Still a City upon a Hill?

"The Soul of a Nation" by Wilfred M. McClay, in *The Public Interest* (Spring 2004), 1112 16th St., N.W., Ste. 140, Washington, D.C. 20036.

When the World Trade Center towers fell to earth, American flags suddenly sprouted everywhere, and millions of Americans flocked to churches for solace and strength. American "civil religion" was back, though for how long it's difficult to say.

Civil religion blends the religious and the secular in a sometimes uneasy union, explains McClay, a historian at the University of Tennessee at Chattanooga, bestowing "many of the elements of religious sentiment and faith upon fundamental political and social institutions." It's the civil religion that makes the Declaration of Independence a "sacred" text and the religious notion of America as a "city upon a hill" a secular touchstone. And it's the civil religion that steels Americans to sacrifice for the common good.

Throughout American history, there have been critics who've seen the whole idea of civil religion as a dangerous invitation to national self-righteousness or to religion's subordination to the state. But most Americans have accepted the civil religion, concerning themselves chiefly with the constant renegotiation of the boundary between the political and the religious that it involves.

Since the 1980s, however, there has been growing disenchantment among committed Christians on the Left and Right, who question whether Christianity is compatible with an America that pursues such policies as intervention abroad (says the Left) or legalized abortion (says the Right). The liberal Methodist theologians Stanley Hauerwas and William Willimon even argued in 1989 that churches should see themselves as "colonies in the midst of an alien culture."

That disenchantment has been fueled by the rising strength of those who question the place of *any* civil religion in America. It can be seen in the criticism of President George W. Bush's post-9/11 "God talk"—which is perfectly in conformity with American tradition, says McClay—and the current controversies over the Pledge of Allegiance, gay marriage, and bioethics. Yes, McClay concludes, there's always a danger of too close an identification between the religious and the political, but a greater danger today is that committed Christians will choose to confine their faith to their churches and cease to consider themselves "loyal and obedient American citizens."

Talking Back to the Court

"We the People" by Larry Kramer, in *Boston Review* (Feb.–Mar. 2004), E53–407, Massachusetts Institute of Technology, Cambridge, Mass. 02139.

Nearly everyone now takes it for granted that the final word on the Constitution's meaning belongs to the Supreme Court. Yet "broad acceptance of judicial supremacy is of surprisingly recent vintage"—and ought to be overturned, argues Kramer, a law professor at New York University.

Judicial supremacy didn't begin with *Marbury v. Madison* (1803), as is commonly supposed, he argues. That decision established the principle of judicial review of acts of Congress, but it didn't imply that the Supreme Court would have the last word on all things constitutional. In invalidating a federal statute, Chief Justice John Marshall avoided using Federalist arguments for judicial supremacy (though he favored it) and instead cribbed Democratic-Republican ones for "departmentalism." This theory, which emerged in the 1790s, grew out of the notion that the different departments of government, by checking and balancing one another, would keep the people informed about controversial proposals. The people themselves would serve as the ultimate arbiter of

the Constitution's meaning, expressing their views through petitions, protests, and public opinion.

For many years, claims of judicial supremacy were revived only occasionally. When "an overconfident Supreme Court" declared in the infamous *Dred Scott* decision in 1857 that Congress had no power to exclude slavery from federal territories, Abraham Lincoln and others reasserted the departmental theory and rebuked the Court for its presumption. After clashing with President Franklin D. Roosevelt over some of his New Deal legislation—and facing the threat of FDR's court-packing plan—the Court essentially backed down: Constitutional questions about the scope of federal power would be left to the political process, while the judges would police individual rights.

But in 1958, when Arkansas and other southern states sought to defy the Supreme Court's school desegregation decision in *Brown v. Board of Education* (1954), the justices made a sweeping claim of judicial supremacy, asserting that it had been accepted since *Marbury*.

That was nonsense, says Kramer, but the idea "seemed gradually to find public acceptance." Conservatives, for the most part, had always favored it, and liberals, enamored of the Court's liberal activism under Chief Justice Earl Warren, abandoned their old doubts. Still, the Court largely refrained from trying to define the scope of presidential and congressional authority.

Until, that is, Chief Justice William Rehnquist's conservative Court became much more aggressive, says Kramer, "striking down federal legislation at a pace far greater than [that of] any other court in American history."

Behind the rise of judicial supremacy since the mid-20th century, Kramer believes, lie "profoundly anti-democratic attitudes." In his view, when the Court overreaches, Americans should pressure their representatives to rein in the jurists: "Justices can be impeached, the court's budget can be slashed, the president can ignore its mandates, Congress can strip it of jurisdiction or shrink its size or pack it with new members or give it burdensome new responsibilities or revise its procedures. The means are available, and they have been used [in the past] to great effect when necessary."

Not So Bully

"Public Presidential Appeals and Congressional Floor Votes: Reassessing the Constitutional Threat" by Richard J. Powell and Dean Schloyer, in *Congress & the Presidency* (Autumn 2003), Dept. of Government, American University, 4400 Massachusetts Ave., N.W., Washington, D.C. 20016.

When a popular president uses the "bully pulpit" of his office, does an aroused public then scare Congress into doing as he wishes? Many scholars have thought so, and some have even fretted that a "plebiscitary" presidency is undermining what passes for deliberative congressional debate. Not to worry, say Powell, a political scientist at the University of Maine, and Schloyer, a graduate student at Northwestern University.

They selected 330 controversial key votes in the House between 1961 and 1992, and 299 in the Senate, and examined how the votes were affected by presidential speeches made during the month before they were taken. Powell and Schloyer found that neither the total number of speeches on an issue nor the fact that one or more were delivered in the legislator's home state made any difference in the legislator's likely vote. But when the president spoke on national television, "vulnerable" senators, especially those of his own party, were slightly more likely to go along with him. House members, in contrast, were slightly more likely to *oppose* him, which suggests, say the authors, "that presidents go public when congressional support for a bill is waning." The odds of winning House converts, particularly in the opposition party, are against them.

So what's the bully pulpit good for? It improves the chances that legislation favored by the president will at least make it to the floors of the House and Senate for votes.