

Judicial Review and Democratic Legitimacy

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A legitimate foundation for judicial review has been the Holy Grail of American constitutional theory. Every constitutional law class begins with the search and ends with the instructor's indoctrination of the students into his or her own favorite among the theoretical contenders. That might be Dworkin's view of law as integrity, Ely's view of courts as the policemen of the democratic process, Bickel's view of the priority of principle over policy, Ackerman's view of a two-track democracy, or Bork's view of originalism. But the legitimacy of judicial review in a democratic polity cannot be established by appeals to theory.

About such theories, we can say two things. First, each provides a description of some element of the judicial practice. Second, the mistake of each is to believe that because it is in part descriptive, it offers the key to the entire puzzle. There is no such key. The legitimacy of judicial review, if it is to be found at all, must be located in its success as a practice. This is good news for judges, but bad news for the law professors.

Judicial review is at the heart of the American practice of constitutional self-government. It occupies that position because it has been a remarkably plastic institution, capable of absorbing many different theories. My ambition in this talk is to illustrate this theoretical diversity and to show that it can be understood from the broader perspective of democratic constitutionalism.

I. THE FOUNDING MYTH : POPULAR CONSENT TO POLITICAL SCIENCE

I don't think it hard to imagine the Framers' understanding of the task of writing the Constitution. They considered themselves to be men of the Enlightenment, and the task of creating a new constitution appeared to them to be a problem of applied political science. Madison prepared for the Philadelphia convention by reading the classics on the history of republics and contemporary political and moral theory. Today, constitutional framers are more likely to read Robert Dahl on the varieties of democratic organization or John Rawls on justice. Nevertheless, the impulse is the same : to understand the ideal elements of self-government, to learn from historical experience, and then to translate those theoretical and historical insights into a set of functioning institutions.

The dilemma that confronts the political scientist or law professor who claims to possess this expert knowledge remains the same as that which confronted the Founders : what is the place of reason within a democratic order that derives its legitimacy from the consent of the governed? Merely possessing a science of politics does not entitle anyone to rule. Conversely, the fact that a government has received the consent of the governed hardly means that it is a rational system of governance.

For the American Framers, the resolution of this dilemma was to conceive of the ratification process as itself an exercise in scientific, self-government. On the opening page of the Federalist Papers, we find the question starkly posed : “whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force.” The people are called upon to deliberate, that is to exercise reason, and to choose, that is to exercise will on the basis of their insights into the science of self-government. The Framers must not only construct a system of government based on science, but they must also have the political skills to convince the people to adopt this structure as their own.

The American myth of the founding, a myth established already by the time of Chief Justice Marshall’s decision in *Marbury v. Madison*¹ in 1803, asserts the successful linkage of reason and will through ratification. The constitution is a product of science, and the constitution is a product of self-government. It is “state of the art” republican constitutionalism.

We see this new science of self-government reflected not just in the conception of ratification, but also in the constitutional product itself. This was not a constitution of rights, but a constitution of structure. The Framers believed that popular government could only be well-ordered if it worked within an elaborate structure of indirect representation and separation of powers. The new science of politics was largely a science of representation. Their ambition was to design a structure of representation that would suppress the corrupting effects of passion — both on the voters and their representatives — and thus create a government of reason. Only if popular government could also be enlightened government, could the republican project be successful.

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

At every level, from their abstract theory of government to the details of its on-going operation, the Framers hoped for a synthesis of political science and popular consent. Of course, even within their own terms they were not fully successful : they offered no scientific, but only a political, defense of the Constitution's protection of slavery. They justified legal recognition of slavery as a necessary political compromise rather than as an expression of a natural inequality. Apart from that, however, they believed they had largely accomplished their task.

The American practice of judicial review has its origin in this optimistic belief in the synthesis of reason and will. Because the constitution expressed popular consent to the product of scientific reasoning, it was possible to believe that judicial application of the principles of political science was a legitimate expression of the will of the people. Believing in this synthesis, they did not confront a conflict between the claims for reason and those for will.

This is just the pattern of argument that one finds in *Marbury v. Madison*, which offers the first articulate expression of the power of judicial review. Chief Justice Marshall appeals directly to the principles of political science, explaining the necessary character of written constitutions, the priority of constitutional principles over statutes, and the logic of the judicial role. For him, these principles are a part of the science of republican government; they do not depend upon the Founders' intent or past legal precedents. Nevertheless, Marshall explains that these scientific principles are confirmed, although not created, by the text that has been ratified by the people.

A generation later, Justice Story, the first law professor at Harvard, praises Chief Justice Marshall's opinions for having a logical character similar to that of mathematical proof. Story had their internal ambition just right : Marshall understood himself to stand in the same political science tradition as the Framers themselves. He continued the task of crafting a constitution on the basis of the insights of political science.

Today, all of this strikes us as quite odd, because we have for the most part lost the beliefs that political science is a "real science," that reason can resolve our political controversies, or that judges are really all that reasonable. Nevertheless, we see a reflection of these views in much of the contemporary discussion of human rights. For the Framers, the science of politics was fundamentally concerned with the structures of representation, i.e., with the deployments of power, rather than with the nature of rights. We are less confident about structure, but more confident about rights. Judges, many believe, should be experts in the new science of human rights, and this should inform all of their work.

Human rights are thought to be universal in the same way that the Framers believed that republican political science was universal. For many constitutional scholars, there is an assumption that the Constitution must establish as law whatever the science of rights demonstrates in theory. Thus, a generation ago, scholars sought to show the constitutional relevance of John Rawls. Today, Ronald Dworkin argues that the constitution incorporates a liberal theory of rights, while Richard Epstein argues for the classical liberalism of property rights. We constantly transfer the debates of political theory to the arena of constitutional interpretation.

In the American context, all of these scholarly efforts suffer from the same problem. Without the Founders' belief that political science has received popular legitimation, even the most just theory of rights confronts a problem of legitimacy. This is, by the way, the same democracy deficit that the European Union confronts, as it too seeks to deploy a kind of scientific, legal rationality.

II. THE RISE OF ORIGINALISM

One pole of American constitutional debate always reflects an enthusiasm for deliberation, reason, and political science. The other pole always reflects a similar enthusiasm for consent as the sole ground of legitimate government. Only the founding generation had the luxury of living within a felt synthesis of the two poles. The next generation had already lost that faith. That generation was the first to confront a problem that is a structural feature of all constitutional government : how can the expression of consent through ratification extend to future generations? If the ground of legitimacy is consent, doesn't every generation have an equal right to express or withdraw its consent?

Nor could the second generation easily turn to the second element of the synthesis, reason, as the ground of constitutional legitimacy. There too they confronted a problem with which we are very familiar. It quickly turned out that there was more than one science of republican government. There were deep and fundamental disagreements over the first principles of this new constitutional government. Was the Constitution properly understood as a sort of treaty arrangement among states that remained fundamentally sovereign, or did it establish a new sovereign to which the states were subordinate? On this issue turned the fate of nation. No appeal to political science could resolve it.

American historians continue to argue about the nature of the founding. What is important in this context is not ascertaining the correct answer, but seeing that the magnitude of this disagreement undermined any claim that the

Court could put forward to continue the Founders' project of governance through application of the principles of political science. Such claims were about as convincing then as would be a contemporary claim by the courts to resolve the difference between Rawls and Nozick, or Dworkin and Epstein, on the grounds of science alone.

At the same time that political science was discrediting itself through disagreement, and consent was undermined by the passage of time, a new ground for judicial review was emerging: maintenance of original intent. To understand this, one has to consider the appearance of political order to the post-founding generation. The era of constitutional construction was over. This generation inherited the constitutional order from their predecessors. If constitutional governance was to survive the generational shift, the new generation had to reconceive of the constitutional project and of their own relationship to the state in a way that made maintenance of an inherited constitution an expression of their own self-identity.

Exactly this need gave birth to the American doctrine of originalism. The second generation understood itself as children of the Founding Fathers — only now do they become “Fathers” rather than Framers or Founders — and they understood their unique moral and political mission to be maintenance of that which was bequeathed to them by the Fathers. The problem of constitutionalism was no longer that of creation guided by political science; rather, it was maintenance of an established order.

The great debates of the antebellum period are not over the need for a childlike devotion to the Fathers, but rather family quarrels over who could legitimately claim to be the good son. Lincoln campaigned on a platform of putting slavery back on the course set by the Fathers, but so did Douglas in his claim that the issue should be resolved under the principle of popular sovereignty. The Confederacy, no less than the Union, believed that they were preserving the work of the Fathers. Both sides worshiped the same ancestors.

We see the clearest example of the rise and power of originalism in the most notorious of all Supreme Court decisions, *Dred Scott*.² If we step back from the repellant holding of the case — that free blacks could not be citizens of the United States — we see an amazing assertion of judicial hubris. The Court believed that it could apply law to settle the most controversial issues confronting the country. What gave it the confidence to believe that the losing side would

2. *Dred Scott v. Sanford*, 19 How. 393 (1857).

accept the legitimacy of a judicial pronouncement? The answer is the political psychology of originalism.

The Court believed that by making contact with the original intent all sides to the dispute would recognize themselves as members of a single intergenerational community with an established identity.

It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws. The decision of that question belonged to the political or law-making power; to those who formed the sovereignty and framed the Constitution. The duty of the court is, to interpret the instrument they have framed [...] according to its true intent and meaning when it was adopted.

Understanding and applying the principles of republican political science no longer falls within the judicial role. Neither can the Court be “the mere reflex of the popular opinion or passion of the day,” even when that popular opinion purports to be more just than the Constitutional text. Maintenance, not reform and certainly not creation, is the role of the Court.

Setting forth the intent of the Fathers could, the Court thought, bring peace and unity to a divided nation. It could do so only on two conditions. First, the citizens too had to think of themselves as children of the Fathers, whose political identity is expressed by maintenance of the inherited order. Citizens had to be willing to subordinate the interests of justice to their common interest in maintaining an intertemporal, communal self-identity. Second, citizens had to believe the Court’s, rather than Lincoln’s, claim to express the Fathers’ intent. The huge sacrifice of the War that followed showed the Court to be half right. This was a familial conflict among the sons competing for recognition as the legitimate heirs of the Fathers, but the majority of these “children” did not believe the Court. Instead, they believed that Lincoln expressed the intent of the Fathers when, at Gettysburg, he invoked the Fathers’ belief in equality.

Despite its association with Dred Scott, originalism remains one of our most powerful modes of constitutional thought. At times, its contemporary supporters see it as a way of constraining judicial activism and thus shifting more power to the representative branches. On this view, anything about which we can say that the Framers had no identifiable intent remains within the power of the political branches. We might call this a “Borkian” originalism. But this is really a thin version of a powerful current in American political and constitutional thought. This positive view of originalism believes that the responsibility of the Court is to maintain in the current moment the past achievements of the

sovereign people. It understands the most dangerous pathology of the judicial role to be the invention of new law, but it sees the same pathology in the political branches' tendency to create law inconsistent with the Framers' intentions, even when that law may be supported by a current majority and wholly justified as rational policy.

Originalism of this sort allows the nation to see the Court as a symbol of its 200 years of history, and thus as a symbol of national unity under a single rule of law. We are in our legal, political, and popular imaginations endlessly fascinated with the Founding moment. We turn to it for guidance and for understanding who we are, and what we should be. We want to be "the good children" of the fathers, preserving for future generations the Constitution that they left us.

The courts' originalist efforts to recover the past in order to resolve current controversies is often derided as "law office history," too simple for the complex historiographic standards of academics. Nevertheless, the turn to historical sources remains the most common form of constitutional argument. No lawyer would submit a brief without a thorough survey of the historical sources; no lawyer, and few judges, would argue that history simply "does not matter." A good example of this dominant role of history is found in the current academic controversies over the Second Amendment right to bear arms. An entire cottage industry has emerged to produce arguments about whether the Framers had in mind only the states' rights to maintain a militia or an individual right of gun ownership. An outsider might well ask why anyone should care what a leisured, gentlemen class now more than 200 years past thought about an issue within a context they could not possibly imagine.

Yet in the Academy today, originalism in various forms is having something of a comeback, having long been disparaged as a bastion of conservative thought opposed to the liberal activism of the Warren Court. Liberals are now trying to reclaim some of the emotional power of originalism. For example, Larry Lessig has argued that the Framers' intentions must be "translated" into a contemporary form. We must imagine how those intentions would express themselves in light of changed circumstances. Bruce Ackerman has expanded the relevant sources to which originalists must look by arguing that the Constitution has been amended by sovereign acts of the people acting outside of the formal boundaries of Article V procedures. Both of these scholars produce an originalism sympathetic to a liberal agenda.

III. THE EVOLVING CONSTITUTION

If the first half of the nineteenth century witnessed the turn from making to maintaining a constitution, a change in constitutional self-conception from the craftsmen of political science to the children of the Founding Fathers, the post-Civil War period saw the exhaustion of the conceptual possibilities of originalism.

Originalism always stands under the threat that it will appear not as a form of popular self-government but rather as rule by the dead hand of the past. Why should the will of a current majority be superseded by the intentions of a prior generation? The problem is compounded when we consider that the politically empowered at those earlier moments consisted almost exclusively of propertied, white males. Justice Thurgood Marshall, as one would imagine, was never much of an enthusiast for originalist arguments. But why should any of us be, if we imagine legitimate government to be popular self-government? Just as a child might find that freedom of the self requires liberation from her parents' wishes, so constitutionalism seems to move between the poles of maintaining faith with the past and declaring itself free in the present.

The Civil War surely taught the American constitutional imagination that originalism was not necessarily a way of avoiding conflict. In the post-war period, the past no longer held out the same promise of meaning and hope for national unity. Past generations, including that of the Founders, appeared, instead, as naive in their optimism and ignorant in their science. This was again an age of scientific advance, and the new sciences were those that grasped the Darwinian truth of evolution. A static constitutional text, and a Court committed to originalism, could only doom the country to a government of unreason, bound to repeat endlessly the mistakes of the past. In place of a written constitution, theorists now spoke of an "unwritten constitution" that evolved with the moral growth of the nation.

The Constitution could not be an object made by those with expertise in political science, because such expertise was never static. Political insight was less abstract and more concrete. It proceeded incrementally, building on experience. Constitutions, Justice Holmes, famously said, are organisms that must grow, not static systems of balanced powers.

Christopher Tiedeman, the first great theorist of this organic constitutionalism, wrote that :

the great body of American constitutional law cannot be found in the written instruments, which we call our constitutions; it is unwritten in the constitutional and legal acceptance of the terms, and is to be found in the decisions of the courts and the acts of the National and State legislatures, constantly changing with the demands of the popular will.

The legitimacy of the Constitution, in his view, lay in “the complete harmony of its principles with the political evolution of the nation [...] and not [in] the political acumen of the conventions which promulgated it.”

By the end of the century, the Constitution had been largely assimilated to the common law, both of which evolved over time, neither of which could be expressed in abstract principles, and both of which required expert training to grasp. Constitutional interpretation shifted its attention, accordingly, to the domain of judicial precedent. Increasingly, constitutional law meant the law made by the Court. The Court need not be embarrassed by the claim that it was making law, because a law that failed to evolve would inevitably be unreasonable and without popular support. This form of constitutionalism received its most forceful expression in the doctrine of substantive due process — a doctrine justified neither by the text nor by the intentions of the Framers, yet a “necessary” doctrine in a world of Social Darwinism.

If we strip this approach of its Social Darwinist frame, we find a very familiar form of constitutional argument. Indeed, we find here the most standard of all law-review arguments. Characteristically, an article begins by claiming an “error” in a recent Supreme Court decision. The argument proceeds through a survey of all of the relevant precedents, leading to the derivation of a principle that has “evolved” from the Court’s experiences in and through these cases. The error of the present decision, then, is that the Court failed properly to read its own precedents, *i.e.*, it failed to see the evolving direction of its own internal history. In many areas of the constitutional law, for example criminal procedure or commerce clause jurisprudence, we look for the principle of law to evolve from the precedents themselves, not from something prior to, or outside of, the case law.

This style of constitutional interpretation continues the Social Darwinist faith in progress and the belief that constitutional adjudication must be a source of reform. The fear of the dead hand of the past remains, alongside the positive belief that each generation builds on the work of its predecessors. American scholars think about the evolution of equal protection jurisprudence, for example,

in just this fashion. The meaning of the norm of equality evolved in a progressive fashion through a series of cases dealing step-by-step with race, alienage, gender, and now sexual orientation. From this perspective, the past is not a kind of golden age — the moment when the Fathers walked the earth — but only the beginning of what inevitably takes many generations, and many cases, to work out in full. The grounds of legitimacy for such a progressive, reformist view of constitutional interpretation remain what they were one hundred years ago : the Constitution represents the moral sense of the nation, which itself evolves over time. The judge's responsibility is to make sure that no substantial gaps arise between an evolving morality and a common-law constitutionalism.

This approach to judicial review has two obvious vulnerabilities : one based on reason, and the other on will. Within the matrix of constitutional thought at the turn of this century, Social Darwinism claimed the legitimacy of science. A constitution that could not evolve would contradict the basic requirements of reason. The claims of science, however, are always vulnerable to the fashions of science. The early decades of this century saw the introduction of the empirical social sciences : economics, sociology, anthropology and psychology. The turn to these positive sciences discredited the formal science of law in which the judges claimed an expertise. A common-law constitutionalism supporting a Social Darwinist world view was an easy target for the new social sciences. This is the story of the legal realists, who attacked this entire earlier world view as “Transcendental Nonsense” and proposed replacing the false science of constitutionalism with the true science of government.

We still live deeply within the embrace of this transformation. Institutionally, the legal realist attack stripped the Court of a “scientific” ground for judicial review. The new social sciences did not include a “legal science.” To this day, there is an extreme reluctance in the United States to speak of “science” when discussing the courts or legal interpretation. The locus of the science of government shifted to the Administrative Agency, with its ability to gather evidence and invoke statistical and economic expertise. The legal realists produced little writing on constitutional law because the science of society had become a science of managers and administrators. Judicial intervention in the name of the Constitution came to look like a source of irrationality, at best, or naked interests, at worst.

In part, the shifting character and locus of a science of government undermined the common-law constitutionalism of the *Lochner* Court. But this approach is equally vulnerable to a democratic attack. For the truth was that the Court's and scholars' claims to interpret the law in accordance with the evolving moral sense of the nation resulted in a very large schism between the people's

popular morality and the Court's judgment of that moral sense. While the Court put the protection of private property at the center of its work, the people were experimenting with support of a populist political agenda. The crisis came in the Court's rejection of the New Deal program of political and economic reform. In the end, of course, the Court yielded, but by the time it did, it could no longer claim the legitimacy of either science or consent.

IV. A POPULAR CONSTITUTIONALISM

These New Deal developments left the modern Supreme Court in an extremely difficult position. If it turned to originalism, it would be attacked for irrationally imposing rule by the dead hand of the past; if it claimed a kind of scientific expertise, it would be debunked for speaking nonsense; if it spoke of an unwritten, evolving constitution, it would be told that the evolution of popular morality is better discerned by the political branches. To some degree these arguments cancel each other out, allowing the Court and scholars to continue deploying all of these approaches, as long as none is put forward as the sole foundation of judicial review.

Judicial review did, however, find a new ground of legitimacy in the post-War period. This ground built upon the understanding of the War itself as a defense of democratic government against anti-democratic, European ideologies that appealed to forms of scientific rationality. Judicial review now had to be defended as an exercise in popular, representative government because this was the only ground of legitimacy available. The two most important theories in the modern period, those of Alexander Bickel and of John Ely, do just this.

Bickel's most important work has the title, *The Least Dangerous Branch : The Supreme Court at the Bar of Politics*.³ Most readers fail to pay enough attention to the subtitle. But Bickel's work is fundamentally about the popular, political validation of the Supreme Court. For Bickel, judicial review is fundamentally "counter-majoritarian." How, he demanded, can such a power to invalidate popularly supported legislation be legitimate within a system of self-government? He was too deeply influenced by the legal realists to accept any claim for the superior wisdom of the judges, and he was not enough of a political romantic to accept any suggestion of a mystical union of the present community with the Founding Fathers. Bickel's answer was blunt : unless judicial review can be understood as democratically validated, it is indeed an illegitimate institution.

3. (New Haven : Yale University Press, 1986).

Bickel thought the key to this dilemma was to distinguish between policies and principles. The political institutions of government are good at choosing among policies, which reflect the short-term interests of their constituents. But this focus on short-term results produces an inadequate consideration of principles, which set forth long-term ideals that may impose short-term costs. A different kind of institution is required for considering principles and for judging whether the immediate ends of a society are consistent with the deeper principles that reflect the moral values of that society. For that, insulation from public pressure and time for deliberation are required. This is exactly the role of the courts.

Yet Bickel did not think that this distinction of principle from policy was self-validating within a democratic order. A Court could identify the principles at issue, and it could offer principled resolution of conflicts. But in the end, there is only one source of legitimacy : popular consent. Accordingly, the Court must receive popular approval of its judgments. Its job was to convince the populace that the principles identified should in fact govern the polity. The Court was, for him, no less a representative institution than the other branches. The difference was that instead of gaining popular legitimacy prior to taking office, the Court had to receive that legitimation piece-meal, after its proposed resolutions of controversies. If consent was not forthcoming, if the people continued to resist the Court's decision, then the Court would have to back down. In his view, there simply was no alternative to consent as the ground of legitimacy.

John Ely agrees with this democratic premise. He, too, thinks that if judicial review is to be legitimate, it must be brought with a politics of popular consent. However, he does not accept the Bickelian distinction of policy from principle. For Ely, the legitimacy of judicial review turns upon the democratic politics that it makes possible, rather than upon democratic validation of judicial conclusions. The courts' role is to police the democratic political process in order to guarantee that the institutions and procedures necessary for a democratic politics are working properly. This role is primarily procedural, not substantive. The courts must make sure that vested interests, whether minorities or majorities, do not block access to the democratic process; that the debate that informs the political process is full and fair; and that the process extends equal respect to all members of the polity.

Ely and Bickel both expressed views deeply attractive to the modern Supreme Court, despite the fact that they point in opposite directions. The Court believes it has a special role in policing the democratic process, and in protecting minorities within that process. Similarly, the Court adopted Bickel's distinction of principle from policy, along with his view that its legitimacy depends

ultimately on the people's perception of the institution. Nevertheless, neither Ely nor Bickel has survived academic criticism very well.

Bickel was criticized from the start for subordinating law to politics, and giving the Court the political task of managing its own public perception. This undermines the belief that law is something set apart from politics. If it is all politics, then there is no reason to believe that in the long run the Court will be better at guiding and responding to the majority than the explicitly political branches of government. Ely has been criticized for too narrowly limiting the function of the courts. Much of what is most admirable about a constitutional democracy cannot be forced into the paradigm of representation-reinforcement. Constitutional values are not just procedural but substantive. They include fundamental beliefs about equality, liberty, and dignity. Similarly, democratic outcomes are not necessarily self-legitimizing. We need the courts not just to police the process but to reject some outcomes when they violate these substantive, constitutional principles.

V. CONTEMPORARY THEORY AND PRACTICE

In broad outline, the history of constitutional theory reflects a kind of continuous gyration between appeals to reason and to will as the ground of legitimacy. The appeal to either is always vulnerable to criticism from the perspective of the other, as well to the criticism that asks, "Whose reason? Whose will?" Contemporary constitutional theory has tried to escape this antinomy by appealing to an idea of a "discursive community." Such a community combines reason and will in the idea of an historically situated discourse.

This discursive community is not just an aggregation of private interests. Rather it is constitutive of the individuals who are its members because their interests and values are shaped in the on-going discourse. Discourse has the traditional quality of reason, subjecting every proposition to public critique and response. However, unlike liberal discourse, which is an abstract discourse of universal rights, this discourse is the narrative of the particular community. Its talk is informed by its history; its values are embedded in that history. The new paradigm borrows the particularism of theories of the will but sets it in a much richer context than do traditional models of consent.

This idea of a discursive community is at the center of the “new republican” thought of theorists like Cass Sunstein, Bruce Ackerman, and Frank Michelman. It is also at the center for those who seek the answer to the problem of legitimacy in the idea of an “interpretive community” — for example, Ronald Dworkin and Owen Fiss. Despite the understandable attractions of such a synthetic theory, this view has had little impact on the Court’s own self-understanding.

From the courts’ perspective, the question of legitimacy arises at the moment a court stops talking and orders action taken. That decision may be less the consequence of a mutual discourse than the result of a vote among disagreeing members of a multimember court. Often that action is directed against those who are not engaged in the discourse at all. All of these discursive theories stumble at just this point of silent coercion. For them, the discourse is never over, and there can be no justification of coercion even if it is the consequence of a vote. Each of these theories identifies a different community of discourse as the source of legitimacy, but about each such community we can ask, why is their discourse relevant to those who are the subject of a judicial order?

There are limits to the capacity of governmental institutions, including courts, to follow theory. Theory may become simply “too theoretical.” This is what has happened to contemporary constitutional theory and its appeal to a community of discourse. It is a law professor’s view of the world — a world in which talk displaces action and the moment of decision can be postponed indefinitely. At this point, theory and practice part company. This is why there is so much dissatisfaction expressed by the Bar with the products of the modern law school.

I have tried briefly to canvass the main strands of argument in the endless debate over the legitimacy of judicial review, to show that each of these strands has a history, and to show that each responds to the weaknesses of the others. Despite the fact that each has a history, constitutional theory has a kind of timeless quality. Once an idea is introduced, there is no way to remove it from the canon of available arguments. In this sense, theories are like precedents : even when they seem to be overruled, a future court or commentator can reinvigorate them.

Nothing ever dies a final death in this field. All of the theories remain as possible forms of argument. Sometimes the multiplicity of arguments point in the same direction; sometimes they do not. When they do not, we have no way of assigning a normative priority to one form of argument over another. All of them are parts of our legal tradition, and all of them respond to aspects of our more general understanding of self-government under the rule of law.

There is no single theoretical answer to the puzzle of the legitimacy of judicial review. It is wrong to think that there should be. Government is not a function of theory but of institutions that work more or less well. These institutions take on different meanings and different roles in different times and places. Judicial review, in the United States, is a practice of governance that has worked within an historically changing set of expectations. It has worked well at times, and poorly at others. We cannot ask the question of whether we have been better off without it, because who we are has been bound up with the workings of this institution.

This means that theorists must be modest in their claims. They can describe the practice and try to understand those circumstances in which it has contributed to national well-being. They can try to understand the arguments for and against the practice. But they cannot say how the practice will work in the future or in other cultures. About such things, not theory but judgment is required.