

The Yale Law Journal

Volume 98, Number 3, January 1989

Article

Reason and Will in the Origins of American Constitutionalism

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Tocqueville was the first to notice that political controversy in America tends to become legal controversy.¹ This is true not just of particular controversies but also of the largest issues of the character and sources of political authority in America. Debate over the foundations of American political order is largely a debate over the nature of constitutional law.

While the longevity of the American Constitution has recently been much praised, the Constitution has, in fact, had many lives. The document is a vessel into which we pour our national debate over the nature of legitimate political authority. That debate has reached different answers at different times. The survival of the formal text should not blind us to the reality of radical change in the meaning of the Constitution.

This article explores the change in constitutional world views in the

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1. 1 A. TOCQUEVILLE, *DEMOCRACY IN AMERICA* 290 (P. Bradley ed. 1945) (Reeve ed. 1862) ("Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.").

first sixty or seventy years of constitutional development. This period began with the constitutional founding and ended with the Supreme Court's disastrously unsuccessful effort to quiet divisive political conflict over slavery through an appeal to constitutional authority in *Dred Scott v. Sandford*.²

American constitutionalism in this period was marked by radical movement in the relationship between two concepts, reason and will, or, what is the same thing viewed from a political rather than a psychological perspective, political science and consent.³ The founders believed in the possibility of molding political order on the basis of political science, and more importantly, they believed that the unique meaning of the constitutional founding lay in successfully obtaining popular consent to scientifically correct political order. By the time of *Dred Scott*, these beliefs had essentially disappeared. The scientific element within the general understanding of the constitutional foundation dropped out. Constitutional order, instead, came to be understood solely within the framework of consent. The model of consent that came to dominate, however, was one that projected the relevant act of popular will into the past. Two simultaneous movements, therefore, require explanation: first, the move from reason to will as the first principle of constitutional order; second, the move from a focus on the present to a focus on the past.

To explain the nature and significance of these developments, I will place the ideas of reason and will within two broader conceptual models of order. Reason is to be located within a model organized around the image of a technical art applying an abstract science. Will is to be located within a model organized around the image of organic life. The changing place of reason and will reflects a broader change in the underlying framework within which political order is understood—a shift from a technical to an organic model.

In the technical model, political order is a product of the application of science—political science—to the community and its structures of government. In this view, constitutional law is the product of a technical art informed by a science of politics.⁴ This scientific foundation explains the prominence of reason in this account.⁵ In the organic model, political or-

2. 60 U.S. (19 How.) 393 (1857).

3. See *infra* text accompanying notes 31–51 for a discussion of the relationship between psychological and political perspectives on order.

4. The idea of a “political art” should not be confused with the “creative arts.” The precise word for the technical, political art I have in mind is the Greek term *techné*. Examples of a *techné* include medicine and civil engineering, rather than the imaginative, creative arts of architecture and poetry.

5. The key terms in this account are “reason,” “science,” and “art.” While all are related, the terms can be further defined as follows. “Reason” refers to the psychological faculty that has the capacity for knowledge. “Science” is the product of reason’s application to the objects of knowledge. The particular science at issue here is “political science.” “Art” refers to the use of a science to mold an appropriate material to reflect or embody the ideal content of the science. The political art, therefore, applies political science to a particular community.

der is self-contained and self-sustaining.⁶ An organic theory understands the problem of constitutionalism to be the maintenance of the order established at the birth of the state. Accordingly, the task of constitutional law is not to mediate between an abstract, universal scientific truth and the actual community, but rather to preserve the unique political order that was put into place by the founding act. That founding act is seen as an expression of pure will—i.e., of consent alone.⁷ The measure of constitutional law in this view is the intent of the founders rather than scientifically revealed truth.

Described in this way, these terms comprehend much of the contemporary debate over the role of originalism in constitutional interpretation.⁸ Originalism claims a privileged place for the intent, i.e., the will, of the founding generation in construing the constitutional text. It rejects interpretations based upon contemporary products of reason—e.g., political or moral theory. One aim of this work, accordingly, is to respond to the increasingly prominent claims of originalist theorists and jurists by locating and examining the emergence of originalism in constitutional law. I will argue that the conflict between originalism and non-originalism is best understood as part of the dynamic development of a national political self-consciousness. Instead of a privileged theory of interpretation, originalism is simply a distinct stage—neither the beginning nor the end—of the development of constitutional theory. Understanding originalism as only a moment in a larger development simultaneously undermines its claim to a privileged authority and reveals the reasons for the doctrine's power in constitutional theory.

The move from a technical to an organic model is not unique to constitutional law. This conceptual shift is characteristic of many social orders.⁹

6. The organic model is distinctly not an evolutionary model of order. On the contrary, "organic" refers to the particular organism that regulates itself by maintaining its defining order, not to the larger natural domain within which species may evolve and change. The organic model can incorporate growth—e.g., the move from youth to adulthood—but not change in the defining form of the organism. On the popularity of organic metaphors in the pre-Darwinian age of American constitutional history, see G. FORGIE, *PATRICIDE IN THE HOUSE DIVIDED* 98 (1979). A well-known example of the use of this model at this time in American history is Lincoln's Gettysburg Address, with its appeal to the metaphor of conception and birth.

7. "Will" refers to the psychological faculty by which we choose. "Consent" is an expression of will, just as science is a product of reason. I will speak of political theories that place consent at their center as theories of "political legitimacy."

8. See, e.g., R. BERGER, *FEDERALISM: THE FOUNDERS' DESIGN* (1987); Maltz, *Foreword: The Appeal of Originalism*, 1987 UTAH L. REV. 773; Powell, *The Modern Misunderstanding of Original Intent* (Book Review), 54 U. CHI. L. REV. 1513 (1987) (reviewing R. BERGER, *FEDERALISM: THE FOUNDER'S DESIGN* (1987)); E. Meese, Address before the D.C. Chapter of the Federalist Society Lawyers Division (Nov. 15, 1985).

9. Both the technical and the organic models are particular manifestations of a more basic distinction between making (founding) a social order and maintaining it. While they are perhaps the most common models of making and maintaining, they are not exclusive. Thus, a making could be understood to be the product of divine inspiration, instead of science. The divine shares with science the concept of an ideal form upon which practical reality is to be modeled. The relationship between these alternative possibilities for understanding the founding of a state was a particular problem in Florentine political thought. See J. POCOCCO, *THE MACHIAVELLIAN MOMENT* 136-37, 190-93 (1975). Sim-

The shift occurs whenever there is a change in the understanding of the relationship between a social order and time: a change from invention in time—starting something new—to maintenance within time—preserving an established order within the vicissitudes of time. Consider, for example, the difference between the prophet claiming to possess true knowledge and the church he founds, or between the lawgiver and the community that maintains the law he provides.¹⁰

These conceptual models have a unique appearance within the history of American constitutional law because they must be integrated at every moment with an idea of popular self-government, a constant presupposition of American constitutional order. The models of order—the technical and the organic—have provided changing conceptual filters by which this idea of self-government has been given form and substance. The “self” of self-government has always been a controversial issue in constitutional theory. Self-government may find itself in either the universalism of reason or the act of consent.¹¹

ilarly, maintenance might be accomplished by a common law model of the application and development of precedent. Maintenance of the community can include some change, as long as that change is itself rooted in the history of the specific community. Again, Pocock's elaboration of the place of custom, or usage, in fifteenth and sixteenth century Florentine thought is a good example. *Id.* at 180. Nevertheless, founding will generally take the form of a technical art in an age that believes in the critical capacities of reason, i.e., the ability to stand apart from and objectively evaluate the existing order. Maintenance, on the other hand, is likely to take the form of the organic model when a community confronts the problem of its historical identity, something that reason alone cannot provide.

10. This distinction between making and maintaining the social order was given classical expression in the myth of Lycurgus, the lawgiver of Sparta. Having established the constitution of Sparta, he exacted a promise from the populace that they would make no change in the laws until he returned from Delphi. In order to maintain the order he had made, Lycurgus committed suicide. The biblical story of Moses leading the Jews out of Egypt, but failing to enter the new land and new community, provides another example. In both cases, the death of the individual's organic body is a symbolic precondition of the creation of an organic community that can sustain itself through history. The individual death symbolizes the transformation of the locus of temporal life from the physical to the social body.

The distinction between founding and maintaining, and the changing role of the individual relative to the community, was well-known to political theorists of the eighteenth century. For example, Rousseau's discussion of the Lawgiver in *The Social Contract* cited Montesquieu for the following proposition: “[A]t the birth of political societies, it is the leaders of the republic who shape the institutions but afterwards it is the institutions which shape the leaders of the republic.” J. ROUSSEAU, *THE SOCIAL CONTRACT* 84 (M. Cranston trans. 1968) (1762). The importance of the distinction to the founders is discussed in D. ADAIR, *FAME AND THE FOUNDING FATHERS* 14–15 (1974). See also H. JAFFA, *CRISIS OF THE HOUSE DIVIDED* 219–21 (1982) (“The founder, *qua* founder, is then never a part of the order he founds. . . . They are not bred under the law of the republic they help to found; they are never so thoroughly molded by it in their inner beings as those who come after them.”).

11. A word of caution is in order, prior to my inquiry into the changing world views that mark American constitutional development. I am looking for the model that best characterizes the general outlooks of Publius, Marshall, and Taney. In each case, the models identified are hardly exclusive; elements of other models and approaches can always be found. The founders, for example, understood themselves to be both starting a political tradition and continuing one. See, e.g., The Declaration of Independence (U.S. 1776) (claiming right “to lay a new foundation” and describing history of grievances peculiar to colonies which were to be corrected by new government). Accordingly, elements of “maintaining” will be found alongside what I identify as the dominant understanding of the founders' constitutional role, one of “making.” Similarly, once a conceptual model is introduced into constitutional discourse, it survives; appeal can always be made to it, despite the general move to a new model. Thus, we should not be surprised if an argument in the mid-1800's has strong similarities to

I. THE FEDERALIST AND THE FOUNDING MOMENT

It is a commonplace to refer to the political life of the United States as an "experiment." To characterize action as "experimental" is to distinguish it from both nature and accident. Unlike the natural event, it is not determined by an endless sequence of cause and effect.¹² Unlike the accident, the experiment is not a product of chance, but arises from deliberate choice. In both of these respects—natural indeterminacy and deliberative determinacy—the experiment is the paradigm of a free act.

The American political community lends itself easily to an "experimental" characterization both because its governmental structure had an historical beginning—a point at which the act of state-building was self-consciously pursued—and because it explicitly holds open the possibility of a remaking of that structure.¹³ The Declaration of Independence sets forth this experimental character when it speaks of the "Right of the People to alter or to abolish [a form of government], and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness."¹⁴ A right to "alter or abolish" points to natural indeterminacy, while the laying of a new foundation suggests deliberative choice.

A written constitution denies, through its very existence, that political structure is a product of either nature or accident. A constitution is a made object, constructed on the basis of a set of beliefs about that governmental order which is most likely to produce "safety and happiness." Political independence was thus linked in both the Declaration of Independence and the Constitution to the experimental character of government. The movement from the Declaration of Independence to the Constitution, however, was one of increasing realization of the need for a science to inform this right of political experimentation.¹⁵ The people may have "an

an argument by Chief Justice Marshall. Likewise, we should not be surprised to see the world view of Chief Justice Taney reemerging in that of the present Chief Justice. See *infra* note 235. My aim is not to locate these intricacies of expression, but to characterize the dominant models that shape the basic understanding of the nature of constitutional authority.

12. From one perspective, the experiment is simply another event in nature. From the perspective of the experimenter, however, there must be a belief that the causal sequence can be interrupted.

13. The amendment process established in Article V carefully preserves the place of political expertise, and hence deliberative determinacy, in any such remaking of the Constitution. Thus, amendments must be proposed by Congress or by a Convention called for this purpose. Both bodies were seen to be centers of political deliberation and insight. See THE FEDERALIST No. 2 (J. Jay) (C. Rossiter ed. 1961) (discussing scientific, deliberative capacities of Philadelphia convention) [hereinafter all citations to *The Federalist* are to this edition]. Amendments were not, accordingly, to be the result of popular action, unmediated by political science. *But cf.* Ackerman, *Discovering the Constitution*, 93 YALE L.J. 1013, 1051-63 (1984) (theory of "structural amendment," which discounts place of science and proposes expanded model of consent instead).

14. The Declaration of Independence para. 2 (U.S. 1776).

15. See G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 593-96 (1969) (discussing emerging realization of "an American science of politics" at time of framing of Constitution).

inherent right . . . to alter or abolish," but without political science, what "to them shall seem most likely to effect their safety and happiness" is not likely to do so in practice.¹⁶

In American political life, these concepts have continued to be linked: experimentalism, constitutionalism, independence, and freedom. Nevertheless, in the history of American constitutionalism, the relationship between political science and political freedom was most directly the focus of attention at the moment of the founding. The interaction between these two concepts provided the great drama of the foundational text of American constitutional law: *The Federalist*.¹⁷ The two sides of this dramatic battle can be variously characterized as political science and political legitimacy, reason and will, or truth and consent. The issue is always the same; the choice of terms is determined only by the perspective from which one approaches the battle.

A. *The Role of Deliberation and the Unity of Political and Psychological Order*

The first page of *The Federalist* contains the following observation:

It has been frequently remarked that it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force.¹⁸

16. When the framers spoke of "experiments" within political science, they did not have in mind a modern inductive science. Rather, they shared Hume's idea of an "experimental" political science. See M. WHITE, PHILOSOPHY, THE FEDERALIST, AND THE CONSTITUTION 19-20, 194-203 (1987). Hume's claim that political science was "experimental" did not contemplate a deliberate sequence of repeated experiments. Rather, its "experimental" character lay first of all in the need to study actual history in order to achieve an understanding of the principles of political science: past social orders were the relevant "experiments." Furthermore, political science was "experimental" in the sense that the knowledge gained in this science could be put into practice in the deliberate creation or design of actual political systems. The framers' use of the term "experimental" in reference to the study of politics shares both of these meanings. Thus, Publius uses the term "experiment" to refer both to the historically available materials respecting prior political orders, see, e.g., THE FEDERALIST NO. 38, at 233 (J. Madison), and to the proposals for political change set forth at the Philadelphia Convention. See, e.g., THE FEDERALIST NO. 37, at 231 (J. Madison).

17. Only Madison's notes on the Philadelphia Convention can compete for this position, but those notes do not purport to be a "text," and they were not available until fifty years after the ratification debate. In calling *The Federalist* the "foundational text," I do not mean to emphasize its actual political effectiveness, but rather its powerful expression of a dominant constitutional world view. Jefferson, for example, characterized *The Federalist* as "the best commentary on the principles of government which ever was written." Letter to Madison (Nov. 18, 1788), in 5 THE WRITINGS OF THOMAS JEFFERSON 53 (1904).

18. THE FEDERALIST NO. 1, at 33 (A. Hamilton). Epstein interestingly comments on this passage as follows: "What the Declaration of Independence calls a 'self-evident' truth—that new governments are instituted by popular consent—is treated by *The Federalist No. 1* as an 'important question.'" D. EPSTEIN, THE POLITICAL THEORY OF THE FEDERALIST 12 (1984). This reflects the growing realization that popular will alone must be displaced by popular deliberation and participation in political science.

“Reflection and choice” are contrasted with “accident and force.” A choice based on reflection may be characterized as an “experiment;” “force,” when contrasted with accident, may be characterized as “nature.” Thus, the alternative to an experimental politics is one determined by accident and nature. The immediate end of the constitutional enterprise, of which *The Federalist* is a part, is to make American political life experimental: Constitutional order should be chosen on the basis of reflection.¹⁹

The experimental character of the constitutional project reappears at a higher level of generality in Publius’s opening remark. American political life is to be a test of a larger theory that is independent of the reflection on the appropriate choice of a particular constitutional order for the United States. The introduction of this larger theory is marked by the subtle recharacterization of the audience to which the argument of *The Federalist* is addressed. *The Federalist* opens with the following admonition: “After an unequivocal experience of the inefficiency of the subsisting federal government, you are called upon to *deliberate* on a new Constitution for the United States of America.”²⁰ The “you” is narrowly the citizens of New York. As the paragraph continues, however, the “you” quickly becomes “the people of this country.” Just as quickly, it expands again into all “societies of men.” The reader is simultaneously the citizen of New York, of this nation, and of all other nations. For this reason, in this admonition to deliberate, there is at issue the “fate of an empire in many respects the most interesting in the world.”²¹

This expansion marks the multiple levels of the text. The text is simultaneously a part of a particular political debate and a general theory of the nature of political order. The general theory concerns the character of political freedom: If men cannot make political choices on the basis of reflection, then political freedom will not be distinguishable from nature and accident. Thus, the question confronting the country is the “most interesting” because in it will be decided the question of the capacity of men for successful self-government.²²

19. Publius himself often refers to the “experimental” character of American political order. See, e.g., THE FEDERALIST No. 14, at 104 (J. Madison); No. 37, at 231 (J. Madison); No. 38, at 233 (J. Madison). With some irony, Publius will later argue that the actual possibility of an experimental politics in America is itself, from a more abstract perspective, a function of the “accidental” conditions attending the post-revolutionary period. See D. EPSTEIN, *supra* note 18, at 19–21. This ambiguous relationship of science to accident—science controls the accidental quality of nature but the opportunity for the use of science is itself controlled by that quality—carries forward a theme of Machiavelian political theory. See J. POCOCK, *supra* note 9, at 172.

20. THE FEDERALIST No. 1, at 33 (A. Hamilton) (emphasis added).

21. *Id.*

22. On the same theme, see *Washington’s First Inaugural*, in INAUGURAL ADDRESSES OF THE PRESIDENTS 2, 24 (R. Bowers ed. 1929) (“[T]he propitious smiles of heaven can never be expected on a nation that disregards the eternal rules of order and right, which heaven itself has ordained: and . . . the preservation of the sacred fire of liberty, and the destiny of the republican model of government, are justly considered as deeply, perhaps as finally staked, on the experiment entrusted to the hands of the American people.”).

The object of this higher-level experiment, then, is not the particular propositions of republican political science describing the structure of an appropriate government for America but the experimental quality of government itself. The "important question" addresses the character, and not the particular content, of the constitutional enterprise. It asks whether "societies of men" can choose a political life on the basis of reflection.²³

These two terms—"reflection" and "choice"—set the framework for the entire analysis that follows. Within that framework, reflection precedes choice in two senses. First, political choice must be based on reflection. Second, reflection must encompass choice as a subject of political theory. That is, a reflection on political order must be self-reflective: It must explain the appropriate relationship between choice and reflection in politics. The higher-order theory, of which American constitutionalism is to provide experimental verification, is just such a reflection on the relationship of reflection to choice in popular self-government. A full analysis of *The Federalist* must place the particular experiment of American constitutionalism within the larger context provided by this higher-order theory.

Popular self-government makes its appearance in the very first line of the work. "You" are called upon to deliberate because all legitimate political order is self-imposed.²⁴ But self-government is immediately linked to deliberation—to reason. "You" are not just called upon to decide, but to *deliberate*. "You" are appealed to because legitimate government requires the consent of the governed. But legitimate government will not be "good" government without successful deliberation.²⁵

In this opening statement, Publius suggests that political legitimacy and political truth are not identical. The convention's plan may be "correct"—a political construction properly derived from true political principles revealed by political science—even if it is rejected by the larger community.²⁶ Publius obviously believes that the Philadelphia Convention got

23. Cf. J. Diggins, *Theory and the American Founding*, (presented at Legal Theory Workshop at Yale Law School, Feb. 25, 1988) (denying both that founders envisioned "theoretical" politics and that they believed that American political life would be morally exemplary).

24. See THE FEDERALIST NO. 49, at 313 (J. Madison) ("[T]he people are the only legitimate fountain of power . . .").

25. In June 1783, Washington had addressed this relationship between political science and popular choice in a circular letter to the state governors:

The foundation of our Empire was not laid in the gloomy age of Ignorance and Superstition . . . but at an Epoque when the rights of mankind were better understood and more clearly defined, than at any former period; the researches of the human mind after social happiness, have been carried to a great extent, the treasures of knowledge, acquired by the labours of Philosophers . . . are laid open for our use, and . . . may be happily applied in the Establishment of our forms of Government. . . . [I]f . . . Citizens [of the United States] should not be completely free and happy, the fault will be intirely[sic] their own.

Letter from George Washington to the state governors (June, 1783), *reprinted in* D. ADAIR, *supra* note 10, at 93.

26. See also THE FEDERALIST NO. 14, at 105 (J. Madison) (structure of Union "has been new modeled by the act of your convention, and it is that act on which you are now to deliberate and to

it right—or, at least as right as could reasonably be expected.²⁷ The truth of the plan is in no way contingent upon the community's acceptance of the plan. Conversely, legitimate government—government based on consent—is not necessarily good government.²⁸

Publius introduces the idea of political deliberation with a warning:

The plan offered to our deliberations affects too many particular interests, innovates upon too many local institutions, not to involve in its discussion a variety of objects foreign to its merits, and of views, passions, and prejudices little favorable to the discovery of truth.²⁹

The exercise proposed by *The Federalist* is a mutual deliberation upon the nature of government. Deliberation must be freed from the natural and accidental—i.e., the everyday—selves. Those everyday selves are pre-deliberative, unconcerned with abstract ideas. Only if that break can occur will deliberation be an exercise in “the science of politics,”³⁰ the end of which is the “discovery of truth.”

Political science in *The Federalist* is initially linked to freedom in this act of self-denial, which is required for successful deliberation. Political science is linked again to freedom at the moment of choice. Publius affirms not simply the possibility of an objective science of politics, but also the possibility of choice based upon that science. The success of the project requires freedom in both dimensions: free thought (reason) and free choice

decide”).

27. Publius identifies only a few areas of disagreement with the plan of the Convention. One example is a proposal for linking the presidential veto to senate action. See THE FEDERALIST NO. 51, at 323 (J. Madison). He does, however, on occasion admit the obscurity of some areas of political science, and the resultant difficulty of reaching the scientifically correct solution of particular political problems. See, e.g., THE FEDERALIST NO. 37 (J. Madison).

28. While sharing Rousseau's belief in the necessity of a coincidence of will and reason, see J. ROUSSEAU, *supra* note 10, at 83 (“[P]ublic enlightenment would produce a union of understanding and will in the social body, bring the parts into perfect harmony and lift the whole to its fullest strength.”), Publius did not accept Rousseau's belief in a substantive, general will whose content could be identified apart from the aggregation of particular intentions. Publius operates with an idea of consent founded on actual, individual choice. Accordingly, his model of will is squarely within the emerging liberal tradition. See *infra* text accompanying notes 61–71. Thus, for Publius, reason and will remain distinct faculties—a distinction that Rousseau denies. See, for example, Rousseau's claim that the terms of the social contract are “precisely determined by the nature of the act.” J. ROUSSEAU, *supra* note 10, at 60. This difference leads to major differences between continental political thought and American political thought. For Rousseau, legitimate government necessarily coincides with good government, because of the coincidence of universal reason and the general will. In American thought, legitimate government does not necessarily lead to good government. The task of statesmanship is to work a convergence of the two, by moving the public to act on, or will, the public good.

29. THE FEDERALIST NO. 1, at 33 (A. Hamilton).

30. THE FEDERALIST NO. 9, at 72 (A. Hamilton) (“The science of politics . . . like most other sciences, has received great improvement.”). See also 1 A. TOCQUEVILLE, *supra* note 1, at 7 (“The first of the duties that are at this time imposed upon those who direct our affairs is to educate democracy . . . to substitute a knowledge of statecraft for its inexperience, and an awareness of its true interest for its blind instincts A new science of politics is needed for a new world.”).

(will).³¹ The task of *The Federalist*, then, is to work a convergence of reason and will, of political science and political legitimacy.

This description of Publius's project emphasizes the interrelation of political and psychological phenomena within the argument of *The Federalist*. Thus, the political project of discerning and constructing the correct political order rests upon the psychological capacity to transcend "passions, and prejudices little favorable to truth."³² Wisdom and virtue are simultaneously psychological qualities and political capacities. In fact, Publius believes in an underlying unity of the psychological and political domains.³³

For Publius, the political order necessarily reflects the psychological character of the populace: "But what is government itself but the greatest of all reflections on human nature?"³⁴ The best government is that in which the good man and the good citizen are one and the same.³⁵ Accordingly, Publius's preference for republican government is tied to his belief that such a political order requires, more than any other, a high degree of virtue among its citizens.³⁶ When Publius writes that republican government has a unique need for virtue among its citizens, this is both a de-

31. See THE FEDERALIST NO. 36, at 224 (A. Hamilton) ("[A] further and more critical investigation of the system will serve to recommend it still more to every sincere and disinterested advocate for good government . . . Happy will it be for ourselves, and most honorable for human nature, if we have wisdom and virtue enough to set so glorious an example to mankind!"). Not just wisdom, but also "virtue," is required of individual citizens, because they must choose well for government to be successful. See also THE FEDERALIST NO. 57, at 350 (J. Madison) (on need for rulers who possess both "wisdom to discern, and . . . virtue to pursue, the common good").

32. THE FEDERALIST NO. 1, at 33 (A. Hamilton).

33. The unity of political and psychological order was given practical effect in their study within the single discipline of "moral philosophy." See D. ADAIR, *supra* note 10, at 128 ("[T]he moral philosophy course at Princeton [treated] history, ethics, politics, economics, psychology, and jurisprudence . . .").

34. THE FEDERALIST NO. 51, at 322 (J. Madison). The idea that government reflects the character of the populace was an essential proposition of Montesquieu's work and his theory of the *esprit general*. On Montesquieu's influence on the framers, see G. WILLS, *EXPLAINING AMERICA: THE FEDERALIST 180* (1981). The roots of this idea of the coincidence of the political and moral domains obviously extend further back to the works of Plato and Aristotle.

35. This statement needs some qualification, because generally Publius's conception of politics remains conventional. He tells us that in "a nation of philosophers"—which is "little to be expected"—a governmental structure different from that proposed in *The Federalist* would be appropriate. THE FEDERALIST NO. 49, at 315 (J. Madison). Publius retains the classical idea of the philosopher as the man who no longer suffers from the competition between the private and the public in his own soul; rather, his love of truth, which is wholly public, makes him wholly public as well. Because a nation of philosophers cannot be expected, the "best government" must accept man not as he is, but as he might realistically be. See also D. ADAIR, *supra* note 10, at 119–20 (leaders of Convention realized that theoretical best might not be practical best).

36. See C. MONTESQUIEU, *THE SPIRIT OF THE LAWS* 20 (F. Neumann ed. 1966) (1748) ("There is no great share of probity necessary to support a monarchical or despotic government. . . . But in a popular state, one spring more is necessary, namely, virtue."). See also J. POCOCK, *supra* note 9, at 204 (discussing republican political theory: "The constitutional order is rooted in the moral order, and it is the latter which corruption affects . . ."). Cf. Ackerman, *supra* note 13, at 1025–27 (arguing that American Constitution was framed to respond to inevitable failure of public virtue during periods of ordinary politics).

scriptive statement and a statement of normative support for republicanism.³⁷

The psychological virtue required by republican government is not simply well-formed habit.³⁸ Rather, it is precisely the capacity to act on the basis of reason—i.e., to deliberate upon and choose a course of action based upon its reasonableness—which is at issue in *The Federalist* itself. The virtue required is the capacity to overcome passion, or appetite, in both reason and will. Virtue thus requires wisdom as a precondition of choice.³⁹

If people cannot be virtuous in this sense, then there can be no free politics: Either reflection or choice will be captured by nature and accident. This virtue is required of everyone in the founding act of constitutionalism, of the voters in their deliberation on and choice of representatives,⁴⁰ and of representatives in the process of governing.⁴¹

The dichotomy of passion and reason—the conflicting bases of choice—has, therefore, simultaneously a psychological and a political manifestation.⁴² As a problem of psychological order, the dichotomy appears as the difference between apparent and true interests. As a problem

37. See, e.g., THE FEDERALIST NO. 55, at 346 (J. Madison) (“As there is a degree of depravity in mankind which requires a certain degree of circumspection and distrust, so there are other qualities in human nature which justify a certain portion of esteem and confidence. Republican government presupposes the existence of these qualities in a higher degree than any other form.”); THE FEDERALIST NO. 76, at 458 (A. Hamilton) (“The supposition of universal venality in human nature is little less an error in political reasoning than the supposition of universal rectitude. The institution of delegated power implies that there is a portion of virtue and honor among mankind, which may be a reasonable foundation of confidence.”).

38. Publius, however, does not simply ignore ordinary political habits founded on non-deliberative opinions. Consider, for example, the reasons he provides for rejecting Jefferson’s proposal for frequent recourse to the people. THE FEDERALIST NO. 49, at 314–15 (J. Madison) (“[A]s every appeal to the people would carry an implication of some defect in the government, frequent appeals would, in great measure, deprive the government of that veneration which time bestows on everything And in every . . . nation, the most rational government will not find it a superfluous advantage to have the prejudices of the community on its side.”). See also G. WILLS, *supra* note 34, at 24–33 (discussing Hume’s influence on Madison’s argument in *The Federalist No. 49*).

39. For this reason, Publius tends to speak of “wisdom and virtue” as a linked pair of psychological characteristics. See *supra* note 31.

40. See THE FEDERALIST NO. 55, at 343–44 (J. Madison).

41. Jay’s introduction is particularly interesting on the place of virtue among the delegates to the Philadelphia Convention. The method of operation is “cool, uninterrupted, and daily consultation.” THE FEDERALIST NO. 2, at 39 (J. Jay). The personal interest of the delegates is not private appetite, but rather “love for their country.” *Id.* The delegates themselves are men “highly distinguished by their patriotism, virtue and wisdom . . . who have been . . . tried and justly approved for patriotism and abilities, and who have grown old in acquiring political information.” *Id.* at 39–41. The object of that convention, the plan of the Constitution, is recommended “to that *sedate and candid consideration* which the magnitude and importance of the subject demand, and which it certainly ought to receive.” *Id.* at 40 (emphasis added). *The Federalist* projects the character of this deliberative assembly onto the population at large. See, e.g., THE FEDERALIST NO. 37, at 225 (J. Madison) (“[T]he truth is that these papers . . . solicit the attention of those only who add to a sincere zeal for the happiness of their country, a temper favorable to a just estimate of the means of promoting it.”).

42. See H. ARENDT, *ON REVOLUTION* 91 (1965) (“[The founders’] thought did not carry them any further than to the point of understanding government in the image of individual reason and construing the rule of government over the governed according to the age-old model of the rule of reason over the passions.”).

of political order, it appears as the difference between public action in pursuit of private interest, which Publius will subsequently label "factional,"⁴³ and action for the public good. These, however, are just different perspectives on the same problem. Thus, Publius writes: "Happy will it be if our choice should be directed by a judicious estimate of our true interests, unperplexed and unbiased by considerations not connected with the public good."⁴⁴ The "public good" corresponds to the true interests of the individual precisely because both are a function of reason—both are discerned by wisdom and chosen by the virtuous individual. Apparent interests, on the other hand, are peculiarly private because they are determined by the individual's passions. Their political manifestation results in a "privatization" of political life, or "faction." If will is captured by passion, then neither political nor psychological order will be achieved or maintained.

The identity of political and psychological virtue implies a reciprocal relationship between political and psychological order: Changes in psychological order will have political manifestations, just as changes in political order will have psychological manifestations. For Publius, the problem of political construction is to achieve a political order that is structured by reason and not by private passions. This requires that the psychological faculties of the citizenry be properly ordered. But this, in turn, depends upon a proper political order. This reciprocal relationship of politics and psychology is captured in Publius's admonition that "it is the reason, alone, of the public, that ought to control and regulate the government. The passions ought to be controlled and regulated by government."⁴⁵ A wise and virtuous citizenry will demand republican government, just as republican government demands wise and virtuous citizens.⁴⁶ Conversely, a citizenry that lacks wisdom and virtue will have little interest in republican government, while the various forms of autocratic government will have no interest in wise and virtuous citizens. Progress must occur simultaneously in the psychological and political domains, or it will not occur at all.

A revolutionary moment is required to break out of the circle of a political and psychological order founded on passion, rather than reason: a moment at which private virtue emerges outside of the ordinary forms of

43. See *infra* text accompanying notes 92–95.

44. THE FEDERALIST NO. 1, at 33 (A. Hamilton).

45. THE FEDERALIST NO. 49, at 317 (J. Madison).

46. Reciprocity between the psychological and political orders was a strong anti-federalist theme, which the anti-federalists connected to the need for a decentralized structure of politics within which virtue could flourish. See Dry, *Anti-Federalism in the Federalist*, in *SAVING THE REVOLUTION* 40, 45–46 (Kesler ed. 1987); Shklar, *Publius and the Science of the Past*, 86 YALE L.J. 1286, 1288–89 (1977); Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 35–38 (1985). Publius accepted this theme, but differed from the anti-federalists on the character of the science of politics and the art of political construction supported by that science. Virtue, for Publius, was best secured through an art of political construction on a national scale.

politics. A political crisis may create the possibility of public deliberation and of choice based upon that deliberation, even in the absence of a government that “controls and regulates” passions.⁴⁷ This is precisely the understanding of the American revolutionary period offered by Publius:

[Constitutional] experiments are of too ticklish a nature to be unnecessarily multiplied. We are to recollect that all the existing constitutions [of the states] were formed in the midst of a danger which repressed the passions most unfriendly to order and concord; of an enthusiastic confidence of the people in their patriotic leaders, which stifled the ordinary diversity of opinions on great national questions; of a universal ardor for new and opposite forms, produced by a universal resentment and indignation against the ancient government; and whilst no spirit of party connected with the changes to be made, or the abuses to be reformed, could mingle its leaven in the operation.⁴⁸

This revolutionary moment creates the possibility of a deliberative, constitutional politics: “I have had an eye, my fellow-citizens, to putting you upon your guard against all attempts, from whatever quarter, to influence your decision in a matter of the utmost moment to your welfare by any impressions other than those which may result from the *evidence of truth*.”⁴⁹ Through mutual deliberation, truth appeals to reason, not to “ambition, avarice, personal animosity [and] party opposition.”⁵⁰ Constitutional republican politics is, then, a paradigmatic case of the link between psychological and political order: It is a political form in which deliberation can become the basis for effective political choice.⁵¹

47. Bruce Ackerman has taken this idea of the possibility of private virtue being released by political crisis and made it the foundation of his theory of constitutional history. For him, at moments of political crisis, which he calls “high politics,” political deliberation becomes possible because of the displacement by reason of private, subjective interests in the individual. See Ackerman, *supra* note 13.

48. THE FEDERALIST NO. 49, at 315 (J. Madison). The uniqueness of these occasions is emphasized in Publius’s rejection of Jefferson’s suggestion of frequent appeals to the people—“the only legitimate fountain of power”—to correct political errors. *Id.* at 313. Jefferson, according to Publius, has confused legitimacy and truth. The people may be the only “legitimate” source of power, but the people are not an appropriate source for the correct resolution of political conflict. Ordinarily, resolution of questions referred to the public “could never be expected to turn on the true merits of the question.” *Id.* at 317. “The passions . . . not the reason, of the public would sit in judgment.” *Id.*

49. THE FEDERALIST NO. 1, at 35 (A. Hamilton). Publius reflects on the division of passion and reason in himself: “My motives must remain in the depository of my own breast. My arguments will be open to all and must be judged by all. They shall at least be offered in a spirit which will not disgrace the cause of *truth*.” *Id.* at 36 (emphasis added).

50. *Id.* at 34.

51. The role of the political scientist at this moment is not to impose political form on the community, but to guide the public’s deliberation. See D. EPSTEIN, *supra* note 18, at 30–32 (“*The Federalist* offers arguments which ‘may be judged of by all’; the people need not begin their reflections on good government from scratch.”) (citation omitted).

B. *The Role of Will and the Creation of a Nation of Political Artisans*

Deliberative choice represents a model of unity of reason and will or, more precisely, of the subordination of will to reason. The primacy of reason, deliberation, and science reflects an enlightenment belief in rationality.⁵² This, however, is only one half of a larger theme of *The Federalist*. The same set of issues can be approached from the perspective of will. In the juxtaposition of these two approaches, *The Federalist* proposes an original American solution to the problems of political freedom.

Publius's appreciation of the psychological consequences of the Revolution and of the political possibilities these create points to a fundamental presumption of *The Federalist's* political theory: The new science of politics cannot remain the possession of a few statesmen, but must extend to the entire nation. *The Federalist* is not, after all, a defense of the work of the Philadelphia Convention on the grounds of the scientific credentials of the Convention's participants.⁵³ Rather, the Convention and its product are immediately integrated into the larger project of *The Federalist*, which is to address "the important question, whether societies of men are really capable or not of establishing good government from reflection and choice."⁵⁴ From this perspective, the issue is not the scientific character of the proposed scheme of government, but rather, the capacity of the people to choose the scheme of government *because it is a product of science*.

Science has thereby been relocated from the Convention to the larger body politic.⁵⁵ The enlightenment concept of freedom as rationality has been moved from the individual to the larger community.⁵⁶ The "important question," therefore, concerns the capacity of an entire society to realize political freedom through an act of self-government founded on scientific insight. *The Federalist* is centrally about the creation of an entire

52. See D. Adair, *Intellectual Origins of Jeffersonian Democracy: Republicanism, the Class Struggle, and the Virtuous Farmer* 48 (1943) (dissertation submitted at Yale University) ("Americans of a later day have not shown any decided preference for the scholar in politics, but it cannot be too strongly stressed that this title will describe both Madison and Jefferson."); M. WHITE, *supra* note 16, at 7 ("Political science was regarded by Publius as a discipline in which one asserts and defends descriptive propositions about the causes of factions and the effects of having a large republic, as well as practical or technological propositions about what ends would be accomplished by a separation of powers, by checks and balances, and by the division of the government into state and federal jurisdictions.").

53. See D. EPSTEIN, *supra* note 18, at 29 ("*The Federalist's* more fundamental argument is not a plea for trust, since the book freely admits that suspicion of men's motives is justified.").

54. THE FEDERALIST NO. 1, at 33 (A. Hamilton).

55. See D. Adair, *supra* note 52, at 54-55 ("The Renaissance delving in the records of Greece and Rome had been primarily a matter of specialists; now two centuries later this ancient wisdom was democratized and popularized to an amazing degree.").

56. A curious inversion of the relationship of Kant to Rousseau is being played out here. Kant's theory of individual freedom grew out of his study of Rousseau's work on the political freedom of the community and the idea of the general will. See generally E. CASSIRER, ROUSSEAU, KANT, GOETHE (1963). In American political life, the demand for popular government has forced the reverse movement from a theory of the role of reason in individual freedom to a theory of reason as the source of a community's political freedom.

nation of political craftsmen: Can a nation make itself on the basis of science? The goal is to achieve popular legitimation of an objectively true, political order: to found popular choice on popular, although still genuine, wisdom.

The idea that political order must be founded upon science is not new. Indeed, political theory began in Plato's *Republic* with just this insight. But in *The Federalist*, the drama of political construction is cast upon the modern nation-state. The body politic has not merely expanded in size. More importantly, the modern nation-state rests upon a particular understanding of political legitimacy: Political legitimacy is dependent upon the consent of the governed.⁵⁷ This understanding is implicit in all of Publius's argument.⁵⁸

Classical thinkers had no distinct concept of the will.⁵⁹ Without a separation of the faculties of reason and will, they had no way to formulate the problem of political legitimacy as an issue separate from that of political truth.⁶⁰ Reflection alone, not reflection and choice, had normative value in the determination of political order. The expert in political reflection was, by that very fact, entitled to rule. This was no longer so by the eighteenth century. Will, not reason, has become the basis of modern ideas of political legitimacy.

With respect to will, all citizens are equal, regardless of the quality of their insight or the degree of their education.⁶¹ The political form of this psychological insight into the will is popular government.⁶² The discovery of the faculty of will provides a new perspective on, and a new value for, democratic political life, which classical theorists could see only as a model

57. See T. HOBBS, *LEVIATHAN* 228 (C. MacPherson ed. 1968) (1651) (defining commonwealth as "One Person, of whose Acts a great Multitude, by mutuall [sic] Covenants one with another, have made themselves every one the Author, to the end he may use the strength and means of them all . . . for their Peace and Common Defence."); J. LOCKE, *TWO TREATISES OF GOVERNMENT* 374 (P. Laslett rev. ed. 1963) (3d ed. 1698) (The Second Treatise) ("Men being . . . by Nature, all free, equal and independent, no one can be put out of this Estate, and subjected to the Political Power of another, without his own *Consent*."); J. ROUSSEAU, *supra* note 10, at 53 ("Since no man has any natural authority over his fellows, and since force alone bestows no right, all legitimate authority among men must be based on covenants.").

58. See, e.g., *THE FEDERALIST* No. 22, at 152 (A. Hamilton) ("The fabric of American empire ought to rest on the solid basis of THE CONSENT OF THE PEOPLE. The streams of national power ought to flow immediately from that pure, original fountain of all legitimate authority."); *THE FEDERALIST* No. 49, at 313 (J. Madison) ("[T]he people are the only legitimate fountain of power."); *THE FEDERALIST* No. 40, at 253 (J. Madison) (proposal of Convention was to be submitted "to the people themselves" because they are "this supreme authority").

59. See, e.g., M. FOSTER, *THE POLITICAL PHILOSOPHIES OF PLATO AND HEGEL* 128 n.1 (1965) ("It is notorious that the conception, and the very name, of will was lacking to Greek ethics.").

60. For example, the philosopher-king of Plato's *Republic* is entitled to rule simply by virtue of his possession of political truth.

61. Of course, Publius's concept of membership in the political body was not coextensive with membership in civil society. There remained a gap between the theory and practice of egalitarianism, notably for women and blacks.

62. Publius argues that popular government may be either republican or democratic. See *infra* text accompanying notes 82-85. At this point, I am not concerned with that distinction, because both forms rest their claim to political legitimacy on the consent of the governed.

of political order—or disorder—completely devoid of the informing art of political science.⁶³ The challenge of modern, popular democracy to political science is precisely the question raised by Publius: “[W]hether societies of men are really capable . . . of establishing good government from reflection and choice . . . [.]” Can reason and will be brought together in the modern nation-state or must a choice always be made between good government and legitimate government?

The discovery of will and its implications for popular sovereignty had a profound effect on the character of political deliberation. Deliberation became an activity for the entire community. For classical philosophers, theoretical deliberation required personal dialogue. *The Republic’s* model of the turning of the soul toward the science of politics occurred within a small, dialogical community that could fit comfortably within a private home. Aristotle taught within the boundaries of his school. For Publius, that deliberative community expanded to include the entire body politic. This was the startling difference between the ancient science of politics and the new science of politics.⁶⁴ The new science of politics was confronted with modernity’s vision of political equality. The social contract was to share the original position with the founders’ science.

Nowhere in the modern idea of the political community was there a place for a philosopher-king who stands as an authoritative lawgiver outside of the community.⁶⁵ Rather, the role of the “founder,” for Publius—and for American constitutionalism generally—was transferred to the entire community. That community was to inform itself through a process of scientific deliberation and then mold itself on the basis of its successful deliberation. The entire community was simultaneously the artist and the object of the art of politics.

When Publius asks in the opening pages of *The Federalist* whether good government can be established by “reflection and choice,” he is not asking whether there is a science of politics. That science has existed for two thousand years.⁶⁶ Rather, he is asking whether the product of that

63. The best expression of this view is found in Plato’s parody, in Book VIII of *The Republic*, of a democratic polity, in which the slaves consider themselves the equal of their masters, children of their teachers, and even the animals of their owners.

64. See *supra* note 30 (Tocqueville describing need to educate democracy with new science of politics).

65. See J. ROUSSEAU, *supra* note 10, at 86:

Thus the man who frames the laws ought not to have any legislative right, and the people itself cannot, even should it wish, strip itself of this untransferable right; for, according to the fundamental compact, it is only the general will which compels individuals and there can be no assurance that an individual will is in conformity with the general will until it has submitted to the free suffrage of the people

See also THE FEDERALIST NO. 38, at 231 (J. Madison) (discussing role of lawgiver—“individual citizen of preeminent wisdom and approved integrity”—in prior republics).

66. The best discussion of the founders’ belief in, and use of, political science is found in the works of Douglass Adair. His early work, *Intellectual Origins of Jeffersonian Democracy: Republicanism, the Class Struggle, and the Virtuous Farmer*, see *supra* note 52, concentrates on the influence on the founders of classical political theory, particularly the theories of Aristotle and Polybius.

science can be made politically legitimate through an act of democratic self-government. The post-enlightenment founders of the American Republic were remarkably optimistic in this regard.⁶⁷ For them, the science of politics was one on which entire "societies of men" could base their actions. The American constitutional founding was to prove this proposition. Without this belief, democracy and political order would have remained, as they were in the classical view, completely incompatible.

Despite his optimism, Publius fully realizes the dangers that were so evident to classical thinkers. That popular government is not necessarily good government is made clear in the opening of *The Federalist No. 10*. There Publius explains that "our governments are too unstable . . . the public good is disregarded in the conflicts of rival parties . . . measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority."⁶⁸ Majorities are not necessarily virtuous, but popular government is necessarily majoritarian. Democratic disorder, moreover, is not an aberration of American politics. Rather, it is endemic to popular governments. Historically, popular government has not been a successful form of political order.⁶⁹

This historical reflection, together with the political/psychological analysis that distinguishes reason from will and political science from political legitimacy, inevitably raise the question of the reasons for Publius's commitment to the priority of will over reason in political life. Put more directly, if Publius truly believes that the Philadelphia Convention reached political truth, and that reason and the public good coincide, in whose interest is it to subject that objective truth to a national debate that may reject truth and the public good in favor of private interests?⁷⁰ Can a truthful end justify an "illegitimate" means? While Rousseau argued that we can force people to be free, Publius suggests that we cannot force a

His later work, e.g., *That Politics May Be Reduced to a Science*, in *FAME AND THE FOUNDING FATHERS*, *supra* note 10, concentrates on the influence of the eighteenth-century Scottish social scientists.

67. There were, of course, differences in the degree of optimism. Hamilton was certainly the least optimistic. See the discussion of his convention speech, proposing a mixed government on the British model, in D. Adair, *supra* note 52, at 144-48.

68. *THE FEDERALIST NO. 10*, at 77 (J. Madison).

69. *Id.*

70. In one sense, this question suggests a category mistake: The new science of politics is a science of republican government, which means that it is a principle of the science that political order must be subject to popular consent. The new science of government establishes consent as the first principle of the modern political order. But this simply introduces the old conundrum of what can be done when the people vote to remove consent from politics, or vote to remove any other necessary condition of good, republican government. Faced with that possibility, the political founder may choose to apply the principles of his science to what may be a second-best political form—e.g., a political form that does not rely upon consent. For discussion of a similar conundrum in Lincoln's thought over the tension between the substantive principle of freedom (equality) and consent, see H. JAFFA, *supra* note 10, at 375-77.

free people to be politically good.⁷¹ If the truth of the Convention's proposal is in no way contingent upon the community's acceptance, why introduce the possibility of political error through the process of popular ratification?

There are a number of possible answers to this question about Publius's political theory, none of which is wholly satisfying. Indeed, the failure to secure a theoretically convincing answer remains vivid in Tocqueville's work, fifty years later.⁷² One answer is the possibility of a convergence of legitimate and good government at this particular moment in American political life. Given the actual possibility of achieving the ideal end of a government that is both legitimate and good, Publius can ignore the theoretical question. Instead, he presents an argument that will aid in the practical accomplishment of this end. Theoretical completeness is, to some degree, sacrificed to rhetorical efficacy.

A second practical answer focuses not on the possibility of success in this enterprise, but on the practical status of the alternative of illegitimate, good government—or some variety of aristocratic government in post-revolutionary America. Here Publius is extremely skeptical. American government, he writes, must be “strictly republican” because:

[N]o other form would be reconcilable with the *genius of the people* of America; with the fundamental principles of the *Revolution*; or with that honorable determination which animates every *votary of freedom* to rest all our political experiments on the capacity of mankind for self-government.⁷³

Here, Publius suggests that practical options are limited by virtue of the fact that America has just fought a war under the legitimating norm of “freedom.” The fact that this was a revolutionary war called forth values of “self-government.” The experience of the war and its accompanying political crisis created an ethic of political liberty. The commitment to

71. While a legitimate, bad government is a theoretical possibility, its existence in practice is always threatened by its own instability. Publius argues that such a government would be so unstable as to lead quickly to illegitimate, as well as bad, government. See THE FEDERALIST NO. 10, at 77 (J. Madison) (discussed *infra* text accompanying notes 79–80).

72. Tocqueville picked up a theme of *The Federalist* when he argued that democratic governments have a tendency to move toward despotism: “Despotism . . . appears to me peculiarly to be dreaded in democratic times.” 2 A. TOCQUEVILLE, *supra* note 1, at 340. Because of this tendency, Tocqueville raises, although without wholly resolving, the question of whether governmental reform should pursue a model of illegitimate, good government rather than open up the possibility, if not the inevitability, of legitimate, bad government. That these were seen as real alternatives in the late eighteenth century is clear. The Articles of Confederation, as well as most state governments, were examples of legitimate, bad government; European aristocracies were examples of illegitimate, good government. For the framers' views of the state governments as both legitimate and bad, see Wood, *Interests and Disinterestness in the Making of the Constitution*, in BEYOND CONFEDERATION 73–74 (R. Beeman ed. 1987). On the quality of European government, see 1 A. TOCQUEVILLE, *supra* note 1, at 247 (“Aristocracies are infinitely more expert in the science of legislation than democracies ever can be.”).

73. THE FEDERALIST NO. 39, at 240 (J. Madison) (emphasis added).

republican government is rooted in America's unique historical experience and the peculiar cultural and political values that have accompanied it.⁷⁴ This historical material must be given shape by the art of politics. At the same time, this material limits the possible applications of the art of politics. Thus, America must find "a republican remedy for the diseases most incident to republican government,"⁷⁵ or continue to suffer the disorders of popular government. There is no real choice. Fortunately, as Publius recognizes, that same political crisis opens up a unique opportunity to shape political liberty through art.⁷⁶

Apart from the constraints of practical politics in 1787, Publius's belief in the identity of political and psychological phenomena also supports an argument for the priority of will over reason. Within an eighteenth-century Protestant world view, the idea of moral rule from without, even if founded on the best knowledge, is extremely problematic.⁷⁷ Moral maturity is marked by the possibility of wrongful choice. For Publius, just as the individual is free to lead a life of moral degeneracy, so, it seems, is the political community. Each has the responsibility to cure itself of the peculiar disorders that afflict moral and political life. And for each, the cure lies in the self-application of the principles of a science.⁷⁸ For that reason, the process of cure must begin with deliberation.

This cluster of considerations identifies the problem Publius confronts: bringing political science to political legitimacy through self-construction of the political order. That process of self-construction must address the problem of disorder—bad government—that has historically destroyed legitimate, democratic governments.

74. On the general theme of accident in the character of the founding, see Banfield, *Was the Founding an Accident?* in *SAVING THE REVOLUTION*, *supra* note 46, at 265. The idea that history, not science, is moving society away from aristocracy and towards democracy is one of the themes of Tocqueville's work. For example, he wrote:

No man on the earth can as yet affirm, absolutely and generally, that the new state of the world [democracy and equality] is better than its former one [aristocracy and inequality]; but it is already easy to perceive that this state is different. . . . They are like two distinct orders of human beings, each of which has its own merits and defects

2 A. TOCQUEVILLE, *supra* note 1, at 351.

75. THE FEDERALIST NO. 10, at 84 (J. Madison).

76. See *supra* text accompanying notes 47-49.

77. See R. NISBET, *THE QUEST FOR COMMUNITY* 92-93 (1953).

78. On Publius's view of moral, as opposed to political, science, see M. WHITE, *supra* note 16, at 20-22, 30-34 (arguing for influence on Publius of Locke's belief in demonstrative moral science). Publius's view that political disorder requires scientific cure is emphasized in his frequent use of the metaphor of disease. See, e.g., THE FEDERALIST NO. 10, at 84 (J. Madison) (arguing that "the extent and proper structure of the Union" will remedy republican "diseases"); *id.* at 77 (referring to "mortal diseases under which popular governments have everywhere perished"); THE FEDERALIST NO. 38, at 234-35 (J. Madison) (describing America as sick patient).

C. *The Construction of Political Freedom*

Popular governments, according to Publius, are uniquely subject to problems of faction.⁷⁹ The answer to this political problem, which infected American political order in the post-revolutionary period, must be found in a "well-constructed Union."⁸⁰ It is, in other words, to be found in the art of political construction. Popular governments in the past have failed precisely because consent was thought to be able to take the place of reason and science.⁸¹ Success requires that consent be given shape by art.

Publius defines democracy as "a society consisting of a small number of citizens, who assemble and administer the government in person"⁸² He defines republican government as "a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure for a limited period, or during good behavior."⁸³ Democracy and republicanism are both forms of self-government. Both are, therefore, legitimate political orders. Democracy differs from republicanism, however, in the directness with which the people govern themselves.

The advantages of republicanism over democracy are found in this element of "indirectness," which opens up a place for the art of political construction. The material upon which this art works is the indirect element of republican self-government. Lacking such a material, pure democracy does not allow for the constructive efforts of the political scientist's art. It is, therefore, power without form—politically legitimate power to be sure, but without any internal form capable of resisting abuse. Accordingly, it can "admit of no cure for the mischiefs of faction."⁸⁴ For this reason, democracies are extremely unstable political institutions.⁸⁵

Political science, therefore, may begin, though it cannot end, with a theory of consent. Self-conscious realization of freedom of the will is only a first step. The separation of the political order from the natural order

79. "The friend of popular governments never finds himself so much alarmed for their character and fate as when he contemplates their propensity to this dangerous vice [the violence of faction]." THE FEDERALIST NO. 10, at 77 (J. Madison).

80. *Id.*

81. "There is no maxim in my opinion, which is more liable to be misapplied, and which, therefore, more needs elucidation, than the current one, that the interest of the majority is the political standard of right and wrong." Letter from James Madison to James Monroe (Oct. 8, 1786) in *Letters* 250-51, quoted in D. Adair, *supra* note 52, at 107-08.

82. THE FEDERALIST NO. 10, at 81 (J. Madison).

83. THE FEDERALIST NO. 39, at 241 (J. Madison).

84. THE FEDERALIST NO. 10, at 81 (J. Madison). The passage continues: "A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert results from the form of government itself; and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual."

85. In a democratic government, the distinction between founding and maintaining a political order disappears. Because all political action is "levelled," there is no structure to lend stability to political order. On the levelling character of democracy, see Ackerman, *supra* note 13, at 1035-38.

merely opens up the possibility of an art of politics. The conceptual model of a technical art, applying scientific principles to the material of political life, completely dominates the argument of *The Federalist*.⁸⁶ The object of this art is to create a political order that can be both good and free, both scientifically correct and politically legitimate.⁸⁷

The art of politics, which is directed at shaping the “indirect” element in republican self-government, moves in two dimensions. First, there must be a molding of the nature of public participation. Self-government requires that power flow from the people, but the people can be variously organized. Public participation is differently structured in adopting a constitution, in selecting representatives, and in selecting Senators, judges, and the President. Publius’s classic argument for a system of representatives elected from large districts within a geographically expansive populace is part of the inquiry into the proper organization of the people.⁸⁸ Second, the structure of government itself—the offices of government—must be formed. To say that government must be republican does not yet reveal much about the distribution and character of offices within that government. This branch of political science leads to Publius’s defense of separation of powers and federalism, which informs so much of the work.⁸⁹

Only when both the populace and the government operate within a properly constructed order will republican government, which is always legitimate, also be good, correct, and true. These forms are the products of an art of politics that rests upon a science of politics.

The threat to popular government, ironically, comes from those who would keep government close to the people. Direct popular control—and its approximation in decentralized community control—are not virtues but the sources of vice in popular government.⁹⁰ They are such sources because they represent unconstructed power, or power without art. They precede the application of art to political life. And a popular political life without art will inevitably succumb to opinion, appetite, and the private

86. It has often been suggested that *The Federalist*’s model of political construction is a Newtonian model of natural, mechanical principles. See, e.g., M. KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF* 17 (1986) (“[T]he notion of a constitution as some sort of machine or engine, had its origins in Newtonian science.”). The Newtonian analogy is accurate in its suggestion that there are universal principles of political science. However, it fails to capture the critical distinction between nature and art.

87. Publius captures this relationship when he characterizes the reaction of “the friend of popular governments” to the plan set forth in *The Federalist*: “He will not fail . . . to set a due value on any plan which, without violating the principles to which he is attached [popular self-government], provides a proper cure for [the violence of faction].” *THE FEDERALIST* NO. 10, at 77 (J. Madison).

88. *Id.* at 82–84.

89. See, e.g., *THE FEDERALIST* NO. 47 (J. Madison); NO. 48 (J. Madison); NO. 51 (J. Madison).

90. This theme returns in Publius’s admonition that government will not become more “democratic,” except in appearance, as the number of representatives increases. See *THE FEDERALIST* NO. 58, at 360–61 (J. Madison).

interests of the natural, or private, man.⁹¹ The anti-federalist's fear that centralized authority will be a brake on popular sovereignty is countered, therefore, by the argument that only a properly constructed, centralized authority can fully realize popular sovereignty.

The threat of nature to a free politics is "the violence of faction," produced by groups of citizens "united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."⁹² Faction, accordingly, is defined by two points of reference, corresponding to the psychological and political perspectives on the problems of order. First, passion, not reason, provides the motive for factional action. Second, a faction's self-interested actions violate "the rights of other citizens," the public good, or both.

These two propositions identify a single underlying phenomenon: The source of faction is *opinion*. Thus, Publius writes that a person's "opinions and his passions will have a reciprocal influence on each other; and the former will be objects to which the latter will attach themselves."⁹³ Publius uses the term "opinion" in the classical sense of a belief formed in the absence of reason or objective evidence: "As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed."⁹⁴ In this clash of opinions, there can be no science of politics; without that science, there can be no political art. The possibility of the elimination of faction rests, therefore, on the possibility of displacing opinion by a science of politics. Political science reveals the public good; the possessor of the science understands the coincidence of the public good with his true interests.⁹⁵

Publius does not suggest that opinion can be wholly replaced by science: "[A] nation of philosophers is as little to be expected as the philosophical race of kings wished for by Plato."⁹⁶ No polity can operate all of the time on the basis of assent to scientific argument. But the very possibility of a polity that is both well-constructed and legitimate depends upon a society operating on that basis at the constitutional, founding moment.⁹⁷ If science can *never* displace opinion, then the whole project of *The Federalist* will

91. Part of the justification for judicial review is similarly the courts' ability to act as a brake upon popular passion and thus allow "better information, and more deliberate reflection" to inform the public will. THE FEDERALIST NO. 78, at 469 (A. Hamilton).

92. *Id.*

93. THE FEDERALIST NO. 10, at 78 (J. Madison). Because opinion and passion have a reciprocal influence on each other, faction is inevitable: It is "sown in the nature of man." *Id.* at 79.

94. *Id.* at 78.

95. *See supra* text accompanying note 44.

96. THE FEDERALIST NO. 49, at 315 (J. Madison).

97. *See* THE FEDERALIST NO. 37, at 230 (J. Madison) ("[A]lthough this variety of [private] interests . . . may have a salutary influence on the administration of the government when formed, yet every one must be sensible of the contrary influence which must have been experienced in the task of forming it.").

be undermined. The goal of reaching a coincidence of democratic legitimacy and political science simply would be out of the question.

Despite the constructions of the political art, republican government exists under the threat of passion and opinion at every level and at all times. This is the political/public appearance of the battle in the soul of man between reason and passion. Publius summarizes this situation, as well as the presuppositions of republican government, in the following lines:

As there is a degree of depravity in mankind which requires a certain degree of circumspection and distrust, so there are other qualities in human nature which justify a certain portion of esteem and confidence. Republican government presupposes the existence of these qualities in a higher degree than any other form.⁹⁸

The supply of virtue and wisdom, however, is not endless.⁹⁹ Political order, furthermore, cannot always cure the disease of the soul. A properly structured system of representation and participation cannot guarantee political success. In particular, it cannot guarantee an indefinite future for the well-founded polis.¹⁰⁰ The populace may elect interested representatives (majority tyranny), or the legislature may choose to act in its own self-interest (simple tyranny). In either case, reason is displaced by opinion and choice is guided by passion. Political tyranny begins and ends with the corruption of the right order in the soul.

D. *Conclusion: Whose Federalist Is It?*

Understanding the drama of *The Federalist* as the conflict and synthesis of reason and will sheds considerable light on the contemporary debate between republican and pluralist readings of Publius's vision of constitutional structure.¹⁰¹ The republican reading emphasizes Publius's concern

98. THE FEDERALIST NO. 57, at 346 (J. Madison).

99. See, e.g., THE FEDERALIST NO. 10, at 80 (J. Madison) ("Enlightened statesmen will not always be at the helm.").

100. Thus, Madison's argument for an extended republic in *The Federalist No. 10* concludes only that structural innovation makes it "less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison." THE FEDERALIST NO. 10, at 83 (J. Madison) (emphasis added).

101. Representative of modern republican readings of *The Federalist* are G. WILLS, *supra* note 34, at 224 ("The strength of a republic was, for Hume and Madison, public virtue. If men do not want that quality represented, first and foremost, in their national councils, then they have ceased to be republicans and that form of government must fail."); Sunstein, *supra* note 46, at 31 ("To the republicans, the prerequisite of sound government was the willingness of citizens to subordinate their private interests to the general good. Politics consisted of self-rule by the people; but it was not a scheme in which people impressed their private preferences on the government. . . . [S]election of preferences was the object of the governmental process." (footnote omitted)). The pluralist reading is represented in the work of Diamond, *Ethics and Politics: The American Way*, in THE MORAL FOUNDATIONS OF THE AMERICAN REPUBLIC 75, 92 (R. Horwitz 3d ed. 1986) ("The American political order was deliberately tilted to resist . . . the upward gravitational pull of politics toward the grand, dramatic, character-ennobling but society-wracking opinions about justice and virtue. Opinion was

with deliberation among government representatives. Public deliberation is a necessary condition of political life because it marks the break with private, personal interests. Deliberation, the new republicans argue, was critical for Publius because he believed that the end of constitutional governance is discernment of, and action toward, the public good, which stands apart from private factional interests.¹⁰²

The pluralist reading, on the other hand, emphasizes Publius's concern with free expression of the will. The pluralists see no distinction in kind between public and private ends, only a distinction in the process of selection. For them, all ends are a product of will—to be an "end" is simply to be the object of someone's will. Publius's achievement, they argue, was the invention of political institutions that could stabilize and give order to the competition among private wills. Publius's system of constitutional governance, therefore, should be understood as based upon competition and compromise among private interest groups, each defined by their members' desires.¹⁰³

Contemporary theorists see in Publius's struggle with the conflict between will and reason only a reflection of their own concerns. Missing the real drama of the work, they have substituted their own drama: the conflict between traditional liberalism and an emerging communitarian challenge to liberalism.¹⁰⁴ The liberal reading finds in Publius's theory a concept of individual freedom under which each person determines his own ends on the basis of his personal values. These values are significant only because and insofar as they are the end of some individual's will. This circularity of ends and values marks the radical subjectivism of the theory: There is no objective perspective on normative issues, whether moral or political. Politics, for their Publius, is only a means of accommodating private interests in a way that maintains public order while distributing public benefits and burdens.

The new republicans attack the liberal claim for the priority of the will and of subjective, individual freedom. For them, individual freedom is displaced by the social history of a community within which the individual gains his identity. That history is maintained through a public discourse

. . . to be moored solidly in the principle of commodious self-preservation and economic self-interest."); R. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956); Bourke, *The Pluralist Reading of James Madison's Tenth Federalist*, 9 PERSP. AM. HIST. 269 (1975).

102. Except for Ackerman, who does not fit easily in either category, these new republicans tend to overlook *The Federalist No. 1* and its emphasis upon achieving a unity of public deliberation and public will. Instead, they focus on *The Federalist No. 10* and argue for the role of deliberation within the formal organs of government. This focus, however, misses the priority Publius ultimately assigns to will rather than reason.

103. On the pluralist view of American political life, see generally J. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY (1950); D. TRUMAN, THE GOVERNMENTAL PROCESS (2d ed. 1971).

104. On this contemporary conflict, see generally A. MACINTYRE, AFTER VIRTUE (2d ed. 1984); R. WOLFF, THE POVERTY OF LIBERALISM (1968); LIBERALISM AND ITS CRITICS (M. Sandel ed. 1984); Gutmann, *Communitarian Critics of Liberalism*, 14 PHIL. & PUB. AFF. 308 (1985).

about the community's values, which thereby gain a kind of objectivity. The community's values exist apart from any particular individual's ends, although not apart from all individuals' ends.¹⁰⁵ Their Publius, accordingly, emphasizes the priority of a non-subjective public good revealed through public discourse among the members of the particular, historical community.

Their battle, however, is not that of Publius.¹⁰⁶ Publius accepted both the model of individual will and the model of public deliberation; the problem for Publius was not to choose between them, but to reach a synthesis. American republican government was to achieve just such a synthesis of will and reason. While that synthesis might fail at times—and surely the constitutional order should be built in such a way as to sustain itself in temporary moments of failure—for Publius, a complete, comprehensive synthesis was required, above all, at the founding moment.

The separation of reason and will, and the attempt to give one-sided accounts of Publius's vision, inevitably misconceive the original project of American constitutionalism. Both reason and will are required in a "well-ordered" republic. Without consent, scientific government can claim no legitimate place in American political life.¹⁰⁷ Without science, popular government will be bad government. What is worse, without science, the principle of self-determination will paradoxically lead to governments that violate that very principle. This was the cycle of political instability so much the object of classical political thought and so obviously present in the mind of Publius.¹⁰⁸ For Publius, the only way to break out of this cycle was to bring science and art to popular government.

Science and legitimacy could achieve a marriage only by seizing the unique historical opportunity presented in the post-revolutionary period. The nation had to become a community of political artisans forming itself on the basis of a shared science. This synthesis of reason and will, however, was not only fragile politically; it was fragile theoretically. Much of the subsequent history of constitutional law represents a breaking apart of this synthesis and a privileging of one aspect—either reason or will—of this dual foundation.

105. By focusing on the particular community's history as the source of objectivity, modern republicans avoid the commitment to an objective, abstract political science that characterized Publius's approach to the role of reason in politics. Publius's political science was concerned with the study of history, but by that he meant *all* history, not the specific history of this community. See D. Adair, *supra* note 52, at 27-64.

106. Ackerman's work is unique in trying to reach a synthesis of the republican and pluralist readings of *The Federalist*. This effort results in a "dualist" theory of the Constitution marked by temporal cycles of republicanism (high, constitutional politics) and pluralism (low, ordinary politics). See Ackerman, *supra* note 13.

107. See THE FEDERALIST NO. 40, at 253 (J. Madison) (submission of proposal of Philadelphia Convention "to the people themselves" will cure formal problem of Convention overreaching its mandate) (emphasis in original).

108. See THE FEDERALIST NO. 9, at 71-72 (A. Hamilton); see also D. Adair, *supra* note 52, at 141-48 (discussion of Hamilton's convention speech).

II. THE SUCCESS OF THE FOUNDERS: THE INVENTION OF JUDICIAL REVIEW

The dual sources of American constitutionalism were carried forward in the immediate, post-ratification history of constitutional law.¹⁰⁹ A critical reading of the early opinions on judicial review finds an increasingly confident understanding of the founding moment as a successful convergence of reason and will. This was Chief Justice Marshall's understanding of the meaning of the founding, and through him, it played a central role in the establishment of judicial review.

This understanding, however, was not without challenge in the early history of the Court. The point of vulnerability was always the place of science. Early on, Justice Iredell argued that abstract political science could play no useful role in judicial decision-making; he saw only competing political opinions. This view was firmly rejected by Marshall, who understood constitutional interpretation to be primarily an inquiry into political science. After Marshall, Justice Story attempted to reconceptualize the role of science in constitutional adjudication. Instead of an abstract science of political order, he defended a science of judicial interpretation. Science, for Story, was methodological, not substantive. By the middle of the century, however, Justice Iredell's skepticism about the possibility of a useful political science dominated constitutional jurisprudence.

A. *Science and Text in Calder v. Bull*

The problem of construing the meaning of the Constitution is well illustrated by *Calder v. Bull*,¹¹⁰ which includes the earliest serious discussion within the Court of the function and character of judicial review: the often cited debate between Justices Chase and Iredell on the role of "natural law" in constitutional adjudication. Natural law is the subject of an abstract science of politics. The debate on natural law, then, is largely about whether reason or will—or perhaps both—is the source of constitutional authority.

The specific question before the Court in *Calder* was the constitutionality of a Connecticut statute which set aside a decree of the local probate court. Pursuant to that decree, Calder had been awarded a right to recover property under a will. The controverted statute required a new hearing, the result of which was to divest Calder of his interest in the will and to award it, instead, to Bull. Calder argued that this retroactive dis-

109. During this period, the articulation and development of constitutional law had not yet become a virtually exclusive function of the judiciary. See, e.g., Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 927-41 (1985) (discussing Virginia and Kentucky Resolutions and role of public usage in constitutional interpretation). The issue of whether constitutional law was to be a function of popular movements or expert knowledge (through the Court) was itself an example of the tension between will and reason.

110. 3 U.S. (3 Dall.) 386 (1798).

turbance of his vested interest in the estate violated the *ex post facto* clause of the Constitution.

Justice Chase's opinion is frequently cited as an early expression of the place of natural law in judicial review of the constitutionality of state and federal legislation.¹¹¹ His view of the role of natural law is, however, more complex than is normally represented. His argument is not simply an appeal to pure reason and an abstract science of politics as the source of constitutional authority. Rather, Chase pursues the dualist vision—scientific, natural law legitimated by the popular will—of the meaning of the founding moment. Thus, he writes that “the obligation of a law in governments established on *express compact, and on republican principles*, must be determined by the *nature* of the *power*, on which [the government] is founded.”¹¹² Self-government, or “express compact,” and science, or “republican principles,” remain essentially linked for Chase. This linkage defines the peculiar character of American constitutional order: it is neither will nor reason alone, but rather a contractual endorsement of science.¹¹³

Chase's argument begins with a distinction between the character of federal and state governmental authority: “All the powers delegated by the people of the United States to the Federal Government are defined, and no constructive powers can be exercised by it, and all the powers that remain in the State Governments are indefinite”¹¹⁴ Because the powers of state government are “indefinite,” the limits of state governmental authority must be set forth in order to determine whether the disputed statute falls within the legitimate authority of the State. Chase introduces this subject as follows: “I cannot subscribe to the omnipotence of a State Legislature, or that it is absolute and without contro[ll]; although its authority should not be *expressly* restrained by the Constitution, or fundamental law, of the State.”¹¹⁵ The “indefinite” character of state power, he opines, does not mean that it is power without limit.¹¹⁶

Chase's meaning, however, is not at all clear. The italicized word “ex-

111. See, e.g., G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 443–44 (11th ed. 1985); G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, *CONSTITUTIONAL LAW* 62–63 (1986); Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1172–76 (1987). But cf. J. ELY, *DEMOCRACY AND DISTRUST* 210–11 (1980) (disputing conventional “natural law” reading of *Calder*); Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 AM. B. FOUND. RES. J. 379, 442 (same).

112. 3 U.S. at 388. That Chase means both characterizations to apply to American governments—state and federal—is clear from the context in which he speaks repeatedly of “our free Republican governments.” *Id.*

113. See *infra* text accompanying notes 131–33.

114. 3 U.S. at 387 (emphasis omitted).

115. *Id.* at 387–88 (emphasis omitted).

116. In the same paragraph, Chase extends this view of the limits of governmental authority to the federal government: “There are acts which the *Federal*, or *State*, Legislature cannot do, *without exceeding their authority.*” *Id.* at 388 (emphasis in original).

pressly”—“expressly restrained by the Constitution”¹¹⁷—renders the statement fundamentally ambiguous: Is he making a statement about interpretation of those broad constitutional phrases that do not “expressly” refer to anything in particular, or a statement about the irrelevance of text? The latter view is usually attributed to Chase because the paragraph continues:

The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it: The nature, and ends of legislative power will limit the exercise of it. . . . There are certain vital principles in our free Republican governments, which will determine and over-rule an apparent and flagrant abuse of legislative power¹¹⁸

That Chase is also worried about the former problem, however, is clear when he actually turns to the *ex post facto* clause, one of the more “express” constitutional restrictions: “The prohibition, ‘that no state shall pass any *ex post facto* law,’ necessarily requires some explanation; for, naked and without explanation, it is unintelligible, and means nothing.”¹¹⁹ To give meaning to the text, Chase turns to “the true principles of Government.”¹²⁰

There are, then, two possible readings of his understanding of the role of these non-express, “vital principles [of] free Republican governments.” First, the principles may be applied directly by the courts; second, they may be used by the courts to interpret the express provisions of the Constitution. The rest of his opinion suggests that, in fact, Chase held only the latter view.¹²¹

Nowhere does Chase explicitly say that the Court may declare state legislation void simply on the ground that it exceeds these “vital” or “true” principles. Arguably, Chase’s opinion denies such a role to the federal courts. He specifically denies the Supreme Court jurisdiction to declare a state law void because it is “contrary to the Constitution of such

117. *Id.* (emphasis omitted). Although Chase seems to be speaking here of the state constitution, his meaning is not entirely clear. The phrase he uses is “restrained by the *Constitution*, or *fundamental law*, of the State.” However, his use of commas does not correspond to modern usage. *See supra* note 116. Nevertheless, the exact meaning of the phrase is not very important, since he applies the same argument to the interpretation of the federal constitution and speaks specifically of federal constitutional constraints on state government. *See infra* text accompanying notes 125–126.

118. 3 U.S. at 388 (emphasis omitted).

119. *Id.* at 390.

120. *Id.* at 391 (emphasis omitted). Interestingly, Chase’s full statement is that “the author of the *Federalist* [had] extensive and accurate knowledge of the *true principles of Government*.”

121. *But cf.* Sherry, *supra* note 111, at 1172 (“Despite [Chase’s] rejection of the plaintiff’s challenge, his opinion is replete with suggestions of natural rights limitations on legislatures, beyond the limits prescribed by the written Constitution.”). Taking this view, however, leads Sherry to conclude that the “basis for his decision is unclear” and “rested on two independent grounds, one natural and one textual constitutionalist” *Id.*

State.”¹²² But this distinction between federal and state constitutions—and the implications of that distinction for federal judicial authority—would make no sense, if the strong, natural-law interpretation were correct. Chase introduces those principles as the identical foundation of both state and federal government: “The people of the United States erected their Constitutions, or forms of government, to establish justice, to promote the general welfare”¹²³ Since the federal constitution imposes limits on state governmental authority, if these true principles of “free Republican government” could be applied directly in constitutional adjudication, there would be no reason to locate their limiting effect on state authority exclusively in the state constitutions. Just as the federal constitution prohibits state *ex post facto* laws, it could be read to prohibit state-law violations of these “true principles” of republican government.¹²⁴ This would collapse the distinction between state and federal constitutional limits, which Chase clearly has no intention of doing.

Furthermore, the examples that Chase gives of violations of these natural-law principles all fall within the scope of specific constitutional provisions: “A law that punished a citizen for an . . . act, which, when done, was in violation of no existing law; a law that destroys, or impairs, the lawful private contracts of citizens; a law that makes a man a Judge in his own cause; or a law that takes property from A. and gives it to B”¹²⁵ Each example suggests a specific, textual prohibition on governmental authority: respectively, the *ex post facto* clause, the contract clause, the due process clause, and the takings clause.¹²⁶

That Chase’s arguments on natural law may present nothing more than a theory of interpretation of the constitutional text is further suggested by his discussion of the *ex post facto* clause, upon which his decision actually turns. That interpretation largely relies upon an explanation of the broad principles of republican government.¹²⁷ Chase goes so far as to put forth an abstract theory of property in this interpretive enterprise:

It seems to me, that the right of property, in its origin, could only

122. 3 U.S. at 392. Furthermore, he specifically reserves the question of judicial review of federal legislation. *Id.* (deciding case “[w]ithout giving an opinion, at this time, whether this Court has jurisdiction to decide that any law made by Congress, contrary to the Constitution of the *United States*, is void”).

123. *Id.* at 388 (emphasis omitted).

124. The guaranty clause, U.S. CONST. art. IV, § 4, could have provided an obvious textual vehicle for this argument. *But see* *Pacific States Tel. & Tel. v. Oregon*, 223 U.S. 118 (1912) (guaranty clause is not source of judicially enforceable private rights).

125. 3 U.S. at 388 (emphasis omitted).

126. Not all of these provisions refer equally to the federal government and state governments, but Chase, in this paragraph, is speaking indiscriminately of both.

127. To confirm his explanation of the principles upon which the interpretation of the *ex post facto* clause relies, Chase mentions several positive law sources, ranging from Blackstone to state constitutions. 3 U.S. at 391–92. Experience, including positive law, may provide the resources for the derivation and demonstration of natural law principles.

arise from compact express, or implied. . . . [T]he right, as well as the mode, or manner, of acquiring property, and of alienating or transferring . . . [it] is conferred by society; is regulated by civil institution, and is always subject to the rules prescribed by positive law.¹²⁸

This theory of property is presented as a relevant source for the interpretation of the text, not as a separate and parallel source of constitutional authority.

Chase ends his discussion of the *ex post facto* clause with a statement of the primacy of the text:

In my judgment the case . . . is not within the *letter* of the prohibition; and . . . I am clearly of opinion, that it is not within the *intention* of the prohibition; and if within *the intention*, but out of *the letter*, I should not, therefore, consider myself justified to *continue* it within the prohibition¹²⁹

Chase, then, is arguing only that the text of the Constitution should be interpreted against the background of the principles of republican government that informed the enterprise of the founders. One needs a science of republican government in order to understand the expressions of the constitutional text, which are otherwise “naked and without explanation . . . unintelligible, and mean[ing] nothing.”¹³⁰

While there is a continuity in the underlying vision of the dual nature of constitutional authority, Chase’s view is not quite that of Publius. What for Publius had been a contrast of will and reason, or consent and science, has become for Chase a contrast of text and science. The text is the visible manifestation of will; it is the “express compact” which is the source of all legitimate political authority.¹³¹ Chase’s acknowledgment of the priority of text,¹³² therefore, corresponds directly to Publius’s acknowledgment of the priority of political legitimacy over political science.

For Chase, however, the success of the founding moment means that this theoretical priority has little practical effect. As long as the Constitution itself can be seen as a positive expression of acceptance of the principles of a scientific politics, no choice is required between political science and political legitimacy.¹³³

128. *Id.* at 394 (emphasis omitted).

129. *Id.* at 392.

130. *Id.* at 390.

131. A contract, or compact, is both a particular text and a positive legal obligation arising from an expression of will.

132. See *supra* text accompanying note 129.

133. Cf. 3 U.S. at 395–97 (Paterson, J.). Unlike Chase, Paterson argues that the “fundamental principles of the social compact” support a broad prohibition on all retroactive legislation. *Id.* at 397. Because he agrees with Chase and Iredell that the *ex post facto* clause refers only to criminal laws, Paterson is confronted with the choice between abstract political principle and positive text. Despite

Chase's opinion, however, is coupled with that of Justice Iredell. Iredell is normally cited for his rejection of the view that the Court can pronounce a legislative act "void, merely because it is, in their judgment, contrary to the principles of natural justice."¹³⁴ His misunderstanding of Chase is not as important as is his reason for taking this position. Essentially, Iredell does not believe in a science of politics:

The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject; and all that the Court could properly say . . . would be, that the Legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice.¹³⁵

Publius's claim to scientific objectivity has been reduced by Iredell to mere "opinion," upon which "able and pure" men may disagree. Iredell denies that there is a science of politics; there are only political opinions, "regulated by no fixed standard." Publius considered opinion to be the source of faction; without science, no distinction could be made between the "public good" and majority tyranny. Iredell's denial of science, then, is a denial of the entire project of *The Federalist*.

Iredell's rejection of a science of politics, however, hardly leads to a vision of a more quiescent role for the Court. Iredell, not Chase, strongly affirms the power of judicial review of federal legislation.¹³⁶ Relieved of the burden of scientific inquiry into the true principles of government, the Court can act as the agent of the people who have "define[d] with precision the objects of the legislative power, and . . . restrain[ed] its exercise within marked and settled boundaries."¹³⁷ The text itself may seem more "precise," if the interpretive task does not include the burden of scientific inquiry. The power of judicial review may, at least in the short term, be unleashed by positivism rather than science.¹³⁸

B. Chief Justice Marshall: Political Science and Judicial Review

Neither Chase nor Iredell, but Chief Justice Marshall, in *Marbury v. Madison*, ultimately provided a secure foundation for the practice and doctrine of judicial review.¹³⁹ The significance of *Marbury*, moreover, was not limited to its conclusions with respect to the judicial role. Of equal

his "ardent desire to have extended the provision in the Constitution to retrospective laws in general," *id.*, he too follows text over abstract principle.

134. *Id.* at 399 (Iredell, J.).

135. *Id.*

136. See *supra* note 122.

137. 3 U.S. at 399 (Iredell, J.).

138. But see *infra* note 301 (on inevitable tensions in this idea of agency and the problems it creates for theory of judicial review).

139. 5 U.S. (1 Cranch) 137 (1803).

importance was *Marbury's* establishment of a methodological framework to guide courts in the exercise of this constitutional role.¹⁴⁰ This framework was subsequently affirmed in *McCulloch v. Maryland*,¹⁴¹ in which Marshall, no longer focusing on the judicial role *per se*, again made clear what it means to interpret a constitution.¹⁴² Together, the two cases develop a methodology that reflects the model of constitutional authority underlying Justice Chase's opinion in *Calder*. Marshall, like Chase, still lived in the unity of the founding moment, when reason and will produced a government that was both correct and legitimate.

Judicial review, since *Marbury*, has regularly required the Court to measure an assertion of governmental authority against a substantive or procedural limit contained in the Constitution. Formally, *Marbury* did this, considering the constitutionality of section 13 of the Judiciary Act of 1789, which the Court interpreted to provide original jurisdiction in the Supreme Court for actions in mandamus. This expansion of original jurisdiction was held to be inconsistent with the strict jurisdictional limits that the Court found in Article III. The question of the constitutional limits on congressional authority addressed in *Marbury*, however, was only an introduction to the larger issue of the role of courts in delineating constitutional limits on governmental authority. The real subject of inquiry for Marshall, then, was the constitutional place of such a judicial inquiry.

In order to make perfectly clear that the real issue in *Marbury* is the role of judicial inquiry itself, and not the consistency of section 13 of the Judiciary Act with Article III, Marshall purposely ignores the interpretive difficulties of the case—difficulties similar to those that characterize virtually all subsequent instances of judicial review. Section 13, he tells us, conflicts with “the plain import of the words” of Article III. This surely is not true.¹⁴³ Denying the interpretive difficulties allows Marshall to focus on judicial review itself; it allows him to shift attention from Congress to courts.

Marbury is, accordingly, an effort at constitutional self-consciousness in which the object of review and the process of review collapse. In interpret-

140. For a different, but related, view of the methodological framework established by *Marbury*, see Nelson, *The Eighteenth Century Background of John Marshall's Constitutional Jurisprudence*, 76 MICH. L. REV. 893, 936-42 (1978). Nelson agrees that “Marshall . . . strove to reconcile popular will and legal principle,” but believes that reconciliation was achieved by distinguishing the domain of law from that of politics. *Id.* at 935.

141. 17 U.S. (4 Wheat.) 316 (1819).

142. That Marshall self-consciously pursues this end is clear from his famous statement in that case: “We must never forget, that it is a *constitution* we are expounding.” 17 U.S. at 407.

143. Marshall, for example, gives little attention to the exceptions clause of Article III, which specifically grants Congress the authority to make exceptions to the Supreme Court's appellate jurisdiction. Similarly, his reading of section 13 of the Act assumes that the mandamus provision is an attempt to create jurisdiction, rather than the creation of a cause of action or a remedy in cases in which jurisdiction otherwise exists. 5 U.S. at 173-76. See generally Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1 (analyzing various approaches Marshall could have taken).

ing the role of the Court, Marshall puts forward exactly the same kind of arguments that he would make in analyzing other constitutional issues that do not involve the *role* of the Court itself. Thus, the argument is a classic example of Marshall's reasoning in its combination of pure political science and textual positivism.¹⁴⁴ The revelations of political science coincide with the written text, which has been given political legitimacy through popular consent.

Marshall starts his discussion of judicial review with an inquiry into abstract political science, wholly independent of the written text and the history of the constitutional founding: "It seems only necessary to recognise certain principles, supposed to have been long and well established . . ."¹⁴⁵ The first of these fundamental principles is: "That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected."¹⁴⁶ From this first principle, certain propositions follow. In particular, a hierarchical relationship between the Constitution and subsequent statutory law can be deduced: "[T]he theory of every such government [which possesses a written constitution] must be, that an act of the legislature, repugnant to the constitution, is void."¹⁴⁷ This is true, he argues, as a matter of logic. Any other view would lead to logical contradiction: "[T]here is no middle ground" between constitutional supremacy and an approach that would make legislative acts superior to the Constitution. The latter view, however, would render written constitutions "absurd."¹⁴⁸

Having deduced "[t]his theory" of constitutional supremacy from first principles alone, Marshall then turns to the function of the courts: "If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts . . . ?"¹⁴⁹ Again, the inquiry relies upon abstract principles of political science. Marshall writes that "[i]t is, emphatically, the province and duty of the judicial department, to say what the law is."¹⁵⁰ This is not a statement about the text or the history of this particular constitution: Article III does not itself define the "judicial power." Rather, Marshall's statement is a definition of the judicial function *per se*: It is the abstract meaning of what it is to be a "court." Thus, Marshall explains this claim by appealing once again to

144. See also *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), discussed *infra* text accompanying notes 160-77; *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810), discussed *infra* note 161.

145. *Marbury*, 5 U.S. at 176.

146. *Id.*

147. *Id.* at 177. Marshall continues at an abstract level: "This theory is essentially attached to a written constitution, and is, consequently, to be considered, by this court, as one of the fundamental principles of our society. It is not, therefore, to be lost sight of, in the further consideration of this subject." *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

the deductive form: "Those who apply the rule to particular cases, must of necessity expound and interpret that rule."¹⁵¹ Necessity here has nothing to do with the positive law; rather, he is referring to the "necessities" of the republican science of government.¹⁵²

Since the Constitution is law, Marshall argues, the courts will confront situations of conflict between this law and ordinary legislation. Resolution of this conflict "is of the very essence of judicial duty."¹⁵³ Why? Not because the text says so, or because the ratification debates spelled this out. Rather, any other view would "subvert the very foundation of all written constitutions."¹⁵⁴ Any other view would be logically inconsistent with the fundamental principles of a political order that is established by a written constitution. A society that had a written constitution, yet denied courts the role of judicial review, would be living a contradiction: "It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits."¹⁵⁵

Marshall has established judicial review from a first principle—the "people have an original right to establish [principles] for their future government"—and a definition of the judicial role. This is, so far, simply an exercise in the new science of politics. It speaks to the judicial function in any constitutional republic, not to any unique, American constitutional requirements. He has said nothing about either the constitutional text—except that there is one—or the framers' intentions. He has not spoken of the particular distribution of powers established by *this* Constitution, but only of certain kinds of institutional authority in the abstract.

At the founding moment, this argument might have been sufficient as an explanation of the constitutional role of the Supreme Court in the new scheme of government. In fact, it is largely Publius's argument from *The Federalist*.¹⁵⁶ The task of 1787 was to convince the people that these propositions were elements of a science of politics, which should form the basis of a new constitutional order to be put in place by an act of popular self-government. But 1803 was not 1787. Ratification had been accomplished and the process of maintaining that which had already been created had begun. An argument based upon the science of politics now had

151. *Id.*

152. The science of politics in *Marbury* is centrally concerned with principles of the structure and character of governmental power. The inquiry in *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), on the other hand, focuses more directly on issues of individual rights. While some have argued that the distinction between individual rights and governmental structure was relevant to the distinction between natural and positive law sources, *see, e.g.*, Nelson, *supra* note 140, at 936; Sherry, *supra* note 111, at 1168, the distinction does not, and cannot, hold. It cannot hold because the first principle of constitutionalism—the right to consent to government—is simultaneously a principle of individual right and of governmental structure. The distinction is again conflated in *Marbury's* discussion of the individual's right to a remedy for a legal wrong. 5 U.S. at 162-63.

153. 5 U.S. at 178.

154. *Id.*

155. *Id.*

156. *See* THE FEDERALIST NO. 78 (A. Hamilton).

to come to terms with the *actual* founding, an agreement marked in the *Marbury* opinion by the sudden turn from abstract deduction to a narrow textualism: “[T]he peculiar expressions of the constitution of the United States furnish additional arguments in favor of its [the doctrine denying judicial review] rejection.”¹⁵⁷

Marshall then looks to specific textual phrases—the “arising under” clause of Article III, the oath requirement and the supremacy clause of Article VI—as themselves demonstrating an “intention” that the courts engage in judicial review. In interpreting the text, he speaks in entirely conventional terms of “the intention” of those who gave the courts their powers and of what “the Framers of the constitution contemplated.”¹⁵⁸ Not surprisingly, this interpretation of text confirms that which has already been developed as a matter of scientific deduction:

Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument.¹⁵⁹

Positive text, the result of an affirmative act of self-government, coincides with abstract science. This is the American solution to the traditional problems of republican governments: A popularly legitimated text lends its legitimacy to a science of politics.

This pattern of argument—scientific deduction linked to, and thus legitimated by, an exposition of positive text—is precisely the pattern that Marshall uses in *McCulloch v. Maryland*¹⁶⁰ to determine the power of Congress to create a national bank and the power of a state to tax such a bank—questions that Marshall describes as concerning the “constitution of our country, in its most interesting and vital parts.”¹⁶¹ In fact, the two-part methodology of constitutional interpretation is carried to an even greater extreme in *McCulloch*. This methodology not only provides the broad framework for the opinion, but is repeated within each section of the argument.

The opinion is divided into two major sections corresponding to the two major issues, congressional authority to create the bank and state authority to tax it. Each section begins with a discourse in pure political science.

157. 5 U.S. at 178.

158. *Id.* at 179–80.

159. *Id.* at 180.

160. 17 U.S. (4 Wheat.) 316 (1819).

161. *Id.* at 400. Another example of this pattern of argument is found in *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810), in which Marshall considers the power of a state legislature to disturb a previous contractual obligation. He examines the issue first from the perspective of “certain great principles of justice, whose authority is universally acknowledged,” *id.* at 133, and then confirms the result of that inquiry by offering a “fair construction” of the contract clause. *Id.* at 137.

Following these abstract deductions, there is an explicit turn away from political theory to pure textual interpretation. The break in the first section is marked by the proposition: "[T]he constitution of the United States has not left the right of Congress to employ the necessary means, for the execution of the powers conferred on the government, to *general reasoning*."¹⁶² The break in the second section is marked by a similar proposition:

We find, then, on *just theory*, a total failure of this original right to tax the means employed by the government of the Union. . . . But, waiving this *theory* for the present, let us resume the inquiry, whether this power can be exercised by the respective States, consistently with a *fair construction* of the constitution?¹⁶³

The breadth of theoretical discourse in each argument is remarkably sweeping. With respect to Congressional authority to create a bank, for example, Marshall's inquiry encompasses a theory of popular sovereignty and its delegation,¹⁶⁴ a theory of conflicts of law,¹⁶⁵ a theory of constitutional form—distinguishing a constitution from a legal code¹⁶⁶—and a theory of implied governmental powers.¹⁶⁷ Similarly, the argument on state power to tax begins with "[t]his great principle . . . that the constitution and the laws made in pursuance thereof are supreme"¹⁶⁸ Marshall then continues: "From this [principle], which may be almost termed an axiom, other propositions are deduced as corollaries. . . . These propositions, as abstract truths, would, perhaps, never be controverted."¹⁶⁹ Application of these "abstract truths" to the question before the Court allows Marshall to develop a theory of taxation in a way that results in an "intelligible standard,"¹⁷⁰ by which to measure "the power of taxation residing in a State."¹⁷¹ This exercise in political science is wholly independent of any legitimating act of popular self-government in the creation of the American Constitution. "General reasoning" and "just theory" exist as objectively true, regardless of the actions—the expressions of the will—of any particular political community in incorporating these truths into their system of government.

Marshall, then, is entirely explicit in his faith that arguments from the abstract science of politics are essential in constitutional inquiry. Because

162. 17 U.S. (4 Wheat.) at 411 (emphasis added).

163. *Id.* at 430–31 (emphasis added).

164. *Id.* at 403–04.

165. *Id.* at 405–06.

166. *Id.* at 407.

167. *Id.* at 407–08.

168. *Id.* at 426.

169. *Id.*

170. *Id.* at 429.

171. *Id.*

this is the constitution of a republican state, it embodies the principles of republican government which are deducible as a matter of science. The abstract inquiry into republican principles, however, does not displace text; rather, the text will normally be read to confirm in its general terms that which scientific deduction has already established. Thus, Marshall turns to an analysis of the "necessary and proper" clause of Article I only after he has established congressional authority as a matter of scientific principle. The argument is reminiscent of Chase's comment that, "naked and without explanation," constitutional text is "unintelligible."¹⁷² Intelligibility for Marshall, as for Chase, proceeds from an understanding of political science.

The text itself, however, includes more than the individual phrases that grant or constrain authority. Thus, while the theoretical deduction of federal authority to establish the Bank in the first part of the opinion is confirmed and given legitimacy by the interpretation of the "necessary and proper clause," the "just theory of taxation" of the second section of the opinion is confirmed not by a specific textual provision but by the general character of the written document: "If we apply the principle for which the state of Maryland contends, to the constitution generally, we shall find it capable of changing totally the character of that instrument."¹⁷³ The overall character of the document demonstrates that "the American people . . . did not design to make their government dependent on the States."¹⁷⁴ Thus the text not only contains specific grants of authority and explicit prohibitions on the exercise of authority, but also establishes an institutional arrangement. That institutional arrangement, the result of a positive act of self-government, can also serve to confirm the deductive results of the abstract science of politics.

In *McCulloch*, the twofold character of constitutional argument extends even into the subsections of the argument. For example, squarely within the scientific argument on the character of the delegation of sovereign authority to the federal government, one finds the following appeal to the twofold scheme:

If any one proposition could command the universal assent of mankind, we might expect it would be this—that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. . . . But this question is not left to *mere reason*: the people have, in *express terms*, decided it, by saying, "this constitution, and the laws of

172. See *supra* text accompanying note 130.

173. 17 U.S. (4 Wheat.) at 432. Even this structural statement, however, is confirmed by a reference to the supremacy clause of Article VI. *Id.*

174. *Id.*

the United States, which shall be made in pursuance thereof, shall be the supreme law of the land"¹⁷⁵

Thus, at each stage of the argument one finds a reciprocal relationship between text and science. This reciprocity structures the broad outlines of the constitutional inquiry and the details of the argument. Marshall's faith in the success of the founding moment, in the integration of science and positive law, legitimates this manner of argument, despite his formal acceptance of the priority of text over science.¹⁷⁶ He operates with the founders' faith that a conflict between political legitimacy and political science will not emerge.¹⁷⁷ The Constitution remains, for him, the embodiment of the principles of political science. Thus, constitutional interpretation can confidently employ the principles and the techniques of an abstract science. *McCulloch* tells us that such a scientific inquiry can turn, at each moment or stage of argument, to the text for confirmation. For Marshall, as for Chase, Iredell's separation of natural law from constitutional text is founded on a misunderstanding of the American constitutional enterprise. Judicial review carries forward the success of the founding moment, which achieved an integration of reason and will, science and popular legitimacy.

The idea of a successful integration, so prominent in *Calder, Marbury*, and *McCulloch*, however, represents a subtle change in perspective on the relationship between science and the political community. In *The Federalist*, the political scientist stands outside of, or apart from, the community.¹⁷⁸ Publius was speaking to the community, but had no authority to impose order upon the community. Publius could draw upon his science to imagine a new model of political order, but that model still had to be impressed upon an actual community through an act of self-government. For Publius, the role of science was to inform an art of politics that could then be pursued in the actual political life of the nation. Science needed to be internalized by the entire community. The aim of Publius was, accordingly, to create a nation of political craftsmen.

The opinions of Chase and then Marshall tell us that Publius succeeded. Precisely because of the success of Publius, Marshall claimed the right to regulate the constitutional order of the nation by virtue of his access to the principles of political science. Unlike Publius, Marshall did

175. *Id.* at 405-06 (emphasis added).

176. That priority is explicitly acknowledged when Marshall writes, "If . . . such be the mandate of the constitution [limiting Congress to an inadequate choice of means], we have only to obey . . ." *Id.* at 408. In this, Marshall continues the founders' belief in the priority of political legitimacy over political science.

177. *But see infra* notes 192, 240 (discussing Marshall's attitude toward Constitution's treatment of slavery).

178. A vivid symbol of this is the fact that the initial work of rational deliberation and construction of the scientific model was done in a secret convention. It is only the success of, not the writing of, *The Federalist* that moves science from outside to within the community.

not stand outside of the community, holding forth an ideal model, but rather stood squarely within the community. To stand within this particular community, however, did not require any disavowal of abstract science for positive law. The integrity of the founding moment, the legitimation of republican science, allowed Marshall to speak simultaneously as political scientist and representative of the community itself. He—the Court—acted in *Marbury* and *McCulloch* as the agent of the sovereign people who had already ordered themselves according to the principles of science.¹⁷⁹

Marshall stood too close to the founders and their belief in the necessity of a science of politics to see the difference, but the role of science in the nation's political life was being reconceptualized. The Constitution was no longer understood as an experiment, testing the possibility of a community making its government according to abstract principles of republican government; rather, it was seen as the internal source of order of an historical community.¹⁸⁰ Self-government remained dependent upon understanding the founders' science, but that science was no longer an external source upon which a political artisan could draw to impose ideal form upon a recalcitrant social matter. Rather, science became the source of self-regulation of a community that had begun to maintain a political identity through time. Because constitutional order was identified with the product of science, the distinction between an external perspective, informed by abstract science, and an internal perspective on the political order of the community remained wholly theoretical. But the problem of relocating the science of political order from the abstract and universal to the constitutional text, and so to the concrete community itself, was quite real for Marshall's intellectual successor on the Court, Joseph Story.

C. *Justice Story and the Transformation of Judicial Science*

Story, who published his *Commentaries on the Constitution* in 1833, maintained Marshall's belief that constitutional adjudication is a scientific enterprise. Like Marshall, he rejected Iredell's claim that there is no sci-

179. See THE FEDERALIST NO. 78, at 467–68 (A. Hamilton):

Nor does [judicial review] . . . by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both, and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former.

This relocation of the scientist into the community corresponds to the relocation of the community's will into the text. See *supra* text accompanying note 131. Only because the public will has been frozen as the text can the judicial scientist claim that his role is legitimate, despite his rejection of legislation that would ordinarily seem to be a contemporary expression of the community's will.

180. See R. NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY 115 (1985) (“[T]he [Marshall] Court’s grand exposition transformed the Constitution from a ‘noble’ but precarious ‘experiment’ in republican government to the final source of republican principles to which all parties turned for legitimation.”).

ence and that the Court can do nothing but juxtapose its opinions on "natural justice" against those of the state and federal legislatures. But Story no longer shared the founders' vision of a tension between reason and will—the tension implicitly embodied in Marshall's dualistic methodology of constitutional interpretation. The problem of constitutionalism for Story was no longer that of informing popular will by a science that exists apart from any particular community's actual consent. Instead, Story relocated abstract science into the enterprise of textual interpretation itself.¹⁸¹ For Story, analysis of text no longer followed—either methodologically or theoretically—the scientific inquiry, but was itself the scientific enterprise.¹⁸²

For Story, text did not simply confirm science as an independent expression of abstract reason. Rather, scientific interpretation of the text itself was the method by which constitutional meaning could develop.¹⁸³ This relationship between text and science has been captured in a recent, belated review of Story's *Commentaries*:

For the Constitution to accord with the science of government it must be open-textured and flexible, built to accommodate the changing needs of the Republic. At the same time, however, Story's interpretive principle locates the Constitution's meaning in a determinate text. As a science, constitutional law "must be forever in progress"; as a form of republican thought, it is bound to the past expression of the will of the people. The reconciliation of these two themes Story finds, not surprisingly, in the role of the judiciary. The proper function of the federal courts in the scientific and popular constitutional

181. Apart from the methodological science of constitutional interpretation, Story also continued to teach and write about natural law: "Natural Law . . . is that system of principles, which human reason has discovered to regulate the conduct of man in all his various relations." Story, *Natural Law*, in JOSEPH STORY AND THE AMERICAN CONSTITUTION 313 (J. McClellan ed. 1971). For contrasting views of Story's theory of natural law, see *id.* at 61-117 (relating it to both Christian and Burkean traditions, as opposed to natural rights theories of Lockean tradition); Eisgruber, *Justice Story, Slavery and the Natural Law Foundations of American Constitutionalism*, 55 U. CHI. L. REV. 273, 302-11 (1988) (arguing that Story's science of natural law was entirely secular).

182. Story's effort to create a science of constitutional interpretation, for example, resulted in a set of nineteen rules, setting forth objective standards for the construction of the text. See 1 J. STORY, COMMENTARIES 382-442 (1833). The rules themselves often read like an explanation of the argument in the greatest of Story's constitutional opinions for the Court, *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

183. In *Martin v. Hunter's Lessee*, for example, Story's argument is preceded by "some preliminary considerations" on the character of the American Constitution, not constitutions in general. 14 U.S. at 324. Story describes these considerations as "deductions [which] do not rest upon general reasoning . . . [Rather] [t]hey have been positively recognised by one of the articles in amendment of the constitution . . ." *Id.* at 325. These "preliminary considerations" lead to a set of principles of interpretation to be applied to the text itself: "With these principles in view, principles in respect to which no difference of opinion ought to be indulged, let us now proceed to the interpretation of the constitution . . ." *Id.* at 327. He thereby affirms that there is a uniform, objective—and so, scientific—set of interpretive principles. From the establishment of scientific methodology, he turns immediately to the text. This approach is strikingly different from that of Marshall, who appeals first to the abstract science of republicanism, only later coming to the text.

system is to adjust the "complicated machine" by an ever more detailed examination of the meaning of the text.¹⁸⁴

Science, for Story, lay in adjusting the details. Reason and will remained separate in theory, but in American constitutionalism, science and text were inextricably linked in and through the institution of the Court. Science was the method by which the text, which alone expressed the will of the people,¹⁸⁵ could remain the foundation of the contemporary community's order. Without a judicial science of interpretation, the text would rapidly become a mere historical artifact, expressive only of some past state of the community's will.

This reconceptualization of science from a body of substantive doctrine to a legal methodology led to a new model of political experimentation. In *Commentaries*, Story describes the Constitution as "a new experiment in the history of nations."¹⁸⁶ He does not mean that the Constitution is the practical test of an abstract theory of republican political order.¹⁸⁷ Rather, for Story, the Constitution is "experimental" in the same way that the common law is experimental or in the way that a complex mechanical prototype is experimental. Both require constant "fine tuning" as they confront changing experience.

The Court is responsible for maintaining this political experiment; it functions as "a balance wheel, which . . . should adjust the irregularities, and check the excesses" that occasionally emerge in the system.¹⁸⁸ Constitutional law, Story believes, is dependent upon understanding the science of the political mechanic, not the political inventor.¹⁸⁹ The political mechanic has a scientific methodology, but not a distinct body of abstract scientific knowledge. His science is neither abstract, nor timeless; rather, it is practical and historical.¹⁹⁰

The proposition that science can serve as a source of constitutional order remained true, however, only as long as the founders' faith that the

184. Powell, *Joseph Story, Commentaries on the Constitution: A Belated Review*, 94 *YALE L.J.* 1285, 1307 (1985). On Story's view of a science of constitutional interpretation in general, see also R. NEWMYER, *supra* note 180, at 114 ("The Court for Story was an instrument of clarification, a force for rationality.").

185. See 1 J. STORY, *supra* note 182, at 389.

186. 3 J. STORY, *supra* note 182, at 686.

187. Story, for example, rejects the arguments of the states' rights theorists because they "[raise] constitutional theory to the level of metaphysics, where truth could be disjoined from consequences." See R. NEWMYER, *supra* note 180, at 188-89.

188. 3 J. STORY, *supra* note 182, at 483.

189. The image of the mechanic may seem quite close to that of the political physician of *The Federalist*. See *supra* note 78. Nevertheless, the physician of *The Federalist* is doing far more radical surgery than Story's fine-tuning.

190. Eisgruber, *supra* note 181, suggests that this contrast should not be firmly drawn. While he acknowledges that Story believed the science of government to be practical rather than a subject of "abstract speculation," *id.* at 314 (quoting J. STORY, *The Science of Government*, in *THE MISCELLANEOUS WRITINGS OF JOSEPH STORY* 636 (1852)), he also argues that for Story, natural law is the subject of a "practical science," *id.* at 312.

political order is the product of science could be sustained. In American constitutional history that was not for very long. The history of constitutional law in the nineteenth century represented a systematic attack on the place of science in the enterprise of judicial review. If Chase had the better of Iredell in the short run, Iredell rapidly displaced Chase after Marshall left the bench.

Story began the movement away from a model of political order as the product of a technical art founded upon an abstract political science. He tried to preserve a place for science within a model of political order that emphasized history, rather than theory. The place of history remained, after Story, but without science. The role of constitutional authority came to be understood as simply that of preserving an historically determined political order, without regard for its scientific foundation. The founders' faith in science was lost, just as Iredell had foreshadowed. Without science, there was only conflicting opinion. Without science, judicial review could rest on only one half of the meaning of the founding moment: that of political legitimacy arising from an assertion of the popular will.

III. THE SEPARATION OF WILL FROM REASON: THE RISE OF ORIGINALISM

A. *Slavery and the Challenge to a Republican Science*

In Story's relocation of the object of legal science from abstract political theory to the text of the Constitution itself, one sees the beginning of the shift from the model of a technical art to an organic model of political order. Not surprisingly, this move was accelerated by the legal controversy over the issue of race and slavery.¹⁹¹ At the center of Marshall's jurisprudence had been a belief that the Constitution was the positive embodiment of a republican science of government. Republican science, however, could offer no defense of slavery.¹⁹²

191. The best account of the antebellum courts' treatment of slavery is R. COVER, *JUSTICE ACCUSED* (1975).

192. See, for example, Madison's comments on slavery at the Philadelphia Convention: "We have seen the mere distinction of colour made in the most enlightened period of time, a ground of the most oppressive dominion ever exercised by man over man." (June 6, 1787) (quoted in M. MEYERS, *THE MIND OF THE FOUNDER* 72 (1981)); see also *The Antelope*, 23 U.S. (10 Wheat.) 66, 120 (1825) (Chief Justice Marshall speaks of slave trade as "contrary to the law of nature"); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 624 (1857) (Curtis, J. dissenting) ("Slavery, being contrary to natural right, is created only by municipal law."). "Scientific" defenses of slavery were presented, most notably in the work of John Calhoun. J. CALHOUN, *DISQUISITION ON GOVERNMENT* 55 (1854) ("[I]t is a great and dangerous error to suppose that all people are equally entitled to liberty. It is a reward to be earned, not a blessing to be gratuitously lavished on all alike . . ."). These, however, were generally outside the mainstream of the political debate. Thus, neither Douglas nor Taney defended slavery on the basis of republican science. For Douglas, republican principles characterized slavery as an issue to be decided by local communities; republicanism comprehended popular sovereignty but was indifferent to the manner of exercise of sovereignty on this issue. See *POLITICAL DEBATES BETWEEN ABRAHAM LINCOLN AND STEPHEN A. DOUGLAS* 109-10 (1895). For Taney, science had to give way to historical intent. See *infra* text accompanying notes 216-19.

Publius had been quite clear in *The Federalist* that the proposed constitution's treatment of slavery could not be justified by an appeal to the science of republican government. In this aspect, the Constitution was nothing but a political compromise.¹⁹³ Thus, in *The Federalist No. 54*, Publius, rather than speaking for himself—the voice of the political scientist—puts the arguments in favor of the Constitution's treatment of slavery in the mouth of a southerner. While complaining of the logic of the argument, Publius nevertheless accepts it:

Such is the reasoning which an advocate for the Southern interests might employ on this subject; and although it may appear to be a little strained in some points, yet on the whole . . . it fully reconciles me to the scale of representation which the convention ha[s] established.¹⁹⁴

That Publius characterizes this argument as that of “Southern *interests*” identifies rather precisely its theoretical status; throughout *The Federalist*, Publius identifies “interest” as the enemy of reason, deliberation, and science.¹⁹⁵ These particular southern interests proved too strong, too hard-formed, to be molded by the arguments of political science.

Protection of the institution of slavery had been a political cost of the new Constitution in 1787. This political reality tested the limits of the constitutional world view of the founders' generation, challenging the claim that the constitutional founding had successfully integrated reason and will. This challenge was all the more difficult because the slavery issue simultaneously tested the commitment to the fundamental republican postulate that in political life will has priority over reason.¹⁹⁶ Here, in an area that was to become critical to the life of the nation, the Constitution was “unreasonable,” resting on will alone. The slavery issue, then, opened up a breach between political science—at least republican, political science—and constitutional law.¹⁹⁷

193. The arbitrary character of this compromise is evident in its reliance on mathematical specificity: slaves were counted as three-fifths of a person for purposes of apportionment, art. I, sec. 2, and importation of slaves was protected from congressional action until 1808, art. I, sec. 9. Cf. *THE FEDERALIST* No. 55, at 342 (J. Madison) (“Nothing can be more fallacious than to found our political calculations on arithmetical principles.”).

194. *THE FEDERALIST* No. 54, at 340 (J. Madison).

195. See, e.g., *THE FEDERALIST* No. 1, at 33–34 (J. Madison); No. 10, at 78–79 (J. Madison); No. 38, at 230 (J. Madison).

196. See *supra* text accompanying notes 70–71.

197. This is just the way that Lincoln characterized the problem created by the *Dred Scott* decision: “[T]hree years ago there never had been a man . . . who said the Declaration of Independence did not include negroes in the term ‘all men.’ . . . I believe the first man who ever said it was Chief Justice Taney in the *Dred Scott* case, and next to him was our friend Stephen A. Douglas.” *POLITICAL DEBATES BETWEEN ABRAHAM LINCOLN AND STEPHEN A. DOUGLAS* (1895). His political mission, accordingly, was to work a reconvergence of the Constitution and republican political science. See H. JAFFA, *supra* note 10, at 30–31. Like the founders, however, he understood the political need to compromise with the reality of slavery as an existing institution in the southern states. However, he insisted upon no further compromise, no further weakening, of the republican principles of equality

As the nation confronted constitutionally-legitimated inequality,¹⁹⁸ the scientific foundation of the whole constitutional edifice became impossibly strained. Thus, in the post-Marshall world of constitutional law, the claims of science were denied in order to support the existing constitutional order. In their place was to be put a powerful new model of order based upon the nonscientific element—will—of the founding dualism. Thus, what had been originally understood as an exception to the general coincidence of constitutional order and the political science of republicanism came eventually to dominate the general understanding of the nature and source of constitutional order.

The emergence of political inequality as the central fact of American constitutional life was not the only factor leading to a shift in the conceptual model of order by which constitutional authority was understood. That shift also reflected the peculiar theoretical difficulties of republican political science at this point in American history. Opposed to the nationalism of Marshall and Story was a republican science based on decentralization and states' rights. From the time of the Virginia and Kentucky Resolutions, two competing first principles of American political structure were present and thus two competing sciences of politics.

This is the great theoretical battle that one finds throughout the political literature of the period, from Marshall's opinion in *McCulloch*, to Story's *Commentaries*, to Calhoun's *Discourse on the Constitution*.¹⁹⁹ Marshall and Story argued that the Constitution was the work of the people of the entire nation acting in their unified, sovereign capacity. Opposing theorists argued that constitutional order was the product of a compact among sovereign states rather than the product of a direct act of na-

and freedom beyond that made by the founders. See E. FONER, *FREE SOIL, FREE LABOR, FREE MEN* 215-16 (1970) ("[Lincoln] was unwilling to jeopardize the Union by interfering directly with slavery in the states, but he was convinced that once the spread of slavery had been halted, the long process of its decline would begin."); R. COVER, *supra* note 191, at 34-35.

198. For an historical description of the development of this confrontation, see R. COVER, *supra* note 191, at 159-93 (tracing growth of particular positivist reading of the Constitution, which protected slave-holding interests); E. FONER, *supra* note 197, at 73-102 (tracing growing political acceptance of Salmon P. Chase's anti-slavery reading of Constitution); J. TENBROECK, *EQUAL UNDER LAW* 66-93 (rev. ed. 1965) (describing constitutional theory of radical abolitionists).

199. Characteristic of the states' rights version of republicanism are not only Calhoun and the Virginia and Kentucky Resolutions, but also Madison's 1800 report explaining the earlier Virginia Resolutions, see J. MADISON, *Report on the Virginia Resolutions*, in 4 *LETTERS AND OTHER WRITINGS OF JAMES MADISON* 515 (Philadelphia 1865); Roane, *Hampden*, in JOHN MARSHALL'S *DEFENSE OF MCCULLOCH V. MARYLAND* 106, 142-43 (G. Gunther ed. 1969); Roane, *Amphiatyon* in *id.* at 52, 56; A. UPSHUR, *A BRIEF ENQUIRY INTO THE TRUE NATURE AND CHARACTER OF OUR FEDERAL GOVERNMENT* (1840). Characteristic of the nationalist views beyond Marshall and Story, are D. WEBSTER, *The Constitution is Not a Compact Between Sovereign States*, in 3 *WORKS OF DANIEL WEBSTER* 448, 479-86 (1851); A. LINCOLN, *Message to Congress in Special Session*, in 4 *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 421 (R. Basler ed. 1953). For insightful discussion of this conflict, see Amar, *Of Sovereignty and Federalism*, 96 *YALE L.J.* 1425, 1451-55 (1987); Powell, *supra* note 109, at 944-46 (1985) (discussing sweeping acceptance of compact theory, ranging from Hartford Convention of 1815 to South Carolina's response to national tariff of 1828); D. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT* (1985).

tional popular sovereignty.²⁰⁰ Instead of emphasizing the opening line of the document, "We the People," these theorists emphasized the process of state ratification and the careful preservation of state authority within the overall structure of national governance. In this view, the science of constitutional law generally resembled that of international law, because both involved the interaction of distinct, sovereign entities. The most important of the principles that the states' rights theorists took from international law was a rule of narrow construction: As a contract between independent states, the Constitution had to be construed narrowly to protect the sovereignty of each of the parties.²⁰¹ Narrow construction meant narrow limits on national authority and, correspondingly, greater authority for the states.

While the conflict between theories of nationalism and states' rights had enormous practical significance, it also had important theoretical consequences for the role of science in constitutional theory. A conflict over the first principles of the republican science of politics had the effect of undermining the authority of science *per se* as a source of constitutional law. Science could not be determinative if there were competing sciences, particularly when those sciences led to opposite conclusions with respect to the major constitutional issues of the day.²⁰²

The conflict between republican political science and slavery and the conflict between competing sciences of politics both pointed to a need to reconceptualize the foundation of constitutional order. Both problems pushed constitutional law toward a new conceptual model, which emerged with startling clarity in *Dred Scott*, the first case since *Marbury* in which the Supreme Court held a federal statute to be unconstitutional.²⁰³

200. See Amar, *supra* note 199, at 1452 ("To states' rightists . . . the people of each state were sovereign The Constitution was a purely federal compact among thirteen sovereign principals to coordinate certain joint activities by employing a common agency.").

201. See Powell, *supra* note 109, at 931 ("[S]trict construction was justified by reference to the 'maxim of political law' that a sovereign can be deprived of any of its powers only by its express consent narrowly construed.").

202. See Amar, *supra* note 199, at 1455 ("Thus the great constitutional issues of the antebellum era—congressional power and interposition, *McCulloch* and *Martin*, nullification and secession—all turned to some degree on *which* People [those of the individual states or those of the entire nation] were sovereign.").

203. I do not mean to suggest that the breakdown of the role of science in constitutional law was abrupt, suddenly occurring in the *Dred Scott* case. See, e.g., Powell, *supra* note 109, at 932–33 (suggesting that Virginia and Kentucky Resolutions implicitly accepted interpretative use of historical documents as evidence of original intent). Surely the whole Jacksonian movement represented an assault on the constitutional claims of science in favor of a more immediate expression of the popular will. This tension was reflected, for example, in *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837), in which Story's strong argument for a scientific interpretation of the contract clause is the dissenting position, while Taney's majority opinion seeks to remove constitutional constraints from the expression of the will of a popular majority. See the excellent discussion of the case in R. NEWMYER, *supra* note 180, at 224–33. The important issue, from the perspective of this article, is the manner in which Jacksonian populism is transfigured as it enters the domain of constitutional theory. Interestingly, it was not a simple concept of the contemporary popular will that came to dominate constitutional law; rather, it was that of a past expression of the will, embodied in the text. Leading the way into the past was Jackson's own addition to the Court, Chief Justice Taney, who was a

B. Dred Scott: *Popular Sovereignty Without Science*

In the history of American constitutional law, *Dred Scott v. Sandford*²⁰⁴ is at least as infamous as *Marbury* is famous. The *Dred Scott* decision, in which the Court held both that a free black person could not become a citizen of the United States and that the Missouri Compromise was unconstitutional, is generally seen as one of the few visible villains in the progress of American constitutional history.²⁰⁵ Disagreement with its holding, however, should not prevent a clear appraisal of its theoretical significance.

Dred Scott reveals a fundamental shift in the framework of American constitutional theory: Republican science was left no role in the Court's new constitutional jurisprudence. Science was replaced by a narrow focus on the intent of the founders. Thus, will displaced reason, and the past displaced the present. This shift survived the demise of *Dred Scott*; it continues within a substantial segment of the bench and academy today.²⁰⁶

Dred Scott is an appropriate place at which to look for an expression of the nature of constitutional authority, because the Court was acutely aware of the political significance of the issues before it and thus conscious of the need to analyze constitutional authority carefully.²⁰⁷ Proper performance of the judicial role was, in the Court's view, critical to the preservation of national order in the face of a mounting political crisis. The presumption that an exposition of the authority and meaning of the Constitution could resolve a political crisis, and thus avoid the violence of civil war, is well summarized by Justice Wayne in his concurring opinion: "The case involves private rights of value, and constitutional principles of the highest importance, about which there had become such a difference of opinion, that the peace and harmony of the country required the settlement of them by judicial decision."²⁰⁸

In pointing to "private rights" and "constitutional principles," Wayne is describing a crisis in the relation of the private to the public. From the

dedicated Jacksonian prior to his appointment. See *id.* at 220.

204. 60 U.S. (19 How.) 393 (1857).

205. Recently, Professor Robert Burt tried to elevate *Dred Scott* slightly by arguing that it was wrong not because it gave the wrong answer, but because it tried to answer the wrong question. Burt, *What Was Wrong with Dred Scott, What's Right About Brown*, 42 WASH. & LEE L. REV. 1 (1985). Even this mild defense was subject to a blistering reply. Teachout, *The Heart of the Lawyer's Craft*, 42 WASH. & LEE L. REV. 39 (1985).

206. From this perspective, Chief Justice Rehnquist, despite his protestations, is the direct descendant of Taney. See Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976). His protestations may be found in *id.* at 700-02; the intellectual inheritance is clear in his description of judges as "keepers of the covenant." *Id.* at 698. For a similar rereading of the constitutional paternity, see Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 875 (1987).

207. Taney excuses the Court's delay in resolving the issues (the case was argued twice) by noting that "the questions in controversy are of the highest importance" requiring "a more deliberate consideration." 60 U.S. at 399-400. See also 60 U.S. at 633 (Curtis, J., dissenting) ("These questions are numerous, and the grave importance of some of them required me to exhibit fully the grounds of my opinion.").

208. 60 U.S. at 454-55 (Wayne, J., concurring).

perspective of private rights, the case involves two mutually incompatible claims: the liberty rights of slaves and the property rights of slaveholders. From the perspective of public order and “constitutional principles,” the case involves a parallel tension between the character of membership in the public/political community of the United States and the character of the public good. The first public order issue addresses the liberty rights of blacks: Does the national political community include blacks? *Dred Scott* is remarkable for its recognition that private liberty is inseparable from public freedom, which exists only as membership in the political community.²⁰⁹ The second public order issue addresses the property rights of the slave holder: Is Congress’s authority to define the public good—in particular, Congress’s authority to act for the public welfare in the territories—limited by constitutional protection of this particular property interest? Again, *Dred Scott* is remarkable for the clarity with which it understands that private property is a legal construction that limits governmental action to further the public welfare.²¹⁰

Two opposing pairs of private and public norms thus emerge: First, the private interest in liberty versus the definition of the public community; and second, the private interest in property versus the definition of the public welfare. Each opposition suggests that public authority may make claims that are rejected in favor of private interest. The exercise of private interests in liberty and property will, in that case, be accompanied by rejection of the public community and the public good. *Dred Scott* suggests, however, that there can be no such assertion of private interests without the assertion of an alternative vision of community and the public good.

This becomes clear as one thinks through the consequences of a withdrawal from the ordered public space and an assertion of the private, individual interests at stake in *Dred Scott*. The withdrawal to privacy is simultaneously that of the property owner and of the free man. These two notions of private interest, however, cannot coexist. The individual black is simultaneously property of another and free man to himself. This conflict of property and liberty makes the idea of a prepolitical state of nature wholly untenable. The conflict forces the return to a political structure which can impose a public order on the private conflict. The withdrawal from public order, accordingly, is the declaration of war over the character of public order. Thus, in *Dred Scott*, the Court’s task of constitutional

209. For this reason, the meaning of emancipation is to be resolved, by Taney, through an examination of the “member[ship] of the political community,” *id.* at 403 (Taney, J.), and writings on natural rights can have no relevance. *See infra* note 240. *But cf.* H. JAFFA, *supra* note 10, at 378–79 (distinguishing natural right in liberty from civil right of citizenship).

210. *See* 60 U.S. at 447–52.

interpretation is to reestablish the public order, to prevent the turn to conflict in a state of nature.²¹¹

Chief Justice Taney's opinion has been criticized on many fronts, for misrepresenting the history of the treatment and status of freed blacks in the states,²¹² needlessly addressing constitutional issues,²¹³ and reading the Constitution in an implausibly strained way.²¹⁴ My interest, however, is not in renewing this critique of Taney's judicial craftsmanship.²¹⁵ Rather, my concern is the ground of authority claimed for the argument that he does offer. Instead of asking whether Taney adequately supported the particular propositions of his argument, I focus on what it was that he thought he had to prove, or perhaps discover, in order to decide the constitutional issues before the Court. Focusing on this issue reveals a rich, and radically different, constitutional world view that is otherwise lost in the details of a negative critique.

If Marshall's opinions are marked by a confidence in the coincidence of the science of politics and positive constitutional law, Taney's *Dred Scott* opinion is marked by the frank acknowledgement of a gap between political science and the Constitution. Thus, Taney starts his analysis of the possibility of black citizenship by anchoring the judicial role in positive law as opposed to political theory.

It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws. The decision of that question belonged to the political or law-making power; to those who formed the sovereignty and framed the Constitution. The duty of the court is, to interpret the instrument they have framed, with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted.²¹⁶

Interpretation of the Constitution has nothing to do with an abstract the-

211. This description of the Court as recreating (or reestablishing) the inherited constitutional order in the face of emerging, conflicting private values, casts the Court in much the same role that Lincoln had described for the political savior in his famous Lyceum speech of 1838. See G. FORGIE, *supra* note 6, at 83-87 (1978). Both Lincoln and Taney tried to portray themselves as "a good (rational, renunciatory, obedient) son [preserving] the father's institutions from some other ambitious person." *Id.* at 86 (emphasis in original).

212. See, e.g., 60 U.S. at 572-75 (Curtis, J. dissenting) (relating preconstitutional history of freed blacks in states); H. JAFFA, *supra* note 10, at 60 ("Lincoln was certainly right when he insisted, against Taney, that opinion in regard to the Negro had become far more unfavorable than it had been when the Constitution was framed, and that public opinion was rapidly becoming what Taney erroneously said it had formerly been.").

213. See, e.g., 60 U.S. at 463-65 (Nelson, J. dissenting). But see Corwin, *The Dred Scott Decision in the Light of Contemporary Legal Doctrines*, 17 AM. HIST. REV. 52, 58 (1911).

214. See, e.g., 60 U.S. at 436-37 (narrowly reading territories clause).

215. See D. CURRIE, *supra* note 199, at 264 ("Scott has been widely lamented as bad policy and bad judicial politics. What may not be so well recollected is that it was also bad law."). For a detailed analysis of the opinions in the case, see D. FEHRENBACHER, *THE DRED SCOTT CASE* (1978).

216. 60 U.S. at 405.

ory of justice or an analysis of right policy.²¹⁷ Constitutional interpretation is nothing more than the articulation of historical intent. While Publius used the priority of the principle of self-government as an argument for the necessity of national deliberation upon the scientific, correct order of government, Taney uses it to justify a rejection of scientific deliberation. The unique place of democratic self-rule means that the inquiry into political theory can have no role in judicial review.

For Taney, the Court is to stabilize the present and preserve the future of constitutional order by carrying forward the past. The tension between present and past, and the understanding of the Court's role as one of "looking backward" is the central theme of Taney's analysis in *Dred Scott*.²¹⁸ Marshall's Court existed in the present; the science of republican government, inquiry into which was the driving force of his arguments, had an ahistorical quality, which allowed the text easily "to keep pace" with changing circumstances. By contrast, Taney sees the Court as exclusively oriented toward the past. For example, of the assertion of universal equality in the Declaration of Independence, Taney writes: "The general words . . . would seem to embrace the whole human family, and *if they were used in a similar instrument at this day* would be so understood. But it is too clear for dispute, that the enslaved African race were not intended to be included . . ." ²¹⁹ Constitutional documents, according to Taney, are historical artifacts; they are not vehicles for the expression of contemporary meanings.

The justices, as the guardians of this founded order, are distinguished by their possession of an esoteric knowledge. The relevant knowledge of the justices is no longer a universally accessible political science, as it was for Marshall; rather, it is a body of highly particularistic, historical facts. Without rational form and deductive inference, constitutional interpretation can only be the product of a special training in the "sacred" origins of political order.²²⁰

Taney, of course, may have been reading into his account of the histori-

217. Taney's rejection of science is indifferent to the variety of characterizations of science. The relevant constitutional science may be abstract and theoretical—the founders' science—or practical and empirical—the common-law approach of Story. Taney excludes both from constitutional jurisprudence.

218. Taney was not alone in this historical orientation. See also 60 U.S. at 454 (Wayne, J., concurring) (role of Court is to reflect intent of framers). On the significance of this theme generally in the pre-Civil War period, see G. FORGIE, *supra* note 6.

219. 60 U.S. at 410 (emphasis added).

220. See G. FORGIE, *supra* note 6, at 93-101 (on "cult of the fathers [the founders]" in pre-Civil War America). In referring to the "sacred" origins, I mean to emphasize the unique place of the founding in determining for all time the character of the public order. This is quite a different view of the nature of constitutional authority from that put forward by contemporary commentators who draw an analogy between the Constitution and "scripture." See Burt, *Constitutional Law and the Teaching of Parables*, 93 YALE L.J. 455 (1984); Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1 (1984); Perry, *The Authority of Text, Tradition and Reason: A Theory of Constitutional Interpretation*, 58 S. CAL. L. REV. 551 (1985). These theorists employ the analogy to attempt to expand the scope of constitutional interpretation beyond a narrow originalism.

cal treatment of blacks nothing more than a reflection of his own prejudices.²²¹ To know that, however, requires a knowledge of history, not political science. The issue is one of fact, not normative characterization. Rediscovery of past meaning may be a difficult analytic task—one in which Taney may fall into error—but this alone defines the role for judicial interpretation of the Constitution: “It is difficult at this day to realize the state of public opinion in relation to that unfortunate race, which prevailed in the civilized and enlightened portions of the world . . . when the Constitution . . . was framed and adopted.”²²² Having discovered that opinion, however, the Court is bound by it:

No one, we presume, supposes that any change in public opinion or feeling, in relation to this unfortunate race, in the civilized nations of Europe or in this country, should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted. Such an argument would be altogether inadmissible in any tribunal called on to interpret it.²²³

The appropriate role of the Court in articulating and applying constitutional law, therefore, requires a complete separation of present from past opinion.

While historical inquiry exhausts constitutional interpretation, Taney does not have a narrow view of the relevant materials out of which that interpretation is to be constructed. Rather, he has an “ordinary language” view of interpretation. His aim is to determine the broad context of beliefs within which the public would have understood the constitutional text. For example, speaking of the drafters of the Declaration of Independence, he says: “They spoke and acted according to the then established doctrines and principles, and in the ordinary language of the day, and no one misunderstood them.”²²⁴ This “ordinary language” is informed, i.e., given meaning, by the “state of public opinion.”²²⁵ Judicial interpretation must strive to understand that public opinion, because it defined the content of the public will in 1787. The public can only will that which it believes.

The Constitution, according to Taney, is not a technical document, addressing a specialized audience. It uses “general terms” without offering any explicit definitions: “It uses them [general terms] as terms so well understood, that no further description or definition was necessary.”²²⁶ Interpretation, accordingly, must reconstruct that general understanding.

221. See D. FEHRENBACHER, *supra* note 215, at 340–41; Burt, *supra* note 205, at 3.

222. 60 U.S. at 407.

223. *Id.* at 426.

224. *Id.* at 410.

225. *Id.*

226. *Id.* at 411.

Thus, speaking of the constitutionality of federal regulation of slavery in the territories, Taney writes:

The powers of the Government, and the rights of citizens under it are positive and practical regulations plainly written down [The] reasoning of statesmen or jurists upon the relations of master and slave, can [not] enlarge the powers of the Government, or take away from the citizens the rights they have reserved.²²⁷

What is “plainly written down” is what is ordinarily understood. That ordinary understanding, not the reasoning of jurists, is the object of constitutional interpretation, because it defines the content of public will at the time of ratification.

In this effort at judicial reconstruction of past public opinion, the relevant historical facts are not limited to the subjective intent of the framers at Philadelphia, although their intent is certainly relevant.²²⁸ Rather, Taney contemplates a sweeping inquiry into the beliefs of all of the participants at the moment of the constitutional founding in order to reconstruct the state of public opinion that informed the general understanding of the terms of the constitutional text.

For example, to determine whether freed blacks can be citizens under the Constitution, Taney inquires into the treatment of blacks in state legislation contemporaneous with the founding. He concludes that “it is hardly consistent with the respect due to these States, to suppose that they regarded at that time, as fellow-citizens and members of the sovereignty, a class of beings whom they had thus stigmatized.”²²⁹ The theory that simultaneous actions in the domains of state legislation and national constitutionalism must be coherent is immediately joined with a similar “coherence theory” of the intent of the framers: “It is impossible . . . to believe that the great men of the slaveholding States [who owned slaves], who took so large a share in framing the Constitution . . . could have [intended black citizenship].”²³⁰ The understanding of institutional (state) and personal intent that emerges from this inquiry is confirmed by an examination of the history of the actual drafting of the text,²³¹ the treatment of blacks in specific clauses of the Constitution,²³² and the actions of

227. *Id.* at 451. The idea that the text is “plainly written” parallels Iredell’s claims about the nature of textual authority in *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798); see *supra* text accompanying notes 137–38.

228. Madison’s notes of the debates at the Philadelphia convention were available at this time, having been published in 1840.

229. 60 U.S. at 416.

230. *Id.* at 417.

231. *Id.* at 418–19.

232. *Id.* at 411.

the first Congress.²³³ All of these inquiries are devoted to a single subject: What was the content of the public will at the founding?

For Taney, then, the Constitution is distinctly not the product of a science; its terms must be understood as ordinary language addressed to the common understanding. The ordinary language of the text, however, must still be filtered through the categories of past and present. The Court can interpret the ordinary language of the Constitution either by reference to the public opinion of the time of its writing or by reference to contemporary opinion. The latter view, however, would abrogate the "judicial" character of the Court, and make it "the mere reflex of the popular opinion or passion of the day."²³⁴ Taney concludes that "[t]his Court was not created by the Constitution for such purposes. Higher and graver trusts have been confided to it"²³⁵ This notion of a trustee, preserving the constitutional principal for future generations, is an apt image for Taney's idea of the judiciary.²³⁶

Taney sees the Court's role as radically distinguished from that of the scientific craftsman of political order. The constitutional order may be remade to correspond to contemporary notions of justice or contemporary ideas of republican political science, but this is distinctly not the responsibility of the Court:

If any of [the Constitution's] provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its adoption. . . . [A]s long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted²³⁷

The role of political art, and with that the possibility of a science that informs that art, is thereby cast into the future. This is not the role of the Court in the present. With that, science is banished from constitutional interpretation.²³⁸

233. *Id.* at 419-20.

234. *Id.* at 426.

235. *Id.* The idea of the Court as "trustee" is captured 100 years later in Chief Justice Rehnquist's image of the Court as "keepers of the covenant." Rehnquist, *supra* note 206, at 698.

236. See generally G. FORGIE, *supra* note 6 (post-founding generations understand themselves as "trustees," maintaining accomplishments of founders for future generations).

237. 60 U.S. at 426.

238. See Corwin, *supra* note 213, at 63 (describing nineteenth century move from natural rights foundation of constitutional law to "the doctrine of 'popular sovereignty,' which insisted in the first place upon tracing the sanctity of the written Constitution, not to a supposed relation to fundamental rights but to its character as the immediate enactment of the sovereign people"). Corwin is discussing the single sentence in *Dred Scott* in which Taney describes the Missouri Compromise as a violation of due process. In particular, Corwin claims that this proposition is inconsistent with the general move to popular sovereignty. But Corwin places far too much emphasis on this single sentence, which is am-

Because the Constitution was not the product of political science, the Court's role in *Dred Scott* was not to engage in a scientific inquiry. The Taney Court understood the Constitution to be the product of men, not ideas. Science's place in the Court's self-understanding was replaced by originalism, the belief that the Constitution's meaning could be discovered through an inquiry into its "true intent and meaning when it was adopted." The Court's new role was that of historian, not political scientist.²³⁹ The importance of this shift is in the radically different conceptions of political authority behind the two approaches. Science understands constitutional order to be a product of reason; history understands it to be a product of will. The former looks for truth, the latter for consent.²⁴⁰

In *Dred Scott*, the founders' understanding of political legitimacy survived—all legitimate governments were to rest on the consent of the governed—but it was stripped of its conjunction with science. This conjunction, however, had been the unique achievement of the American founding. In *Dred Scott*, the success of the founding represented only a peculiarly successful bargain struck among diverse groups: It was seen as choice alone, not deliberation and choice.

Taney's Court lived in a world of opinion. The only manner in which legally relevant distinctions could be made among opinions was through an express investment of popular will. Accordingly, the very idea of distinguishing between political science and opinion became irrelevant to constitutional inquiry. That inquiry was directed at a different psychological faculty: not the faculty by which people know, but that by which people will. Thus, when Taney asked about the "true intent" of the framers, he was asking what it was that they willed, regardless of the reasons

biguous at best, and ignores the larger structure of historical legitimacy to which Taney appeals.

239. This shift in constitutional world views was limited neither to the Court nor to the pro-slavery faction. See Powell, *supra* note 109, at 947 ("By the outbreak of the Civil War, intentionalism in the modern sense reigned supreme in the rhetoric of constitutional interpretation.").

240. Taney, accordingly, recognized the possibility of constitutional injustice. See 60 U.S. at 405. (The quote appears in full *supra* text accompanying note 216.) Taney specifically rejects the claim that either the "laws and usages of nations [or] the writings of eminent jurists upon the relations of master and slave and their mutual rights and duties" can have any bearing on issues of constitutional law. 60 U.S. at 451. See also *id.* at 483 (Daniel, J., concurring) (discussing interconnections of international law, natural rights, and writing of "eminent jurists"—particularly Vattel).

This is not to say that either Publius or Chief Justice Marshall had a better, or more satisfying, answer to the problem of slavery. See THE FEDERALIST NO. 54 (J. Madison), discussed *supra* text accompanying notes 194–95; *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825); *supra* note 192. Nevertheless, the slavery issue was not at the center of their constitutional world view; it remained the exception, rather than the model of constitutional understanding. Story vividly captures this "exceptional" quality in the opening of his argument in *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 610 (1842):

Before . . . we proceed to the points more immediately before us, it may be well—in order to clear the case of difficulty—to say, that in the exposition of this part of the Constitution [the fugitive slave clause], we shall limit ourselves to those considerations which appropriately and exclusively belong to it, without laying down any rules of interpretation of a more general nature.

why they willed as they did. Constitutional truth, for Taney, was a function of historical accuracy, rather than theoretical insight.

While Taney may have been completely wrong in all of his assertions of historical fact about public opinion at the time of the founding, the important point to see is the distance he put between contemporary values and the Court's constitutional responsibility. The only expression of the popular will in which Taney, as a Justice, was interested was that of a long-past community: not contemporary public opinion informing a contemporary public will, but the will of the founders' generation. The Court must hold to the popular opinion of the founding moment, which alone gives content to the positive law. Constitutional interpretation, on this view, can be both true and wrong—historically accurate but wrong as a matter of moral and political principle. In that situation, the path of law—and thus the path for the Court and the nation—would be one of moral and political error.

Justice Curtis's *Dred Scott* dissent rejects this narrow understanding of the Constitution, but that rejection is far more ambiguous than it may at first appear.²⁴¹ While Curtis's vision of the nature of constitutional interpretation differs substantially from that of Taney, it is nevertheless not the vision of Marshall. First, the confident reliance upon a science of politics is no longer evident. Second, Curtis demonstrates a greatly increased sensitivity to historical intent. History is a factor in interpretation.²⁴²

[I]f anything in the history of this provision [the territories clause] tends to show that such an exception [regarding regulation of slavery] was intended by those who framed and adopted the Constitution . . . I hold it to be my duty carefully to consider, and to allow just weight to such considerations in interpreting the positive text²⁴³

“Just weight,” however, is not the same as the determinative weight that Taney would give this showing. History is not to be ignored, but it is only one element of the analysis.

Curtis supports this restriction on the role of history in constitutional interpretation by invoking language similar to that used by Marshall in *McCulloch*: “There was to be established by the Constitution a frame of government, under which the people of the United States and their poster-

241. Curtis is generally recognized as having the better of the historical argument on state treatment of freed blacks at the time of the founding. *See, e.g.*, D. CURRIE, *supra* note 199, at 273 (“Curtis’s dissent . . . is one of the great masterpieces of constitutional opinion-writing, in which, calmly and painstakingly, he dismantled virtually every argument of his variegated adversaries.” (footnotes omitted)); D. FEHRENBACHER, *supra* note 215, at 414.

242. Professor Burt does not do justice to the Curtis dissent when he describes it as “a mechanistic use of history without an adequate appreciation for full context which can make old words truly intelligible to new readers.” Burt, *supra* note 205, at 8.

243. 60 U.S. at 621.

ity were to continue indefinitely."²⁴⁴ For this reason, its "language . . . is broad enough to extend throughout the existence of the Government . . . throughout all time."²⁴⁵ In effect, Curtis discounts history by appealing to historical intent: He builds a broad acceptance of the possibility of future changes into the founders' actual intent.

Constitutional interpretation, therefore, cannot limit itself solely to carrying forward a past meaning. But if history is not completely determinative, neither is an abstract science of politics. Curtis identifies a variety of arguments about slavery that rest "upon general considerations concerning the social and moral evils of slavery, its relations to republican Governments, its inconsistency with the Declaration of Independence and with natural right."²⁴⁶ With all such arguments, Curtis declares, "[T]his Court has no concern."²⁴⁷ He describes these arguments as "theoretical opinions" and "theoretical reasoning"²⁴⁸ which constitute "[p]olitical reasons."²⁴⁹ Constitutional adjudication, however, requires a firmer foundation than can be provided by such political reasons, which are merely an invitation to judicial subjectivity. "Political reasons have not the requisite certainty to afford rules of juridical interpretation. They are different in different men. They are different in the same men at different times."²⁵⁰

To avoid this judicial subjectivity, Curtis at times suggests that the Court should stick to the "words of the Constitution."²⁵¹ But Curtis's opinion shines, where Taney's does not, precisely because of the wealth of resources to which he appeals in interpreting "the words." While no explicit theory of interpretation emerges, Curtis draws upon structural considerations,²⁵² upon "practical constructions"²⁵³ (that is, how the political branches have construed their constitutional powers over time), historical context,²⁵⁴ political science,²⁵⁵ historical intent, and rational inference from the clear purposes of the text. This melange of sources does not pro-

244. *Id.* at 613.

245. *Id.*; *see also id.* at 611.

246. *Id.* at 620.

247. *Id.*

248. *Id.* at 621.

249. *Id.* at 620.

250. *Id.* at 620-21. *See supra* text accompanying notes 135-36 (discussion of Justice Iredell's opinion in *Calder v. Bull*). The reference to "rules of juridical interpretation," *see also* 60 U.S. at 621 (referring to "fixed rules which govern the interpretation of laws"), should probably be taken as a reference, at least in part, to Story's work. *See supra* notes 182-85 and accompanying text.

251. 60 U.S. at 622.

252. *See, e.g., id.* at 577-86 (discussing meaning of citizenship in Constitution and relationship between state and federal authority in defining citizenship).

253. *See id.* at 616 ("A practical construction, nearly contemporaneous with the adoption of the Constitution, and continued by repeated instruments through a long series of years, may always influence, and in doubtful cases should determine, the judicial mind, on a question of interpretation of the Constitution.").

254. *See, e.g., id.* at 605-08 (discussing political problem of territories at time of Constitutional Convention).

255. *See, e.g., id.* at 624 ("Slavery, being contrary to natural right, is created only by municipal law.").

duce a simple theory of constitutional meaning or of legal interpretation in general. Nevertheless, it produces a rhetorically convincing account. It is a model of judicial craftsmanship that disavows theory. This "disavowal" is behind his restless movement from history, to "fixed rules" of interpretation, to the "words" themselves.

The problem with Curtis's approach, however, is that it was inadequate to the demands of the constitutional debate within which he found himself. Constitutional interpretation is essentially about the sources of authority in American political life. Practical, judicial craftsmanship is not a sufficient answer to this question of authority, because it fails adequately to distinguish the judicial craftsman—the judge—from his craft—the law. The need to explain the nature of constitutional authority, to provide the foundation of a theory of constitutional interpretation, will always push the interpretive exercise toward explicit political theory. Thus, not surprisingly, despite the political failure of Taney's opinion in *Dred Scott*, his model of constitutional authority survived.

The survival of Taney's model is seen not merely in contemporary arguments about originalism, but is equally dramatic in the *Slaughter-House Cases*,²⁵⁶ in which the post-Civil War Court first had before it claims arising out of the Thirteenth and Fourteenth Amendments.²⁵⁷ Plaintiffs argued that a state-created monopoly in the meat processing business was unconstitutional. Just as in *Dred Scott*, the Court self-consciously pointed to the political importance of the controversy and the need to reach a judicial resolution to secure the public order:

We do not conceal from ourselves the great responsibility which this duty devolves upon us. No questions so far-reaching and pervading in their consequences, so profoundly interesting to the people of this country, and so important in their bearing upon the relations of the United States, and of the several States to each other and to the citizens of the States and of the United States, have been before this court during the official life of any of its present members.²⁵⁸

The reference to the "official life" of the members is surely intended as an oblique reference to *Dred Scott*.²⁵⁹ Once again, the conflict of private

256. 83 U.S. 36 (1873).

257. I do not mean to suggest that originalism survived without any challenge. Late nineteenth century challenges to this model of constitutional authority took two forms. First, the paradox of overruling a present majority in the name of a past majority—originalism's concept of popular sovereignty—was elaborated and criticized in the work of James Thayer. See *infra* note 301. Second, there was a strong resurgence of science and reason as the ground of constitutional authority. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 562–67 (2d ed. 1988) (discussing rise of substantive due process and its relation to theories of natural law in late nineteenth century). This newly emerging science, however, no longer purported to be the republican, political science of the founders.

258. 83 U.S. at 67.

259. Despite the angry reception accorded *Dred Scott*, the Court had emerged in the post-Civil War period as a powerful institution. The most important evidence of this is the critical role the

rights and public order has come before the Court. Symbolic of the shift from the pre- to the post-Civil War era, the locus of the problem of individual rights has moved to a position squarely within the domain of economic interests.²⁶⁰

Remarkably, the performance of the “judicial duty” in *Slaughter-House*, upon which the possibility of resolution of the political dispute depends, takes precisely the form that it takes in *Dred Scott*.²⁶¹ Judicial duty is exhausted in the “carrying forward” of a past expression of the will of the sovereign authority. The Court may appeal to nothing beyond the founders’ intent:

Nor can such doubts, [as to the construction of the amendments] when any reasonably exist, be safely and rationally solved without a reference to that history; for in it is found the occasion and the necessity for recurring again to the great source of power in this country, the people of the States²⁶²

Because the passage of the Civil War amendments was so recent, the Court in *Slaughterhouse* suggests that the relevant historical inquiry is unproblematic: “Fortunately that history is fresh within the memory of us all, and its leading features . . . free from doubt.”²⁶³ Because history governs textual construction, the proposal that the term “servitude” in the Thirteenth Amendment might be interpreted broadly to apply to economic burdens is subject to derision:

To withdraw the mind from the contemplation of this grand yet simple declaration of . . . personal freedom [the result of the historical inquiry] and with a microscopic search endeavor to find in it a reference to servitudes, which may have been attached to property in certain localities, requires an effort, to say the least of it.²⁶⁴

The narrow historicism of the Court’s reasoning reaches its peak in its interpretation of the equal protection clause of the Fourteenth Amendment:

We doubt very much whether any action of a State not directed by

Court was given in the enforcement of the Civil War amendments. See Burt, *supra* note 205, at 12–13.

260. That economic rights are now understood to raise a problem of liberty, rather than property, is itself indicative of a newly emerging crisis in public order.

261. A nonjudicial example of the pervasiveness of this constitutional world view, even after the Civil War, is found in remarks by Massachusetts Senator Charles Sumner on the floor of the Senate: “Every Constitution embodies the principles of its framers. It is a transcript of their minds. If its meaning in any place is open to doubt . . . we cannot err if we turn to the framers” CONG. GLOBE, 39th Cong., 1st Sess. 677 (1866).

262. 83 U.S. at 67.

263. *Id.* at 68.

264. *Id.* at 69.

way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other.²⁶⁵

Justice Miller obviously proved to be a poor prophet. Nevertheless, he held to this position despite powerful dissents by Justices Field and Bradley, both of whom tried to reclaim the Marshall tradition of linking the science of politics to the constitutional text. As Field put it, "No one will deny the abstract justice which lies in the position of the plaintiffs in error; and I shall endeavor to show that the position has some support in the fundamental law of the country."²⁶⁶ When justice is clear, "some support" is a sufficient constitutional anchor.

Nevertheless, justice and science were not of sufficient weight to displace the profound linkage of constitutional order to will and originalism. The meaning of that linkage, and the reasons for its strength, remain to be explained.

IV. FROM SCIENCE TO MYTH: THE MEANING OF POPULAR SOVEREIGNTY

The critique of originalism is a well-traveled area in contemporary scholarship and not an area I intend to traverse again.²⁶⁷ But limiting the discussion of originalism to criticism would be a mistake similar to that of limiting discussion of *Dred Scott* to the errors in Taney's opinion. The power and attraction of originalism as a framework for understanding constitutional authority must be addressed at a higher level of generality. That discussion must begin by focusing on the concept of popular sovereignty upon which originalism relies.²⁶⁸ History is relevant to the originalist, after all, only because of his claim that it captures an act of popular sovereignty.²⁶⁹ This act of popular sovereignty provides the political legitimacy for the interpretive methodology of the originalist.

265. *Id.* at 81.

266. *Id.* at 86. See also *id.* at 119 (Bradley, J., dissenting).

267. See R. DWORKIN, TAKING RIGHTS SERIOUSLY 134-36 (1977); M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS (1982); Bennett, *The Mission of Moral Reasoning in Constitutional Law*, 58 S. CAL. L. REV. 647 (1985); Bennett, *Objectivity in Constitutional Law*, 132 U. PA. L. REV. 445 (1984); Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980); Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional Interpretation*, 58 S. CAL. L. REV. 551 (1985); Powell, *supra* note 8; Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?*, 73 CALIF. L. REV. 1482 (1985); Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983).

268. Professor Ackerman has gone the furthest in providing such a theory in his dualist account of American political life. See Ackerman, *supra* note 13.

269. This use of history must be distinguished from the use of history made by Madison, Hamilton and Jefferson, who also considered the study of history a necessary part of constitutional theory. See D. Adair, *supra* note 52, at 27-64. For them, history provided the materials for a study of human

Originalism understands the act of popular sovereignty in creating the Constitution as an expression of the public will: The fact of its performance, not the reasons for its performance, makes it relevant. Historical inquiry, then, is simply a method of comprehending the will of the popular sovereign. However, nothing about the concepts of the public will or popular sovereignty makes an historical approach the only possible method: The idea of originalism is not built into either concept. Constitutional theory could easily have developed, or could still develop, an alternative methodology designed to capture the content of a contemporary popular will.²⁷⁰ Nevertheless, this linkage of popular sovereignty and history is hardly an accidental characteristic of American constitutionalism. The need for reconstruction of a constitutional world view was an inevitable consequence of the stabilization of the political community in the period following the founding. Constitutional order, in this period, was no longer something to be made; rather, it was something to be preserved or maintained.

Understanding the significance of originalism requires a consideration of the distinction between a constitutional world view founded on the idea of making and one founded on the idea of maintaining, and the unique way in which this distinction developed in American constitutional history.²⁷¹ The founder understands himself to be starting history anew. He simultaneously terminates one political order and starts another. The maintainer, on the other hand, understands his task to be that of carrying forward a communal, historical life that precedes his own existence. Maintaining sees no place for creativity, seeking instead continuity.

The account I have given of the early development of American constitutional theory describes the character of a particular experience with this inevitable shift in political self-understanding. That shift involved an inversion of the place of reason and will in understanding constitutional order; the concept of constitutional order moved from an embodiment of the principles of reason—science—to an expression of will. This movement can best be understood as a shift from a model in which political order is understood to be the product of a technical art to one in which political order is understood to be organic.²⁷² Each model—art and organism—offers a conceptual apparatus by which to organize, and so understand, the nature of political life in time.²⁷³

nature and political organization. History supported theory; it was not itself politically authoritative. History was a part of political science—an aid to reason—not an expression of popular will.

270. Rousseau's *The Social Contract*, for example, offers a model of a theory of legitimate political order founded on the contemporary general will. Recent interest in non-Article V means of amending the Constitution reflect similar concerns with a contemporaneous public will. See Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043 (1988); Ackerman, *supra* note 13, at 1062–70.

271. See *supra* note 9.

272. See *supra* text accompanying note 6.

273. While he does not speak of the “organic” model as such, John Gunnell, an intellectual

In the remainder of this article, I want to focus on and explain the difference between the models of art and organism, and in so doing, explain what I will call the mythical character of originalism in American constitutionalism. Originalism, I will argue, is appropriately characterized as "mythical" because it shares with other myths two characteristic attitudes toward the nature of political order.²⁷⁴ First, the mythical attitude denies the artifactual character of the political order, believing instead that the political order is a product of nature. Myth knows no place for the freedom of art. Second, the mythical attitude understands the present political order to be a re-expression of the past.²⁷⁵ Myth makes an assertion of intertemporal identity. In sum, myth works by putting nature in the place of art and the past in the place of the present. Originalism is the supporting myth of an organic model of constitutional order that satisfies both criteria.

The model of a technical art informed by a science organizes political experience around the concept of a founder (artist) who mediates between a timeless ideal and historical experience. The founder's end is to construct political order in the image of the timeless pattern revealed by science. Time is, in this model, primarily a force of disorder to be overcome by measuring existing social order against an ideal pattern expressed in abstract, universal principles. The measure of the founder's art, accordingly, remains outside of the product of his art, which is the political order

disciple of Ernst Cassirer, has written extensively on myth and political philosophy as distinct efforts to deal with time. J. GUNNELL, *POLITICAL PHILOSOPHY AND TIME* (1968).

274. My discussion of myth relies heavily on Ernest Cassirer's work on symbolic forms. In particular, see E. CASSIRER, *THE MYTH OF THE STATE* (1971); 2 E. CASSIRER, *THE PHILOSOPHY OF SYMBOLIC FORMS* (1955) [hereinafter E. CASSIRER, *SYMBOLIC FORMS*]. My use of the term "myth" and my characterization of the force of myth in American public order is, however, far more benign than his analysis of the force of myth in modern politics—particularly his analysis of the Third Reich. My discussion of myth is also, in many ways, a continuation of a discussion started by Robert Cover in *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 *HARV. L. REV.* 4 (1983). Cover understood myth as the narrative that founds and holds together a normative world:

These myths establish the paradigms for behavior. They build relations between the normative and the material universe, between the constraints of reality and the demands of an ethic.

These myths establish a repertoire of moves . . . that may be combined into meaningful patterns culled from the meaningful patterns of the past.

Id. at 9. Like mine, Cover's explanation points to the linkage of normative and natural reality in myth, as well as to the identity of past and present. Cover, however, locates the domain of myth in the diverse local communities that appear within the larger nation, while I am concerned with the appearance of a national myth.

275. Cassirer, for example, describes the mythical framework as follows: "By a first act of identification man asserts his fundamental unity with his human or animal ancestors—by a second act he identifies his own life with the life of nature." E. CASSIRER, *THE MYTH OF THE STATE*, *supra* note 274, at 39. Cassirer and Gunnell, see J. GUNNELL, *supra* note 273, both emphasize that one function of myth is to overcome temporality. In other words, myth denies history. My account, on the other hand, understands myth as a way of organizing and expressing historical experience. The difference here is more apparent than real. They are, for the most part, speaking of myth as it functioned prior to the emergence of science and the objectification of time. I am speaking of a mythical mode of thought in a post-scientific world. That world no longer has the option of not recognizing temporal change; rather, a modern myth must simultaneously recognize and reorder the scientific discovery of time.

of the actual community. The measure is timeless, while the product is inevitably corrupted by the instability of time.

This model of a technical art of political construction dominated the argument of *The Federalist*. The uniqueness of Publius's argument inhered not in his use of this model to explain the making of the Constitution, but in his effort to combine this model with a theory of political legitimacy based on consent. This required, as I argued above, the creation of an entire nation of political artisans who could order their interactions on the basis of political science. The framers' successful integration of the model of an art with a concept of popular sovereignty allowed Marshall to carry on the tradition of the political scientist/artisan in the early years of judicial review. Indeed, this model of a popularly legitimated political science largely accounted for the development of judicial review. This tradition died, for good reason, in the antebellum period.²⁷⁶

The organism or organic model, on the other hand, denies the separation, central to the model of an art, of the ideal and the real, of timeless form and temporal matter. While the artist mediates between ideal form and temporal matter, the organism contains both form and matter within its own being. Without an ideal or abstract form, there is no place for the craftsman or maker. The organism may be born, but it is not made. Thus, in the organic model, form only exists as temporally embodied. To be organic—to be alive—is to maintain identity in difference in just this manner of internal synthesis of form and matter. The perceived alternative to organic maintenance is not an ideal form of abstract meaning, but disintegration and the meaninglessness of death.

The dissolution of organic form brings time itself to an end—at least a time that has any meaning. This is true not just of an individual's personal history, but even more vividly of the life of a community, which understands itself as having both a past and a future. When self-perpetuation stops, history stops and the organic community simply dissolves. Thus the organic model is completely and essentially temporal.

This is the model of constitutional maintenance so evident in *Dred Scott* and in originalism in general. The originalist denies that there is an ideal or abstract political form that is of any relevance to the constitutional task; rather, the problem of constitutionalism is to maintain the constitutional order as it was established at the "birth" of the nation. Because constitutional order is self-instantiating, history, not science, is its measure. Failure to maintain the past order will result in disorder, dissolution and the death of the body politic.²⁷⁷

276. See *supra* text accompanying notes 191–203.

277. A classic expression of these themes of maintenance of the past order, as well as the threat of dissolution and death of the body politic that arises from a failure of maintenance, is found in Lincoln's first inaugural address. Not only does Lincoln defend the "declared purpose of the Union [to] constitutionally defend and maintain itself," see THE INAUGURAL ADDRESSES OF THE PRESIDENTS

Both models—art and organism—make possible historical, communal life. Nevertheless, history appears differently in each. Neither model presents an idea of history as “moving toward” an end—an alternative, messianic vision of historical life.²⁷⁸ Rather, both understand history as moving away from a founding moment, which makes history possible by giving form to what would otherwise be merely chaotic change. Within the artistic model, history represents the intrusion of a recalcitrant, disorganized social life into the instantiated, scientific ideal achieved by the political artisan. In *The Federalist*, for example, the problem of history is that of the intrusion of man’s interests and passions into the scientific, artistically constructed social order. The lesson that the republican political scientist learns from his study of past political experience is that time threatens every political order with decay. The intrusion of nature, unless continually limited by artistic recourse to political science—“wisdom and virtue” in the words of Publius—will ultimately destroy the political regime of reason. Thus, the failure of past democratic regimes was rooted in their lack of scientific understanding and of an artistic application of ideal political form. This was the problem of legitimate, bad government that was so troubling to Publius.²⁷⁹

For the organic model, on the other hand, history is the sole domain of meaning, not a force in competition with meaning. History does not work against the founding moment because, on this view, there is no abstract ideal of political order; rather, there is only the self-expression of an historical community. The community so understood maintains its identity by continually reaffirming its historically (not scientifically) legitimated order.²⁸⁰ This concept of legitimacy is exhausted in the community’s self-expression of its own identity. Time may still raise the possibility of disorder—this is always true—but a community’s life does not inevitably represent a gap between ideal meaning and historical reality. Rather, life within history is all that there is.

The organic state is, therefore, completely self-referential: There is nothing outside of the particular historical community which either informs or measures that particular social order. This denial of the political relevance of ideal form simultaneously affirms the autonomy of the political domain. To be autonomous here means to be self-legitimizing and self-sustaining. For just this reason, the Taney Court believed that it

244–45 (R. Bowers ed. 1929), but he further presents a methodology of constitutional interpretation that relies on will: “the intention of the lawgiver is the law.” *Id.* at 242.

278. Cf. Cover, *supra* note 274, at 9 (narratives, of which myths are part, include “visions of alternative futures”).

279. See *supra* text accompanying notes 26–28.

280. Describing this attitude toward origins found in mythical consciousness, Cassirer writes: “The past itself has no ‘why’: It is the why of things. What distinguishes mythical time from historical time is that for mythical time there is an absolute past, which neither requires nor is susceptible of any further explanation.” E. CASSIRER, *SYMBOLIC FORMS*, *supra* note 274, at 106.

could settle the raging political controversy of the *Dred Scott* period by renewing contact with the historical origins of the political order: Renewal, not reconsideration, was the Court's end.

The organic model is distinctly historical, then, in a way that the model of a political art is not. Art, and the science upon which it is based, are timeless; art and science remain constantly available for those that would re-make political order. A contemporary political problem is better resolved by reference to that science than to the moment in the past when the political order was made.

The organic model has an entirely different attitude toward the moment of its appearance in time, a moment likely to be described as a "birth." The problem of order within the organic model is to perpetuate the meaning—the form given the political community—at the birth of the nation.²⁸¹ This meaning is perpetuated by continually reimposing, upon the centrifugal forces of disorder that emerge in the temporal life of the community, the communal identity that appears at birth.²⁸² Perpetuation is accomplished by continually renewing contact with the moment of birth.

While the organic model always looks to the birth, it is likely to deny that the founding was itself a product of art. This reconceptualization of the founding is implicit in the shift from art to organism, for to recognize a place for a political art would be to undermine the self-perpetuating character of public order. That which has been made by individual artisans can be re-made. Art suggests freedom; it suggests that public order may be measured against ideal form and that it can, therefore, be made better and made anew. To suggest that history can be started over is to deny the very foundation of the organic model. The movement to the organic model therefore generally includes a denial of the place of art, and the artist, in political life.²⁸³

281. For a vivid example of the connections among the organic as a conceptual model, the emergence of a communal history, and birth, in the context of American post-foundation thought, see G. FORGIE, *supra* note 6, at 98 ("[I]t became common in nineteenth-century rhetoric to evoke the myth that the new Republic was the fortunate child of the best of space and time."); *id.* at 98–100. Of course, the most famous of all such evocations of the organic model and the idea of a political birth is found in Lincoln's Gettysburg Address: "Four score and seven years ago our forefathers brought forth . . . a new nation conceived in liberty . . ." See H. JAFFA, *supra* note 10, at 228 ("The 'people' is no longer conceived in the Gettysburg Address, as it is in the Declaration of Independence, as a contractual union of individuals existing in a present; it is as well a union with ancestors and with posterity; it is organic and sacramental. For the central metaphor of the Gettysburg Address is that of birth and rebirth."). Compare this formulation with Cassirer's statement that in myth we see "a deep and ardent desire of the individuals to identify themselves with the life of the community and with the life of nature." E. CASSIRER, *THE MYTH OF THE STATE*, *supra* note 274, at 38.

282. The need to impose order internally will normally result in a class-differentiated society, in which rulers and ruled are defined by their differing relationships to the origin. Thus, even if we are all political craftsmen at the moment of the founding, we are likely to need courts to function as "trustees" of political order, once the self-conception of the community has moved from art to organism.

283. In American history, this shift is marked by the change in language used to represent the early political leaders of the country: They become the "founding fathers" and assume an almost sacred status. They are not simply political scientists with the opportunity to exercise their art, but

The organic model further defends itself against the possibility of a renewal of art by denying the separation of subject and object in political life. A political art depends upon the ability of the subject—the political scientist—to achieve a “theoretical” distance from his political role. To give shape to political life through art requires the ability to take that life as an object of thought and action.²⁸⁴ Creating this distance was the goal of Publius’s call to the citizenry to deliberate together and thereby remove themselves from their everyday opinions and interests. Within the organic model, on the other hand, the individual does not, and cannot, stand apart from the political community in which he finds himself.²⁸⁵ Rather, individual identity—at least in its political aspect—is conceptualized as only a part of a larger public order, which is itself determined by a unique history.²⁸⁶ Political identity, on this model, exists prior to, and apart from, any deliberative act.

The organic model of political order is, in sum, characterized in its understanding of public order by simultaneous beliefs in the autonomy of political life and historical determinism, and in its understanding of the citizen by a denial of individual freedom and a reduction of the individual to a part of the political community. This entire political structure is founded on a set of beliefs that is characteristic of myth. Myth is the state of belief that supports an organic model of politics, just as science supports an artistic model.

The function of both political myth and political science is to constrain the outbreak of disorder, which threatens from two directions. First, there is the disorder of private appetite. The public order will always appear to be in tension with individual self-interest.²⁸⁷ Precisely because men are not wholly public, coercive governmental authority is required. Second, any government given the power to rule may misuse political power for private ends. Thus, the problem of political order is always twofold: to convince the general populace to accept government and to convince government to use its power only for public purposes.

Both ends are accomplished by a mythic account of the natural origins of the political order.²⁸⁸ By seeking to put nature in the place of the artificial, myth secures political order by convincing both ruled and rulers

figures that are larger than life.

284. For a discussion of freedom as self-transcendence, see *supra* text accompanying notes 31–32.

285. See *supra* text accompanying note 211 for an illustration with respect to the conceptualization of private liberty as public freedom.

286. On the massive psychological trauma caused by this denial of political freedom in nineteenth century America, see G. FORGIE, *supra* note 6.

287. Recognition of this problem was central in the analysis of both *The Federalist*, see *supra* text accompanying notes 38–41, and *Dred Scott*, see *supra* text accompanying notes 208–11.

288. Ironically, the image of nature frequently used is that of the family—precisely the pre-political, non-artificial association that the political order must displace. See E. SAGAN, *THE DAWN OF TYRANNY* (1985). This displacement is vivid in the American transfiguration of the republican artisans of Philadelphia into the “founding fathers.” It is also implied in the metaphor of “birth.”

to accept the responsibilities of their stations. To believe that the political order is "natural" is not simply to believe that it is correct, but more importantly, to believe that it cannot be other than it is. Nature in this context is both descriptive and normative, as it is, for example, in the "natural" association of family. No one chooses to be a member of a particular family, but membership entails a social role of distinct responsibilities which are simultaneously presented as "given" and invested with enormous normative significance.²⁸⁹ The mythical mode of thinking extends this naturalness of position to the social role that attaches to citizenship. Each individual will perform his political task—he will exercise his political rights and responsibilities—as long as he believes that task to be a natural function.²⁹⁰

As soon as the realization emerges that the political order is only an artifact, the possibility of questioning the political role appears. One who does not believe in the civic myths is likely to be perceived as, and indeed is likely to be, politically dangerous. He is a free actor, and nothing is more dangerous to the political order than the assertion of a freedom not simply within that order, but a freedom to choose among competing political orders.²⁹¹ That freedom may be exercised in the direction of science and art—a new making of the state—or in the direction of personal self-interest—the denial of any value in public order distinct from individual interest. Either move would reflect the dissolution of the power of myth and the renewed separation of subject and object—the citizen from his political role—creating the possibility of a challenge to the existing political order. Myth must defend against both science and mere subjectivism; it must defend against both public revolution and private interest. Myth meets these challenges by borrowing from the most basic and "natural" of all emotions: feelings toward and about family, home, and personal identity.

Originalism has all of the essential characteristics of the supporting myth of an organic model of political order.²⁹² It asserts the autonomy of

289. For a modern jurisprudence that largely relies upon this combination of the descriptive and the normative in analyzing certain kinds of communal associations, including family, neighborhood and nation, see R. DWORKIN, *LAW'S EMPIRE* 195-202 (1986).

290. Traditionally, education into civic life has been largely the shaping of character by the dominant political myths of the culture. Patriotism and nationalism, for example, are forces that are deeply subversive of any effort to divorce subject and object in political life. See, e.g., B. CRICK, *IN DEFENSE OF POLITICS* 69-86 (1962); J. SCHUMPETER, *supra* note 103, at 262-68.

291. The theoretical commitment to individual political freedom in a democracy means that a democratic political order always has an ambiguous position with respect to the legitimacy of revolution. On the one hand, a preference for the existing political order amounts to a denial of freedom. On the other hand, without that commitment no political order, including a democracy, can be maintained. Lincoln, for example, cannot speak of the responsibilities of maintenance without also speaking of the right to revolution. See *Lincoln's First Inaugural Address*, in *THE INAUGURAL ADDRESSES OF THE PRESIDENTS* 249-50 (R. Bowers ed. 1929).

292. My account of the power and function of originalism is not intended to describe every use of history in constitutional interpretation. Not every constitutional theorist who pursues historical inquiry fits within the organic/mythical framework. Historical inquiry might be relevant, for example,

the political order, specifically its closed, determined character. This type of closure makes the political order self-legitimizing: There is no set of principles, apart from the historical character of the state itself, by which politically relevant, normative evaluations of public order can be made.²⁹³ Thus, Taney recognized that constitutional law may be both true—historically accurate—and wrong—inconsistent with abstract moral principle. The autonomy of the system also means that public order is self-perpetuating: There is no place for an art of politics in constitutional law. Thus, Taney projected any role for such a political art into the future; such an art has no role in the present where the task is only maintenance of public order.²⁹⁴

Like the mythical assertion of “nature,” originalism suggests inevitability in the outcome of political controversy. Problems of political order are to be settled by a renewal of contact with, a re-presentation of, the origins. Originalism suggests that the past is determinative of the present, leaving no place for an art of political construction.

Accordingly, originalism denies that the present decisionmaker has any role except as conveyor of the historical facts. The decisionmaker has no personal identity: he is only ritualistically mouthing the voice of the past. Originalism thereby discourages the separation of the subject from the object of political construction. The role of the Court, on this view, is, as Chief Justice Rehnquist has expressed, that of “keepers of the covenant.”²⁹⁵ This is powerful imagery, at the level of belief as well as emotion.

Originalism does all of this by suggesting a “natural” identity between the present citizenry and those present at the origin. This is the function of the idea of “popular sovereignty,” which is the dramatic actor in the myth of originalism. This actor—the popular sovereign—suggests identity across time and space. It links not only the entire nation at the moment of birth, but the entire nation back to the moment of birth.

Originalism denies individual freedom by asserting participation in the popular sovereign. “Popular sovereignty” asserts that we are them. Problems of individual differentiation are submerged in the affirmation of this vague political entity. Differences in belief, in history, in political participation and even in biology—how many of us are even related to the founders?—are all submerged in this mythical entity.²⁹⁶ Through this as-

within a scientific framework. See *supra* note 269. I am not giving an account of all historical inquiry, but of the peculiar power of the idea that the problem of constitutionalism is to maintain contact with the origin of political order.

293. Gunnell describes the social life of a society organized around myth as follows: “The life of society was an active participation in the poetic truth of the origin or foundation.” J. GUNNELL, *supra* note 273, at 30.

294. See *supra* text accompanying notes 237–38.

295. Rehnquist, *supra* note 206, at 698.

296. See E. CASSIRER, *AN ESSAY ON MAN* 89 (1970) (“[Myth’s] view of life is a synthetic, not an analytical one.”).

sertion of intertemporal identity, the organic model of American political order comes to terms with the idea of popular self-government.

The popular sovereign is the American political self, just as the individual body is the physical self, and the soul is the moral self. The meaning and content of popular sovereignty, however, have evolved. The understanding of popular sovereignty that emerged in the mid-nineteenth century is one that is linked neither to universal reason nor to individual expressions of consent. Instead, it is completely national, and so completely historical. What defines this national self is the expression of public will alone.²⁹⁷ The expression of this will has created a national history. This historicized—mythical—concept of popular sovereignty asserts that we are our history.

Originalism, then, casts the concept of popular sovereignty as pure will back into time. Popular sovereignty is defined and exhausted by a past expression of will. What was intended, what was willed, determines our present political life. We are not simply the “natural” descendants of that popular sovereign; the very idea of “descendant” is challenged by the myth of popular sovereignty. Popular sovereignty suggests identity—we are them—and not just genealogy. This is true despite the fact that what the popular sovereign intended must be excavated through esoteric historical research. We do not even know ourselves, yet we are that intent even before we know its content.²⁹⁸ This is the model of *Dred Scott*: History can resolve public, political disorder because it reveals our national identity.

The myth of popular sovereignty suggests that constitutional order is not the work of political artisans, but rather the expression of the will of the citizenry. Just as the traditional myth expressed the individual's belief that he was a part of nature in his public life, so the myth of popular sovereignty expresses the belief that the American citizen is part of an historical past in his political life. As long as that belief is maintained, the artifactual character of political rule is denied and political order will be maintained.

Popular sovereignty is connected through originalism to will and history, therefore, because these are the materials out of which a modern myth of a democratic state may be built.²⁹⁹ Myth is required to support an organic model of political order. By turning to that model, American

297. This “expression of will” is not, however, the expression of any contemporary individual's will. Originalism and the organic model must deny any place for a model of will based on actual, individual consent. Rather than “express consent,” originalism is likely to speak of “implied consent.” Implied consent, however, is a weak construction, when there is no reason to believe that the consenting citizens even vaguely understand the content of that to which they are allegedly consenting.

298. This is why the concept of “implied consent” is so artificial in this context. See *supra* note 297.

299. Cf. E. CASSIRER, MYTH OF THE STATE, *supra* note 274, at 277–96 (modern myth-making of fascism).

constitutional life turned away from the revolutionary moment of political founding. Until the break is made with the founding world view that relies upon the model of art, a state lives simultaneously at the end and beginning of history, but never within it.³⁰⁰ To live within history requires a new world view that reconceptualizes the problems of constitutionalism. This reconceptualization is startlingly vivid in the development of American constitutional history.

V. CONCLUSION: BEYOND ART AND ORGANISM TO COMMUNITY

The models of art and organism represent two radically different approaches to the problem of conceptualizing political order. Art rests on a science of politics which provides abstract principles by which to measure and model political life. The organic model rests on a myth of birth and self-perpetuation. Science is timeless; myth, and the myth-teller, carry the state through history. Science is abstract and universal; myth is esoteric and particularistic. Science preserves order by constant reference to abstract standards; myth does so by keeping faith with the origin.

Art and organism, science and myth, are powerful, competing models in political theory in general and in American political life in particular. Each can claim support in one aspect of the dualism of reason and will in the American founding. Art carries forward the place of science in political order: Without science, political life will be marked by temporal decay and disorder. The organic model carries forward will: The expression of the will of the popular sovereign is the only legitimate foundation of political order.

The founding was a brief moment of unity in American political life. Since then, that life has been marked by periods of alternation between the primacy of reason and that of will. Marshall, the political scientist, was followed by Taney, who claimed to be the "trustee" of the popular will. Taney's myth of popular sovereignty was attacked, in turn, by James Thayer, the leading constitutional theorist at the end of the nineteenth century.³⁰¹ By then, the constitutional myth of popular sovereignty had lost much of its power. It was seen as only an artifice, which had the perverse result of denying the primacy of the will of the real—because present—popular sovereign. Thayer's attack on the myth led ultimately to a resurgence of the claims of political science as the source of constitu-

300. "[O]ur national birth was the beginning of a new history . . . which separates us from the past and connects us with the future only . . ." *The Great Nation of Futurity*, 6 UNITED STATES MAG. & DEMOCRATIC REV. 426 (1839).

301. Thayer describes judicial review as "always attended with a serious evil, namely, that the correction of legislative mistakes comes from the *outside*, and the people thus lose the political experience, and the moral education and stimulus that come from fighting the question out in the ordinary way, and correcting their own errors." J. THAYER, JOHN MARSHALL 106 (1901) (emphasis added). The idea that judicial review is applying a standard from "outside" represents the breakdown of originalism and the organic model of order.

tional interpretation. Thus, the problem of constitutionalism for the early twentieth-century Court was to guarantee a convergence of governance and reason.³⁰² Popular governance was to be found, once again, in the universalism of reason. As this belief in a science of politics broke down before the diverse claims of competing sciences, constitutionalism turned again to will.³⁰³ This time the sustaining myth of will was not originalism, but "process."³⁰⁴ Process, however, will be found no more secure than history.

American constitutional theory still bears the marks of this struggle between reason and will, but there is increasing acknowledgement that neither science nor consent alone can account for the constitutional concept of popular sovereignty. This has led to an effort to break out of this cycle of reason and will by appealing to a new model of political order. That model is "community," which has swept constitutional theory.³⁰⁵

The appeal of the concept of community is that it simultaneously captures the discursive element of reason—these are primarily communities of discourse—while maintaining the historical particularity of the concept of will. Furthermore, as a member of a particular discursive community, the individual simultaneously creates both his own individual identity and that of the community.³⁰⁶ In this way the gap between subject and object, between private life and public role, is overcome, but without reducing the individual to a mere part of the organic state.

Thus, the promise of the model of community is that it will end precisely that which has driven American constitutional theory, just as it has driven all political theory: the separation of the citizen—the private individual—and the state—the public order. Whether it can deliver on this promise, and how it will rewrite the meaning of our Constitution, remain to be seen.

302. See, e.g., *Lochner v. New York*, 198 U.S. 45, 53 (1905) ("Both property and liberty are held on such *reasonable* conditions as may be imposed by the governing power of the State" (emphasis added)). The Court repeatedly states in *Lochner* that the rule of decision is to be the "reasonableness" or "rationality" of the state action.

303. The classic expression of the competition among diverse sciences of political order is found in Holmes's dissent in *Lochner*, 198 U.S. at 75 ("[A] constitution is not intended to embody a particular economic theory, whether of paternalism . . . or of *laissez faire*.").

304. See generally J. ELY, *DEMOCRACY AND DISTRUST* (1980). The idea that the popular will can be captured if only we can get the process right has in turn been subject to attack—parallel to the attack of Thayer on originalism—by contemporary public choice scholarship, see, e.g., K. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (1963), and by those who argue that substantive value choices are inevitably built into process analysis. See, e.g., Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 737–40 (1985); Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131 (1981).

305. "Community" has appeared in two theoretical contexts: first, in the work of the new republican theorists, see, e.g., Ackerman, *supra* note 13; Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self Government*, 100 HARV. L. REV. 4 (1986); Sunstein, *supra* note 46; and second, in work on theories of interpretation, see R. DWORKIN, *supra* note 289; Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982).

306. See A. MACINTYRE, *AFTER VIRTUE* 324 (2d ed. 1984); M. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982).

