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Judicial Review vs. Judical Supremacy

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JUDICIAL REVIEW vs. JUDICIAL SUPREMACY

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". . . any secure possession of their (the people's) civil rights is absolutely dependent upon unvarying adhesion to the letter and the spirit of the Constitution. For that great instrument, defining and restraining the powers of those persons in the representative, executive, and judicial departments of the Government, to whom the people from time to time commit the administration of the laws, is the sole charter of their political liberties, and their only barrier against usurpation. It is itself the government, of which men, duly chosen for the purpose, are only administrators. If disregarded in any one of its essential provisions—no matter under what plea, or what pretext—though the forms of a republic may for a time, and possibly, from habit or whatever cause, for a considerable time, may remain; yet the life of the republic will have, in fact, departed . . . ."
—GEORGE LUNT

OTHERWISE expressed it may be stated that power is insatiable; and permeates and penetrates *all* government; and that the power of government is *always* dangerous in *any* hands.

Under our Declaration of Independence and Federal Constitution the principles of absolute sovereignty in the government, and subordination of the people to the State, were completely and unconditionally repudiated and in the place of this sinister inexpiable doctrine, the natural principles of self-government were adopted; and the principle that "sovereignty vested in the people—that magistrates were consequently their trustees" became the beacon light of the new republic. As a result of the adoption of this basic principle the Federal government became operative upon purely conventional rights or powers, with all such powers being initially delegated by the people.

In the division of powers the people created three basic divisions of government: the Legislative,[1] the Executive,[2] the Judiciary.[3] There being no statement in the Constitution that any one branch is superior to any other

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[1] U. S. CONST., art. I.
[2] *Ibid.*, art. II.
[3] *Ibid.*, art. III.

branch, it can only be concluded that all three branches are co-ordinate divisions each supreme within the limits of its own sphere.

While no superiority is delegated to any one division over any other, it is James Madison who tells us that the Federal Convention was clearly of the opinion that it was essential to our contemplated form of government that there be a provision in the Constitution for deciding in a peaceful and regular mode, all cases arising under its operation, and that it intended the judicial department as a final resort in this respect.[4] Accordingly, three basic principles were written into the Federal Constitution which provided that:

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land; . . ." [5]

> "The judical power of the United States shall be vested in one Supreme Court, and in such inferior courts as the congress may from time to time ordain and establish. . . ." [6]

> "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority. . . ." [7]

It is under the postulates of these provisions that the Supreme Court assumed the last word in determining the constitutionality, or unconstitutionality, of both acts of Congress and state legislatures, and it is this power that is commonly known as the power of judicial review. Originally the principle of judicial review was recognized by the Supreme Court in 1796 in *Hilton v. United States,*[8] wherein the court discussed and approved the doctrine. However, it was not until 1803 in the famous case of *Marbury v. Madison* that the principle was definitely settled and the doctrine of Judicial Review of Congressional Acts conclusively established.[9] Literalized and rephrased with elegant atticism by Professor Corwin the principles of this decision have been succinctly and concisely stated as follows:

> "Since the Constitution is law (Art. VI, Sec. 2) it must be interpreted and enforced by the judges in cases arising under it. (Art. III, Sec. 2. Part 1).

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[4] WRITINGS (Hunt Edition) Vol. 9, at 142.
[5] U. S. CONST., art. VI, § 2.
[6] *Ibid.*, art. III, § 1.
[7] *Ibid.*, art. III, § 2.
[8] 3 Dallas 171.
[9] The principle of judicial review had, however, prior to Hilton v. United States and Marbury v. Madison, been recognized by Federal Circuit Courts. In 1792, in Rhode Island, state legislation was invalidated in Champion v. Casey; in 1793, in the State of Connecticut, in Connecticut v. Courant; and in 1795, in Pennsylvania, in VanHorn's Lessee v. Dorrance. In 1816, in Martin v. Hunter's Lessee, 1 Wheat. 304, the Supreme Court adopted the principle of review of the final decisions of state courts involving federal questions. In Cohens v. Virginia, 6 Wheat. 264 (1821), Justice Story reaffirmed the doctrine in a very considered opinion.

Since it is 'supreme law' (Art. VI, Sec. 2) the judges must give it preference over any other law." [10]

It is, of course, clear that the doctrine invoked by the court in deducing this principle is not one of substitution of law but of interpretation of law, and is not based upon any right, or power of its own in the matter. Expressed in absolute singleness it is the judicial declaration of a void act void, and of course to be a lawful declaration it must involve a rightful and accurate exposition of the constitution.

This doctrine has been the subject of very rigorous and severe denouncement and impeachment.

John Taylor, credited with having one of the keenest and most analytical legal minds in the United States, severely criticized the doctrine of Judicial Review. Summarizing his contentions very briefly and with considerable diversity, he states his conclusions in part as follows:

". . . There is no phrase in the constitution which even insinuates, that the actual divisions of power should be altered or impaired by incidental or implied powers. . . . Let it be remembered . . . that the means for executing the powers delegated to the latter [Federal government] are frequently *marked,* whilst those for executing the power reserved to the former, [State government] are left chiefly unlimited. And then let it be computed, which sphere may make the greatest use of the strange position 'that means, or incidental, or implied powers not excluded, are not prohibited,' however they may be at discord with the positive diversions of power. . . ." [11] (Writer's parentheses.)

". . . That court [Supreme Court] by declaring every local or internal law of Congress constitutional, would extend its own jurisdiction; a limitation of which, attended with a power to extend it without control, by a supreme power over the state courts, would be no limitation at all; since the power of supremacy would destroy the co-ordinate right of construing the constitution, in which resides the power of enforcing the limitation. The jurisdiction, limited by its own will, is an unlimited jurisdiction. . . ." [12] (Writer's parentheses.)

"If the division of powers among the great number of political departments, endowed with rights independent of each other, constitutes its chief beauty, its distinctive superiority, and its soundest security for human happiness; then the absence of supremacy or sovereignty in one department over the rest does not require the expedient of shuffling words and phrases for the purpose of getting rid of an imaginary defect, by introducing the very evil intended to be avoided. . . ." [13]

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[10] CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 67.
[11] JOHN TAYLOR, CONSTRUCTION CONSTRUED, AND CONSTITUTIONS VINDICATED 109 (1820).
[12] *Ibid.,* p. 31.
[13] *Ibid.,* p. 140.

There is also an amplitude of additional analytical reflections and commentaries upon this question.[14]

In any event, the Marshall doctrine of Judicial Review has been the law of the land. Undoubtedly if the court had absolutely adhered to the true doctrine of Judicial Review which essentially created a veto upon legislative and executive acts, clearly unconstitutional, such canons would receive the constant enthusiastic endorsement and advocacy of all proponents of limited government and true constitutional liberty.

The doctrine of Judicial Review, principally in cases involving personal liberty and freedom secured through the Bill of Rights, clearly shows that the doctrine has yielded great deterrence against legislative encroachment, though in the *Legal Tender Cases* [15] and the *Insular Cases* [16] hereinafter discussed, the court refused to exercise the doctrine in the face of clear constitutional mandate.

Prior to 1863 only two acts of Congress were declared void, and a brief analysis of some leading cases since 1870 is clearly convincing that the Supreme Court has been outstanding in guarding the individual against irresponsible legislative ordinances.

In the case of *Justices v. Murray* [17] in 1870, certain facts had been tried and determined in favor of plaintiff in the state courts. Congress had attempted by legislation to sanction a new hearing of the case in the United States courts. The court held that so much of the fifth section of the Act of Congress of March 3, 1863 as provides for the removal of a judgment in a state court and in which the cause was tried by a jury, to the federal courts for a retrial on the facts and law, is not in pursuance of the Federal Constitution and is void.

In 1886, in *Boyd v. United States,*[18] Congress attempted the unlawful authorization of search and seizure of personal and private papers, and such legislation was negated by the court. In *Gould v. United States* [19] the principle is emphatically re-affirmed.

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[14] Gilbert E. Rowe, *"Our Judicial Oligarchy"; The Development and Evaluation of Judicial Review,* 13 WASHINGTON LAW REVIEW AND STATE BAR JOURNAL (1938). EDWARD S. CORWIN, COURT OVER CONSTITUTION 17 (1928); HAINES, THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY (2d ed. 1932).

[15] The Legal Tender Cases: Knox v. Lee and Parker v. Davis, 12 Wallace 457 (1871); Julliard v. Greenman, 110 U.S. 421 (1884).

[16] The Insular Cases: Downes v. Bidwell, 182 U.S. 244 (1901); and Hawaii v. Makichi, 190 U.S. 197 (1903).

[17] 9 Wallace 274 (1869).

[18] 116 U.S. 616 (1886).

[19] 255 U.S. 298 (1921).

In the case of *Wong Wing v. United States,*[20] plaintiff and others had been found by the U. S. Commissioner to be illegally within the country, and ordered by him incarcerated at hard labor for a period of 60 days and then removed to China. The court declared unconstitutional the legislative act which so authorized their commitment to jail without indictment by grand jury and subsequent trial by jury.

In *Councilman v. Hitchcock,*[21] a leading and oft-cited case on the question of self incrimination. Congress passed legislation sanctioning criminal prosecution after obliging the individual to testify before a grand jury. The court established the doctrine that absolute immunity from federal criminal prosecution, for offenses disclosed by the evidence, must be given a person compelled to testify after claim of privilege against self-incrimination.[22]

In 1893, in *Monongahela Navigation Co. v. United States,*[23] the court points out that while Congress may determine what private property is needed for public purposes, it cannot include what shall be the *measure* of compensation or what shall be *just compensation;* such question being judicial and not legislative. And in this case due and full compensation was decreed as a condition of the recommendation.[24]

In *Kilborn v. Thompson,*[25] the House of Representatives had directed one of its committees to make a particular investigation. In this case the committee was not directed to inquire into matters of which the House "had jurisdiction." The court held that the House of Representatives had exceeded its power and announced the principle that neither House of Congress possessed "general power of making inquiry into the private affairs of citizens." [26]

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[20] 163 U.S. 288 (1896).

[21] 142 U.S. 547 (1892).

[22] In Smith v. U.S., 337 U.S. 137 (1949), Justice Reed, in commenting on Councilman v. Hitchcock, points out that to meet the requirement of that case Congress amended the immunity provisions of the Interstate Commerce Act, Vol. 24 STATS. 383, § 12. These amendments protect a witness in any subsequent criminal proceeding in the use against him of evidence so obtained, the amendments provide that "the witness should not be . . . prosecuted . . .".

[23] 148 U.S. 312 (1893).

[24] For an interesting discussion on the question of constitutional dispensing of jury trial in fixing full compensation see Paxton Blair, *Federal Condemnation Proceedings and the Seventh Amendment,* 41 HARV. L. REV. 29 (1927).

[25] 103 U.S. 168 (1880).

[26] In Marshall v. Gordon, 243 U.S. 541 (1917), the House of Representatives had punished for contempt, a person, not a member, for writing an ill-tempered letter to the foreman of one of the committees respecting the action and purposes of the committee. The question was whether the House exceeded its power in punishing the writer for contempt of its authority. The writer was not a member of its body. The court held that its action was without constitutional justification, that the letter, while offensive, was not likely to affect the House in any of its proceedings or functions. Also see Harriman v. Interstate Commerce Commission, 211 U.S. 407 (1908), and Federal Trade Commission v. American Tobacco Co., 264 U.S. 298 (1923).

While these cases illustrate judicial enforcement of limited government through judicial review, the cases also are multitudinous, with increasing emphasis, where constitutional limitations are overlooked and basic principles compromised by interpretation, interpolation and interdirection. This in substance, is the doctrine of Judicial Supremacy and consists in reading into the law either social, political or economic doctrines not contemplated by, or comprehended in the basic statute itself.

The Legal Tender Cases [27] and the *Insular Cases,* [28] decided shortly after the Civil War, show genesis and a commanding determination to sustain the doctrine of Judicial Supremacy. To understand the *Legal Tender Cases* it is necessary to first analyze briefly, *Hepburn v. Griswold* [29] and the issues therein decided.

Originally Congress was given the power in Article I, Section 8, Subdivision 2 of the U. S. Constitution, "to borrow money on the credit of the United States", and in the following Subsection 5, the power "to coin money, regulate the value thereof, and of foreign coin, and fix the standards of weights and measures." These provisions were approved by the Federal Convention (1787), after it had overwhelmingly voted (9 states to 2) to eliminate from the proposed powers of Congress, the right to "emit bills of credit." [30] At the time of this decision in the Convention, the members were well aware of the evils of paper money, and the last thing intended to be conveyed was the right to make paper money, legal tender. But, on the contrary, the debate shows that it was intended and believed to be wholly beyond power of either the union, or the states. The members of the Convention had just passed through all the horrors of an unredeemed paper currency. They were well aware of the fact that the history of unredeemed soft money had been, within the view of those who staked their property on the public faith, "always freely given and grossly violated", and that evils of such fiat issues had prostrated all private and public credit and morals, and was responsible for such fraud and chicanery as to destroy confidence, progress and development. Actually, the country was still wallowing in the trough of unredeemed currency so hopelessly irredeemable as to actually be discarded as worthless. And they knew further that it was in the face of such debauchery and profligacy in currency issues that the country had returned, at the time of the Convention, to a specie currency, and to hard money with an intrinsic value.

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[27] See note 15 *supra.*

[28] See note 16 *supra.*

[29] 8 Wallace 603 (1870).

[30] FARRAND, RECORDS OF THE FEDERAL CONVENTION, 11, 309.

However, during the stress of the Civil War there was issued by the Act of Congress of February 25, 1862, $150,000,000 of inconvertible paper currency, and by law made legal tender for the payment of all debts, both public and private. This was followed by the Acts of July 11, 1862 and March 3, 1863, each of which authorized an additional issuance of $150,000,000 of paper currency. This legislation authorized a total issuance of $450,000,000 of fiat money, all of which was legal tender.

This paper money soon depreciated in value and it was not long before its actual worth was only 35 cents on the dollar. Of course, such depreciation soon led to litigation, and it was such litigation that was involved in the case of *Hepburn v. Griswald* in which the Supreme Court was called to pass upon the constitutionality of these acts authorizing the payment of debts existing before the acts in legal tender notes. After elaborate argument and presentation of authorities it was decided by the court that the Legal Tender Acts of 1862 and 1863, insofar as they authorized the payment of debts existing before the passage of the acts in paper money, were unconstitutional and void. This decision was made in conference,[31] November 27, 1869, there then being eight judges on the bench, and at that time the court was divided five to three, to invalidate the Legal Tender Acts. At the request of the minority opinion, the announcement of this decision from the bench was withheld to enable the preparation of minority opinions. On February 1, 1870, Justice Grier, who voted in conference to invalidate the Legal Tender Acts, resigned from the bench. On February 7th, 1870 the decision of the court, heretofore arrived at in conference, was announced from the bench. This resignation now left the door open for a reversal of this opinion through new judicial appointments, and the procedural steps for this purpose were as follows: Congress, soon after Grant's election and inauguration, increased the number of justices in the Supreme Court from 8 to 9 (the number having been reduced during Johnson's presidency to deprive him of the right to make an appointment to the bench) thus creating one new appointive office. By reason of the resignation of Justice Grier, there was thus a second vacancy existing. Justice Grier was one of the five judges voting for the unconstitutionality of the Legal Tender Acts. It was now clear that if partisans to the cause of fiat money were to be appointed to the court the judgment of *Hepburn v. Griswold* could be reversed.

On February 18, 1870, President Grant appointed Judge William Strong of Pennsylvania to fill one of the vacancies, and on March 21, 1870, he appointed Joseph P. Bradley of New Jersey. Judge Strong had been on the

[31] 110 U.S. 421 (1884).

bench in Pennsylvania and he had rendered a judicial decision sustaining the constitutionality of the legal tender, and Justice Bradley had been paid as an attorney, to defend the constitutionality of the act at the bar of New Jersey.

No sooner had the Senate confirmed appointments of Strong and Bradley than the Attorney General asked that the two cases pending before the Supreme Court (*Knox v. Lee,* and *Parker v. Davis* [32]), involving the constitutionality of the Legal Tender Acts that had been heretofore argued before the court (November 1869) be reargued and submitted for decision. This request was granted by the court by a 5 to 4 decision of the judges. The five judges voting for this motion comprised three judges who formerly dissented in the case of *Hepburn v. Griswold,* plus Judges Strong and Bradley, and therefore permitted the usual procedure of reargument and resubmission. After copious reargument, the two cases were again resubmitted and on May 1, 1871, the court reversed the case of *Hepburn v. Griswold.* This of course was due to the appointments of Strong and Bradley, because the complexion of the original voting of the court was the same, the decision for reversal now standing 5 to 4, the court holding the Legal Tender Acts were a valid exercise of the war power in respect to all contracts, whether made before or after the passage of the Acts, and in so doing, it may be pointed out, that even more devastating than the conclusion of the court in the question of the legality of the Acts was the fact that Justice Bradley, in his concurring opinion, concluded that the National Government is invested with ". . . *all those inherent and implied powers* which, . . . belong to every government as such, . . ." thusly attacking limited government, the fundamental basis of the American Republic. (Emphasis supplied.)

This settled the question of the legal tender until 1875 when Congress ordered the redemption of the notes. However, in 1878, it stopped the redemption and enacted that there should be a reissue of the legal tender that had come into the Treasury. This last act resulted in the question again being brought before the court as to the legality of fiat money or legal tender notes being issued during peace times. Formerly, the legal tender had been issued during times of war. The case presenting this question was *Juilliard v. Greenman,*[33] and in this case, the court sustained the validity of the reissuance during times of peace as well as war. The crux of the decision, as in the former *Legal Tender Cases,* was the statement of the inherent or implied powers to be found in the Federal Government, the court holding that the national government possessed inherent and sovereign powers by virtue of nationality.

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[32] See note 15 *supra.*

[33] 110 U.S. 421 (1884).

The actual effect of the *Legal Tender Cases* and that of *Juillard v. Greenman* is to nullify the action of the Constitutional Convention as well as to negate the constitutional limitation of Congress to emit bills of credit. Such a doctrine, once firmly established, reduces the Constitution to a meaningless parchment.

But other changes rapidly occurred, more serious even, then the *Legal Tender Cases*. In the case of *Hawaii v. Mankichi*,[34] the petition of Mankichi asked for a writ of hapeas corpus, alleging that he had been convicted in Hawaii for manslaughter upon information of the Attorney General of the Territory (not an indictment) and was convicted by a jury voting 9 for conviction and 3 for acquittal. Hawaii had been incorporated into the United States at this time, and by the act of incorporation, the criminal law of Hawaii was to continue only so far as it was not contrary to the Constitution of the United States. Under our law 12 votes must be for guilty, and all criminal proceedings (other than treason) must proceed from indictment by a grand jury.

In this case the court laid down the most dangerous decree ever propounded by a court of justice. It held that the two guarantees; one of indictment by grand jury [35] and one of trial by jury,[36] were not fundamental rights but were procedural matters and therefore did not protect the inhabitants of the Island even after annexation.

It is the writer's contention that if the right of indictment by grand jury, and the right of trial and conviction by 12 jurors is not fundamental in its nature, then it is hard to select any right set forth in the Constitution or Bill of Rights that is fundamental. Our Bill of Rights embodied principles of English liberty which existed from 300 to 500 years before the adoption of our Constitution. By this decision the Supreme Court has held that a person being tried for a crime in the Territory of the United States annexed under these provisions shall not have the protection of Article III, Section 2, clause 3, of the United States Constitution or of the 5th and 6th Amendments thereto.

Where does the court secure the power to decide that certain portions of our Constitution and Bill of Rights are material and certain portions of these fundamental guarantees immaterial or merely procedural, and by what power does it distinguish between these guaranteed rights. Is it not logical that if the court can withhold certain of these guaranteed rights from the protection

[34] See note 16 *supra*.

[35] U. S. CONST. amend. V.

[36] U. S. CONST. art. III, § 2, cl. 3; U. S. CONST. amend. VI.

of the individual one time, that at another time they can just as well hold all of the rights to be immaterial?

In *Pennsylvania v. Nelson*,[37] the defendant was convicted in the trial courts of Pennsylvania for a violation of the Pennsylvania Sedition Act, which forbids sedition against the United States Government and also the State of Pennsylvania. The case was reversed in the Pennsylvania Supreme Court. In the United States Supreme Court the court held (6-3) by reason of the enactment by Congress of the Federal Smith Act in 1940, which proscribed advocacy of the overthrow of the federal—state—or local governments by force or violence, that: "The conclusion is unescapable that Congress has intended to occupy the field of sedition. Taken as a whole they evidenced a congressional plan which makes it reasonable to determine that no room has been left for the states to supplement it." In so doing the court by a margin of 2 votes struck down the sedition laws in 42 states of the Union plus the Territories of Hawaii and Alaska.

This majority holding is fallacious for two reasons: (1) The Federal Smith Act does not in any wise bar the exercise of state power to punish in similar acts under state law. In other words, the court has read into the Federal Act, phraseology and intent that Congress has specifically *not* placed therein.

Secondly, and more germane and fundamental to the case, is the fact that within the Union the states are sovereign in their own capacity and are the parents and the creator of the Federal Government—that the power to constitutionally create can be exercised by the states in the power to constitutionally alter the compact (Article V) or dissolve the union, and that the power to preserve statehood is as primary as the power of the Federal Government to maintain itself. It overlooks the 10th Amendment to the Constitution entirely and the doctrine that all original sovereignty vests in the people or in the states and not in the Federal Government, and that the Federal Government is a government of *delegated powers only.* It seeks to make the states the creature of the Federal Government rather than the Federal Government the creature of the states.

The minority opinion of Justice Reed touches this vital question only suggestively when he states, "in the responsibility of national and local governments to protect themselves against sedition there is no dominant interest."

In *Cole v. Young* [38] Congress had enacted on October 26, 1950, the Summary Suspension Act. The Act specifies eleven agencies of the government

[37] 350 U.S. 497 (1956).
[38] 351 U.S. 536 (1955).

and states that the head of any such agency "may, *in his absolute discretion* and when deemed necessary *in the interest of national security, suspend* . . . any employee . . . of his agency." This may be followed by a complete termination of service. Under the authority of Section 3 of the Act, it was extended by the President "to all other departments and agencies of the government."

In November of 1953 the petitioner (Cole), as a food and drug inspector for the New York District of the Food and Drug Administration, Department of Health, Education and Welfare, was suspended under the provisions of the Act. He was given a written statement of charges that he had "a close association with individuals reliably reported to be Communists" and "a sympathetic association" of an allegedly subversive organization. The secretary of the department later concluded that Cole's employment was not "clearly consistent with the interests of national security" and terminated the employment. The court held that the term *"national security"* is used *in a limited sense* and relates only to those activities which are directly concerned *with the nation's safety* as *distinguished* from the *general welfare,* and that the Act was intended to authorize the suspension and dismissal only of persons in *"sensitive positions."* And that not all positions of the Government are affected with the "national security." They held the petitioner was wrongfully discharged. (Author's emphasis.)

To this opinion there were three dissenting judges. The dissent stated "The President having extended the coverage of the Act . . . it became the duty of the Secretary (Department of Health) to dismiss any employee wherever she deemed "it necessary and advisable in the interest of national security." She made such a finding and it is implicit in her order of dismissal. Her "evaluation as to the effect which continuance of (petitioner's) employment might have upon the 'national security' has been made."

This is another illustration of the court reading into the law something that is not there, to wit, the words *"sensitive position."* This is not only judicial supremacy but judicial legislation as well.

What Madison said in 1835 was most important then, but it is more important now: "The authority of constitutions over governments, and of the sovereignty of the people over the constitutions are truths which are at all times necessary to be kept in mind and at no time more necessary than the present."

Actually the doctrine of Judicial Supremacy has created a revolution in constitutional construction, and as we are now going, has changed a limited

Federal Government operating under a written constitution into a government operating under the judicial supremacy of the Supreme Court. Unfortunately, such decisions and this policy of the Court place the Court "over the constitution." Or, as said by Justice Stone, "While unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check on our exercise of power is our own sense of self-restraint." [39]

Justice Stone's schism in the *Butler* case stemmed from the fact that the majority of the court refused to label agriculture as commerce. And his conclusion is clear that while there is a complete emancipation of the court from constitutional restraint, the executive and legislative branches of the government are subject to constitutional limitations, but such circumscription as may be chartered by the Supreme Court. It, of course, follows that if the only limitation on the powers of the Supreme Court is its own sense of self-restraint, it is a power without control and is no limitation whatsoever. As a corollary to such postulation it also follows that such judicial omnipotence can either negate the puissance of the executive or legislative branches of the government or the gratuitousness of the court may subjoin to the powers of the other branches of government, such cogency as it may desire to give.

This conclusion is well illustrated in the case of the *United States v. Curtis-Wright Corporation* and subsequent decisions in which it has decreed to the President, inherent powers in the execution of executive agreements [40] and in the case of *U.S. v. California,*[41] through the improvised doctrine of "paramount rights," nowhere to be found in the United States Constitution,

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[39] U.S. v. Butler, 297 U.S. 1, 78 (1936).

[40] 299 U.S. 304 (1936). Also see U.S. v. Belmont, 301 U.S. 324 (1937); Valentine v. U.S., 299 U.S. 5 (1936); U.S. v. Pink, 315 U.S. 203 (1942). The following executive agreements also cogently illustrate this principal: The agreements of Cairo (Nov. 22, 1943); Teheran (Nov. 28, 1943); Yalta (Feb. 4, 1945); all executed by President Roosevelt with Russia and England; and Potsdam (July 17, 1945) executed by President Truman with England and Russia. Also on point: Joseph L. Call, *Government by Decree Through Executive Agreement,* 6 BAYLOR L. REV. 277 (1954).

[41] 332 U.S. 19 (1946). This decision of the Supreme Court quieted title of the United States against the State of California in fee simple for possession of all rights and powers over the lands and minerals and other things of value underlying the Pacific Ocean and lying seaward of the ordinary low water mark for 3 nautical miles is based on the premise that ". . . the Federal Government *rather* than the State has *paramount rights* in their power over that belt, and incident to which is full dominion over the resources of the soil under that water, *including oil.*" (Emphases added.) The doctrine of "paramount rights" is not to be found in any of the delegations of power given by the people or the States to the Federal government in the United States Constitution, nor can it be implied therefrom. The only effect that can be given to this decision is to read sovereignty and omnipotent power into the Federal Government. See also United States v. Darby, 312 U.S. 100 (1940); Wickard v. Filburn (applying the Agricultural Act of 1938 to the Commerce Clause), 317 U.S. 111 (1942); Mulford v. Smith, 307 U.S. 38 (1939); Woods v. Cloyd Miller Co., 333 U.S. 138 (1947); Bowles v. Willingham, 321 U.S. 503 (1943); Yakus v. U.S., 321 U.S. 414 (1944).

there was again created and vested inherent powers in the Federal Government.

And so in conclusion we see that through the doctrine of Judicial Supremacy a transposition has taken place, the result of such transmutation being a sovereign centralized government of inherent powers restrained only by the court's prenotion. By exercising the sole power to interpret its own authority as well as the authority of the Congress, the President, and the people, the Supreme Court has become absolute in its nature. As the power to interpret includes the power to change, it of course follows that the court is not only the guardian, but the master, of the Constitution. By such stewardship the sovereignty, vested constitutionally in the people, has now been absorbed by the court, and by such conversion it stands possessed as the ultimate sovereignty in the United States rather than the people themselves being and possessing the sovereign power.