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Articles

Community in Contemporary Constitutional Theory

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American constitutional theory has been cyclical, understanding the Constitution sometimes as a product of will and sometimes as a product of reason.¹ Neither reason nor will ever completely disappears, but an age can usefully be characterized by either its majoritarian, consensual cast or its rationalist, scientific outlook. Chief Justice Marshall's Court, for example, was committed to the idea of reason in politics: To Marshall, the Constitution was the product of political science.² This faith in a convergence of constitutional order and a science of politics disappeared in the

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1. "Reason" and "will" are the psychological faculties by which we pursue knowledge, on the one hand, and give consent, on the other. The political analogue to the psychological contrast of reason and will is the contrast between government founded on political science and government founded on popular consent. For an examination and elucidation of these basic concepts, see Kahn, *Reason and Will in the Origins of American Constitutionalism*, 98 YALE L.J. 449, 450-51 (1989).

2. For a description of Chief Justice Marshall's understanding of the Constitution, see Kahn, *supra* note 1, at 479-87.

ante-bellum period. It was replaced by the belief that the Constitution rests on will alone. The purpose of constitutional interpretation, on this view, was to determine the object of that will, or, in more traditional terms, the intent of those who drafted and ratified the Constitution. By the end of the nineteenth century, the Constitution was again understood as a product of reason.³ The *Lochner* court believed that the Constitution was to be approached through a science of law that linked the exposition of the common law to contemporary social science, in particular to social darwinism.⁴

Contemporary constitutional theory, however, offers something different. Not a repetition of the cycle, but an attempt to break out of it. Much of contemporary constitutional theory is an effort to find a new conceptual model for constitutional order, one that simultaneously acknowledges reason and will. The conflict of reason and will continues to dominate the theoretical debate, but no longer as alternatives between which a choice must be made. Rather, reason and will appear as thesis and antithesis for which constitutional theory must now find a creative synthesis.⁵

In seeking such a synthesis, contemporary constitutional theory is following the pattern of the Founders. Even more self-consciously than contemporary theorists, the Founders understood the need to combine political science and popular will. The synthesis they imagined, and thought they achieved, was one in which popular consent was given to the principles of political science. This harmonization achieved expression in the popular ratification of the Constitution—itsself the product of scientific deliberation at Philadelphia.

For the Founders, the means to achieve this synthesis was simply argument: The people had to be persuaded to consent to a constitutional order

3. See, e.g., A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 15-16 (1978) (on linkage of Constitution, a rational Court and social darwinism); J. CARTER, *LAW: ITS ORIGIN, GROWTH AND FUNCTION* 132-36 (1907); C. TIEDEMAN, *THE UNWRITTEN CONSTITUTION OF THE UNITED STATES* 144 (1890); F. WHARTON, *COMMENTARIES ON LAW* 62-68 (1884). The cycles continue through the legal realist attack upon scientific formalism, with a corresponding re-emergence of will as the fundamental basis of American political order. For a dramatic interchange between will and reason compare L. HAND, *THE BILL OF RIGHTS* (1958) with Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). I am working on a book-length manuscript that will present a complete account of these cycles and place them within a theory of the ordered development of a number of larger paradigms of the character of constitutional order.

4. See generally B. TWISS, *LAWYERS AND THE CONSTITUTION* (1942) (on the successful campaign by conservative lawyers to move the Court in this direction).

5. Not all theorists, of course, participate in this effort to find a synthesis. Two recent examples in which this dialectic of reason and will breaks out into the open and is portrayed as an irresolvable tension are Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063 (1981) (Madisonian democracy rests on unsolved contradiction between majoritarianism and individual rights) and Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983) (judicial principles intended to limit place of subjective will of individual judge are themselves undermined by necessary reliance upon social consensus). Interestingly, while both Brest and Tushnet see an irresolvable tension in existing constitutional theory, both conclude by invoking the possibility of creating a new community of discourse as a means of resolving the tension.

that was scientifically correct.⁶ The nation as a whole, at the moment at which it imposed a constitutional order upon itself, had to engage in, and act upon, political science.⁷ In this idea of joining reason and will, each moment remained conceptually distinct. Science and popular will could, and in fact were, brought together in the circumstances of post-revolutionary America, which included an historically unique capacity of political leaders to use, and of the people to be persuaded by, scientific argument.⁸ The Founders did not expect this openness to political science, on the part of both the leaders and the people, to continue indefinitely.

Contemporary constitutional theorists share the goal of synthesis but no longer try to bring reason to will through argument directed at the general populace.⁹ This is not the age of enlightenment, but of mass media. Few believe that the synthesis of reason and will can be accomplished through a national debate in which will is persuaded by reason.¹⁰ The locus of such a synthesis must, therefore, be elsewhere. Increasingly, that locus is found in the concept of "community." Community functions not as a geographical place, but as a conceptual model of order that combines elements of reason and will.

The community that has captured the imagination of constitutional theory is one in which the only relevant activity is discourse. This community talks itself into an historical identity. Argument—the appeal to principles and reasons—remains critical to the identity of this community, not just because talk about values must be clear and consistent. More importantly, only through discourse are common values revealed and maintained. This discursive element of community replicates much of the function of reason in classical political theories. But discourse here does not have the abstract, universal quality of classical, natural-law theories of political science. Rather, the community's discourse is historically specific.

The object of this communal talk is the values of the particular commu-

6. This statement characterizes their theory, not their practice. For an account of the less than ideal nature of the actual ratification debate, see J. MAIN, *THE ANTIFEDERALISTS* 187-248 (1961). For an elaboration of the Federalists' theoretical vision, see Kahn, *supra* note 1, at 462-67.

7. *The Federalist Papers*, for example, were a product of a remarkable, enlightenment optimism that rational argument could create an entire nation of scientific, political craftsmen, i.e., a nation in which each citizen participated in, and so willed, the scientific construction of constitutional order.

8. See *THE FEDERALIST* No. 49, at 315 (J. Madison) (C. Rossiter ed. 1961) ("[T]he existing constitutions 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. . . .").

9. That this idea continued to have appeal as recently as the post-war period is clear from the writings of Dean Rostow. See, e.g., E. Rostow, *Democratic Character of Judicial Review (I)*, in *THE SOVEREIGN PREROGATIVE: THE SUPREME COURT AND THE QUEST FOR LAW* 147, 167-68 (1962) ("The Supreme Court is . . . an educational body, and the Justices are inevitably teachers in a vital national seminar."). This theme was continued by Bickel. See *infra* notes 64-65 and accompanying text.

10. Among contemporary theorists discussed in this article, Ackerman comes closest to this view. But, even he believes this synthesis of reason and will to be possible for the national community only at extraordinary moments in the political life of the nation. For a more extreme view, see Brest, *Constitutional Citizenship*, 34 CLEV. ST. L. REV. 175 (1986).

nity. The concept of the discursive community, accordingly, includes the particularity of membership and history. This focus on the particular history of *this* community replicates much of the function of will in classical theories of consent.¹¹ The contemporary idea of community, therefore, offers a model of "discursive particularity" or of "historicized reason" that bridges the traditional dichotomy of reason and will.

The attraction and power of the model of community is evident first in this synthesis of reason and will. The model gains even more power, however, in the explanation it may offer of the relationship of the individual to the state. A constitutional theory that rests upon the model of reason understands constitutional order as an expression of objective, universal principles that are the product of a science of politics. Constitutional order is legitimate, under this theory, because reason is the normatively valuable component of personality. To the degree that one rejects or opposes the constitutional order, one is acting irrationally. The state is, therefore, our better self.¹²

A theory of constitutional order based on will overcomes the gap between the individual and the state by relying on the concept of consent. On this view, in confronting the constitutional order, the individual confronts only that to which he has already consented to be bound. The binding character of law derives from an affirmative act of the individual: That act alone overcomes the divide between citizen and state. The state may not be our better self, but nevertheless we still confront only an objectification of our selves.

Between reason and will, traditional constitutional theory faced a problematic choice.¹³ To choose the abstract principles of reason was to deny any place for the particularity of membership. To choose will, on the other hand, threatened to undermine the moral ground of the constitutional order: Rights are not simply the product of consent. Either choice rendered problematic the historical character of the state, which is not adequately expressed by either the timeless character of reason or the im-

11. A theory of consent must, for example, begin by defining membership in the community: Only when membership has been specified is it possible to determine whose will is relevant. See Brilmayer, *Shaping and Sharing in Democratic Theory: Towards a Political Philosophy of Interstate Equality*, 15 FLA. ST. U.L. REV. 389, 399-400 (1987).

12. The classic exposition of this view is Madison's discussion of "a faction." See THE FEDERALIST No. 10 (J. Madison). For him, faction was the political expression of the irrational passions of individuals. The problem of political order was that of simultaneously achieving individual virtue and the rule of reason in the state. See Kahn, *supra* note 1, at 458-61. The same identification of reason, the public good, and individual virtue reappears in the *Lochner* Court. It is seen more recently in the attempt to ground judicial review in "neutral principles." See Wechsler, *supra* note 3, at 16 (collapsing any distinctions among reason, neutral principles, justice and law).

13. As did traditional political philosophy. For example, in *The Apology*, Plato offers a model of the role of reason in the state, while in *The Crito*, he offers a model of a role of will. Accordingly, as many have observed, the Socrates of the *Crito* is a problematic figure in light of the Socrates of the *Apology*. See R. KRAUT, *SOCRATES AND THE STATE* 11-12 (1984); Weinrib, *Obedience to the Law in Plato's Crito*, 27 AM. J. JURIS. 85 (1985); Woozley, *Socrates on Disobeying the Law*, in THE PHILOSOPHY OF SOCRATES 299 (G. Vlastos ed. 1971).

mediacy of consent.¹⁴ Either model, then, attempts to legitimate the state at a substantial cost to a full concept of the autonomous individual. To save the state, the individual seems required to sacrifice either reason or will, the one renders him an abstraction, the other amoral. Precisely this incommensurability of a two-termed psychology of faculties—reason and will—and the historical character of the state has caused the cycles of reason and will in constitutional theory.

Contemporary theories of community offer a new model of the relationship between the individual and the constitutional order. Instead of a problematic relationship of part (citizen) to whole (state), in which either the part or the whole threatens to subsume the other, the new communitarians understand the relationship of the individual to the political order as that of the microcosm to the macrocosm. We create and maintain our personal identity in the very same process by which communal identity is created and maintained. Thus, the historically specific discourse, which is at the center of communitarian theory, simultaneously creates the individual and the community. Individual identity does not exist apart from the discourse that creates and sustains the community.¹⁵ There is no self to understand, apart from the community, just as there is no community apart from the members. Neither the community nor the individual has any priority—temporally, conceptually, or normatively. Individual and community are two perspectives on a single process of discursive particularity. Within this universe of discourse, we cannot separate the talker from the talking: Both the individual and the community exist only in the talking.

The move to a communitarian model in constitutional theory reflects larger trends in political and moral theory.¹⁶ Nevertheless, the new emphasis on community can also be understood from within the discipline itself. The emergence of community is a response to particular problems in the history of constitutional theory. Yet, the move to a communitarian model creates unique problems in constitutional theory. This essay takes this intradisciplinary perspective and aims to accomplish three goals.

14. See Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 225 (1980) ("Even if the adopters freely consented to the Constitution . . . this is not an adequate basis for continuing fidelity . . . for their consent cannot bind succeeding generations" (citation omitted)). For an application of the dynamics of the temporality of consent to a contemporary legal problem, see Kahn, *Gramm-Rudman and the Capacity of Congress to Control the Future*, 13 HASTINGS CONST. L.Q. 185 (1986); see also Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 AM. B. FOUND. RES. J. 1379.

15. This view finds its strongest philosophical expression and defense in the writings of Michael Sandel. See, e.g., M. SANDEL, *LIBERALISM AND ITS CRITICS* 6 (1984) ("[T]he story of my life is always embedded in the story of those communities from which I derive my identity."); see also *id.* at 5 ("[W]e cannot conceive our personhood without reference to our role as citizens, and as participants in a common life.").

16. See, e.g., B. BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE* (1984); A. MACINTYRE, *AFTER VIRTUE* (1981); J. POCOCK, *THE MACHIAVELLIAN MOMENT* (1975); M. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982).

First, I hope to demonstrate how the model of community responds to serious problems in traditional constitutional theory. In Part I, I expose those problems through an examination of Alexander Bickel's classic, *The Least Dangerous Branch*. The weakness of Bickel's work, I argue, lies in his effort to ground the authority of reason in a model of popular consent. This turn to consent ultimately undermines both the authority of the courts and the privileged place Bickel affords to reason in political discourse. Much of the appeal of the communitarian model in contemporary constitutional theories can be understood as a response to these problems.¹⁷

Second, I hope to demonstrate the dominance of the model of community in contemporary constitutional theory.¹⁸ There are two main schools of contemporary constitutional theory: the new republicans, whom I discuss in Part II, and the interpretivists, whom I treat in Part III. Both schools understand community on the model of what I have described as discursive particularity or historicized reason.¹⁹ Both use this model to reconceptualize the relationship of the individual to the state. Nevertheless, the two schools ask different questions and use community to provide different answers. The new republicans ask how the existing institutions of American government should operate. They respond with a theory of community that provides a ground for a normative critique of institutional practice. The interpretivists ask how law is possible. They respond with a theory of meaning that rests upon the discursive community.

While I cannot offer an exhaustive account of each school, I have tried to organize the discussion in a way that responds to the unique problem each school suggests for constitutional theory. For the new republicans, that problem is the institutional location of the community of discourse. Each of the new republicans I discuss places that community in a different institution of governance.²⁰ For the interpretivists, that problem is not to provide an institutional location for a communal discourse, but to differentiate among many such communities of discourse. Each of the inter-

17. Together these problems point again to the problematic relationship of reason and will in constitutional theory. Bickel could only answer the question of the Court's legitimacy by appealing to consent (will), yet he claimed the Court's unique role was to bring principled discourse (reason) to political decisionmaking.

18. See generally Cornell, *In Defense of Dialogic Reciprocity*, 54 TENN. L. REV. 335, 335-36 (1987) (concept of community links the debate between liberalism and its critics with the debate over the role of law as interpretation).

19. See *supra* text accompanying note 11.

20. The possible institutional locations are limited to the Court, see *infra* Part II, Section B (discussing Michelman), the Congress, see *infra* Part II, Section C (discussing Sunstein), and the people as a whole, see *infra* Part II, Section A (discussing Ackerman). The last of these possibilities obviously creates its own institutional difficulties—i.e., the people must organize themselves—but those institutional difficulties play a central role in Ackerman's theory. See *infra* notes 82-91 and accompanying text. There remains one additional possible location for the discursive community for the new republicans: the executive branch. Sunstein has come the furthest in filling this space. See C. SUNSTEIN, *INTERPRETING THE REGULATORY STATE* (forthcoming).

pretivists I discuss reaches a different resolution of this problem of privileging one discursive community over others.²¹

Finally, I hope to demonstrate the inability of the model of community to provide a normative account of legal authority. The unifying factor in the problems of both the new republicans and the interpretivists is the difficulty of supporting a concept of authority within a communal, discursive framework. Ultimately, each of the new communitarians fails for the same reason: The authoritarian character of constitutional law is inconsistent with the egalitarian quality of the community of discourse. My account of each theorist, accordingly, involves a juxtaposition of authority and community. In each instance, we are left with either an unsupported claim of authority or an invitation to the anarchy of diverse discursive communities. Theory and law cannot meet on the field of community, because the law remains bound to a concept of authority that can find no place in the discursive community. The emergence of community as the central conceptual structure of contemporary theory, therefore, accounts in part for the growing divide between theory and practice in constitutional law.

I. THE LEGACY OF ALEXANDER BICKEL

A. *Bickel's Recreation of the Founders' Constitutional Project*

Alexander Bickel begins a new generation of constitutional theory by rediscovering the conceptual framework of the Founders.²² He casts into contemporary form the Founders' understanding of the problem of constitutionalism in a democratic political order, which is the need to achieve popular consent to a governmental order based upon reason.²³

Bickel agrees with the Founders that the ultimate foundation of American constitutional order must be popular consent: "[O]n the supreme occasion, when the system is forced to find ultimate self-consistency, the prin-

21. For the interpretivists the possibilities are: 1) to fail to privilege any discursive community, inviting anarchy, *see infra* Part III, Section B (discussing Cover); 2) arbitrarily to privilege one community's discourse as authoritative, *see infra* Part III, Section A (discussing Fiss); or 3) to try to ground the authority of one community in the theory of interpretation itself, *see infra* Part III, Section C (discussing Dworkin).

22. Cf. Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567 (1985) (claiming that Bickel had very little influence on subsequent development of constitutional theory). Kronman does not capture the constitutional/political character of Bickel's thought because he focuses on the personal virtues that a judge must have to accomplish the political task that Bickel sets out. Kronman's perspective remains largely psychological—the virtue of prudence is his object—instead of political. For other works that follow the Bickelian structure of identifying the institutional role of the Court as that of bringing reason to political choice and that then see the problem of judicial review as that of finding a mechanism by which majoritarian consent is given to the expression of reason, *see, e.g.,* M. PERRY, *THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS* (1982); Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221 (1973).

23. Bickel's own preferred historical analogy is Lincoln's view of the slavery issue.

ciple of self-rule must prevail."²⁴ Nevertheless, he sees, as they did, that the achievement of political legitimacy based wholly on popular consent is hardly a guarantee of reasonableness in general, or of moral and political value in particular. Just as the Founders distinguished between government based on consent and "good" government—and sought a coincidence of the two—so Bickel writes that our "society [is] dedicated both to the morality of government by consent and to moral self-government. . . ."²⁵ Elsewhere he states that "[s]uch a government must be *principled* as well as *responsible*. . . ."²⁶ Principled government rests on reason; responsible government responds to the will of the people.

The moral and political values of a political order, then, must come from outside of the principle of consent, which is given institutional expression in majoritarianism.²⁷ These values depend upon substance, and not simply process. Accordingly, Bickel sees a need for the entrance of substantive values into the political system, and, therefore, the need for a political institution responsible for introducing these values. The problem is to find a way in which that responsibility can operate without undermining the consensual foundation of the whole. Following Madison, Bickel seeks a "republican remedy for the diseases most incident to republican government."²⁸

Despite this similarity in the analysis of the problem of constitutional order, there is a striking difference between the Founders and Bickel. For the Founders, the synthesis of reason and will was to be achieved at a single moment—the moment of popular ratification of the work of the political scientists who drafted the Constitution.²⁹ For Bickel, that moment of complete synthesis is projected into the indefinite future. For him, there is no actual, single moment at which reason and will are fully integrated; rather, there are many moments at which popular consent is given to particular substantive principles. Accordingly, the problem of constitutionalism is to create a process by which the society can continually move closer to that end-point. Bickel's explanation of judicial review is an account of the Court's institutional role in sustaining and managing this process.

24. A. BICKEL, *THE LEAST DANGEROUS BRANCH* 261 (1962). Compare *THE FEDERALIST* No. 22, *supra* note 8, at 152 (A. Hamilton) ("The fabric of American empire ought to rest on the solid basis of THE CONSENT OF THE PEOPLE . . . that pure, original fountain of all legitimate authority.").

25. A. BICKEL, *supra* note 24, at 199.

26. *Id.* at 29 (emphasis added).

27. This is not to say that majoritarianism is not in itself a substantive principle of some value. But that value may not be sufficient to overcome unjust results reached by majority decision. See J. SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* 242 (3d ed. 1950) (democratic majority may be a "rabble" pursuing criminal or stupid ends).

28. *THE FEDERALIST* No. 10, *supra* note 8, at 84 (J. Madison).

29. The Founders did not believe that subsequent to ratification reason becomes irrelevant to the operations of government. Rather, they saw the underlying constitutional order, the basic structure of government, as based on a complete synthesis.

While this shift in temporal attitudes has important consequences for the details of the institutional explanation that Bickel offers, it does not affect the nature of the integration of reason and will that characterizes constitutional governance.³⁰ That integration remains contingent upon the ability of reason to persuade and of will to be persuaded. These are qualities that change with historical circumstances. The marriage of reason and will, therefore, remains subject to the constant possibility of divorce. There is no third concept for Bickel—just as there was none for the Founders—that in its essence provides a unity of reason and will.³¹

B. *The Countermajoritarian Difficulty and the Turn to the Future*

Perhaps the most memorable lines that Bickel ever wrote are the following:

[T]he reality [is] that when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it. That, without mystic overtones, is what actually happens.³²

In rejecting “mystic overtones,” Bickel suggests a certain hardheadedness.³³ He will look at “what actually happens,” within the interplay of the institutions of American politics. What he sees is an institution—the Supreme Court—that exercises the “power to apply and construe the Constitution, in matters of the greatest moment, against the wishes of a legislative majority, which is, in turn, powerless to affect the judicial decision.”³⁴

30. The attitude toward time is a central organizing principle in distinguishing and explaining various constitutional theories. Bickel's orientation towards the future presents a striking contrast, for example, to the originalist's orientation toward the past. See, e.g., Bork, *Tradition and Morality in Constitutional Law*, in AM. ENTERPRISE INST., FRANCIS BOYER LECTURES ON PUBLIC POLICY 10 (1984) (“[F]ramers' intentions with respect to freedoms are the sole legitimate premise from which constitutional analysis may proceed.”). For an example of a “present-oriented” theory, see Wellington, *supra* note 22 (on role of contemporary consensus).

31. This lack of synthesis characterizes Bickel's political and legal thought, but not necessarily his psychological theory. Bickel's concept of “prudence”—a psychological virtue—may offer a model of synthesis. See *infra* text accompanying notes 52–55.

32. A. BICKEL, *supra* note 24, at 16–17.

33. Bickel attacks traditional justifications of judicial review for either invoking a “mystical” identification of the “people now” with the people who ratified the constitution or for building a theory of implied consent out of what is in fact uninformed, passive acquiescence. *Id.* at 17–21. For contemporary attempts to reconstitute both branches of traditional theory, see Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984) (developing an intertemporal concept of “we-the-people”) and Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043 (1988) (theory of implied consent requires possibility of non-Article V amendments through alternative, majoritarian process).

34. A. BICKEL, *supra* note 24, at 20; see also *id.* at 19:

[N]othing can finally depreciate the central function that is assigned in democratic theory and practice to the electoral process; nor can it be denied that the policy-making power of represen-

Bickel begins his resolution of the countermajoritarian difficulty by focusing on what he calls a "truism": "[M]any actions of government have two aspects: their immediate, necessarily intended, practical effects, and their perhaps unintended or unappreciated bearing on values we hold to have more general and permanent interest."³⁵ This distinction allows him to identify the institutional role of the Court. Once we know what the Court can do well, we can ask whether that function is both valuable in itself and consistent with the general commitment to democratic, electoral legitimacy.

While the political branches are good at tending to the first aspect of public action—the "immediate, necessarily intended, practical effects"—they are not good at tending to the second aspect—the effect on values of "general and permanent interest." The courts are the institution best suited to "be the pronouncer and guardian of such values."³⁶ While this is cast initially as a distinction between short- and long-term interests, Bickel quickly comes to speak of it as a distinction between actions based on expediency and actions based on principle.³⁷ The courts', and in particular the Supreme Court's, capacity to serve this function is rooted in their institutional character.³⁸ "Judges have, or should have, the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government."³⁹ These personal and institutional characteristics allow courts to focus on the "enduring values of a society," the society's principles. Good government, accordingly, requires scholarship as well as political responsiveness.⁴⁰ Bickel is suggesting that the judge may compete with the politician's claim to represent the community. Different aspects of a community's values require different kinds of representative institutions. By focusing on substance—i.e., what is represented—Bickel seems to have shorn representation from its traditional roots in the electoral process.⁴¹

tative institutions, born of the electoral process, is the distinguishing characteristic of the system. Judicial review works counter to this characteristic.

35. *Id.* at 24.

36. *Id.*

37. *Id.* at 25. For a comparable distinction between principle and policy, see R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 22-23 (1977).

38. There is an inverse relationship here between the order of the inquiry and the order of political legitimacy. The inquiry moves from institutional character to the object or purpose of the institution. But in political life, it is the nature of the object to be represented—enduring values—that justifies an institution of the character of the courts.

39. A. BICKEL, *supra* note 24, at 25-26; cf. FISS, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 12-14 (1979) (grounding this function of courts in judicial procedures, rather than judicial psychology).

40. Bickel starts here the theme of the importance of academic scholarship to constitutional governance. The institutional model of the judge as a kind of academic takes a prominent place in the theorizing of many of Bickel's followers. See, e.g., M. PERRY, *supra* note 22, at 100-02; FISS, *supra* note 39; Wellington, *supra* note 22.

41. For a recent, thought-provoking analysis of judicial review that relies on a similar claim about the two-fold character of representation of community interests, see Seidman, *Ambivalence and Accountability*, 61 S. CAL. L. REV. 1571 (1988).

Even assuming that Bickel has correctly identified a representative function that the courts could perform well, the argument has not yet offered a justification of judicial review. The gap between the institutional account and the still-to-be-offered normative account is implicit in his characterization of his goal: "The search must be for a function which might (indeed, must) involve the making of policy"⁴² If the courts make policy when they engage in judicial review, then what is it that privileges this policy over that made by the majoritarian political institutions of government? To describe it as representative of long-term, rather than short-term, values, or as principled instead of expedient, is hardly sufficient.⁴³

Unless Bickel is willing to defend a normative difference between principle and policy in a way that can be reconciled with the primacy he accords to democratic legitimacy, calling a choice "principled" will not do the work required. Why should the community prefer principle to expediency, or long-term values to short-term interests? Why should the legislature not make exceptions to general and enduring values, when this represents the wishes of a present majority of the community? Consistency among values over time is not an obvious first principle of legitimate, democratic government.⁴⁴ Why should the relative value of conflicting policy judgments not be an issue for the people themselves to determine?⁴⁵

In fact, Bickel is not willing to make an argument for the priority of principle over short-term interests in general or in a democratic polity in particular.⁴⁶ Thus, the institutional explanation of the role of the

42. A. BICKEL, *supra* note 24, at 24. I am not the first to focus on this passage of Bickel's as posing the critical problem of legitimacy. See J. ELY, *DEMOCRACY AND DISTRUST* 103-04 (1980); M. PERRY, *supra* note 22, at 122-23 (Perry's response to Ely).

43. Bickel does not claim that principles, or long-term values, are themselves second order preferences—i.e., preferences about preferences. Cf. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1140 (1986) ("Laws may . . . reflect the majority's . . . second-order preferences, at the expense of first-order preferences.").

44. For an argument linking consistency and legitimacy, see Dworkin's theory of "integrity" discussed below. See *infra* text accompanying notes 301-28.

45. Nor is Bickel on solid ground when he suggests that long-term values may not be clearly in focus when the political branches act. Surely, in the most controversial instances of judicial review, the conflict is over these long-term values; it is not between the short-term and long-term perspectives. Consider, for example, slavery, segregation, abortion, capital punishment, and apportionment. The constitutional issue in these cases is hardly a matter of taking a "sober second look" at long-term consequences. Rather, it is one of identifying and responding to politically entrenched wrongs.

46. Bickel's distinction between principles, or enduring values, on the one hand, and preferences, or policies of expedience, on the other hand, begins the modern tradition of dualist accounts of the character of political discourse. See, e.g., *infra* Part II, Section A (discussing Ackerman on constitutional and normal politics); Part II, Section B (discussing Michelman on positive and negative freedom); Part III, Section B (discussing Cover on jurisgenerative and jurispactic legal process). Calling only one form of discourse "principled," however, is probably not a helpful way of drawing the distinction. Bickel's terminology reflects again the twofold psychology of reason and will which he inherited most immediately from the lively debate between Hand and Wechsler. See *supra* note 3. For Bickel, this psychological distinction is projected onto an institutional framework. This institutional character of his thought reflects the influence of the "legal process" school at Harvard, where Bickel had been a student. See H. Hart & A. Sachs, *The Legal Process: Basic Problems in the Making and Application of Law* 179-85 (1958) (unpublished manuscript); Amar, *Law Story*, 102 HARV. L. REV.

Court—pointing to a political function that the Court is best able to perform—does not in itself explain either the legitimacy or value of this function in a general system of democratic governance. To solve this problem, Bickel turns to the future.

The “passive virtues” constitute the means by which the Court can look to the future. Much of Bickel’s early work is an assessment of the function and value of these “passive virtues.”⁴⁷ These are devices by which the Supreme Court can avoid making a constitutional decision: “The essentially important fact, so often missed, is that the Court wields a threefold power. It may strike down legislation as inconsistent with principle. It may validate, or . . . ‘legitimate’ legislation as consistent with principle. *Or it may do neither.*”⁴⁸ When the Court does neither, it pushes the issue into the future.⁴⁹

Bickel’s explanation of the importance of judicial inaction is framed in terms of a need for the Court “to maintain itself in the tension between principle and expediency.”⁵⁰ Following Wechsler before him,⁵¹ he argues that the Court must always decide cases on a wholly principled basis. That is its institutional role. Unlike Wechsler, however, Bickel argues that the Court need *not* always decide the constitutional issue presented. The passive virtues allow the Court to avoid constitutional rulings. They allow principle to be silent in the face of short-term politics. A court that understands when such silence is appropriate exercises the virtue of “prudence.”⁵² Prudence is, accordingly, the virtue of managing the conflict of reason and will.

Prudence is required because a society governed entirely by principle would self-destruct: “No society, certainly not a large and heterogeneous one, can fail in time to explode if it is deprived of the arts of compromise”⁵³ Nevertheless, if the Court is to maintain the institutional role that Bickel has identified, that compromise cannot be with the values that it is responsible for bringing to public policy-making. Rather, compromise

688 (1989).

47. See Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961); A. BICKEL, *supra* note 24, at 111–98.

48. A. BICKEL, *supra* note 24, at 69 (emphasis in original).

49. The classic critique of Bickel’s theory of the passive virtues is Gunther, *The Subtle Vices of the “Passive Virtues”—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964) (passive virtues are inconsistent with Bickel’s own demand for principled adjudication).

50. A. BICKEL, *supra* note 24, at 69. Just as Bickel’s substantive position can be seen as a synthesis of that of Hand and Wechsler, *see supra* note 46, his procedural position can also be understood as such a synthesis. While Hand had argued that there is no necessity that the Court exercise its jurisdiction in any case, and that the decision whether or not to engage in judicial review must always be based on political considerations, *see* L. HAND, *supra* note 3, at 15, Wechsler had argued that whenever jurisdiction exists, the Court must exercise it. *See* Wechsler, *supra* note 3, at 9. Bickel’s explanation of the passive virtues is intended to satisfy both Hand’s prudentialism and Wechsler’s formalism.

51. *See* Wechsler, *supra* note 3, at 15.

52. *See* Kronman, *supra* note 22, at 1569 (arguing that prudence is central, organizing concept of Bickel’s entire corpus).

53. A. BICKEL, *supra* note 24, at 64.

must be exercised outside of, not within, the domain of substantive principle. The passive virtues "are the techniques that allow leeway to expediency without abandoning principle."⁵⁴ The moment of principled judgment is simply postponed, pushed into the indefinite future.

The Court, then, must engage in a kind of politics of principle. It must politically manage its own role of bringing principle into the political order. To move too quickly or too far would be self-defeating; to move too slowly or too little would be to fail in its responsibilities.

This account, while fuller, still leaves open the critical question of legitimacy. Even when the Court can get away politically with the exercise of judicial review, and even when it exercises that function in a principled way, what makes its rulings legitimate? Here it is not enough to say that "[n]o good society can be unprincipled,"⁵⁵ because the issue is not goodness but legitimacy. Furthermore, even the claim that a good society must be principled hardly tells us which principles are the right ones for any particular society. Nor does it tell us how to recognize or formulate a principle: Any reasonably good rhetorician can turn a statement of policy into a statement of principle and vice-versa.⁵⁶ Given this, the conflict between the courts and the political institutions of representative government can always be recast as a conflict over principle.

Bickel's response is to offer an explanation of the democratic legitimation of the work of the Court. Principles are entitled to govern the social order only when those principles themselves receive the consent of the governed. Bickel expresses this idea in a striking sentence: "The Court should declare as law only such principles as will—in time, but in a rather immediate foreseeable future—gain general assent."⁵⁷ The legitimacy of judicially articulated principle derives not from past constitutional decision, but from future political confirmation. The rule of reason, if that is what the courts use, is legitimate only insofar as it can stand on the consent of the governed. Thus, the content and level of generality of moral principle is determined not by abstract logic, but by the moral beliefs of the larger community.

The Court's political responsibility is, therefore, to gain general consent to the principles that it articulates. In another striking phrase, Bickel writes that the Court "labors under the obligation to succeed."⁵⁸ When it

54. *Id.* at 71.

55. *Id.* at 64.

56. See R. DWORKIN, *supra* note 37, at 22–23 ("The distinction can be collapsed by construing a principle as stating a social goal . . . or by construing a policy as stating a principle . . . or by adopting the utilitarian thesis that principles of justice are disguised statements of goals. . . ."). Even if we could agree on the need for principles, there remains a problem with the level of generality at which principle should be formulated. The level of generality often determines outcomes. See Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 7–8 (1971); Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982, 987–88 (1978).

57. A. BICKEL, *supra* note 24, at 239.

58. *Id.*

fails, it has no right to impose principle, regardless of the abstract or theoretical merits of the position.⁵⁹ Prudence, then, is not just the efficient management of principle; rather, it is the means to achieve the legitimation of principled governance. Conversely, an imprudent Court will be not only ineffective, but also illegitimate.

While initially Bickel's characterization of the judiciary as a representative institution seems to focus on substance, not procedure, in the end he relies upon a quasi-electoral model of representation to overcome the countermajoritarian difficulty. The difference between the Court and more overtly political institutions is that for the Court the moment at which popular consent is expressed comes after, not before, the institutional action. Courts are representative institutions because they must gain the consent of the governed, just as the more directly political institutions of government must have that consent.⁶⁰

C. *Discourse, Community and Legitimacy*

The possibility of obtaining popular legitimacy for judicial review is rooted both in the kind of society in which the Court operates and in the techniques of persuasion that it can deploy. Here, Bickel introduces two ideas that have become critical to the constitutional jurisprudence of those who follow him: first, the idea of the historical "moral unity" of the community; and second, the idea of the Court as a participant in a dialogue about that moral unity.

The Court can follow principle in America, and expect popular legitimation of its decisions, because of the moral unity of the country. On this point it is worth quoting Bickel in full:

Very probably, the stability of the American Republic is due in large part . . . to the remarkable Lockean consensus of a society that has never known a feudal regime; to a "moral unity" that was seriously broken only once, over the extension of slavery. This unity makes possible a society that accepts its principles from on high, without fighting about them. But the Lockean consensus is also a limitation on the sort of principles that will be accepted.⁶¹

59. See *id.* at 28 ("Are we sufficiently certain of the permanent validity of any other principle [beyond popular sovereignty] to be ready to impose it against a consistent and determined majority . . .?").

60. For a theory of judicial review that also rests upon fundamental values and appeals to the future, but does not seek legitimacy in a theory of popular consent, see M. PERRY, *supra* note 22, at 98-102 (arguing for prophetic function of judicial review).

61. A. BICKEL, *supra* note 24, at 30. Bickel's claim about the "Lockean consensus" in American political history was soon to be challenged in a range of historical works focusing on the non-Lockean aspects of the American tradition. See, e.g., B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967); J. POCOCK, *supra* note 16; G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC* (1969).

The Court's function, then, is not so much to mediate between abstract principle and political expediency, but between past and future. While it appears to deliver principles from on high, "on high" turns out to be simply the past of this particular community.

Through the Court's exploration of history, it comes to understand the substantive moral principles that characterize this particular society. Its institutional role is to explicate those principles as rules of decision for current policy. However, in pursuing that role the Court faces an external measure: Its formulation of principle is either accepted by the populace or rejected. History alone offers no legitimacy for principle.⁶² Nevertheless, the fact that American history demonstrates a certain moral unity makes it likely that the community will continue to accept the principles which it has held in the past. The legitimacy of judicial review hinges on this possibility becoming a reality.⁶³

The legitimacy of the Court's articulation of principle, accordingly, depends upon the possibility of the society remaining, or at least becoming, a society with a moral vision that coincides with that of the Court. These two points, however, are not unrelated. The Court does not merely serve up the moral history of the country and then wait to see if this is still accepted as a ground of action. Rather, the Court helps mold the future which will, in turn, legitimate the substantive principles of decision upon which the Court relies.

Bickel adopts from Dean Rostow the metaphor of the Court as "teacher[] in a vital national seminar."⁶⁴ The metaphor, however, is rather inaccurate in two senses. First, for Bickel, the Court does not have the authority of a teacher: In a democratic polity, ultimately it is what the people say that counts. Second, and more importantly, Bickel believes that the Court is less a teacher than a participant in a dialogue. Again, it is worth quoting his views in full:

Over time, as a problem is lived with, the Court does not work in isolation to divine the answer that is right. It has the means to elicit partial answers and reactions from the other institutions, and to try tentative answers itself. When at last the Court decides that "judgment cannot be escaped," the answer is likely to be a proposition "to which widespread acceptance may fairly be attributed," because in the course of a continuing colloquy with the political institutions and

62. At least one contemporary scholar holds just the opposite view. Instead of arguing that contemporary, popular consent is a limit on historically validated principle, Michael McConnell argues that principled decisionmaking acts as a limit on historical consent. See McConnell, *On Reading the Constitution*, 73 CORNELL L. REV. 359, 361-62 (1988).

63. Thus judicial review continues to have the contingent quality of the founding's success in bringing together reason and will. See *supra* notes 4-7 and accompanying text.

64. See A. BICKEL, *supra* note 24, at 26 ("The Justices, in Dean Rostow's phrase, 'are inevitably teachers in a vital national seminar.'" (quoting Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952))).

with society at large, the Court has shaped and reduced the question, and perhaps because it has rendered the answer familiar if not obvious. In these continuing colloquies, the profession—the practicing and teaching profession of the law—plays a major role But in American society the colloquy goes well beyond the profession and reaches deeply into the places where public opinion is formed.⁶⁵

If we ask what it is that is discussed in this continuing dialogue, the answer can only be the “moral unity” of the community. This is a dialogue that never ends, because it is constantly constructing that moral unity anew.

The Court, then, is engaged in a dialogue concerning the character of the community of which it is both a part and a representative. Prudence now can be seen as the virtue of the court as a participant in this dialogue: When the Court successfully carries out its dialogical responsibilities, it exercises the virtue of “prudence.”⁶⁶ When the dialogue is successful, the Court is entitled to a claim that it is a legitimate representative of the community.⁶⁷ Because the judicial decision itself is only a part of the dialogue, the ultimate measure of success is never in the past or the present, but only in the future. Success depends upon what is said in response to the decision.

D. Conclusion: Bickel's Legacy

In the end, Bickel's own work must be evaluated as an aspect of the larger dialogue within which he placed the work of the Court. Whether he was successful or not depends upon the character of the dialogue that he generated. Viewed in retrospect, Bickel's most important contribution was not in the identification of the passive virtues, the issue upon which he concentrated his attention. Rather, it was in his answer to the continuing problem of how to join reason and will in American constitutional theory. Here, he introduced two critical ideas: the moral unity of the community and the court as a participant in an historically situated dialogue.

When he argued that judicial review is best understood as a dialogue about the moral unity of the community, he combined these ideas in a way that was to have a tremendous impact on the next generation of con-

65. *Id.* at 240.

66. The strongest contemporary defender of the political virtue of prudence is Kronman, *see supra* note 22, much of whose work is devoted to providing a model of the relationship between law and statesmanship, both of which, he argues, are founded on prudence. *See also* Kronman, *Practical Wisdom and Professional Character*, 4 SOC. PHIL. & POL'Y 203 (1986); Kronman, *Living in the Law*, 54 U. CHI. L. REV. 835 (1987).

67. There is a running together of two distinct concepts of representation at this point in Bickel's theory. On the one hand, to the degree that he borrows from the electoral model of consent, Bickel offers a model of the representative as “agent” for the represented. On the other hand, to the degree that he argues that the Court acts only as a part of a larger dialogical whole, he suggests a model of “symbolic” representation. On the different meanings of representation, see H. PITKIN, *THE CONCEPT OF REPRESENTATION* (1967).

stitutional theorists. They took this framework and freed it from the conventional constraints of electoral politics that Bickel still accepted. In their view, Bickel maintained far too much faith in a model of legitimacy founded on popular consent. This in turn was rooted in his erroneous belief that reason and will remain separate moments in the life of the community.

Once separated, reason and will cannot be brought together again by any institutional management of the Court's role. Thus, Bickel's reliance on public opinion as the ultimate grounds of judicial legitimacy, which led quickly to a "consensus" school of fundamental rights theorists,⁶⁸ has been repeatedly criticized on the grounds that the Court is no better, and perhaps worse, than the political branches in perceiving and acting upon the underlying values of the community.⁶⁹ Public opinion, even if cast into the future, remains too weak a ground upon which to found the democratic legitimacy of the Court.⁷⁰ Public opinion will never speak with a single voice. The Court's claim to popular support is always subject to challenge, precisely in the name of public opinion, by the more directly political institutions of government. Contemporary constitutional theory will try to avoid this charge by reconstructing the idea of "representation": The Court's representational claim will no longer depend upon an electoral model, or upon controversial claims of majority support.

Bickel's continued acceptance of the separation of reason and will also undermined his claim for the priority of principle over expediency, or long-term values over short-term interests. By privileging will over reason, Bickel rendered obscure this distinction's political relevance.⁷¹ Any interest could become politically paramount if supported by a sufficient popular consensus, even if it were difficult—which it generally is not—to recast a short term interest as a principle. Contemporary theorists will revitalize Bickel's political dualism by recasting it as a distinction between republican and nonrepublican politics.

The means that contemporary theorists use to overcome the dichotomy of reason and will were already present in the concepts of discourse and community, which Bickel began to bring together in his concept of "pru-

68. See, e.g. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 709 (1975); Perry, *Abortion, The Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 UCLA L. REV. 689 (1976); Perry, *Substantive Due Process Revisited*, 71 NW. U.L. REV. 417 (1977); Wellington, *supra* note 22.

69. See Brest, *supra* note 5, at 1083-85; J. ELY, *supra* note 42, at 63-69.

70. Bickel himself came to criticize sharply what he characterized as the Warren Court's "reliance on the intuitive judicial capacity to identify the course of progress." A. BICKEL, *supra* note 3, at 173-74.

71. Thus, Bork follows the implications of Bickel's own argument when he writes:

Even if we assume that courts have superior capacities for dealing with matters of principle, it does not follow that courts have the right to impose more principle upon us than our elected representatives give us. Governmental decisions will involve a mix of, or a tradeoff between, principle and expediency.

Bork, *Styles in Constitutional Theory*, 26 S. TEX. L.J. 383, 389 (1985).

dence." Bickel's failure was a failure truly to understand the significance of his own theory. The meaning of his discourse, like the legitimacy of the Court's work, lay just in the future.

II. THE SHIFTING PLACE OF THE NEW REPUBLICAN COMMUNITY

A. *Ackerman and the Recovery of a National Community*

Ackerman begins with Bickel's expression of the countermajoritarian difficulty: When the Court reverses a decision of the political branches, while it may invoke the "people," it in fact "thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it."⁷² Bickel's focus on the countermajoritarian difficulty symbolizes, according to Ackerman, a failure on the part of modern constitutional theorists to understand the true character of the object of their theory: the Constitution. Because they have lost sight of the Constitution, it must be "discovered" anew.⁷³

Ackerman argues that the countermajoritarian difficulty, which defined the problem of theory for Bickel, rests on a "levelling" premise. That premise assumes that no normative distinctions can be drawn among the variety of ways in which the people of a community make political decisions. On this premise, for example, differences in the character of political action—e.g., differences between popular participation in the selection of congressmen and in the selection of representatives to a constitutional convention—do not result in normatively distinguishable political actions. Only if we accept this levelling premise can the actions of legislatures and those of constitutional conventions appear equally to be actions of "the people."⁷⁴

The leveller has no good answer to the question of why we should prefer the actions of representatives of the people past to the actions of the representatives of the people now.⁷⁵ In each case, the people have acted in the only way in which they are capable—by consenting to actions by their representatives. If all political action occurs on a level field, the only relevant distinction would seem to be that between past and present. In a democracy, normative priority must be given to a present majority, be-

72. Ackerman, *supra* note 33, at 1013 (quoting A. BICKEL, *supra* note 24, at 17).

73. There is a great irony in Ackerman's claim of loss, given the substantial parallels between Bickel's and the Founders' understandings of the problem of constitutionalism as well as their resolutions of that problem. See *supra* notes 21–30 and accompanying text.

74. The constitutional convention does not exhaust alternative unconventional forms of politics for Ackerman. Indeed, much of his theory is devoted to giving life to a political dualism that finds less formal analogues to the constitutional convention.

75. Ackerman traces this levelling tendency back to what he describes as the "foundational" texts of academic political science and academic constitutional theory: Woodrow Wilson's *CONGRESSIONAL GOVERNMENT* (1885) and James B. Thayer's *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893). "In these foundational texts of the modern American university, the dangerous tendency of our governmental institutions to act undemocratically is already established as a central source of scholarly anxiety." Ackerman, *supra* note 33, at 1015.

cause the alternative would effectively empower a present minority to control a present majority.⁷⁶ The institutional levelling Ackerman describes embraces a further levelling among the ends of political action. "[B]y definition, the leveller treats all acts of political participation as if they were accompanied by the same degree of civic seriousness."⁷⁷ The leveller, therefore, cannot make a politically relevant distinction between principle and policy, or between long-term values and short-term interests. Legitimacy, for the leveller, derives from consent, not reason.⁷⁸

Pursued to its logical conclusion, Ackerman argues, levelling will produce a theory of constitutional law that views the function of the Supreme Court as the protection and perfection of the structures of the everyday politics of representation.⁷⁹ Since everyday politics is informed by a competition among private interests, in which each factional interest strives to use government to minimize its burdens and maximize its benefits, levelling reduces politics and the meaning of the public order to just such a coordination of conflicting private interests.⁸⁰ Levelling, then, represents a political world-view that simultaneously drains the Constitution of any special, public meaning, undermines the necessary conditions of the democratic legitimacy of a substantive judicial review, and reduces citizens to private individuals using politics for the pursuit of purely personal ends.⁸¹

For Ackerman, the meaning of the Constitution must still be "discovered" because no account which accepts the levelling premises of modern liberal democracy can make sense of our constitutional institutions. Rather, constitutionalism only makes sense on the basis of a political dual-

76. This idea is given visible effect, for example, in the traditional rule of statutory interpretation, which resolves conflict between statutory commands by acknowledging the supremacy of the later statute. The traditional rule is embodied in the doctrine of "implied repeal." See, e.g., H. BLACK, HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS 351-56 (1911); T. SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND CONSTRUCTION OF STATUTORY AND CONSTITUTIONAL LAW 127-28 (1857); Kahn, *supra* note 14, at 197.

77. See Ackerman, *supra* note 33, at 1038; see also *supra* note 71 (discussing Bork).

78. Both of these problems of levelling were visible in Bickel's theory. Despite his attraction to a principled politics, he was compelled to accept the ultimate authority of a present majority, see *supra* text accompanying notes 56-59, and to recognize the problematic character of a distinction of principle from policy, see *supra* text accompanying notes 41-45.

79. This is Ackerman's account of Ely's theory presented in *Democracy and Distrust*. See Ackerman, *supra* note 33, at 1048 ("In [Ely's] view, private citizens can legitimately expect that the courts will protect only those constitutional rights which keep our regularly elected representatives electorally accountable and suitably broad-minded in the exercise of their lower-track functions."). For a similar view of Ely's theory as the perfection of conventional constitutional theory, see Parker, *The Past of Constitutional Theory—And Its Future*, 42 OHIO ST. L.J. 223 (1981).

80. To the leveller, politics is merely an alternative to a market mechanism for coordinating diverse, conflicting private interests. See, e.g., R. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956); J. SCHUMPETER, *supra* note 27, at 250-83; D. TRUMAN, THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND PUBLIC OPINION (2d ed. 1971); Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371 (1983).

81. While levelling has these consequences, it is nevertheless perfectly compatible with the liberal pluralism entrenched in the famous footnote four of *Carolene Products*. See *infra* notes 241-42 and accompanying text. Thus, it is no accident that John Ely, whom Ackerman describes as the "archetypical" leveller, Ackerman, *supra* note 33, at 1047, takes the *Carolene Products* footnote as the foundational text for his own theory of constitutional law.

ism, which breaks with the levelling present in order to recover a republican past. For Ackerman, constitutional politics is republican politics, and this must be distinguished from the ordinary politics of our day-to-day lives. The difference between these two forms of politics is the difference between a politics founded on a community of discourse and a politics of private individuals. Republicanism reconceptualizes the character of public order as a domain in which individuals construct their identity through the dialogical creation of a community.

Against the leveller's reduction of all politics to the "normal" politics of self-interest, Ackerman juxtaposes a qualitatively different manner of public life that occurs at unique moments in the history of the nation. These moments of constitutional politics are characterized by their "public-regarding forms of political activity, in which people sacrifice their private interests to pursue the common good in transient and informal association."⁸² Constitutional politics is distinguished from normal politics, then, by virtue of its end, its institutional nature, and its characterization of public life.

While in normal politics each individual pursues his private interests, in constitutional politics "people sacrifice their private interests to pursue the common good."⁸³ This contrast between private interests and the common good is not between selfishness and altruism. For some people, altruism—helping others at some apparent cost to one's self-interests—may be their private interest. Some people are like that; they are like that even in moments of normal politics. The common good is not the wellbeing of others, nor even the aggregate of all individual members' well-being. Rather, it is the well-being of the community understood as a single, historical entity. It is the good of the whole, which exists prior to any differentiation among community members.⁸⁴

Institutionally, constitutional politics, or the politics of the common good, occurs within "transient and informal political association."⁸⁵ The first of these characteristics is far more important than the second. In fact, Ackerman argues that constitutional politics may, under some circumstances, make extraordinary use of the normal institutions of political life.⁸⁶ The "transient" character of constitutional politics is indicative of its extraordinary character. Constitutional politics is "transient" because no citizen can live a wholly public, political life. Citizens remain individuals with private interests. A wholly public life is not possible because the

82. Ackerman, *supra* note 33, at 1020.

83. *Id.*

84. In considering this common good, we take that attitude toward the public order which Dworkin characterizes as "personification." See *infra* notes 317–19 and accompanying text. On the idea of the common, or public, good in republican theory in general, see Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1554–55 (1988).

85. Ackerman, *supra* note 33, at 1020.

86. See *id.* at 1055–56 (describing institutional roles in process of structural amendment)

private demands of desire, family and career must continue to be met.⁸⁷ Constitutional politics is transient, then, for just the same reasons that revolutions are transient: It takes extraordinary effort, which can only be brought on by extraordinary circumstances, to move from the private to the public life.⁸⁸ Thus, the republican theory that Ackerman develops denies the possibility of "permanent revolution." Instead, it asserts the permanent possibility of revolution. More precisely, it invites the latter, by subordinating the structures of normal politics to future constitutional moments. It institutionalizes revolution, without reducing revolutionary politics to normal politics.

Finally, and most importantly, the character of public life changes dramatically when we move from normal to constitutional politics. In normal politics, the character of interaction is competitive: "[F]actions try to manipulate the constitutional forms of political life to pursue their own narrow interests."⁸⁹ The individual can stand apart from this ordinary political competition and assess how best to use the mechanisms of political life to advance personal ends. In constitutional politics, on the other hand, the method of interaction is debate: The American citizen finds "deeper meaning on those rare occasions when the American people . . . after sustained debate and struggle, . . . hammer out new principles to guide public life."⁹⁰ These principles are neither rules for the governance of some foreign community, nor rules that a majority simply imposes upon the private activities of individual citizens.⁹¹ Rather, these principles are constitutive of the identity of this public body and so of the citizens who compose it.

Ackerman frequently appeals to the language of self-identity in describing constitutional politics: At these unique moments citizens "invest a certain aspect of their personality with heightened significance";⁹² we "redefine, as private *citizens*, our collective identity";⁹³ "constitutional law . . . has always provided us with the language and process within which our political identities could be confronted, debated, and defined."⁹⁴ Thus, in constitutional politics, the individual does not stand apart, already formed,

87. Ackerman speaks of George Washington as a paradigm of public virtue, someone for whom "the good life is the political life," which is now beyond the reach of purely private citizens. *Id.* at 1032 (emphasis in original). Of course, even Washington had a private life of family and career, although both have been appropriated by the public in the myth that Washington has become.

88. *See id.* at 1032-33.

89. *Id.* at 1022. Ackerman goes on to write that "[n]ormal politics must be tolerated in the name of individual liberty." *Id.* The important word here is "individual," not "liberty." Liberty is essentially contested: Constitutional politics makes an equal claim to liberty, but it is no longer an "individual" liberty.

90. *Id.* at 1039.

91. In both cases, preferences would remain "exogenous" to politics. *See* Sunstein, *supra* note 43, at 1138-69 (distinguishing among kinds of preferences).

92. Ackerman, *supra* note 33, at 1041.

93. *Id.* at 1050 (emphasis in original).

94. *Id.* at 1072.

from the mechanisms of political interaction. The process of constitutional politics is not a means to an end—personal and private—that exists apart from the process itself. Self-creation is an end in itself. This is the classic republican idea of life in the polis, presented now within a model of community as discursive particularity.

The difference between constitutional politics and normal politics, then, is the difference between the republican vision of community as the domain of self-creation through mutual, dialogical engagement and the liberal vision of the public order as a mechanism for the advancement of private ends.⁹⁵ “The first, recalling the grandeur of the Greek polis, insists that the life of political involvement serves as the noblest ideal for humankind. The second, recalling a Christian suspicion of the claims of secular community, insists that the salvation of souls is a private affair”⁹⁶ In this dualism, Ackerman’s sympathies are clear: “Normal politics must be tolerated in the name of individual liberty; it is, however, democratically *inferior* to the intermittent and irregular politics of public virtue associated with moments of constitutional creation.”⁹⁷ The polis must replace the church if we are to re-discover the Constitution. The private epiphany of grace is to be replaced by the constitutive process of dialogue in the public community. The inferior politics of the ordinary reflects the inferior virtues of liberalism compared to those of republicanism.

The constitutional role of the Court follows easily from this account of a dualist politics. The Court is to preserve, in times of normal politics, the substance of communal self-identity achieved in prior moments of constitutional politics. The Court, then, represents the community’s better self: It represents its public identity to its private constituents.⁹⁸ Thus, the Court speaks for the people in a way in which the ordinary institutions of political representation do not, because the “people” as such do not really exist in normal politics. The “people” only exist at those critical moments of history when the entire nation engages in an identity-generating dia-

95. See Horwitz, *History and Theory*, 96 YALE L.J. 1825, 1832 (1987) (“Liberalism has stood for a subjective theory of value, a conception of individual self-interest as the only legitimate animating force in society . . . and denial of any conception of an autonomous public interest independent of the sum of individual interests. Republicanism has stood for the primacy of politics. . . . It has emphasized the growth and development of human personality in active political life. It has proceeded from some objective conception of the public interest. . . .”).

96. Ackerman, *supra* note 33, at 1043. Ackerman’s idea is clear here, even though he fails to recognize the communal character of the Christian tradition. That tradition offered an alternative community to that of the state, not simply a domain of private salvation. See E. PAGELS, ADAM, EVE AND THE SERPENT (1988); P. HANSON, THE PEOPLE CALLED: THE GROWTH OF COMMUNITY IN THE BIBLE (1986). Moreover, at various points in the Christian tradition, the Church itself used the state to impose “salvation” upon citizens. See generally P. JOHNSON, A HISTORY OF CHRISTIANITY 191-264 (1976).

97. Ackerman, *supra* note 33, at 1022-23 (emphasis in original) (footnote omitted).

98. Ackerman pursues this dualist conception of politics into his description of the individual himself, whom he characterizes as a “private citizen.” The private citizen is contrasted with both the “perfectly private person[]” and the “perfectly public citizen[.]” *Id.* at 1042-43.

logue. In holding forth the meaning of the Constitution reached by the people at those moments, the Court has a better claim *qua* representative than do the electoral institutions of government. Those institutions represent the aggregate of private interests, but no such aggregate constitutes "the people." Thus, only when we abandon levelling, can we understand the Court's representative role in a democracy. With that understanding, the countermajoritarian difficulty is "dis-solve[d]." ⁹⁹

There is, of course, a good deal of Bickel in Ackerman's account. The dualistic account of politics, the reliance on public dialogue, and the understanding of the Court as a "representative" institution are all ideas introduced by Bickel. Both theorists are concerned with weakening the representational claims of the elected political institutions of government.¹⁰⁰ Neither Ackerman nor Bickel shows much concern for actual elections as uniquely privileged expressions of the public will. Despite these similarities, Ackerman seems to embrace precisely the kind of "mystic" reification of the people that Bickel attacked.¹⁰¹ Ackerman's response to Bickel's critique is rooted in his claims about the self-generative character of the republican community of dialogue. The strength of this response rests on the connections Ackerman can demonstrate between the institutional structure he describes and the theory of community upon which he relies. The problems with his theory emerge at just this juncture.

Ackerman's dualism is projected into the linear progress of American history. The people who speak in a constitutional moment of high politics are never, or at least are rarely, the people of the present moment: Most of the people, most of the time, pursue normal politics. Whatever or whoever this popular sovereign—"we the people"—was, it was not me, nor you, nor any of the rest of us. Indeed, it is not even likely to have been most of the actual people around when "we the people" was acting. The participants in the constitutional politics of 1787 surely did not include women, blacks, or the propertyless.¹⁰² Neither can we speak of universalism in describing the constitutional politics of the post-civil war period.¹⁰³ Ackerman's description of constitutional politics as a politics of the "national community" has, in reality, a very thin standard of "national" participation.

99. *Id.* at 1016.

100. Ackerman argues that the ordinary, representative institutions were purposely designed to have a complex and conflicting relationship to "the people." *Id.* at 1028-29. Because of those conflicts, any representational claim by these institutions will necessarily be problematic.

101. See *supra* notes 31-32 and accompanying text. One might say that Ackerman's whole effort is to "demystify" this mysticism. That he is not entirely successful is well captured in Michelman's recent characterization of Ackerman: "Surprisingly, another authoritarian constitutional theorist is Bruce Ackerman." Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1497 n.11 (1988).

102. See Simon, *The Authority of the Framers of the Constitution*, 73 CAL. L. REV. 1482, 1498 n.44 (1985) (only 2.5% of population voted in favor of ratification of Constitution).

103. See J. JAMES, *THE FRAMING OF THE FOURTEENTH AMENDMENT* (1956); James, *Is the Fourteenth Amendment Constitutional?* 50 SOC. SCI. 3 (1975).

Ackerman's response to this might be that it is not the universalism of participation and assent but rather the quality of political life that distinguishes constitutional from normal politics. That is a fine answer, but it is ultimately not an answer consistent with the claims he wants to make for the dialogical community. Such a reliance on qualitative rather than quantitative characteristics of political participation is inadequate for three closely related reasons, the net effect of which is to raise precisely the problem of the legitimacy of constitutional authority that Ackerman seeks to escape.

First, to focus on the quality of participation inevitably raises troubling issues concerning the continuity of the community. If quality is what matters, it must be because there are substantively correct political principles which are more likely to be discovered in constitutional politics. But if this is true, then the grounds of the geographical and historical continuity of the community are threatened. Why not just look to the outcome of constitutional politics wherever and whenever it occurs? Perhaps we could learn a good deal about the meaning of justice, equality and due process, for example, by looking to the contemporary, revolutionary politics of the Third World. We certainly could learn much from the French Revolution. This answer would, in short, convert a theory of discursive particularity and historicized reason into an epistemological claim about the character of inquiry likely to lead to the discovery of "natural law." The claim for quality, therefore, cannot be so abstract as to undermine the sense that it is *our* history which is important. But then we still need an explanation of why it is important.

Second, by projecting constitutional politics into the past, Ackerman creates a problem of constitutional interpretation. His Justices must interpret the content of past constitutional moments, in which they did not participate and in which their identities were not formed. Their access to the past accomplishments of "the people" must be mediated through the tools of historical inquiry. Constitutional provisions—particularly what Ackerman labels "structural amendments"—hardly carry their meanings on their faces.¹⁰⁴ A theory of intertemporal identity, which is ultimately what Ackerman seeks in his idea of "we the people," must still be supported by a theory of interpretation. To the degree that interpretation is controversial, the very identity of "we the people" is thrown into question. The effect of controversy both over theories of interpretation as well as over particular interpretations is to reintroduce the countermajoritarian difficulty. The stronger the distinction becomes between past and present, between the object of interpretation and the interpreting institution, the

104. See Ackerman, *supra* note 33, at 1071 ("[W]e will require nothing less than a dualistic reinterpretation of every significant event in our constitutional history. . . .").

more the Court will be isolated in its claim to represent "we the people" of the past against all of us right now.

While Ackerman is surely correct in asserting that the possibility of a structural amendment relieves the Court of some difficult interpretive problems—in particular finding a textual hook upon which to hang the changing meaning of substantive due process¹⁰⁵—this possibility raises other problems that are just as difficult. At any given time, constitutional adjudication is likely to focus on problems at the edge, not the center, of accepted doctrine. Saying that there was a structural amendment that legitimated the welfare state during the New Deal struggle,¹⁰⁶ for example, hardly tells us whether Texas must equalize the financial resources of its various school districts¹⁰⁷ or whether a state must provide equal access to public funding for child birth and abortion.¹⁰⁸ These questions are not likely to be answerable from the historical sources alone, even if we dramatically expand the relevant and legitimate historical sources.¹⁰⁹ To the degree that the Justices must look outside of history for a resolution, we confront in renewed form the countermajoritarian difficulty, even if we were to accept the premise of an intertemporal identity of "we the people."

Finally, and most importantly, Ackerman's theory seems particularly troubled by the deficiencies in participation in past constitutional moments. Such deficiencies pose an obvious problem to his claim that in republican constitutional politics there is a process of simultaneous self-generation of the citizen—the individual—and the people—the community. A citizen not involved in the process may "consent" to the creation of "the people" by others, but his own political experience is mediated through that consent. This is hardly a politics of self-creation. Thus, even at moments of constitutional politics, there may be a substantial gap between "the people" and the people.

This asymmetry between "the people" and the rest of us becomes even more problematic as one considers the temporal character of Ackerman's account. Ackerman argues that a successful effort to pursue a contemporary constitutional politics must meet a condition of universality.¹¹⁰ Without universal participation—or something approaching it—there is not the requisite legitimacy for a change in the content of the higher law that expresses the American political identity. But imagine that we could determine that the total number of people engaged in constitutional politics in 1787 or 1868 was "x" and that we could further determine that cur-

105. *See id.*

106. *Id.* at 1053–55.

107. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

108. *See* Maher v. Roe, 432 U.S. 464 (1977).

109. *See* Powell, *Rules for Originalists*, 73 VA. L. REV. 659 (1987) (history yields interpretations, not legal facts).

110. *See* Ackerman, *supra* note 33, at 1042–43.

rently some "x + y" are engaged in constitutional politics. Nevertheless, according to Ackerman, the Court remains bound by the results of the earlier moment, unless "x + y" meets a standard of contemporary universality. Why? What does the past have over the present, if it is neither numbers or truth?¹¹¹

Ackerman's answer seems to rest on a theory of implied consent. All those not presently engaged in constitutional politics have implicitly consented to that understanding of the Constitution reached at prior moments of constitutional politics. In the absence of at least a majority's participation,¹¹² there is not sufficient consensus for a change in constitutional doctrine.¹¹³ This theory now, however, is approaching dangerously close to the levelling premises of Bickel: Both Ackerman and Bickel seem to seek a measure of contemporary popular consent to the principled discourse they describe. This poses a peculiar difficulty for Ackerman, however, given his commitment to a dualist model of politics.¹¹⁴

Ackerman acknowledges that, under conditions of normal politics, citizens' attitudes towards political issues are frequently characterized by apathy, ignorance, and selfishness.¹¹⁵ If that is so, why should those attitudes be respected over the constitutional politics of a contemporary minority? This is precisely what is at issue when Ackerman imposes a unanimity—or even a majority—requirement on constitutional politics. Of course, Ackerman does not contend that apathy, ignorance, and selfishness are definitive of the constitutional self-understanding, but precisely at that moment he appeals to an "implied," popular self-understanding directed at prior moments of constitutional politics. Only then can the self-understanding of those *not* engaged in the communitarian dialogue of constitutional politics stand on the same field as that of those so engaged. Ackerman has substituted an implied self-understanding for implied consent, but the object and effect are the same.¹¹⁶

111. Given the growth of our nation's population, the problem identified in the text is not just a problem arising from less than complete participation in a national dialogue in the past.

112. Requiring a supermajority would seem problematic. See Amar, *supra* note 33, at 1073.

113. Ackerman comes closest to acknowledging the implied-consent basis of his argument in describing the meaning of a judicial decision holding a statute unconstitutional: "[T]he Court's backward-looking exercise in judicial review is an essential part of a vital present-oriented project by which the mass of today's private citizenry can modulate the democratic authority they accord to the elected representatives who speak in their name. . . ." Ackerman, *supra* note 33, at 1050. Since the usual answer of the people to the Court is "no answer," the operative effect of this statement is to understand a failure "to modulate" as implied consent to continue as before.

114. While Ackerman accuses modern levellers of levelling "down," i.e., of reducing all political actions to the lowest common denominator, Ackerman seems guilty of levelling "up." He must implicitly raise up the level of political action engaged in during normal politics, in order to constitute a majority's understanding of constitutional politics that may compete with an actively engaged, discursive minority.

115. Ackerman, *supra* note 33, at 1034.

116. See J. Waldron, A Perfect Technology of Justice (paper delivered at Legal Theory Workshop, Yale Law School, Mar. 16, 1989) (Ackerman's self-understanding argument plays role essentially indistinguishable from ordinary contractarian arguments).

Ackerman's explanation of the legitimacy of an authoritative past rests, then, on a theory of contemporary consensus that simply substitutes an implied self-understanding for an implied consent. However, once he acknowledges that the legitimate authority of the past depends upon the beliefs of the contemporary generation, there is little reason to favor implied, over actual, beliefs. If that is so, we are back at the countermajoritarian difficulty. To avoid the consequences of levelling, Ackerman must envision not simply a dualism of political life in the historical life of the nation, but must project that dualism implicitly into the political psychology of every citizen at every moment.¹¹⁷

Implied consent arguments, moreover, are notoriously slippery. How exactly do we know to what the ordinary citizen has implicitly consented, or, in Ackerman's terms, the content of his implied self-understanding? Given the choice between government by a current minority or a past majority, it is surely not clear what choice has been implicitly made.¹¹⁸ Implied consent too often turns out to be a vehicle for obtaining present legitimation of a substantive norm that, in fact, has its source in some other—i.e., nonconsensual—theory. The same problem plagues claims about implied self-understanding.

Each of these problems of continuity, interpretation and revision is simply a reformulation of Bickel's countermajoritarian difficulty. That these problems can be reformulated as questions about Ackerman's theory suggests that his discovery of "the people" as a dialogical community is not a sufficient answer to the problems of modern constitutional theory. To satisfy the demand for a national dialogue constitutive of identity, he must project that dialogue into the past. But precisely in doing that, he renders the dialogue incapable of supporting the authoritative claims of constitutional law in the present.

The problems with Ackerman's theory, accordingly, arise out of his attempt to couple a model of republican dialogue with a claim of contemporary authority. Ackerman tries to find authority in a picture of national dialogical community, but the model of discursive particularity is not reasonably constrained by either of the principles of temporal uniqueness or geographical comprehensiveness to which he appeals. Either we take seriously the dialogue or the numbers. The marriage of numbers and dialogue may be possible at unique moments of history, but that is an empirical

117. Accordingly, Ackerman might save his theory by acknowledging a kind of political schizophrenia in which citizens are simultaneously pursuing constitutional and normal politics. Despite his characterization of individuals as "private citizens," I see no particular reason to believe this to be true. Such a view would wholly undermine his cyclical interpretation of constitutional history. Furthermore, the communitarian dialogue of self-creation is simply not present as a national phenomenon during times of normal politics.

118. It is not at all clear that it even makes sense to speak of choice here. Perhaps different choices have been implicitly made by different people.

proposition, not a matter of theory.¹¹⁹ When history does not work out that way, we cannot avoid the choice. Bickel ultimately chose numbers. Ackerman's problems arise from his effort to avoid the choice by insisting that numbers and dialogue remain united in a national identity. But the cost of maintaining that view is too high; he must give up real dialogue for an implied dialogue, and real community for an "implied" community.

Ackerman attempts to dissolve Bickel's antimajoritarian difficulties by offering a republican theory of political self-identity. In the end, however, he cannot justify the limits he places on the discourse that defines the self. The limits come from outside of the discourse. For Ackerman these limits come from the institution of a *national* political discourse. Other new republicans, however, have far less confidence in the capacity of the people to enter a dialogical community. When forced to choose between the discourse and the people, they choose the discourse.

B. *Michelman: The Supreme Court as a Community*

Michelman understands his recent essay, *Traces of Self-Government*, as following upon the work of Ackerman.¹²⁰ Michelman accepts Ackerman's goal of using the conceptual model of the discursive community to provide an account of the institutional character of self-government in the American polity, but finds Ackerman's institutional resolution unsatisfactory. He wants to save the republican vision of self-government from the problems that arise from Ackerman's attempt to make us all potential, if not real, republicans. In place of a national community of dialogue, he proposes an alternative vision of the dialogical community that is the locus of republican self-government. For Michelman, that community is constituted by the discourse among the nine members of the Supreme Court.

Rousseau, Michelman argues, was right: Republicanism cannot exist in a community larger than a Swiss canton.¹²¹ The self-generative community of dialogue is, contrary to Ackerman's claim, beyond the reach of "we the people." As a "people," we are irretrievably lost to normal politics. If there never was a "we the people," then, the Court's authority cannot

119. See *supra* notes 8-10 and accompanying text.

120. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 16 n.65 (1986) [hereinafter Michelman, *Traces*]. Michelman sees both Cover and Ackerman as his intellectual predecessors. Of Cover, Michelman says: "This essay is for him. I hope it shows well his inspiration." *Id.* at 4. Later, he speaks of his argument as extending, but not deepening, Cover's work in *Nomos and Narrative*. See Michelman, *Traces*, at 16. Of Ackerman, Michelman states that his own argument that "the republican tradition, and its relation to American constitutionalism, points away from the countermajoritarian difficulty as the true focus of democratic concern," *id.*, is "merely an elaboration of the work of Bruce Ackerman." *Id.* at 16 n.65. I focus on this particular work of Michelman's because of the unique argument it provides about the character and function of the Supreme Court. In his more recent work, Michelman has, himself, moved away from this Court-centered perspective on the discursive community. See, e.g., Michelman, *supra* note 101, at 1531 (arguing for "non-state centered notion of republican citizenship").

121. J. ROUSSEAU, *THE SOCIAL CONTRACT* 83 (trans. C. Sherover 1974) (appropriate size is that "in which every member can be known by all").

come from the past acts of such a subject.¹²² Accordingly, Ackerman's attempt to find a community in the past leaves us all presently subject to a very uncommunitarian vision of judicial authority.¹²³

The loss of a national republican community, however, does not mean that there is no place in our constitutional system for the discursive particularity that constitutes republican self-government. Rather, the theoretician's task is to find the place at which that discourse can, and should, occur and so inform constitutional governance. By relocating the republican community into a narrow part of the nation's political life, Michelman hopes to resolve the various difficulties discovered in Ackerman's expansive vision of the dialogical self-construction of the people. Thus, Michelman's new model of republicanism seeks to overcome the problems of continuity, interpretation and revision that undermined Ackerman's account.¹²⁴

While Michelman may meet each of these difficulties, his project nevertheless raises disturbing questions about the character and usefulness of the concept of a discursive community. From an institutional perspective, the concept appears extraordinarily unstable: Where is the community of constitutional self-government? Who are its members? If the new republicans' project is to marry community and authority, the unstable character of community suggests a deeper problem with the linkage of these two concepts in constitutional theory.

There are three moments to Michelman's argument. First, he identifies republicanism with self-government and self-government with freedom.¹²⁵ Second, he denies both that republican self-government is possible in politics on a national scale and that the Constitution sought to establish a republican model of participatory self-government in the national political process.¹²⁶ Third, he defends a place for republicanism in the constitutional scheme by offering the dialogical community or discursive particularity as the proper model for constitutional adjudication by the Supreme Court.¹²⁷ Each of these points needs elaboration.

Michelman explains the fascination of contemporary legal and political theory with republicanism by noting its powerful response to "the Cartesian Anxiety: The sense of entrapment between nihilism on the one hand,

122. See Michelman, *Traces*, *supra* note 120, at 65 ("Certainly the author [of the authoritative constitutional interpretation] is not 'We the People' in anything like the demystified sense that allows Ackerman his victory over Bickel." (footnote omitted)). See also *id.* at 74 ("Unable as a nation to practice our own self-government (in the full, positive sense) . . .").

123. See *id.* ("In the final analysis, the People vanish, abstracted into a story written by none of us.").

124. See *supra* notes 118-19 and accompanying text.

125. See Michelman, *Traces*, *supra* note 120, at 26-27.

126. See *id.* at 57; *infra* notes 141-42 and accompanying text.

127. Michelman offers the model for other courts as well, but focuses especially on the Supreme Court. See Michelman, *Traces*, *supra* note 120, at 74.

and domination on the other.”¹²⁸ Nihilism and domination are both the product of what Michelman calls “negative” freedom.¹²⁹ Negative freedom is the view that “moral choice proceeds not from publicly certifiable grounds or reasoning, but from the inexplicable private impulses of individuals, objectively unfounded and rationally unguided.”¹³⁰ This is a theory of the extreme subjectivity of choice, of the impotence of moral reasoning and of the relativism of moral values.

From the perspective of negative freedom, a choice is valuable only to the degree that it reflects a particular individual’s own ends. Apart from the individual, or individuals, who actually have those ends, a choice has no value. Translated into a political theory, negative freedom leads to nihilism and domination. In the absence of an external, objective standard, action reflects either the subject’s own arbitrary choice—nihilism—or someone else’s choice—domination.¹³¹ The difference is only in the identity of the person choosing, not in the qualitative character of the choice. Between nihilism and domination there is, from the perspective of negative freedom, no third possibility, representing an objective or public ground of moral and political value, which we might call justice.

Michelman argues that contemporary answers to the dilemmas of negative freedom focus on the idea of an historically situated, dialogical community: themes of “dialogue,” “history,” “responsibility,” and “identity” together “characterize a modern project of ethical reconciliation through dialogue, in search of freedom.”¹³² Rejecting the extreme subjectivity of negative freedom, this alternative perspective argues that normative disputes are resolved “by conversation, a communicative practice of open and intelligible reason-giving”¹³³ in which the decision-maker must take immediate responsibility for the construction of a “normative history,” within which the dispute may be situated and so resolved.¹³⁴ The unique, historical dialogue that is constitutive of the particular community, there-

128. *Id.* at 24.

129. See *id.* at 25. For elaboration of the distinction between negative and positive freedom, see also I. BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118 (1969); Taylor, *Kant's Theory of Freedom*, in *2 PHILOSOPHY AND THE HUMAN SCIENCES: PHILOSOPHICAL PAPERS* 318 (1985) (elaborating concept of positive freedom).

130. Michelman, *Traces*, *supra* note 120, at 25 (citation omitted). This is the psychological-ethical side of the political phenomenon of “levelling” that Ackerman describes. See *supra* notes 74–82 and accompanying text.

131. While “nihilism” and “domination” are used to characterize negative freedom, they are likely to be so used only by someone who accepts the possibility of positive freedom. They express the subordinate, defective character of negative freedom. Someone who is not concerned with positive freedom is more likely to use the term “utility” to distinguish choices within the domain of negative freedom.

132. Michelman, *Traces*, *supra* note 120, at 33.

133. *Id.* at 34.

134. The idea of a “normative history,” *id.* at 35, directly links Michelman’s work to that of both Ackerman and Cover. On Cover, see *infra* notes 248–51 and accompanying text. This idea was already implicit in Bickel’s appeal to the “moral unity” of the American political tradition. See *supra* note 68 and accompanying text.

fore, provides the public, objective ground for a theory of "positive freedom." Republicanism is the expression of positive freedom as a political doctrine.

Between the alternatives of nihilism and domination, then, republicanism promises positive freedom. Republicanism remains a doctrine of freedom because the rule of action is given by the subject to him or herself. Yet it is not nihilistic: the rule of action has an objectivity grounded in a particular community's discourse. This public discourse provides an external measure of reasonableness: "This view of the human condition implies that self-cognition and ensuing self-legislation must . . . be socially situated; norms must be formed through public dialogue and expressed as public law. Normative reason . . . cannot be a solitary activity."¹³⁵

This is the same theme of self-generation through a communal dialogue upon which Ackerman relied. On this view, the community's political and moral norms do not stand as external demands, dominating individual choice; rather, they are themselves an expression of individual identity. Individual and communal identity are only two perspectives on a single phenomenon: discursive particularity. This understanding of community makes possible an objective model of self-government. "Public law" is identified with "self-legislation"; in coming to know the law, then, the individual achieves "self-cognition."

In this community of discourse, according to Michelman, modern republicans seek to find an expression of the unity of the subjective and the objective, and so of the individual and the universal, which does not rest upon an abstract concept of human nature.¹³⁶ Positive freedom in its contemporary appearance lacks the completely universal aspiration of Kantian ethics, in which the giving of an objective moral rule to the self requires the denial of the historical uniqueness of the individual. For Kant, all selves give themselves precisely the same moral rules. The contemporary concept of the universal—that which functions as the moment of law in republican self-government—cannot gain its legitimacy from any claim that it is the "essence" of human nature. Negative freedom is too much with us to tolerate such a claim. Instead, the objectivity of law is founded in the dialogue of a particular community. The "universal" is now tailored to the particular community of discourse. What looks like a universal moral rule—a principle of justice—is such only for the community in which it appears.

In all of this, Michelman is covering the common ground of contemporary theory, even if that ground sometimes resembles a marsh, rather than dry land. He admits that "[r]epublicanism is not a well-defined historical doctrine" and that "it figures less as canon than ethos, less as blueprint

135. Michelman, *Traces*, *supra* note 120, at 27.

136. *See id.* at 28–31.

than as conceptual grid, less as settled institutional fact than as semantic field for normative debate and constructive imagination."¹³⁷ This is surely a good description of the role of republicanism in contemporary constitutional theory. Michelman's own account of republicanism remains more ethos than blueprint. Nevertheless, his originality arises precisely to the extent that he does offer an institutional blueprint.

Michelman's account, so far, has been one of the possibility of a republican politics of self-government. It has not been an analysis of the institutional structure of American politics. To make the move from possibility to actuality, Michelman asks "where, if anywhere, can we find self-government inside the Constitution?"¹³⁸ He responds that the question is "undeniably baffling . . . because the document so obviously charters not a participatory democracy but a sovereign authority of governors—representatives—distinct from the governed."¹³⁹ The republicans, on his view, lost the original constitutional debate. The antifederalists objected to the proposed Constitution precisely because they believed that the creation of a national, representative government would deny the communitarian conditions necessary for self-government on the republican model.¹⁴⁰ Those conditions include direct participation in a discourse about the moral unity of the community. The antifederalists correctly perceived that power would pass to national representatives. Citizens would, correspondingly, lose contact with the public deliberation required to maintain positive self-government. American national government was intended to be and has become generally a structure of authority over the individual citizen. The institutions of government stand over the citizen not as expressions of self-identity but as coercive powers.

Michelman identifies a paradox in the continued strength that republicanism shows in constitutional theory, "despite its obvious impracticality in the national constitutional setting."¹⁴¹ Republicanism is impractical because national government is government through institutions, which may be more or less representative, but which are certainly not participatory or dialogical in the strong sense required by positive freedom. Ackerman's effort to reconstruct a national republican tradition is reduced by

137. *Id.* at 17.

138. *Id.* at 56.

139. *Id.* at 57.

140. See *id.* at 19. Michelman presents this description of constitutional history as a summary of the views put forth in G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, *CONSTITUTIONAL LAW* (1986). Nevertheless, he seems to embrace it when he speaks of "the historical defeat of [civic-republicanism] antifederalist defenders." Michelman, *Traces*, *supra* note 120, at 74. For a different view of the appropriate characterization of the debate between the federalists and antifederalists, see Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985), discussed *infra* at notes 161–62 and accompanying text.

141. Michelman, *Traces*, *supra* note 120, at 74. Michelman's later work no longer seems to accept this "obvious impracticality," see Michelman, *supra* note 101, although he continues to believe that the discursive community of self-government is not likely to occur within the political institutions of national governments.

Michelman to a problem of judicial authority. Even for Ackerman, he writes, "[i]n the final analysis, the People vanish, abstracted into a story written by none of us . . . unless we happen to be justices."¹⁴²

This, according to Michelman, is an inadequate account of republicanism because positive freedom requires active participation in a communal dialogue. Positive freedom cannot be achieved by compliance with a set of authoritative rules, even if they emerge from someone else's dialogue. Self-government is an activity, not a set of substantive rules. To speak of the Court "representing" the content of a past republican moment of constitutional politics, is, according to Michelman, already to move from self-government to external authority.

Michelman abruptly cuts through the institutional bafflement created by the juxtaposition of constitutional authority and republican self-government by making a startling suggestion. While the Constitution does not establish a republican citizenry, it does establish a republican Supreme Court. If we are searching for a model of positive freedom, for a republican community of self-government founded on a model of discursive particularity, we need look no further than to the Supreme Court itself: "[T]he courts, and especially the Supreme Court, seem to take on as one of their ascribed functions the modeling of active self-government that citizens find practically beyond reach."¹⁴³ Thus, within the institutional structure of the American constitutional order, Michelman finds a community that is uniquely privileged to engage in the discourse of republican self-government. He preserves the possibility of positive freedom somewhere in the system by converting the Court into a community of discourse.

Judging, for Michelman, is not primarily an activity of applying the law to the parties.¹⁴⁴ Rather, it is an activity of self-government within the community of the Court itself: "Judges [must be committed] to the process of their own self-government."¹⁴⁵ A republican Supreme Court is one in which each Justice participates in a communal dialogue among this group of nine citizens. In participating in that dialogue, the Justice simultaneously gives the law to himself and creates a communal identity. This is a Court in which the process of voting on an outcome is subordinated to a discourse on the moral unity of the community of the Court itself.¹⁴⁶

142. Michelman, *Traces*, *supra* note 120, at 65. See also *id.* at 16 ("My reading of the republican tradition, and its relation to American constitutionalism . . . confirms that, however Bickel's difficulty may or may not be resolved, the Court is, vis-a-vis the people, irredeemably an undemocratic institution.").

143. *Id.* at 74.

144. Compare Fiss, *The Social and Political Foundations of Adjudication*, 6 LAW & HUMAN BEHAV. 121, 121 (1982) (contrasting "dispute resolution" model of adjudication with model that understands adjudication as "process by which the values embodied in an authoritative legal text . . . are given concrete meaning and expression").

145. Michelman, *Traces*, *supra* note 120, at 75.

146. For an alternative vision of the Court as dialogical community, see Burt, *Constitutional Law*

Michelman follows Bickel in looking to the unique institutional capacities of the Court as the starting point for his analysis.¹⁴⁷ What for Bickel had been a community of scholars with the leisure for sustained intellectual inquiry—a private, individualistic image—becomes for Michelman a dialogical community engaged in the self-generative process of positive freedom. More importantly, Michelman, like Ackerman before him, takes up Bickel's insight that the Court must be understood as itself a "representative" institution. Yet Michelman's republican Court is representative in quite a different sense from either Bickel's forward-looking Court or Ackerman's backward-looking Court.

For Bickel, the Court's legitimacy depended ultimately upon its representation of public opinion. Bickel's creativity was in understanding that the Court is not passive in its representational qualities; rather, it participates in the formation of the public opinion it is to represent. Ackerman rejected the forward-looking quality of Bickel's account of representation. His Court represented the substantive content of past decisions of "we the people." Both Bickel and Ackerman, accordingly, invite questions about the accuracy or correctness of judicial interpretation, because for each there is a gap between the representative (the Court) and the represented (the people). Michelman escapes that problem of interpretation by collapsing the distinction between the Court and what it represents.¹⁴⁸

Judicial representation, for Michelman, is not something other than, or apart from, the representative. The Court represents by symbolizing the possibility of self-government. It represents to the rest of the nation the possibility of a dialogical community and thus the possibility of positive freedom and self-government. The Court represents this possibility by providing an example of it. The Court represents the possibility of our free selves, to our necessarily unfree, political selves. "Unable as a nation to practice our own self-government (in the full, positive sense), we . . . can at least identify with the judiciary's as we idealistically construct it."¹⁴⁹

The collapse of the represented and the representative frees Michelman's account of the problems encountered in Ackerman's republicanism. Because a republican Court does not even try to preserve the past constitutional achievements of "we the people" in the face of conflicting contemporary interests, neither the intertemporal problem nor the problem of consent arises with respect to judicial review. Both of these problems arise out of the use of an agency model to legitimate judicial

and the Teaching of the Parables, 93 YALE L.J. 455 (1984) (Court should follow "pedagogic strategy" of ensuring inclusion of all minority viewpoints in communal discourse).

147. See *supra* notes 38–41 and accompanying text.

148. In so doing he rejects both the future and the past as sources of representation. Michelman's Court exists squarely in the present.

149. Michelman, *Traces*, *supra* note 120, at 74.

review, but that is precisely what Michelman denies. Michelman's Court is engaged always in the construction of a contemporary narrative in which the past figures, but does not control.¹⁵⁰ A republican Court may have problems of interpretation, but these are problems with the quality of its internal dialogue. They are not problems with the relationship of its decision-making to some substantive content outside of the Court itself. Interpretation is now a characteristic of self-government, not an external measure of legitimate authority.¹⁵¹ A "correct" interpretation does not legitimate a judicial decision by virtue of its correspondence to some reality outside of the Court itself.

Michelman envisions a republican court in a generally nonrepublican system of government. This is a strange new sort of "mixed" government.¹⁵² Instead of mixing the rule of the one and the many, or of aristocracy and democracy, it mixes positive and negative freedom, republican self-government and representative authoritarianism. Even the institutional character of the Court mixes positive freedom with authoritative domination. Michelman does not deny the authoritative character of the Court from the perspective of those outside of its communal discourse. More importantly, his analysis of the internal character of the Court as a community of dialogue does not provide a legitimating foundation for this authoritative, external character. In disavowing a nonsymbolic quality, Michelman abandons any effort to ground the content of the Court's authoritative pronouncements in a politics of consent. Neither may he appeal to the authority of universal reason, in the natural law tradition.¹⁵³ Thus, it remains possible, and indeed necessary, to ask what it is that privileges the discursive particularity of this particular community: Why is the dialogue of the Court authoritative, or more precisely, why should it be authoritative?

Michelman's answer to this problem of legitimacy seems to be simply that positive freedom is better than negative freedom, and positive freedom within the Court is the best we can do within the existing institutional framework of American constitutional government. Neither proposition, however, is self-evidently true. That positive freedom relieves the Cartesian anxiety may suggest that any individual would be wise to choose his own positive, over negative, freedom. But that hardly tells us that positive

150. For an elaboration of this view, see R. DWORKIN, *LAW'S EMPIRE* (1986), discussed *infra* at Part III, Section C. Michelman embraces Dworkin's account of interpretation. See Michelman, *Traces*, *supra* note 120, at 66-73.

151. Accordingly, "interpretation" in both the republican and interpretivist accounts must be distinguished from the more conventional claims of "interpretivism" in constitutional theory. See, e.g., Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 *IND. L.J.* 399 (1978); Perry, *Interpretivism, Freedom of Expression, and Equal Protection*, 42 *OHIO ST. L.J.* 261 (1981).

152. Compare Michelman's discussion of mixed government in Harrington's thought as founded on the idea that "distribution of office [is] . . . inclusionary, an affirmation of the universality of the republic and of the good of self-government." Michelman, *Traces*, *supra* note 120, at 46.

153. See *supra* text accompanying note 136 (denying universal telos).

freedom is better than negative freedom in a political organization. This is especially true if the suggestion is that we accept a minority's positive freedom at the cost of a majority's negative freedom. In short, even if we accept the distinction between positive and negative freedom as Michelman elaborates it, nothing follows with respect to any particular institution of government or even with respect to government organization in general.

Similarly, the proposition that this is as much positive freedom as we can find in American constitutional structure does not appear to be true even on Michelman's own premises. We can have more positive freedom if we accept less authority. This is the same battle that was fought out between the federalists and antifederalists. It is a battle that is refought most vividly in the conflict between the "jurisgenic" and "jurispathic" that Robert Cover describes.¹⁵⁴ The Constitution has not made this choice between authority and anarchy for us. Rather, that line is itself always subject to challenge.¹⁵⁵

Sometimes Michelman seems to argue that recognition of the positive freedom of the Court is a step in a process toward the positive freedom of the larger body politic.

[I]f freedom consists of socially situated self-direction—that is, self-direction by norms cognizant of fellowship with equally self-directing others—then the relation between one agent's freedom and another's is additive: One realizes one's own only by confirming that of the others. This seems to hold no less for a judge than for any other agent.¹⁵⁶

Yet Michelman has already argued that this cannot be true as a political proposition, because the institutional character of a national citizenry makes positive freedom in national politics impossible. The issue will never be incremental progress toward national self-government on the republican model, but always one of choice between national authority and the anarchy implicit in the endless possibility of distinct new communities emerging to claim for themselves positive self-government.

154. See *infra* text accompanying notes 247–48. I cite Cover both because he is discussed below and because Michelman acknowledges an intellectual debt to him. But Michelman, to borrow one of Cover's favorite words, has done "violence" to Cover's vision of the anarchical character of positive self-government. Michelman seems to come closer to Cover's view of the anarchic character of positive self-government in his more recent work. See Michelman, *supra* note 101.

155. For example, this line is at issue in much federalism jurisprudence, see, e.g., *FERC v. Mississippi*, 456 U.S. 742, 788 (1982) (O'Connor, J., dissenting) (arguing for state freedom from federal control on grounds that states "serve as laboratories for the development of new social, economic, and political ideas"), and in cases involving the autonomy of alternative, nonpolitical communities, see, e.g., *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (protecting private choice as to constitution of family from authoritative state regulation); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (protecting idiosyncratic religious community from uniform state regulation).

156. Michelman, *Traces*, *supra* note 120, at 75.

Michelman attempts to meld authority and community. On the one hand, he affirms that "Justices engaged in adjudication and judicial review are not for this purpose citizens; rather, they are organs of the state, the ultimate oracles of its law."¹⁵⁷ On the other hand, he urges a model of adjudication as dialogical self-government within the community of the Court. This is ultimately a conjunction of incompatible concepts. It is not that the Court does not, or should not, engage in such dialogue; but whether it does or not simply has nothing to do with the legitimacy of its exercise of authority over the rest of us. Republican self-government imagines a process in which an individual's values are molded through participation in the dialogue of an historically situated community. This means that between those within and those outside of that dialogical community there may be no common ground by which to evaluate disagreement. Accordingly, republicanism is not self-validating to those outside of the community. Yet Michelman has placed most of the nation irretrievably outside of the self-governing community of American political life. In order to respond to the problems of continuity, interpretation and revision that characterized Ackerman's theory, Michelman has created an incurable problem of republican elitism.¹⁵⁸

Republican elitism generates its own unique problem, which becomes clear when we turn to a competing republican theorist, Cass Sunstein. The juxtaposition of Sunstein and Michelman exposes a conflict among elites, each claiming for itself the republican title. The Court will always speak in a situation of conflict with some other institution of government. That other institution can construct just as strong a claim as the Court to speak out of an exercise of positive freedom or republican self-government.

C. *Sunstein: Congress as a Community of Discourse*

All of the new constitutional theorists of both the republican and interpretivist schools share a concept of positive freedom characterized by discursive particularity. For all of them, the community of discourse is to transform ordinary politics into a process of self-government and self-creation. Republicans differ from interpretivists in their effort to frame this model of community in terms of political institutions. Precisely from this institutional perspective, however, the weakness of the republicans is most evident: They are unable to agree on the institutional setting within which this self-constitutive dialogue occurs. Thus, in place of Ackerman's

157. *Id.*

158. On the elitism of traditional federalist accounts of politics, see J. APPLEBY, *CAPITALISM AND A NEW SOCIAL ORDER: THE REPUBLICAN VISION OF THE 1790s*, 8-19 (1984). For a skeptical account of the new republicanism, raising the problem of elitism from a contemporary perspective, see Fitts, *Look Before You Leap: Some Cautionary Notes on Civic Republicanism*, 97 *YALE L.J.* 1651 (1988).

extraordinary institutions which arise in moments of high politics, or Michelman's Supreme Court, Cass Sunstein looks to Congress as the locus of the republican community.

Sunstein provides a mix of historical, legal and moral arguments in support of the claim that the responsibility of Congress is not simply to exercise authority in response to constituent pressures, but rather to engage in mutual deliberation about the common good. His historical argument borrows from recent work on the importance of republican, rather than Lockean, themes to the Framers.¹⁵⁹ Instead of reading *Federalist* No. 10 as an early work on the virtues of pluralist politics,¹⁶⁰ Sunstein sees the Framers, particularly Madison, as appropriating much of the argument of the antifederalists with respect to the danger of faction (private interest groups) and the need for a politics based upon a "face-to-face process of deliberation and debate."¹⁶¹

According to Sunstein, the federalists and antifederalists agreed that the end of politics was the common good and that the means to get there was through dialogue founded on the civic virtue of the participants. Correspondingly, they shared a common understanding of the problem of faction as the use of political power for the satisfaction of private interests. The disagreement between federalists and antifederalists lay primarily in their conflicting visions of where and how legitimate republican politics could be pursued.

For the antifederalists, republican politics had to be participatory at the level of citizenry. Therefore, it had to occur, as much as possible, within the local community. For the federalists, the only hope for a politics that would not be corrupted by private interests was to relocate the community of discourse to the level of national political institutions and, particularly, to the national legislature: "Representatives would have the time and temperament to engage in a form of collective reasoning. . . . The representatives of the people would be free to engage in the process of discussion and debate from which the common good would emerge."¹⁶² Unlike Michelman, who suggests that the republicans largely lost the constitutional debate, Sunstein argues that far less was at stake. The constitutional debate was essentially one among republicans, who disagreed only on the geography of dialogical self-government.

Shifting from history to law, Sunstein argues that throughout constitutional law one finds a consistent rejection of the pluralist model of interest group politics.¹⁶³ That a statute is the product of a fair competition among

159. See *supra* note 61 and accompanying text.

160. See Diamond, *Ethics and Politics: The American Way*, in *THE MORAL FOUNDATIONS OF THE AMERICAN REPUBLIC* 39 (R. Horwitz 2d ed. 1979).

161. Sunstein, *supra* note 140, at 37; see also Sunstein, *supra* note 84, at 1558-60.

162. Sunstein, *supra* note 140, at 41.

163. See generally Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984).

competing private interest groups is never a sufficient argument for its "reasonableness." The political process alone is never "due process." Rather, the common ground of diverse constitutional norms is that legislation must be justified by reference to a public purpose, which is something other than the politically strongest private interest. Legislators, accordingly, are constitutionally required to deliberate on and select public values.

This constitutional prohibition on the legislative pursuit of what Sunstein calls "naked preferences"—the distribution of public resources solely on the basis of political power—is "the best candidate for a unitary conception of the sorts of government action that the Constitution prohibits."¹⁶⁴ Because the responsibility for republican government is located squarely within the legislature, the Supreme Court's republican responsibilities become derivative or indirect.¹⁶⁵ The judiciary's role is not to pursue within the community of the Court a republican politics of discursive particularity; rather, its role is to police the process of republican politics within the legislative branch.¹⁶⁶

The heart of Sunstein's argument, however, is neither the historical nor the legal claim, both of which are no more than controversial, descriptive propositions. Even if he were correct on both, it would hardly follow that we should encourage the republican aspects of our political institutions and traditions over the pluralist aspects—even Sunstein admits that both aspects are there.¹⁶⁷ For that, we need a normative argument that we will get "better" laws from a legislature that understands itself as a community of dialogue.

Posing the issue in this way, however, demonstrates the difficulties created by Sunstein's mixture of conventional legal argument and republican theory. The general attractiveness of the idea of a community of discourse derives from the concept of personal autonomy it offers—positive freedom—and the possibility of grounding the legitimacy of a political order in that concept. Republicanism promises to bridge the gap separating the citizen from the state through a model of dialogical engagement in which the individual and the community, the speaker and the discourse, are simultaneously created. Once that community of discourse has been located in Congress—Sunstein's legal and historical move—the theoretical idea of positive freedom, of giving the rule of law to oneself, can have little power outside of the elite membership of that institution. This is the dilemma

164. *Id.* at 1693.

165. For an analogous strategy for legitimating the work of the Court by describing its function as that of policing the political process of other institutions, see J. ELY, *supra* note 42. Of course, Ely and Sunstein disagree dramatically on the norms that are to govern the political process.

166. While Michelman has a republican Court facing a nonrepublican legislature, Sunstein has a nonrepublican court facing a republican legislature.

167. See e.g., Sunstein, *supra* note 84, at 1558 ("There can be little doubt that elements of both pluralist and republican thought played a role during the period of the constitutional framing.").

that Michelman confronts directly in his appeal to the symbolic function of the Court.¹⁶⁸

Congress may be free, but from the perspective of the ordinary citizen, the law still appears as the imposition of an authoritarian, external rule. Instead of being able to emphasize republicanism as positive freedom, as the giving of the rule of action to oneself, Sunstein is, therefore, forced to emphasize the "public good." Statutes founded on legislative deliberation will be better than those that represent naked preferences. This, of course, is a proposition about which we are entitled to be skeptical.¹⁶⁹ Minimally, we are entitled to ask for some evidence and an explanation of the methodology behind that evidence: What exactly is the measure of the public good used in making an evaluation?

This is not to say that Sunstein is completely immune to the attractions of the traditional republican ideal of positive freedom. He emphasizes, for example, that republican politics does not take preferences as "exogenous," i.e., as formed prior to, and apart from, the political process. Rather, it sees preferences as "endogenous," i.e., as the results of the political process.¹⁷⁰ Through the legislature's own discourse, therefore, preferences are to be shaped. Preferences are a central aspect of personhood and thus self-identity is, at least to some degree, a product of this communal discourse. But whose preferences and whose identities have been shaped? If Sunstein means those of legislators, then he must explain why the rest of us should prefer to have statutes based on their preferences as opposed to our own prepolitical, exogenous preferences. If he means those of citizens, then he must explain how a dialogue in which we are not participants can have this self-generative effect. Finally, if he means the state's preferences, then he must explain the meaning of this personification of the state.¹⁷¹

Sunstein usually seems to take the first of these options. He is overwhelmingly concerned with legislative motivation.¹⁷² If so, the republican argument for positive freedom does not ever bridge the gap between governors—it is their positive freedom—and citizens. To the governed, however, outcomes are likely to remain more important than process.

168. For Michelman, the Court does not represent us as our political agent, but represents, as a work of political artistry, the possibility of positive freedom. See *supra* notes 142–43 and accompanying text.

169. See generally Mashaw, *The Economics of Politics and the Understanding of Public Law* 65 CHI.-[KENT L. REV. 601 (1989) (arguing that substantial empirical work needs to be done to determine actual effects of different political ideologies on legislative product); see also Fitts, *The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process*, 136 U. PA. L. REV. 1567 (1988).

170. See Sunstein, *supra* note 84, at 1548–49.

171. For such a theory of state personification, see Dworkin, *infra* notes 317–19 and accompanying text.

172. This theme is most evident in *Naked Preferences*, *supra* note 163, but it is evident throughout Sunstein's rather sizable corpus.

Sunstein is forced, therefore, to return to a more conventional argument that a republican legislature will produce better laws: "The republican conception . . . reflects a belief that debate and discussion help to reveal that some values are superior to others. Denying that decisions about values are merely matters of taste, the republican view assumes that 'practical reason' can be used to settle social issues."¹⁷³ To defend the normative value of a republican Congress, Sunstein finds that he must defend an objective public good.¹⁷⁴ Nevertheless, his argument is at its weakest at just this point.

The weakness is twofold. First, his own theory indicates that the nature of the good appears quite differently to those within and those without the community of dialogue. This was the point of the distinction between exogenous and endogenous preferences. The legislators are likely, therefore, to have quite a different understanding of the public good than the rest of the citizenry who do not participate in that community of discourse. The public good will not appear as a common good and, without that, there is no measure. Second—and one suspects because of the failure to find a common measure—Sunstein offers a remarkably thin idea of the community of discourse out of which the public good is to emerge. For Sunstein, that community is accomplished as soon as something is said. That something may be virtually anything.¹⁷⁵ All that appears to be prohibited is a vote without discourse. Yet even Sunstein admits that it is not very difficult to frame a reason, even a public-sounding reason, for every choice, including one based on personal preferences.¹⁷⁶ If the measure of community is simply the giving of reasons, the republican community becomes too thin to support much of a notion of positive freedom and altogether too thin to support a substantive vision of the public good.

Sunstein's normative account of the republican community of dialogue is in danger of collapsing into the trivial point that it is better to think before you act. Legislation that is carefully considered beforehand is likely to be more effective and to meet social goals more adequately. One does not have to be a republican to agree with that.¹⁷⁷ One hardly needs a

173. Sunstein, *supra* note 140, at 31–32 (footnote omitted). Elsewhere Sunstein speaks of "something like an objective public good." *Id.* at 42.

174. "Practical reason" is the epistemological correlate of an objective public good. See Sunstein, *supra* note 84, at 1554–55.

175. See Sunstein, *supra* note 163, at 1698–99 (distinguishing weak and strong views of prohibition on government distributions based on raw political power, but recognizing dominance of former).

176. See *id.* at 1728 ("For practical purposes, the line between public value and naked preferences is quite thin, since attempts to protect particular groups are usually justifiable as responsive to some public value."); see also J. ELY, *supra* note 42, at 125–31 (expressing skepticism "that a method of forcing articulation of [legislative] purposes can be developed that will be both workable and helpful").

177. This point is vividly made in Sunstein's choice of *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166 (1980), as an example for the elaboration of the republican model of legislative behavior. In *Fritz*, one group of beneficiaries was harmed through legislative ignorance: "Congress was unaware of that harm and indeed had sought to prevent it." Sunstein, *supra* note 140, at 71.

theory of community, or even a theory of discourse, to support that proposition. Everyone is for talking through problems; the important issue is what gets said. There is a substantial risk here, then, of the trivialization of the idea of the community of discourse.

Sunstein has stumbled over precisely the problem of authority that troubles each of the constitutional theorists of community. He wants simultaneously to recognize the authority of the legislature and to recognize the power of the idea of a community of dialogue. The two ideas, however, operate in wholly different dimensions. The legislature may or may not be a self-generative, dialogical community, but this has nothing to do with the authority the institution exercises over the rest of the political community. Sunstein strives for compatibility between these ideas of dialogue and authority by so weakening the idea of community that little is left standing but the authority of the state.

None of these problems are unique to Sunstein; all are equally applicable to Michelman's theory that the Court is the locus of the community of discourse. He too needs to argue that we get better law out of such a Court, even from the perspective of the nonrepublican majority. While he does suggest that, the suggestion stands as a bald assertion: "Judges' actions may augment our freedom. As usual, it all depends. One thing it depends on, I believe, is the commitment of judges to the process of their own self-government."¹⁷⁸ Whether or not it depends on that, I do not know. But nothing Michelman or Sunstein has told us has brought us any closer to an answer.

The same problem of juxtaposing the republican community and the nonrepublican life of the rest of us plagued Ackerman's theory. The only difference was that for Ackerman the problem appeared in a temporal, rather than an institutional form. But this difference amounts to less than it might appear, because—as Michelman demonstrates—it easily translates into an institutional form as one shifts focus to the problem of interpretation of a past act of "we the people."¹⁷⁹

The problem of authority has not been resolved by the new republicans. Each offers an image of positive freedom through self-government within a dialogical community. But that community fails to make contact with the authority of constitutional law as we normally experience it. That experience is simultaneously temporal and institutional. The Constitution is an historical artifact and in recognizing its authority we recognize the continuity of the present with the past. The rule of law—including the Constitution—represents the authority of past political acts over the present. Yet this idea of temporality is mediated through institutions that

Surely, no one will disagree that a Congress that acts in ignorance and on the basis of misrepresentation is unlikely to accomplish the ends it sets for itself.

178. Michelman, *supra* note 120, at 75.

179. See *supra* note 124 and accompanying text.

wield authority in the present. They may look to the past for rules of decision, but their function is to exercise authority over the contemporary social order. The new republicans have tried to meld authority and community at both points: Ackerman uses community to explain the temporal quality of constitutional authority; Michelman and Sunstein use community to explain how existing institutions should act. But in each case, the grounds of authority are neither explained nor justified by the model of community. The interpretivists more directly recognize the problem of authority, but ultimately offer no better solution.

III. THE INTERPRETIVISTS' USE OF COMMUNITY

The juxtaposition of Sunstein and Michelman points to a fundamental problem in communitarian-based theories of constitutional law: Too many communities can be fit within the dialogical mold. Because of the institutional presuppositions the new republicans bring to their inquiry, they never directly confront this problem. They construct the problem of choice such that the possibilities are radically limited from the start: The people as a whole, the Court, and the Congress are the only options they see.¹⁸⁰ But just as choice among these possibilities appears arbitrary—from the perspective of both the critic and the non-participating citizen—so the limits on the domain of choice appear arbitrary. The constraint on possible communities comes from a source external to the communal-dialogical foundations of the theory and thus requires separate justification. What the grounds of that justification might be are not addressed by the new republicans. The interpretivists differ from the new republicans precisely in their confrontation with this possibility of a proliferation of dialogical communities. They too appeal to the model of discursive particularity, but they free this model from the institutional presumptions that artificially constrain the domain of possible communities. This does not mean that they simply accept an anarchical expansion of dialogical communities. Each interpretivist, however, confronts the possibility of such an expansion. Each of them can, therefore, be usefully examined in terms of the juxtaposition of anarchy and authority. Each must find a way of explaining authority in light of the anarchical implications of the dialogical community.

This tension between anarchy and authority is at the center of Robert Cover's essay *Nomos and Narrative*.¹⁸¹ The same tension is at the center of Owen Fiss' work on interpretation and adjudication.¹⁸² Fiss and Cover,

180. Cf. *supra* note 20.

181. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

182. See Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982) [hereinafter Fiss, *Objectivity*]; Fiss, *Conventionalism*, 58 S. CAL. L. REV. 177 (1985) [hereinafter Fiss, *Conventionalism*].

however, reach radically different conclusions: Cover embraces anarchy; Fiss pursues authority. Fiss sees a successful integration of community and hierarchy, while Cover sees only the pathos of conflict between the anarchical creation of meaning through community and the death of meaning in the exercise of authority.

Both Cover and Fiss are in the Bickelian tradition of grounding constitutional law in the discursive particularity of an historically situated community. Despite their radically different conclusions, they share a common understanding of community as creating the very possibility of law. Each is attracted to a particular form of community: Fiss to the professional community; Cover to the religious community. The professional community, however, offers Fiss a source of stability and authority, while the religious community offers Cover only the pluralism of sects.

Yet a different approach is pursued by Ronald Dworkin, who offers the most philosophically rigorous and complete account of the meaning and significance of discursive particularity in the creation and maintenance of law.¹⁸³ Dworkin aims to ground the legitimacy of law in the character of a particular kind of political community. His hope is to ground the privileged place—i.e. the authority—of this community within a theory of interpretation. Dworkin's account, however, fails to justify the privileged place of this particular community. Because his theory of community is so complete, the character of his failure tells us a great deal about the possibility of successfully using the model of dialogical community to support the legitimacy of legal authority.

A. *Fiss: Hierarchy and Authority in the Professional Community*

"Adjudication is interpretation," Fiss announces in the opening line of his essay *Objectivity and Interpretation*.¹⁸⁴ This is a statement about the conceptual foundations of law: about how law is possible.¹⁸⁵ This need to explain "how law is possible" arises out of the nihilist's challenge in contemporary legal theory. The nihilist, according to Fiss, properly "fastens on the objective aspiration of the law and sees this as a distinguishing feature of legal interpretation."¹⁸⁶ The nihilist, however, is unable to find the requisite objectivity in constitutional adjudication. Thus, a defense of constitutional law, responsive to this challenge, must provide an explanation of the objectivity that characterizes adjudication. For Fiss, the objectivity of interpretation provides such an explanation. Fiss, accordingly, has

183. See R. DWORKIN, *supra* note 150.

184. Fiss, *Objectivity*, *supra* note 182, at 739.

185. Fiss writes that "a recognition of the interpretive dimensions of adjudication . . . will also deepen our understanding of law and . . . might even suggest how law is possible." *Id.* at 740. In a later essay, he describes his earlier article as follows: "I was trying to explain how law is possible." Fiss, *Conventionalism*, *supra* note 182, at 189.

186. Fiss, *Objectivity*, *supra* note 182, at 742.

two tasks: first, to describe that kind of objectivity; second, to demonstrate that it is sufficient to satisfy the demands for an objective rule in constitutional law.

Fiss' account of interpretation turns to the familiar features of discursive particularity.¹⁸⁷ Interpretation denies a separation of the subject from object—in this case, the judge from the law. The law does not confront the judge as a set of formal rules, which he has only to apply. But neither does the judge come to the law as a free subject, able to exercise his will in the direction of his own personal interests and values. A claim for radical subjectivity would be just as false as a claim for radical objectivity. In place of these extremes, Fiss describes interpretation, and so adjudication, as a synthesis: “[A]n activity that affords a proper recognition of both the subjective and objective dimensions of human experience.”¹⁸⁸

Fiss locates the objectivity of adjudication in a set of “disciplining rules” which structure the interaction of text and judge. To be a judge is to respond to the text through the application of disciplining rules, “which constrain the interpreter and constitute the standards by which the correctness of the interpretation is to be judged. . . .”¹⁸⁹ Application of these rules not only constrains the freedom of the judge, but is constitutive of the practice of judging.¹⁹⁰ We understand what it means to be a judge by understanding the rules that are put into play in adjudication.

We come to adjudication, then, with an understanding of the function of judging, defined by a set of rules that we expect to be put in play by the judge. Adjudication has a settled—and thus objective—meaning for those who accept these rules. The reality of the disciplining rules makes possible agreement on what it means to judge, on who is a judge, and on who is performing properly in his role as a judge. In this way, the rules are both descriptive and normative; they combine an “is” and an “ought.”¹⁹¹ Anyone who rejected these rules, or who had a different understanding of the appropriate rules, would come to different conclusions as to who is a judge and how a judge *should* operate.¹⁹²

The group of individuals who share the same understanding of the disciplining rules that define adjudication constitutes the “interpretive com-

187. Fiss himself recognizes the larger theoretical context within which he is writing: “[Interpretation] has emerged in recent decades as an attractive method for studying all social activity.” *Id.* at 739 (citing Taylor, *Interpretation and the Sciences of Man*, 25 REV. METAPHYSICS 3 (1971); Taylor, *Understanding in Human Science*, 34 REV. METAPHYSICS 25 (1980)).

188. Fiss, *Objectivity*, *supra* note 182, at 739.

189. *Id.* at 744.

190. Stated in this way, it becomes clear that one function of the rules is to specify the appropriate text. Thus, text does not stand wholly apart from rules, although a variety of systems of rules may share a common text. For example, not just lawyers, but historians as well, “read” the constitutional text.

191. See Dworkin, *infra* notes 334–37 and accompanying text, discussing a similar collapse of the “is” and the “ought” in interpretation.

192. The source of the disciplining rules constitutive of the judge’s role is discussed *infra* at note 199.

munity.” There is a critical reciprocity between rules and community: “[T]he disciplining rules that govern an interpretive activity must be seen as defining or demarcating an interpretive community consisting of those who recognize the rules as authoritative.”¹⁹³ Someone outside of the interpretive community is, regardless of his legal situation, outside the jurisdiction of the judge: He may be coerced by the violence of law, but he does not acknowledge the authority of law. For someone inside the community, however, the exercise of legal authority can be measured against objective standards.

Interpretation, thus, shares the objectivity of the interpretive community. This is not the objectivity of a universal natural law, but neither is it the free subjectivity of nihilism. Judging is objective within a particular community, because the judge applies the disciplining rules to which that community adheres. Fiss refers to this as “bounded objectivity”: “It is bounded by the existence of a community that recognizes and adheres to the disciplining rules used by the interpreter and that is defined by its recognition of those rules.”¹⁹⁴ To the degree that the judge fails to submit to the community’s rules, he is not judging at all: He is “abusing” his public office for private ends.¹⁹⁵

For Fiss, then, community is the anchor of interpretation. Interpretation is only possible because of community. Since adjudication is interpretation, adjudication rests on community. Without an interpretive community, subjectivity and objectivity would split apart into an irreconcilable dichotomy.¹⁹⁶

The description I have so far offered leaves out a critical element of Fiss’ account: the singular character of the interpretive community of law. For Fiss, the account of interpretation in adjudication is no different in its essential meaning-generating function from the account of the general phenomenon of interpretation as the central explanatory device of all social activity.¹⁹⁷ In other social activities, however, meaning may be contested through the freedom “to leave one community and to join or establish another. . . .”¹⁹⁸ In law, Fiss contends, there is only one interpretive community. If there were to be a plurality of competing communities in

193. Fiss, *Objectivity*, *supra* note 182, at 745.

194. *Id.* at 745.

195. Because Fiss insists that there is only one interpretive community of law, a judge who operates outside of that community’s disciplining rules will appear to be a “private” actor rather than a member of a competing public community. This rejection of a public pluralism raises the problem of “cliques,” discussed below. See *infra* text accompanying note 237.

196. This is the same dichotomy of nihilism and domination that Michelman identified with negative freedom. See *supra* note 131 and accompanying text.

197. See *supra* note 187. In addition to Charles Taylor, Fiss acknowledges his debt to the work of Clifford Geertz. See Fiss, *Objectivity*, *supra* note 182, at 739 n.2 (citing C. GEERTZ, *NEGARA: THE THEATRE STATE IN NINETEENTH CENTURY BALI* (1980); C. GEERTZ, *Deep Play: Notes on the Balinese Cockfight*, in *THE INTERPRETATION OF CULTURES* 412 (1973)).

198. Fiss, *Objectivity*, *supra* note 182, at 746.

law, then there would be no adequate response to the nihilists' challenge of adjudicative indeterminacy. Thus, the objectivity of law must be defended by identifying a singular and authoritative community within the larger society. Fiss does this by privileging a particular community: the legal profession.¹⁹⁹

Assessment of the objectivity Fiss affords constitutional adjudication requires both an external and an internal critique.²⁰⁰ The external critique examines the nature and status of the legal, professional community within which Fiss claims constitutional adjudication occurs.²⁰¹ The internal critique looks at the character and effects of the disciplining rules that operate within that community to determine whether they can yield the kind of results Fiss needs to defeat the nihilists' challenge.

1. *The External Critique*

For Fiss, the interpretive community that is to provide objectivity to constitutional interpretation is the professional community of lawyers: Lawyers speak to judges and judges speak to lawyers. Lawyers know how the constitutional text is to be read. They can recognize a professionally competent reading, even when they disagree with that reading. They know the range of legitimate sources and the appropriate moves that can be made with those sources. Fiss repeatedly emphasizes that objectivity does not require agreement, but only constraint on the subjective freedom of the judge.²⁰² Professional training and membership in the professional community is the source of that constraint.²⁰³

From an external perspective, however, the problem of objectivity is not simply that of the existence of constraints on the subjective freedom of the judge. Constraints, for example, that are a function of the judge's participation in a religious community may be objective—they really do limit the possibilities of judicial choice—but they are hardly a reassuring response to the nihilist. Nor are they a satisfying response to anyone else worried

199. See Fiss, *Conventionalism*, *supra* note 182, at 183 ("The judge's choice is constrained by a set of rules . . . that are authorized by the professional community of which the judge is part (and that define and constitute the community)."). Fiss is unclear on whether this community is the same for all adjudication. For example, are state bars, which are responsible for the articulation and development of state law, constitutive of separate communities?

200. For a similar use of an "external" and "internal" critique of a constitutional theory, see Tushnet, *supra* note 5, at 786-804 (critique of originalism).

201. At various points, Fiss too speaks of an "external critic" of the law. See, e.g., Fiss, *Objectivity*, *supra* note 182, at 749-50. But for Fiss, the external critic looks only to the results of the legal process: He asks whether the results meet some non-legal normative standard.

202. See, e.g., *id.* at 747 ("Nothing I have said denies the possibility of disagreement in legal interpretation.").

203. Fiss is unclear on the relationship between concepts of identity and consent with respect to the meaning of membership. See *supra* notes 92-99, 111-18 and accompanying text (discussing identity and consent in Ackerman's theory). For example, he speaks of judges as a "part" of a professional community which is "defined and constituted" by rules, Fiss, *Conventionalism*, *supra* note 182, at 183, yet also speaks of membership in the community as resting on "a commitment to uphold and advance the rule of law itself." Fiss, *Objectivity*, *supra* note 182, at 746.

about the political legitimacy, rather than the political psychology, of adjudication. Objectivity in adjudication must provide a ground for the legitimacy of judicial interpretation, which means a ground for its authority. That legitimacy cannot arise from constraint alone. Fiss, after all, suggests that literary critics are also constrained by the disciplining rules of their professional, interpretive community. Nevertheless, no one would suggest that it follows from this that they can or should be given political authority.

A theory of the authoritative character of judicial interpretation must, therefore, explain the relationship between the professional community of lawyers and the larger national community. Without such an explanation, the objectivity offered by the former may, from the perspective of the latter, appear just as arbitrary as the personal, judicial subjectivity that Fiss fears. Imagine, for example, a professional community that operated under the disciplining rule of the founders' intent, while the larger community interpreted democratic self-government to require the consent of a present majority. It does not require much imagination to envision a professional community wildly out of sync with the political community.²⁰⁴

The claim that the Constitution is a "legal document" is not in itself sufficient to legitimate the disciplining rules of this professional community.²⁰⁵ At least it is not sufficient unless the argument is made that the larger political community, which also interprets the constitutional text, uses the same disciplining rules as the legal community. If there is a difference, we still need an explanation of why the professional community of lawyers should have, or has been given, authority over the political community—an authority given effect whenever the courts hold a statute unconstitutional.²⁰⁶ Perhaps Fiss would argue that the rules used by the larger political community—or is it communities?—contain a principle of deference to the lawyers on such "legal" issues. This proposition, however, is hardly self-evident.²⁰⁷ Lawyers may have successfully occupied the field of constitutional interpretation, but that in itself is hardly a ground of legitimate authority. It was, after all, the search for a link between the larger community and the professional community of lawyers and judges

204. It may be that self-consciousness about the need for objectivity within the professional community is itself a force that drives a wedge between that community and the larger body politic. Consider, for example, the tension between originalism and majoritarianism in constitutional theory. For an interesting example of such a dissynchronization, see Hovenkamp, *The Political Economy of Substantive Due Process*, 40 STAN. L. REV. 379 (1988) (discussing conflict between political economy of the Court at the turn of the century and the state of professional economics).

205. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176–78 (1803), for an early example of legitimation of judicial review through the use of this claim.

206. See, e.g., Dahl, *Decision-making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 293 (1957) (arguing that "the Supreme Court is inevitably a part of the dominant national alliance").

207. See A. BICKEL, *supra* note 24, at 20–21 (challenging claim that majority has freely consented to constitutional authority of the Court).

that brought Bickel to his theory of the passive virtues as the means by which the Court may establish such a linkage by participating in the creation and direction of public opinion.

Fiss recognizes that he has not provided an account of objectivity that bears on legitimacy when he writes that "[i]nterpretation is countermajoritarian, even if properly understood. On the other hand, a proper conception of interpretation will help us understand the pervasiveness of the countermajoritarian dilemma and thus, in my judgment, reduce its significance."²⁰⁸ In truth, however, Fiss does not explain the "pervasiveness of the countermajoritarian dilemma." This pervasiveness is presumably a function of his claim that interpretation occurs within a bounded community. Interpretation is always by someone and for someone. The bounds that hold speaker and listener together are constitutive of a particular community. In most fields of interpretation, for example literary criticism, there are a plurality of such communities.²⁰⁹ Objectivity will hold within each, but not across all of them.

Fiss denies precisely this pluralism in legal interpretation: "There can be many schools of literary interpretation, but . . . in legal interpretation there is only one school and attendance is mandatory."²¹⁰ The countermajoritarian difficulty remains not because of the theory of interpretation, but because of the identification of a particular community as the authoritative source of interpretation in constitutional law. The countermajoritarian difficulty is produced by the denial of an "exit" option and the insistence on "loyalty" in the face of disagreement.²¹¹ That this choice is neither obvious nor compelled is clear from the embrace of anarchy by Cover.²¹² Authority, not interpretation, is the source of the unique countermajoritarian difficulty of constitutional law.

Fiss does suggest that there are powerful interactions between law and morality which will encourage the judge to interpret the legal text in a way consistent with popular morality.²¹³ A judge who understands the disciplining rules of the professional community to require an interpretation of the text that renders the Constitution "immoral" is, according to Fiss, inviting the broad question of legitimacy: "Why must we respect the Constitution?"²¹⁴ Such an interpretation, Fiss argues, represents a bad strategy, although not necessarily a bad interpretation.²¹⁵ A political sys-

208. Fiss, *Conventionalism*, *supra* note 182, at 182.

209. See *supra* notes 196-99 and accompanying text.

210. Fiss, *Objectivity*, *supra* note 182, at 746.

211. See A. HIRSCHMAN, EXIT, VOICE AND LOYALTY (1970).

212. See *infra* Part III, Section B.

213. Fiss, *Objectivity*, *supra* note 182, at 753.

214. *Id.*

215. Fiss, like Bickel, suggests that a judge must manage the interaction between popular opinion and adjudication. Indeed, Fiss inherits much of Bickel's concern with the interaction between a judge's function of articulating long-term values and the judge's remedial role of re-making social reality in light of those principles. See *id.* at 759-62; see also Fiss, *supra* note 39, at 53-58.

tem can take just so much dissonance between its moral community and its legal community. The authority of law is, in this sense, always tenuous. Judges are, therefore, well advised to look to the larger community's reception of the interpretive products of adjudication.

While these forces of public morality may contribute to the actual outcome of adjudication, they are outside of, not within, interpretation itself. These are forces which constrain interpretation apart from the disciplining rules of the legal community. They are the price law pays for failing to provide a compelling ground of its own authority.²¹⁶

To be sure, Fiss writes that "[i]t is important to note that the claim of authoritativeness . . . is extrinsic to the process of interpretation."²¹⁷ But this statement, while perhaps true in itself, is fundamentally inconsistent with Fiss' whole project, which is to respond to the nihilist's challenge. First, that challenge directly links authority and objectivity. The nihilist's point is that judicial subjectivity or arbitrariness is incompatible with the proposition that judicial authority represents a "legitimate" rule of law. Accordingly, Fiss cannot simply detach objectivity from authority, as if the latter did not depend critically upon the former. If the objectivity of interpretation remains arbitrary from an external perspective, the nihilist's challenge to legal authority remains in place.²¹⁸

Second, Fiss cannot defend his appeal to interpretation in order to ground a theory of adjudication by pointing to the potential of interpretation to offer a unified theory of social meaning,²¹⁹ and then suggest that the unique aspect of law—its authoritative character—must be explained on noninterpretive grounds. The claim of interpretation is more thorough. Interpretation cannot ground objectivity and then be set aside as we turn to authority.²²⁰

For Fiss, the grounds of authority of the interpretive community remain, therefore, elusive. He frequently suggests that authority is a function of the constitutional text itself, as if we could get to the Constitution in itself, prior to any interpretation. Thus, he writes that "[t]he ultimate

216. If moral rules were within, or part of, legal interpretation, then the relevant interpretive community would be that within which that morality holds sway, not the professional community of lawyers. Fiss emphasizes this insulation of the legal community when he writes that "the judge is to read the legal text, not morality or public opinion, not, if you will, the moral or social texts." Fiss, *Objectivity*, *supra* note 182, at 740.

217. *Id.* at 757.

218. This is just the point of the example of the religious community. See *supra* text accompanying notes 203–04. For similar refusals to take at face value Fiss' effort to separate his inquiry into objectivity and interpretation from the larger problem of authority, see Brest, *Interpretation and Interest*, 34 STAN. L. REV. 765, 765 (1982) ("Professor Fiss' mission . . . is to reaffirm the morality of legal process—to reaffirm that adjudication, performed in good faith and according to professional canons produces outcomes deserving of respect and obedience.").

219. See *supra* text accompanying note 197.

220. Dworkin's more thorough interpretivism is evident on both of these points. He argues both that judicial interpretation is not different in kind from the interpretive activity of every citizen, see *infra* notes 277–78 and accompanying text, and that the grounds of legitimacy must be found within the theory of interpretation, see *infra* notes 334–38 and accompanying text.

authority for a judicial decree is the Constitution, for that text embodies public values and establishes the institutions through which those values are to be understood and expressed."²²¹ But the Constitution does not first establish institutions and embody values and then become a subject of interpretation. The institutions and values are themselves products of constitutional interpretation. Fiss remains, nevertheless, not quite sure whether there is an escape from interpretation, somewhere out there beyond the confrontation with text. Thus, his final response to the problem of authority once again suggests that he would, at some point, abandon interpretation: "The answer to such a question [why respect the Constitution] is not obvious or easily discovered, for one must transcend the text and the rules of interpretation to justify the authority of the text. . . one must move beyond law to political theory, if not religion."²²² Perhaps Fiss believes that this move is simply from one interpretive community to another—perhaps larger—community,²²³ but then we need to know how these communities interact in producing an interpretation of law that grounds the authority of the professional community.

2. *The Internal Critique*

While Fiss ultimately has little to say about the authority of the professional, legal community over other interpretive communities—the question of legitimacy—he has much to say about authority within this professional community. The internal critique of his account of interpretation focuses on his explanation of hierarchy and authority within the law.

Authority is critical to Fiss' account of the character of the professional legal community because of his recognition that whatever objectivity the disciplining rules provide to constitutional adjudication, they do not provide constraints sufficiently strong to prevent profound disagreement among judges and lawyers.²²⁴ The objectivity provided by the disciplining rules is compatible not only with disagreement, but also with error.²²⁵ Error is not simply a product of unconstrained subjectivity. Controversy within law, as opposed, for example, to controversy between law and morality, may arise from disagreement over the application of a disciplining rule or even over the existence of a rule. Such disagreement, however, is resolved by the structure of authority within the legal community. There are appellate courts and, if need be, constitutional amendments to resolve conflict. "The presence of such procedures and a hierarchy of authority

221. Fiss, *Objectivity*, *supra* note 182, at 751.

222. *Id.* at 753. For a similar critique of Fiss, arguing that he seeks ultimately to escape interpretation, see Fish, *Fish v. Fiss*, 36 STAN. L. REV. 1325, 1326–28 (1984).

223. Of course, in both political theory and religion we can point to a professional class which has its own discourse. Thus, the interpretive community in each may be no larger—in fact, it may be smaller—than that of the law.

224. See *supra* note 202 and accompanying text.

225. Fiss, *Objectivity*, *supra* note 182, at 748.

for resolving disputes that could potentially divide or destroy an interpretive community is one of the distinctive features of legal interpretation."²²⁶ Because there is such an authority structure within this community, it can remain one community instead of splintering into many.

Fiss has linked authority and communal identity, but he still must link authority and interpretation. What is it about the interpretation offered by an institution of authority within this community that makes it correct? Or, is it rather that correctness is simply a function of authority?

Disagreement is not occasional or exceptional in law. Rather, the adversary structure used in much legal process, and in all adjudication, suggests that the constraining effects of the disciplining rules will hardly ever be sufficient to resolve a serious legal dispute, and particularly a constitutional dispute. Members of the profession know how to frame an argument within these rules for either side of a case. This is given effect in the practice of brief writing. It is given a continuing, visible presence in adjudication through the practice of writing dissents. Dissenters may lack the votes, but it is hardly true that they lack the objectivity of the disciplining rules. Yet Fiss suggests that the rules themselves can resolve such disagreement. This is simply an implausible claim.²²⁷

Fiss picks an easy target when he argues with the nihilist who claims that there are no constraints at all on the judge's decision. The more difficult target is the legal realist who claims that the constraints are insufficient to ground a choice between two contrary outcomes.²²⁸ True, not everything can be said, but enough can usually be said to support as objective, within the bounded professional community, either of two possible outcomes of a case.

Because the possibility of disagreement within the disciplining rules is built into the very structures within which legal interpretation occurs, Fiss must go beyond objectivity to "correctness." Indeed, he usually couples objectivity and correctness: The disciplining rules "constrain the interpreter, thus transforming the interpretive process from a subjective to an objective one, and they furnish the standards by which the correctness of the interpretation can be judged."²²⁹ This suggests that objectivity and correctness are on a kind of continuum: The correct decision arises simply from a further application of the same rules that provide the objectivity of a decision. Fiss says as much when he writes, "The image I have in mind

226. *Id.* at 747.

227. For an even more radical view, see Tushnet, *supra* note 5, at 819 ("[T]he limits of [the lawyers'] craft are so broad that in any interesting case any reasonably skilled lawyers can reach whatever result he or she wants.").

228. See, e.g., K. LLEWELLYN, *Some Realism About Realism*, in JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 42, 58 (1962) ("[T]he line of inquiry [of the legal realists] has come close to demonstrating that in any case doubtful enough to make litigation respectable the available authoritative premises—i.e., premises legitimate and impeccable under the traditional legal techniques—are at least two, and that the two are mutually contradictory as applied to the case in hand.").

229. Fiss, *Objectivity*, *supra* note 182, at 745.

is that of a judge moving toward judgment along a spiral of norms that increasingly constrain."²³⁰ At an early point of constraint, the judge passes the threshold of objectivity; further on, he passes that of correctness.²³¹

Conflict in constitutional interpretation, however, is so profound that Fiss' claim seems simply inaccurate. Right decisions are not likely to be distinguished from wrong decisions by their greater attention to the disciplining rules. It is not in the quality of historical research or the attention to precedent that right interpretations will be distinguished from wrong ones. Disagreement is more likely to arise from the application of different disciplining rules: One judge wants to return to original history; another wants to follow more recent precedent. Both are objective within the norms of the professional community; neither is pursuing simply his own subjective preferences. Moreover, there is no reason to believe that resolution of conflict among the rules can be achieved by further application of the rules themselves. If we have second order rules for resolving these conflicts, Fiss surely has not elaborated them.²³² Fiss' argument, in fact, supports a simpler, but far less useful claim. While we have authoritative institutions for resolving such conflicts, we do not have authoritative rules of interpretation for resolving them.

If the rules do not lead to a single, "correct" outcome—and they are not likely to do so unless they also fall within a hierarchy of authority²³³—Fiss must choose between two equally problematic alternatives. First, conflict may indicate that there is more than one professional community that interprets the Constitution. If communities are defined by their disciplining rules and if conflict over the rules is sufficiently profound, then it would seem to follow that there are a plurality of communities.²³⁴

The problem with a theory of multiple communities is not internal to interpretation. There is nothing about the concept of interpretation that precludes a plurality of legal communities, just as there are a plurality of communities of literary interpretation. Rather, the problem with such a theory is one of political legitimacy. If there is more than one legal community, which one legitimately exercises authority? Profound disagreement within the professional community will raise, from an internal perspective, exactly the same problem of legitimacy that arose in the external

230. Fiss, *Conventionalism*, *supra* note 182, at 185.

231. Cf. Bennett, *Objectivity in Constitutional Law*, 132 U. PA. L. REV. 445 (1984) (judicial decisions can be "objective" only in weak sense of relying on sources external to judge's own values; those sources of objectivity cannot yield "correct" decisions).

232. Cf. R. DWORKIN, *Hard Cases*, in *TAKING RIGHTS SERIOUSLY* 81 (1977) (distinguishing principles from policies and arguing that Courts must rely on former).

233. Cf. Fallon, *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987) (in most cases various kinds of constitutional arguments prescribe the same results, but when arguments fail to do so, they are hierarchically ordered).

234. The possibility of developing a theory of plural communities is demonstrated by Robert Cover's work. See *infra* Part III, Section B.

critique.²³⁵ A splintering of the legal community will shatter the authority of the alleged professionals.²³⁶

Fiss, accordingly, rejects pluralism within the legal community. He labels a community that forms around an alternative set of disciplining rules a "clique": "The legal community transcends cliques; some cliques may dissolve over time, others may come to dominate the community."²³⁷ Some cliques win, others lose. Now, however, he is speaking of force and coercion as the marks of authority, not the objectivity of interpretation. Interpretation may support some sort of objectivity, but not authoritatively imposed uniformity.

Alternatively—and indeed the only option that seems to remain open to Fiss—he can define the community's disciplining rules to include acceptance of an institutional hierarchy of authority. Such an argument, however, is circular. The disciplining rules were meant to ground the objectivity of the institutions of legal authority—in particular, constitutional adjudication by the Supreme Court. This alternative, however, suggests that only the authority of the Court can ground the rules. Instead of legal disagreements being resolved by appealing to the disciplining rules of the community, this alternative would resolve disagreement over the disciplining rules by an appeal to the courts.²³⁸ On this view, we are left no explanation of either the objectivity or correctness of the courts' decisions. They are right because it is their role to be right. Authority again stands alone without the support of interpretation.

In the end, neither the authority of the legal community to govern the larger community, nor the authority of an appellate court majority within the professional community has been grounded in interpretation. At every turn, Fiss' arguments may be challenged by the claims of other communities of interpretation. This proliferation of communities may occur both outside of the professional, legal community, and within it. Each such community, from the standpoint of interpretation, stands on the same ground. Thus, authority characterizes adjudication, but interpretation does not characterize authority. No one has better grasped the splitting apart of authority and interpretation than Robert Cover.

235. See *supra* note 202 and accompanying text; see also M. TUSHNET, *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* 3 (1988) ("Grand theory [in contemporary constitutional law] and its problems are just constitutional law's version of this general crisis of legitimacy.").

236. See Kahn, *supra* note 1, at 492–93, on the splintering of the professional legal community in the early 1800's, with respect to the grounds of constitutional authority.

237. Fiss, *Objectivity*, *supra* note 182, at 748.

238. See Carter, *Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle*, 94 YALE L.J. 821, 835–36 (1985) (Fiss' claim of authority does not rest on interpretation).

B. Robert Cover: *Interpretation and Anarchy*

Like other works that assault an established tradition, an important aspect of *Nomos and Narrative*²³⁹ is the invention of a new vocabulary. Cover introduces us to a narrative of conflict between the "jurisgenic" and the "jurispathic," between the "paideic" world of the "nomos" and the violent world of the "imperial." His sources are equally unfamiliar—or at least out of place in this context. Large parts of the essay are devoted to biblical exegesis, while the specifically legal texts that do appear tend to be lawyers' briefs rather than judicial opinions.²⁴⁰ This represents an extreme assault on our ordinary legal sensibilities and an immediate challenge to Fiss' confident reliance on the language and habits of the professional, legal community. Yet the object of this new vocabulary is once again the community of discourse. Cover and Fiss share a common understanding of the meaning-generating function of the community of discourse, yet they diverge radically in their appraisals of the community or communities that are relevant to the creation and maintenance of law.

Cover's assault on traditional constitutional theory is best introduced by juxtaposing his views to those given short-hand expression in the famous footnote four of the *Carolene Products* opinion.²⁴¹ Cover proposes a complete inversion of what has been seen as the canonical text of the modern Court.²⁴² Precisely those aspects of political life previously understood as most problematic, and thus most requiring judicial correction, become, for Cover, the locus and source of political meaning and value.

Footnote four purports to identify a number of structural problems in the pluralist, liberal model of politics. This model understands the society as composed of competing interest groups, none of which constitutes a majority. The political process is one in which these diverse self-interested groups coalesce to form effective majorities in order to gain control of governmental institutions. Politics, on this model, remains fluid as groups perceive diverse possibilities for compromise and coalition building. Politi-

239. Cover, *supra* note 181.

240. See, e.g., *id.* at 26–33 (discussing Mennonite amicus brief in *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983)).

241. *United States v. Carolene Prods.*, 304 U.S. 144, 152 n.4 (1938). Interestingly, Cover wrote an essay on the footnote in 1979, in which he concluded:

Each constitutional generation organizes itself about paradigmatic events and texts. For my generation, it is clear that these events are *Brown v. Board of Education* and the civil rights movement and that the text is footnote four. For, whether or not the footnote is a wholly coherent theory, it captures the constitutional experience of the period from 1954 to 1964. And that experience, more than the logic of any theory, is the validating force in law.

Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1316 (1982). Cover did not himself see the extreme tension between his soon-to-emerge views on community and the footnote's understanding of the "minorities problem." Yet in one critical respect, this essay did anticipate his later views. See *infra* note 247.

242. See, e.g., J. ELY, *supra* note 42; Brilmayer, *Carolene, Conflicts and the Fate of the "Inside-Outsider,"* 134 U. PA. L. REV. 1291 (1986); Lusky, *Footnote Redux: A Carolene Products Reminiscence*, 82 COLUM. L. REV. 1093 (1982); Powell, *Carolene Products Revisited*, 82 COLUM. L. REV. 1087 (1982).

cal success for any particular group requires the possibility of participating in this process. Paragraph three of the footnote recognizes that this ideal of participation is not a reality for certain groups: "Prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."²⁴³

Discreteness and insularity were meant to refer to those marks of difference from the majority that prevent participation in coalition politics and thus prevent a sharing in the public goods that are the result of that process.²⁴⁴ The role of the courts, accordingly, is to act as political physicians and thus to heal this defect in the political process. This remedial role is twofold: First, to facilitate participation of discrete and insular minorities in the ordinary, pluralist politics of coalition building; second, to assure fair access to the outcomes of the political process, when that outcome reflects a process to which minority groups have been denied access. Group difference, therefore, is a political defect that requires an extra-political, judicial effort to overcome.

The differences identified by the expression "discrete and insular minorities" are products of history. For the *Carolene Products* Court, there would be no such political defects—because there would be no prejudice—if there were no history. The absence of history would not create an identity of interests. It would, however, allow every individual to establish his or her own political associations and thus define those interests that the individual seeks to further through the process of majoritarian politics. The role of the Court, accordingly, is to remove the burden of history as an external restraint on private freedom of choice.²⁴⁵

Carolene Products thus understands the problem of politics as the preservation of an idea of individual freedom that is pre-political. The attractiveness of the *Carolene Products* theory is precisely this promise of a political order that affirms, rather than undermines, individual autonomy. As long as the individual could freely choose his associations—thus the critical importance of the discovery of a "right of association"—the Court

243. 304 U.S. at 152 n.4.

244. For a different view of the political consequences of discreteness and insularity in contemporary politics, see Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985).

245. For this reason, once the Court adopted a *Carolene Products* ideology, it had to create both a constitutional right to travel and a constitutional right of association. See *Shapiro v. Thompson*, 394 U.S. 618 (1969) (right to travel); *Edwards v. California*, 314 U.S. 160 (1941) (same); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) (right to association). The two rights correspond to the freedom "to leave one community and to join or establish another" described by Fiss. See text accompanying note 197. More generally, the *Carolene Products* Court can be understood as trying to create the conditions—and outcomes—of a free market model of politics. See, e.g., J. ELY, *supra* note 42, at 102–03 (describing *Carolene Products* process-oriented approach to constitutional law as based on "antitrust" model of "political market").

could imagine a coincidence of individual autonomy and political order, of subjective freedom and public constraint.

On the *Carolene Products* model, then, history is the source of prejudice, which denies individual freedom. The *Carolene Products* Court understood its function to arise out of the need to overcome history in order to create the conditions of freedom within the political order.²⁴⁶ A society without a history would be a society of completely free individuals: Each individual would be entirely free to mold himself on the basis of his present preferences. Each association formed by the aggregation of such free choices would have equal access to the political process.

This model of the political process and of the Court's role is the object of Cover's attack. For Cover, discreteness and insularity are marks of political virtue; they are not the source of a political defect.²⁴⁷ Discreteness and insularity are the conditions of "jurisgeneration"; uniformity is the goal of the "jurispathic." The former gives birth to meaning; the latter marks the death of meaning, including the meaning and value of law. Perfect justice on the model of *Carolene Products* might eliminate injustice, but at the cost of all that can be meaningful in life. It might secure negative freedom by removing the burden of history, but at the cost of positive freedom which only exists in the historically situated community.

The central concept of Cover's theory is announced in his first sentence: "We inhabit a *nomos*—a normative universe."²⁴⁸ Both words of this definition—"normative" and "universe"—are equally critical to understanding the *nomos*. The normative character of the *nomos* distinguishes it from the physical universe: The *nomos* is the domain "of right and wrong, of lawful and unlawful, of valid and void."²⁴⁹ But by describing the *nomos* as a "universe," Cover asserts that the normative has an objective character. The *nomos* is a universe because it constitutes a world in which subjects find themselves; it is not a creation of individuals' subjective value choices. "This *nomos* is as much 'our world' as is the physical universe of mass, energy, and momentum. . . . Our apprehension of the structure of

246. This task of dismantling history, set by *Carolene Products*, is most evident in the Court's reapportionment decisions, in their insistence upon the rule of "one person, one vote" regardless of political history. See *Reynolds v. Sims*, 377 U.S. 533, 579-80 (1964); see also, Gewirtz, *Choice in the Transition: School Desegregation and the Corrective Ideal*, 86 COLUM. L. REV. 728, 735 (1986) (corrective concept of antidiscrimination law requires Court "to purge the present of the past").

247. In one significant respect, Cover's earlier essay on *Carolene Products*, Cover, *supra* note 241, anticipated his later work. Cover recognized that one method of protecting blacks from the consequences of prejudice would have been the imposition of national values of equality on local political and social life. About this method, which the Court used in cases like *Beauharnais v. Illinois*, 343 U.S. 250 (1952) and *Terry v. Adams*, 345 U.S. 461 (1953), Cover wrote:

It may be, of course, that a sanitized political discourse—one free of racist invective—and a hygienic principle of political organization that would not tolerate racial exclusion at any level would produce at least as good a political system as we now have. But, certainly, candor requires recognition of the risks entailed.

Cover, *supra* note 241, at 1313.

248. Cover, *supra* note 181, at 4.

249. *Id.*

the normative world is no less fundamental than our appreciation of the structure of the physical world."²⁵⁰ Subjects find themselves in a world of meaning in just the same way that they find themselves in a world of space and time.

This twofold character of the *nomos* is captured in Cover's account of its locus and source. The *nomos* exists in and arises out of discourse. Discourse supplies a normative meaning by creating "history and destiny, beginning and end, explanation and purpose."²⁵¹ Discourse cannot be private; it requires a community. The scope of the community of discourse defines the scope of the universe that is the *nomos*.²⁵²

By now, the conceptual model that is the object of Cover's difficult rhetoric should be clear. The *nomos* rests upon the familiar model of discursive particularity.²⁵³ This is once again the discourse on moral unity that constitutes the history of the community. For Cover, a community's discourse produces a meaningful history by offering an "explanation and purpose" for the social life it finds itself already to have and to have had. History is inseparable from destiny, because a community that understands a unique, normative past will understand itself as carrying that set of meanings into the future.²⁵⁴

Individuals do not create values through private subjective choices; rather, they discover their values in a universe of which they are always already a part, and in which they are never alone. Thus, Cover writes: "The intelligibility of normative behavior inheres in the communal character of the narratives that provide the context of that behavior. Any person who lived an entirely idiosyncratic normative life would be quite mad."²⁵⁵ The communality, and so objectivity, of the normative universe for Cover is marked by his constant return to the idea of discourse and variations on discursive action: speech, myth, narrative, communication, and signification.²⁵⁶

Cover writes: "The *nomos* that I have described requires no state."²⁵⁷ Nevertheless, the legal system of the state requires a *nomos*. Like the *Carolene Products* understanding, Cover suggests that political order

250. *Id.* at 5.

251. *Id.*

252. *Cf. supra* note 193 and accompanying text.

253. Like Fiss, Cover cites C. GEERTZ, *THE INTERPRETATION OF CULTURES* (1973), as the familiar starting point for this perspective on social phenomena. *See* Cover, *supra* note 181, at 5 n.7.

254. Cover takes this account one step further in his description of the objectivity of "narrative." Every narrative is tied to a particular community: there are no disembodied narratives, just as there are no disembodied discourses. But once created, a narrative has a continuing life. The objectivity discourse attains in the narrative provides an objectivity to the community. The community can now be defined by its relationship to a text.

255. Cover, *supra* note 181, at 10.

256. *See, e.g., id.* at 8 ("Legal precepts and principles are . . . signs by which each of us communicates with others."); *id.* at 9 ("A legal tradition. . . includes not only a corpus juris, but also a language and a mythos—narratives in which the corpus juris is located . . .").

257. *Id.* at 11.

stands on a prior, pre-political domain that is the source of value and meaning. Unlike *Carolene Products*, the pre-political for Cover is not constituted by autonomous, private agents exercising free choice. Rather, just as the state is derivative of the *nomos*, so is the individual. There is nothing behind or prior to the normative universe: The world of social meaning and so of individual freedom is irreducibly communal.²⁵⁸

Legal prescriptions do not simply appear as the formal demands of an external sovereign upon an otherwise private person. Like every social practice, law will have a meaning, or, in Cover's vision, many meanings, which explain why the law is as it is. Meaning can only arise within a *nomos*. "[L]aw and narrative are inseparably related. Every prescription is insistent in its demand to be located in discourse—to be supplied with history and destiny, beginning and end, explanation and purpose."²⁵⁹ Indeed, law is nothing more than "a resource in signification";²⁶⁰ it is a device for communicating meaning within a shared *nomos*. A complex society is, for Cover, one in which the legal norms perform a multiplicity of signifying acts as they are given meaning in a number of discursive communities, each with its own *nomos*. Different communities talk differently about the same legal norm, whether written or unwritten. Accordingly, they give a common text different meanings. Fiss's professional community is, for Cover, just one *nomos* among many, all of which are constructing the meaning of law.²⁶¹

This superabundance of law, or more precisely of legal meaning, creates the problem of constitutionalism from the perspective of the state. That problem is not to create law, but to limit it. Without such limits, the jurisgenerative forces that create meaning would lead to anarchy among competing communities. "It is the problem of the multiplicity of meaning—the fact that never only one but always many worlds are created by the too fertile forces of jurisgenesis—that leads at once to the imperial virtues and the imperial mode of world maintenance."²⁶² A common text is not itself a constraint on the construction of meaning; rather, it is an invitation to the jurisgenic forces of community.

Cover has in mind the plurality of sects that give meaning to the com-

258. This theme will be fully developed in Dworkin's work. See *infra* notes 300–03 and accompanying text.

259. Cover, *supra* note 181, at 5.

260. *Id.* at 8.

261. Cover explicitly rejects Fiss:

[M]y position differs fundamentally from [that] of Fiss . . . in that I accord no privileged character to the work of the judges. I would have judges act on the basis of a committed constitutionalism in a world in which each of many communities acts out its own *nomos* and is prepared to resist the work of the judges in many instances.

Id. at 57 n.158. See also R. COVER, O. FISS, J. RESNIK, PROCEDURE 729–30 (1988) (previously unpublished note of Cover's, accusing Fiss of having a "romantic" notion of a "community of interpretation that is national in character").

262. Cover, *supra* note 181, at 16.

mon text of the Bible. The text is the starting point of creative interpretation; not the end, but the beginning of meaning.²⁶³ The same creative forces are at work in the law, particularly with a law as open to diverse readings as the Constitution. Constraint on this potential anarchy of jurisgenesis must come from outside of the text. More importantly, it must come from outside of the process by which meaning is given to the text. No interpretation is authoritative in its character as an interpretation. No single meaning has any more authority than any other. Authority is simply not built into the structure of the *nomos*.²⁶⁴ Or, more precisely, the claim of authority only appears legitimate to those within the *paideic* community. Even that claim has no power against those who would disagree and leave the community to form a new community organized around a new interpretation.

For Cover, then, the imperial virtues of world maintenance are necessarily "jurispathic." Their function is to control the anarchy of legal meanings. They cannot do this, however, by the creation of a competing, yet authoritative, meaning, because all meaning is a function of the *nomos*:

The precepts we call law are marked off by social control over their provenance, their mode of articulation, and their effects. But the narratives that create and reveal the patterns of commitment, resistance, and understanding . . . are radically uncontrolled. They are subject to no formal hierarchical ordering, no centralized, authoritative provenance, no necessary pattern of acquiescence. . . . [A]n interdependent system of obligation may be enforced, but the very patterns of meaning that give rise to effective or ineffective social control are to be left to the domain of Babel.²⁶⁵

Thus, the meaning of every legal norm, including constitutional norms, is "essentially contested."²⁶⁶ In that contest, there is no justification for a hierarchy of authority. The Supreme Court is not a privileged source of meaning. Rather, to the extent that it engages in jurisgenesis at all, it acts

263. See S. LEVINSON, *CONSTITUTIONAL FAITH* (1988) (developing theological analogy). Levinson's contrast of the Catholic and the Protestant approaches to the constitutional text, *id.* at 27-30, is a fair approximation to the contrast of Fiss and Cover. Fiss sees the constitutional world of meaning through the institutional hierarchy of a professional community that parallels the church hierarchy. The hierarchy in each case exercises the authority to decide, and that authority is independent of the disciplining rules which define the boundaries of the community of believers. Cover's insistence on an unmediated relation of each community to the constitutional text parallels the Protestant vision in which sects can freely multiply as new claims to truth are made.

264. This is precisely the problem of the conflict between internal and external perspectives that undermined so much of the work of the new republicans: there is no common measure of the good between those inside and those outside of the interpretive, self-governing community. See *supra* Part II.

265. Cover, *supra* note 181, at 17 (footnotes omitted). On the image of Babel, Cover writes, "It suggests not incoherence but a multiplicity of coherent systems and a problem of intelligibility among communities." *Id.* at 17 n.45.

266. *Id.* at 17.

"in that respect, in an unprivileged fashion."²⁶⁷ The Court may have a *nomos* of its own, but even then it is simply one among many communities.²⁶⁸ Its privileged place of authority comes not from its unique capacity to create meaning, but from a unique power to deny other meanings.²⁶⁹

Cover uses the example of the Mennonite community to elaborate his vision of the relationship between *nomos* and law. The Mennonite community is defined by its particular narrative, which combines a moral vision with an historical account of the community's conflicts with civil authorities. The narrative is a story of struggle between moral ideals and recalcitrant social reality. "[T]he narrative creates a *people* dedicated to the vision—a people whose actions and norms for action render the vision a constant, with the various civil demands constituting shifting variables around it."²⁷⁰ A people and their *nomos* precede the appearance of an individual confronting the law of the state. Thus, "[t]he Mennonite narratives . . . help to create the identity of the believer and to establish the central commitment from which any law . . . of the state will be addressed."²⁷¹ The individual believer and law are abstractions from the *nomos*, which is the only source of meaning for both.

Cover's project is to deny the abstraction and separation of individual subject and objective law. Instead, he wants to return both to their foundation in the *nomos*. The denial of the abstract individual, distinct from any community, is relatively easy in his example. To be a Mennonite is to be a member of a community. Only as a member of that community, not as a disembodied subject, is Mennonite belief a plausible way of life. More difficult to accept is Cover's argument that law too can only have meaning to the extent that it is incorporated within a *nomos*. This leads him to make the extraordinary claim that "within the domain of constitutional meaning, the understanding of the Mennonites assumes a status equal (or superior) to that accorded to the understanding of the Justices of the Supreme Court. In this realm of meaning . . . the Mennonite community creates law as fully as does the judge."²⁷² And again, "[t]he meaning judges thus give to the law . . . is not privileged, not necessarily worth any more than that of the resister they put in jail."²⁷³ Discursive communities are diverse; they are not hierarchical.

267. *Id.* at 18.

268. *Cf. supra* notes 143–58 and accompanying text (Michelman defends *nometic* understanding of Court, but fails to ground authority of that particular *nomos*).

269. Cover developed this theme most explicitly in his work on judges as people of "violence." See Cover, *The Bonds of Constitutional Interpretation: Of the Word, the Deed, and the Role*, 20 GA. L. REV. 815, 817 (1986) ("For legal interpretation occurs on a battlefield . . . which entails the instruments both of war and of poetry. Indeed, constitutional law is . . . more fundamentally connected to the war than it is to the poetry."); see also Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986).

270. Cover, *supra* note 181, at 27.

271. *Id.* at 28.

272. *Id.*

273. *Id.* at 60.

At this point, Cover's reversal of the political theory of *Carolene Products* is complete. The Constitution does not save the discrete and insular community from the defects of the political process; rather, the discrete and insular community saves the Constitution from the burden of meaninglessness. *Carolene Products*' pursuit of homogeneity and its denial of history are not the virtues of the legal system but rather its vices. Thus, for Cover, *Carolene Products* is little more than the benign form of the jurispathic character of the state. The non-benign form of this same phenomenon is the violence which supports authority. Both forms come together in the Court: "Because of the violence they command, judges characteristically do not create law, but kill it. Theirs is the jurispathic office."²⁷⁴ Cover sees a choice between the creative anarchy of meaning and the violence of authority. "By exercising its superior brute force . . . the agency of state law shuts down the creative hermeneutic of principle that is spread throughout our communities."²⁷⁵

There is no easy way out of this dilemma. In fact, there may be no way out at all. Having located meaning within the discrete and insular communities of the diverse nomoi, a national politics—and so a national political community—will appear always to rest upon the violence of the jurispathic. If the cost of statehood is the destruction of meaning, then we cannot have a political life in the state that preserves individual integrity. The individual that appears in, and to, the national state is just as much a product of violent abstraction from the community of meaning as is the state itself. Indeed, they are essentially linked, for the violence of the jurispathic will always appear simultaneously as the freeing of the subject from the burdens of communal history.²⁷⁶ This is the lesson of *Carolene Products*. To be a member of the state is to participate in the violent destruction of meaning.

For Cover, the discursive community, not the private individual, is the basic unit of social reality. This community is not a part of, but rather an alternative to, the state. Its existence challenges the state's claim upon the individual. Within the discourse of this community, the public order of the state appears as a threat of violent death to meaning. A choice must be made, therefore, between the anarchy of meaning and the politics of violence.²⁷⁷ To choose meaning, however, is not simply to reject the violence of the state, it is ultimately to reject the *Carolene Products* vision as well. Modern liberalism's vision of the autonomous, private individual is at the center of Cover's attack upon the state.

274. *Id.* at 53.

275. *Id.* at 44.

276. See R. NISBET, *THE QUEST FOR COMMUNITY* (1953) (on simultaneous and linked development of centralized state and autonomous, private individual).

277. See R. COVER, O. FISS, J. RESNIK, *PROCEDURE* 730 (1988) ("‘*Nomos*’ is fundamentally a piece about the necessary disjuncture between the range of state violence and the range of legal meaning.").

The stripping away of communal identity from the individual, the portrayal of the individual as a free, undetermined agent who may define his values as he pleases, requires a parallel political process in which the state frees the individual from the claims of intermediate communities.²⁷⁸ Historically, this meant freeing the individual from the bonds of religion, family, work-place, and local political associations. A world of individual contractors is a world in which central political authority has come to dominate all other communities. The public order of the free, private individual is the state, not the community. This is the political world of the jurispathic state.

Cover's effort to recover community threatens the value of the modern achievement of centralized political authority. His world of jurisgenesis is closer to the feudal world of sect, family and guild, than to the liberal world of free individuals interacting within a nation state. It is, therefore, no accident that Cover's central example of a meaningful political life is the Mennonite community.

Despite the shock to our political sensibilities, Cover's narrative of anarchy is faithful to the theory of discursive particularity that is so powerfully attractive to contemporary legal theorists. He alone puts the juxtaposition of the anarchy of community and the authority of law at the center of his theory. His vision of anarchy suggests that, as a theory of constitutional law, interpretation may remain forever outside of the practical reality of constitutional law. Constitutional law is above all about order and authority. Interpretation, however, seems to lead to anarchy in the place of order. Unless interpretation can somehow be made to support authority—a task that Fiss essentially avoided—Cover's accusation that the work of the courts is the death of law signals the limits of the usefulness of the interpretive approach.

Such an effort to ground legal authority in a theory of the interpretive community is at the heart of Dworkin's latest work. Dworkin represents a third approach, somewhere between that of Fiss and Cover. He tries to save the discursive community from Cover's vision of anarchy and Fiss' unexplained embrace of authority. Even more importantly, he offers the most powerful, philosophical account of the model of community to which so many contemporary theorists appeal. While the philosophical account is lucid and compelling, the conclusion he reaches, which tries to privilege a certain kind of community, is completely unsupported by the larger theory, and indeed, seems inconsistent with that theory.

278. This has been generally recognized as the move from status to contract.

C. *Ronald Dworkin: Community in the Transcendental Analytic of Adjudication*

Dworkin's most recent and comprehensive work is *Law's Empire*.²⁷⁹ Much in this book is a restatement of his earlier positions, including the claims that there are right answers to hard cases and that law is an interpretive exercise.²⁸⁰ What is new is the prominent place given the concept of community. Community is the foundation for the entire legal structure that Dworkin builds.

The foundational character of community is twofold. First, community is the conceptual ground of interpretation. Because Dworkin argues that law is itself an interpretive exercise, it follows that community is the conceptual ground of law. Second, community is the ground of legitimacy for law. Without a community of a particular character, what Dworkin calls a "true community," the commands of law will not provide a normative ground for action. Conversely, only in such a true community do citizens have a moral obligation to comply with law. Community, then, makes law possible, as well as legitimate. The move from the community of interpretation to the true community is Dworkin's attempt to move from a theory of meaning to a theory of authority: The true community is that singular form of community that may legitimately exercise authority. Unfortunately for Dworkin's theory, these two functions of community are inconsistent: The community of interpretation undermines the special claims to authority of the true community.

This is a complex and difficult theory, which is best approached by focusing on three key concepts—"interpretation," "integrity," and "legitimacy." Each of these concepts is dependent upon a prior conceptual construction, which is community.

1. *Interpretation and Community*

Legal disagreements, argues Dworkin, do not raise problems about whether some rule or judgment satisfies an agreed upon set of characteristics that define the concept of law. Rather, legal disagreements are more fundamental: They are about what law is. This observation poses something of a conundrum, which Dworkin labels the "semantic sting": How can we so easily and commonly use a term, "law," upon the meaning of

279. Dworkin is not a "constitutional theorist" in the same way as the others discussed in this essay. His theoretical object is law as such, not the Constitution. Nevertheless, he applies his general theory of law to constitutional adjudication. This, coupled with the fact of his commanding presence within contemporary discussions of legal theory, including constitutional theory, justifies consideration of his work in this essay.

280. See R. DWORKIN, *supra* note 37; Dworkin, *Law as Interpretation*, 60 TEX. L. REV. 527 (1982). But cf. Christie, *Dworkin's Empire* (Book Review), 1987 DUKE L.J. 157, 184 (arguing Dworkin has abandoned the one right answer claim).

which we do not agree?²⁸¹ Dworkin's answer is that such disputes are characteristic of a common category of concepts, which he labels "interpretive." The semantic sting misrepresents the nature of a large portion, if not the whole, of our communicative practices.²⁸² To avoid the semantic sting, we must understand the nature of interpretation. To understand law, we must understand it as an interpretive concept.

In particular, we must understand the nature of "creative interpretation." The object of creative interpretation—that which is interpreted—is "something created by people as an entity distinct from them, rather than what people say [the object of conversational interpretation] . . . or events not created by people [the object of scientific interpretation]."²⁸³ To interpret an object as "created by people" is to understand it as meaningful. Of all such objects, we can ask why they were created. In response, we expect an explanation that relies on ends that are valuable to someone or to some group.²⁸⁴ Human creation is distinguished from both nature and accident by its purposiveness.²⁸⁵ A created, meaningful object may be a work of art, but it may also be a social practice, including law.

Meaning does not inhere in the interpreted object independently of the interpreter. There is not a world of meaningful objects to which subjects are subsequently introduced. Objects appear meaningful only because they have already been interpreted. Dworkin has effectively shifted the locus of creativity in "creative interpretation": Creativity does not inhere in the object as a product of a past act; rather, creativity is a process of interaction between the subject who interprets and the object he interprets.²⁸⁶ This is as true of a social practice as it is of a work of art.

Because there is no such thing as a disembodied interpretation, the process of interpretation always joins subject and object. More precisely, subject and object—including citizen and social practice—are only partial abstractions from a prior whole which is the creation of meaning.²⁸⁷ This collapse of individual and social practice through the process of discursive particularity is given its strongest expression when Dworkin describes "social interpretation as a conversation with oneself."²⁸⁸ This is not a suggestion of solipsism; rather, it is a suggestion that the line between subject

281. R. DWORKIN, *supra* note 150, at 15–16.

282. *See id.* at 53 (suggesting that all concepts may be interpretive).

283. *Id.* at 50.

284. Much of Dworkin's discussion of interpretation is simply a discussion of the central role of "final causes" in our understanding. *See* ARISTOTLE, *PHYSICS* II 3–9 (on final causes).

285. *See* Kahn, *supra* note 1, at 453. (distinguishing constitutional creation from nature and accident).

286. Not only does Dworkin challenge the distinction between subject and object, but also that between the creator of the object to be interpreted and the interpreter. *See* R. DWORKIN, *supra* note 150, at 55–62 (attacking "artist's intention" theories of interpretation).

287. *See supra* notes 248–52 and accompanying text.

288. R. DWORKIN, *supra* note 150, at 58. Dworkin, accordingly, argues that to interpret a social practice is to participate in it: "A social scientist who offers to interpret the practice . . . must . . . join the practice he proposes to understand. . . ." *Id.* at 64 (emphasis in original).

and object, between citizen and the community of which he is a part, is disappearing in the face of the analysis of interpretation. We cannot get outside of the self to see the social practice pure. This is not because we always stand too far from the community, but because we are already within a community, or it is within us.

The interpretive attitude toward a social practice, Dworkin argues, can only take hold in a community of a certain kind.²⁸⁹ He lays out the conditions of such a community in a description of the three "stages" of interpretation. First, there must be a large degree of agreement on the "rules and standards" that inform the pattern of behavior that is to be the object of interpretation.²⁹⁰ These are the practices and the beliefs about those practices that define the ordinary understanding of the community within which we already find ourselves. This commonality of practices and beliefs allows us to identify and speak of a particular, historical community.

A community that exhibited no consistent patterns of behavior would not offer an object of interpretation, but only a field for possible political invention. Without such commonalities, it would be wrong to speak of a community. This would be, instead, the proverbial "state of nature." Moral and political theory would either meet no resistance—they would write on a blank slate—or theory would be overcome by the resistance of anarchy.

For Dworkin, theory must meet some resistance.²⁹¹ Interpretation must be of something, if interpretation is to be distinguished from invention. Interpretation, then, presupposes a "preinterpretive" community as that pattern of social practices and beliefs in which we always find ourselves already located.²⁹² Among the practices we understand and follow in this preinterpretive way are those that we identify as "law."

To say that a pattern of social practices is preinterpretive is not to say that it is uninterpreted: "[S]ome kind of interpretation is necessary even at this stage. Social rules do not carry identifying labels."²⁹³ Only to an interpreting subject does social behavior appear as a practice putting into effect a common rule.²⁹⁴ Someone who could find no such unifying rule

289. This is not meant to be a practical restriction on particular communities; rather, it is a description of what it is that allows a community to present a meaningful set of social practices.

290. See R. DWORKIN, *supra* note 150, at 65–66.

291. On the other hand, if that resistance is too solid, if ritual is too hardened, the interpretive attitude is again precluded. See *infra* text accompanying notes 297–99.

292. R. DWORKIN, *supra* note 150, at 65. Compare Cover's understanding of the "nomos" as a "normative universe," see *supra* notes 248–50 and accompanying text.

293. *Id.* at 66. See J. DEWEY, *THE PUBLIC AND ITS PROBLEMS* 3 (1927) ("[N]o one is ever forced by just the collection of facts to accept a particular theory of their meaning.").

294. The purpose that gives meaning to the practice, as understood by someone, is not necessarily the same as the purpose that may have originally motivated the creation of the practice. The author's intention is no more privileged with respect to social practices than with respect to works of art. See *supra* text accompanying note 286.

would see only chaotic or random behavior. Thus, even to identify a social practice as an object for explicit interpretation requires interpretation.

Preinterpretive practice, therefore, does not describe social regularity without meaning, but a social life in which the interpretive attitude has not been made explicit. Interpretation will not be explicit as long as there is substantial consensus on the character and meaning of the practice.²⁹⁵ Interpretation only becomes explicit when conflict arises. Dworkin identifies this as the second stage of interpretation.

Conflict may be over the meaning of a practice or it may be over what exactly the practice requires. An interpretive attitude only fully takes hold when both dimensions—meaning and practice—are open issues. Practice must be responsive to meaning, just as meaning must be responsive to practice. This reciprocity between theory and practice, interpretation and the object of interpretation, characterizes the “interpretive attitude.”

Interpretation exists in this tension between historically given practice and normative intelligibility. An interpretation must “fit” the social practice: It must “count as an interpretation of it rather than the invention of something new.”²⁹⁶ Nevertheless, an interpretation is not an explanation of the causes of the practice, as if the practice were a natural phenomenon. It is, instead, a justification of the practice. A justification isolates the most important elements of the practice and explains how they contribute to a valuable end. Conversely, a justification will also isolate those elements of the practice that do not contribute to the attainment of that end. A justification thereby offers a perspective from which to criticize the practice in its full range.²⁹⁷

The third and final stage of interpretation is the reconstruction of social practice to serve better the justification offered. Interpretation is reformist in its justificatory ideal. A justification is offered not only as an explanation, but as a ground for reform. This complete interpenetration of practice and meaning is given expression in Dworkin’s careful choice of words: “[T]here must be a postinterpretive or reforming stage, at which [the interpreter] adjusts his sense of what the practice ‘really’ requires so as better to serve the justification he accepts at the interpretive stage.”²⁹⁸

The interpretive attitude, in short, denies that prior to interpretation the practice was “really” something, which is now being changed in light of values subsequently discovered. Rather, the nature of the practice is

295. “[P]erhaps an interpretive community is usefully defined as requiring consensus at this stage [T]he classifications it yields are treated as given in day-to-day reflection and argument.” R. DWORKIN, *supra* note 150, at 66.

296. *Id.* at 67.

297. The critique is “internal” because it assumes the perspective of values that are themselves understood to be the ends of the social practice. For more elaborate articulations of this theory of social criticism, see M. WALZER, *INTERPRETATION AND SOCIAL CRITICISM* (1987); White, *Introduction: Is Cultural Criticism Possible?* 84 MICH. L. REV. 1373 (1986).

298. R. DWORKIN, *supra* note 150, at 66.

itself a product of this reciprocal relationship of meaning and practice. What a social practice is, therefore, changes as interpretations change. "Creative interpretation . . . is a matter of interaction between purpose and object."²⁹⁹ There is no way to get to the object prior to, or apart from, the interpretation. The reformist stage of interpretation is not a moment of "reform" which follows an interpretive inquiry into a social practice. Rather, reform is a part of interpretation, the product of which is the social practice of a community. One important part of that social practice is law. Accordingly, there is no *real* law that confronts the subject as an already formed "thing-in-itself."

This emphasis on reform as a part, and not a consequence, of interpretation reminds the reader that the analysis of the stages of interpretation is only an explanatory device. These stages do not represent a temporal sequence, but a conceptual structure. The identification and explication of this structure forces a reconsideration of the place and character of community. Community, understood as a shared set of practices and beliefs, was the starting point of the analysis. It provided the preinterpretive ground for the possibility of an interpretive attitude toward created objects, including law. At the end of the analysis, however, it is clear that community is itself an interpretive concept. Community is not something apart from interpretation which provides an independent, objective foundation. Community is simultaneously the condition of interpretation of social practices and the end of interpretation. Like Plato's Ideas, which inform discourse before we set them forth as the objects of discourse, or Kant's categories, which structure our understanding before we understand them, Dworkin's community informs interpretation before it is itself the object of interpretation.³⁰⁰ This characteristic of community as both the origin and the end of interpretation suggests that community plays a unique role in the theory.

Community describes the deep structure of the social imagination.³⁰¹ The social imagination does not look, for example, to the aesthetic value of human action; rather, it looks for and finds a value expressing the historical identity of a group committed to a moral vision of their communal life.³⁰² In the next section I will pursue further the implications of this idea that community provides the conceptual structure of interpretive un-

299. *Id.* at 52.

300. I owe this insight to Harry Frankfurt.

301. For just this reason, Dworkin's community is best described as the "transcendental condition" of law. See I. KANT, CRITIQUE OF PURE REASON 59 (N.K. Smith trans. 1929) ("I entitle *transcendental* all knowledge which is occupied not so much with objects as with the mode of our knowledge of objects insofar as this mode of knowledge is to be possible *a priori*.").

302. A full description of imagination would describe the various domains of its construction, including, e.g., the social, aesthetic, and scientific. Such an effort would parallel Kant's three *Critiques*.

derstanding. Here it is enough to notice the transformation in the locus of community.

Community is bound to interpretation. Since it is itself the product of interpretation, it cannot—as Bickel thought it could—validate interpretation. One can no more get to the real community before interpretation than one can get to the real painting before any interpretation. As an interpreted object, community does not exist as an historical and geographical entity independent of the subject who understands it. Community exists only in the citizen's imagination—the faculty by which object and value, practice and meaning are combined.³⁰³

2. *Integrity and Community*

So far, I have said only that Dworkin argues that law is an interpretive concept and that legal judgments are acts of interpretation. I have not yet said anything about the interpretation of law that he offers. Dworkin identifies the preinterpretive understanding of the practice of law as that of not using force “no matter how useful that would be to ends in view, no matter how beneficial or noble these ends, except as licensed or required by individual rights and responsibilities flowing from past political decisions about when collective force is justified.”³⁰⁴ An interpretation of law, therefore, must explain how a legal judgment “provides a justification for the use of collective power against individual citizens or groups.”³⁰⁵ Dworkin takes up this task of justification by offering an interpretation that focuses on the virtue of “integrity.” Law is an expression of integrity as a political virtue.

In its simplest form, integrity is the virtue of “treating like cases alike.”³⁰⁶ While accurate, this description of integrity as consistency fails to focus on the assumptions about community that are built into the concept of integrity: “Political integrity assumes a particularly deep personification of the community or state.”³⁰⁷ Once again, the moving force in Dworkin's theory is an understanding of community.

Integrity, for Dworkin, is a second-order virtue because it attaches to other political or moral virtues. He mentions, in particular, fairness, justice and procedural due process.³⁰⁸ These are substantive values, about which there may be substantial disagreement. Such disagreements are the subject of traditional moral and political theory. Integrity is a response to this possibility of disagreement. An agent who has integrity relies upon

303. This belief accounts for the complete absence of discussion, by Dworkin, of the traditional political devices for community representation, e.g., elections.

304. R. DWORKIN, *supra* note 150, at 93.

305. *Id.* at 109.

306. *Id.* at 165.

307. *Id.* at 167.

308. *See id.* at 164–65. Dworkin does not mean this to be a comprehensive list.

the same understanding of a substantive value in diverse circumstances. An agent has integrity with respect to justice, for example, when he gives expression to a single understanding of the meaning of justice in all of his interactions with others.³⁰⁹

There is nothing in the concept of justice that points to consistency as the appropriate response to such a conflict over its meaning.³¹⁰ If there are competing concepts of justice, then, from the point of view of justice itself, it makes as much sense to alternate among them as consistently to choose one over the others. Nevertheless, our moral sensibilities, according to Dworkin, are offended by such inconsistent conduct. Since the offense cannot be to our sense of justice there must be another virtue at stake. This is "integrity."³¹¹ Having isolated this distinct virtue of integrity, Dworkin makes a strong claim for it: "This ability is an important part of our more general ability to treat others with respect, and it is therefore a prerequisite of civilization."³¹²

A political community has integrity when it applies its best understanding of justice, fairness and procedural due process in a consistent fashion, despite the presence of moral conflict within the community.³¹³ As a principle of legislation, integrity prohibits enactment of what Dworkin describes as "checkerboard" statutes, i.e., statutes in which conflicts about the meaning of a substantive value are resolved by assigning each definitional claim a discrete area of application.³¹⁴ A state would lack integrity if it were redistributive one week, but libertarian the next. Similarly it would lack integrity if it were to resolve conflicts over procedural due process by assigning juries in some cases but not in others, without some explanation of the different requirements of procedural fairness in each.

Adjudicative integrity requires the judge to act as the representative of a community that has the virtue of integrity. To do so requires that he understand the community as itself a single moral agent. Hence, the "deep personification" to which Dworkin refers.³¹⁵ The judge must articulate the principles of justice, fairness and due process that are operative in the

309. Dworkin is not clear about the relationship between the different substantive virtues. It is not clear, therefore, whether he believes that an agent may have integrity with respect to justice, yet lack integrity with respect to fairness.

310. The same is true of fairness, due process, and any other moral or political virtue.

311. To exercise integrity may, in fact, lead to less rather than more justice. The agent may come to learn that he was entirely wrong in his conception of justice. In that case, alternating among different conceptions of justice would have resulted in the accomplishment of more justice.

312. R. DWORKIN, *supra* note 150, at 166. This statement remains unexplained by Dworkin. One possible explanation would argue that integrity is required if we are to treat others as having a single, moral identity over time. It is, in this sense, a condition of personal identity. If behavior failed to arise out of a single source of identity, there would be no grounds for respecting it.

313. Dworkin's insistence that compromise not occur within the domain of principle recalls Bickel's insistence that political compromise within the Court never occur within the principles of decision themselves. See *supra* notes 50-54 and accompanying text.

314. R. Dworkin, *supra* note 150, at 178-79.

315. See *supra* text accompanying note 307.

practices of the community. He must tell a single story about the community, which displays its diverse practices as the work of a single actor who is putting in place a single moral point of view. This justification of past practice will, then, be juxtaposed to the facts of the current controversy. This is the reformist moment of all interpretation.³¹⁶ The result of this process is a statement of what the law is in this situation.

To interpret law as integrity, then, is to assert that through law the state expresses itself as a single moral agent. This personification of the state forces on us a recognition of a dualism in our moral vision.³¹⁷ On the one hand, the citizen can understand himself as an individual who on occasion contributes to a group decision, but remains morally responsible only for his own contribution. The community remains, from a moral point of view, simply an aggregate of individual actors each of whom can be held accountable only for his own actions.³¹⁸ On the other hand, we can understand a public act as the moral responsibility, in the first instance, of the community considered as a moral agent in its own right. When we take this point of view, individual moral responsibility arises out of membership in the community. This is the point of view we assume when we feel responsible for public actions against which we may have voted or, even more dramatically, for public actions that preceded our own membership in the state.³¹⁹

While neither of these moral points of view is more basic than the other, we are not free simply to choose between them in the different areas of our experience. Different areas of experience are dominated by one point of view or the other. By interpreting law as integrity, Dworkin tells us that the possibility of law requires the communitarian point of view. The possibility of this moral identification of the state as prior to, and larger than, the sum of its parts allows us to see the state as continuous through time, despite its changing membership. Integrity makes not only law, but political history, possible.³²⁰

Identification of the moral agency of the state, however, has profound implications for our understanding of the character of the individual citizen. The moral independence of the state is essentially connected to the moral dependence of the individual. Dworkin is describing the possibility of a deep identification of the individual with the state. We see national history as an expression of our own identity—think of the “founding fathers”—regardless of any actual, empirical connection to that history.³²¹

316. See *supra* notes 298–99 and accompanying text.

317. See R. DWORKIN, *supra* note 150, at 168–75.

318. This is generally the viewpoint of pluralist models of government. See Michelman, *supra* note 101, at 1507–13 (pluralist, private interest model cannot account for constitutionalism).

319. Dworkin provides as illustrations the attitude of many contemporary Germans toward Jews, or white Americans toward black Americans. See R. DWORKIN, *supra* note 150, at 172–73.

320. It may also make individual history possible. See *supra* note 312.

321. See Kahn, *supra* note 1, at 514–15 (on mythical concept of popular sovereignty).

We may, for example, be the children of recent immigrants. We hold ourselves responsible, and are held responsible, for the actions of the state, even when there is little we can do, or could have done, about them. Dworkin is claiming that this identification with the state exists wherever we find a system of law.³²²

When we take this attitude, the personified community is understood as an expression of individual political identity.³²³ Dworkin argues, accordingly, that this concept of integrity is central to our ability to see politics as a manifestation of self-government: "The ideal [of self-government] needs integrity . . . for a citizen cannot treat himself as the author of a collection of laws that are inconsistent in principle, nor can he see that collection as sponsored by any Rousseauian general will."³²⁴ The connection to Rousseau is deeper than this passage suggests.

Dworkin is simultaneously borrowing from and transforming classical notions of sovereignty. Like the sovereign, the state understood on the model of integrity is a single moral agent that is the source of law. The community as sovereign, however, is neither the people themselves understood as prior to the state, nor an entity—e.g., king or parliament—that is distinct from the people themselves. Rather Dworkin's sovereignty is *the people as the state*. The closest parallel in the history of political theory is Rousseau's concept of the "general will," which is the whole of the state but not the aggregate of individuals who constitute the state.³²⁵

To connect integrity to self-government is to begin to move to the next step of this inquiry: the connection between political legitimacy and the theory of community that Dworkin offers. Before that, however, I want to connect integrity more explicitly to the theory of interpretation discussed above.

Dworkin writes that "[l]aw as integrity is . . . both the product of and the inspiration for comprehensive interpretation of legal practice. The program it holds out to judges deciding hard cases is essentially, not just contingently, interpretive. . . ."³²⁶ The connection between interpretation and political integrity is not simply that integrity requires interpretation of social practices. Rather, both present a conceptual structure that dissolves the distinction between the subject and the community of which he is a part. Both are deeply participatory in the sense that individual iden-

322. *But see* Soper, *Dworkin's Domain*, 100 HARV. L. REV. 1166, 1182 (1987) ("'[L]aw as integrity' . . . fits only one particular society.").

323. The distinction between political and moral identity hardly exists for Dworkin. Political identity is, therefore, quite broadly understood. *See, e.g.*, R. DWORKIN, *supra* note 150, at 189-90.

324. *Id.* at 189.

325. *See* J. ROUSSEAU, *THE SOCIAL CONTRACT* 27-31 (C. Sherover trans. 1974). Just as Dworkin's theory of interpretation tracks Kant's transcendental deduction, his theory of integrity tracks Rousseau's theory of political freedom. On the general influence of Rousseau's thought on Kant, *see* E. CASSIRER, *Kant and Rousseau*, in ROUSSEAU KANT GOETHE (1963).

326. R. DWORKIN, *supra* note 150, at 226.

tity is found in and through the community. Both rest on the same idea of a community of discourse, of discursive particularity.

Community, Dworkin warns, does not represent a metaphysical entity, but a conceptual structure.³²⁷ It is, nevertheless, a conceptual structure that deeply challenges our ordinary metaphysics of individual identity. Both interpretation and political integrity suggest that community is not the aggregation of individual subjects whose existence precedes that of the community. Rather, community and individual are two perspectives on the same phenomenon: The particularistic discourse that creates meaning in the present by constantly writing, or rewriting, history.³²⁸

Dworkin uses the metaphor of a "chain novel" to illustrate the adjudicative function of integrity.³²⁹ This is a novel written in serial fashion by a number of writers, each of whom, after the first, inherits a work in progress. Despite the diversity of past authors, the present author must interpret the work as a single whole. His task is to construct an interpretation that gives the best unitary shape to the material with which he is presented and, in adding his own chapter, to give expression to that interpretation.

This literary metaphor has obvious connections to Bickel's idea of constitutional adjudication as a dialogue about the moral unity of the community.³³⁰ While discourse remains central, Dworkin expresses this through the image of the author. This is an image quite different from Bickel's teacher who is a participant in a national dialogue.³³¹ Dworkin's novelist may be talking about the discourse of others—those who preceded him in the chain—and he may be trying to direct the discourse of those who will come later in the chain, but he is primarily talking to himself.³³² At any given moment, the novel exists as a meaningful whole only in the imagination of the particular author whose turn it is to write. As with the novel, so with the community: At any given moment, the unity of the community is sustained only in the imaginative construction of integrity out of a set of social practices.

When we move from the metaphor to actual adjudication, we confront not just a sequence of historical authors, but also a diversity of contemporary authors. There are many judges—as well as other citizens—simultaneously working with the same serial text. Yet Dworkin says virtually nothing about the way in which they are to talk to one

327. *Id.* at 168.

328. It is this sense of two perspectives on a single phenomenon that I meant to capture in my earlier characterization of the new theorists' conception of the relationship between individual and community as that of a microcosm to a macrocosm. See *supra* text accompanying note 15.

329. See R. DWORKIN, *supra* note 150, at 228–32.

330. See *supra* Part I, Section D.

331. See *supra* note 64 and accompanying text.

332. For a similar reflection on the singular character of discourse in Dworkin's account, see Michelman, *Traces*, *supra* note 120, at 76.

another in order to generate a single meaning of the history they receive and create. Judges may be writing many novels in their isolated chambers. There may be as many communities as there are stories that can be told with integrity. Indeed, there must be, for there is no way to get to the "community-in-itself" as an "objective" source of political legitimacy. The community does not exist apart from the interpretive judgment that gives meaning to community by giving integrity to its history. Community exists only in the imagination of the interpreter, in the dialogue he holds with himself.³³³

3. *Legitimacy and Community*

The legitimacy of the state's use of coercion to enforce law is dependent upon the moral claim made by law: "Do citizens have genuine moral obligations just in virtue of law?"³³⁴ If there is no moral obligation to obey law, then there is no moral ground for enforcing compliance. Dworkin argues that the moral ground of law must be found in the "obligations of community." For a third time, community is at the center of Dworkin's theory.

Obligations of community are responsibilities that arise from the individual's understanding of himself as maintaining a "role" within a social order.³³⁵ Such obligations are found, for example, among family members, friends and colleagues. In these relationships, moral obligation arises out of a complex history of association. Consent may be an element in some of these relationships—for example in friendship, but not in family—but it is neither a necessary nor a sufficient condition of obligations of community. Neither do such obligations arise out of abstract principles of justice. Obligations of family and friendship are not abstract and uniform. Rather, they depend upon actual understandings of what is at stake within a particular family or friendship.

Participation in such a relationship, membership in such a community, is simultaneously descriptive and normative. The conundrum of how an "ought" can arise from an "is" arises, therefore, from a failure of moral self-perception. Much of what we believe we ought to do, according to Dworkin, arises from the factual circumstances in which we find ourselves.³³⁶ Moral obligation runs to members of one's own family, for example, simply because of what it means to be a member of that family. As a social practice, family is simultaneously an object and product of inter-

333. The community's legitimacy will be a function of the interpreter's own ability to find principles of justice, fairness and due process in the history of the community that he writes. Thus, Dworkin completely breaks with the model of representation as the paradigm for an explanation of legitimacy: "The new approach . . . relocates the problem of legitimacy and so hopes to change the character of the argument." R. DWORKIN, *supra* note 150, at 207.

334. *Id.* at 191.

335. *Id.* at 195-96.

336. *See id.* at 196.

pretation. Interpretation grounds its object in a normative context of purpose. Familial obligation may, of course, be the subject of intense debate, even within a particular family.³³⁷ Nevertheless, each member has an obligation to act consistently on the basis of his own best understanding of what it means to be a member of the family. Dworkin emphasizes the coincidence of "is" and "ought" in these communal associations by describing the moral obligation that they generate as a "natural duty."³³⁸

Dworkin's jurisprudential strategy, then, is to place the question of law's legitimacy within a context of obligation that is similarly "natural" without being universal—this is not an abstract theory of natural law—and particularistic without being contractual—this is not a theory of consent. He argues that at least certain political communities support obligations of role.

To support this argument, he must first specify the qualities of a community that generate a "natural duty" or "obligation of role." Second, he must demonstrate that a political community can possess those characteristics. Finally, to complete his project on the legitimacy of law, he must demonstrate that the kind of political community that possesses those characteristics is one that interprets law as integrity: "[A] political society that accepts integrity as a political virtue thereby becomes a special form of community, special in a way that promotes its moral authority to assume and deploy a monopoly of coercive force."³³⁹ Dworkin argues each of these propositions, but the total argument is hardly a success.

First, he argues that obligations of role can arise only in communities that meet four conditions. The community must demonstrate a concern that (1) is special to members of that community, (2) runs "directly from each member to each other member," (3) reaches to the general well-being of each member, and (4) is egalitarian.³⁴⁰ A community that meets these conditions is referred to by Dworkin as a "true community."³⁴¹

Second, he argues that a political community that accepts what he calls the "model of principle" meets these four conditions. This is a community in which political life is "a theater of debate about which principles the community should adopt as a system, which view it should take of justice, fairness, and due process. . . ."³⁴² This is a community characterized by what I have called discursive particularity.³⁴³ Finally, he argues that this community of principle is one that understands law as integrity: "A com-

337. Such interpretive conflict may, but does not necessarily, strain the bounds of obligation. Not every conflict is so significant as to undermine the possibility of reciprocal obligation. *See id.* at 204–05 (example of sexism within family).

338. *Id.* at 198. *See generally* Dworkin, *Natural Law Revisited*, 34 U. FLA. L. REV. 165 (1982).

339. R. DWORKIN, *supra* note 150, at 188.

340. *Id.* at 199–200.

341. *Id.* at 201.

342. *Id.* at 211.

343. *See supra* at text accompanying note 11.

munity of principle accepts integrity."³⁴⁴ The argument can then be run backwards: To interpret law as integrity is to create a community of principle within which legal obligations will coincide with moral obligations of role.

The weakness of this argument begins with Dworkin's specification of the conditions a community must satisfy to generate obligations of role. Dworkin argues that a particular conception of justice, focusing on an equal concern for the well-being of each individual, is such a condition.³⁴⁵ This claim, however, remains unfounded. Worse, the argument he offers threatens to trivialize the theory of interpretation and community that he has built.

The theory of legitimacy that one would expect from Dworkin is one which would focus on the collapse of the distinction between the individual and community. This collapse is central to his account of both interpretation and political integrity. Dworkin suggests just such a theory of legitimacy when he writes that "[p]olitical obligation is . . . not just a matter of obeying the discrete political decisions of the community . . . [but rather of] fidelity to a scheme of principle each citizen has a responsibility to identify, ultimately for himself, as his community's scheme."³⁴⁶ Because the community does not exist apart from the individual's imaginative construction of it as a meaningful, normative entity, the question of legitimacy does not appear as a question of obligation to a social order that confronts the citizen from outside of himself. Imagination is simultaneously the locus of community and the source of obligations of role. Through imagination the citizen achieves a self-understanding that is already deeply embedded in an historical web of roles which simultaneously constitute the community. One of the strengths of Dworkin's account is the continuity it suggests between the functions of the judge and the imaginative community construction that each citizen pursues in reaching a self-understanding.³⁴⁷

This theory of legitimacy would argue that by acting as a member of the state, the individual gives expression to his own identity. The demands of law appear as moral obligations because in imaginatively constructing the political community, the individual has already brought into play his own understanding of the values of justice and fairness. There can be no

344. R. DWORKIN, *supra* note 150, at 214.

345. I focus on this fourth condition—equality—because it is that with which Dworkin is most concerned and is the only substantive condition among the four. One may legitimately question, however, the ground—and meaning—of his second and third conditions as well: direct interpersonal concern with the general well-being of each member. These conditions suggest a concern with something like Kant's categorical imperative that each person be treated as an end, rather than a means, but Dworkin fails to explain the link between such a moral rule and obligations of role within a community.

346. *Id.* at 190.

347. Cf. Ackerman, *supra* notes 92–99 and accompanying text (legitimacy depends upon self-understanding).

separate moment of moral evaluation of associational role, because there is no way to get beyond the interpretative construction of community. This is the idea behind Dworkin's statement that integrity "fuses citizens' moral and political lives" ³⁴⁸

Because obligations of legal role are constructed in part out of beliefs about justice and fairness, legal obligations do not confront the subject as an arbitrary set of demands. We do not first make our selves as moral subjects and then come to politics, possessing a moral identity against which to measure the demands of law. Moral and political obligation, just as the individual and the state, are products of interpretation and thus rest upon the conceptual structure of community which makes interpretation possible.

If this is a correct reading of the theory of legitimacy implicit in Dworkin's account of interpretation and community—and at times rather explicitly suggested by Dworkin himself—then Dworkin's implicit theory undermines his explicit claims about liberal egalitarianism. ³⁴⁹ Dworkin's account of interpretation and community provides a theory of legitimacy from an "internal" perspective. ³⁵⁰ It explains why the law appears legitimate to the member of the community. It does not purport to explain why, or if, the law is legitimate from an "external" perspective. Ultimately, however, Dworkin is not satisfied with the internal account. He tries to press the theory further in order to provide an external account of legitimacy. But to do that he must justify the authority of law in a way that his theory, built out of an internal account, simply cannot support.

There is nothing in the implicit theory of legitimacy that suggests a moral and political life of a certain character. Associative communities that support obligations of role are surely not noted, in general, for their commitment to individual equality. Obligations of role traditionally have more to do with understanding one's place in a social hierarchy—"my station and its duties" ³⁵¹—than with a commitment to individual equality. Nor is it sufficient to contend that such a hierarchy reflects "the group's assumption that its roles and rules are equally in the interest of all, that no one's life is more important than anyone else's." ³⁵² The first part of this sentence—equal interest—will be asserted by every community; the second part—equal value—will likely be asserted only by some select group of communities that satisfy Dworkin's idea of equality.

This difference between an internal and external perspective is clear in Dworkin's own example of the traditional family, in which Dworkin im-

348. R. DWORKIN, *supra* note 150, at 189.

349. By "liberal egalitarianism" I mean to employ a short-hand expression for the conditions of a "true community." See *supra* note 338 and accompanying text. I use this expression because of the criteria's concern with individual self-fulfillment and equality.

350. R. DWORKIN, *supra* note 150, at 14.

351. See F.H. BRADLEY, *ETHICAL STUDIES* 173 (2d ed. 1927).

352. R. DWORKIN, *supra* note 150, at 200-01.

mediately discovers a conflict between justice and obligations of role.³⁵³ Yet Dworkin contends that only a community that supports an interpretation of justice that accepts a particular view of individual equality can sustain the identity of individual and community that is the ground of legitimacy. To ground this claim Dworkin would need a theory of justice that provides an external measure of community and of obligations of role. Yet, Dworkin has already argued that "justice" is simply another interpretive concept, grounded in the same account of community as law.

By pushing on to an "external" account, Dworkin risks trivializing his own account of the role of community in interpretation. The concept of community that he describes is not contingent upon the emergence of the liberal idea of individual equality. Rather, it marks a deep conceptual structure that makes human history possible.³⁵⁴ History as an imaginative construction is dependent upon just those features of a community that Dworkin identifies in setting forth the conditions of interpretation. Community is not a product of recent history, but rather the transcendental condition of history.³⁵⁵

Finally, and most important, Dworkin's argument for the legitimacy of only one particular kind of political community assumes that there is a perspective on justice that is separate from the perspective of interpretation within a community.³⁵⁶ Dworkin's own chapter in the chain novel may embrace this particular form of political community, but he has provided neither a plot that compels this conclusion, nor an answer to the question of why each of our chapters must embrace this conclusion. In singling out this community, Dworkin seems to suggest the possibility of a trans-communal perspective on community, but he has already committed himself to the view that there is no escape from interpretation and so none from community.

This opening to an Archimedian point is again implicit in the attitude Dworkin takes toward his observation that obligations within the community are special to members of that community. Communities are discrete; their identity is formed, in part, by opposition to nonmembers. The meaning of the community is always bound up with understanding this line defining appropriate behavior within and without the community.³⁵⁷

353. See *id.* at 204-05.

354. See *supra* notes 301-03 and accompanying text. The problems with the explicit theory of legitimacy that is based upon the idea of a "true community" are clear in the alternatives Dworkin suggests. A "true community" must be committed to individual equality. The alternative to a true community is either a "bare community" or a "rule book community." R. DWORKIN, *supra* note 150, at 208-15. But none of these characterize the communities that we actually find prior to the modern era. Where is the Church? Where is feudal society or the polis of ancient Greece?

355. See *supra* note 301 (on Kant's transcendental analytic).

356. See Fish, *Dennis Martinez and the Uses of Theory*, 96 YALE L.J. 1773, 1788 (1987) ("To think *within* a practice is to have one's very perception and sense of possible and appropriate action issue 'naturally'—without further reflection—from one's position as a deeply situated agent.").

357. See *e.g.*, Hirsch, *The Threnody of Liberalism: Constitutional Liberty and the Renewal of*

Dworkin responds that justice provides a moral standard against which to measure the community's attitude toward outsiders.³⁵⁸ But from where does this idea of justice come? Justice, Dworkin had argued, is itself an interpretive concept.³⁵⁹ If so, then it too arises out of the imaginative bringing of meaning to social practice, which is the construction of community. There is, by this view, no abstract definition of justice by which to measure a community's practices either within or without its boundaries. There are only competing communities of meaning: "Our lives are rich because they are complex in the layers and character of the communities we inhabit."³⁶⁰ There is no neutral perspective from which to evaluate the whole. If this is true, and it does seem to follow from Dworkin's theory of interpretation, then Dworkin has not told us why the community we call the state should be allowed to use coercion to enforce its particular concept of justice.³⁶¹

4. *The Transcendental Community and the Just State*

In the end, Dworkin's account of the transcendental conditions of interpretation is stronger than his argument for a liberal concept of justice. Because we generate our history through the imaginative construction of meaning, we find ourselves always already in communities which entail obligations of role. This participation, which is based neither on will nor reason alone, is the ground of legitimacy. This is why we accept the community's use of force both within the community and against other communities. Indeed, Dworkin's account would be stronger had he thought to link the internal coercion sanctioned by law with the external coercion expressed in war.³⁶² Force, in both cases, is an expression of our own identity. This is why Dworkin finds himself speaking the language of Rousseau: Like Rousseau, he suggests that we can force people to be free.³⁶³ Legitimacy, by this view, precedes justice, just as the conditions of interpretation precede any particular community.

This answer to the problem of legitimacy is hardly a ground for opti-

Community, 14 POL. THEORY 423, 424-25 (1986) (community requires policing of "borders" and protection of "frontier"); Young, *Polity and Group Difference: A Critique of the Ideal of Universal Citizenship*, 99 ETHICS 250, 257 (1989) ("People necessarily and properly consider public issues in terms influenced by their situated experience and perception of social reactions.").

358. R. DWORKIN, *supra* note 150, at 202.

359. *Id.* at 73-76.

360. *Id.* at 215.

361. What Dworkin needs is not an account of how history is possible, which he offers, but of how the conditions that make history possible lead to a certain kind of historical outcome—that is, an account of how the liberal idea of justice is the end of history, perhaps because it is the full actualization of the conditions of history. This theory would argue that individual equality is a function of the self-generation of history. Here Dworkin's theory would follow Hegel rather than Rousseau.

362. For a contemporary work that makes such a linkage of internal and external coercion and that understands both as a working out of the relationship between individual identity and community, see E. SCARRY, *THE BODY IN PAIN* (1985).

363. J. ROUSSEAU, *THE SOCIAL CONTRACT* 31 (C. Sherover trans. 1974).

mism. To the degree that we are not optimistic, however, we expose the limits of the transcendental account of interpretation as the ground of legitimacy. Our felt ability to measure the community's justice makes us strangers to the community once again.³⁶⁴ Each of us is simultaneously writing the novel and criticizing the novel we write. Dworkin appeals to that critical ability but has exhausted his explanatory apparatus before he reaches it. Or, even worse, the same explanatory apparatus can be applied to it, in which case the critique becomes simply the expression of yet another interpretation. Interpretations multiply, with no ground for hierarchically ordering them. The implications of Dworkin's theory, therefore, lead quickly to the same dilemma that faced Cover: Authority and community split apart as multiple possibilities for interpretation emerge. Dworkin suppresses this potential anarchy by appealing to an idea of a "true community," yet the authority of that community remains unsupported.³⁶⁵

The failure of Dworkin's philosophical project of linking community and interpretation to an idea of justice as individual equality should not blind us to the success of his more narrow jurisprudential project. Dworkin offers a powerful account of how law appears from the perspective of those engaged in legal practice, particularly the judge and the lawyers who argue before the judge. This is the perspective of what I have elsewhere called "maintenance":³⁶⁶ Obligations of role are essentially tied to the maintenance of an historical social construction—in this case, the state. Dworkin oversteps the bounds of his own theory when he moves from an internal to an external perspective, when he tries to derive from a theory of the interpretive community an abstract measure of the legitimacy of authority. To achieve that, he would need to move from the perspective of maintenance to that of "criticism." He would need to describe the character of a community which is wholly critical in its attitude toward all claims of authority. That community would make a decisive break with the past, always constructing for itself the character of its own freedom. In the conclusion, I briefly describe one such community: the Platonic community of philosophical discourse.

That Dworkin stumbles here simply demonstrates again what has been evident in the analysis of each of the communitarians: A theory of community cannot provide an adequate ground of authority. Instead of speak-

364. It may be that we understand ourselves as members of a world community in the discourse on justice. But that community is not marked by special obligations to members, and, therefore, the concept of community becomes trivial.

365. Dworkin also suppresses this potential for anarchy among interpretations and interpretive communities by substituting a mythical "Hercules" for actual judges and citizens. See R. DWORKIN, *supra* note 150, at 239. The device of Hercules permits Dworkin to suppress differences by appealing to an idea of "exhaustiveness," by which all other competing interpretations can be dismissed as "partial."

366. See Kahn, *supra* note 1, at 451 n.9.

ing directly of authority, Dworkin speaks of legitimacy, but the point is the same. The argument for legitimacy is designed to provide the grounds for the authority of the legal rules of this community rather than other competing communities. This, however, is precisely what communitarian theories cannot provide.

While Dworkin provides the most compelling and analytically complete account of community, he comes no closer to providing an adequate account of authority. That he too feels the need to provide such an account again demonstrates the limits of the communitarians' approach to law. Each of the new communitarians attempts to perceive—and must attempt to justify—the authority of law through a theory of discursive particularity or historicized reason. The most such an account can provide, however, is an account of the appearance of authority within a particular community. It cannot provide an argument for the authority of law to anyone outside of that community or even to one who takes himself out of the community by assuming a critical attitude toward its claims. That each of us can take this attitude and ask the question of law's justice reveals again the need for Dworkin's Archimedean point or, as I will argue in the conclusion, for an understanding of a community of critical inquiry that is not bound to the state.

CONCLUSION: COMMUNITY AND AUTHORITY

I hope to have demonstrated three points in this Article. First, the community of discourse provides a conceptual model of order common to diverse efforts in contemporary constitutional theory. Second, the idea of discursive particularity, which is at the heart of this model, is powerfully attractive because of its synthetic features. It offers a synthesis of reason and will and a synthesis of individual and community. Third, despite the enormous theoretical attractiveness of this model, none of the contemporary theorists surveyed has managed successfully to use it to support a political structure of authority. This should make us skeptical, in general, of the usefulness of the communitarian model in constitutional theory. The object of that theory is, after all, the structure of authority in the state.

Despite the disjunction between community and authority, I do not think it surprising to find constitutional theory moving in the direction of community. For two hundred years, constitutional theory has been bound up with the question of political legitimacy. Legitimacy has not meant simply a political system that makes morally compelling demands. Rather, constitutional theory has aspired to achieve an understanding of the political order under which the regulatory demands of the community—a significant aspect of which are law—do not appear as external, coercive commands, but as consistent with, and even as an expression of, individual

autonomy. The search has been for a conception of the political order that could encompass in a single whole both the community and the individual, the state and the citizen. The goal of constitutional theory has been a conception of politics that could portray the citizen's life under public law as simultaneously the individual's giving of law to himself.³⁶⁷

This problem of reconciling the individual and the state has generally resulted in appeals to two different models: one based on reason and political science; the other based on will and popular consent. Constitutional order has been understood as either the expression of a science with which no "rational" individual could disagree or as the objective embodiment of an act of consent by which the individual had bound himself. The entire history of constitutional theory can be seen as a cycling between these two concepts.³⁶⁸ The modern period opens with Alexander Bickel's attempt to achieve a new synthesis of reason and will by explaining the consensual basis of the Supreme Court's rule of reason. For the reasons I explain above, this effort fails. Instead of achieving a synthesis, Bickel's theory fails to provide either reason or will with sufficient grounds to respect the other.

The new communitarians emerge out of this cyclical history of theory. They also seek to achieve a synthesis of the individual and the public order, but they seek to do so by overcoming the dichotomy of reason and will. The power of the idea of the community of discourse to resolve both of these dichotomies—that of reason and will and that of citizen and community—has been evident at least since Plato wrote his dialogues. Through the very form of expression employed, the dialogue, Plato portrayed the goal of philosophy as the simultaneous creation of communal and individual identity. The dialogue creates individual identity through mutual creation of a discursive community. Through the discursive inquiry a new community emerges, the citizens of which are those who speak to each other. The dialogue is therefore simultaneously about the moral life of the individual and of the group. The constitutive function of the dialogue has long served as a model of positive freedom.

For this reason, Plato's greatest dialogue, *The Republic*, introduces the inquiry into justice in the city as simply a metaphorical device for inquiring into justice in the individual. Ultimately, the two inquiries are one and the same because the well-ordered, or just, soul only forms itself in the community of dialogue which constitutes a just community. Philosophy for Plato is not a body of knowledge, but a commitment to dialogue. Plato therefore exists only through Socrates, who can be found nowhere but in the community of discourse that is re-presented in the dialogue.

367. See Michelman, *supra* note 101, at 1500–03 (American constitutionalism seeks unity of government by the people and government by law).

368. See *supra* notes 1–3 and accompanying text.

Plato has no substantive body of knowledge to transfer; rather, he has only the methodological insight into the character of positive freedom.

While the platonic dialogue is about the politics of positive freedom and the creation of community, it is not about the state as a structure of historical authority which confronts us with the power of coercion through law. Or, to the degree that it does address the state, it presents a critique of state authority. The community of discourse that emerges in the platonic dialogue is always an alternative to the state. The legitimate community of dialogue stands always against the coercive community of state authority. The character of the challenge that this alternative community poses to the state is never out of mind, because of the fate of Socrates. Socrates is executed by a democratic Athens because of his subversive activity, which consists of nothing other than the activity of engaging others in dialogue.

Community and authority split apart in the platonic dialogue. This incompatibility of the community of discourse and the authority of the state is the great lesson of Plato's Socrates. The choice for positive freedom is a rejection of authority. This remains a lesson, however, that most contemporary theorists have yet to learn. While they see the need for the theory of a legitimate political order to work itself pure through a theory of the discursive community, they have not accepted the possibility that this communitarian model of a "legitimate" public order is not one that can support the historical state. As constitutional theorists, they remain bound to the Constitution, despite the subversive character of their own theories.

Having accused contemporary constitutional theorists of failing to recognize the fault line that runs between the constitutional and theoretical aspects of their enterprise, I want to conclude by reflecting on the reasons for this divide. Even if this tension between theory and authority is what Plato hopes to teach by asking us to engage in a dialogue which promises us positive freedom, we can still ask if it is a necessary lesson. What is it about the character of the dialogue, of discursive particularity, that precludes a conjunction of genuine community and legal authority? Here, I can offer only my own tentative speculations, backed up by the failure of contemporary theory to demonstrate how the link between authority and community is to be made successfully.

Fundamentally, the problem is one of taking positive freedom seriously. If we create ourselves in and through the dialogue, then we cannot know in advance the conclusion to which the dialogue will lead. If the community of discourse is to be the locus of positive freedom, then it cannot be limited in advance. This is not to say that there are no internal limits; not everything can be said at every moment. But these are limits that inhere in the language and history within which we find ourselves. To use Dworkin's metaphor, they are the limits of the previous chapters. These limits never preclude a surprising turn of events in the next chapter.

Without external political constraints on the discourse, we cannot know

whether the product of the dialogue will be an affirmation or denial, a unifying or a splintering, of the inherited political order. To be free in that dialogue, we must deny the state any privileged place. Authority becomes one voice, but one with no greater privilege than any other. As many states have learned, there may be no greater danger than unconstrained discourse.

Robert Cover saw this most clearly and was most willing to accept its implications.³⁶⁹ Each of the other theorists seeks somehow to constrain the discourse or to privilege one particular discourse as a means of supporting the authority of law. That is exactly what must be done, if the authority of the state is to be supported. Yet those constraints cannot rest on a communitarian foundation. Those constraints may come from a theory of justice or from a privileging of one political institution's discourse over others. Any such choice, however, must be supported. I surely would not suggest that no such support can be offered. Rather, I want to suggest that the support must come from some source other than the ideas of community, interpretation, or discursive particularity.

Law is always a structure of authority and constitutional law is a structure of ultimate authority. Law may tolerate much discussion, but it must also locate the authority to decide, and its decisions are binding. Yet those binding decisions do not enter into a real community of discourse with any privileged place. Truth, not authority, is the measure of that discourse. Truth, however, is the end, not the beginning of the discourse.

Another way to explain this incomensurability of constitutional law and the dialogical community is to focus on the conflicting attitudes toward time that characterize each. The authoritative character of the Constitution points always to the past.³⁷⁰ The Constitution represents the historical continuity of the state and thus the authority of the past over the present. Just for this reason, American constitutional law has always had a backward-looking cast, focusing on the Founding and precedent.³⁷¹ We expect the authority of law to be grounded in a discourse about past political acts. This is in stark contrast with the true community of discourse. That community exists only in the present. Its present character is captured in its creative function: The community of discourse represents the possibility of self-creation in every encounter among those willing truly to engage in serious discourse about moral values. Because the community of discourse cannot privilege the past, it cannot promise respect to authority. The possibility of making ourselves anew, of rejecting the authority of the past, hangs over every true, discursive engagement.

369. See *supra* Part III, Section B.

370. On this point, I agree with Dworkin's elaboration of the concept of law. See *supra* Part III, Section C.

371. See Michelman, *supra* note 101, at 1496 (on "authoritarian" jurisprudence as backward-looking).

Yet law represents authority. Those responsible for enforcing the law understand themselves as standing apart from the rest of the community by virtue of their authority. Their authority derives in part from their unique responsibilities for maintaining the historical identity of the state. For them, the discourse has stopped. At least it has stopped to the degree that there are limits on what can and cannot be said and, perhaps even more important, on who can and cannot speak. Not everything is "up for grabs," not every possibility remains open for those responsible for the law. If this is true, there must be a splitting apart of the theory of law from the practitioners of law. Theory must go on to seek the resolution of antinomies within which law must live. Law exercises authority, even if it cannot give a theoretically complete account of the legitimacy of that authority.

To seek to found a theory of the legitimacy of constitutional law in the community of dialogue may therefore be wholly reasonable, if not inevitable, from the perspective of the development of theory. But it may also be wholly unreasonable from the perspective of law. From the latter perspective, this may appear as an effort to found law in the destruction of the conditions of law. Authority and discourse are both powerfully attractive ideas, but that does not make them reconcilable. If they are not, then perhaps we confront a genuine tragedy. Theory will inevitably move beyond practice, but no man lives wholly in theory. Even Socrates had to suffer the deeds of authority. Those who seek to find a harmony of discourse and authority might do well to recognize the Socratic risks that accompany genuine discourse.