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Comparative Constitutionalism in a New Key

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COMPARATIVE CONSTITUTIONALISM IN A NEW KEY

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Law is a symbolic system that structures the political imagination. The "rule of law" is a shorthand expression for a cultural practice that constructs a particular understanding of time and space, of subjects and groups, as well as of authority and legitimacy. It is a way of projecting, maintaining, and discovering meaning in the world of historical events and political possibilities.[1] The rule of law — as opposed to the techniques of lawyering — is not the possession of lawyers. It is a characterization of the polity, which operates both descriptively and normatively in public perception. Ours, we believe, is a nation under law, and law is a normative measure of all that it might do.

That the polity should express the rule of law is a belief that has been present from the revolutionary foundation of the nation. The end of the Revolution was to be the rule of law. Mexico may have sought to institutionalize revolution.[2] In America, with abolition of the monarch, law was to be king.[3] In our Founding myth, Revolution and Constitution are tightly bound together as equal and linked expressions of popular sovereignty. The historical sources from which this understanding of law draws are not technical, but widely accessible. They are rooted in religious conceptions of ultimate meaning and Enlightenment understandings of rational perfectionism. The rule of law is our civic religion; it exists just at the intersection of faith and reason.

If the rule of law is a cultural phenomenon, then there are no a priori grounds for believing that what is true in the United States — its practices and beliefs about law — is true elsewhere. The forms of law

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1. *See* PAUL W. KAHN, THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP (1999) [hereinafter KAHN, CULTURAL STUDY OF LAW]; PAUL W. KAHN, THE REIGN OF LAW: *MARBURY V. MADISON* AND THE CONSTITUTION OF AMERICA (1997) [hereinafter KAHN, REIGN OF LAW].

2. The Institutional Revolutionary Party ("PRI") held the Mexican presidency from 1929 to 2000.

3. *See* Thomas Paine, *Common Sense* (1776), *in* POLITICAL WRITINGS 28 (B. Kuklich ed., 1989).

may be as diverse as those of religion or art: the cultural practices of one community are just that — nothing upon which to build a universal claim. Of course, like other cultural practices, the rule of law does not come from nowhere. The American rule of law is embedded within broader Western traditions. It is one particular formation of the historically possible.[4] Inherited practices and beliefs, however, never point in a single direction; they never have the coherence of a rationally ordered or a causally determined system.

Despite a shared, deep history of religious practice and of science in the West, there is substantial evidence to suggest that the modern American culture of law's rule may be rather distinctive. Most evident to contemporary legal scholars is the deep resistance within the American practice of constitutional law to arguments that appeal to international or comparative law. Our practices in this respect are strikingly different from those of other constitutional democracies. While others are pursuing a transnational constitutional discourse, Americans are determined to locate their constitutional discourse within their own unique text and their own historical narrative. The American concern with "original intent," for example, appears simply irrational — a kind of legal fetish — to the rest of the world. Why should we care more about the intent of the Founders — who are long-dead as well as culturally removed from us — than about the understandings of contemporary judges struggling with the same problems of governance of a modern welfare state in countries with which we must build a just and efficient global order of law? There is no principled answer to this question, if we mean by that an answer accessible to those outside of our own culture. There is only a set of practices and beliefs by which we understand who we are.

A cultural approach seems to begin by turning away from the rest of the world. Why, then, should it turn back to take up the subject of comparative constitutionalism? Not for the sake of reform. The pursuit of reform is the most prominent feature of the contemporary study of law. The scholar asks "what should the law be."[5] But a culture is not trying to be anything other than what it is.[6] Of course, it has its own internal norms; it will even have norms about norms. But from the perspective of cultural studies, those norms are phenomena to explain, not goals to advance. A cultural approach begins by bracketing off the study of law from the practice of reforming the law. The same is true in its approach to comparative constitutionalism. The aim cannot be to determine the most efficient or efficacious constitutional

4. Borrowing from Foucault, I have called this inherited conceptual horizon the "historical *a priori*." *See* KAHN, CULTURAL STUDY OF LAW, *supra* note 1, at 36.

5. *See* ROBERTO M. UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? (1996).

6. *See* KAHN, CULTURAL STUDY OF LAW, *supra* note 1, at 92-97.

practices, nor can it be to advance a conception of justice. Comparative work may in fact be useful in the pursuit of reform, but the pursuit of reform undermines the objective of a cultural approach to law. To return to an example that I have used elsewhere: we don't study comparative religion in order to figure out which religion is the best or to reform our own set of beliefs.[7]

The cultural approach nevertheless should be interested in comparative constitutionalism for the same reason that the study of our own religious practices and beliefs can be usefully illuminated by studying those of others. If the rule of law is a cultural practice — for us a wholly naturalized one — then the unnoticed in our practices may become visible in the contrast with other cultural practices of law. This is a particularly important inquiry at the present moment, for one aspect of globalization is an effort to move toward a common constitutionalism. A cultural approach can illuminate the different constitutionalisms that already exist. It can help us better to understand what is at stake in various efforts at reform and in the movement toward globalization. Most importantly, it can help us to understand who we are. It cannot, however, tell us whether we should remain what we have been.

Constitutional-court judges around the world often seem to believe that they are engaged in a single, transnational conversation with their counterparts. They write opinions as much for each other — drawing freely on their collective work — as they do for their own citizenry. This is comparativism under the sign of reform. It is the dominant discourse of the contemporary practice of comparative constitutionalism and the main source of interest in the field. This entire approach is deeply against the grain of our own practice of constitutionalism. American constitutional discourse does not fall within this transnational discourse — although to the degree that American law professors share the liberal aspiration for a global order of law, they are doing their best to push American entry into this discursive practice.

A cultural approach can be a powerful antidote to this liberal ideal of world governance under the rule of law. Not, however, because it defends an alternative normative vision. It does not argue for diversity against uniformity. It does not argue for any position at all. Rather, its ambition is only to show that the field upon which the reformers act is more complex than they imagine; that the values at stake do not all respond to the demands of reason, nor line up in a particular direction. Whether they should or not is a different question. That question is no more accessible to the academic than the question of whether or not individuals should fall in love, should find particular works of art beautiful, or believe in certain gods. The rule of law is as fundamental

7. KAHN, CULTURAL STUDY OF LAW, *supra* note 1, at 2.

to individual and group identity as these other cultural practices. Law professors can, of course, have a position on who we should be as individuals and citizens. But their claim to legal expertise does not give them a privileged position in that debate. Perhaps this is the most important lesson that a cultural approach has to offer: claims of expertise in the law do not offer a short cut to political reform. If Americans should be other than they are, changing them will take a good deal more than appeals to law reform.

I. PLACING THE CULTURAL: FROM THE UNIVERSAL TO THE PARTICULAR

The cultural approach to comparative constitutionalism stands at just the opposite extreme from that of most social scientists who study law. Their approach is to come to the courts, including constitutional courts, from the perspective of the institutional deployment of political power. Courts interact with other governmental institutions in the production of policy. Accordingly, they should be studied from the perspective of the policies they help to produce.[8] That study has both an internal and an external component.

Like any other actors in the process of policy formation, the courts want to be successful. This means, in part, taking those measures that will legitimate their own role. Judicial behavior is simultaneously directed at producing policy and securing an institutional role. For an institution without material resources, efficacy is tightly tied to legitimacy. From this perspective, we can understand the expansion and rationalization of jurisdiction, as well as the internal norms of consistency, explanation, and selfcitation.[9] Indeed, one of the lessons of *Marbury*[10] is the way in which a court's claim to "look to" the Constitution is itself a means of building the authority of the court vis-á-vis other political actors and in the eyes of the public. We can think of these as the "internal" necessities of the judiciary.

Apart from studying the courts' institutional self-interest, inquiry must also explore the opportunities courts present to "players" — individuals and groups — to advance their own agendas, or to block the accomplishment of others' agendas. Interested individuals and groups will make use of whatever institutions are available in order to advance their interests.[11] They will turn to the courts when there is

8. *See, e.g.*, MARTIN SHAPIRO & ALEC STONE SWEET, ON LAW, POLITICS, AND JUDICIALIZATION 3-13 (2002).

9. *See* Alec Stone Sweet, *Path Dependence, Precedent, and Judicial Power*, *in* ON LAW, POLITICS, AND JUDICIALIZATION, *supra* note 8, at 112, 112-35.

10. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

11. *See* MARTIN SHAPIRO, LAW AND POLITICS IN THE SUPREME COURT: NEW APPROACHES TO POLITICAL JURISPRUDENCE (1964).

some advantage in doing so. Their interest is not in vindicating or affirming the rule of law, but in accomplishing ends exogenous to the judicial system. Courts can become effective policy players when they present a means of compensating for setbacks and defeats in the ordinary policy-setting institutions of the state, whether legislative or regulative.

Both approaches are interested in understanding how a constitutional court contributes to the formation of an actual regulative policy, for example, labor law or telecommunications law. On the former approach, we would be interested in studying the growth of doctrine as one case is followed by another, and as different courts respond to the decisions of others. We would also track the way in which judicial decisions shape the perception of possibility within other institutions. On the latter, we would look to see how contending factions use the availability of the courts and constitutional arguments as a means to the formation of policies that they seek to advance. The social scientist believes that these two approaches are appropriately pursued with respect to the study of any political institutions. For example, we would ask the same questions about the legislative role in the formation of policy, distinguishing between the necessities of the legislators — getting reelected and expanding their influence — and those of the interest groups that seek to influence legislation. For the social scientist, courts are to be integrated into a single study of politics.

To the political scientist, there is nothing about the courts that cannot be captured in the ordinary forms of social science inquiry. Courts may believe that they are doing something different from legislatures — they may speak a language of law instead of economics, of rights instead of interests, and of constitutions instead of elections — but the social scientist reveals the courts to be nothing other than another site for the contestation and construction of policy. How courts do this matters far less than that they do it. Of course, social scientists are likely to disagree on the scope of the inquiry, the appropriate methodologies, and the range of factors that need to be considered. Alec Stone Sweet's approach, for example, is marked by the breadth of his methodological techniques and the range of interests he considers. He realizes that the juridification of policy takes place both on and off the bench, and that interests are not independent of institutions and the rules those institutions deploy to resolve disputes.[12] Still, the interesting comparative questions for social scientists are broadly political: How and where do constitutional courts create a substantial

12. *See, e.g.*, ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE (2000); Alec Stone Sweet & Thomas C. Brunell, *Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community*, 92 AM. POL. SCI. REV. 63 (1998).

policy-making role for themselves? How do they stand in relation to other institutions? Whose interests are advanced by that role?

The legal scholar of comparative constitutionalism resists any suggestion of a collapse of the distinction between law and politics. The distinctive character of law as a discipline is founded on just this claim of difference: law may be produced by politics, but it is not merely another forum for a politics driven by interests and power.[13] Even as the legal scholar resists founding comparative work on broadly political norms, he or she still needs a common measure by which to approach different constitutional systems. Indeed, the legal scholar's sense of the usefulness of the comparativist enterprise depends upon the possession of such a measure. Like virtually every other law scholar, the comparativist's common measure is the ambition to reform the rule of law under the guidance of reason. His or her aspiration is to drive out of the constitutional-legal system those irrational aspects that can only be accounted for by the accidents of history or the misfortune of mistake. The end of legal study is to be a set of programmatic suggestions.

Another name for those deficiencies identified by comparativist legal scholars is "politics." Here, they define themselves against the political-science approach. To the scholar of constitutional law, courts have a higher mission than offering an alternative forum for interest-group politics, on the one hand, or expanding their own influence, on the other. Courts are to represent principle, reason, rights, or enduring values. Different scholars will use different language. What they all have in common is the easy move from a particular to a transnational discourse: reason cannot mean one thing in one place and another elsewhere. Rights are universal. Who can object to such enduring values as liberty, equality, and due process? The legal scholar as comparative constitutionalist gladly takes up the role of norm articulation for the new transnational legal order. He or she personifies a liberal attitude toward law's rule, which expresses a genuine skepticism, if not hostility, toward the particularity of national politics.

This contrast in approaches to comparative constitutionalism reflects a fundamental split within the Enlightenment tradition over the locus of a practical science of politics. Most social scientists locate the science of politics — reason — in their own enterprise of study.

13. Periodically, legal movements arise that challenge this distinction: most famously, the legal realists; most recently, the Critical Legal Studies Movement. These dissident groups never last for long because their own investments in law — and the possibilities of law — are too great. The legal realists are literally brought back into the fold by appointment to the Bench and success in the Academy. The Crits find themselves committed to legal claims of right and disempowered in the turn to politics.

The objects of that study — the political practices of a community — respond to interests and power. For these scholars, it is a kind of Hegelian confusion to suggest that the domain of the political is the working out of reason itself. Reason is what the social scientist brings to the conflict of interests that is politics. Reforming the disorder of the political is possible at the margins, but it is fundamentally a mistake to think that politics is supposed to be the working out of reason's path. Politics, even in its juridical form, is only the means to the satisfaction of interests that are, for the most part, exogenous to the institutions available for their accomplishment. Comparative constitutionalism is thus a study of the ways of power. The reason to which it appeals is the reason of categorization, generalization, and prediction. These are in the possession of the scholar, and they are of little or no interest to the actual actors.[14] Whatever regularities appear in the phenomena are produced by common interests, which may be more or less extensive.

The comparative-constitutional-law scholars don't accept the premise that reason is and must remain outside of politics.[15] For them, the role of the constitution is to subject politics to higher norms of reason. A constitution expresses the reasonable ordering of the polity; it is reason's presence within the internal workings of the state itself. This is not a matter of describing a particular constitutional text or of analyzing the origins of that text — which may indeed point to a contribution from the understandings of the political scientist. It is, rather, the animating idea behind modern constitutionalism and constitutional decisions: reason itself constitutes the implicit constitution toward which every decision is reaching. Legal scholars believe that if we cannot separate law from politics, we are already examining a failure of the rule of law. Who in the constitutional state is willing to say that the constitution requires "irrationality" of us or that it demands the violation of fundamental rights or compelling moral principles? Of course, powerful interest groups may manage to entrench in the constitution their own interests, but that represents a deficiency under the rule of law; it is an appropriate object for future reform.[16]

14. When the scholar believes his knowledge qualifies him for a political role, he commits himself to a kind of vanguardism, which does not have a particularly good track record, beginning with Plato's mission to Syracuse.

15. Because Stone Sweet places the self-elaboration of judicial rationales at the center of his account of the political development and effectiveness of constitutional courts, his work straddles this divide and may even be closer to that of the legal scholars.

16. In American constitutional history, the best example is the constitutional protection of slavery until passage of the Civil War Amendments.

From the perspective of the constitutional-law scholar, then, the ideal of reason works within the object of the scholar's study.[17] Reason is already there, and the scholar's contribution is only to make clear what it is that reason demands. The ambition of his study is not to understand the law by deploying tools of inquiry that are not themselves a part of the object of study, but rather to say "what the law should be." Because the constitution lays claim to reason within the state, the distinction between what the law is and what it should be is so narrow as to disappear in the scholar's self-understanding. The rule of law is and should be the rule of reason. Reform, accordingly, is not a process brought to law from the outside, but the internal development of the law itself.[18]

It would be too much to say of comparative constitutionalists that their ambition is to find the hidden science of constitutionalism that should unite all liberal constitutions as variations on a common theme — but it would not be exaggerating all that much. Indeed, if one turns from American to European and Latin American constitutionalists, the ambition to locate comparative studies in the science of law is not hidden at all.

If we ask what is the organizational structure of this belief in an objective, universal constitutionalism of reason, we find a doctrine of rights and a theory of political legitimacy. The former locates comparative constitutionalism in the discourse of human rights; the latter, in the modern social-contract tradition. Contemporary constitutionalism is the inheritor of a double-stream of thought. The science of politics of the eighteenth century was a mechanistic science of institutions. These institutions were to mediate between the social-contractarian origins of the legitimate state and the exercise of authority by agents of the state. The aim was to structure institutions such that they would serve to restrain the potential abuse of the political power created by the social contract itself.[19] The science of politics of the twentieth century, on the other hand, is one of universal human rights. The protection from the abuse of power appears now as less a function of institutional design than of delineation of a set of legal claims that protect the individual as a rights-bearing subject.[20]

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17. British common law was, for a long time, able to offer a foundation for reason within the state. The move toward written constitutionalism in contemporary Britain suggests a deeper conflict over the locus of reason — i.e., a debate over the roles of history and contemporary expertise in the identification of reason. This is a debate that never goes away, but reappears in questions concerning the role of precedent in interpreting a constitutional text: Why should past understandings ever be favored over contemporary reasoning?

18. *See* KAHN, CULTURAL STUDY OF LAW, *supra* note 1, at 7-18.

19. On this, *The Federalist Papers* remains the classic text, with its emphasis on federalism and separation of powers.

20. One characteristic of contemporary, American constitutional theory is the effort to link these two sources. We see, for instance, arguments that federalism or the separation of

Legal scholars understand constitutional courts to be working on a common set of problems dealing primarily with rights and legitimacy. The scholar looks to the variety of national, constitutional courts to learn from the experience and arguments of others. Every modern, liberal state confronts the same set of constitutional issues — rights to privacy, speech, process, and welfare, on the one hand, and issues of legitimate institutional design, on the other. Since courts address these issues in an order that is entirely accidental, one constitutional court can make use of the research and reasoning of another court that may have confronted a similar problem earlier. Comparative materials, thus, come to compete with precedents as a material source of legal reasoning. If the authority of the decision rests upon its appeal to reason, then this approach appears not only natural, but essential. It draws upon the model of inquiry of other sciences. No research program can fetishize its own past; rather, it must remain open to new "discoveries" wherever they are made.

Both of these approaches — that of the social scientist and of the legal scholar — miss much that is essential to understanding the character of the American rule of law. More importantly, they fail to understand the way in which the Supreme Court is embedded functionally and institutionally in beliefs about the rule of law. The Court's most important role is not to make policy, nor to achieve the ends of a rational legal science — although surely the Court does make policy and is subject to the critique of reason. Rather, the primary work of the Supreme Court is to construct and maintain an understanding of our polity as the expression of the rule of law. This function operates, for the most part, independently of the outcomes the Court reaches, even in controversial cases. For example, were the Court to reverse *Roe v. Wade*,[21] it would do so in the name of the rule of law. The opinion would celebrate the "recovery" of law in just the same way that *Adarand* celebrates the rule of law while reversing *Metro Broadcasting*.[22] This does not mean that the Court can say whatever it wants. But with respect to any controversial case that makes it to the Court, there are sufficient legal materials available to support either affirmance or reversal. Dissents could be majority opinions. We cannot tell them apart solely by reference to the standards of legal reasoning and the rule of law.

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powers actually have their purposes in the protection of individual rights. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 575-79 (1995) (Kennedy, J., concurring). Contrast this with an earlier understanding of separation of powers as a negative doctrine of protecting rights by disabling government. *See, e.g.,* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 613-14 (1952) (Frankfurter, J., concurring).

21. 410 U.S. 113 (1973).

22. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995); Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990).

This role of the Court does not depend on getting the outcomes right, nor does it depend on supporting the interests of some groups and not others. Rather, the Court works to support and maintain a cultural formation. As such, it can only be understood if we approach the rule of law as we would any other set of cultural beliefs: religious, mythic, aesthetic, or even scientific. We cannot ask about the truth of the law, nor about its usefulness, if our ambition is to understand it as a world-view. Instead of the tools of science or of the self-elaboration of reason, we have to bring to the study of law the tools of cultural interpretation.

Only when we understand our own Supreme Court as engaged in the unique enterprise of maintaining the belief in American citizenship as participation in a popular sovereign that expresses itself in and through the rule of law can we begin to understand the immense power of this institution. That power has its symbolic point of origin in *Marbury v. Madison*,[23] but its most vivid recent display in *Bush v. Gore*.[24] *Marbury* articulates a vision of the rule of law even as the Court shows itself to be a weak political actor. Two hundred years later, that same vision operates as the civic religion of the American nation-state.[25]

The Court as the guardian of that symbolic order wields an unquestionable power. So much so that it can tell us that the President of the United States is the person who lost the popular vote. Americans have no theory of legitimate government other than that of democratic decisionmaking, limited by a regime of individual rights — if we mean by theory, an appeal to principles and rational arguments based upon those principles. They literally had no theory by which they could understand how Bush could be a legitimate President. Had the same thing happened elsewhere, they would have taken it as evidence of an antidemocratic frustration of the legitimate will of the people. Nevertheless, Americans have a profound faith in the Constitution and in the Court as the voice of the Sovereign People. When faced with a choice between a theory of legitimacy and an affirmation of their symbolic order, there was no contest. Not even the losing party could seriously complain about the outcome. They too had to affirm that ours is a nation under law and the Court's decision is the final word on what the Constitution means.

Americans are willing parishioners in this Temple of Belief. When the Court spoke, the election was over. This was so even though few outside of the professorate claimed to understand the words spoken, and even though most scholars thought it an unconvincing opinion.

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23. 5 U.S. (1 Cranch) 137 (1803).

24. 531 U.S. 98 (2000).

25. For a detailed exploration of that vision, see KAHN, REIGN OF LAW, *supra* note 1.

There was no further appeal to the court of political opinion. If we approach the subject of comparative constitutionalism with this experience in mind, we open up a new range of questions: we ask whether constitutional courts elsewhere are similarly engaged in a mythic enterprise of maintaining a community of faith. If they are, we need to investigate what are the elements of that faith and in what ways they resemble our own faith in the rule of law.

Take as a simple example the American practice of judicial appointment — particularly of a Supreme Court Justice. A nominee is ordinarily selected on the basis of beliefs about how he or she is likely to vote. Selection is a highly political process in which interests are assessed and interest groups are heard. The reaction to the nominee — both for and against — is based on a similar assessment of interests. Yet, we invest a tremendous amount of effort and resources into denying the political character of the process. The President will announce that he picked the best jurist and desires only a Justice who will follow the rule of law.[26] The nominee will steadfastly refuse to comment on how she might vote on any issue that might come before the Court. We hear instead statements of allegiance to the law, of good faith in studying briefs and arguments. As a Justice, the nominee assures us, she will be wholly transparent to, and an instrument of, the law. Whatever she may have felt and believed beforehand, life will begin again with the donning of the uniform black robe of the Bench.

Confirmation is literally a ritual of transformation — a rite of passage — whereby an individual who had been a political being becomes an instrumentality of the rule of law. Nothing is allowed to survive that breaks from one world into the other. The appointee will be born again, stripped of her old party attachments, institutional affiliations, contacts, and even friendships. Elected officials bring their political advisors with them; a Justice is not even supposed to accept a phone call from the very people who helped her obtain office. Once she enters the Temple of Justice, she is literally on her own — with the exception of a few law clerks, who are themselves characterized by their political innocence — standing before that mysterium tremendum of our civic order: the Constitution.

Every country confronts the problem of the relationship between its courts and its political institutions, i.e., between law and politics. The legitimacy of the courts depends to a substantial degree on the judges' independence from those who exercise political power. Given the power of constitutional courts, the problem is even more acute with respect to them. But in some countries the approach to the problem is not to suppress but to make explicit the relationship between

26. See, for example, the statement of President Bush on the nomination of Clarence Thomas to the Supreme Court. *Nomination of Judge Thomas by President Bush*, *available at* http://www.people.virginia.edu/~govdoc/thomas/nomination.html (last visited Nov. 8, 2003).

political belief and judicial appointment. In France, "the single most important criterion for appointment to the [Constitutional] Council is political affiliation, and the Council has been dominated by professional politicians."[27] Something similar is true of the constitution of the International Court of Justice, which not only follows a principle of geographic distribution, but also guarantees the right of any state brought before the Court to have a justice sitting on the bench for that case.[28]

Of course, this does not mean that the appointee simply acts as a representative, tending to the interests of his political party or state. The explicit connection to politics in the appointments process may have to be overcome at another point in the judicial process. Yet, in the United States, we cannot even get close to such an acknowledgment of the intersection of law and politics. In our cultural construction, they are maintained on separate sides of an unbridgeable divide such that the private person the Justice had been wholly disappears once she receives the commission. She has no more connection to that former life than does the priest who takes confession and administers the sacrament.

This idea is interestingly refracted through the inquiry of the first part of *Marbury*, in which the question is whether Marbury has a right to his commission.[29] The Court can only answer that question by answering the question of whether he is a Justice of the Peace: Has he completed the transition from political actor — Marbury was a Federalist party operative in Maryland — to an instrumentality of the law? In concluding that his right has vested and that what has been done by law cannot be undone by politics, the members of the Court are speaking no less of their own appointments. They may have been the political associates of the now-defeated Adams, but now they exist only in the dimension of law. Indeed, they have lost their personal voice, as well as their political appearance. *Marbury* is not the voice of John Marshall, former Federalist Secretary of State; it is the "opinion of the Court," which may be announced by Marshall but purports to be the opinion of us all as participants in the popular sovereign.[30] The Justices tell us that they exist completely in and of the law, beyond the space of politics. That, at least, is what they would have us believe, and for the most part we do.

For us, recognition of the connection of law to politics appears only as a form of critique. Indeed, this is the most standard and the

27. ALEC STONE, THE BIRTH OF JUDICIAL POLITICS IN FRANCE: THE CONSTITUTIONAL COUNCIL IN COMPARATIVE PERSPECTIVE 50 (1992).

28. Statute of the International Court of Justice, art. 31, *available at* http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm (last visited Nov. 8, 2003).

29. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 154 (1803).

30. *See* KAHN, REIGN OF LAW, *supra* note 1, at 209-19.

most devastating critique that can be offered of a judge: his or her decisions are based on politics, not on law. But while the most devastating of critiques, it is also completely ineffective against the autonomous character of law's rule. For if we go one step further, we see that the legal order is not just generally selfprotective as a matter of institutional interest, but has at its heart an internal mechanism of neutralizing this critique. Even decisions most criticized as the products of politics become precedents to be acknowledged and followed in future cases. What had been politics is transformed into law such that a failure to follow it becomes itself a sign of misplaced politics.[31] This produces the peculiar cycle of expert reaction to the decisions of the Court. First, the decisions are criticized as failing to follow existing law. If so, they must be based on something outside of law — i.e., the political beliefs of the Justices. Second, those same decisions must be integrated into a comprehensive account of what the law is, which is just what the expert claims to possess. The decision thereby moves from object of criticism to a naturalized place within the body of law. The Court, thereby, produces its own infallibility as long as belief in the rule of law is sustained. The most poignant display of this movement in recent years was in *Casey*, where Justices appointed politically with an eye to overruling *Roe* found themselves bound by the internal mechanisms of legal reasoning to affirm the precedent.[32] The same movement from aberration to norm characterizes the recent federalism jurisprudence of the Court.

The separation of law and politics is secured in some countries by an institutionalization of the idea of legal expertise. This institutionalization can take a variety of forms. Some countries train their judges separately from their practicing bar, and offer them a career path wholly within the judiciary. Expertise in judging is seen as a skill to be developed over an entire career.[33] Others establish a committee of experts to create short lists of those "most qualified" for judicial appointment. Those lists tend to focus on the most successful practitioners before the courts. France follows the former route; England, the latter.[34] Other countries rely heavily upon law professors. In Israel, appointments to the Bench are a product of a "Nominations Commit-

31. This is why the persistence of dissent is such a problem for the rule of law. A Court that remains divided on the same issues is always one that suggests the connection of law to politics. On the other hand, the American practice of dissent may itself be made possible by the strong investment in other means of separating law from politics.

32. Planned Parenthood v. Casey, 505 U.S. 833, 854-64 (1992).

33. *See* John Bell, *Principles as Methods of Judicial Selection in France*, 61 S. CAL. L. REV. 1757, 1758 (1988).

34. In France, of course, the Constitutional Council is not part of the regular judiciary and its appointments follow a different — and more political — process.

tee" that institutionalizes ideals of professional expertise.[35] We follow none of these procedures.[36] Constitutional law cannot appear a mysterious science in this country. It cannot be the possession of experts or careerists.

Just as with the relationship of law to politics, the construction of constitutional interpretation requires a willing suspension of disbelief. We may know that the law is an enterprise of erudite and sophisticated interpretation, but it nevertheless cannot appear inaccessible to the least of us — at least constitutional law cannot appear that way, whatever may be true of the more technical areas of regulation.[37] The criminal defendant, in this respect, stands for anyone and everyone in his relationship to the exercise of the state's legal authority: he is read his rights and asked if he understands what has been read to him.

Many states around the world today have lengthy constitutions that establish law in great detail. Our Constitution remains a short, eighteenth-century document written, for the most part, in the vernacular. Its most important phrases are simple and direct: "free exercise," "freedom of speech," "commander in chief," or "legislative power." Of course, the whole document has been subject to hundreds of years of esoteric interpretation, but that is another matter. Here, what matters is the belief in the citizen's direct accessibility to the text. At stake in that relationship of accessibility is the foundational claim of the American rule of law: the Constitution expresses the voice of the popular sovereign. It is the possession of the people, not of the legal scientist.[38]

The citizen stands to the rule of law as both subject and author. In his particularity, he is ruled by the law, but as a part of the popular sovereign, he is the author of that law. This relationship of part to whole, which Rousseau theorized, rests at the foundation of American belief in the rule of law. This belief is maintained not as a matter of democratic theory, but as a cultural practice of ritual, myth, and faith. At the center of this practice, we find the Justices of the Supreme Court.

Our Justices don't just represent the nation as a single community under law. Their role is performative, not representative. The Court is the locus of our belief in ourselves as a Sovereign People. Listening to

35. *See* SHIMON SHETREET, JUSTICE IN ISRAEL: A STUDY OF THE ISRAELI JUDICIARY (1994).

36. The Bush administration recently broke with past practice of obtaining a formal evaluation of judicial nominees from the American Bar Association.

37. Special technical courts are not just a matter of localizing expertise, but also of preserving the general symbolic character of the other courts.

38. *See* JOSEPH GOLDSTEIN, THE INTELLIGIBLE CONSTITUTION: THE SUPREME COURT'S OBLIGATION TO MAINTAIN THE CONSTITUTION AS SOMETHING WE THE PEOPLE CAN UNDERSTAND (1992).

the Court, we are to hear ourselves. This is the meaning and legacy of *Marbury*. The Court speaks in the voice of the popular sovereign only as long as and to the degree that people believe it does. The legitimacy of the judicial voice depends upon the Court's ability to maintain this belief. The Justices must, accordingly, maintain a sense of contact with the people: they are everyman, not an elite distinguished by an esoteric training and knowledge.[39] Of course, this does not mean that we think they can be ignorant of the law. But there is a continuity from jury, to judge, to Justice. All present us to ourselves as a self-governing community.

In the vernacular of ordinary belief, we find two connected mythical assertions: "anyone can grow up to be President" and any individual has a right to take his grievances "all the way to the Supreme Court." This sense of selfgovernment through law is threatened by too explicit an acknowledgment of a legal science. Indeed, claims to legal science in this country were thoroughly discredited in the early part of the twentieth century when the Court allowed a wide gap to emerge between its voice and that of the popular opinion.[40] The Court, as Alexander Bickel said, "labors under an obligation to succeed," by which he meant that their opinions must not only be principled but must be accepted as such by the nation.[41]

To understand what is going on here we have to think of the rites of passage that transform the ordinary individual into a priest. In an age that no longer believes in the ancient God of the Church, we could say that there can be no real transformation of the person. The priest, we are all too aware, remains the same person, with the same interests, desires, and even passions. We could say this because we know it to be true. But we do not say it because we willingly suspend disbelief. We understand that a symbolic universe of meaning is not merely a personal universe of interest. Power exists not as an individual capacity to take advantage of social position. Rather, power exists in a role that is made possible by a culture of belief that is shared by the self and others.[42] Neither priest nor judge mediates between the individual and a transcendent subject. Both mediate between the individual and a symbolic order that is as real, but no more real, than language or history. That, however, is not only real enough; it is the only reality we ever had.

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39. *See* Frank I. Michelman, *The Supreme Court 1985 Term — Foreword: Traces of Self Government*, 100 HARV. L. REV. 4 (1986).

40. *See* PAUL W. KAHN, LEGITIMACY AND HISTORY: SELF-GOVERNMENT IN AMERICAN CONSTITUTIONAL THEORY 125-31 (1992) [hereinafter KAHN, LEGITIMACY AND HISTORY].

41. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 239 (2d ed. 1986).

42. Of course, power that exists can be abused for personal ends.

The American rule of law is neither politics nor science. To recognize this is the first step in understanding law as its own symbolic system. Like all such systems, it offers a complete ordering of the world. From within law, we can look out on science and politics — law offers an understanding of both. But it does so without collapsing into either. Comparative constitutionalism, from the perspective of a cultural approach, must not collapse the inquiry into the rule of law into either science or politics. Everything is at stake, therefore, in the opening assumptions of the inquiry. If we want to understand the meaning of judicial review, we can't just look at doctrines of rights that are produced by the courts, nor at the political maneuvering that tries to affect the outcomes. We have to look instead at the rituals and myths of law — the content of the faith in law's rule.

II. SOME INITIAL DIVISIONS

Every modern, Western state characterizes itself as both democratic and law-governed. No state can ignore or give up these terms because they bear directly on the legitimacy of the polity and its government. Both terms refer less to a defined set of practices than to a popular selfconception: the state must hold itself out to its citizens as both democratic and law-governed. Nevertheless, neither the meaning of these terms, nor their relationship to each other, is self-evident. Indeed, both are ways of understanding or characterizing the entire state from a particular point of view. A democratic state may include undemocratic institutions, and it may set restrictions on the reach of democratic decisionmaking, but both kinds of limits must themselves be grounded in an understanding of the conditions of democratic legitimacy. Democratic states don't yield any area as beyond the concern of a democratic populace, even if the conclusion is to exclude the area from the immediate reach of democratic politics.

The same is true of the rule of law. A state under law does not leave room for a discretionary power outside of, or unbounded by, the rule of law. Rather, discretion is a function of law. For example, the President has substantial discretion with respect to foreign policy because he has been assigned that role by the Constitution. Nor does the rule of law respect the division between the private and the public. The law may have little to say about the private affairs of the family, but all that means is that those affairs are permitted under the law. We see this immediately if there is pathological deviance from the norm. The modern welfare state is capable of massive intervention in the family when necessary. The family too is a space regulated by law.[43]

43. *See* Jill Elaine Hasday, *Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations*, 90 GEO. L.J. 299 (2002).

From within the rule of law, anything that is outside is "illegal." About every action and proposed action within the state, we can ask the question "is it legal?" There is always an affirmative or a negative answer to this.[44] Similarly, about every object and space, we can ask "who is its owner" and about every subject we can ask "is he a citizen?" A state that allowed law to govern only a part of its activities would appear to lack the rule of law. If there is no outside, then it is wrong to think of law as distinguished by certain marks or characteristics — the approach of analytic jurisprudence. The rule of law is a symbolic order that is constitutive of an entire world view. It is as comprehensive as science, religion, or economics. There is no phenomenon that is beyond scientific explanation, beyond God's order, or beyond a measure of value. Neither is there anything beyond law. To explore the culture of law's rule is to describe the manner in which a world of legal meaning is created and maintained.

Creation does not begin with a constitution. The relationship between constitution and the rule of law is not a relationship of causality, as if the entire order of law flows from the constitution. It is rather the other way around. Because we find ourselves believing in the rule of law, we make possible a constitution. States that do not believe in the rule of law may formally have constitutions, but those constitutions do not serve the legal function expected in the West. Accordingly, before we get to a text, we need to ask about the possibilities that a text can serve. Those possibilities are established by the structure of belief that attaches to the very idea of the rule of law within a community.

Scholars of comparative constitutionalism, as well as ordinary observers, are likely to make an initial division between states with or without a written constitution. They will make a further division based on systems of representation — parliamentary or presidential, federalist or centralist. Finally, they are likely to differentiate constitutional forms based on the presence and character of judicial review: abstract or concrete, specialized constitutional court or regular courts. Having delineated broad structural categories, they will turn to a comparison of constitutional rights: social and economic, or political and civil. I want to suggest a different division — that between constitutional regimes that purport to be founded on the sovereign will and those that rest on a claim to reason. Only when we turn to this distinction can we begin to answer the question "what is the structure of belief that characterizes a court engaged in judicial review?"

In the West, we are never far from these double sources of authority: reason and will. Law as the will of the sovereign is our oldest idea of the origin of law; law as the expression of reason is our oldest source of the critique of laws. Even a creator God is subject to

44. That the international order did not share this quality was one reason for the traditional skepticism regarding the claim that international law was law.

the critique of reason — that is the puzzle for which the history of theodicies in the West was to be the answer.[45] God's will may be the source of law, but God's will cannot be irrational. If that will appears arbitrary and capricious, there must be a problem in man's apprehension of the divine plan. The distinction is captured in the traditional European monarchy. Drawing on ideas of divine will and presence, the monarch as sovereign is the mystical corpus of the state.[46] Law expresses the will of this sovereign, which is not the same as the finite will of the individual who happens to be king. The transformation of the individual into the sovereign is a ritual process quite independent of his or her quality of judgment or capacity for rule. This dimension of succeeding to the throne is a matter of legitimacy — a usurper might be labeled "illegitimate." The legitimacy of power, however, is not an answer to the problem of just rule. Even legitimate power can be abused. The answer to that problem is rule according to reason.

Exactly the same reasoning is present in a democratic state. A government may come to power through an electoral victory. Electoral legitimacy, however, is not the only normative criterion we apply in evaluating a government and its law. Few people outside of Serbia were happy when Milosevic was elected. Indeed, even within Serbia, the Kosovars and others had much to fear from the election. A government may abuse its legitimate power by directing it to the accomplishment of factional interests instead of the public good. Rousseau warns that even if the faction expresses the will of all, it may still be subject to the critique of reason for failing to advance the public good.[47] Plato made the same point at the origin of Western philosophy: pursuit of interest without knowledge of the good is just as likely to lead to political and moral failure as to success.[48] A democracy can destroy itself no less than an autocracy.

In the liberal tradition, the only measure of the public good is the discourse of reason. Of course, even among liberals there is no single direction marked as "the discourse of reason." The appeal to reason does not in itself tell us whether we should be Rawlsian contractarians or utilitarians — or how broadly to extend our recognition of utility. It does tell us, however, that an argument that simply makes a claim for factional advantage or personal interest does not in itself qualify as a public reason for common action.

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45. *See* SUSAN NEIMAN, EVIL IN MODERN THOUGHT: AN ALTERNATIVE HISTORY OF PHILOSOPHY (2002).

46. *See* ERNST H. KANTOROWICZ, THE KING'S TWO BODIES: A STUDY IN MEDIAEVAL POLITICAL THEOLOGY (1957).

47. *See* JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 72-74 (Maurice Cranston ed., Penguin 1968) (1762).

48. *See* PLATO, GORGIAS 466b-468e (G.P. Goold ed., 1961).

Every modern society is likely to sustain a serious debate over the character of justice and the public good. That debate is necessarily attached to law, not just because law is coercive and coercion must be justified in a liberal society, but also because law offers an image of ourselves and our public values. The liberal approach to constitutionalism and to constitutional courts is to think of judicial review as the locus of an authoritative discourse of public reason. This is a position that easily accommodates, for example, Habermas's discourse ethics or Luhmann's idea of the autopoesis of law.[49] We see this move toward the discourse of reason in the U.S. Supreme Court, when the Court invokes the need for "sound judgment" to determine those fundamental rights "implicit in the concept of ordered liberty."[50]

Liberal constitutionalism tends to stop at just this point, seeing a choice between faction and the public good. This choice is negotiated successfully to the degree that law becomes the internalized expression of reason in the public order. But there is an equal and opposite reaction to the perception of the risk of faction or personal interest arising within the institutionalized mechanisms of governance. If we describe the turn to reason as the appeal to justice in order to determine the public good, we can describe the turn to the sovereign will as the turn to legitimacy. Precisely because justice is a contested concept, the appeal to justice alone can never suppress the alternative norm of legitimacy — and vice versa.

This conception of legitimacy is not exhausted in the mechanisms of electoral politics. Constitutional politics is not ordinary electoral politics. Rather, constitutional politics invokes an identification with the transhistorical, popular sovereign. A king who was not perceived as the mystical corpus of the state failed in this dimension of legitimacy even if he rightfully succeeded to the throne. An elected leader who is viewed as representative of party interests rather than the entirety of the nation equally fails in the dimension of constitutional politics. Leaders must speak in the voice of the popular sovereign if citizens are to see themselves as participants in a political project that makes a compelling claim on individual identity. That project establishes the link a citizen feels between the self and the community's narrative, which, in turn, sets forth a privileged history and a national destiny. Citizens stand not just in a relationship of reason to each other and to the state, but in a relationship of identity. They understand themselves as mutual participants in a unique historical

49. *See generally* HABERMAS ON LAW AND DEMOCRACY: CRITICAL EXCHANGES (Michel Rosenfeld & Andrew Arato eds., 1998); Niklas Luhmann, *The Unity of the Legal System*, *in* AUTOPOIETIC LAW: A NEW APPROACH TO LAW AND SOCIETY (Gunther Teubner ed., 1987).

50. *See* Planned Parenthood v. Casey, 505 U.S. 833, 951 (1992); Palko v. Connecticut, 302 U.S. 319, 325 (1937).

project and they are willing to sacrifice to assure the success of that project.

This is the dimension of political leadership that Weber identifies with charisma.[51] That, however, is to personalize it too much. Most importantly, it misses the direction in which we must look for expressions of the popular sovereign. It is likely to point us toward electoral politics instead of law. In the United States, the most important source of the expression of the transtemporal will of the popular sovereign is to be found in the Supreme Court. The Justices are hardly charismatic political leaders, yet the discourse of the Court is largely shaped by the political rhetoric of legitimacy. This is the animating source of the turn in American constitutional discourse toward the Framers, original intent, and the historical artifact of the text. It is the source of judicial resistance to the discourse of natural law, legal science, and claims of universal rights.

Marbury was critical in the development of this tradition of judicial self-understanding. Marshall identifies the voice of the Court with the voice of the popular sovereign. If the Constitution is the expression of the popular sovereign and the role of the Court is to "say what the law is," then the opinion of the Court is the opinion of the people. Just here, we find the elaboration of the sovereign will. This equation equally implies that the President and Congress represent only popular opinion, which is always bound to contemporary circumstances. Popular opinion is changeable, while the opinion of the people is permanent. It is also the permanent possession of the Court. The success of *Marbury* is located in the strength of the belief that popular sovereignty and the rule of law are one and the same — the constitutional rule of law is the expression of government by and through the popular sovereign. The cultural construction of the Court is the elaboration of this fundamental claim that here we find the sacred source of the nation itself.

Just as the ideal of a discourse of reason does not specify the content of reason, the ideal of a discourse of sovereignty does not specify the character of the national will. We find two primary divisions in modern politics. One identifies a prepolitical nation as the subject of the will; the other identifies the nation with the community of citizens, committed to each other through the institutions and laws of the state itself. This debate between ethnic nationalism and civic nationalism has been a contest over the very soul of the modern nation-state.[52] In the post-Cold War era, the dispute has literally erupted into battle, as movements of ethnic nationalism have resisted

51. *See* MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 358-73 (A.M. Henderson & Talcott Parsons trans., Oxford Univ. Press 1947).

52. *See, e.g.*, MICHAEL IGNATIEFF, BLOOD AND BELONGING: JOURNEYS INTO THE NEW NATIONALISM 243 (1993).

norms of civic nationalism that were shared by both of the multi-ethnic empires of the Cold War. Yugoslavia fails as a state when its diverse citizens no longer see themselves as participants in a common historical project of state construction and maintenance, which defines who they are. The Yugoslavian experience is so symbolically threatening to Europe because of the latent character of a tradition of ethnic nationalism that cuts deeply against the project of civic nationalism represented not just by the European Union but by the emerging recognition of the multicultural character of individual European states. The same battle is going on in Israel as it struggles with its dual sources of legitimacy: it is to be both a Jewish state and a liberal, democratic state.

This distinction of reason and will marks a fundamental difference in answering the question of what a constitution does. On one view, the constitution is the expression of reason within what would otherwise be a continuous conflict of interests among the individuals, parties, and institutions that constitute the state. The problem it addresses is not the construction of a nation, but the just organization of interests and interest groups. Its aim is not to make one out of many, but rather to impose order on disorder. The foundational act is not the analogue of God's speaking the world into existence, but rather a kind of Rawlsian inquiry into the reasonable structure of a common political project.

The distinctive character of the Western study of law is the belief in the law's internalization of a principle of reason. This first view of constitutionalism identifies that principle of reason with the constitution — whether written or not. Indeed, the absence of a constitutional text is not an issue of tremendous import from this perspective. To say that something is unconstitutional is to say that it is unreasonable. The role of a constitutional court is to maintain the reasonableness of the polity by subordinating politics — always the expression of interests — to law.

Political identity is not at issue on this view of constitutionalism and the judicial role.[53] We ask, for instance, what are the necessary conditions of a just political order; we produce, in response, a doctrine of rights. We similarly ask, what is the best method of organizing political activity, and respond with doctrines of separation of powers, of parliamentary government, or judicial review. On this view, constitutions are experimental, not existential. They are subject to external norms — whether of justice or efficiency — rather than constitutive of the meaning of the political. We catch a remnant of this idea within

53. This requires some qualification, since the commitment to a liberalism of reason can also be a commitment to be a certain kind of citizen, i.e., a liberal citizen. *See infra* text accompanying note 72. This commitment is likely to be qualified with the understanding that what is at stake is only political, not comprehensive, liberalism.

American constitutional law in the continuing attachment to the standard of minimum rationality. At no point can the Court say that the legal order is indifferent to its own reasonableness. However, what is a weak and politically ineffective standard here can be the primary source of constitutional review elsewhere.

For example, judicial review in the Israeli Supreme Court is an endless deployment of proportionality review.[54] Proportionality is nothing more than the contemporary expression of reasonableness. This is what the Israeli Court promises: It will guarantee that the actions taken by the state pass a test of reasonableness. Reasonableness requires first a specification of the right at issue — itself a product of a liberal science of law — and second the balancing against that right of the government's interest in the purported action. The Israeli Court is not alone in finding its own voice in the expression of reason in an all-things-considered judgment. Proportionality review is central, for example, to the Canadian Supreme Court's jurisprudence.[55]

Proportionality review is often criticized as a practical judgment that lacks the indicia of legal principle and instead involves the courts in making policy.[56] This criticism, however, fails to understand the genealogy of proportionality review, which lies in the belief that the rule of law is the internalization of reason itself as a regulative ideal within the political order. Proportionality is the form that reason will take when there is no longer a faith in formalism — i.e., when reason must be sensitive to circumstance — and there is no longer a belief in a single coherent order among what are otherwise conflicting interests. The retreat of formalism is true across the entire sweep of the social sciences, which increasingly call for the parsing of particular interests within particular circumstances. The model of judicial reasoning is the situated judgment of "equity" — a form of reason already identified by Aristotle.[57] This does not mean there is no room for principled judgments — indeed the derivation of rights continues to appeal to principle — but those principles do not apply independently of a contextualized judgment that takes into account competing interests.

As long as belief in a formal science of law is strong, the reasoned judgments of a court look different from the "all things considered" judgments of the political branches. When reasonableness replaces science, however, the work of a court looks like little more than

54. *See* Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16 (2002).

55. *See, e.g.*, R. v. Edwards Books & Art Ltd., [1986] 2 S.C.R. 713, 768; R. v. Oakes, [1986] 1 S.C.R. 103, 135-40. R. v. Edwards Books & Art Ltd., [1986] 2 S.C.R. 713, 768.

56. *See, e.g.*, Richard Fallon, *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 79-80 (1997); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179-81 (1989).

57. ARISTOTLE, THE NICOMACHEAN ETHICS BK. V, ch. 10 (1137b19-24).

prudence. Prudence may be a political virtue, but why should it be the constitutional norm to which all other political virtues are held accountable? In the end, a judicial claim to prudence is likely to be judged on political grounds: Is the polity better off, all things considered, with judges exercising a second-order judgment of reasonableness? That question will be answered in part by a judgment on the policies produced — the form of analysis offered by the social scientist. But, in part, it will also be answered by the continuing appeal of the Western ideal of law as the internalization of reason, even as the form of reason changes.

If we move from national to transnational courts, the appeal of reason appears even stronger precisely because there is no counterpart to the sovereign will. There is, of course, the formalism of a treaty's text, which can be read as an expression of national will in form of consent. But contemporary international courts are not arbitration bodies; their founding texts speak to ideals and principles that require interpretations, not merely the formal application of that text. The expansion of the European Court of Justice into the domain of human rights was a powerful example of the independence of reason from text.[58] That court, too, increasingly understands reason as reasonableness. This is entirely in accord with the ideal of the development of Europe, which is not a mobilization of a transnational European will, but the development of a reasonable course of action. The norms of Europe are bureaucratic, not democratic. The measure of reason within administration is just this ideal of reasonableness all things considered. Accordingly, the power of the European Court is inextricably linked to its capacity to express itself as the voice of reasonableness guarding against the pathologies of administration, on the one hand, and national self-interest, on the other.

Reasonableness and proportionality may dominate the judicial voice in much of Europe, but it would be a mistake to see there the single model for the future of judicial review. Proportionality review is hardly absent from American jurisprudence, but here it is always viewed with some skepticism as too close to political judgment.[59] The deeper point is that the source of the American Court's power lies in the direction of will, not reason. This Court is primarily concerned with legitimacy, not justice.

In a state in which citizenship is understood as a matter of civic, rather than ethnic, identity, the constitution may be the most important point of reification of the group. The constitution is understood to be the self-expression of the sovereign people. It is a product of their

58. *See* J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2417 (1991).

59. *See, e.g.*, T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987); Paul W. Kahn, *The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell*, 97 YALE L.J. 1 (1987).

will and thus an objectification of the founding idea of the nation as a selfconstituting community. This is the case in the United States, in which every assertion of political loyalty — oaths of office and of naturalization, for example — is made to the Constitution.[60] The Constitution is the sovereign will as an enduring object in the world. Political will is power, and power unexpressed is not power at all. In this sense, the Constitution is the political analogue of the Bible. The Bible is not just an expression of the divine will. It is the point at which that divine will manifests itself and is thus constituted as power.

Still, to observe this function of a constitution is not yet to specify any particular institution's relationship to the constitution. The French view their Revolution in much the same terms as the Americans: the mobilization of the popular sovereign as an act of will. They, too, identify with a revolutionary tradition of civic nationalism. But the French courts did not emerge from the Revolution with the power to speak in the name of the popular sovereign. The locus of that voice was instead the French Assembly.[61] Comparing the French and American judicial experiences raises the question of the conditions under which a court can speak in the name of the will of the sovereign people. There is no abstract answer to this question. We know that it is a possibility because the American Court has indeed accomplished this.

The most critical point of *Marbury* is the Court's claim to speak in the name of the popular sovereign. By the end of the opinion, we are to believe that the opinion of the Court is the opinion of the people. It is not quite correct to say that the authority of the Court derives from the people. Rather, the opinion of the Court quite literally is the authority of the people. *Marbury* begins as a kind of continuation of the election of 1800 — a contest of representation between Federalists and Republicans. The Court wins that contest — at least in the long run — by making a claim that is beyond representation. The voice of the Court is the sacred voice of the people themselves.[62]

Of course, the Court has no interest in suggesting that the sovereign people speak in an irrational manner. It does not disregard the internalization of the norm of reason in a legal order. Yet, will precedes reason — legitimacy precedes justice — in American constitutionalism. The sovereign people first create themselves by speaking themselves into existence. This is an act of will. God spoke and there was something rather than nothing; the people spoke and there was something new in the world. The techniques of the judicial decision do

60. This tradition of patriotism directed at the Constitution is what made the new discourse of "homeland" security so jarring to many.

61. On the development of constitutional review in France post-World War II, see STONE, *supra* note 27.

62. For an exploration of the rhetorical and conceptual techniques by which the Court achieves this, see KAHN, REIGN OF LAW, *supra* note 1, at 102-74.

not derive primarily from the necessities of reason, but from those of will. All of our constitutional pronouncements begin from the text and then move to history. Even those scholars and lawyers who would move on must begin with text and history. This is not because these sources give us clear answers or eliminate interpretative debate but because it is through the text that identity is maintained between the judicial voice and the voice of the popular sovereign. The Court is quite literally all of us: it maintains that faith in the mystical corpus of the state, which is nothing other than the popular sovereign.

The fundamental problem of democratic constitutionalism is to negotiate the relationship between reason and will. This is not a matter of identifying particular institutional spaces or discrete principles. It may appear that way from within a cultural practice that will include contending voices and institutions making arguments of both sorts. From the perspective of the study of culture, however, reason and will are neither institutional regimes nor objective principles. Much that has been thought to be reasonable turns out to be quite unreasonable — from alchemy to divine right, to Newtonian science in a world of quarks. Reason operates in law not in the form of Hegel's cunning of reason, but only as a set of ideas which courts and others believe to be appropriate at particular points in time. Similarly, there is no noncontextualized measure of the truth of a claim to express the will of the popular sovereign. The difference between a coup and a revolution lies in the perceived absence or presence of the popular sovereign; this is a matter of belief, not metaphysics. The popular sovereign is present when there is a belief in its presence. Every failed revolution is understood, in retrospect, to lack the support of the popular sovereign. But even failed efforts can be recovered when history is rewritten by a later, successful revolutionary effort.[63] The negotiation of the relationship between reason and will is more like a negotiation of the space between two gods — the Father and the Son — than it is like a negotiation of a contract among parties with conflicting interests. It is a hermeneutic task bound by the possibilities that already exist within a culture.

We have then two different sets of distinctions that can serve to plot the character of constitutional discourse or, more directly, the voice of a court engaged in judicial review. First, there is the distinction between reason and will or between justice and legitimacy. Each of these forms of discourse tends toward a totalizing perspective. Thus, the discourse of justice easily ignores the importance of national borders. It moves naturally toward universal norms; it aspires for institutions of international governance. A judicial voice that rests fundamentally on a discourse of reason will find itself easily moving from

63. Consider the 1848 revolts in Europe or the converse phenomenon in understanding the Confederacy or the Bolsheviks.

the particular, to the comparative, to the universal. This is the pattern of thought behind the emergence of a strong European Court of Justice in a hierarchical relationship to the national constitutional courts.[64] Conversely, the discourse of legitimacy can easily marginalize claims of universality. American constitutional jurisprudence gives us many examples of this phenomenon, including the early statement by Justice Iredell disclaiming any judicial use of abstract theories of justice:

> The ideas of natural justice are regulated by no fixed standard: the ablest and purest men have differed upon the subject; and all that the Court could properly say . . . would be, that the Legislature . . . had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice.[65]

American judicial resistance to arguments from international and comparative law has its source in an idea of an American exceptionalism that rests not on American power, but rather on a vibrant idea of popular sovereignty as the source of the rule of law.[66] Those who object to American legal exceptionalism too often appeal to a discourse of reason that simply fails to make contact with the ground norm of the American rule of law.

Second, within each of these categories a further distinction is to be made. Within the discourse of reason, we can distinguish between those constitutional courts that pursue an autonomous "legal science" and those that understand their role as mediating between law and the expression of reason more generally. In American jurisprudential thought this distinction is marked by Langdell at one end and Dworkin — or the followers of law and economics — at the other. The constitutional, common-law reasoning of the Supreme Court in a decision like *Lochner*[67] stands in marked contrast to the eclectic, social-science reasoning of *Brown*.[68] In European courts, there is a similar conflict as those courts move from the traditional, formalism characteristic of continental legal science to a model of reasonableness as proportionality review.[69] Within the discourse of legitimacy we can distinguish between norms of ethnic and of civic nationalism. The exploration of the role of ethnic nationalism in nineteenth and early twentieth-century American constitutional thought is a burgeoning

64. See the German *Solange* cases as expressions of resistance and collapse: Decision of October 22, 1986, BVerfGE 73, 339; Decision of May 29, 1974, BVerfGE 37, 271.

65. Calder v. Bull, 3 U.S. (3 Dall.) 385, 398-99 (1798) (Iredell, J.).

66. *See, e.g.*, Printz v. United States, 521 U.S. 898, 921 n.11 (1997).

67. Lochner v. New York, 198 U.S. 45 (1905).

68. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

69. On the growth of balancing or proportionality review, see STONE SWEET, *supra* note 12, at 97-99, 114-24.

field of legal studies.[70] The experience of European courts with ethnic nationalism remains a reminder that we cannot expect courts to save us from ourselves.[71]

While every modern constitution must negotiate this relationship between reason and will, not every judiciary will do it in the same way. If we imagine a single axis with reason at one end and will at the other, we can distinguish among constitutional cultures by observing the direction in which they are inclined to move. One critical point at which we can make this observation is when a constitutional court speaks: Does it speak in the voice of the popular sovereign or in the voice of reason? The single axis suggests that the voice is not necessarily one or the other. There is no requirement that a court pick one option over the other: it may appeal to different voices in different circumstances.

How and where a constitutional court locates itself within these possibilities is as much a matter of judicial experience as it is of abstract beliefs about a constitutional order. Judicial experience is not independent of the larger context of political experience — particularly the experience of victory and defeat. Constitutional norms can have their source from outside of the polity: they can be imposed as a consequence of political defeat or foreign intervention. Under those circumstances, it is unlikely that the rule of law will mobilize a cultural ideal of the sovereign will. The emergence of a constitutionalism of reason in Europe surely reflects a twentieth-century experience of disaster with the politics of the sovereign will. American popular sovereignty, on the other hand, appeals to a 200 year narrative of triumph.

There is rarely a single story to be told with respect to the relationship of reason and will within constitutional jurisprudence: both sources are too deeply embedded in Western belief. The American Court, for example, pursued an ideal of legal science at the end of the nineteenth and the beginning of the twentieth century.[72] This was a time of self-confident belief in national progress, but also a time still within the historical memory of the "failure" of the original constitutional design in the Civil War. The science of constitutional law had a distinctly Social Darwinist cast, but this is misunderstood if seen as merely an expression of the personal beliefs of the Justices. Even an autonomous science of law cannot turn to an ideal of reason that fails to cohere with "the best" available theories of political

70. *See, e.g.*, IAN F. HANEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996); EFREN RIVERA RAMOS, THE LEGAL CONSTRUCTION OF IDENTITY: THE JUDICIAL AND SOCIAL LEGACY OF AMERICAN COLONIALISM IN PUERTO RICO (2001).

71. *See, e.g.*, INGO MULLER, HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH (Deborah Lucas Schneider trans., 1991).

72. *See* KAHN, LEGITIMACY AND HISTORY, *supra* note 40, at 108-17.

justice, any more than legal science can insist that the world is flat once the best available view is that it is round. That Court could no more avoid Social Darwinism than a present Court can avoid ideals of justice that have a certain similarity to the theories of John Rawls or Jurgen Habermas. It is not a coincidence that rights of speech and communication dominate so much of contemporary constitutional jurisprudence. In the American experience, however, this appeal to a science of constitutional law is thoroughly discredited in the political confrontation between the Court and the New Deal. The triumph of Roosevelt leaves an enduring characterization of the science of law as transcendental nonsense.[73]

If we turn from twentieth-century America to post-War Europe, we see a very different experience of constitutionalism, beginning with the repudiation of a politics of the sovereign will. Constitutional review starts from a Kelsenian model. Kelsen is more social scientist than legal scholar for he locates reason outside of the law.[74] He objects to the constitutionalization of rights since this will invite courts to deploy norms of reason within the law. Instead, he offers a principle-agent theory of constitutional authority founded on a belief in legal positivism — a jurisprudence of will stripped of its contact with the vibrant politics of popular sovereignty. Yet, the story of European constitutional courts is one of expansion along the dimension of reason. European constitutional courts incorporate doctrines of rights — the first demand of the jurisprudence of reason. They proceed to take on a positive, and not merely a negative role, deploying the situated judgment of reason as proportionality. They are leading agents in the development of a transnational order of law as reasonableness. And that discourse has been very much a part of the project of establishing a liberal identity for the European citizen.

III. CONCLUSION

I can summarize much of what I have argued by reversing direction and asking what it is that constitutionalism is not. It is not a political structure that advances the interests of a faction at the expense of others. When inherited constitutional structures have this appearance, the conceptual conditions of revolution are present — of course, the material conditions of successful revolution may not be present. Every revolution speaks of the abuse of power in the pursuit of individual or

73. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

74. This follows from Kelsen's positivism and his opposition to placing a bill of rights — "norms of natural law" — in a constitution. *See* Hans Kelsen, *Le garantie juridictionnel de la constitution*, 44 Revue de droit public 197 (1928), *discussed in* ALEC STONE SWEET, THE BIRTH OF JUDICIAL POLITICS IN FRANCE 228-31 (1992).

factional — including class — interests. Since every polity is marked by inequality, the burden on the privileged is always to convince the general population that inequality in fact serves their interests. The British aristocracy was remarkably successful at this, negotiating their own relinquishment of power over more than a century.[75] The French aristocracy was not: falling in a moment of revolutionary enthusiasm.[76] The discourse of "special interests" marks the same phenomenon in American politics.

The enemy of constitutionalism is found in this convergence of political epithets: interest, faction, class. All gain their meaning from the opposition to the public good, which is delineated by reason and affirmed by the will of the sovereign. But just here agreement begins to break down. There are two paths open to a constitutional court even as it affirms a common set of aspirations — that of justice and that of legitimacy.

Modern, western constitutionalism rests on patterns of thought that are as old as the West itself. We simultaneously believe in the universality of norms and in the nation; we believe in rationality and autonomy, in justice and legitimacy. At the source of all of these antinomies is the tension between reason and will. Western constitutionalism does not resolve this antinomy but situates itself, in all of its various forms, within it. It cannot resolve the conflict because there is no single right way to pursue law's rule. Indeed, while the American Court has had spectacular success along the path of will, it is the exceptional voice in contemporary constitutionalism. Most constitutional courts today speak a language of reason, of universal values, of situated judgments of reasonableness. Of course, across a wide variety of issues there will be agreement, whichever path a court pursues. But there remains a deep division over the conception of self and polity that animates the legal culture. *Marbury* is one model, but not the only one. Its voice has become our voice. That voice is distinctly not the voice of reason; it is the voice of our popular sovereign. Other nations have good grounds to pursue a constitutional voice of reason over that of a popular sovereign. It would be remarkably shortsighted for American legal scholars to urge *Marbury* upon them.

75. *See, e.g.*, DAVID CANNADINE, ORNAMENTALISM: HOW THE BRITISH SAW THEIR EMPIRE (2001).

76. On the night of August 4, 1789, the French National Assembly abolished feudalism and all privileges possessed by the aristocracy.