Conservatives to question the *bona fides* of American democracy. The Founding Fathers, it is argued, rejected democracy, which to them signaled anarchic mob rule. The Progressives' model of the undemocratic origin of American government was apparently constructed upon the assumption that the Constitution per se had by the 1890's become an obstacle to progress—that liberal ferment could be fostered only through popular disillusion with the prevailing constitutional worship. The Progressives thus argued that the supposed anti-democratic origin of the Constitution invalidated any claim to legitimacy and veneration by a majoritarian society.

This is the underlying thesis of J. Allen Smith's work, as well as Charles Beard's *An Economic Interpretation of the Constitution of the United States*,⁵ a book which clearly follows the spirit of Smith's *The*

4. See, e.g., COHEN & NAGEL, AN INTRODUCTION TO LOGIC AND SCIENTIFIC METHOD (1934).

5. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913). The Beard thesis has been sharply under attack ever since its inception, and in recent years it has been thoroughly demolished. The work of Robert Brown is discussed and evaluated in Hofstadter, *On Reading the Constitution Anew*, in BURKHART,

Spirit of American Government.⁶ Perhaps the clearest statement of the Progressive argument, aside from the implications of the conspiracy theory developed in the *Economic Interpretation*, is to be found in Beard's later work, *The Republic*,⁷ which is considerably more kindly in its imputations of intention on the part of the Founding Fathers.

Drawing upon a lifetime of research, Beard still concluded that democracy was not popular among the majority of the delegates at the Constitutional Convention, and "until well into the nineteenth century the word was repeatedly used by conservatives to smear opponents of all kinds." So far as he could find, Beard reported that Jefferson, Madison and Jackson never used the word in public papers nor called themselves at any time democrats.⁸

This essentially muck-raking position developed by the Progressives in the early part of the century is currently utilized in the main for quite opposite purposes by quite divergent political groupings. The extreme Right today accepts the Progressive conclusion of the anti-democratic tenor of the government instituted by the 1789 Constitution, and draws from this the conclusion that any currently existing democracy in consequence represents a departure from the true principles that ought to govern American life. While the Progressives utilize the present to indict the past, the Rightists would use the past to inhibit the future.

A sample of this avowedly reactionary position is to be found in the work of E. Merrill Root, Professor of English Literature at Earlham College, who has specialized in critical treatment of the modern educational system. In his most recent indictment, *Brainwashing in the High Schools*, he insisted categorically that "our American form of government is not a 'democracy' at all."⁹ His examination of textbooks in American history utilized in the high schools finds all of them at fault in that they "fail to clarify the fact that the United States is not a democracy, but a constitutional republic." He then describes what he considers to be a concerted effort "to shunt it onto the track called democracy."¹⁰ Chapter 3 of his work is devoted entirely to an examination and

BUSH, KRISLOV & LEE, *AMERICAN GOVERNMENT: THE CLASH OF ISSUES* (1960). Mr. Brown's exhaustive line-by-line critique of Beard and his portrait of a relatively unstratified middle-class society in the Colonial era, derived from painstaking research, has now been supplemented by a trenchant and systematic critique of the essential method of Beard. The work McDONALD, *WE THE PEOPLE* (1958) will stand as a model of systematic historical treatment for some time. *But see* BENSON, TURNER AND BEARD: *AMERICAN HISTORICAL WRITING RECONSIDERED* (1960) for a different evaluation.

6. J. ALLEN SMITH, *THE SPIRIT OF AMERICAN GOVERNMENT* (1907).

7. BEARD, *THE REPUBLIC* (1943).

8. *Id.* at 30-31.

9. ROOT, *BRAINWASHING IN THE HIGH SCHOOLS* 28 (1959).

10. *Id.* at 31.

discussion of this thesis, which is, indeed, a most familiar one.

Yet the point, if familiar, is also an overdone one, stretched far beyond any real evidence. Gouverneur Morris, at the Convention, did, of course, maintain that the "evils we experience flow from the excess of democracy," and Hamilton condemned the "violence and turbulence of the democratic spirit."¹¹ Madison, however, in terms similar to those used in *Federalist X*, spoke of a need for an extended country, since "this was the only defense agst the inconveniences of democracy consistent with the democratic form of govt [*sic*],"¹² while Wilson insisted that the majority ought to bind the rest of society.¹³

The Virginia Debates on the Constitution certainly emphasized the democratic spirit, with Lee and Pendleton outvying each other in claiming the Constitution to be an egalitarian document.¹⁴ This was climaxed by John Marshall's assertion that "we, sir, idolize democracy. Those who oppose it have bestowed eulogies on monarchy. We prefer this system to any monarchy, because we are convinced it has greater tendency to secure our liberty and promote our happiness. We admire it because we think it a well-regulated democracy."¹⁵

The congressional discussion over the Bill of Rights had similar, if somewhat more mixed, connotations. A proposal to empower the people to instruct the representatives as a provision of the Bill of Rights was made by Tucker. Jennifer Stone of Maryland objected. "I think the clause would change the Government entirely; instead of being a Government founded upon representation, it would be a democracy of singular properties."¹⁶ Gerry was to challenge this assertion:

There was one remark which escaped him, when he was up before: The gentleman from Maryland (Mr. Stone) had said that the amendment would change the nature of the government, and make it a democracy. Now he had always heard that it was a democracy; but perhaps he was misled, and the honorable gentleman was right in distinguishing it by some other appellation; perhaps an aristocracy was a term better adapted to it.¹⁷

Page also argued along the same lines. He found that "all power vests

11. DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES 125, 221 (1927).

12. *Id.* at 162.

13. *Id.* at 373.

14. 3 ELLIOTT'S DEBATES 272, 295 (2d ed. 1838).

15. *Id.* at 222.

16. I ANNALS OF CONGRESS 739 (1789).

17. *Id.* at 742-43. A few moments later Gerry added the observation that the heat had heightened the acrimony of the debate, which perhaps explains his strong reaction to Stone's rather qualified statements. *Id.* at 748.

in the people of the United States; it is, therefore, a Government of the people, a democracy."¹⁸

It does not necessarily follow that the rejection of the proposed amendment constituted a denial of Page's and Gerry's description of the government as a government of the people. Madison's statement that he did not wish to disturb the principles of government¹⁹ would seem to be more properly understood as a factual statement of the consequences of the power to instruct representatives, rather than a response to the discussions on the word "democracy" which, indeed, Madison's remarks do not closely follow. Even Stone, a point Gerry overlooked, condemned only the creation of a democracy of "singular properties."

While it is true that Jefferson avoided use of the term "democrat" publicly, the import of this seems to have been somewhat exaggerated. He was an infrequent utilizer of the term in private correspondence, but invoked it in a favorable context when he employed it. On those rare occasions, too, he showed no self-consciousness in equating "republican" and "democratic," defining "republican" in terms of majority control that, if anything, were more sweeping than any currently conventional definitions of democracy. "A nation," he wrote in 1788, "ceases to be republican . . . when the will of the majority ceases to be the law"—and this conviction was carried to the point where "I readily suppose my opinion wrong when opposed by the majority."²⁰

In short, there does not appear to have been any established, consistently derogatory usage of the term during the early period of the republic. The contrary impression would seem to be the product of the *Federalist Papers*, which do counterpoise the terms "republic" and "democracy" to the disadvantage of the latter. Even here, however, we find that the discussion of the terms was in a specific context—namely, involving a contradiction of "pure" democracy as a form of government to a representative republic. In the further discussions the term "pure" then tended to be omitted, as in *Federalist X, XIV, and LXIII*, apparently for ease of discussion.²¹ This usage is supported by Madison's letter to

18. *Id.* at 744.

19. *Id.* at 747.

20. See Palmer, *Notes on the Use of the Word "Democracy" 1789-1799*, POL. SCI. Q. 203 (1953), typical of the exaggerations of Jefferson's antipathy. Compare with Jefferson's letters, to James Madison, IV THE WRITINGS OF THOMAS JEFFERSON 479 (Ford ed. 1787); to David Humphreys, V WRITINGS 90 (Ford ed. 1789); and to Dr. William Eustis, IX WRITINGS 236 (Ford ed. 1809).

21. See Modern Library Edition, FEDERALIST X 58-59, as contrasted with pp. 60-61 and FEDERALIST XIV 80. See also FEDERALIST LXIII 412-13,

Jefferson of October 24, 1787,²² another anticipation of the *Federalist* discussion, which equates a "simple Democracy or a pure Republic."

This special usage seems confirmed by the case of Joseph Dennie in 1805 in Pennsylvania.²³ The facts involved indicate sharply that writers have not properly conveyed the standing of the word "democracy" as a popular symbol in our early history. Dennie had written an article derogatory of democracy and had been accused of seditious libel. The article had been phrased in quite general terms with no concrete references to existing systems or governments. He wrote that:

A democracy is scarcely tolerable at any period of national history. It was weak and wicked at Athens, it was bad in Sparta, and worse in Rome The institution of a scheme of polity so radically contemptible and vicious, is a memorable example of what the villainy of some men can devise, the folly of others receive, and both establish in despite of reason, reflection, and sensation.²⁴

Though 1803, when these words were written, hardly can be said to be "well into the 19th century," the case was not treated as a simple expression of epithets, but as, at least potentially, a grievous attack upon both the State and National Governments, though neither were mentioned specifically by Dennie. His eventual acquittal did not hinge upon any supposed inapplicability of the term to American governments, but rather upon the legitimacy of philosophic discussion of political systems as opposed to specific advocacy of action—a distinction curiously anticipatory of the opinion in *Yates v. United States*.²⁵ The Pennsylvania Court approved "temperate investigations of the nature and forms of government," and contrasted them with writings "plainly accompanied with a criminal intent, deliberately designed to unloosen the social band of union, totally to unhinge the minds of the citizens, and to produce popular discontent with the exercise of power, by the known constituted authorities."²⁶

22. I WRITINGS OF JAMES MADISON 350-51 (1867). The admirable discussion in Palmer, *supra* note 20, has little on the American situation, but pp. 224-25 contain nothing contrary to this interpretation, and the material from Paine is in agreement.

23. *Republica Against Dennie*, 4 Yeates 267 (Pa. 1805).

24. Dennie on April 23, 1803, *Republica Against Dennie*, 4 Yeates 267, 268-69 (Pa. 1805). "Among their writers, Dennie, the editor of the *Portfolio*, who was a kind of oracle with them, and styled the Addison of America, openly avowed his preference of monarchy over all other forms of government, prided himself on the avowal, and maintained it by argument freely and without reserve, in his publications." X WRITINGS OF THOMAS JEFFERSON 334 (Ford ed. 1825).

25. 354 U.S. 298 (1957).

26. *Republica Against Dennie*, 4 Yeates 267, 269 (Pa. 1805).

The Court found the day "long past" when seditious libel was to be utilized to prevent criticism. "The enlightened advocates of representative republican government pride themselves in the reflection, that the more deeply their system is examined, the more fully will the judgments of honest men be satisfied. . . ."27 The Court felt Dennie's comments could be innocent if meant either as a philosophical discussion of democracy generally, "or that the censures on democracy were bestowed on *pure unmixed* democracy,"28 and in this sense were not discussions of the American system.

In general, it is clear that the Court assumed that the terms "democracy" and "representative republican government" were usually synonymous, although there was a sense in which they were sometimes, for special purposes, distinguished. The case also demonstrates that if democracy was unpopular in some circles in the formative years, it also had vast public support as an appropriate term for the system of government. If some individuals used "democrat" as an epithet "well into the 19th century," it would appear they even ran the risks of prosecution for such usage.

No doubt the distinction was popularly made between absolute majority dominance in face-to-face communities and the existing system of government, but this distinction was not extrapolated into a defense of minority rule nor of a denial of majority supremacy. The distinction between a pure democracy and a republic was one accepted way of dealing with the dichotomy, but A. T. Mason's formulation of a difference between "popular government" and "free government"²⁹ is probably a superior formulation of the distinction. In any event, the supposedly unfavorable connotations of the term have been, it is clear, at best exaggerated.

II. THE RECURRENT INCLUSION OF THE WORD "EXPRESSLY" IN THE TENTH AMENDMENT

Probably the most persistent error in all our constitutional history is the continuous misstatement of the wording of the tenth amendment. In spite of the precise, yet polemical, statement of the Court in *United States v. Darby*,³⁰ the error has not disappeared. Justice Stone, in the *Darby* case, took great pains to provide a thorough account of the histori-

27. *Ibid.*

28. *Id.* at 270 (Emphasis added.).

29. MASON, *THE SUPREME COURT FROM TAFT TO WARREN* 140 (1958).

30. "The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of the amendment to suggest . . . that its purpose was other than to allay fears." 312 U.S. 100, 124 (1941).

cal context of the adoption and wording of the amendment. In spite of this, the amendment is constantly reamended in popular discussion and controversy, with the ghost word "expressly" (purposely omitted in the amendment's enactment) continuously reintroduced into the text. In former years, however, it was even similarly utilized in judicial decisions, though Justice Story had in his *Commentaries* provided a similar and exacting statement of its history.³¹

Part of this peculiar survival is sheer historical persistence. The tenth amendment clearly owes its origin to Article II of the Articles of Confederation, which provided that: "Each state retains its sovereignty, freedom, and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled."³²

The lack of a similar provision in the original Constitution provoked considerable discussion at the state ratifying conventions. Massachusetts, South Carolina, New Hampshire, and Rhode Island all called for an amendment which would have limited the powers of the national government to those "expressly" granted, while New York somewhat more generously would have allowed circumspection of the national government only to those "clearly" granted.³³ Virginia, however, considered such a proposed restriction and rejected it.³⁴

When Madison pressed for a Bill of Rights during the months of May through July of 1789, he proffered the present form of the tenth amendment *sans* the word "expressly." Successive efforts to reinclude

31. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1907-08, p. 652 (5th ed. 1891). "The attempts which have been made from time to time to force upon this language an abridging or restrictive influence are utterly unfounded. . . . Stripped of ingenious disguises in which they are clothed they are neither more nor less than attempts to foist onto the text the word 'expressly.'"

32. DOCUMENTS ILLUSTRATIVE, *op. cit. supra* note 11, at 27.

33. DOCUMENTS ILLUSTRATIVE, *op. cit. supra* note 11, at 1018 (Mass.), 1025 (N.H.), 1052, 1056 (R.I.), which last state utilizes the term "clearly" in the text as a rule of construction, and "expressly" in the form of the suggested amendment. South Carolina (*Id.* at 1025) suggests the limitation as a rule of construction. In Maryland a committee considered proposed amendments and recommended some fifteen amendments, including a proposal limiting congressional powers to those "expressly" granted. However, they did not feel the Maryland convention the proper forum for consideration of the amendments, and the convention upheld this position. The minority later issued these and other rejected amendments as an Anti-Federalist document. See RUTLAND, THE BIRTH OF THE BILL OF RIGHTS 154-55 (1955). The account in Feller, *The Tenth Amendment Retires*, 27 A.B.A.J. 223, 224 n.14 (1941), is misleading with regard to Maryland. On the action of New York, see DOCUMENTS ILLUSTRATIVE, *op. cit. supra* note 11, at 1035. North Carolina would have prohibited Congress from exercising powers "not by this Constitution delegated." *Id.* at 1047.

34. On Virginia see DOCUMENTS ILLUSTRATIVE, *op. cit. supra* note 11, at 1027-34, esp. 1031. Madison on the floor of Congress commented on the consideration in the Virginia Convention and the decision not to include the term. See I ANNALS OF CONGRESS 761.

the vital term were made three times—by Tucker and Gerry in the House, as well as once in the Senate. All failed.³⁵

In the face of this direct and repeated rejection of the term, however, efforts of various kinds were persistently made to reinclude it. The word seemed to spring to the lips so naturally; the sense of the amendment seems to cry out for such closure. Without such an absolute qualifier the tenth amendment reduces itself to a logical tautology, as legalists from Story to Stone have pointed out. The interpolation of the word “expressly” thus has a psychological motive—a desire to impute meaning and an unwillingness to accept any barrenness of so dignified and superficially momentous a provision. When this was coupled with obvious political motives and questions of political advantage, a potent force was indeed created.

Almost instantaneously—indeed prior to the actual ratification of the amendment—the revival of the old restrictions was attempted. In the course of the Virginia struggle against the Assumption Act in 1790 opponents of Hamilton’s fiscal policies were moved to formal protest. In a brilliant state paper of remonstrance, which Beveridge calls “the Magna Charta of States’ Rights,” the Anti-Federalist majority asserted that “during the whole discussion of the federal Constitution by the convention of Virginia, your memorialists were taught to believe ‘that every power not expressly granted was retained’ . . . and upon this positive condition”³⁶ only had the Constitution been acceptable and been approved.

Here was the first formal assertion of absolute construction by the legislature of the very state whose convention had rejected such a restrictive wording in recommending the adoption of the tenth amendment not two years previous. This, said Hamilton, “is the first symptom of a spirit which must either be killed or it will kill the Constitution of the United States.”³⁷

The further diffusion of this new reading of the amendment is probably traceable to Jefferson’s writings, notably in the Kentucky Resolutions. There he asserts that “it is true as a general principle, and is also *expressly* declared by one of the amendments to the Constitution”³⁸

35. I ANNALS OF CONGRESS 761, 767-78. See also DUMBAULD, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 41-42 (1957). During the course of his appeal for its adoption Tucker argued that the inclusion of the word would not be tightly restrictive.

36. The Resolution is to be found, together with an analysis and discussion, in II BEVERIDGE, THE LIFE OF JOHN MARSHALL ch. 2 (1916), esp. pp. 66-70.

37. Hamilton to Jay, November 13, 1790, IX WORKS OF ALEXANDER HAMILTON 473-74 (Lodge ed. 1886).

38. *The Kentucky Resolutions*, November 16, 1798 (Emphasis added); text reprinted in SMITH & MURPHY, LIBERTY AND JUSTICE; A HISTORICAL RECORD OF AMERICAN CONSTITUTIONAL DEVELOPMENT 100-04 (1958).

that powers not delegated are reserved to the states. This peculiar juxtaposition of "expressly" and the tenth amendment appears twice in the Resolutions. The interpolation of the word into the substantive portions of the sentence was to proceed from these beginnings, buttressed as they were by memories of the Articles of Confederation.

In *McCulloch v. Maryland*, Luther Martin urged the amendment as a substantive limitation upon the granted powers of the federal government, only to have Marshall take judicial cognizance of the form of the amendment:

[T]here is no phrase in the instrument which, like the articles of confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described. Even the 10th [*sic*] amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word "expressly"³⁹

Similar observations by Story and Madison emphasize that the tenth amendment was seen contemporaneously as a "tub to the whale," and, in Madison's own terms, "superfluous."⁴⁰

Only fourteen years later, however, a divergent note was sounded in *United States v. Hudson and Goodwin*.⁴¹ In what was probably the greatest Democratic-Republican judicial victory of the era, the Court through William Johnson ruled against the existence of common law federal crimes. In the course of his decision, Justice Johnson observed that "the powers of the general Government are made up of concessions from the several states—*whatever is not expressly given to the former, the latter expressly reserve*. . . ."⁴² This observation, oddly enough, was not to be picked up in later judicial decisions, and remains a solecism; dual federalism was to find its texts elsewhere and in another era.

Half a century later, in *Lane County v. Oregon*,⁴³ Chief Justice Salmon P. Chase was to comment along similar lines. In ruling that the Legal Tender Acts did not require a state to accept the paper currency established as legal tender for the payment of state taxes, Chase asserted more than just that the states existed before the Constitution. The states were prior to the Union also, in the sense of possessing the potential of existence without the national government, while the latter was de-

39. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406-07 (1819). Luther Martin, at 374, in the course of argument advanced the proposition that the national government had only express powers.

40. I ANNALS OF CONGRESS 457-58.

41. *United States v. Hudson and Goodwin*, 11 U.S. (7 Cranch.) 32 (1812).

42. *Id.* at 33 (Emphasis added.)

43. 74 U.S. (7 Wall.) 71 (1869).

pendent in its processes upon the existence of the states. But this was not the ultimate; more directly Chase continued: "To them and to the people all powers not *expressly* delegated to the National Government are reserved."⁴⁴

Chase's observations on the general nature of the Union did not go unrecognized; representing virtually the obverse of Lincoln's proposition that the Union is anterior to the states, his epitome of state-federal relations became a shibboleth of dual federalism. Similarly, his use of the tenth amendment became a regular feature of dual federalist decisions.

The standard judicial technique became one of quoting the tenth amendment, not in terms of its actual wording in the Constitution itself, but to refer to the tenth amendment and to quote *Lane County v. Oregon*. This became almost a bench mark of judicial decisions in derogation of federal power. The classics that cite *Lane County v. Oregon* include *Collector v. Day*, *Pollock v. Farmers' Loan and Trust Co.*, and *Hammer v. Dagenhart*.⁴⁵ This judicial sleight-of-hand of quoting one source and citing another has dazzled observers. So, for example, our greatest constitutional historian, E. S. Corwin, credits Justice Day with having creatively amended the Constitution in *Hammer v. Dagenhart*, where actually Day was merely following along by citing Chase's amendations.⁴⁶

This peculiar use of the tenth amendment was rendered all the more peculiar by the persistence of the more logical and restrictive sense in treatises and in decisions. So Story's *Commentaries* remained a check upon this type of states' rights reasoning. Again, court decisions were by no means unanimous in expanding the reserved powers. Contemporaneously with *Lane County v. Oregon* a New York court noted that "the omission of this word in the tenth amendment is most significant, and shows the object was not to interfere with or restrain any of the powers delegated to the United States by the Constitution, whether expressly delegated or not."⁴⁷ Similarly, Holmes' comments on the "invisible irradiations" of the amendment not limiting the treaty power are paralleled by emphatic remarks from a surprising source. It was Justice Roberts who in 1931 observed that: "the Tenth Amendment was intended to confirm the understanding of the people at the time the Constitution was adopted It added nothing to the instrument as originally ratified."⁴⁸

44. *Id.* at 76 (Emphasis added.)

45. 78 U.S. (11 Wall.) 113, 124-25 (1871); 157 U.S. 429, 560 (1895); 247 U.S. 251, 275 (1918).

46. See CORWIN, *THE TWILIGHT OF THE SUPREME COURT* 32-33 (1934).

47. *Metropolitan Bank v. Van Dyck*, 27 N.Y. 400, 416 (1863), relying on the discussion in *McCulloch v. Maryland*.

48. *United States v. Sprague*, 282 U.S. 716, 733 (1931).

So the Judges actually created a dual line of decision of the type described so well by Corwin and Llewellyn, even with regard to a question of historical fact. By 1937 such judicial tactics were no longer respectable. Finally, in *United States v. Darby*, the Court speaking through Justice Stone most emphatically laid to rest the Chase heresy. It was after that decision that A. H. Feller wrote his article with the remarkably descriptive title, *The Tenth Amendment Retires*.⁴⁹

The sole persistence of the old myth is in popular discussion and controversy. It is a sign of the intellectual weakness of the Southern segregationist position that even its most effective ideologue, James Kilpatrick, has chosen to rest his argument on the discredited historical and logical interpretation of the tenth amendment.⁵⁰

III. THE SUPPOSED ORIGIN OF THE DOCTRINE OF RECIPROCAL TAX IMMUNITIES IN *MCCULLOCH V. MARYLAND*

If some things are obscure because hidden, others are yet more unknown because so familiar. The case of *McCulloch v. Maryland*⁵¹ is one where early and continuous acquaintance makes deeper investigation unlikely and the early impressions of the case tend to be accepted as mature findings.

The origins in this case of the doctrine of federal government immunity from taxation is well known. The familiar "the power to tax involves the power to destroy"⁵² still rings through history more fervently than Holmes' postscript that this was not in fact the case "so long as this court sits."⁵³ The logic of Marshall, at least superficially, was strong and clear. An instrumentality of the federal government could be created as a consequence of the implications of the "necessary and proper" clause; such an agency, if legitimate, was a necessity imputed with all the attributes of the supremacy of the nation. This, in turn, required freedom from the exaction of a portion of the national community. Following Marshall's typical mode of interpretation—a power granted, he was inclined to say, could be exercised to its outmost limit—if the state could tax, it could thereby control. A state could disagree with the policies of the national government; it ought not constitutionally to prevail. A state might benefit materially by taxing aspects of national government activity and thus, in effect, gain at the expense of the remaining states;

49. 27 A.B.A.J. 223 (1941).

50. KILPATRICK, *THE SOVEREIGN STATES: NOTES OF A CITIZEN OF VIRGINIA* (1957).

51. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

52. *Id.* at 431.

53. *Panhandle Oil Co. v. Mississippi*, 277 U.S. 218, 223 (1928).

the part ought not to be in a position to so aggrandize itself as against the whole.⁵⁴

The origins of federal immunity in the case are, indeed, so clear that there is a strong tendency for writers to leap ahead historically and to assert that Marshall also delimited the power of the nation to tax the states. So Fred Rodell, a Yale tax expert, has written that:

Perhaps the best known of those pieces of the Highest Law of the Land that the court has manufactured out of ethereal logic with no help at all from the words of the document is the piece that deals with the federal government taxing the state governments and vice versa. It all started with Chief Justice Marshall's famous bromide that "the power to tax involves the power to destroy." Therefore, argued Marshall, with his court chiming in, we can't have the states laying taxes on the property or the activities or the bonds or the employees of the federal government and we can't have the federal government levying taxes on the states either. For if we allowed such taxes one of our governments might insidiously destroy the other.⁵⁵

Lest there be any ambiguity as to Rodell's view of the origin of state immunity, he has emphatically and more distinctly suggested the same in another work. "Marshall," writes Rodell:

[S]aid, in effect, that since the Constitution creates a dual sovereignty—federal and state—it *must* mean that neither sovereign may destroy the legitimate activities of the other. . . . It was this black-or-white logic . . . that made all the federal government's operations completely untouchable by state taxes and vice versa.⁵⁶

Somewhat more circumspectly, Bernard Schwartz has suggested that the principle of state immunity from federal taxation is not expressly confirmed in *McCulloch* but can be derived from it. "Implicit in the Marshall holding," Schwartz has written, "is a broad doctrine of intergovernmental immunity which protects the states as well as the federal government."⁵⁷

Whether put in terms of an exact statement appearing on its face in

54. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 432 ff. (1819).

55. *RODELL, WOE UNTO YOU, LAWYERS* 66-67 (2d ed. 1957).

56. *RODELL, NINE MEN* 98 (1955).

57. *SCHWARTZ, THE SUPREME COURT: CONSTITUTIONAL REVOLUTION IN RETROSPECT* 199 (1957).

McCulloch or as a derivative of the logic of the decision, state immunity does not seem to have originated there. After all, Marshall not only did not imply such an immunity, he emphatically and unequivocally denied it. If such a denial has not found favor in the eyes of the Court it is not Marshall but his successors who have made that evaluation. Marshall dealt specifically with the problem of state taxation, and indeed it was argued by the Maryland attorneys. The contention of the state counsel was that the argument that might sustain national government taxation of state instrumentalities ought to justify similar exactions by the states. Marshall emphatically rejected the contention. "But the two cases," he insisted, "are not on the same reason."

The people of all the States have created the general government, and have conferred upon it the general power of taxation. The people of all the States, and the States themselves, are represented in Congress, and, by their representatives, exercise this power. When they tax the chartered institutions of the States, they tax their constituents; and these taxes must be uniform.⁵⁸

The situation he found to be different when the state taxed the operation of the national government. Here "it acts upon institutions created, not by their own constituents, but by people over whom they claim no control. It acts upon the measures of a government created by others as well as themselves."⁵⁹ Thus, the exactions of the state were exactions at the expense of others.

The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole—between the laws of a government declared to be supreme, and those of a government which, when in opposition to those laws, is not supreme.⁶⁰

Thus Marshall leaves nothing to implication, but most definitely, clearly, and concisely rejects the reciprocal nature of the immunity.

It was not until 1871 in *Collector v. Day* that the Court asserted state immunity. Justice Nelson invoked the principles of sovereign immunity explicated in *McCulloch* and in *Dobbins v. Erie County*,⁶¹ posing the question, "why are not those [instrumentalities] of the States depending upon their reserved powers, for like reasons, equally exempt

58. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 435 (1819).

59. *Ibid.*

60. *Id.* at 435-36.

61. 41 U.S. (16 Pet.) 435 (1842).

from Federal taxation?"⁶² The reply of Justice Bradley to Nelson's question is essentially a *precis* of the arguments in *McCulloch*; Bradley's dissent clearly reflects Marshall's position to a much greater extent than the majority opinion in *Collector v. Day*.⁶³ The majority ignored and did not even attempt to answer the logic of Marshall's distinction between the two types of intergovernmental immunity. There can be no historical justification for attributing to Marshall a doctrine which he most emphatically denied.⁶⁴

IV. THE MYTHICAL ISSUE OF THE LEGITIMACY OF JUDICIAL REVIEW

In 1886 George Bancroft inaugurated the constitutional debate over the power of judicial review with his polemical work against the *Legal Tender* decision,⁶⁵ *The Constitution of the United States Wounded in the Home of its Guardians*.⁶⁶ Judicial review has since then been continuously discussed in rather stark terms. With few exceptions the tendency has been to regard the issue as monolithic, to assume that the Founders either intended a plenary power of judicial nullification or none at all. This tendency has multiplied error. A classic case in point is the discussion by Beard in his *The Court and the Constitution*.⁶⁷ There, as Corwin has pointed out,⁶⁸ Beard has assimilated statements made in widely divergent times, in different contexts, on different aspects or interpretations of judicial review, and has assumed that every statement

62. *Collector v. Day*, 78 U.S. (11 Wall.) 113, 127 (1871).

63. *Id.* at 128-29. Even Johnston's dissent in *McCulloch v. Maryland* is far from the doctrine of *Collector v. Day*, inasmuch as it implies congressional dominance and the absence of state parity. Apparently Johnson would have allowed federal immunity if Congress so provided. See MORGAN, *JUSTICE WILLIAM JOHNSON* 249-51 (1954).

64. Mr. Rodell is also the source of another apparent myth, perhaps engendered by his claimed virtue of not using such paraphernalia as note cards. In *RODELL, op. cit. supra* note 55 at 238, he repeats the charge that Hughes switched his vote in deciding *United States v. Butler*, 279 U.S. 1 (1936). "There is no longer any doubt, despite the secrecy of Supreme Court conferences (the story has been told scores of times and never denied) that Hughes both talked and voted for the AAA's validity until, unable to win Roberts back to reason, he let himself be counted with the majority to make the score 6-3." Yet Pusey, writing in 1951, four years previous, found the story "void of substance." Pusey also points out that Brandeis had not made up his mind at conference time which way to vote, and indeed vacillated to the end, making the 5-4 split considerably less of a threat than usually assumed. PUSEY, *CHARLES EVANS HUGHES* 743-45 (1951). A. T. Mason, certainly not ranked among Hughes' admirers, has confirmed the picture drawn by Pusey with regard to Brandeis. Mason's study of Stone's memoranda suggests that if any criticism lies against Hughes in the *Butler* case it is for his determination to push the case through without adequate consideration of the minority position. See MASON, *HARLAN FISKE STONE: PILLAR OF THE LAW* 414-16 (1956). It would seem the story has been both denied and disproven.

65. *Legal Tender Cases*, 110 U.S. 421 (1884).

66. BANCROFT, *A PLEA FOR THE CONSTITUTION OF THE U.S. OF AMERICA WOUNDED IN THE HOME OF ITS GUARDIANS* (1886).

67. BEARD, *THE SUPREME COURT AND THE CONSTITUTION* (1912).

68. *May 1913 AM. POL. SCI. REV.* 329-32.

can be treated in equivalent fashion as either positive or negative with respect to judicial review.

Some commentators have persisted in taking out of context statements made long after the constitutional convention, have assumed that statements on judicial power over state legislation necessarily apply to all possible usages of judicial review, and have extrapolated the rather vague statements of the Constitution to cover problems not therein dealt with. Others, perhaps even more peremptorily, have insisted that Marshall's action in *Marbury v. Madison*⁶⁹ constituted simply "a great usurpation." However, a close examination of historical facts and present-day protagonists, as well as the more subtle of our constitutional commentators, suggests that the issue has been both exaggerated and vulgarized; the true conflict was not over the power of the Court to declare laws unconstitutional, but over the nature and extent of that power.

Certainly it seems definite that the Framers intended judicial review of state action. This is not provided for in the Constitution in *haec verba*, but seems a necessary and obvious consequence of the provision that "the judges in the several states shall be bound thereby."⁷⁰ Any doubts on this question seem to be dispelled by the well-known provisions of section 25 of the Judiciary Act of 1789 providing for Supreme Court review of state court decisions, including those occasions when a state court might declare a federal law unconstitutional.⁷¹

Some have argued that the implications of the Supremacy Clause are equally clear with regard to congressional acts. It can be argued that the degree of implicitness in the Constitution with regard to review of congressional legislation is not appreciably different than with regard to court action over state legislation. From this point of view, the power to invalidate congressional acts can be found in the specific restriction that "acts of Congress in pursuance" of the Constitution are alone supreme law of the land. One may question this position—the "pursuance thereof" clause may well be a stylistic flourish, and this cannot be the case with regard to the injunction to the state judges to be bound by the Constitution; yet, there is more than some logic in the denial that review on the state level is firmly and immutably distinguishable from other forms of judicial power to invalidate. Even in the realm of the constitutional text, the argument for judicial review is by

69. 5 U.S. (1 Cranch) 137 (1803).

70. U.S. CONST. art. 6, 2d para.

71. See Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States*, 47 AM. L. REV. 1 (1913).

no means an obviously specious one. Even to acknowledge this, however, would not be to accept what many have previously thought a consequence. Corwin has brilliantly shown that there existed many views of the nature and limits of judicial power.⁷² The argument for homogenization of judicial review ignores the opinions shared at the time—there exists historical record of clear and emphatic statements embracing and denying virtually every possible variation of judicial review⁷³—and also ignores changes in intellectual content that are the products of time and events. It seems clear that the implications of such power were thought through by few, if indeed by any. Hamilton's *Federalist LXXVIII*, for example, is perennially cited in support of judicial review and reads like a first draft of *Marbury v. Madison*;⁷⁴ yet its precision disappears completely in the context of *Federalist XXCI*, which argues that the powers of the judiciary will not differ from those of the British courts, which by that time did not even proffer the shadow of a claim of nullificatory power.

On the other hand, Jefferson clearly seems to have recognized the right of judicial review over acts of Congress, but was vague as to the consequences of such review. Where Jefferson was firm was in his emphatic denial that the Court was to have the last word—to him, judicial review did not imply judicial supremacy.⁷⁵ On occasion Madison showed greater realism by suggesting that the consequence of the Court's peculiar role in the final steps of decision must result precisely in its being the ultimate arbiter; but Madison was by no means consistent in exploiting this insight.⁷⁶

This pattern of acknowledgment of some aspect of review without full recognition of its consequences was not confined to the primary figures of the day. The rather universal nature of such partial and inchoate evaluations of the institution seems to be reflected in the surprising confluence of judgment that is represented in the works of the closest students of its evolution.

The *locus classicus* of the anti-Court argument is, of course, Louis

72. CORWIN, *COURT OVER CONSTITUTION* 26-33 (1937).

73. Warren, *supra* note 71.

74. 5 U.S. (1 Cranch) 137 (1803).

75. See Krislov, *Jefferson and Judicial Review: Refereeing Cahn, Commager and Mendelson*, 9 J. PUB. L. 374 (1960), and the ensuing discussion with Mendelson: Mendelson, *Jefferson and Judicial Review—A Reply to Professor Krislov*, 10 J. PUB. L. 113 (1961), and Krislov, *The Alleged Inconsistency: A Revised Version*, 10 J. PUB. L. 117 (1961). Compare Corwin, *The Supreme Court and Unconstitutional Acts of Congress*, 4 MICH. L. REV. 616, 629 (1906).

76. See Madison, probably October 1788, 5 WRITINGS OF JAMES MADISON 294 (Hunt ed. 1910). "It results to them by refusing or not refusing to execute a law, to stamp it with its final character. This makes the Judiciary Department paramount in fact to the Legislature, which was never intended and can never be proper."

Boudin's two-volume *Government by Judiciary*.⁷⁷ Boudin takes great pains in his preface to disassociate himself from the charge of usurpation. "The term 'usurpation,'" he writes, "has never been used by the author in this book as his own characterization of the assumption of power involved."⁷⁸ At a number of points in the work he elucidates the distinction between several possible variations of judicial nullification—particularly to defend their own prerogatives—and the ultimate power of judicial supremacy. On occasion he comes so close to overtly endorsing some of the milder forms of review that his legio-Marxian rhetoric barely obscures this.⁷⁹ In later writings he was to argue that judicial review with regard to Bill of Rights provisions was intended and was defensible.⁸⁰

A more conventional yet more subtle treatment is to be found in Robert McCloskey's *Essays in Constitutional Law*.⁸¹ Following Corwin in his criticism of Beard's *The Court and the Constitution*, McCloskey asks "a more sophisticated and thus more difficult question than the one posed by Beard," and attempts to deal with the problem of the type of review. "Suppose, for example," McCloskey suggests, "we ask what was the *scope* of the judicial review which the framers had in mind, *i.e.*, did they think of the courts as being empowered to overrule Congress in all cases that raised any constitutional question or did they see the power as applying only when direct constitutional prohibitions were transgressed?"⁸² He goes on to pose another problem:

Suppose, for another example, we ask what conception the framers had of the *finality* of the court's judgments on mat-

77. BOUDIN, *GOVERNMENT BY JUDICIARY* (1932).

78. *Id.* at iii. Compare Holmes, in *Blodgett v. Holden*, 275 U.S. 142, 147 (1927): "Although research has shown and practice has established the futility of the charge that it was a usurpation when this Court undertook to declare an act of Congress unconstitutional." Justices Brandeis, Stone, and Sanford concurred in this opinion.

79. BOUDIN, *op. cit. supra* note 77, *e.g.*, p. 182: "One may very well admit that Congress has no right to impose upon the courts non-judicial duties, and when it attempts to do so the courts have a right to refuse to act, without at all admitting the power of the judiciary to declare a general law unconstitutional"; p. 98, where Boudin distinguishes between refusal to enforce laws manifestly unconstitutional and instances where the unconstitutionality has to be inferred; and pp. 99-101 and 574, where Boudin discusses the Jeffersonian theory of the right of each branch to decide unconstitutionality for itself.

The truth of the matter is that *GOVERNMENT BY JUDICIARY* is a lawyer's brief, with many alternative pleas and arguments, making it difficult to ascertain Boudin's precise views. Yet the care with which he disentangles himself from the usurpation charge suggests a realization that it is the usage and the particular form of judicial review that is vulnerable, rather than the institution *in toto*.

80. See Boudin, *Majority Rule and Constitutional Interpretation*, 4 *LAW GUILD REV.* 1, 4 (March-April 1944).

81. McCLOSKEY, *ESSAYS IN CONSTITUTIONAL LAW* 20 *ff.* (1957).

82. *Id.* at 22.

ters of constitutionality, *i.e.*, whether they thought of Supreme Court decisions as binding all other departments of government, or only the judiciary? On both these questions . . . the founding fathers had only the dimmest of notions.⁸³

When we ask this type of question, which McCloskey rightly suggests is the real one, the evidence becomes thinner, and the conclusion that there was an absence of full anticipation of the consequences becomes surer.

The generally unorthodox findings of W. W. Crosskey are on close examination amazingly similar to these rather divergent approaches. The critical book review by Rossiter of Crosskey's *Politics and the Constitution*⁸⁴ has appropriately found Crosskey's treatment of Court power by far the outstanding portion of his controversial reassessment of the intent of the Framers. Crosskey's conclusions on the power of the Court are essentially that:

[J]udicial review was not meant to be provided generally in the Constitution, as to acts of Congress, though it was meant to be provided generally as to the acts of the states, and a limited right likewise was intended to be given to the Court, even as against Congress, to preserve its own judiciary prerogatives intact.⁸⁵

There is, according to him, a power to nullify state action and a "separation of powers—checks and balances" notion that the Court might utilize review essentially for self-protection. In no sense, however, was Court decision to be final or its nullificatory powers catholic in nature.

The surprising consensus developed by these authorities is that judicial review was fundamentally an emergent, in Whitehead's terms, in that it took on additional dimensions and scope with the passage of time from an original core of authentic power. Alone among current authorities in a total denial of the legitimacy of any review, Henry Steele Commager's *Majority Rule and Minority Rights*,⁸⁶ is basically an evasive and contradictory effort.⁸⁷ It is in the area of delimiting the Framers' intended fundamental core of judicial review that scholars tend to disagree, both as to the field of endeavor and the finality of judicial decision.

83. *Ibid.*

84. 16 REV. OF POLITICS 237, 241 (1954).

85. 2 CROSSKEY, POLITICS AND THE CONSTITUTION OF THE UNITED STATES 1007 (1953).

86. COMMAGER, MAJORITY RULE AND MINORITY RIGHTS 3 (1943).

87. Boudin, *supra* note 80; and Krislov, *supra* note 68.

A more defensible extreme position has been developed by Hart and Wechsler, who have embraced judicial review *in toto*. "Despite the curiously persisting myth of usurpation," they comment, "the Convention's understanding on this point emerges from its record with singular clarity."⁸⁸ Basically, these authors are forced to assert this more by fiat than by evidence. They point to what they regard as "conclusive" demonstrations in Warren, Farrant and Beard, which they assert "should have put an end to the discussion."⁸⁹ They attribute to the intellectual climate of the twenties and thirties a bias which "appears to have paralyzed the capacity of large numbers of political scientists and historians to appraise evidence or avow conclusions."⁹⁰ To support this indictment of ideological blindness they suggest comparing "the trenchancy of Beard's 1912 book" with his neutral statements in 1927 and his portrait of judicial review as a defense of property owners in 1930.

Curiously, Hart and Wechsler indict political scientists and historians for alleged former misdeeds, but give no indication of the extent to which they have considered and rejected the more sophisticated arguments, largely devoid of older ideological content, which these professions have developed in recent years. Without some further examination of the historical data, and a closer analysis than is presented by the authorities they cite in support of their argument, it would appear that Hart and Wechsler's largely *ad hominem* argument must remain suspect.

Wechsler has individually given us a closer view of his position⁹¹ in a reply to Learned Hand's *The Bill of Rights*.⁹² Hand has argued that the Constitution merely provides for review of state laws, and that the principle of *expressio unius exclusio alterius* ought to exclude review of Congressional action. The latter, he finds, is based upon necessity, rather than the constitutional document itself.⁹³ Wechsler sharply challenges this, arguing that logic would dictate a complete system of judicial review—that is, if state judges are to rule on the constitutionality of Congressional acts then so must federal judges.⁹⁴ Wechsler's argument is a cogent one, and closely reasoned. However, it is hard to accept

88. HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 14 (1953).

89. *Id.* at 14-15, n.34.

90. *Ibid.*

91. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 2 (1959). "I have not the slightest doubt respecting the legitimacy of judicial review."

92. HAND, *THE BILL OF RIGHTS* (1958).

93. *Id.*, esp. at 5-6.

94. It is also interesting to note that Wechsler does not attempt to distinguish between forms and degrees of finality of judicial review even in this elucidation of his position.

the arguments that a pattern of governmental institutions *must* have been intended merely because such a pattern seems today more logical than its alternatives; there is a threshold of minimum historical evidence which every historically oriented writer must reach.

Indeed, the argument for an illogical, unplanned, emergent, ill-understood concept of judicial review seems much more convincing. There is almost an historical presumption against rigorous, logical consistency in a collective intent in the creation of a full-blown human institution. Agreement on a broad pattern of expected human behavior by a large body of discreet individuals who are torn by a multiplicity of perceptions is, quite simply, a rare phenomenon. More important than this broad overgeneralization is the ample evidence we have buttressing a judgment of lack of agreement on the content of judicial review in congressional debates and polemical discussion.⁹⁵ These theories ranged far afield with multiple interpretations of the phenomena and there are few outbursts in the early period of genuine indignation on the part of proponents of judicial review—the kind of indignation associated with perception of a denial of a consensually and universally accepted institutional expectation. The discussions at the ratifying conventions, even at the Convention itself, the letters of the Framers, court decisions, *Marbury v. Madison* itself, all bear the stamp of tentativeness of statement associated with an emerging rather than an established pattern.

Thus the argument for a full-scale system of judicial review and judicial supremacy seems to rest upon merely excogitated legal arguments rather than on a sound critical historical basis. While such arguments are of great moment and worthy of respect *vis-a-vis* the question of functional desirability and necessity, they cannot serve to dismiss the problem of legitimacy and intent. For those who regard the question of historical intent as a valid one, logical arguments alone cannot suffice.

It is between these two positions that modern scholarship must choose. Simple usurpation can be rejected out of hand. The argument of fullblown creation and legitimacy has not been demolished, but is in any case very shaky. It seems safest to say that judicial review in its present day form was an innovation and a product of an on-going democratic society.

CONCLUSION

The underlying theme uniting these diverse misconceptions is their amazing persistence. Commonly born in strife, they are the product of

95. The demonstration of this is the finest by-product of Warren, *supra* note 71.

an ideological position, a rationalization of existing conditions or past history. As such, their origins are easily understood.

Their persistence, however, goes beyond this function, and the mere avoidance of a commitment has not necessarily led to escape from error. There is little vested interest, for example, in the position that Marshall was responsible for reciprocal tax immunities. Similarly, even so-called "neutrals" on the issue of judicial review are precisely the ones who have misunderstood the position of the primary protagonists. Perhaps this is not actually as surprising as it seems on the surface. One must realize that, in a deeper sense, even one who is not engaged has, in fact, an ideological position and a world view that accompanies it. All our lives we have been not only talking prose without knowing it, but living out a *Weltanschauung* without awareness as well.

The evidence is not as dismaying as it appears at first sight. Scholars have been misled into serious error, and have avoided appreciation of truth even when the facts were readily available; but there have always been scholars of note and of conviction who have retained a respect for facts. It has not been the quality of conviction or enthusiasm that has distinguished between those who could successfully reproduce the past and those who could not. In contradiction to his views on historical method, it is curious to note that Charles Beard retained an ability to distinguish between his wishes with regard to the historical record and the events as they occurred. In fact, the critics of Charles Beard have usually been able to build a case by merely reading his works rather closely. The fact that so violent a critic as Louis Boudin was careful to modify his case to avoid overstatement is instructive, though most readers have avoided noting the qualifications. From even this scattered data, drawn from the very vortex of error, there is substantial evidence for objectivity *malgré lui*. The reign of misconceptions is a discouraging fact, and the temporal durability of such misconceptions is awesome. Yet the record also bears out and inspires respect for the objective scholarship of a select number of first-rate scholars.

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