THE MASTER CRAFTSMAN OF AMERICAN MYTH: JOHN MARSHALL

"Like Socrates' daimonion, the city's constitution whispers in a man's ears."

-- Joel D. Schwarz[1]

Although the authors of the Federalist Papers contribute heavily to the construction of an American political mythology by establishing institutions to cure the ills of the "critical period" under the Articles of the Confederation, the real myth-making lies in the work of the Supreme Court and John Marshall. It lies specifically to the fact that Article III (the Judicial Article) is just sufficiently vague that it could serve as a receptacle for Marshall's economic and political philosophy through the establishment of the doctrine of "judicial review." Once the right of the Court to overturn federal and state laws is established, a further series of customs, traditions, and illusions follows in which the original of 1789 becomes nothing but a symbolic structure which is believed to give unity, continuity, and legality to the country in much the same manner as primitive myth. The Constitution elaborates and formalizes the social contract mythology. It appears to correspond to reality but actually summons a tremendous amount of emotional appeal and belief.[2]

Nowhere in our political system could the presence of myth be more evident than in the judiciary. The Court has in fact succeeded in converting large sections of the Constitution into exactly the opposite of what they were intended to mean. Some people, particularly the NRA would argue that this statement is true of the second amendment. Others would point to the fact that the ex post facto clause was intended to prevent debtor relief legislation, but from Calder v. Bull to the

Minnesota Mortgage Moratorium cases it has been used to the opposite effect. The due process and equal protection clauses of the Fourteenth Amendment were intended to protect the freedman, through an artistic illusion they came to protect corporates. The virtues of originalism can and have been debated, whether or not the meaning of the Constitution should remain fixed in the past, and whether or not that past is retrievable, but we are asked to have faith in the Court, the Constitution, and the right of the Court to adjust the mythological mechanism in accord with changing conditions. We are also asked to believe that the Court is capable of making decisions far outside its area of competency and moreover to believe that in some manner the decisions are just decisions, which is especially difficult when we are confronted by realities. The belief demands which now sustain the American judiciary are at least as heavy as those Plato places on his citizens in the Republic. (Meanwhile we are also asked to suspend disbelief in the ability of our Congress to maintain some sort of fiscal responsibility.) From a mythological point of view the role of the Court is awesome, but ultimately there is more myth, more power, and less value in the Court than in any other branch of government.

Nowhere can the gap between the myths of government and the realities of power be more noticeable than in attempting to use the written Constitution as a guide to understanding political action. The entire Watergate affair revolved around inherent or customary powers, "executive privilege," "Judicial review," "legislative investigation," none of which are mentioned in the document in itself. Nowhere is there a mention of the role of political parties, let alone nominating conventions, which have become an "efficient" part of the political process, while the Electoral College, which has the appearance of being powerful, has been relegated to a "dignified function." Nowhere, except in the first amendment, could a reader of the document obtain any feeling for the role of the press as an agency of public criticism and reform. The point is that although the written constitution of 1789 contains a core of information regarding our political system, the actual Constitution is much broader, and increasingly we are told in the phrase of a New York political boss, "What's the constitution among friends" -- the Constitution can be made to

legitimize any policy position, pro-life or pro-choice, and probably both or neither, for example. We also are told that "the Constitution is what the Court says it is," that the Supreme Court is the ultimate creator of belief and arbiter orthodoxy. What the Court actually does is to manipulate arcane formulas and lega fictions in the pious hope that its mythmaking will sustain the system, but in one sense the justices are merely an elegant group of rainmakers who suffer a more than occasional drought.

It was, however, not the Federalists but John Marshall who recognize the potential for manipulating myths as a source of power. It is true that in cases such as Calder v. Bull the Marshallian techniques are pre-tested with a vengeance. Here the Court appears to argue the merits of a Connecticut law designed to allow a probate appeal after the statutory time limitation has elapsed. Thelegal terminology either mystifies or bores. What the Court is really doing is attempting to establish a precedent by which the Federalist leaders, who were in debt for financing the Revolution, could be sprung from jail through the passage of a national bankruptcy act which would have allowed bankruptcy to be declared as of 1783. To achieve this political result all of the Federalist orientation toward the protection of property rights, insistance upon loose construction, and national over state interests, disappears. Little indeed does judicial philosophy obstruct a desired result. Both legal rhetoric and legal logic are in the style of a prosophon, the Greek actor's mask. The Court conceals, and admirably so, the real intent and purpose of its mythmaking.

If you would watch the master magician concentrate his techniques with great skill and historical awareness, then you must observe Marshall with Marbury v Madison, for while he gives the appearance of not wanting to enlarge judicial power, he actually establishes the power of "judicial review" for all time (even though the Court was extremely reluctant to exercise that power, and did so in the nineteenth century only three times over federal laws: Dred Scott, Legal Tender, and Income Tax, and each time it did so it suffered what Mr. Justice Hughes termed a

self-inflicted wound.") As in Calder, the issue in Marbury was technical, the right of the Court to issue a writ of mandamus to allow the plaintiff to receive his commission as justice of the peace in the District of Columbia.

After commenting on Marbury's abstract right to the commision, Marshall continues that there is no appropriate judicial relief because the original jurisdiction of the Court is established by Article III. Congress can only limit the appellate jurisdiction. The Court had already established that principle in Hayburn's Case in 1792 in refusing to serve as a review board for veterans' pension claims. It is of more than passing interest that Marbury's appointment as one of the "mid-night judges" was part of the Adams administration's last ditch effort to stack the federal judiciary with Federalist Party members. Marshall was the Secretary of State entrusted with issuing the commission. His brother was the State Department's messenger who failed to deliver it. Further, all of the records of the case were conveniently lost. Jefferson's attorney general, Levi Lincoln, appeared only as a witness, "mysteriouser and mysteriouser." Marshall was not required to disqualify himself because of any conflict of interest although he did so in Hunter v. Martin's Lessee in which he had served as an attorney for the Fairfax heirs who were litigants. The Federal period was a time when precedents and customs were abuilding, a time when myth-making was easy. Marshall clearly saw that the Constitution provided a receptacle for his myth creation, precisely because of the silences and compromises required to get the document ratified. It was a "dumb statue" waiting for someone to articulate its major and minor premises.

It is all to easy to get lost in the rhetoric and logic of judicial decisions. The real key to Marbury lies in both Marshall's grandiose historical vision, which rivals that of any Utopian, and his seizure of the opportunity to assert the power of judicial review while seemingly denying additional power to the Court. It is simply a fact of life, one of Marshall's "facts which are too obvious to be contested," that a law contrary to the Constitution is unconstitutional, and while chewing on that bit of wisdom, Marshall simply sweeps on to the assumption that it is the Court which has the right to make such a determination, even though as Mr. Justice Gibson in Eakin v. Raub pointed out, given the separation of powers doctrine, not to

mention the doctrine of legislative supremacy, it is just as reasonable that Congress should set aside a decision of the Court as for the Court to declare a law of Congress unconstitutional. Yet what most concerned the Jeffersonians was the short term issue, the symbol of having to deliver the principle, the Federalist hack politician. Watch the hands of the master magician as he performs his "Judgment of Solomon Act" disarming his opponents by conceding the narrow issue while an entire covey of rabbits is entering through the wide open back door, placing the Supreme Court in its cental role in the federal system.

While the myth and illusion in Marbury is masterful, it is by no means Marshall's only tour de force. There is another bit of legerdemain, for example, in Cohens v. Virginia in which Marshall effectively dehydrates the 11th Amendment and asserts federal power over the states, but does it in such a way that the Jeffersonians applaud him as a Daniel rather than villify him as a Herod. The issue in Cohens is the sale of lottery tickets by the federal government to finance the building of the capital and the arrest of Cohens, a ticket salesman in Virginia, under a Virginia law making it illegal under the state police power to sell tickets. Now had Marshall been in a Gibbons v. Odgen mood, he would merely have said federal law, state statute, federal law prevails, but instead he yields on the narrow issue of the conviction, maintaining that the states must maintain the right to regulate the health, safety, and morals of their citizens which pleases the states' rights advocates, but meanwhile the magician, having distracted the Jeffersonian's attention elsewhere, casually asserts the right of the Court to review state laws and criminal convictions, when it was a theory held by a sizeable part of the country that the state Supreme Court was the final judge on matters of state law. Successfully haveing divided and conquered his opponents, he casts a net of illusion. Well, what of the prohibition in the Constitution against a suit against a sovereign state, specifically the intent of the Congress in remedying Chisholm v. Georgia, well this is a suit obviously commenced by Virginia against Cohens when they arrested him and not a suit of Cohens against Virginia.[3]

Once Marshall establishes the mode of the Court as a myth-making institution, the Court becomes so entranced with its own abilities, that there is hardly any myth that it

will not attempt, especially after it has been reinfoced with the sacred formulas "due process" and "equal protection" from the Fourteenth Amendment which it uses at will to exorcise any evil in public policy which happens to offend it at a given moment. Under the guise of "speaking the law" orinterpreting the law, it legislates and restructures politics, economics, and ssociety and it does so with Olympian grandeur and panache all the while demanding that the citizens believe that it is adhering to something called Constitution.

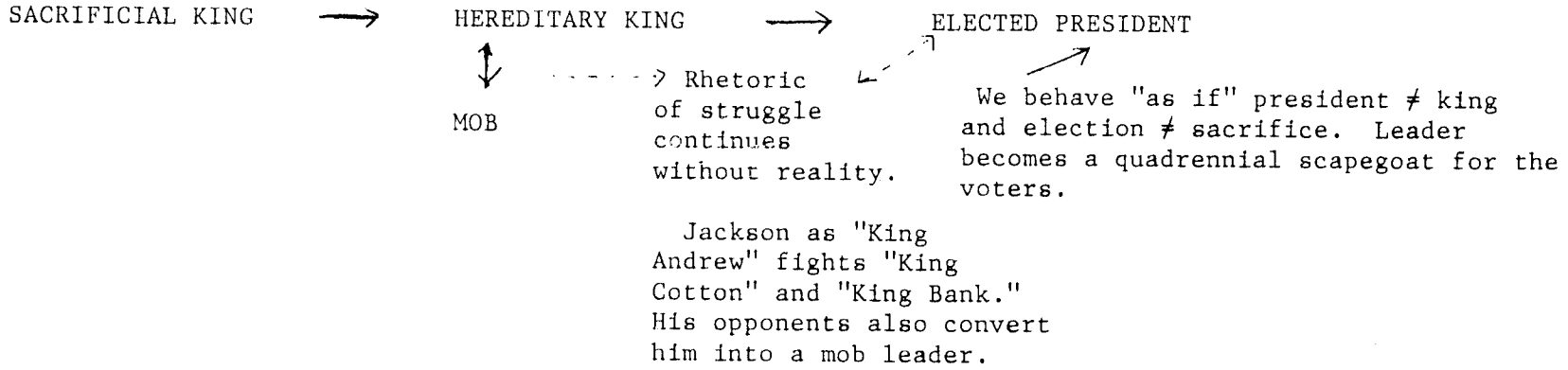
NOTES:

1. Joel D. Schwartz, Human Action and Politics in Oedipus Tyrannos," p. 207 in Euben, op. cit.

2. Albert Beveridge, The Life of John Marshall (1944-47).

3. Cf. Robert G. McCloskey, ed., Essays in Constitutional Law (1957) and in general, Edward S. Corwin, The Constitution and What It Means Today (1973); I acknowledge a great debt to Prof. McCloskey for an understanding of Constitutional Law and John Marshall, but the interpretation is more that of Prof. W.Y. Elliott, Cf. "The Constitution as American Social Myth" in Conyers Read, ed., The Constitution Reconsidered (1938).

I. PROCESS AND REALITY IN AMERICAN MYTHOLOGY



II. LEGITIMACY AND LEGALITY

MEDIEVAL PERIOD — EIGHTEENTH CENTURY

GOD → SOCIAL CONTRACT → REVOLUTION → ROUTINIZATION OF CHARISMA → REMYTHOLOGIZATION

CONSTITUTION

Demythologization and secularization

We behave as if the secular mythology is "rational."

National heroes established; Judicial remystification and "legal fictions."