I

"A GOVERNMENT by laws and not by men": This ancient legal maxim can be traced as far back as Aristotle, who argued in the Politics that "it is more proper that the law should govern than any of its citizens." To secure ordered liberty, men have fought under the banner of Rule of Law down through the ages. It was in the name of Rule of Law that American revolutionaries protested against the pretended legislation of British authorities, pronounced their laws null and void, and took up arms in 1776. They were neither the first nor the last to pledge their lives, their fortunes, and their sacred honor upon this fundamental principle of jurisprudence.

But with the rise of modern democracy in the West, our understanding of Rule of Law has atrophied. The triumph of Rule of Law in the United States, climaxed by the establishment of a written Constitution, declared to be the supreme law of the land, was at the same time the triumph of a countervailing principle, the principle of popular sovereignty. We too often forget that the problem of divided sovereignty in American politics is not confined to the principle of federalism and the division of authority between the several states and the national government. It includes also the tension and conflict between the sovereignty of the people and the sovereignty of the law. This conflict, which is inherent in any constitutional democracy, has in turn produced widespread confusion over the difference—and it is a crucial one—between Rule of Law and Rule of the Law. As one student has observed, in a very profound but neglected study of this challenging problem, Rule of the Law amounts to little more than rule of men. Rule of Law, explains Friedrich Hayek:

... is a doctrine concerning what the law ought to be, concerning the general attributes that particular laws should possess. This is important because today the conception of rule of law is sometimes confused with the requirement of mere legality in all government action. The rule of law, of course, presupposes complete legality; but this is not enough: if a law gave the government unlimited power to act as it pleased, all its actions would be legal, but it would certainly not be under the rule of law. The rule of law, therefore, is also more than constitutionalism; it requires that all laws conform to certain principles.

In other words, Rule of Law is an ideal to which a constitution and the laws and judicial decisions handed down under its authority should conform. Its attainment is not dependent upon the democratic method; for a small handful of unelected officials is theoretically capable of establishing and maintaining a legal system which adheres to this ideal. Of course, we in America have adopted the democratic method as that best suited for the attainment of this goal. Still, the method does not guarantee
the desired results. What matters is not simply who made the law, but what it is.

Rule of Law, then, may be said to exist not because a popular assembly has enacted legislation, but because the laws which govern a particular society possess certain characteristics which allow men to exercise liberty, enjoy the rewards of their labor, use their knowledge, pursue virtue, communicate their thoughts, and live under justice. Thus, Rule of Law may be said to exist not because a popular assembly has enacted legislation, but because the laws which govern a particular society possess certain characteristics which allow men to exercise liberty, enjoy the rewards of their labor, use their knowledge, pursue virtue, communicate their thoughts, and live under justice. Thus, Rule of Law means that all laws should be prospective rather than retrospective; that they should be known, general, certain, and equal in their content and applicability, if only so men may be thinking and valuing persons who can avoid coercion by anticipating the consequences of their actions. If Rule of Law is to prevail in our constitutional democracy, therefore, it would seem to follow that the laws of Congress and the decisions of our courts should conform to certain principles, not all of which are spelled out in the fundamental law; otherwise we are forced back to the untenable position that the Constitution is not a device for prescribing rules of political and legal behavior to limit the coercive powers of the state, but that it is a mere euphemism for arbitrary and unlimited government by men who are free to act without restraint. "A constitution," as one writer puts it, "is a government's better self, able to rebuke and restrain the baser self when it starts off on a vagary. If the mass of every electorate were wholly right at every period, constitutions would be only curious encumbrances."

In the quest for Rule of Law, and well before the appearance of the written constitutions of modern times, judges have traditionally played a unique and prominent role. To their care men have customarily entrusted the awful responsibility of preserving Rule of Law. The lawgiver creates the law, and hopefully the laws that he creates will embody the principles of certainty, generality, and equality; but the endeavor to establish Rule of Law does not stop here, for once a law has been enacted, it must thereafter be enforced and applied to particular circumstances. Enter now the judges, who must work with the laws they have received from the lawgivers. Through their interpretation and application of the law, the law-making process is thereby completed, and Rule of Law maintained. Like the law-giver, however, the judge must strive toward certainty, generality, and equality in the application of the law. This can be achieved, and has been achieved, through self-imposed rules of interpretation, such as stare decisis, which are designed to promote the certainty, generality, and equality so essential to Rule of Law. In many constitutional systems, or where in the distant past the principles of natural law were regarded as a standard of legitimacy, the legal process has frequently been modified: before moving to the stage of application, the judges first inquire through interpretation whether the law they have received conforms to the principles of Rule of Law. If it does not, they refuse to consider the law further and reject it as null and void ab initio. Their only other alternative, if Rule of Law is to be achieved, is to remodel and refine the law, or within limits fill in the gaps, through the process of interpolation and application until it has acquired the desired characteristics. This is precisely what has occurred in common law courts for centuries, although outright rejection of the law as received from the lawgiver has also been practiced in America under the doctrine of judicial review. In any event, the point to be remembered is that Rule of Law is more than simply the making or creation of law; its application must also be taken into account, if certainly, generality, and equality are to prevail over the long run. For this reason, a judiciary, the guard-
ian of the law, is essential to Rule of Law. Without trained judges versed in the philosophy and science of jurisprudence, Rule of Law is possible, but unlikely. But more importantly, the judges must follow basic rules of interpretation if through the application and enforcement of law certainty, generality, and equality are to be obtained.

The inability or failure of the judges to achieve these goals is the complaint of men since the dawn of civilization, of men who, consciously or unconsciously, look for Rule of Law. Such complaints have been expressed in a variety of forms, but they usually have a common basis. Certainty in the law, for example, is undermined when the judges repeatedly abandon established precedents or suddenly reverse themselves. Thus the ancient Code of Hammurabi, written in 2100 B.C., declared that “If a judge has tried a suit, given a decision, caused a sealed tablet to be executed, and thereafter varies his judgment ... then they shall remove him from his place on the bench of judges in the assembly...”

Perhaps the most frequently voiced criticism in modern times, however, has been the charge that the judge has exceeded the powers of his office by straying into the domain of legislative authority. Francis Bacon admonished the judges of England in 1625 “to remember that their office is jus dicere, and not jus dare—to interpret law, and not to make law, or give law.” Some thirty years ago, Franklin Delano Roosevelt, struggling desperately to rescue his infamous court-packing scheme, censured the Federal judiciary on similar grounds, arguing that the Supreme Court “has been acting not as a judicial body, but as a policy-making body ... reading into the Constitution words and implications which are not there, and which never were intended to be there.” These verbal assaults bear a striking resemblance to some of the criticisms of the Supreme Court that are currently bandied about in legislative halls, newspapers, law journals, and even within the hallowed walls of the Court itself. Accusations hurled from the High Bench against fellow justices—and nearly every member of the Court is engaged in this practice—of usurpation of power, of misreading statutes, and distortion of the intent of the Constitution are familiar, nowadays, to those courageous seekers of the law who, with an ennuied sense of consternation, continue to plod through the bewildering array of conflicting opinions of the Warren Court. “The Court’s elaboration of its new constitutional doctrine indicates how far—and how unwisely—it has strayed from the appropriate bounds of its authority,” reads one representative sampling of the dissent. “It is difficult to imagine a more intolerable and inappropriate interference with the independent legislatures of the states ... [W]hen, in the name of constitutional interpretation, the Court adds something to the Constitution that was deliberately excluded from it, the Court in reality substitutes its view of what should be so for the amending process.”

To the student of Constitutional history, unsparing criticism of the Supreme Court’s interpretation of the Constitution would appear to be endemic to the American political system. What I am suggesting, however, is that the kind of criticism we have long been accustomed to hearing in America has been broached throughout history. Most of the difficulties of legal interpretation experienced by the Supreme judiciary are not peculiar to our particular court, but to courts in general. That is, most courts have usually been criticized for committing the same errors, errors which weaken and destroy Rule of Law. In ancient law, in English law, and in American law, judges have been attacked for making the law
rather than interpreting it; for allowing their personal prejudices to intrude upon their decisions; for disregarding precedent or the intent of the law; for poor reasoning and a lack of legal knowledge; for allowing uncertainty and confusion to creep into the law; for exceeding their jurisdiction; for yielding to threats and political pressure; and for lack of independence and courage. The persistence and uniformity of these long standing criticisms attest to the durability of the tradition of Rule of Law. The standards of judicial craftsmanship and the attributes one normally looks for in a court of law have not changed, in this respect, over the past two thousand years.

It is important to bear in mind, however, that a desire for Rule of Law is not invariably the motivating force behind an accusation that the judges have “wrongfully usurped legislative authority,” and are “making public policy.” To the advocate of legislative supremacy, judicial tampering with statutes is wholly improper. He can see no justification for liberal construction of the law, which may be necessary in order to get it in line with the principles of Rule of Law; nor can he accept the judges’ refusal to apply the law under the doctrine of judicial review. The answer to the charge of judicial malfeasance under these circumstances is, of course, rather obvious: the legislature has no authority to enact laws which violate Rule of Law, and it cannot therefore complain of losing authority which it did not originally possess. Conversely, judicial remodeling or nullification of the law may not be for the purpose of achieving Rule of Law, but a particular ideology, which may possibly be inconsistent with Rule of Law. This type of judicial tinkering with the law is clearly a usurpation of legislative authority.

In sum, the statutes of a legislative assembly, and the decisions of a lower court, may be modified or overturned by the Supreme Court for different reasons. Whether the Court has abused the powers of its office depends upon the circumstances of the case; and Rule of Law is the major, if not the only, objective standard by which to judge the lawfulness of the Court’s actions. Parenthetically, we should also keep sight of the fact that under the American constitutional system, judicial usurpation of authority can also include usurpation of state authority. Likewise, state governments are as capable as Congress of enacting laws which conflict with Rule of Law. In any event, Supreme Court review or modification of statutes and lower decisions in our system should have a two-fold purpose: to maintain not only Rule of Law, but also Rule of the Supreme Law, the Constitution. All of this is a way of saying that judicial activism, in the sense I have described here—that is, for the purpose of preserving the supremacy of law and of the Constitution—is not unconstitutional per se. The Constitution does not forbid the Court to exercise judicial review or to construe the Constitution and statutes broadly. As the Framers perhaps realized, these methods are at times essential for the attainment of Rule of Law and protection of the Constitution. Whether they have been used properly depends upon the results of the case at hand, or the legal end achieved.

There is yet another type of judicial review, which might better be termed negative judicial review. This is where the Court interprets the law and finds it clearly constitutional, or where it refuses to declare the law unconstitutional and blindly accepts it without questioning its validity. Negative judicial review of the latter sort often occurs where the Court has substituted legislative supremacy or an ideological principle, such as libertarianism, for Rule of Law or the Supremacy of the Constitution. Accepting Chief Justice Mar-
shall's reasoning in *Marbury v. Madison* that the Supreme Court has a constitutional duty to protect the supremacy of the Constitution, it is safe to conclude that "the only proper judgment that may lead to an abstention from decision is that the Constitution has committed the determination of the issue to another agency of government than the courts." Whether negative judicial review, which serves as a major expedient for recourse to judicial self-restraint, is lawful depends again on the purposes for which it is used. Judicial self-restraint is not unconstitutional *per se*. If the Court stands idly by while Congress enacts laws clearly in violation of the Constitution, however, it would appear that such self-restraint is an abuse of the powers of the office.

II

I return now to my original proposition that the rise of modern democracy has muddled our understanding of Rule of Law by introducing legislative supremacy and popular sovereignty as new and competing objectives of government. Let me append to this proposition an additional one: that the rise of modern democracy has also confused our understanding of the Constitution and the role of the Supreme Court in the American political system. Much of the current controversy over methods and ends of constitutional law can be traced directly to the influential writings of the progressivist scholars of the late nineteenth and early twentieth centuries, and to the legal realists who later followed in their footsteps. Both schools of thought impugned traditional rules of interpretation, and in so doing laid the groundwork for future judicial innovations and the present confusion surrounding the Supreme Court's function. Chief among the progressivist political scientists was J. Allen Smith, who with others, launched a frontal assault against the Constitution and the doctrine of judicial review. By imposing upon the American political system a preconceived ideal of absolutist democracy, Smith was able to argue convincingly that the Supreme Court is an undemocratic body; and that it employs the undemocratic method of judicial review to uphold through deception a reactionary Constitution that has outlived its time.

In American legalistic literature relating to the power of the judiciary [he wrote], we have a striking illustration of the way in which a doctrine that affirms the supremacy of the people has been employed to deprive them of effective political control . . . It is on the assumption that public officials are agents of the people and bound by their will as expressed in the Constitution, that the Courts have come to rest their claim to the veto power. What the public do not recognize and, indeed, are not expected to see is that the voice of a politically independent Court is much less likely to be the voice of the people than is that of the more dependent legislative body.

Of course, it is impossible to determine with exact precision how much of an impact these progressivist attacks had on the Court or the practice of judicial review. They did not produce a constitutional convention to democratize the fundamental law, or cause the Court to abandon the doctrine of judicial review. They did, however, arm the opponents of the Court, especially in the twenties and thirties, with the necessary moral ammunition to put the Court and its apologists on the defensive, and to implant in the minds of some judges a sense of guilt, or a feeling that it was improper for the Supreme Court to interfere with the public policy of the popular branches of government. The progressivists probably deserve more credit
than they have received for the constitutional revolution of 1937, which led to the near total abandonment, through negative judicial review, of economic due process and limitations on Congress' power over commerce and taxation. Despite all the agitation today protesting judicial activism, it is nevertheless the case that the Supreme Court has largely withdrawn from many fields of legislative concern directly affecting the economic life of the nation and its two hundred million inhabitants. Then too, the progressivists seem to have exerted some influence on what has now become, oddly enough, the so-called conservative view of adjudication. The notion that the Supreme Court is, to use Frankfurter's words, "the nondemocratic organ of our government," and that its powers "are inherently oligarchic," is the basic assumption, the main arch, upon which rests the whole doctrine of judicial self-restraint as we know it today. The progressivists, it may thus be seen, introduced to American constitutional law an entirely new concept of adjudication, and thereby substantially altered the thinking of political scientists, lawyers, and the practice of the Court regarding judicial review.

Perhaps we all have been too long the captives of the progressivists' antiquated theories. Thanks to the efforts of Robert Brown, Forrest McDonald, and Martin Diamond, the progressivist assertion that the Constitution is inherently undemocratic has been forcefully challenged, if not refuted. But, further revisions of progressivist constitutional theory would seem to be in order. Before the appearance of the progressivists, let us recall, neither the legitimacy nor the democratic character of judicial review was much doubted—as witnessed by the fact our textbook writers, who attach such great significance to the claims of the progressivists, are compelled to challenge Marshall's opinion in Marbury with the pathetic and lonely dissent of a state judge in the case of Eakin v. Raub. By resurrecting Justice Gibson's dissent and placing it with great fanfare alongside Marshall's opinion, our textbook writers have in effect read back into American constitutional history a debate which never really existed. The absurdity of this practice is manifest when it is realized that Justice Gibson, citing Blackstone and the doctrine of legislative supremacy, was not even interpreting the American Constitution, but the Constitution of Pennsylvania, which contained no supremacy clause. If it supports any one, the case of Eakin v. Raub supports Marshall, by virtue of the fact a majority of the Pennsylvania judges thought that judicial review was proper even in the absence of a supremacy clause.

Exhaustive combing of the public and private papers of Jefferson and his followers has likewise failed to produce a shred of historical evidence that lends any weight to the inventive theories of the progressivists. How strange it is that Mr. Jefferson and his Republican friends, democrats of democrats, founding fathers of the liberal tradition in American politics, never advanced any claims that judicial review was in principle either illegal or undemocratic. The truth of the matter is, such arguments were not presented until the progressivists appeared on the scene in the 1880's. As Charles Warren observed, the Supreme Court's nullification of Federal statutes, "had been attacked by the Democrats (the Republicans of those days) in 1802 and again in 1819, and by the Republicans in 1857 and 1867, but on all of these occasions the attack had been based on political prejudices. In 1885, the basis of the power became subject to investigation and consideration by jurists of distinction; and a number of valuable articles were written presenting each side of this controversy—the
The legitimacy of judicial review, then, is a subject which has received extensive treatment for many years; and it is doubtful whether any new insights can be added here to what has already been said. Suffice it to say, John Marshall established the doctrine of judicial review upon a sound intellectual basis. Probably no opinion in the history of the Court has been subjected to more rigorous analysis than Marbury v. Madison. Yet, it has withstood the test: despite its shortcomings, it continues to enjoy respectability and attract supporters. Standing squarely in the great tradition of Rule of Law, and echoing Hamilton’s statements in the 78th Federalist, Marshall argued that the power of judicial review is a logical deduction from the Constitution. Judicial review, he insisted, is implicit in the concept of a written constitution; it is the accepted function of the Court because it must interpret the law. Even without the support of a written constitution and a supremacy clause, Marshall’s thesis under the principle of Rule of Law was tenable; but he went further. He also made reference to the text of the Constitution, including the judiciary article and the supremacy clause, concluding that “the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the Constitution is void; and that courts, as well as other departments, are bound by that instrument.” To those of us who find “the judicial power anchored in the Constitution,” writes Professor Wechsler, “there is no . . . escape from the judicial obligation” of the Court “to decide the litigated case and to decide it in accordance with the law. . . .” These are powerful arguments in support of the doctrine of judicial review, though admittedly, they must be read into the Constitution. Marbury v. Madison stands on constitutional theory—that is, the theory of a supreme, written constitution—or it rests on sand. Certainly it is not in principle inconsistent with Rule of Law or the Supremacy Clause. To challenge Marshall’s reasoning, the opponent of judicial review must meet the Chief Justice on theoretical grounds. It is fruitless to argue against Marshall, as is so often the case, by pointing to the alleged absence of judicial precedents for Marbury, or Marshall’s failure to cite a single case to support his position. Whatever was decided in the English or state courts before 1801 neither affirms nor denies the power Marshall is exercising, for the simple reason the American Constitution differs markedly from the English and early state constitutions. The English Constitution is unwritten; both the English and early state constitutions allow for some kind of legislative supremacy; and most significantly, only the American Constitution contains a supremacy clause. The conflict between Marshall and his critics on the question of the legitimacy of judicial review is at best a stand-off, and it is safe to say that for most of us, Marshall has carried the day. Nearly a century of constitutional history elapsed before it occurred to the American legal profession that judicial review was illegitimate. Certainly this casts a cloud of doubt upon the case against judicial review when it is viewed through the eyes of the Framers. More important, the whole issue is in large measure rendered moot by the fact the case against the legitimacy of judicial review has failed to gain acceptance in the Supreme Court itself. In these respects, then, the progressivists have been unsuccessful. The doctrine of judicial review has become a permanent fixture of the American political system. When we turn to the question of whether judicial review is democratic, however, we
find that the progressivists are still haunting political science departments, our law schools, and judges’ chambers. The progressivists have firmly embedded in the American mind what I would term the doctrine of Judicial Democracy—the idea that the Supreme Court has a democratic function of the first order to seek out the popular will and follow it, and to keep the Constitution in strict harmony with public policy as expressed through elected officials. It is important to emphasize that this assumption lies at the heart of most current debate concerning the proper role of the Court; and has been adopted by the advocates of both judicial self-restraint and judicial activism. Those who argue in support of judicial self-restraint insist that judicial review, though undemocratic, is a necessary evil, a correcting device that keeps the democratic machinery in operation, but must rarely be employed. Like most advocates of restraint, Bernard Schwartz is convinced that “no matter how we may gloss over it, judicial review is basically an undemocratic institution . . . The Supreme Court is essentially a check of the past upon the present. But it is the present that represents the will of the people and it is that will that must ultimately be given effect in a democracy.”

Devotees of judicial activism are no less sympathetic toward the doctrine of Judicial Democracy. The Court, they agree, should keep in step with public policy; but it should also keep sight of still higher “democratic” goals. This can best be achieved through aggressive judicial review, through the active pursuit of “democratic” ideals which the legislatures may subvert or neglect. In their attempt to reconcile judicial review with democracy, the judicial activists are thus inclined to look beyond the mechanics of democracy, which are the crucial consideration of the passivists, to the end result. Eugene V. Rostow contends, for example, that there is no conflict between the practice of judicial review and democratic government, because the Court, at least in recent times, is prone to use judicial review for the enlightened purpose of protecting the libertarian claims of political and racial minorities.

It is a grave oversimplification to contend that no society can be democratic unless its legislature has sovereign powers. The purpose of the Constitution is to assure the people a free and democratic [i.e., liberal] society. The final aim of that society is as much freedom as possible for the individual human being. . . Given the possibility of constitutional amendment, there is nothing undemocratic in having responsible and independent judges act as important constitutional mediators. Within the narrow limits of their capacity to act, their great task is to help maintain a pluralist equilibrium in society.

Following a different line of reasoning that leads to similar conclusions, Robert Dahl, another proselyte to the doctrine of Judicial Democracy, has likened the Court to a powerful legislative committee chairman, who can delay but cannot prevent the effectuation of legislative policy. According to Dahl, “the elaborate ‘democratic’ rationalizations of the Court’s defenders and the hostility of its ‘democratic’ critics are largely irrelevant, for lawmaking majorities generally have had their way.”

The practical and constitutional objections which have been raised in response to the jurisprudential theories of the judicial passivists and activists, deserve repeating. In the first place, judicial self-restraint, as the activists are quick to point out, leads ultimately to legislative supremacy. It is, in this respect, a reactionary doctrine that promises to take us back to the days of the Articles of Confederation. That
it also plays havoc with Rule of Law and of the Supreme Law is already apparent, I should think. It seems inconceivable to me that the basic principles of Rule of Law and of the Constitution can long endure if legislative bodies are given a free hand to enact any policies they please. And it has further been suggested by one critical observer that judicial self-restraint does not actually save us from the pitfalls of judicial policy-making anyway. Unswerving deference to legislative policy by the judiciary is in itself a policy, and a poor one at that.

Judicial self-restraint insofar as, in the application of the rule of reason, it involves the resort to legal relativism, may run the risk of too frequently reducing to an unconscious and therefore (since the weighing of policy alternatives requisite to an informal decision is necessarily absent) rather inefficient form of policy-making.80

The activists are on equally hazardous ground. Practical limitations to the effectiveness of judicial activism for the promotion of public policy are almost too numerous to mention. Consider, for example, the highly specialized legal education of the judges, their lack of close contact with the electorate, their seclusion from interest groups, their inaccessibility to information, their inability to follow up policy and examine carefully its value and effect. These, and many other factors, point to the conclusion that the judiciary is poorly equipped for the policy-making role the activists have prescribed for it. And again, the constitutionality of judicial activism is in serious doubt if it is to be a regular, doctrinaire element of the judicial routine. Rule of Law and of the Supreme Law will forever remain in jeopardy if judges are at liberty to follow whatever policy objectives they please. Advocates of judicial activism who smile upon the current course of constitutional development seem to overlook this problem. Professor Rostow defends aggressive judicial review, not on the ground that it is constitutional as such, but that it is democratic. And why is it democratic? Because it promotes the freedom of minorities. Is this not to confuse democracy, a mere method of government, with liberalism, a particular end sought through government? Rostow also implies that judicial review is both democratic and constitutional because it allows the Court, as he puts it, to pursue its great task of helping to maintain a pluralist equilibrium in society.” One of the difficulties with this assertion is, of course, that equilibrium is a relative concept which knows no constitutional standard; not only does the equilibrium change, but men may honestly disagree over what constitutes a true equilibrium. Indeed, the members of the present Court, if their conflicting opinions be any guide, are not sure themselves. And certainly Congress’ reflection and understanding of the equilibrium may differ from the Court’s. Why the Court’s interpretation is any more valid, and should supersede that of the popularly elected branches, which surely represent a broader cross-section of that equilibrium, Rostow does not say. Dahl’s analysis of the problem surmounts these obstacles, but it fails to consider the constitutional aspects of judicial activism. The legislative policy which ultimately prevails may well appear to justify judicial review democratically, but that may nevertheless conflict with the Constitution. Moreover, Professor Dahl makes no mention of the fact that the frequent nullification of state laws by the Court has in countless ways resulted in the permanent enactment of judicial policies, most notably in the area of civil liberties. Judicial review is democratic, he argues, because Congress eventually gets what it wants. But is not judicial review also undemocratic, according to Dahl’s mode of reasoning, if the...
legislative policies of state majorities are constantly nullified by the Supreme Court? The good professor cannot have it both ways.31

We, in the political science profession, seem to have reached an impasse over the debate between the passivists and the activists. Both theories of adjudication apparently contain an element of validity, but neither has proved to be entirely satisfactory. In one of the more instructive studies of the problem, Edward McWhinney surmises "that the philosophic division in terms of judicial self-restraint versus judicial activism on the present Court stems from the Holmesian dilemma bequeathed to the Court in the 1930's,"32 that is, Holmes' two-sided concept of the judicial function, which demanded restraint in matters affecting economic rights and activism in matters affecting civil and political rights. It is not denigrating the importance of Professor McWhinney's contribution to our understanding of the problem here to say that the Holmesian dilemma with which we are all familiar was more the symptom than the disease. I think the problem is more deeply rooted and more complex than McWhinney's essay suggests. It extends backward to changing ideas, to changing economic and social conditions, which in turn produced an army of critics who revolutionized American political and legal thought. It extends to men like John Stuart Mill, who formulated libertarian doctrines of free speech; to the progressivists, whose assaults upon established institutions resulted in the lowering of esteem for property rights and the introduction of a new concept of democracy to be engrafted upon the Constitution; and it extends to the legal realists of the 40's and 50's, whose reckless debunking of traditional rules of interpretation added to the growing confusion over the Court's proper role in American political life.

I am persuaded that this whole question concerning the democratic character of judicial review, as presently understood, is a phantom problem. The question we should be asking is not should the Court be passivist or activist, but when and according to what rules of interpretation? At bottom, the democracy of the Constitution is a question of degree. Inasmuch as the Constitution does tolerate some democracy, it is appropriate to inquire whether it tolerates enough to justify the assertion of Publius that, the Framers did, in fact, establish a democratic republic. What the Framers hoped to achieve was a balance between majority rule and limited government, to establish simultaneously the sovereignty of the people and of the law, which would allow for the operation of both under a written Constitution. This is one of the problems to which Madison alluded himself in the Federalist 51 while discussing separation of powers:

In framing a government which is to be administered 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 of the government; but experience has taught mankind the necessity of auxiliary precautions.33

Understood, then, as a system of government allowing for limited democracy, whereby the power of coalescing majorities (or minorities constituting a majority) would be restricted by auxiliary constitutional devices, it would appear that the Constitution, as Martin Diamond contends, is now and always has been essentially democratic. In addition, it may be argued that the Supreme Court, though its members are not elected, is nevertheless a democratic office. This is so because it occupies its place in the American political structure...
through the consent of the governed. The Court has not been imposed upon an unwilling public; for the bargain struck off at the time of ratification included the establishment of this unelective branch. In other words, a majority of those who participated in the ratification of the Constitution voted to create the Supreme Court. Their descendants have refused to reverse that decision. What, then, could be more democratic? Even if the people elect to impose restrictions upon themselves, has not the requirement of democracy still been met?

The question unavoidably presents itself: at what point does judicial law-making become an intolerable practice in the American constitutional democracy? A moment's reflection, or a perusal of Mr. Justice Story's "Rules of Interpretation" in his Commentaries on the Constitution, demonstrate clearly enough that a doctrinaire philosophy of narrow or enlarged construction, judicial activism or judicial self-restraint, ultimately fails, if only because there may be a time for either, depending upon the constitutional issue, the wording under examination, the context in which it is placed, and circumstances attending the case. The conclusion seems inescapable that there will be moments when the Court is unable to pinpoint the proper constitutional ruling, and will of necessity actually make the law, even to the point of altering the Constitution. Such, it would seem, is part of the bargain struck off in 1787, and is an acceptable and inevitable consequence, given the fact that, we have a Constitution, replete with nebulous phrases, the proper interpretation of which cannot always be determined by going back to contemporary construction or the debates of the Federal and State constitutions. In this sense, the Constitution is, indeed, "what the judges say it is."

Beyond this point, however, judicial law-making raises serious problems in our constitutional democracy. We may join the legal realists in snickering at the judges of the Old School, who, in their innocence and naivete, sincerely believed that they merely discovered the law when deciding a case, and left intact the original understanding of those who framed and ratified the Constitution. But if they did alter the Constitution, it was more likely by accident than design. We sometimes forget that more than a half-century elapsed before the members of the Supreme Court, working often with no judicial precedents, gained access to the intent of the Framers through Madison's Notes on the Federal Convention. The members of the Marshall Court commonly, though not without exception, acknowledged the binding authority of "original intent" when it could be ascertained, and in general followed a philosophy of construction which did not prevent, but at least discouraged bold constitutional tinkering. Agreed, judges do make law, but it does not necessarily follow that judicial policy-making should be recommended as a general principle of judicial construction. When the rule is clear of doubt, is it not the task of the judge to find the law and apply it to the case, as always? Before resorting to an individual interpretation, should not the judge make a sincere and honest effort to discover the original meaning of a word or clause in the Constitution?

A strong nationalist whose constitutional doctrines were essentially the same as Chief Justice Marshall's, Mr. Justice Story nevertheless opposed unrestricted interpretation, recognizing that there are certain fixed principles which are valid for all times. Story's thoughts on this subject are worthy of repeating:

The Constitution of the United States is to receive a reasonable interpretation of its language, and its powers, keeping in view the objects and purposes for
which these powers were conferred. By a reasonable interpretation, we mean that in case the words are susceptible of two different senses, the one strict, the other enlarged, that should be adopted, which is more consonant with the apparent objects and intent of the Constitution. . . . Of course we do not mean that the words for this purpose are to be strained beyond their common and natural sense; but keeping within that limit, the exposition is to have a fair and just latitude. . . . On the other hand, a rule of equal importance is, not to enlarge the construction of a given power beyond the fair scope of its terms, merely because the restriction is inconvenient, impolitic, or even mischievous. If it be mischievous, the power of redressing the evil lies with the people by an exercise of the power of amendment. . . . Nor should it ever be lost sight of, that the government of the United States is one of limited and enumerated powers; and that a departure from the true import and sense of its powers is, pro tanto, the establishment of a new constitution. It is doing for the people, what they have not chosen to do for themselves.88

How far we have departed from these rules of interpretation is suggested by the fact judges nowadays are openly encouraged to ignore the original intent of the Constitution and its Framers.36 But to ignore the original intent is to subvert not only the principle of Rule of Law and the Supreme Law, but the very principle of American constitutional democracy. To repeat: past misunderstanding has often led to the false assumption that judicial review, considered in the abstract, is essentially undemocratic in that it allows members of the judiciary, who are not elected, to impose their will on the people’s representatives. In the final analysis, however, the democratic character of judicial review depends upon the intended results it is used to achieve. If the American political system were a pure democracy, with a single majority governing, in the absence of a fundamental and supreme law, judicial review would indeed be undemocratic. But in fact our system is run by a coalition of majorities. Different people elect different political officials at different times, and no single office-holder, including the President himself, can in reality speak for the majority of the American people. Similarly, members of the Supreme Court are part of the democratic process in the sense that they speak for past, present, and future majorities. As Justice William Paterson declared more than a century ago, the Constitution “is the form of government delineated by the mighty hand of the people, in which certain first principles of fundamental laws are established . . . [I]t contains the permanent will of the people and is the Supreme Law of the Land.”37 It necessarily follows there is nothing undemocratic about judicial review in principle, in view of the magistrates’ obligation to support and defend the permanent will of the people in preference to the temporary will of transient majorities.88 Similarly, when the Court blindly submits to current policy, and refuses to exercise judicial review, it can be argued that the Court is committing an undemocratic act by permitting the will of transient or temporary majorities to take precedence over the permanent will of the people, in violation of the Supremacy Clause. Thus it may be that when members of the Court openly defy “the permanent will of the people” under the pretext they speak for temporary majorities or “the advancing needs of the time,” they violate their oaths of office and subvert a democratic principle basic to the American political system—a system which, as the Preamble states, was constitutionally ordained by “We the People,” meaning the people of each generation and
not merely the people in 1789. As Justice Story once observed:

The last clause in the preamble is to “secure the blessings of liberty to ourselves and our posterity.” And surely no object could be more worthy of the wisdom and ambition of the best men in any age. If there be any thing, which may justly challenge the admiration of all mankind, it is that sublime patriotism, which, looking beyond its own times, and its own fleeting purposes, aims to secure the permanent happiness of posterity by laying the broad foundations of government upon immovable principles of justice.3

III

HAVING THUS returned to my original point of departure, which emphasized the value and importance of strict adherence to basic legal principles, let me conclude with a brief summary of the arguments presented here against the doctrine of Judicial Democracy. This paper rests upon the hypothesis that Rule of Law is a timeless, practical and normative principle of jurisprudence, inherent in the Constitution, which calls for close judicial scrutiny of positive laws threatening the supremacy of law and of the Constitution. When any court of law sits, it must interpret and apply the law to the facts of the case. In a political system based upon legislative supremacy, such is the sole function of the courts. The burden of maintaining Rule of Law rests largely upon the legislature, and the courts are discouraged or prevented from interfering with the legislature’s policy—which may or may not conform to the principles of Rule of Law. When the Supreme Court of the United States sits, it too must interpret and apply the law to the facts of the case; but it must do more. For the American political system is not based upon legislative supremacy, but the supremacy of the Constitution. The burden of maintaining Rule of Law and of the Supreme Law is thus shared by the legislative, executive, and judicial branches of government. It may well be that of the three branches, Congress possesses the greatest power and has at its disposal the means by which to dominate the other two branches. But the Supremacy Clause is a clear denial of legislative supremacy; it “strengthens” and “confirms,” as Marshall appropriately stated, the supremacy of the Constitution. It necessarily follows that in the American political system, the Supreme Court must defer not to the legislature, but first and foremost, to the Constitution. Judicial review of legislative acts is therefore a logical deduction from the American Constitution. If the legislature believes that its negativated law does conform to the principles of Rule of Law and of the Constitution, then it is free to seek a reversal of the Court’s decision by proposing an amendment to the Constitution. The Court does not have the last word in determining the constitutionality of our laws; but it does have a say, which can be meaningfully expressed only through judicial review. Rule of Law in the American system is a cooperative venture. Judicial supremacy, legislative supremacy, and executive supremacy are incompatible with the design of the fundamental law.4

The genius of the American Constitution lies in the fact that the Framers were able to resolve the modern dilemma of reconciling the sovereignty of law with popular sovereignty. This they accomplished by combining the two in a fundamental law that is at once the expression of the people and alterable by them. Progressivists and their votaries distorted this original understanding by imposing upon the Constitution a form of absolute democracy which the Framers had rejected as unworkable and dangerous. Incapable of coming up to this
new standard of democracy, the Constitution was suddenly blacklisted as a hopeless-ly reactionary document, as the product of a foul conspiracy of selfish aristocrats who despised and cheated their fellow men. Charles A. Beard found these evil conservatives under nearly every colonial bed. The Constitution, the Supreme Court, and judicial review, all of a sudden, were undemocratic. The past would have to be overcome through a democratization of the judicial process.

Thus was born the doctrine of Judicial Democracy. A new role was for the first time ascribed to the Supreme Court in the American political system. Henceforth, democracy, not Rule of Law or the supremacy of the Constitution, was to be the cardinal principle of the judicial function. This could be achieved by judicial deference to the popular will as is (judicial self-restraint) or as it should be (judicial activism). But whether it is implemented through activism or restraint, judicial democracy is antithetical to the law and theory of the Constitution. Since ancient times, courts of law have been regarded as chief instruments for the maintenance and support of the Rule of Law. The Framers of the Constitution not only affirmed this belief, but strengthened it by supplying American courts with a constitutionally ordained statement which announces to all the branches of government, both Federal and State, that the Constitution is the Supreme Law of the Land. That supremacy is improperly and unnecessarily jeopardized when the Supreme Court slavishly bows to King Demos whenever the justices assemble to perform the solemn duties of their office. The popular will is expressed in different forms, by different people, and at different times in the American system of government. If it be insisted that the Supreme Court play a democratic role, let the popular will as expressed in the Constitution itself be its guide; for only through deference to the Constitution is judicial review truly democratic.41

1Aristotle, Politics (Everyman ed.), Sec. 1297a.
2The phrase is taken from the American Declaration of Independence of 1776.
4Professor Fuller offers eight principles of rule of law: (1) generality (that there be rules); (2) promulgation (that they be publicized and made available to the affected party); (3) prospectiveness (that they be prospective rather than retrospective); (4) clarity (that they be understandable); (5) consistency (that they not be contradictory); (6) reasonableness (that they require conduct within the powers of the affected party); (7) constancy (that they not introduce changes more frequently than the affected party can prepare for them); (8) congruence (that there be congruence between the rules as announced and their actual administration). Lon Fuller, The Morality of Law (New Haven, 1964), pp. 39, 46-94.
7Francis Bacon, Essay LVI (Of Judicature), Works, I (Philadelphia, 1854), p. 58. "The liberty of considering all cases in an equitable light must not be indulged too far," advised Blackstone, "lest thereby we destroy all law, and leave the decision of every question entirely in the breast of the judge. And law, without equity, though hard and disagreeable, is much more desirable for the public good than equity without law; which would make every judge a legislator, and introduce most infinite confusion; as there would then be almost as many different rules of action laid down in our courts, as there are differences of capacity and sentiment in the human mind." Sir William Blackstone, Commentaries on the Laws of England, I, Sec. 2 (Lewis ed.), p. 62.
10See Blackstone, Commentaries, I, 41; A. V. Dicey, Introduction to the Law of the Constitution,
"Substantive due process," either under the Fifth or Fourteenth Amendments; and in only one case, Morey v. Doud, 354 U.S. 457 (1957), has the Court invalidated economic legislation under the equal protection clause. For an excellent analysis, see Robert G. McCloskey, "Economic Due Process and the Supreme Court: An Exhumation and Reburial," Supreme Court Review (1962), pp. 34-62.

Since 1941 the Supreme Court has consistently maintained that, so far as the due process and equal protection clauses are concerned, the "reasonableness" of economic policy is to be determined by the legislature. In the last twenty years the Supreme Court has not struck down a single piece of economic legislation as violative of substantive due process, either under the Fifth or Fourteenth Amendments; and in only one case, Morey v. Doud, 354 U.S. 457 (1957), has the Court invalidated economic legislation under the equal protection clause. For an excellent analysis, see Robert G. McCloskey, "Economic Due Process and the Supreme Court: An Exhumation and Reburial," Supreme Court Review (1962), pp. 34-62.


See Robert E. Brown, Charles Beard and the Constitution (Princeton, 1966); Forrest McDonald, We the People (Chicago, 1958); Martin Diamond, "Democracy and the Federalist: A Reconsideration of the Framers' Intent," American Political Science Review, LHI (March 1959), pp. 52-68.


"1See Charles L. Black, Jr., The People and the Court (New York, 1960).

"2Cranch 137 (1802).


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"912 Serg. & Rawle (Pa.) 330 (1825).

"10See, however, Thomas Jefferson to Abigail Adams in Writings of Thomas Jefferson, ed. by Andrew Lipscomb (Washington, 1903), ch. XI, pp. 50-51; see also remarks of Senator John Breckinridge and Representative Ezekiel Bacon, Annals, 7th Congress, 1st Session (1802), reprinted in Charles Hyneman and George Carey, A Second Federalist (New York, 1967), pp. 84-88. It is true, of course, that the Jeffersonians challenged the validity of Martin v. Hunter's Lessee and Cohens v. Virginia concerning judicial review of state court decisions, but these attacks should not be interpreted as an assault on the principle of judicial review or Marbury v. Madison.


"12Marbury v. Madison, 5 U.S. (1 Cranch) 139 (1803).


"15But according to Judge Learned Hand, the supremacy clause did not provide for judicial review of acts of Congress. It was, in Hand's view, directed, like section 25 of the Judiciary Act of 1789, against the states and did not grant general authority to the Court. Hand's interpretation is not the generally accepted view. For an excellent discussion, see Howard E. Dean, Judicial Review and Democracy (New York, 1966), ch. 2.


"18Though he stands somewhere between the activists and passivists, Alexander Bickel nevertheless subscribes to this view. As Charles Hyneman notes in his perceptive analysis of the Court's role, "The judges of our day," in Bickel's view, "are required to search the constitutional language and the environment of its birth for a vision of future needs, for a grander purpose behind the immediate purpose." Hyneman, Supreme Court on Trial, p. 223. As with the activists and passivists, Bickel believes that "judicial review is a counter-majoritarian force in our system. . . . [It] is a deviant institution in the American democracy." Alexander Bickel, The Least Dangerous Branch (Indianapolis, 1962), pp. 16, 18.


"22"[I]n a federal system as with the United States," observes McWhinney, "it may be a question of which popular will, or more precisely, which legislative majority, is to be deferred to. What if the majority will, as expressed in a particular state or states, runs counter to over-all national will, as for example the judicial activists might say is the case in respect to civil rights, matters of public morality, and especially race relations?" Ibid., p. 183.

"23Ibid., p. 187.


"25See Joseph Story, Commentaries on the Constitution, I (Boston, 1833), Secs. 382-442.

"26Ibid., Sec. 419 and Sec. 426.

"27According to Clinton Rossiter, "most talk about the intentions of the Framers—whether in the opinions of judges, or in the monographs of professors—is as irrelevant as it is unpersuasive, as stale as it is strained, as rhetorically absurd as it
is historically unsound. No one, surely, can read the records of the Grand Convention... and not come to this harsh yet honest conclusion." 1787, The Grand Convention (New York, 1965), p. 333. In reply to this astonishing statement, Paul Eidelberg acutely remarks: "That Rossiter should say no one can avoid this 'harsh yet honest conclusion,' when countless judges and professors have done precisely that, is a cause for wonder. And how he would evaluate his own work in view of this 'harsh yet honest conclusion' is another cause for wonder—for he attempts to elucidate the intentions of the Framers for the better part of three hundred pages! Apparently, the only 'clear intent of the Framers,' according to Rossiter, 'was that each generation of Americans should pursue its destiny as a community of free men.' If this is their only 'clear' intent, why study their writings? Indeed, if their writings are as obscure as Rossiter here suggests, they are not worthy of being studied at all." The Philosophy of the American Constitution (New York, 1968), pp. 293-294.

"Van Horne's Lessee v. Dorrance, 2 Dallas 308 (1795). The judges ought to prefer the intention of the people as expressed in the Constitution to the intention of their agents, the legislators, as expressed in a statute, said Hamilton in Federalist 78.

"The American democratic tradition," observes Professor Dean, "is a tradition of constitutional democracy in which the ideal of constitutionalism as a system of effective, regularized restraints upon the exercise of power has been fused with the ideal of popular government. Accordingly, the "will of the people" can be realized only within the framework of certain rules of the game; the people's voice can be expressed only in accord with the syntax, grammar, and logic of the constitutional system." Dean, Judicial Review and Democracy, p. 58.

"Story, Commentaries, I, Sec. 506.

"The type of "principled" decision to which I refer here is, of course, different from that proposed by Professor Wechsler. Wechsler's analysis and defense of Marshall's reasoning in Marbury seem to this writer to be entirely correct, nevertheless his conception of "neutral principles," as Professor Wright observes, apparently "means in practice no more than carefully reasoned, fully articulated, or, possibly, consistency and universality of application—so long as a given principle or doctrine is accepted by the Court." Benjamin F. Wright, "The Supreme Court Cannot be Neutral," Texas Law Review, 40 (May, 1962), pp. 615-616.

There remains the all-important problem of implementing and applying the principled decision, a problem which is, of necessity, beyond the purview of this paper. It may be noted, however, that some of the most persuasive arguments against the principled decision are those of Alexander Bickel, who insists that unyielding obedience to principle is neither democratic nor practical. In the first place, it is "at war with a democratic system" because it would impose upon the country "an absolute rule of absolute principle," and would thus lead "the country to ruin by intractable, doctrinaire stages of irrepressible conflict." Rather than apply principles unerringly, the Court should adopt a rule of action that is modulated by pragmatic compromises. "No society," he writes, "... can fail in time to explode if it is deprived of the arts of compromise, if it knows no way of muddling through. No good society can be unprincipled; and no viable society can be principle-ridden." The good Court is that which knows when to stay its hand, when to inch toward an objective using whatever tactics and strategy the situation calls for, and when to allow the political processes relatively free play until a consensus is formed. Bickel, Least Dangerous Branch, pp. 58, 64, 70.

But Bickel's argument assumes too much. It assumes that the general public is aware of the Court's gradualism, and is thus prepared for the principled decision when it ultimately comes. In truth, most decisions of the Court have a sudden impact on the public mind, irrespective of the strategy employed by the Court. Moreover, it assumes that consensus, even when known, is permanent, when in fact we know it is elusive, temporary and changes quickly on many issues which the Court attempts to resolve. To shelter the Court under the dome of consensus is to place it on the shifting sands of public opinion, and the Court cannot always move before the roof collapses, particularly if it must move quickly or to a position of doubtful constitutionality. More importantly, Bickel's objection to the principled decision is based on the false assumption that the Supreme Court has the last word; it seems to rest on the doctrine of judicial supremacy, for implicit in his argument is the idea that once the Court has faced a situation squarely and has proclaimed the principle, that the coordinate branches are thereafter helplessly locked in a constitutional vise. If this were the case, then the principled decision (or for that matter the unprincipled decision) might indeed be a perilous course of action. Indeed, the present constitutional crisis apparently stems from the widespread and erroneous belief that Supreme Court decisions are permanently binding on the other branches, that the Court's interpretation of the Constitution is irrevocably the Supreme Law of the Land. So long as the myth of judicial supremacy persists, the Court is doomed to be the center of controversy, no matter how tactful its decisions. For these reasons, I am persuaded that Bickel's recommendations may well produce the very "absolute rule of principle" and loss of compromise that he so much wishes to avoid.

When viewed as a joint venture, however, the legitimization process allows for greater compromise and flexibility, while permitting the Court
at the same time to hand down principled decisions. It also allows each of the branches to share the responsibility of public policy, and to relieve the Court of the immense burden it now carries of being the final repository of the law and the target of public dissatisfaction. Too often Congress and the President avoid controversial decisions by passing them along to the Court or by refusing to interfere with the Court's decisions. What is needed is a total rethinking of the President's and Congress' role in the law-making process, a rethinking of the doctrine of separation of powers and checks and balances, and not, as Bickel suggests, the adoption of a policy of judicial legerdemain. If the President decides that a particular decision of the Court conflicts with the Constitution, is he not free, constitutionally speaking, to block its enforcement? Is he not obliged to do so? And is not Congress also free to propose amendments, or to alter the Court's appellate jurisdiction? The Court does not have to bear the burden of finality, and it can simply say to the country, while standing behind principle: "This is the opinion of the Court concerning the constitutionality of the legislation under consideration. It is only an opinion, and if the President, Congress, or the American people do not agree with our interpretation, they are free to offer their own opinions as well. But until our opinion is reversed, it shall remain the law of the land." This, it seems to me, is the rule of action best suited to the balancing of principles with expediency—recognizing that no rule of action promises to guarantee either.

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