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MINORITY RULE AND THE CONSTITUTIONAL TRADITION*

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I

"Law," Aaron Burr once remarked, "is that which is boldly asserted and plausibly maintained."¹ I prefer this insight, crude as it may seem, to much of the wisdom of the whole array of schools of legal philosophy.² Burr must have had an uncanny prescience about the development of American constitutional law. Into the increasingly bold assertion of judicial supremacy—the history of the judicial power—I do not propose to enter here.³ It has been explored a good deal recently and is a matter of record in the annals of the court. That record is one of tortuous maneuverings and bold *faits accomplis* in the field of governmental practice. The men who have guided the destinies of the judicial power, from Alexander Hamilton and John Marshall to Chief Justice Hughes in our own day, have been masters of the art of political manipulation and anything but novices in the technique of presenting the enemy with the completed actuality of a decision.

I am not one of those who regard the bold assertion of judicial supremacy as an act of usurpation.⁴ It is a truism, of course, that the power of

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1. Quoted in Nelles and King, *Contempt by Publication in the United States* (1928) 28 *COL. L. REV.* 401, 428.

2. I say this, of course, while recognizing that Burr's remark represents in itself a school of legal philosophy—something that would correspond to a cross between the American realists and the glorification of the survivor contained in some of the German jurists. But while we may formalize Burr's remark thus, Burr himself did not.

3. This is dealt with in Lerner, *The Supreme Court and American Capitalism* (1933) 42 *YALE L. J.* 668.

4. The theme of usurpation, either in assertion or denial, is the grand underlying theme of most of the recent literature on the Supreme Court. Thus also the theme of exploitation

judicial supremacy over the whole governmental process is nowhere to be found expressly granted in the Constitutional document. It is a body of inferences, a system of "givens" and "therefors", an intellectual construction. But it has by this time become accepted as a living institution, and I have too much respect for any part of an organic going-concern to think that it can be exorcised out of existence by legalistic discussions of whether it was actually intended. The judicial power has by this time *written itself* into the Constitution by court interpretation and prescriptive right, just as much as if it were clearly granted in the document. In short, it is a colossal gloss upon a text not given, a gloss with which we must deal as we would with any political actuality.

It is time that American thought on the Constitution moved away from the question of original intent, away from *whether* the men in the Constitutional convention intended judicial review, to the question of *how* judicial supremacy has been built up and maintains itself in what is presumably a democracy. To move from the *whether* to the *how* is, perhaps, always a step forward—from what can be only subjectively guessed at to what can be objectively observed, from theology to science, from polemics to history. What can be said of intent with respect to judicial review, although it will undoubtedly prove eternally interesting, is actually rather little, and that little is uncertain. One may balance the warily expressed desires of the framers against the clear aversion of the people at the time and get nowhere.⁵ What can be said of the logic of the way in which the judicial power has been built up is clearer—that it is the natural outcome of the necessity for maintaining the rule of a capitalist minority under the forms of a democracy. Judicial review has not flowed merely from the will-to-power of individual justices, but has been the convenient channel through which the driving forces of a developing business enterprise have found expression and achieved victory.

Let us, however, turn to the last half of Aaron Burr's definition. "Law is that which is boldly asserted *and plausibly maintained.*" Bold assertion is pursued in the realm of political action and economic pressure. Plausible maintenance proceeds in the realm of symbols, interest-structures, and idea-systems. The aggressions of the judicial power cannot be understood unless we see them as part of the attempt to maintain the existing power-structures in our peculiar form of capitalist democracy. But the defenses of the judicial power are also formidable. Every going institution seeks to build a triple line of defense. First, there is the area of *symbols*, or what Professor Elliott

has been used as the grand theme of much of the recent literature on capitalism. But the abstract question of legalism would seem to have as little to do with political power-realities as the abstract question of social justice with economic power-realities. In either case they are usable primarily as evocative myths.

5. Paraphrasing Lord Justice Buckley in *Hanau v. Ehrlich*, [1911] 2 K. B. 1056, 1069, one may say that it is a century and a quarter too late to apply our own minds independently to the task of determining whether judicial review was intended by the Constitution.

calls "social myths"⁶ and Thurman Arnold calls now "symbols" and now "folklore".⁷ The realm of symbols is most often an unconscious realm; when they have become too articulate their spell is broken. I have sought to examine elsewhere in a paper the interrelated symbols that the Constitution and the Supreme Court have built up in the mind of the common man, and especially the symbolism of the divine right of judges.⁸ Secondly, there are *interest-structures*, the pulls and thrusts of class-relations that make various groups defend the judicial power and that have made the Supreme Court defend those groups; these interest-structures are generally unconscious and operate best on the level of unconsciousness, but in times of tension they tend increasingly to become articulate. In between these two there is the third area—that of *formal apologetics*—the ideology by which the judicial power has operated and has been defended. Thus we have, in a triple defense-ring around the judicial power—symbolic structures, interest structures, and idea structures. It is with the relation of the last two that I am here principally concerned.

II

The Court's own *apologia* for its power—what may be called the "official" theory of the judicial function—is well known, but I shall take the liberty of recapitulating it. It runs somewhat as follows. We have a fundamental law, in the form of a written Constitution, overriding legislative enactments that are not in harmony with it. We have a federal system, in which powers must be divided between the states and the central government; and a system of separated powers, in which the lines must be drawn between the departments of the government, and the encroachments of one upon the others avoided. We have thus in two respects a system that would result in chaos or tyranny unless there were a final arbiter. We have, moreover, the danger that men in power will aggrandize their power at the expense of other men, and invade their rights; we have a people safe from such invasion only under the protection of the Constitution. We have finally a judicial body, deliberately placed above politics and beyond partisan control, and empowered to assure for us a government of laws and not of men. The fund of knowledge and principles to which this body appeals is to be found in the Anglo-American common law, the precedents of constitutional law, and a "higher law" resident in the "genius of Republican institutions".

In its way this official theory is something of a masterpiece. It is, to be sure, a mosaic pieced together from diverse materials: the Federalist Papers, court decisions and dicta, commentaries by scholars like Kent and Cooley,

6. See his paper, *The Constitution as a Social Myth*, which was also presented at the Round Table on "Varying American Attitudes toward Constitutionalism".

7. See ARNOLD, *SYMBOLS OF GOVERNMENT* (1935) and *FOLKLORE OF CAPITALISM* (1937).

8. See Lerner, *Constitution and Court as Symbols* (1937) 46 *YALE L. J.* 1290.

classic speeches like those of Webster; but, while it is a mosaic, it is a thing of beauty nevertheless, neat, logical, close-fitting, comprehensive—so long as you grant its premises.

Let me set out some of those premises, generally unexpressed.⁹ The official theory assumes that a fundamental law must be superior to all legislative enactments, despite the example of the English system where the line of constitutional growth lies in Parliamentary enactment rather than judicial construction. It assumes that other departments of the government may not be as capable as the judiciary of the task of constitutional construction—assumes, that is, a fund of exclusive and inspired knowledge of the law on the part of the judges. It assumes that the binding obligation of a litigant at law to accept the court's construction of a statute is binding as well upon Congress. It assumes on the part of the executive and the legislature an imperialistic thirst for power and expansion, and despite Justice Stone's agonizing cry *de profundis* in the *Butler* case ("the only check upon our own exercise of power is our own sense of self-restraint")¹⁰—despite this cry, the official theory makes no similar assumption about the stake the judges have in their own power. It assumes that all government is dangerous, and thus adopts a negativist attitude toward governmental powers. It assumes that the legal aspects of a governmental problem can be separated and abstracted from its real aspects. It assumes, in short, a closed Constitution in a malignant universe, instead of an open instrument of government in a changing and challenging world.

I have spoken thus far of the formal ideology of the judicial power. But an ideology is not merely a series of linked propositions drawn from related premises. It sometimes draws its greatest strength from allies—ideas in this case not directly within the official *apologia* of the court's power, but imbedded in the popular mind and strengthening the acceptance of that power. I want to pick four of them for brief discussion—the doctrine of limited governmental powers, the doctrine of the sanctity of property, the doctrine of federalism, and the doctrine of minority rights.

The Constitution was born in a century obsessed with the notion of limited powers, a century overhung by the shadows of Locke and Rousseau. Conservative thought clung to the rights of minorities against the tyranny of the majority; and radical theory, such as that of Jefferson and the great European rationalists, took the form of belief in the perfectibility of man and the malignancy of government. But the pattern of the century contained a curious inner contradiction in its thought. Its prevailing economic policy was mercantilistic, with all the close and comprehensive controls that the mercantilist state exercised over economic life, and with all its resulting

9. I am indebted here to some extent to Edward S. Corwin's acute article, *Judicial Review* (1937) 8 *Encyc. Soc. Sci.* 457.

10. *United States v. Butler*, 297 U. S. 1, 79 (1936) (dissenting opinion).

concentration of authority.¹¹ Its prevailing political thought, however, was atomistic, with its emphasis on individual liberties and governmental dangers. The men who framed the Constitution and ran the government that it created were caught in this contradiction. Their conservative economic interests dictated a strong central mercantilist government; the prevailing political ideas of the time, fortifying their fear of democracy, made them place that government of expanded powers in an intellectual framework of limited powers. Hence, to a large extent, the confusion of the Constitutional debates. The interesting fact is that judicial ideology still clings to this doctrine even in a world where to act on it would be grotesquely tragic, and where the popular impulse is to abandon it.

When we pass to the doctrine of the sanctity of property, we find that the sense of property has assumed a variety of forms in our history, but always the protection and support it has accorded to the judicial power has been a continuing factor in the Court's life. American life has pushed forward along a variety of trails—farm, frontier and factory; plantation and city; trade-route, logging-camp, mining-town and real-estate boom; corporation and cooperative. But through all these the common base-line has been a persistent and pervasive sense of property. It first took the form of the land-mysticism and land-hunger of Physiocratic thought, deeply resident in the whole movement of colonial land-settlement, and from which Jefferson eventually drew much of his support; then the sense of vested rights and the deep sense of contractual obligation, to which Marshall gave doctrinal expression in his "contract decisions",¹² and which, using and twisting somewhat Sir Henry Sumner Maine's terminology,¹³ provided a new sort of status for an age of capitalism; then the sense of property individualism, born of the movements for European liberation, blessed with the approval of Protestant capitalism,¹⁴ flourishing in the wilderness of the American frontier, turned into *laissez-faire* by the conditions of a reckless and exploitative capitalism; and finally, when individualism could no longer thrive as an idea because it had been extinguished as a fact in economic life, the clinging to the profit system and the cash-nexus as bulwarks against social anarchy and the destruction of the social fabric. This sense of property, even when its widespread social base has been so largely destroyed in the age of absentee ownership, is still a powerful ally for the judicial power.

11. For the mercantilist character of the economic thought of the era of the Constitution, see HAMILTON AND ADAIR, *THE POWER TO GOVERN* (1937) 103-144.

12. See Isaacs, *John Marshall on Contracts—A Study in Early American Juristic Theory* (1921) 7 VA. L. REV. 413.

13. I am referring, of course, to his famous distinction between status and contract. See MAINE, *ANCIENT LAW* (6th ed. 1876) 170.

14. See TAWNEY, *RELIGION AND THE RISE OF CAPITALISM* (1926) (following Weber); and à propos of the Weber-Tawney thesis, see LASKI, *THE RISE OF EUROPEAN LIBERALISM* (Eng. ed. 1936) 29-34.

When we turn to the theory of federalism and states rights, we are dealing with a powerful intellectual and sentimental force that the Supreme Court has at times had to fight and more latterly has been calling to its aid. We are all acquainted with the kinds of arguments which, like ghosts, are continually looming up in the world of ideas, which rule us from the past by their wraith-like being, although we are aware they no longer represent actualities. The idea of free opportunity under capitalism is one, and it lingers on even in a world dominated by monopoly. In the political realm the most potent and assertive American ghost is still federalism.¹⁵ Most of its former functions have been stripped from it; it haunts a nation in which every force drives toward centralization, both economic and political. But when I call it a ghost, I do not mean it is no longer a fact to be reckoned with. The strength of a ghost, it must be remembered, rests in its capacity to get itself believed; and that, in turn, depends more than anything on our own needs and fears. And the fear of over-centralization, of the wiping out of the traditional political and cultural landmarks of the states, is a very real fear, especially in the light of what the fascist dictatorships have done to federalism.¹⁶ And it is a fear which the Supreme Court, as witness the *AAA* case,¹⁷ has not been averse to exploring and exploiting.

It may be said of the doctrine of minority rights and individual liberties that recent events have given them or seemed to give them even greater meaning than they once possessed. This tradition of minority rights has always been an important source of strength for judicial supremacy. The doctrine of vested rights,¹⁸ the sanctity of contract and liberty of contract,¹⁹ the doctrine of due process of law—all have drawn upon this tradition. In fact, most of the Court's decisions invalidating legislation hostile to property might be interpreted as proceeding from its zeal for minority rights, rather than from any untoward zeal for business interests. Nevertheless, as long as a strong rationalization for capitalist power existed in economic

15. Lest this be interpreted as an attempt to depreciate the value of the federal principle, I want to say that I value our regional cultures highly. But one must not confuse such personal valuations with the stream of tendency. And while I believe that an element of the federative principle will always remain in American political history, I must recognize that the strength of federalism lies in the past and not in the future. The corporation has not obliterated federalism in political theory, but it has done so in economic fact. I have found much of interest on federalism in DICEY, *INTRODUCTION TO THE LAW OF THE CONSTITUTION* (8th ed. 1915), especially the introduction to this edition; FRIEDRICH, *CONSTITUTIONAL GOVERNMENT AND POLITICS* (1937) c. 12; McMahon, *Federation* (1937) 6 *ENCYC. SOC. SCI.* 172.

16. For a moving account of the German experience, written by a German liberal of the old school to whom the federative principle meant much, see MENDELSSOHN-BARTHOLDY, *THE WAR AND GERMAN SOCIETY* (1937).

17. *United States v. Butler*, 297 U. S. 1 (1936).

18. Edward S. Corwin's articles on vested rights are, of course, well known. I have sought to treat the subject in my article, *Vested Interests* (1937) 15 *ENCYC. SOC. SCI.* 240.

19. See Hamilton, *Freedom of Contract* (1937) 6 *ENCYC. SOC. SCI.* 450. See also LASEK, *op. cit. supra* note 14, at 237-264, where he treats of the liberalism of the Supreme Court majorities and concludes that it serves only to clothe the business interests that they guard.

thought and opinion, the civil liberties and minority rights argument was secondary. Now, however, two things are happening to push it to the fore. One is the decline of laissez-faire, both in practice and in thought. The second is the spread of fascism in Europe and the fear of it in America. The first has made the business-man and the judges turn increasingly to the rhetoric of civil liberties; the second has made the liberals and the middle-classes more ready to accept the court's guardianship of civil liberties, even if it means a measure of judicial control over economic policy.²⁰

About civil liberties and minority rights and the liberals I shall have more to say later. But I want to pause here for a moment to survey the meaning of these four ideological allies of the judicial power. All four, viewed historically, have their roots in majority movements, and have played a great and even revolutionary role in the history of the western world.²¹ And all four have been turned to the uses of minority rule as parts of the constitutional tradition. Take, first, the idea of a government of limited powers. The notion of a higher law; the idea of natural rights of individuals, which adhere to them independently of government and even in despite of government, and which must be protected against government; the necessity of disobedience to a government that violated these rights—these had once been living parts of a revolutionary movement that swept western Europe from the Parliamentary champions of the struggle against the Tudors and Stuarts to the philosophers of the French Revolution. They were majority movements, aimed at limiting the powers of minority governments of the dying classes. They rationalized the actual movement toward parliamentarism in England and toward middle-class democracy in France. But in taking them over, judicial review turned them to quite different uses—to defeat parliamentary supremacy and hedge democracy around with severe limitations—in short, to the uses of minority rule. And the same may be said of that property sense which has been part of the American democratic experience, of the democratic localism that underlies federalism and states rights, and of the democratic movements that generated the doctrines of civil liberties and minority rights. All have been twisted out of their original context, and turned to the uses of minority rule.

III

I want now to examine more closely what I mean by three concepts I have been using—democracy (or majority will), minority rule, and minority rights. The relation between these three is central to an understanding of the ideology of the judicial power.

20. During the public controversy in 1937 over President Roosevelt's court reorganization plan, many liberals who had earlier been critical of the Court's decisions came to its defense, motivated largely by the fear that "packing" the Court or weakening its prestige would remove the principal guarantee of civil liberties.

21. See LASKI, *op. cit. supra* note 14.

Scratch a fervent believer in judicial supremacy, and like as not you will find someone with a bitterness about democracy. The two are as close as skin and skeleton. When I speak of *democracy* here, I want to distinguish it sharply from *liberalism*. There is no greater confusion in the layman's mind today than the tendency to identify the two. American history has been the scene of a protracted struggle between democratic and anti-democratic forces.²² Anti-democracy started as aristocratic thought, with emphasis on a neo-Greek élite. Alexander Hamilton, heart-broken because the new American state could not be a monarchy with George Washington as king and himself as kingmaker, sublimated his monarchical passion in a dream of America as an aristocracy of property. And a whole school followed him. But it soon became clear that in a country where a revolutionary war had been fought to achieve democracy, an aristocratic body of thought could not form the base of any party successful at the polls. The collapse of the Federalist Party proved it.

A shift was made, therefore, to liberalism; and so powerful an aid did liberalism become to the anti-democratic forces that even conservatism grew shamefaced and, in order to survive, had to don the garments of liberalism. In the South alone, in the period of tension preceding the Civil War, slavery as an economic base caused aristocratic theory to linger on, and the spokesmen for the slaveocracy defended it as an élite that had reëstablished a Greek republic among the roses and cotton bolls below the Mason-Dixon line.²³ But the Civil War proved by blood and iron that aristocratic theory was, like slavery, an unnecessary survival from archaic times. The northern financial oligarchy that rose to unchallenged political power out of the Civil War spoke thereafter in the name of an orthodox, if slightly cynical, liberalism. And it has continued to do so.

Let us be clear about it; minority rights liberalism (which becomes in practice minority-rule liberalism) furnishes the only reasoned defense of the capitalist power that we have in America. This liberalism has three facets: a defense of individual civil liberties against society, a defense of

22. The sharpest delineation that I know of this struggle in American history is to be found in Parrington's three volume work, *MAIN CURRENTS IN AMERICAN THOUGHT* (1927-1930). Parrington stood on the shoulders of J. Allen Smith, whose two books, *THE GROWTH AND DECADENCE OF CONSTITUTIONAL GOVERNMENT* (1900) and *THE SPIRIT OF AMERICAN GOVERNMENT* (1907), are not as well known as they deserve to be. Latterly the work of the Marxist historians has begun to realize the implications for American history of this struggle between democratic and anti-democratic forces. I refer especially to the work of Louis M. Hacker, in *HACKER AND KENDRICK, THE UNITED STATES SINCE 1865* (1932) and in articles in *THE MARXIST QUARTERLY*. I refer also from a different perspective to the series of reinterpretations of American history being currently edited by Richard Enmale for International Publishers.

23. I do not mean to say here that the Athenian republic was a slaveocracy in the sense in which the American South was. The recent researches of Zimmern and others have shown that the slave base of Athenian society was by no means as rigorous as had been previously believed. See Westermann, *Ancient Slavery* (1937) 14 *ENCYC. SOC. SCI.* 74-77. But it did furnish a convenient *apologia* for the classical-minded defenders of the Southern economic system.

minority rights (including both human and property rights) against the possible tyranny of the government, and a belief in rationalism and in the final triumph of the idea. In the course of the liberal revolutions in Europe, democratic forces were unleashed which sought to carry the implications of the libertarian movements to their logical conclusion not only for the middle class but for the underlying population as well, not only for political but for economic freedom and equality. These forces are what I shall call the "democratic impetus" or the "democratic thrust". They began to loom as the great threat to the privileged position of the middle classes. Fortunately for those classes, they could find in the armory of liberalism the intellectual weapons they needed for fighting the democratic threat. The basis of democracy is that the majority will shall prevail; its premise is that the common man can fashion his own political destiny, and that government must consist of representative institutions to carry the majority will into execution. To this, liberalism has opposed the proposition that the freedom and rights of the individual and the minority were more sacred than the will of the majority. In that lies the essential distinction between liberalism and democracy.

In their fear of majority will the propertied groups have depicted the democratic mass-movements in the darkest colors of extremism. They have called the Jeffersonians "Jacobins", the Jacksonians "Locofocos", the Abolitionists "Niggerlovers", the agrarian radicals "Populists", the trade-unionists "Reds" and "Bolsheviks". The democratic forces in turn have responded by calling the propertied groups "Monarchists", "plutocrats", "economic royalists". The two barrages of epithets have enlivened American politics, but failed to illuminate them. But behind the battle of the epithets there has been a very real struggle between the thrust of majority will, ever present in a nation whose collective life has been based on democratic premises, and the counter-thrust of minority rule.

This has been the basic paradox of American life—the necessity we have been under of squaring majority will with minority rule—that is, democratic forms with capitalist power. It has made us, in one sense, politically speaking, a nation of hypocrites. But it has also spurred our wits and sharpened the edge of our political inventiveness. Out of it have emerged our peculiar institution of judicial supremacy and that whole idea-structure of the defense of judicial supremacy which I have outlined.

The mistake we are all too ready to make is to pose an antithesis between the Constitution as such and the democratic impulse, an antithesis that does not exist. We have been led into this error partly by the excellent work of Charles Beard and his school in proving that the Constitution

represented the property interests of the minority.²⁴ That is true enough. But we must also remember that the Constitution, without the accretion of judicial review, could (whatever its origins) have become an instrument of the majority will. The whole animus behind it, despite the system of checks and balances, was a flexible one. It was meant, as has recently been pointed out with great effectiveness by Professor Hamilton²⁵ and Professor Corwin,²⁶ to adapt itself to the changes and chances of the national life. It is significant that the majority groups, who were first rather sullen about it, and then accepted it after affixing to it a bill of rights guaranteeing individual liberties, finally became enthusiastic about it. It is well known that Jeffersonians as well as Hamiltonians and Marshallians vied in their praise of the Constitution.²⁷ What they differed about was the judicial power. The real antithesis is between the democratic impulse and the judicial power.²⁸ And with Jefferson and the so-called Revolution of 1800, which saw the triumph of Jeffersonianism, began that series of democratic thrusts, upsurges of the majority will, that has enlivened and vitalized American history. In Jefferson and Jackson, notably in the Bank War and the Dorr Rebellion, in Lincoln, to an extent in Cleveland, in the Populist movement and Bryan, in Theodore Roosevelt and Woodrow Wilson, in Eugene Debs, in Franklin Roosevelt and the New Deal, and in John L. Lewis and the C. I. O., we have had repetitions of that democratic thrust at the seats of minority power. It became the task of the propertied minority to ward off those thrusts. And they have been thus far enabled to do it through the instrument of judicial supremacy, the ideology that surrounds and defends it, and especially the ideology of liberalism.

In two senses judicial supremacy has smoothed the way for minority rule. In one specific instance after another, measures of policy which the majority has desired have been invalidated by the courts. If the people of Georgia wanted to undo a corrupt grant of land,²⁹ or the people of New York wanted an eight-hour working day in bakery shops,³⁰ or the people of Oklahoma wanted to restrict the number of ice-plants,³¹ their wishes

24. I refer, of course, to his *ECONOMIC INTERPRETATION OF THE CONSTITUTION* (2d ed. 1935). I do not mean that Mr. Beard has himself fallen into the error of posing an antithesis between the Constitution and the democratic impulse, but that the emphasis in his early work lent credence to that error.

25. HAMILTON AND ADAIR, *THE POWER TO GOVERN* (1937).

26. Corwin, *The Constitution as Instrument and Symbol* (1936) 30 AM. POL. SCI. REV. 1071.

27. For the best statement of this development, see Schechter, *The Early History of the Tradition of the Constitution* (1915) 9 AM. POL. SCI. REV. 707.

28. Louis B. Boudin has brought out with the greatest sharpness the distinction between the Constitution, as embodying the democratic experience of the past and democratic potentialities for the future, and judicial supremacy as an instrument of minority power. See BOUDIN, *GOVERNMENT BY JUDICIARY* (1932), and especially Boudin, *The United States Constitution 150 Years Later*, New Masses, September 21, 1937.

29. *Fletcher v. Peck*, 6 Cranch 87 (U. S. 1810).

30. *Lochner v. New York*, 198 U. S. 45 (1905).

31. *New State Ice Co. v. Liebmann*, 285 U. S. 262 (1932).

were so much dry stubble to be trod under foot by the minority will of the court.

But there is an even deeper sense in which the Supreme Court has acted as the final barricade against the assaults of democratic majorities. We must remember that the process of the triumph of the democratic majority is a long and tedious process, as majority leaders from Jefferson to Franklin Roosevelt have discovered. It is a process of seeking to displace the enemy from one position after another. There is a vast inertia of the party system, with an autonomous force of its own even after popular sentiment has changed; there is the political apathy of the masses, the tendency they have of forgetting to remember. There is the pressure of special interests, blocking up committees, arranging filibusters. There is the control that the vested interests exercise over our newspapers and our very patterns of thinking. And there is, finally, the effective weapon the propertied minority has in withdrawing capital from investment and thus paralyzing the economic process. And after all these positions have been captured, the anti-democratic forces retreat to their last barricade—judicial review. There, behind the safe earthworks of natural law, due process, minority rights, the judges can in the plenitude of their virtue and sincerity veto and outlaw the basic social program of the majority.

IV

The democratic forces of the country have known, in intervals of lucidity, what they were up against and what they were fighting. But in addition to all the difficulties of mustering the necessary big electoral battalions, they have become increasingly confused recently. And their confusion has risen from the fact that the rationalizations that are used to explain and defend the Supreme Court power are the rationalizations that flow from the premises of liberalism—that minority rule uses the theory of minority rights, and manages somehow to equate the two.

Minority rule has recently had to work very subtly to defeat majority will. There was a time, in Alexander Hamilton's day, when the anti-democratic theorists could say frankly, when confronted with the accusation that they had defeated the people's will: "Your people, Sir, is a great beast".³² Or they could speak more gravely, as did Fisher Ames, of "a government of the wise, the rich and the good",³³ as if all three were coterminous. Later they had to convert the Bill of Rights and the Fourteenth Amend-

32. I HENRY ADAMS, HISTORY OF THE UNITED STATES DURING THE ADMINISTRATION OF JEFFERSON (1930) 85.

33. Ames' writings are the classic repository of anti-democratic comment. "Our country," he wrote in 1803, "is too big for union, too sordid for patriotism, too democratic for liberty." *Id.* at 83. And George Cabot, another high Federalist, wrote in 1804, "We are democratic altogether; and I hold democracy in its natural operation to be the government of the worst." 2 *id.* at 165.

ment, the heart of the protection of minority rights, from a charter of liberties to a charter of property protection. The task, as is well known, was a difficult one, and involved two major intellectual somersaults—twisting due process of law from a procedural meaning to a substantive meaning, and endowing the corporation with all the attributes of human personality. But, while the task was well done, it was done with a certain cynicism that is particularly apparent in the political commentaries between the Civil War and the World War, as well as in the court decisions of that period. Now, however, in the midst of world tensions in which democracy has taken on a new meaning and a new prestige for us, it is necessary to be more subtle in defense of minority rule. The new defense is, therefore, not only a plea for minority rights, powerfully evocative in itself in these days, but a new interpretation of majority will as well.

That interpretation is to be found in its most finished form not in the Supreme Court decisions, in all of which it is implicit, nor even in scholarly commentary, but in two popular commentators, Mr. Walter Lippmann and Miss Dorothy Thompson. It is significant that Mr. Lippmann embodies it in his book, *The Good Society*,³⁴ which is an attack on economic planning, the most dangerous threat to the economic power of the minority. It is even more significant that Miss Thompson's theory, which is the more sharply delineated, is to be found best in a series of three articles which form a critique³⁵ of Mr. Roosevelt's Roanoke Island speech.

The new theory (I use Miss Thompson's articles as a model) reinterprets the democratic principle so that it becomes something quite different from the naked principle of majority will. First, not only must minorities be protected from majorities, but majorities must even be protected from themselves.³⁶ Second, if true democracy does operate in terms of majority will, it is not the will of a numerical majority, but a very different conception.³⁷ Third, the notion of numerical majorities really smells of fascism.³⁸

34. (1938). I have made an attempt to analyze the argument of this book and point out some of its implication in *Lippmann Agonistes* (Nov. 27, 1937) 145 *THE NATION* 589.

35. Thompson, *The President's Political Philosophy*, N. Y. Herald-Tribune, Aug. 23, 1937, p. 15, col. 7; Aug. 25, 1937, p. 17, col. 7; Aug. 27, 1937, p. 15, col. 7.

36. "But the converse of oligarchic rule is not rule by an unchecked majority, for there can be an oligarchy of the majority as well as of the minority. The converse of minority rule is the restoration in this country of genuine popular constitutional government, of government by law, to which not only minorities but majorities and bureaucracies, Congresses and the government itself, must give obedience." *Id.*, Aug. 23, 1937, p. 15, col. 8.

37. "For the American tradition conceives of democracy not as something which functions periodically, in the form of ratifying or rejecting plebiscites, but as something which functions continually; which derives authority, not from the majority, but from the whole people . . . and which avows that every individual is invested with certain natural rights, which not even a majority of 99 per cent can divest him of. . . ."

"The parents of American democracy never advocated mass rule or the will of the majority as the final and sole authority." *Id.*, Aug. 25, 1937, p. 17, cols. 7, 8.

38. "The important thing about the president's conception of government—of the unchecked reign of the majority expressed in the form of a blanket mandate—is that it is not incompatible with dictatorship but does, indeed, furnish the philosophical justification for

And having arrived at that position, one falls back in fright on minority rights, even if it involves scrapping the TVA, the Wagner Act, the Securities Exchange Commission and the Labor Relations Board.

When we say that majorities must be protected from themselves, the premise is the anti-democratic one—that the common man may be good material for being ruled but that he has no capacity for governing.³⁹ When we go on to talk of “true” democracy, as distinguished from majority will, what are we saying? We are saying that democracy is nothing so vulgar and demagogic as a counting of heads, but that there is a “real” national will, as distinguished from the one that expresses itself at the polls. That real national will is somehow a trusteeship⁴⁰ of the minority. For the few know what is to the interest of the many better than the many know themselves. This whole conception of the national will as something transcending numbers and having no traffic with the felt desires of the day is an essentially mystical conception.

It has always been the role of reactionary thought to retreat to a mystical conception of the body politic, as witness Burke, de Maistre, Adam Müller and the French Catholic school.⁴¹ For mystical notions enable you to escape from the fact of the naked majority will. And conservative minority groups have always regarded the majority as unsavory, as meaningless by the very fact of numbers, strident and mechanical like the clashing of weapons through which the primitive Germanic tribes indicated their

modern dictatorships which have conquered the state by democratic means.” *Id.*, Aug. 23, 1937, p. 15, col. 7.

“The conception that the majority’s ratification of any executive program is the final expression of the democratic principle is, therefore, a revolutionary idea. Its adoption will inevitably lead to a change in the spirit and the form of American government. . . . The appeal to that principle is what Machiavelli recommended to his prince. The German socialists taught it to Hitler. And Aristotle was familiar with it, in the fourth century before Christ. It is revolutionary, but it is not liberal. It is, I believe, deeply reactionary.” *Id.*, Aug. 25, 1937, p. 17, col. 8.

39. This conception of the common man is embodied in the anti-democratic philosophy of Nietzsche and other German romantics; it deeply influenced the thought of Carlyle, Ruskin, and other English writers of the nineteenth century. See BRINTON, *ENGLISH POLITICAL THOUGHT IN THE NINETEENTH CENTURY* (1933); LIPPINCOTT, *VICTORIAN CRITICS OF DEMOCRACY* (1938). It has also found expression in such contemporary writers as WYNDHAM LEWIS, *THE ART OF BEING RULED* (1926); MENCKEN, *NOTES ON DEMOCRACY* (1926).

40. There is an interesting parallel between this notion of political trusteeship by the minority for the majority, and the notion of economic trusteeship by the propertied minority for the propertyless majority. It is worth noting that the minorities and majorities are roughly the same in the two instances. Economic realism has made Americans increasingly skeptical of the notion of trusteeship in the economic realm, and cautious in accepting the claim, voiced most articulately once by George F. Baer of anthracite fame, that God had granted the captains of industry their wealth to hold in trust for the welfare of the masses. They have not yet applied a similar acidity to the parallel claims in the political realm. Ultimately, of course, the concept has been extended—notably by Henry Sumner Maine—to the fabric of society itself. Maine held that all civilization was a trust held by the few for the many. See Smellie, *Sir Henry Maine* (1928) 8 *ECONOMICA* 64.

41. For an interesting study of liberal Catholicism that sought to mitigate the rigors of de Maistre and Chateaubriand through the writings of Lammenais, Ozanam, Donoso Cortes and Bishop Ketteler, see Götz Briefs, *The Dispute Between Catholicism and Liberalism in the Early Decades of Capitalism* (1937) 4 *SOC. RESEARCH* 91.

assent by the greatest noise.⁴² What is novel is the fact that all this is now said—and believed—in the name of liberalism. And yet not so novel if we consider the extent to which the ingredients of liberal thinking—that is, minority rule thinking—have entered into the traditional defense of the judicial power under the Constitution.

What has happened, of course, cannot be blamed on the Constitution. What has happened is that there has been built in America an extra-democratic structure of economic reality which dare not operate through the democratic machinery; for the democratic machinery is too easily turned into an instrument for leveling economic privilege. When this extra-democratic structure of economic reality (I use it as an academic phrase for the structure of corporate power), when this is challenged, and a successful attempt is made to take our democratic theory literally and nakedly, how far will the corporate groups allow this attempt to go? To my mind, this is the most important question that the Constitution faces in the calculable future, and it faces it more dangerously than it has confronted any problem since the Civil War. Does the economic interest of the corporate groups so far outweigh their sense of commonwealth as to make them ready either to keep their minority rule or scrap the whole democratic framework? My own conviction is that this is their attitude, and that they will insist on one or the other of these alternatives.⁴³

If this is so, the new attack on the majority principle, represented by Miss Thompson and Mr. Lippmann, takes on a disquieting importance. A counter-thrust against a successful labor government, for example, will look for a theory to attach itself to. Here is a theory ready-made. The naked majority principle, Miss Thompson tells us, is really fascist; it is part of a totalitarian state. I find a readiness in surprisingly intelligent quarters to accept this paradox. If that readiness spreads, corporate power will not lack those intellectual garments which it needs to stave off a socialized democracy—intellectual garments which the liberals are now spinning just as assiduously as the Parcae once spun other fateful garments.

42. See Konopczynski, *Minority Rights* (1937) 10 ENCYC. SOC. SCI. 525.

43. When the corporation cannot win its fight against democracy by economic means, it may call in military and political means and become (if I may give the term a twist) the corporative state.