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## GOVERNMENT BY CLICHÉ: KEYNOTE ADDRESS OF THE EARL F. NELSON LECTURE SERIES

*William H. Rehnquist\**

*Clichés are used in many aspects of our society. Mr. Justice Rehnquist fears that the judiciary, like other institutions, has fallen prey to the use of clichés in place of reasoned analysis and thoughtful discussion. In the following article, Justice Rehnquist takes issue with two popular clichés about the United States Constitution and the Supreme Court. The first is that the United States Constitution is a charter which only guarantees rights to individuals against their government. The second is that the Supreme Court “upholds” the Constitution only when it decides a constitutional issue in favor of an individual and against the government. Justice Rehnquist points out that the original Constitution created a national government with the power to limit both states’ rights and individual freedoms. The Constitution is a reflection of the will of the majority and is subject to change through the amendment process. The role of the Supreme Court is to interpret the Constitution, and in so doing the Court indirectly enforces the will of the majority. Thus, Justice Rehnquist concludes that the Supreme Court “upholds” the Constitution every time it renders a decision in a case which is properly before it.*

Webster’s Third International Dictionary defines “cliché” as “a trite or stereotyped phrase or expression.” A cliché is by no means the equivalent of a false or intentionally misleading statement; indeed it is probably true in the literal sense of the word. The vice of a cliché is not that it is false, but that it seems to make simple that which is actually complicated, and thus avoids the painstaking attention which most sensible discussion of complicated questions entails. Many of you may be familiar with the motto engraved in large letters over the front entrance to the splendid building which houses the Supreme Court of the United States: “Equal Justice Under Law.” But I dare say that only a very few of you are familiar

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\* Associate Justice, Supreme Court of the United States.

with the motto emblazoned in equally large letters over the rear entrance to the same building: "Justice, Guardian of Liberty." Both of these mottos are inspiring, but by themselves neither answers any but the most obvious questions that might arise in the administration of a system of justice such as we have in the United States. Just as the political arena during election years has long been dominated by clichés and mottos, so recently I fear the judicial arena has succumbed to the same temptation to substitute clichés for reasoned analysis and thoughtful discussion.

One is unavoidably tempted to compare the discussion conducted in the Lincoln-Douglas debates in the summer of 1858 regarding the opinion of the Supreme Court of the United States in its *Dred Scott* case,<sup>1</sup> with editorial page discussion and serious commentary on the decisions of the present Court. And yet a reading of these debates gives one the feeling, not merely that he is transported back in the history of the United States to the epoch preceding the Civil War, but that he is virtually transported to another planet. There were thousands of people surrounding the podium—people who had but a rudimentary education by the standards of our present day system—listening to two great political orators debate the merits and the consequences of a single decision of the Supreme Court of the United States (as well as a number of other issues) not on thirty-second or five-minute television "spots," but for a total of several hours at a time.

Perhaps such intensive discussion of issues is the only way to avoid "government by cliché." It is certainly the only way to understand the role of the Supreme Court of the United States in our constitutional system, and it is a way which takes a great deal of patience on the part of the listener. A patient listener possesses some of the same characteristics as one engaged in mining a "placer claim." The latter term was defined by the United States Supreme Court nearly a century ago: "By the term 'placer claim,' as here used, is meant ground within defined boundaries which contains . . . valuable deposits . . . which are in a loose state, and may in most cases be collected by washing . . ." <sup>2</sup> Since this "washing" frequently took place with metal pans, it took a great deal of "panning" of the water in a creek to get a worthwhile haul of gold or silver particles from amidst all the sand or gravel which was collected along with it. But that is precisely the process one must indulge in if he is to understand anything that does not immediately reveal itself to the naked eye, and that has any complexity about it. It is a process which requires patience, just as placer mining does. Unfortunately, the reward of patience in listening to a reasoned effort to describe a system of government is not a panful of gold particles, but at best only a better understanding of that system of government.

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1. *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

2. *United States v. Iron Silver Mining Co.*, 128 U.S. 673, 679 (1888).

I often fear that instead of sitting down and carefully thinking about the role of the national government, the state and local governments, the legislatures, and the judiciary in our society, we succumb to the temptation of accepting the clichés which others assign to these interrelationships. It is my intent to try to “debunk” two popular clichés about the United States Constitution and the Supreme Court of the United States. The first is that the United States Constitution can fairly be described as a charter which guarantees rights to individuals against the government. The second is that the Supreme Court in its decisions “upholds” the Constitution only when it decides a constitutional claim in favor of an individual, and not when it decides such a claim against the individual and in favor of the federal, state, or local government.<sup>3</sup>

Both of the above statements are indeed “clichés”; in each case they substitute not an untruth, but an oversimplified partial truth for a much more complicated whole. The United States Constitution is a charter ratified by the thirteen original colonies which establishes a limited national government and gives to that government certain powers. As such, it is certainly not a “guarantee” of individual liberty. The “Bill of Rights,” which is the term commonly applied to the first eight amendments to the United States Constitution, is a set of guarantees of individual liberties against the United States government. But the Bill of Rights is only a part, albeit an important part, of the Constitution.

The Constitution itself is a scheme for government which contemplates the existence of national, state, and local governments existing side by side, each independent to a certain degree from the other, and each likewise limited by the authority confided to or reserved to the other. Thus it simply is not accurate to equate the Constitution with the Bill of Rights, however important a component part of the former the latter may be. The United States Constitution called into being a system of government which was to have direct authority over the individual citizen. Many today may feel that the legislative and executive branches of the national government, who have the responsibility for enacting laws, have regulated too much individual conduct which they would prefer to remain unregulated. But one of the prices that each of us pays for a Constitution establishing a national government is that the lawmaking branches of that government will most assuredly enact some laws with which each of us, as individuals, would disagree.

In the best of all possible worlds, we should neither want nor need a government, either at the local, state, or federal level. Each of us would obey the golden rule which teaches that we should do unto others as we would have others do unto ourselves. There would be no occasion to call into being the coercive instrument which by definition any government is. Yet we all know that there is scarcely a corner of the world which

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3. The danger of ascribing too quickly to another cliché was addressed in Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976).

does not live under a government of some sort, whether that government be tribal in character, a dictatorship, a democracy, or perhaps a combination of some elements of all three.

In one of the most perceptive of the *Federalist Papers*, No. 51, James Madison discussed the principle of separation of powers as it was embodied in the Constitution drafted in Philadelphia in 1787. In the course of his skeptical, if not cynical, observations about the people who would exercise the power necessary to any government, he said:

It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.<sup>4</sup>

As Madison realized, and as people have come to realize throughout history, men are not angels, and therefore some form of government is necessary.

Perhaps no one stated the alternative better than Learned Hand in his famous essay, *The Spirit of Liberty*:

And what is this liberty which must lie in the hearts of men and women? It is not the ruthless, the unbridled will; it is not freedom to do as one likes. That is the denial of liberty, and leads straight to its overthrow. A society in which men recognize no check upon their freedom soon becomes a society where freedom is a possession of only a savage few; as we have learned to our sorrow.<sup>5</sup>

Learned Hand, of course, in referring to what we have "learned to our sorrow," was speaking of Hitler's army's aggressive invasion of other countries in Europe which brought on World War II, but that was not the first historic cataclysm which taught the average man and woman that it is better to endure the coercive force wielded by a government in which they have some say, rather than risk the anarchy in which neither life, liberty, nor property are safe from the "savage few." The whole movement from petty warring tyrants of the Dark Ages toward the nation-states of England and Western Europe is testimony to the fact that, so long as men are not angels, government is a necessary restriction on unbridled individual freedom.

This recognition can stem from entirely divergent sources, as is amply

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4. THE FEDERALIST No. 51 (J. Madison) at 323 (Henry Cabot Lodge ed. 1886).

5. L. HAND, THE SPIRIT OF LIBERTY 190 (3d ed. 1960).

demonstrated by the writings of some of the great political philosophers. Thomas Hobbes, who wrote in the sixteenth century, and John Locke, who wrote in the eighteenth century, were diametrically opposed in their view of what life would be like in what each of them referred to as "the state of nature"—by which they meant the absence of any organized government. For Locke, every person had a right to liberty and property, quite apart from any constitutional declarations by reason of what Locke called the "law of nature." Government was a necessary evil, in his view, justified only because it could protect these rights and only so long as it did so.<sup>6</sup>

To Thomas Hobbes, on the other hand, who was much more of a realist, life in the so-called state of nature was, in his famous phrase, "nasty, brutish, and short."<sup>7</sup> It was to escape this world of violence, insecurity, and the like, that men formed governments, and they were better off for having formed them even though the governments themselves proved to be tyrannical.<sup>8</sup>

From a historical point of view, these philosophical speculations probably do not square with reality. It is doubtful that in most nations original governments were "formed" or "created" as a matter of conscious effort on the part of all the citizenry; it seems more likely that they evolved out of some more chaotic form of existence, whatever it may have been. Today in the United States, of course, we are not writing on a clean slate. We have a national government consisting of three coordinate branches—the legislative, the executive, and the judicial—and fifty state governments, each with its own constitution and its own organs of government. No one who has lived in any populated area of this country for even a day needs to be told that we have government at many levels, which enforces many laws and prohibits many kinds of conduct on the part of those who are subject to its authority.

One of the great novelties about the United States Constitution is that in 1787, unlike 1980, the framers *were* writing on a clean slate; they had the philosophical discussions of Locke, Hobbes, Montesquieu, and others to instruct them, but apparently this was the first time that a group of citizen-statesmen sat down and actually planned for a real-life government. They attempted to distribute authority between the newly created national government and the state governments already in existence, and between each of these and the individual citizen. As a result, we have a Constitution binding us together as one nation, to which twenty-six amendments have been added over the course of nearly two centuries. One of the great questions that had to be answered by the framers of our

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6. See J. LOCKE, *Are Men Bound by the Law of Nature? Yes*, in *ESSAYS ON THE LAW OF NATURE* 181 (W. vonLeyden ed. 1954).

7. T. HOBBS, *LEVIATHAN OR THE MATTER, FORM AND POWER OF A COMMONWEALTH, ECCLESIASTICAL AND CIVIL* 105 (H. Schneider ed. 1958).

8. *Id.*

Constitution, and a question which is bound to recur in any sort of speculation in the field of political philosophy, is how should the policies of a government which has the authority to enact laws regulating the conduct of its citizens—and a similar authority to refuse to enact proposed laws—be decided upon?

Historically, those leaders of our nation who have spoken to the subject have come down all but unanimously on the side of what may loosely be called "majority rule." In his Gettysburg Address, Lincoln referred to it as "government of the people, by the people, and for the people." Madison in the *Federalist Paper No. 51* stated that "[a] dependence on the people is, no doubt, the primary control on the government."<sup>9</sup> The noted American historian Samuel Eliot Morrison, in describing the Constitution, remarked upon the fact that the federal government is supreme and sovereign within its sphere, and then went on to say that "both federal and state governments rest on the same broad bottom of popular sovereignty."<sup>10</sup>

This notion is borne out by the Preamble to the United States Constitution, which provides:

We the People of the United States, in order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

This theme runs so constantly through the utterances of the great statesmen and political thinkers which this nation has produced, that I think it must be taken as a first premise in any attempt to define the source of authority exercised by a government or to define any theory of political obligation which gives moral sanction to the actions of a government based on the rule of the majority. Of course, the recognition of this truth is only a starting point in any such inquiry, since there remains another vital question: What is a government based on the views of the majority? Is it sufficient to have a plebiscite every four years reaffirming the mandate of an executive whose power is otherwise unchecked, or must there be other "checks and balances" which permit the decision of the majority not only to be a reasonably well-informed one, but to take into account various possible compromise solutions to problems which may be possible only in a system where power is dispersed? Since it is easier to start covering a broad canvas such as this by saying what a chosen phrase does *not* mean than by trying to define what it *does* mean, perhaps it will be useful to clear up some confusion which seems to inhere in the notion of "majority rule."

I think that confusion was accelerated, if not generated for the first

9. See THE FEDERALIST No. 51, *supra* note 4, at 323.

10. S. MORRISON, OXFORD HISTORY OF THE AMERICAN PEOPLE 312 (1965).

time, by the lexicon of propaganda generated by the Second World War. So long as it was France, Great Britain, and its Commonwealth allies who were fighting Germany, Italy, and Japan, it was at least plausible to characterize the war as one between the "free world" and the "dictatorships." I say plausible, for there were some flaws in the claims of the allies to represent the "Free World." In this country during that war many people were denied the right to vote solely on account of their race, and the same was true in many of the overseas possessions of France and Great Britain. At least the claim was a plausible one when stacked up against the methods by which governments came to power in Germany, Italy, and Japan. When Russia became a partner of the allies by virtue of Hitler's invasion in June of 1941, however, the claim was distinctly less plausible. Even if one were to substitute the word "democracy" for the words "the free world," it was very difficult for most people to see any significant distinction between the popular participation which went into the choosing of the Russian leadership and the degree of popular participation which took place in Germany, Italy, or Japan.

On paper one would have said that the nations most devoted to "majority rule," the ones which were the greatest devotees of democracy, were Germany and Russia. At regular intervals, self-styled elections were held in each country, and Hitler and Stalin, respectively, were returned to office by margins of nearly 100 to 1. Of course the only choice offered the voters was a "yes" or "no" as to whether these two paradigms of democracy should be retained in office; there was no free press, and no feeling of freedom from the long arm of the secret police even in the polling booth. It is fair, then, to say that one thing we do not mean by "majority rule" or "democracy" or "popular sovereignty" is a government which in fact exercises dictatorial powers, and is maintained in office without any organized political opposition or any freedom to criticize its acts. Majority rule or, as Lincoln put it, "government of the people, by the people, and for the people," means more than just a plebiscite in which a voter is given the right on a particular day to go to a polling place and check either a "yes" box or a "no" box as to whether the current political leader should be retained in office. For popular sovereignty or majority rule to have substance as well as form, it must have an institutional infrastructure which permits public political opposition and frank and spirited criticisms of the policies followed by the government then in power.

We may likewise paint out another small corner of the canvas which we are trying to bring to life when we say that "government by the people" does not necessarily include "freedom" to do as one chooses. As suggested in the earlier quotation from Learned Hand's book, *The Spirit of Liberty*, "[a] society in which men recognize no check upon their freedom soon becomes a society where freedom is a possession of only a savage few."<sup>11</sup>

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11. L. HAND, *supra* note 5, at 190.



Understandably, this was less apparent in the United States two centuries ago, at the time of Shays' Rebellion in western Massachusetts shortly before the Constitution was adopted. Luke Day, a man whose fame never reached the level of Abraham Lincoln, Learned Hand, James Madison, or others who spoke on issues of liberty, majority rule, and government, was nonetheless the commander of 400 men in that rebellion which took place in the Connecticut River Valley area of the State of Massachusetts. While drilling his men on the town common, he said: "My boys, you are going to fight for liberty. If you wish to know what liberty is, I will tell you. It is for every man to do what he pleases . . ." <sup>12</sup> It is probably not entirely coincidental that the United States Constitution was framed and ratified so shortly after Shays' Rebellion; and most assuredly Luke Day's definition of liberty is one that is simply incompatible with the idea of any organized government having any authority to regulate the conduct of its citizens. That is undoubtedly why those who have thought seriously about the subject, and attempted to describe the type of government which the United States Constitution established, have largely tended to agree with Justice Benjamin Cardozo's characterization of it as "a scheme of ordered liberty."<sup>13</sup> Not order at the expense of liberty, and not liberty at the expense of order, but as large a measure of each as may be had without sacrificing the other, with that measure often being the subject of heated disagreement among well-informed and well-intentioned participants in the governmental process.

Just as the public perception of the terms "freedom" and "democracy" tended to become somewhat distorted in the caldron of the Second World War—a war fought with words as well as weapons—the public perception of the nature and function of the United States Constitution as a whole has tended to become distorted by attention paid to the Bill of Rights and the Civil War Amendments. The Constitution is often referred to as a "charter of liberty" or a "bulwark of individual rights against the state." The original Constitution was neither of these things; it was far more like a set of articles of incorporation for a government not yet in existence. The document which emerged from the Constitutional Convention convened in Philadelphia in 1787 was viewed by many as a conservative reaction to the revolution of the colonies against England. Patrick Henry, for example, the Virginia firebrand whose famous orations in the House of Burgesses helped to spur the Revolution, vigorously fought ratification of the United States Constitution in the Virginia Convention called for that purpose.<sup>14</sup>

Because of these sentiments, the supporters of the Constitution were able to secure its ratification by the necessary number of states only by making at least a moral commitment that it should at once be amended

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12. M. STEARNS, *SHAYS' REBELLION* 45 (1968).

13. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

14. R. BEEMAN, *PATRICK HENRY, A BIOGRAPHY* 135-63 (1974).

to provide a Bill of Rights placing specific limitations on the national government. Such a Bill of Rights, consisting of the first eight amendments to the Constitution, was proposed by the first Congress, and promptly ratified.<sup>15</sup> Because the process of amendment is not an easy one, only one of the two methods prescribed in the Constitution has been employed to promulgate those amendments which have in fact have been adopted. Under that method two-thirds of each House of Congress must first approve the amendment, and then three-quarters of the states must approve it.<sup>16</sup> Nonetheless, the fact that there have been twenty-six amendments ratified indicates that when the Nation sees the need for a change, it is willing to alter the fundamental charter of government. The Civil War Amendments were passed to eradicate the evils of slavery and in hopes of improving the condition of the newly freed slaves. The eleventh amendment was adopted because Congress felt that the Supreme Court had infringed on the sovereignty of the states by holding that they were suable in the federal courts. The sixteenth amendment gave Congress the power to levy a graduated income tax after the Supreme Court held that Congress, as the Constitution then stood, did not have such a power. These are but examples of the significant changes which have been able to pass muster under the exacting process provided in the Constitution for its amendment.

Thus, while it is perfectly accurate to refer to the Bill of Rights—the first eight amendments to the Constitution—as a bulwark of individual freedom against government tyranny, it is a gross mischaracterization to describe the entire Constitution in these terms. The original Constitution was adopted not to enshrine *states'* rights or to guarantee *individual* freedom, but to create a limited *national* government which was empowered to *curtail* both *states'* rights and *individual* freedom. Much as the centralization of power and development of nation-states in England, France, and other European countries during the last several centuries, the result may have benefited many individual citizens by ensuring and providing protection against abuse of private power, but it did not protect these citizens against the authority of the national government. It was for that purpose that the Bill of Rights was adopted.

To be sure, there have been occasions since the ratification of the Constitution when not merely isolated individuals, but entire sections of the country defied the authority of the national government. The first of these to occur was the so-called Whiskey Rebellion in western Pennsylvania in 1794. Those frontiersmen who lived on the western side of the Appalachian Mountains in the first decade after the adoption of the Constitution did not take kindly to the levy of a federal excise tax upon the

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15. The first eight amendments to the Constitution were ratified in 1791.

16. U.S. CONST. art. V. The second method by which the Constitution may be amended is through a Constitutional Convention upon the application of two-thirds of the state legislatures.

whiskey which they distilled from home-grown grain.<sup>17</sup> Their reaction provoked not only a military response from the newly formed federal government, but also a philosophical commentary from Alexander Hamilton, who was then Secretary of War as well as of the Treasury. Hamilton, according to one of his principal biographers, was nothing if not eager to test the authority of the newly formed national government against that of the State of Pennsylvania, and under the common practice of those days he used the pseudonym "Tully" to address four essays "to the people of the United States" in which he rhetorically asked: "Shall the majority govern or be governed? Shall the nation rule or be ruled? Shall the general will prevail, or the will of a faction? Shall there be government or no government?"<sup>18</sup> It might well be thought that allowing the Whiskey Rebellion to occasion such philosophical speculations was akin to breaking a butterfly on the wheel, but in the abstract the questions have always been with us, and will necessarily be with us in the future.

The Hartford Convention in 1814, at which the New England states brooded about the possibility of secession because of their dissatisfaction with the embargo imposed in connection with the War of 1812,<sup>19</sup> and the controversy over nullification in South Carolina which reached its climax in 1832,<sup>20</sup> were other instances in which different sections of the country sought to challenge the authority of the national government because of a particular policy which they disliked. But the final answer to the question of states' rights as opposed to the authority of the national government was solved, not by philosophers or debaters, but by the brave soldiers on both sides who fought the Civil War.

Throughout this strain of American political thought in which there has been such a general consensus for the notion of majority rule, there runs side by side another strain of thought that somehow the federal courts created by the United States Constitution, and especially the Supreme Court of the United States, is an exception to this principle. In a certain sense it is, but in a larger sense it is not.

17. Act of March 3, 1791, ch. 15, 1 Stat. 199.

18. N. SCHACHNER, *ALEXANDER HAMILTON* 335 (1946).

19. The Convention was called by the Massachusetts legislature and met in December 1814, in Hartford, Connecticut, with the avowed purpose of severing the union. Moderates gained control of the proceedings, however, and the Convention ended after proposing a few amendments to the Constitution aimed at curbing the influence of the State of Virginia in the national government. Even these proposals were dropped after the signing of the Treaty of Ghent on Christmas Eve 1814. See R. HOFSTADER, W. MILLER & D. AARON, *THE STRUCTURE OF AMERICAN HISTORY* 93-94 (2d ed. 1973).

20. The nullification crisis was precipitated by South Carolina's decision in November 1832, to declare two congressional tariff acts void and to prohibit their collection within its borders. President Andrew Jackson responded with a threat of force and by signing a new, less onerous, tariff law. This combination averted a violent confrontation over the issue and South Carolina withdrew its nullification of the federal tariffs. See R. HOFSTADER, W. MILLER & D. AARON, *supra* note 19, at 111-12.

First, let us look at the doctrine of judicial review as explained by Chief Justice Marshall for the Supreme Court in *Marbury v. Madison*,<sup>21</sup> decided in February 1803. The case is traditionally associated with the proposition that the federal courts, and in particular the Supreme Court of the United States, have the final say as to whether laws enacted by Congress, acts of the President, or laws enacted by state legislatures violate the United States Constitution. It does indeed say that, and since the Supreme Court of the United States then consisted of six members, and today consists of nine members, any doctrine which confides in that small a group of people the authority to set at nought the enacted will, in the form of laws, of the elected representatives of a constituency of more than 200 million people, has a distinct anti-majoritarian strain to it. But let us look at Marshall's justification for the doctrine as contained in the opinion of *Marbury v. Madison*. Speaking for the Court in that case, he said:

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.<sup>22</sup>

One may readily see from these quotations that Chief Justice Marshall's understanding of the Constitution, and the basis for its authority, is wholly consistent with Abraham Lincoln's notion of a "government of the people, by the people, and for the people." The Bill of Rights, and other similar provisions contained in the Constitution and its amendments, simply

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21. 5 U.S. (1 Cranch) 137 (1803).

22. *Id.* at 176-77.

represent decisions on the part of the extraordinary majority required to amend the United States Constitution to remove from the authority of temporary majorities who may be in control of agencies of government—whether those agencies be legislatures, presidents, governors, or courts—the authority to take action forbidden by the amendment in question.<sup>23</sup>

All of us are familiar with accounts of people in various parts of the country who circulate petitions in shopping center malls, entrances to stadiums, and the like, which simply recite the Declaration of Independence or the “Bill of Rights,” and find that the majority of people they approach refuse to sign the petition. I suppose all of us at one time or another have our fill of petition circulators, and quite independent of the content of the petition simply feel we don’t want to be bothered on a nice sunny afternoon with trying to digest some language which may or may not be important and with which we may or may not agree. But I would like to share with you this recent account from *Time* magazine.

**Taking Liberty:** William Forstchen, a teacher at the Oak Grove-Colburn School in Vassalboro, Me., wanted to give his eleventh- and twelfth-grade students a lesson about their democratic heritage. So he drew up petitions containing a text of the Bill of Rights with a preamble asking that the “crime coddling” Ten Amendments be repealed. The high school students circulated the petitions door to door, at shopping centers, even near the state capitol building in Augusta.

Some civics lesson. More than 70% of the people solicited—many of whom read through the whole petition—agreed that the Bill of Rights should be repealed and signed their names. One lady gushed: “God bless you for what you’re doing.” In desperation, Forstchen resorted to censorship. He tore up the petitions and burned them in his fireplace.<sup>24</sup>

There are at least two lessons to be drawn from this account. The first is that the Bill of Rights—the “crime coddling” amendments described in the magazine article—may be doing a very effective job as intended by those who framed and adopted the amendments in preventing individuals from being denied the protections which they extend in criminal cases. That is obviously the lesson which the high school civics teacher drew, and the conclusion of the story makes it obvious that his reaction was one of total disappointment to the student experience—a reaction which one suspects the author of the article shares.

There is also another lesson to be drawn from this account. As you will note, it states that “more than 70% of the people solicited—many of whom read through the whole petition—agreed that the Bill of Rights should be repealed and signed their names.” Under a system based on

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23. For a further discussion of this concept, see Rehnquist, *supra* note 3, at 696-97.

24. *TIME*, Dec. 17, 1979, at 35.

majority rule, and not on some more elitist or philosophical notion of "natural law" or "government by the judiciary," if the 70% majority in this part of Maine near the state capitol in Augusta accurately reflected the views of the nation as a whole, and felt sufficiently strongly about it, they presumably would be able to either petition Congress or elect members of Congress and Senators committed to the cause of repealing that part of the first ten amendments which guarantee certain rights to accused criminals. There is nothing in John Marshall's justification for judicial review in *Marbury v. Madison*,<sup>25</sup> nor in the philosophy which says that the ultimate sanction of any government is the approval of the majority, which would make this an illegal, an immoral, or an improper act. It might well be an unwise one, but in a system based on "government of the people, by the people, and for the people," there is no appeal to any higher forum or court than a forum which properly and accurately reflects their will.

Thus, the justification for judicial review is in no sense anti-majoritarian, even though it permits a small appointive body of judges to override the will of the elected representatives of the people of a nation, of a state, or of a local government. The difficulties arise when the phrases and provisions of the Constitution are so broad and so capable of differing interpretation that few mortals who occupy the position of judges can be wholly free of the temptation to read into such a document their own personal prejudices and predilections. But this is no new phenomenon. It is reflected in the different approach to the problems of their day between the Marshall Court and the Taney Court; it is reflected in the difference between the approach of the Supreme Court to constitutional interpretation when Charles Evans Hughes was Chief Justice compared to that which the Court took after he had retired; and it is reflected in more than one way between the approach taken by the Supreme Court when Earl Warren was Chief Justice and the constitutional interpretation adopted by the present Court presided over by Chief Justice Warren Burger. Furthermore, I am willing to predict it will be reflected, generation after generation, as long as the United States Constitution is capable of being read differently by reasonable minds of the Justices of the Supreme Court who must construe it. But so long as they follow in the tradition of Chief Justice Marshall's opinion in *Marbury v. Madison*, they will not be acting on the assumption that they, as judges, are endowed with more than their ordinary share of mortal wisdom about the great principles of government or how a nation such as ours should be governed.

In Marshall's view, the Constitution, including the Bill of Rights guaranteeing individual freedom against governmental action, derives its authority not from any principles of natural law, or any notion that judges know better than ordinary mortals what government should or should not

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25. See text accompanying notes 21 & 22 *supra*.

be allowed to do in the way of regulating its citizens, but instead from the idea that the Constitution was ratified by the representatives of the people of the United States. In effect John Marshall's defense of the doctrine of judicial review—that is, the doctrine that the courts have the authority, in a case properly before them, to say that either a state or the national government has exceeded the bounds set for it in the Constitution—is itself a ringing endorsement of the notion of majority rule. *Marbury v. Madison* simply recognizes the fact that the “people” or the “majority” who ratify a fundamental charter may choose not to put all their eggs in one basket. They may delegate certain powers to Congress, certain powers to the courts, other powers to the President, and reserve still other powers to the states or to themselves.

Let me now conclude by returning to the task which I originally set for myself, that of “debunking” two popular clichés about the United States Constitution and the Supreme Court of the United States. The Constitution of the United States, as drafted and ratified in order to bring the United States of America into being, along with the twenty-six amendments which have since been added to it, are far more than guarantees of certain individual rights against abridgment by local, state, or national government. The original Constitution contained several such provisions limiting the authority of the states, and the addition of amendments, particularly the Bill of Rights and the Civil War Amendments, *do* contain important guarantees of individual rights against action by federal and state governments. But the Constitution as a whole is a charter, adopted originally by the people of the thirteen colonies, which created a national government and empowered it to *limit* not only the authority of states but the liberties of individuals. When amendments guaranteeing individual rights against governmental abridgment have been added to the Constitution, they have been added by the process of amendment which is an exercise in a particular form of majority rule prescribed by the Constitution itself. They represent a determination by Congress and by the ratifying states that certain individual rights should not be impaired by the action of temporary majorities in control of the policy-making branches of the state governments or the national government. The ultimate sanction of these amendments, just as that of the Constitution itself, is in the will of the people.

The Supreme Court of the United States, in deciding a case in which individual rights are pitted against the claim of the national government or of state governments to regulate individual conduct, “upholds” the Constitution by simply holding the balance true to the best of its ability. To suggest that it should “tilt” that balance in favor of individual rights, or in favor of governmental authority, breaches faith with the assumptions upon which the Constitution was adopted and upon which the Supreme Court has to the best of its ability operated for nearly two centuries. It is no more accurate to say of our Court that it is the ultimate guardian of

individual rights than it is to say that it is the ultimate guardian of national authority or of states' rights. Its function is to decide among these conflicting claims as truly and accurately as it can in accordance with a fundamental charter and later amendments which have been adopted by the source of *all governmental authority*—the people of this country.