minable meaning, he argued, it should be irrelevant because it is the product of a world that is "dead and gone."

If, however, we should accept the argument that the Constitution is unknowable or irrelevant — and we should not accept it — the result should be that the judges have no basis for declaring any law unconstitutional. Enforcing the Constitution is, after all, their only justification for disallowing the policy choices made through the political process. The result should not be, as Brennan believes, that the judges are therefore free to declare laws unconstitutional on some other basis and still call the result "constitutional law."

> "This country was founded on the then-revolutionary idea that the people can and must be trusted to govern themselves, i.e., that the best form of government is self-government through elected representatives."

After disposing of the actual Constitution, Justice Brennan's next task was to imagine a new and very different one, for judicial review cannot proceed without some sort of Constitution. The constitution of Brennan's vision is undoubtedly a wonderful thing, a constitution of "great" and "overarching" principles, of "majestic generalities and ennobling pronouncements both luminous and obscure." It is the embodiment of the "aspiration to social justice, brotherhood, and human dignity that brought this nation into being," a "sublime oration on the dignity of every individual," and so on. In a word, it is simply the "lodestar for our aspirations."

The constitution of Justice Brennan's imagination has no relation to, and is often contrary to, the actual Constitution. The actual Constitution was adopted not out of any felt need to provide additional protection for human rights or to compose an oration to human dignity, but almost entirely for commercial purposes — primarily to empower the federal government to regulate interstate commerce in order to create and protect a national common market. How little the Constitution had to do with brotherhood or human dignity is most clearly indicated by its several provisions expressly recognizing and providing for slavery.

The vast bulk of constitutional litigation involves state law, and nearly all of the challenges to state law purport to be based on a single sentence of the Fourteenth Amendment and, indeed, on four words: "due process" and "equal protection." The Supreme Court, it should be clear to all, does not find the answers to the basic policy issues it decides by studying those four words. The Constitution is undoubtedly a great document, the foundation of one of the most prosperous and free nations in history. It does not detract from that greatness to point out that it is not, however, what Justice Brennan would make of it.

It is obvious that Justice Brennan's divorcing of the Constitution from its historical meaning and treatment of it as simply a lodestar for "our," or at least *his*, aspirations, is in fact simply a prescription for judicial policymaking. The question raised, therefore, is why should the people prefer government by the Supreme Court — a committee of nine lawyers, unelected and holding office for life, sitting in Washington, D.C. — to the decentralized democratic process contemplated in the Constitution? Attorney General Meese argued that judicial interpretation of the Constitution in accordance with the framers' intent is necessary if judges are to be something other than simply political actors, a third and the highest branch of the legislature, as it were. Brennan responded that this argument has its own "political underpinnings" and that it would establish a presumption of constitutionality as to challenged statutes, which involves "a choice no less political than any other."

Justice Brennan is certainly correct that a presumption of the constitutionality of legislative acts has a political basis, but it is surprising that he should find it "far from clear what justifies such a presumption." What justifies it, of course, is the basic premise of democratic government that policy issues are ordinarily to be decided through the electoral process, not by unelected judges. To refuse to assume the validity of the acts of electorally responsible officials and institutions of government is simply to refuse to assume the validity of representative self-government. By reversing the presumption of constitutionality, Brennan would reject political decisionmaking as the norm and require elected representatives to justify their policy choices to the Supreme Court justices in all cases, presumably by showing that the choices contribute to the justices' notion of social progress.

A Question of Authority

Brennan would justify the judicial supremacy he favors on the not entirely consistent grounds that, on the one hand, the justices are the true voice of the people, and, on the other, that the people are in any event not generally reliable. "When justices interpret the Constitution," he assures us, "they speak for their community, not for themselves alone" and "with full consciousness that it is, in a very real sense, the community's interpretation that is sought." The community, however, is, of course, fully capable of speaking for itself through the representatives it elects and maintains in office for that purpose. Brennan does not explain why he thinks the community needs or wants unelected judges to speak for it instead or why the judges can be expected better to reflect or express the community's views.

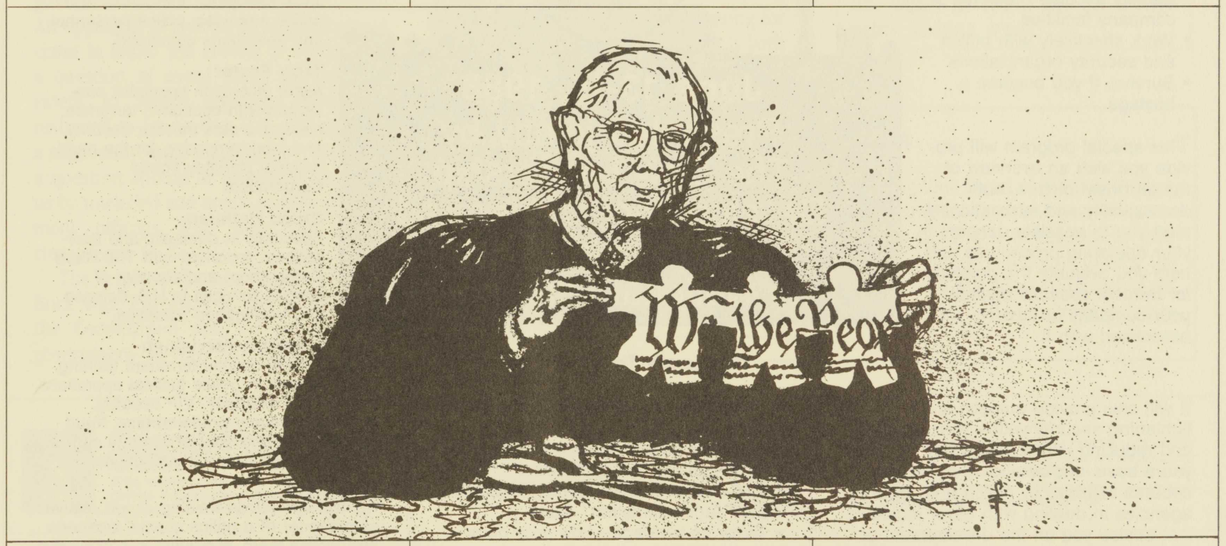
The actual effect of most judicial rulings of unconstitutionality is, of course, not to implement, but to frustrate the community's views. For example, Justice Brennan would disallow capital punishment as constitutionally prohibited despite the fact that it is repeatedly provided for in the Constitution, and that it is, as referenda and polls repeatedly show, favored by a large majority of the American people. In some cases, however, he explains, a justice may perceive the community's "interpretation of the text to have departed so far from its essential meaning that he is bound by a larger constitutional duty to the community, to expose the departure and point toward a different path." On capital punishment, Brennan hopes to "embody a community striving for human dignity for all, although perhaps not yet arrived." The people, it seems, really do oppose capital punishment; they just don't know it yet. Interpreting an aspirational constitution apparently requires clairvoyance as well as a high degree of self-confidence.

The foundation of all defenses of judicial activism, however, is not any fanciful notion that the judges are the true voice of the people, but on the contrary the conviction that the people and their elected representatives should not be permitted to have the last word. Rarely has this conviction, common among our intellectual elite, been expressed with more certainty than in Justice Brennan's speech. Judicial acceptance of the "predominant contemporary authority of the elected branches of government" must be rejected, he argues, for the same reason he rejects judicial acceptance of the "transcendent historical authority of the framers." That reason, it now appears, is not so much that original intent is unknowable or irrelevant as that its acceptance as authoritative would leave judges with too little to do. "Faith in the majoritarian process" is objectionable, he is frank to admit, simply because it "counsels restraint." It would lead the Court generally to "stay its hand" where "invalidation of a legislature's substantive policy choice" is involved. The unacceptability of a counsel of restraint by Supreme Court justices, Brennan considers beyond need of argument.

Legislative supremacy in policymaking is derided by Justice Brennan as the "unabashed enshrinement of majority will." "Faith in democracy is one thing," he warns, but "blind faith quite another." "The view that all matters of substantive policy should be resolved through the majoritarian process has appeal," he concedes, but only "under some circumstances," and even as so qualified "it ultimately will not do." It will not do because the majority is simply not to be trusted: To accept the mere approval of a "majority of the legislative body, fairly elected," as dispositive of public policy issues would be to "permit the imposition of a social caste system or wholesale confiscation of property," a situation "our Constitution could not abide."

> "If we would accept the argument that the Constitution is unknowable or irrelevant — and we should not accept it — the result should be that the judges have no basis for declaring any law unconstitutional."

How a people so bereft of good sense, toleration and foresight as to adopt such policies could have adopted the Constitution in the first place is not explained. Brennan seems to forget that if the Constitution prohibits such things — indeed, if it is an oration to human dignity, as he maintains — it must be because the American people have made it so and therefore, it would seem, can be trusted. It cannot be Brennan's position that political wisdom died with the framers and that we are therefore fortunate to have their policy judgments to restrain us; he rejects those judgments as unknowable or irrelevant.

The actual effect of judicial activism is not to protect us from Justice Brennan's imaginary dangers, but to deprive the people of each state of the right to decide for themselves such real issues as whether to provide for capital punishment or suppress pornography. In any event, the issue presented by contemporary judicial activism is not whether majority rule is entirely trustworthy — all government power is obviously dangerous — or even whether certain specific constitutional limitations on majority rule might not be justifiable; the issue is whether free-wheeling policymaking by Supreme Court justices, totally centralized and undemocratic, is more trustworthy than majority rule. If the Constitution can be said to have an overarching principle, the principle of federalism, of decisionmaking on most social policy issues at the state level, is surely the best candidate, and that principle is not adapted or updated but violated by the Court's assertion of power to decide such issues.

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