Judicial Review and *The Federalist*

Sotirios A. Barber†

I. INTRODUCTION: THE CURRENT RELEVANCE OF *THE FEDERALIST*

I argue here that the general theory of constitutional government in *The Federalist* favors judicial activism. I conceive judicial activism as the practice of judges forming their best understanding of general constitutional ideas and acting, if need be, without deference to legislative or community opinion.¹

I emphasize at the outset that this article is not designed to justify judicial activism by appealing to the alleged intentions of the framers. I have tried to defend judicial activism elsewhere, and that defense is not primarily an appeal to assumed historical authority.² Nor do I assume that *The Federalist* is either the sole or even the main source of evidence of the framers' intent. Rather than confront the difficult meta-interpretive issues concerning framers intent,³ I proceed here on the reasonably safe assumption that *The Federalist* is one of the several prominent sources of framers' intent. I do not assume—though I see no reason to deny—that the authors of *The Federalist* understood or would have accepted the full implications of what they wrote in defense of judicial review. I aim only at a plausible interpretation of what they wrote.

In analyzing *The Federalist*, I shall refer to its authors jointly as "Publius," thus adopting their pen name for my purposes. By

© 1988, Sotirios A. Barber.

† Professor of Government, University of Notre Dame. This article is taken from *Theories of Judicial Review* (in progress). The author is grateful for the criticism and assistance of Sue Hemberger and the support of the National Endowment for the Humanities.

¹ For a more extended treatment of the concept of judicial activism, see Sotirios A. Barber, Epistemological Skepticism, Hobbesian Natural Right and Judicial Self-Restraint, 48 Rev. of Pol. 374 (1986). I reject a definition of judicial activism that refers to "noninterpretive review" or the judicial creation of "new rights." Few judges admit to "noninterpretivism" or agree that they should, or do, create "new rights," rather than announce better conceptions or changed practical implications of existing rights. For discussion of the illusory concept of "noninterpretivism," see Ronald Dworkin, The Forum of Principle, 56 N.Y.U.L.Rev. 469, 471-76 (1981).

² Sotirios A. Barber, On What the Constitution Means 5-7, 183-85, 196-99, 206-20 (1984).

³ See Dworkin, 56 N.Y.U.L.Rev. at 471-500 (cited in note 1).

referring to Publius instead of Hamilton, Madison and Jay, I acknowledge that my analysis is, as all similar analyses are, an interpretation—a plausible imputation at best, defensible partly on historical but ultimately on moral grounds, since the overall purpose of such interpretations is to make an argument about how the community should conduct an aspect of its affairs.⁴ So in this paper, “Publius” is not Madison and Hamilton separately or as historically bounded persons. “Publius” is who *The Federalist* implicitly says Publius is: Madison and Hamilton (in the main) together and therefore reconciled, and both together addressing what they assume to be a community that embraces both their generation and what their constitutional proposal calls their “Posterity.”⁵

The main objective of this paper is to show through an examination of *The Federalist* that the framers’ position on judicial activism may not be what the judiciary’s modern critics say it is. Though the critics I have in mind reason from diverse premises and philosophic positions,⁶ they arrive at the same basic prescription: judges should defer to others in constitutional cases that require controversial judgements of political morality. These critics of judicial power reserve most of their hostility for controversial cases arising under what they typically term the “vague” provisions of § 1 of the fourteenth amendment. They usually oppose a role for moral philosophy in judicial decision and call for historical research into “framers’ intent” as the preferred means of controlling judicial discretion.⁷ They frequently invoke the authority of

⁴ For a defense of this understanding of interpretation, see Michael S. Moore, A Natural Law Theory of Interpretation, 58 S.Cal.L.Rev. 279, 286, 388-96 (1985).

⁵ I join a number of writers in rejecting the “split personality” view of *The Federalist*, but I do so partly because I read *The Federalist* with an eye toward illuminating a normative debate. Those who assume that a work speaks to a practical question one way or another (as is typical of commentators who invoke *The Federalist* in practical argument) commit themselves to interpreting the work in a manner that would enable it to function in a practical argument. (Those who argue for ignoring a work would emphasize its inconsistencies and other normative liabilities.) Such interpreters must find ways to iron out the material’s inconsistencies, as I try to do in at least one part of my analysis here, on *Federalist* 78’s reference to a strict practice of stare decisis. For an overview of the historians’ debate, see, Douglass Adair, The Authorship of the Disputed Federalist Papers, 1 Wm. & Mary Q. 97, 235 (1944); Alpheus Thomas Mason, The Federalist—A Split Personality, 57 Amer.Hist.Rev. 625 (1952); George W. Carey, Publius—A Split Personality? 46 Rev. of Pol. 5 (1984).

⁶ Compare Sotirios A. Barber, The New Right Assault on Moral Philosophy in Constitutional Law, 54 Geo.Wash.L.Rev. 253 (1986), with Richard A. Posner, The Meaning of Judicial Self-Restraint, 59 Ind.L.J. 1, 10-11 (1983).

⁷ See Robert H. Bork, The Constitution, Original Intent and Economic Rights, 23 San Diego L.Rev. 823, 825-27 (1986); Christopher Wolfe, The Rise of Modern Judicial Review 108-13 (1986).

The Federalist as part of their argument that the framers opposed judicial activism.⁸

Yet versions of framers' intent vary, and a few exponents of judicial activism have relied on theories of the founding that differ from the theories of the judiciary's modern critics.⁹ These activist appeals to framers' intent cannot hope to convert everyone, of course.¹⁰ But the fact that there are conflicting versions of framers' intent should suggest that imputations to the framers do not flow simply from historical facts regarding the framers. They flow also from controversial background theories of those facts, namely, theories of who the framers were, what constitutes evidence of their intentions, and what aspect of their intentions should be authoritative.¹¹

In this paper I argue, through a more sustained examination of *The Federalist's* treatment of judicial power than is elsewhere available,¹² that *The Federalist* does support an active judiciary. A plausible interpretation of *The Federalist* that favors judicial activism hardly forecloses the possibility of future arguments that advocate a different view of what the framers intended for judicial power. But if successful, this paper and similar arguments would transform the nature of the debate over framers' intent. They would succeed in establishing that it will take a multifaceted and persuasive *political theory* of the American founding to establish any particular picture of the framers's views on judicial activism. The kind of political theory to which I refer stands in opposition to

⁸ See, for example, Raoul Berger, "Original Intention" in *Historical Perspective*, 54 *Geo.Wash.L.Rev.* 296, 310-11 (1986); Walter Berns, *The Constitution as Bill of Rights*, in Robert A. Goldwin and William A. Schambra, eds., *How Does the Constitution Secure Rights* 50, 66 (1985); Judge Robert H. Bork, *Styles in Constitutional Theory*, in 1984 *Yearbook of S.Ct.Hist.Soc.* 53; Wolfe, *The Rise of Modern Judicial Review* at 74-77 (cited in note 7).

⁹ See H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 *Harv.L.Rev.* 885 (1985); H. Jefferson Powell, *Consensus and Objectivity in Early Constitutional Interpretation: An Unproven Thesis*, 65 *Tex.L.Rev.* 859 (1987); H. Jefferson Powell, *The Modern Misunderstanding of Original Intent*, 54 *U.Chi.L.Rev.* 1513 (1987); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 *Stan.L.Rev.* 29 (1985); Stephen Macedo, *The New Right v. the Constitution* (1986).

¹⁰ See Berger, 54 *Geo.Wash.L.Rev.* (cited in note 8) (criticizing Powell, 98 *Harv.L.Rev.* 885 (cited in note 9)).

¹¹ See Dworkin, 56 *N.Y.U.L.Rev.* at 471-500 (cited in note 1).

¹² For broader recent treatments of *The Federalist*, see Sunstein, 38 *Stan.L.Rev.* 29 (cited in note 9); Morton White, *Philosophy, The Federalist, and the Constitution* (1987); David F. Epstein, *The Political Theory of The Federalist* (1984). I share aspects of Sunstein's understanding of *The Federalist* as a whole. I elaborate and defend here a position close to his cautious suggestion that judicial activism "in pursuit of republican goals may be both desirable and legitimate." 38 *Stan.L.Rev.* at 85 and, more generally, at 79.

the "absolutistic positivism and flaccid historicism" that characterizes much of the current debate on framers' intent.¹³ This shift to new modes of inquiry and persuasion would be a major change. To argue *from* a political theory *to* a particular view of framers' intent would be to argue philosophically, and philosophic arguments appeal to reason, not ancestral authority.

II. PUBLIUS ON RESPONSIBILITY IN GOVERNMENT

The problem that dominates American constitutional theory in our century is that of reconciling the power of an electorally unaccountable judiciary with norms of democratic responsibility. But since problems are largely what they are perceived to be, our century's problem with the judiciary may reflect a defect in our own thinking, especially our conception of democratic responsibility. Sanford Levinson has recently pointed out that John Marshall was comfortable with judicial power because he conceived accountability not just in terms of responsibility *to* someone, but, more importantly, responsibility *for* a certain set of objectives. The judiciary was supposed to serve the latter, and Marshall thought the latter was constitutionally more important.¹⁴ We shall see that the same is true of Publius. Publius's theory of judicial power is part of his general theory of responsible government. The story starts at a point in *The Federalist* well before Publius focuses on the power of the federal courts.

We have to begin with Publius's reason for wanting a new constitution in the first place: he regards the government under the Articles of the Confederation as a bad government. The overall arrangement of confederal and state governments is a failure, he believes, because it is unable to handle social problems such as commercial rivalries among the states, declining investor confidence in the face of paper money and other debtor relief laws of the states, the inability to raise revenues and troops for purposes like retiring the war debt, and the failure to inspire foreign respect for treaty

¹³ The quoted phrase is Herbert Storing's characterization of modern judicial attempts to escape the difficult problems of practical principle involved in applying the bill of rights to concrete cases. See Herbert Storing, *The Constitution and the Bill of Rights*, in Goldwin and Schambra, eds., *How Does the Constitution Secure Rights?* 15, 26 (cited in note 8). For a related complaint, see Richard A. Posner, *What Am I? A Potted Plant?*, *The New Republic* 23-25 (Sept. 28, 1987). Readers who know Professor Storing's work will quickly recognize his influence on my thinking, though some will say that I deviate from his views.

¹⁴ Sanford Levinson, *Accounting for Tastes in Constitutional Interpretation*, *Dissent* (forthcoming summer 1988).

obligations and domestic respect for the consequences of sedition.¹⁵ Not only does "[t]he imbecility of our Government" defeat hopes for national security, prosperity, and honor,¹⁶ but the Confederation's fragmentation of effective institutional power reinforces disintegrative tendencies and territorial rivalries that can eventually lead to war among the states.¹⁷

This practical concern for ameliorating real problems of national security, order, wealth, credit and honor is basic to Publius's outlook; it influences his treatment of the more legalistic and institutional varieties of constitutional question. His response to complaints that the proposed government will exercise too many of the most important governmental powers is, essentially, that people should not oppose means that are necessary for ends that they want.¹⁸ In an important passage he recalls "the impious doctrine in the old world that the people were made for kings, not kings for the people," and he charges his states rights adversaries with reviving this old doctrine in a new shape. He finds the jealous concern for state prerogatives tantamount to a suggestion that "the solid happiness of the people is to be sacrificed to the views of political institutions."¹⁹ In a statement that mitigates his own shortsighted and even disingenuous predictions about the preservation of state prerogatives and "the greater probability of encroachments" by the states upon the central government, he acknowledges that such "conjectures . . . must be extremely vague and fallible," and he all but leaves the eventual balance between state and nation to popular assessment of which arrangement best serves the people's happiness.²⁰ Publius's attitude is all the more remarkable because his audience conceives a federal division of power as essential to a legitimate constitutional system. From the way he insists that the concerns of states righters be translated into more fundamental questions of means and ends, we are led to ask how else substance overpowers institutional form in Publius's constitutional thought.

The answer is revealed quite plainly in *Federalist* 45, where Publius states flatly that "the real welfare of the great body of the

¹⁵ See *Federalist* 15, in Jacob E. Cooke, ed., *The Federalist* 89, 91-92 (1961). All subsequent references to particular papers are to this edition.

¹⁶ *Id.* at 92.

¹⁷ See *Federalist* 6 at 28, *Federalist* 7 at 36, and *Federalist* 8 at 44.

¹⁸ *Federalist* 23 at 146, 146-48.

¹⁹ *Federalist* 45 at 308, 309.

²⁰ *Federalist* 31 at 193, 198. See also, Epstein, *Political Theory of The Federalist* 52-54 (cited in note 12); Herbert J. Storing, *The Problem of Big Government*, in Robert A. Goldwin, ed., *A Nation of States* 65 (1963).

people is the supreme object to be pursued; and that no form of Government whatever, has any other value, than as it may be fitted for the attainment of this object. Were the plan of the Convention adverse to the public happiness, my voice would be, reject the plan. Were the Union itself inconsistent with the public happiness, it would be, abolish the Union."²¹

This attitude pervades *The Federalist*; it surfaces in the discussion of each of its principal topics, from states' rights to the general principles of representation and the separation of powers. Thus, when Publius defends his proposal for a strong executive he says that if "a vigorous executive is inconsistent with the genius of republican government," we must condemn not (as we might have expected) a strong executive, but republican government. For a "feeble executive" means "a bad government" in practice, "whatever it may be in theory," and a bad government is indefensible.²² The overriding character of Publius's substantive commitment is evident also in *Federalist* 10. There, he defines a "faction" as a group whose demands are "adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." He declares majority faction to be the great problem of republican government, and he says that republican government is not to be recommended unless it can "secure the public good, and private rights, against . . . a [majority] faction."²³ The primacy of substance over institutional form is plain also in *Federalist* 51, where Publius says: "Justice is the end of government. It is the end of civil society. It ever has been, and ever will be pursued, until it be obtained, or until liberty be lost in the pursuit. In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may truly be said to reign, as in a state of nature."²⁴

To secure minority rights and the common good from majority faction in a manner consistent with the forms of popular government, Publius proposes a plan that exhibits two general and complementary aims: (1) preventing the tyranny of any one segment of the community over the others, and (2) providing governmental "energy" both for effective legal sanctions and for identifying and ameliorating social problems. Publius's plan for controlling the effects of faction, and majority faction in particular, is well known to

²¹ Federalist 45 at 308, 309.

²² Federalist 70 at 472.

²³ Federalist 10 at 56, 57, 60-61.

²⁴ Federalist 51 at 347, 352.

the general reader through the most famous of the *Federalist* papers, Number 10. What is not as well known is Publius's argument for responsible government. It is the latter that I emphasize in this paper, for it houses his theory of the judiciary.

Publius starts by proposing a national government with power to act directly on the large number of individuals and interest groups that are to comprise the society.²⁵ The legislature of this government is designed to "refine and enlarge the public views, by passing them through the medium of a chosen body of citizens."²⁶ The legislature is divided into houses whose "different modes of election," tenure, function, and resulting institutional psychology will divide and weaken the legislature as a whole. This arrangement makes majority faction less likely, in accord with the argument of Number 10. It also creates, through the weakening of the legislature, one of the conditions for the independence of the executive, which would otherwise be a weaker branch in this as in other popular governments.²⁷

The executive is designed to exercise the initiatives of government. The executive branch features a unitary organization conducive to decision and dispatch, an independent electoral base and independent constitutional powers. Moreover, it has independent means of support and defenses against legislative encroachment, including the presidential veto and a constitutional prohibition against diminution of salary.²⁸

It is important to note that the executive is designed to act independently of Congress and even of public opinion for limited periods of time. In a remarkable passage of Number 71, Publius asserts that "[t]he republican principle demands" only that the "deliberative sense of the community should govern the conduct" of government. The republican principle "does not require an unqualified complaisance to every sudden breeze of passion, or to every transient impulse" of public opinion.²⁹ Publius believes the people agree with this conception of republican government; "the people commonly *intend* the PUBLIC GOOD," realize their capacity for error, and "despise the adulator, who should pretend that they always *reason right* about the *means* of promoting" the pub-

²⁵ See generally, Federalist 9 at 50, Federalist 10 at 56, Federalist 15 at 89, Federalist 51 at 347.

²⁶ Federalist 10 at 56, 62.

²⁷ Federalist 51 at 347, 350.

²⁸ See generally, Federalist 69 at 462, Federalist 70 at 471, Federalist 71 at 481, Federalist 72 at 486, Federalist 73 at 492, Federalist 74 at 500.

²⁹ Federalist 71 at 481, 482.

lic good.³⁰ Thus, when “the interests of the people are at variance with their inclinations,” persons appointed “the guardians of those interests” have a “duty” to “withstand the temporary delusion” of the people and “give them time and opportunity for more cool and sedate reflection.”³¹ Such conduct has on occasion “saved the people from . . . their own mistakes, and has procured lasting monuments of their gratitude to the men, who had courage and magnanimity enough to serve them at the peril of their displeasure.”³²

Here, then, is a government that is prepared to be initially less responsive to both public and legislative opinion so that it can be more responsible in the long run—that is, so that it can achieve objectives that the public ought to approve and can eventually approve. Publius outlines a more explicit conception of “responsible government” in a section of *Federalist* 63 that compares the Senate with the House of Representatives. “Responsibility in order to be reasonable,” he says, “must be limited to objects within the power of the responsible party; and in order to be effectual, must relate to operations of that power, of which a ready and proper judgement can be formed by the constituents.”³³ Because the size of the House and the tenure of its members cause it to fall short of the standards entailed by this view of responsible government—because, in other words, a body that is too responsive to too many too often cannot be as responsible as a body that is not—the government needs “an additional body in the legislative department, which, having sufficient permanency to provide for such objects as require a continued attention, and a train of measures, may be justly and effectually answerable for the attainment of those objects.”³⁴

Then Publius says something about the Senate that prefigures his views about “personal firmness” in the executive: “To a people as little . . . corrupted by flattery” as those whom Publius addresses, he says that an institution like the Senate “may be sometimes necessary, as a defence to the people against their own temporary errors and delusions.” Though “the cool and deliberate sense of the community . . . will in all free governments ultimately prevail,” “there are particular moments in public affairs” when some “irregular passion” grips public opinion and “the people . . .

³⁰ Id. at 482 (original emphasis).

³¹ Id. at 482-83.

³² Id. at 483.

³³ *Federalist* 63 at 422, 424.

³⁴ Id.

may call for measures which they themselves will afterwards . . . lament and condemn." "In these critical moments" the people need "some temperate and respectable body" to check public opinion "until reason, justice and truth, can regain their authority over the public mind." Had the Athenians enjoyed "so provident a safeguard against the tyranny of their own passions," popular government might have escaped "the indelible reproach of decreeing to the same citizens, the hemlock on one day, and statues on the next."³⁵

In these passages Publius suggests that responsibility in government is conditioned on a certain kind of power and a certain kind of visibility: *power* to perform the tasks for which one is held responsible (responsibility *for* something) and *visibility* sufficient to be held responsible by others (responsibility *to* someone). Most importantly, the tasks for which one is to be held responsible include controlling the individual and collective tendencies that make government necessary in the first place. As Publius elsewhere notes, human beings everywhere are "ambitious, vindictive and rapacious;"³⁶ they are "much more disposed to vex and oppress each other, than to co-operate for their common good."³⁷ And because human nature is what it is, those who found governments "must first enable the government to controul the governed; and in the next place, oblige it to controul itself."³⁸

III. THE TASK OF RESPONSIBLE GOVERNMENT

An obvious problem with Publius's conception of responsibility in government is that its elements appear to conflict. The power that a responsible government must have is power to be exercised against the inclinations of the governed themselves. Yet it is the governed who, at the founding, will judge the propriety of the power to be exercised; and, subsequent to the founding, they will judge the actual exercises of that power. Resolution of this paradox is to be found in Publius's distinction between the immediate *inclinations* of people and their long-range *interests*. We saw this distinction at work in a passage on the executive's personal firmness: "When . . . the interests of the people are at variance with their inclinations, it is the duty of the persons whom they have appointed to be the guardians of those interests, to withstand

³⁵ Id. at 424-25.

³⁶ Federalist 6 at 28.

³⁷ Federalist 10 at 56, 59.

³⁸ Federalist 51 at 347, 349.

the temporary delusion, in order to give them time and opportunity for more cool and sedate reflection.”³⁹ And when Publius defends the organization of the Senate he speaks of “some temperate and respectable body of citizens” standing up to public opinion “until reason, justice and truth, can regain their authority over the public mind.”⁴⁰ So Publius’s idea is that, in the long run, the public will come to see the virtue of policies whose intrinsic value may not have been evident at first. He is not saying, we should note, that whatever might attract sustained public approval will for that reason be in the public interest, for throughout he assumes *objective* criteria of justice, human rights, and common good. His commitment to democracy causes him to believe that a government of the people can make the people aware of their objective interest. Publius believes the case for popular government depends on its reconciliation to objective standards.

Thus, he cannot recommend democracy unless he believes it likely that the mass of the people will eventually support a government whose policies tend to satisfy objective criteria of justice, human rights, and the common good. Eventually, his approach calls for inquiry into the substance of those criteria, and elsewhere I have defended a conception of the ideal state of affairs implicit in the Constitution’s arrangement of offices, powers and rights.⁴¹ In general, I view this constitutional ideal as a commercial society whose people enjoy as much personal and collective security as is compatible with a strong commitment to individual and minority rights, a commitment emanating from what is in effect a ruling desire to be, and be recognized as, a community of reasoning and reasonable beings.⁴² Yet this is not the place to elaborate any particular version of substantive constitutional values. I wish simply to emphasize that objective criteria of some description are integral to Publius’s purposes and enter into his general view of government’s fundamental problems and methods. His aim, abstractly stated, is a state of affairs in which a government initially rooted in consent can pursue the common good while honoring individual and minority rights, and his basic method is a government that is insulated from popular reaction for a period of time sufficient to change public opinion for the better without denying the public’s ultimate right to judge.

³⁹ Federalist 71 at 481, 482-83.

⁴⁰ Federalist 63 at 422, 425.

⁴¹ Barber, On What the Constitution Means at 63-168 (cited in note 2).

⁴² Id.

IV. PUBLIUS AND THE JUDICIARY

A. The Broader Institutional Context

I shall return to Publius's view of responsible government, but first let us see how the judiciary enters Publius's exposition of the Constitution's principles. The first extended reference to the judiciary occurs in *Federalist* 22, the last of a series of papers devoted to a criticism of the Articles of Confederation. A principal theme of the series is the Confederation's lack of *energy*, energy for enforcing sanctions for violations of law, and energy for identifying and acting on society's problems. *Federalist* 15 begins the series; it focuses on those provisions of the Articles that require Congress to raise revenues and troops by directing requisitions to the legislatures of the several states, rather than by passing laws directly binding on individual citizens. Publius calls the Confederation's method of raising money and troops through requisitions the "principle of LEGISLATION for STATES or GOVERNMENTS, in their CORPORATE or COLLECTIVE CAPACITIES, and as contradistinguished from the INDIVIDUALS of whom they consist."⁴³ What makes this defect such a serious one is that it transforms what are nominally laws binding on the states into "mere recommendations, which the States observe or disregard at their option."⁴⁴ The states are free to obey or not because Congress is politically and economically incapable of mustering the amount and kind of force needed for effective sanctions upon entire states. Legislation for states is the "parent of anarchy" whose only remedy is force on a scale that amounts to civil war, says Publius.⁴⁵

The Confederation's principle proceeds from "an ignorance of the true springs" of human conduct because it assumes that "a sense of common interest" can replace fear of sanctions as the foundation for the general obedience to law. The defenders of the Confederation ignore "the original inducements to the establishment of civil power," that "the passions of men will not conform to the dictates of reason and justice without constraint."⁴⁶ They also ignore a natural jealousy of power "that disposes those who are invested with . . . it, to look with an evil eye upon all external attempts to restrain or direct its operations." This jealousy gives an "excentric tendency" to all political associations "formed upon

⁴³ *Federalist* 15 at 89, 93.

⁴⁴ *Id.*

⁴⁵ *Federalist* 16 at 99.

⁴⁶ *Federalist* 15 at 89, 96.

the principle of uniting . . . a number of lesser sovereignties." And this eccentric tendency leaves little prospect that the laws of the union will be executed at all if entrusted to the states.⁴⁷ The laws of the union should apply directly to individuals, for individuals alone are amenable to coercion by the civil magistracies; coercing whole states requires military force, or civil war.⁴⁸

In the next several papers Publius shifts his emphasis to the potential danger to the states of a central government continually faced with the choice of disintegration or military force. He offers examples from the histories of ancient confederations to support his point that the principle of legislation for states is at once the parent of anarchy and tyranny.⁴⁹ And he concludes with the "important truth" that as "legislation for communities" is a "solecism in theory; so in practice, it is subversive of the order and ends of civil polity, by substituting *violence* . . . in place of the mild and salutary *coertion* of the magistracy."⁵⁰

Such is the background for Publius's comment in Number 22 on "[a] circumstance, which crowns the defects of the confederation . . .—the want of a judiciary power." "[W]ithout courts to expound and define their true meaning and operation," says Publius, "[l]aws are a dead letter." To courts belong the duty to ascertain the "true import" of treaties and "all other laws" "as far as respects individuals." And since "[t]here are endless diversities" of opinion among judges regarding the meaning of laws—"[w]e often see not only different courts, but the Judges of the same court differing from each other"—"all nations have found it necessary to establish one court paramount to the rest." This one court possesses "a general superintendence . . . and . . . settle[s] and declare[s] in the last resort, an uniform rule of civil justice."⁵¹

Publius believes that one paramount court is especially necessary in a federal system because he takes it as a general proposition of political behavior that men in office naturally look "towards that authority to which they owe their official existence." Without a supreme national tribunal, conflict between local systems would compound the inevitable "contradictions . . . from difference of opinion" between judges of the same system; "there will be much to fear from the bias of local views and prejudices and from the

⁴⁷ Id. at 96-97.

⁴⁸ Id. at 95-96.

⁴⁹ See Federalist 17-20.

⁵⁰ Federalist 20 at 124, 128-29 (original emphasis).

⁵¹ Federalist 22 at 135, 143-44.

interference of local regulations" with "the general laws." Such a situation obtains with respect to the construction of treaties under the Articles, and "[t]he faith, the reputation, the peace of the whole union, are thus continually at the mercy of the prejudices, the passions, and the interests of every member of which it is composed." In exasperation, Publius asks: "Is it possible that the People of America will longer consent to trust their honor, their happiness, their safety, on so precarious a foundation?"⁵²

From the perspective of the debates in the twentieth century over the nature, scope, and legitimacy of judicial power, one of the remarkable things about these statements from *Federalist* 22 is the ease with which Publius expresses his view that independent judges should ascertain the "true import" of the law, while taking for granted the inevitable controversies concerning the meaning of the law. Publius says these controversies originate in the "endless diversities in the opinions of men" and the tendency of individual judges to favor "that authority to which they owe their official existence." This tendency is particularly significant in a federal republic, for if we granted the proposition that explains Publius's prediction that state judges will, if permitted, tend to favor state authority, we would expect a nationalist bias among federal judges. Publius thus sees no contradiction between a willingness to entrust the nation's judges with the quest of the law's true meaning and an expectation of both inevitable controversies over meaning and a nationalistic bias among federal judges.

Further evidence that Publius admits the possibility of true meaning in the face of controversy is available wherever he himself takes a position on a matter of legal-moral controversy. *Federalist* 1 affords as telling an instance as any. Here he says Americans may be in a position to decide for the whole of mankind the possibility of establishing "good government from reflection and choice." He exhorts them to "choice[s] . . . directed by a judicious estimate of our true interests, unperplexed and unbiassed by considerations not connected with the public good." And he says these things notwithstanding his belief that an objective decision with regard to ratification "is more ardently to be wished, than seriously to be expected," since the proposed constitution "affects too many particular interests, innovates upon too many local institutions, not to involve in its discussion a variety of objects foreign to its merits, and of views, passions and prejudices little favorable to the discov-

⁵² Id. at 144.

ery of truth.”⁵³

In this statement Publius presupposes an objective view of the merits of the constitutional proposal despite his recognition of the obstacles to achieving such a view. He therefore proceeds to offer his arguments to all “in a spirit[] which will not disgrace the cause of truth.”⁵⁴ He urges his readers to moderation, toleration, and reflection by observing that “the causes which serve to give a false bias to the judgment” are “so powerful” that we find many “wise and good men” on both sides of many important questions.⁵⁵ He proceeds, in other words, on the assumption that a process of open-minded and self-critical striving can raise an individual and a community of individuals above parochialism and prejudice toward a true understanding of the common good. Since this assumption is itself part of the background of every other argument of *The Federalist*, literally every significant thought of that work is evidence for the proposition that Publius believes controversy does not preclude true meaning.

As evidence for Publius’s further belief that a nationalist bias inclines federal officials toward an objective grasp of what the Constitution means, consider Publius’s theory of checks and balances, the very heart of his theory of constitutional maintenance. In that theory Publius makes plain his belief that an official’s personal ambition can coincide with official duty, as defined by a scheme proceeding from a true understanding of the common good. Assuming that the Constitution is such a scheme, then regardless of one’s motivation, performing duties that the Constitution prescribes is acting as one would act if one were moved by a devotion to the common good. Publius can reconcile his pessimistic view of human nature with his belief that constitutional duties serve the public interest if he can somehow harness self-serving ambition to duty. He claims to have done just this, of course, when he says in *Federalist* 51 that “the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others. . . . Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.”⁵⁶

⁵³ *Federalist* 1 at 1, 3-4.

⁵⁴ *Id.* at 6.

⁵⁵ *Id.* at 4.

⁵⁶ *Federalist* 51 at 347, 349.

Publius's theory of checks and balances can explain how he might rely on a nationalist bias among federal judges and others. It also explains some of the institutional conditions necessary to provide for leadership that is more than simply biased. The theory of checks and balances is Publius's answer to a question that appears initially in *Federalist* 47: On what are we to rely "for maintaining in practice the separation [of powers] delineated on paper?"⁵⁷ In Numbers 48 through 50, he rejects several alternative answers for reasons that have important implications for the argument he will eventually make in favor of judicial review. I shall review Publius's analysis briefly.

In *Federalist* 48, he dismisses what is perhaps the first proposal one might suggest as a means to maintain the separation of powers: "mark with precision the boundaries of these departments in the Constitution of the government." His well known response to this proposal is that "parchment barriers" will not work "against the encroaching spirit of power." Means more effective than mere words are needed to defend the "feeble, against the more powerful members of the government." And in "our republics" it is the legislature that is "every where extending the sphere of its activity, and drawing all power into its impetuous vortex."⁵⁸

To corroborate his fear of legislative encroachments Publius invokes the testimony of Jefferson and the Pennsylvania Council of Censors. Both criticize legislative acts that, in Jefferson's words, "should have been left to *judiciary controversy*."⁵⁹ Publius feels that the legislature of a representative democracy is particularly dangerous because it is a more competent body than the deliberative assembly of a direct democracy. Unlike the latter, the former is "sufficiently numerous to feel all the passions which actuate a multitude; yet not so numerous as to be incapable of pursuing the objects of its passions."⁶⁰ So the message of Number 48 is that the nation cannot hope to maintain the constitutional arrangement of offices and powers by relying on the inadequate degree of devotion to law that is typical of representative legislatures.

From Publius's account it would appear that the legislature's responsiveness to public opinion is the cause of the legislature's tendency to disregard constitutional limitations. Publius makes his distrust of public opinion explicit in the next number of *The Fed-*

⁵⁷ *Federalist* 47 at 323, 331.

⁵⁸ *Federalist* 48 at 332, 332-33.

⁵⁹ *Id.* at 335-36, quoting Notes on the State of Virginia at 195 (original emphasis).

⁶⁰ *Id.* at 334.

eralist, where the subject is Jefferson's proposal, submitted for inclusion in the Virginia constitution, that any two branches of government could call a convention of the people to correct constitutional violations of the third branch.⁶¹ Although Publius criticizes this proposal, he begins by acknowledging that "the people are the only legitimate fountain of power" and that "[t]he several departments being perfectly co-ordinate . . . neither of them . . . can pretend to an exclusive or superior right of settling the boundaries between their respective powers." From this it follows that some "constitutional road to the decision of the people, ought to be marked out, and kept open, for certain great and extraordinary occasions."⁶²

But Publius then offers objections to Jefferson's specific proposal that bear unflattering implications for public opinion. Frequent appeals to the people would undermine the veneration for the constitution upon which the stability even of the "wisest and freest governments" depends. Frequent referrals of constitutional questions to the people will disturb "the public tranquility by interesting too strongly the public passions."⁶³ He says the people, because of their close connection with it, will usually favor the legislature over the other branches. They will rarely favor a judiciary whose appointment, tenure, and functions render it "too far removed from the people to share much in their prepossessions."⁶⁴ And though a popular executive might cause temporary reversals of the normal pattern, the people's decision

could never be expected to turn on the true merits of the question. It would inevitably be connected with the spirit of pre-existing parties, or of parties springing out of the question itself. It would be connected with persons of distinguished character and extensive influence in the community. It would be pronounced by the very men who had been agents in, or opponents of the measures, to which the decision would relate. The *passions* therefore not the *reason*, of the public, would sit in judgement. But it is the reason of the public alone that ought to controul and regulate the government. The passions ought to be controuled and regulated by the

⁶¹ See Jefferson's Draft of a Constitution for Virginia (May-June 1783), in Julian P. Boyd, ed., 6 The Papers of Thomas Jefferson 294 (1952).

⁶² Federalist 49 at 338, 339.

⁶³ Id. at 340.

⁶⁴ Id. at 341.

government.⁶⁵

Of the institutions mentioned in *Federalist* 49—the electorate, the legislature, the executive, the judiciary, and the Constitution—Publius associates the judiciary and the Constitution with “the reason . . . of the public.” In his thinking, public opinion more often expresses the “passions” of the public, passions which “ought to be controuled and regulated by the government.” And public opinion is normally closer to legislative opinion than to executive and judicial opinion.

Open distrust of public opinion cannot be a comfortable position for Publius, a republican statesman conducting a ratification campaign for the public’s approval. Publius must explain the anomaly of entrusting the public with the more basic and demanding task of ratification but not with the relatively routine tasks of constitutional maintenance. His explanation is that there is something special about the founding generation. Unlike the subsequent generations to whom would fall the responsibility of constitutional maintenance, the ratifying or founding generation is the generation of the Revolution. Revolutionary pressures on the founding generation bring dangers and opportunities that inspire popular confidence in patriotic leaders and repress “the passions most unfriendly to order and concord.”⁶⁶ When normalcy returns, says Publius, partisan passions will reoccupy their usual position of influence with most people. In normal times, the institution least susceptible to partisan passions will be the judiciary.

What about appeals to the people not just during times of crisis, but at regular intervals? *Federalist* 50 rejects this modification of Jefferson’s proposal, arguing that factionalism is likely to affect popular deliberations at any time that does not produce “either a universal alarm for the public safety, or an absolute extinction of liberty.”⁶⁷ Publius then advances the familiar proposal of *Federalist* 51: instead of relying on the virtue of citizens and officials, the nation should rely on checks and balances for maintaining the separation of powers.

Because the defense of each branch of the government “must . . . be made commensurate to the danger” of encroachment from the others, and because Publius believes that in our political culture there is more to fear from the legislature than other branches,

⁶⁵ Id. at 342-43 (original emphasis).

⁶⁶ Id. at 341.

⁶⁷ *Federalist* 50 at 343, 346.

Federalist 51 deliberately weakens the legislative branch by dividing it into two houses, "render[ing] them by different modes of election, and different principles of action, as little connected with each other, as the nature of their common functions, and their common dependence on the society, will admit." Publius adds that as the strength of the legislature requires that it should be weakened, "the weakness of the executive may require . . . that it should be fortified."⁶⁸ Publius mentions the veto as one of the executive's methods of defense along with "some qualified connection between this weaker department, and the weaker branch of the stronger department."⁶⁹ Publius thus employs an institution's relative responsiveness to public opinion as the measure of its inherent strength. He then proposes constitutional provisions that will alter the inherent strength of the institution. In this manner, Publius seeks to weaken the inherently stronger and strengthen the inherently weaker. In *Federalist* Numbers 67 through 77 he elaborates additional ways of strengthening the executive branch. A most revealing part of his discussion of the executive is the passage I have cited above concerning a four-year term of office and the executive's "personal firmness." Publius considers such firmness essential to a plan that would promote the triumph of the public's real "interests" over its temporary "inclinations."⁷⁰ Four paragraphs later, he raises the question "whether a duration of four years would answer the end proposed." He admits that neither four years nor "any other limited duration" will serve the purpose completely, though he seems prepared to accept the four year term as a concession to democratic fears of executive power.⁷¹

B. The Constitution of Judicial Power

Publius's views on the presidency and its complex relationship to public opinion are important for understanding his views on the judiciary. The latter follow the papers on the presidency, and as with the presidency, Publius's proposals for the judiciary aim at strengthening what would otherwise be a weak institution. Upon turning to the judiciary, he first defends a life tenure for federal judges, and the principle he employs is the same as in his defense of the tenure for senators and presidents: duration in office en-

⁶⁸ *Federalist* 51 at 347, 349-50.

⁶⁹ *Id.*

⁷⁰ *Federalist* 71 at 481, 484-85.

⁷¹ *Id.* at 484-85.

hances an institution's independence and firmness.⁷² We should recall that this principle reflects both his pessimism about the deliberative and moral qualities of public opinion, and a conception of governmental responsibility that involves power to stand up to public opinion in the service of ends—the common good and the protection of individual and minority rights—whose worthiness and content are independent of public opinion. Thus, Publius notes the “natural feebleness of the judiciary” and its “continual jeopardy of being overpowered, awed or influenced by its coordinate branches.” And since “nothing can contribute so much to its firmness and independence, as permanency in office,” permanency is an “indispensable ingredient” in the judiciary’s constitution, “in a great measure . . . the citadel of the public justice and the public security.”⁷³

Publius then elaborates the extent and objectives of judicial power. He recognizes a judicial “duty . . . to declare all acts contrary to the manifest tenor of the constitution void.”⁷⁴ This function is “peculiarly essential in a limited constitution” because it is the only practical way to enforce “specified exceptions to the legislative authority.”⁷⁵ In a statement that closely parallels his arguments on the firmness of the Senate and the executive, Publius construes the power of judicial review as power to oppose public as well as legislative opinion. As with the Senate and the executive, he seems to regard a strong and independent judiciary partly as an instrument for educating the public. This is the suggestion of his statement that judicial independence is “requisite to guard the constitution and the rights of individuals from the . . . ill humours . . . [of] the people themselves, and which, though they speedily give place to better information and more deliberate reflection, have a tendency in the mean time to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.”⁷⁶ Though he reassures his readers of his commitment to republican principles, including “the right of the people to alter or abolish the established constitution whenever they find it inconsistent with their happiness,” he denies that this implies a right to violate the Constitution “whenever a momentary inclination happens to lay hold of a majority.” He denies that

⁷² Federalist 78 at 521, 529.

⁷³ Id. at 523-24.

⁷⁴ Id. at 524.

⁷⁵ Id.

⁷⁶ Id. at 527.

courts should “connive at infractions” supported by public opinion any more than infractions proceeding “wholly from the cabals of the representative body.” “Until . . . some solemn and authoritative act,” like amendment or revolution, has “annulled or changed the established form, it is binding upon” the people and their representatives. “But it is easy to see that it would require an uncommon . . . fortitude in the judges to do their duty as faithful guardians of the constitution, where legislative invasions of it had been instigated by the major voice of the community.”⁷⁷ So Publius sets out to provide the conditions for the requisite judicial fortitude.

As for the scope of judicial review, Publius does not regard expressed constitutional provisions as the sole source of standards for exercises of judicial power. Publius apparently believes that a government will occasionally act unjustly, though within its sphere of competence and in a manner beyond the full reach of courts. When judges have no choice but to live with such unjust laws, Publius says judicial independence will enable judges to construe laws in ways that mitigate injustice. Publius thus defends a power of therapeutic construction—a duty to select interpretive options closest not to legislative intent but what simple justice would require.⁷⁸ He goes on to recognize that the very existence of this power in the courts should serve to inhibit legislatures that plan injustice.⁷⁹

Publius concludes this part of his discussion of judicial tenure with a clear statement of approval for the way independence can help transform a weak institution into one strong enough to maintain uncompromising opposition to unconstitutional public and legislative preferences. Thus he holds “inflexible and uniform adherence to the rights of the constitution and of individuals” to be “indispensable in the courts of justice.” And he says that such firmness “can certainly not be expected from judges who hold their offices by a temporary commission.” Foreclosing any suggestion of judicial deference to others, Publius says that periodic judicial appointments would mean “an improper complaisance” to the legislature, or to the executive, or to both, or to the people—and thus would create “too great a disposition to consult popularity” rather than “the constitution and the laws.”⁸⁰

⁷⁷ *Id.* at 527-28.

⁷⁸ See Posner, 59 *Ind.L.J.* at 5 (cited in note 6).

⁷⁹ *Federalist* 78 at 521, 528 (cited in note 15).

⁸⁰ *Id.* at 529.

C. A Judicial Monopoly of Constitutional Interpretation?

Publius's argument for judicial review lends itself to a construction we may ultimately want to reject, namely, that judges apply the Constitution not only for concrete controversies before the courts, but also for the future decisions of the other branches of the government.⁸¹ In other words, Publius may imply that the judiciary will monopolize the general function of determining what the Constitution means. Several considerations favor this generous construction of Publius's argument. To begin with, we have seen him suggest that responsiveness to public opinion is inversely related to firmness on behalf of minority rights and long range public objectives.⁸² He says, in addition, that as compared to other officials, judges must be persons of more learning, because of the volume of precedents to be mastered, and more integrity, because of their expected firmness in support of principle.⁸³ He is pessimistic about the states' fidelity to "the articles of union," and he conceives judicial review as a substitute for congressional power to veto state acts.⁸⁴ This implies that judicial precedents can function as rules for legislative conduct and that courts can interpret the Constitution for the other branches.

Moreover, in *Federalist* 80 Publius treats as virtually self-evident the propriety of the grant in Article III, § 2 of federal jurisdiction over federal questions: "The mere necessity of uniformity in the interpretation of the national laws, decides the question. Thirteen independent courts of final jurisdiction . . . is a hydra . . . from which nothing but contradiction and confusion can proceed."⁸⁵ Since contradiction and confusion might also proceed from a plurality of interpretations among the branches of the national government, this passage adds to the case for judicial monopoly at both the national and federal levels. Finally, in *Federalist* 81, Publius defends the decision not to give Congress power to review judicial decisions, arguing that judicial encroachments will be rare and relatively inconsequential, and that Congress's power to impeach

⁸¹ For recent challenges to this presumed judicial monopoly, see John Agresto, *The Supreme Court and Constitutional Democracy* (1984); Sanford Levinson, "The Constitution" in *American Civil Religion*, 1979 S.Ct.Rev. 123; Walter F. Murphy, *Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter*, 48 Rev.of Pol. 401 (1986).

⁸² *Federalist* 49 at 338, 341-42; *Federalist* 63 at 422, 423-25; *Federalist* 71 at 481, 481-84 (cited in note 15).

⁸³ *Federalist* 51 at 347, 348; *Federalist* 78 at 521, 529-30; *Federalist* 81 at 541, 543-44.

⁸⁴ *Federalist* 80 at 534, 535.

⁸⁵ *Id.* at 535.

"is alone a complete security."⁸⁶

Despite Publius's emphasis on judicial competence, relative fidelity to the Constitution, and the value of uniformity, a closer look at these and other considerations suggests that Publius would allow limited concessions to a pluralistic view of who should interpret the Constitution. Admittedly, Publius insists on judicial independence and firmness in cases before the courts,⁸⁷ and this independence alone should give the judiciary's interpretations of the Constitution great strategic advantage over other interpretations as long as the courts remain within a range of tolerable alternatives.⁸⁸ The question, therefore, is not so much whether other branches can normally ignore judicial interpretations, but whether they ever have constitutional warrant deliberately to undermine the precedential value of judicial decisions. The power to impeach cannot preclude a pluralist approach, for by referring to impeachment as a remedy for "deliberate usurpations," not mere legislative disapproval,⁸⁹ Publius implies that the legislature has some independent power to decide what the Constitution means. Thus, the advantages of national supremacy and uniformity in interpretation need not imply a judicial monopoly.

The strongest argument for a judicial monopoly of constitutional interpretation proceeds from the premise of special judicial competence. I have discussed Publius's pessimism about the public's commitment to constitutional principle in normal times. In setting the stage for his theory of checks and balances, Publius observes that their tenure and method of appointment will render judges less responsive to popular prejudices than the elected branches will be.⁹⁰ His conception of governmental responsibility leads him to emphasize that some insulation from electoral pressure is essential to good government, and he doubts that four years or "any other limited duration" will suffice for executives to educate the public to its true interests—a result on which he expressly conditions his very support of popular government.⁹¹ His central themes all flow from his basic project to reconcile popular govern-

⁸⁶ Federalist 81 at 541, 545-46.

⁸⁷ *Id.* at 545.

⁸⁸ See Federalist 79 at 531, 532-33 (arguing that impeachment is the only method for removing judges compatible with judicial independence, and opposing provision for removal "on account of inability," though conceding that "insanity" is a disqualification).

⁸⁹ Federalist 81 at 541, 545-46.

⁹⁰ Federalist 49 at 338, 341.

⁹¹ See Federalist 71 at 481, 484-5. For similar discussion, see Federalist 63 at 422, 425.

ment to minority rights and the common good.⁹² And because responsiveness to the public's more immediate inclinations obscures the practical meaning of these values, Publius cannot expect the elected branches to be as competent as the courts in discerning these values.

As we have also seen, Publius does recognize that judges can usurp. Impeachment is the remedy he proposes. He considers impeachment "the only provision . . . which is consistent with the necessary independence of the judicial character."⁹³ Furthermore, he either ignores or, in view of his emphasis on judicial independence, excludes the potential check of Congress's power to establish the lower federal courts and regulate the appellate jurisdiction of the Supreme Court.⁹⁴ We can therefore read him to suggest that when the elected branches disapprove of what the judges say, their recourse is replacing irresponsible judges with responsible ones. Such a check would still leave constitutional interpretation largely in the hands of the courts.

On the other hand, Publius insists that judicial independence is not the same thing as judicial superiority over the other branches.⁹⁵ He also seems to assume that judges should remain sensible of the independence of the other branches—in particular, with regard to their freedom to refuse cooperation with judicial decision, at least in extraordinary circumstances. Thus Publius acknowledges the judiciary's dependence on the executive more than once⁹⁶ and this at least suggests that there is no necessary inconsistency between refusals to cooperate with judges in some instances and a more general respect for judicial independence.

Publius's clear support for a strong judiciary flows from his central objective of reconciling popular government to higher standards. He implies that those standards are not of the judges's own making by his famous statement that the judiciary's power is "neither Force nor Will, but merely judgment."⁹⁷ By acknowledging objective standards of judgment and the judiciary's partial dependence on others, Publius's theory lends itself to a construction that permits other branches some power to decide the constitutionality of their own acts. The mere possibility of such a construc-

⁹² See Federalist 9 at 50, 51; Federalist 10 at 56, 61; Federalist 51 at 347, 352.

⁹³ Federalist 79 at 531, 533; see also Federalist 81 at 541, 545-46.

⁹⁴ For Publius's discussion of the "exceptions" clause, see Federalist 80 at 534, 541; Federalist 81 at 541, 551-52.

⁹⁵ Federalist 78 at 521, 525. See also Federalist 49 at 338, 339.

⁹⁶ Federalist 78 at 521, 523; Federalist 81 at 541, 545.

⁹⁷ Federalist 78 at 521, 523.

tion is of course not a sufficient argument for it, and because I have made that argument elsewhere,⁹⁸ I will not dwell on the matter here. My point is that Publius can be read as acknowledging the possibility of judicial error and accepting other branches' opposition to judicial constructions without displacing judicial power to decide concrete cases and controversies. The broader influence of a judiciary thus confined might depend to a greater extent than is presently the case on the persuasiveness of the Supreme Court's arguments.⁹⁹

V. PUBLIUS'S DEFENSE OF JUDICIAL REVIEW

The defense of judicial review in *Federalist* 78 is comprised of three propositions: (1) judicial review does not amount to judicial supremacy, (2) judicial review is instead an expression of constitutional supremacy, and (3) constitutional supremacy ensures the supremacy of the people over their government.¹⁰⁰

The first thing to notice about Publius's argument is its defensive character, which derives from the fact that it is addressed to an audience with a democratic outlook. Publius to some extent accepts the leading assumption of his critics over the years: judicial review would be illegitimate if it in fact did lead to the supremacy of electorally unaccountable judges. He also seems to concede his opposition's view of the appearances: a power to declare the legislature's acts unconstitutional does suggest judicial supremacy. It thus falls on defenders of judicial review to show that, despite the appearances, judicial review does not amount to judicial supremacy. If advocates of judicial review cannot make that showing, then the appearances will stand and will condemn judicial review as illegitimate.

According to Publius, then, judicial review does not amount to judicial supremacy; it is an instrument of constitutional supremacy that insures the people's supremacy over government. The mediating concept of this argument, the term that connects the judges and the people, is the *Constitution*. Judicial review implies *constitutional* supremacy, and *constitutional* supremacy implies popular supremacy.

The key presuppositions of this argument concern the psychology of judges in constitutional cases, the semantic qualities of

⁹⁸ Barber, *On What the Constitution Means* at 197-98, 216-18 (cited in note 2).

⁹⁹ See Murphy, 48 *Rev. of Pol.* at 408, 417 (cited in note 81).

¹⁰⁰ *Federalist* 78 at 521, 525 (cited in note 15).

constitutional values from one generation to the next, and the ontological status of those values. A rough outline of the basic alternatives and presuppositions of Publius's argument follows:

Judicial Review *implies either*

I. Judicial Supremacy, *or*

II. A. Constitutional Supremacy, *which in turn implies*

B. Popular Supremacy.

That it implies II.A. (constitutional supremacy) *presupposes*

1. That judges are psychologically capable of repressing their personal predilections in favor of what the Constitution means; *and*

2. That constitutional language is adequate to the communication of meaning in concrete cases.

That it implies II.B (popular supremacy) *presupposes*

1. That fundamental constitutional values can in fact be transmitted from generation to generation; *and*

2. That because of their objective validity and transhistorical applicability, fundamental constitutional values are worth transmitting from one generation to the next.

I shall further explicate Publius's defense of judicial review by discussing each of its presuppositions.

II.A.1. The Possibility of Dutiful Judicial Decision.

The leading psychological presupposition of Publius's argument is simply that it is possible for judges to decide cases in a manner that is faithful to the law. This presupposition has, of course, long been controversial as a result of the legal realist theories of writers like Holmes, Frank, and Arnold.¹⁰¹ On the other hand, important recent theories affirm the possibility of dutiful judicial performance, even in hard cases.¹⁰² Settling this issue forms no part of my purpose here. What *is* relevant is the apparent paradox of Publius's assuming the possibility of judicial duty in the face of his own well known skepticism about the likelihood of law abiding officials generally, as well as the clear suggestion in other parts of *The Federalist* that judging constitutional questions is not a mechanical process free of controversy. In defending judicial review, Publius may rely on an understanding of duty under law that much of his earlier skepticism directly undermines.

¹⁰¹ See generally Edward A. Purcell, Jr., *The Crisis of Democratic Theory* 79-94 (1973).

¹⁰² Ronald Dworkin, *Taking Rights Seriously* 80-130 (1977); Michael S. Moore, *The Semantics of Judging*, 54 S.Cal.L.Rev. 151 (1981); Neil MacCormick, *Legal Reasoning and Legal Theory* (1978).

Yet it would be a mistake to oversimplify Publius's view of human psychology. From the beginning of his argument in *Federalist* 1,¹⁰³ he expressly appeals to (and therefore presupposes) the influence both of self interest *and* public spiritedness or virtue. When, in *Federalist* 10, he defines "faction" as either a minority or a majority adverse to the rights of others and the common good, and, more generally, when he proposes a plan for reconciling democracy to higher standards of political morality, he assumes that his democratic audience is sufficiently virtuous to respond appropriately to such distinctions and prospects.

In *Federalist* 49, as we have seen, he does observe that normalcy diminishes virtue's influence and that it is the Revolution's lingering impact that explains the relative virtue of his generation. But he also believes that even in normal times the method of appointing judges and the functions they perform will diminish the judiciary's share in the people's presuppositions.¹⁰⁴ And throughout his discussion of judicial appointment and tenure, Publius aims at elevating and insulating the few then in society who can "unite the requisite integrity with the requisite knowledge" to be federal judges.¹⁰⁵

Publius can go so far as to defend judicial review even though he recognizes that, despite all constitutional precautions, judges may "substitute their own pleasure to the constitutional intentions of the legislature."¹⁰⁶ We have seen that his general approach to constitutional maintenance involves linking officials' personal ambitions to what he expects of their offices. Self interested individuals will thus seek to aggrandize their offices, ambition will check ambition, and in some sufficient respects, all will act not strictly from duty but as if motivated by duty.¹⁰⁷ On the principle that men in office naturally look up to "that authority to which they owe their official existence," Publius opposes leaving federal questions to state judges, who can be expected to act "from the bias of local views and prejudices" at the expense "of the general laws."¹⁰⁸ And, as I have argued above, he can defend a nationalist bias in federal judges if he believes, as he does, that the national government is best suited for realizing the proper ends of government.

¹⁰³ *Federalist* 1 at 3, 3-4 (cited in note 15).

¹⁰⁴ *Federalist* 49 at 338, 341.

¹⁰⁵ *Federalist* 78 at 521, 529-30.

¹⁰⁶ *Id.* at 526.

¹⁰⁷ *Federalist* 51 at 347, 349.

¹⁰⁸ *Federalist* 22 at 135, 144.

One could view the modern court's incorporation of the first eight amendments into the fourteenth amendment as an example of this national bias at work. By aggrandizing national judicial power at the expense of the states, the explanation would go, the federal courts advanced a culture of liberal toleration that all reasonable persons would approve if they were in a position to reason aright. I need not evaluate this suggestion here. The point is that material in *The Federalist* suggests both that judges can be motivated by duty and that even when they are not motivated by duty, it is possible for personal or political ambition to be connected with patterns of decision that the dutiful would favor.

II.A.2. *The Clarity of Constitutional Language.*

When Publius contends that judicial review implies constitutional supremacy, not judicial supremacy, he also presupposes that the language of the Constitution has sufficient communicative power to point judges toward the law and away from those of their predilections that do not coincide with the law. He assumes that the Constitution has a meaning independent of any particular preferences and that persons of particular biases can grasp that meaning. These assumptions are of course linked to his belief that judges can do their duty. Assumptions regarding constitutional meaning are manifest in his statements that "[a] constitution is in fact, and must be, regarded by the judges as a fundamental law," that "interpretation of the laws is the proper and peculiar province of the courts," and that in declaring "the sense of the law" judges should be disposed to exercise judgment, not will.¹⁰⁹ Clearly, the notion of decision under law presupposes the law's capacity to communicate prescriptions contrary to at least some of the inclinations of persons whom the law would instruct or to whom the law would apply. And Publius's defense of judicial review seeks to assure his audience that judges are likely to treat the Constitution as law applicable to themselves as well as to others.

It may surprise us to see Publius's confidence coexist with his appreciation of the controversial character of constitutional meaning. But in Publius's thought, adequacy of constitutional communication cannot imply the elimination of controversy and judgment in the quest for the Constitution's practical implications. Though *Federalist* 78 refers to the judicial function in terms of judgment as opposed to will, the distinction does not imply that judgment is

¹⁰⁹ *Federalist* 78 at 521, 525-26.

mechanical. Construed with the bulk of other things that he says on the subject, judicial judgment instead manifests an attitude of thoughtful concern for principled choice among debatable alternatives—decision that is not willful in the sense of “connected with the spirit of preexisting parties, or of parties springing out of the question itself.”¹¹⁰ Thus, we have seen him propose final appellate power over federal questions in “one SUPREME TRIBUNAL” as a way of compensating for what he acknowledges to be “endless diversities” over the meaning of the law; one, final authority makes sense *because* of the endless controversy.¹¹¹ Yet he refers in the same place to the “true meaning and operation” of the law as something judges must “expound and define,”¹¹² and it is not likely he would use these terms to describe self-evident meaning. Later, in a passage already quoted, he uses the term “discretion” to describe judicial duty in the presence of conflicting laws, even though maxims of interpretation provide some guidance to specific kinds of conflict.¹¹³

Publius thus distinguishes “judgment” from “will” without pretending that judicial decision can be something mechanical or free of controversy. How should we react to this fact? Many commentators eschew formulating a theory of decision under law that would reconcile the familiar reality of judicial discretion with the political principle that would limit judicial discretion. Instead, they assume that, because no test can resolve the controversy over interpretive options, decisions can only register the personal preferences of decision makers. In short, they believe that where controversy remains reasonable, the political preferences of judges are the decisive factors.

Publius seems to have a different view, for he argues that judges can be expected to exercise judgment, not will, at the same time that he accepts the fact of continuing controversy over the meaning of laws. We need not conclude that these elements of

¹¹⁰ Federalist 50 at 338, 342.

¹¹¹ Federalist 22 at 135, 143 (original emphasis).

¹¹² *Id.*

¹¹³ Federalist 78 at 521, 525-26. These maxims would include the preference for fundamental laws, like the Constitution, over ordinary legislation and the preference for later over earlier legislation. Such rules of interpretation are “not derived from any positive law,” says Publius, “but from the nature and reason of the thing.” *Id.* at 526. Similarly, “reason and law conspire to dictate”: that courts should try to reconcile conflicting statutes “[s]o far as they can, by any fair construction.” *Id.* at 525-26. Publius continues to expect disagreement over the meaning of the law when he later returns to his recommendation that federal courts have jurisdiction over federal questions and certain other kinds of controversy. Federalist 80 at 534, 534-35.

Publius's view are incompatible. To render Publius coherent, we need not embrace theories of *The Federalist* that exclude one element or the other, for modern jurisprudence has produced theories of judicial decision that claim to reconcile the realities of judicial discretion with the value of decision under law.

Dworkin was the first contemporary legal theorist to defend a way to reconcile judicial discretion with the rule of law. He interprets normal judicial controversy over the practical meaning of abstract normative ideas as disputation over concrete "conceptions," not general "concepts." When judges proceed in good faith, the discretion involved in such controversies is an unobjectionable "weak discretion," rather than the "strong discretion" that offends our traditional sense of judgment under law. When judges exercise weak discretion, they quest in a responsible and self-critical way for the best available argument of legal principle; they try to avoid mere rationalizations of partisan preferences.¹¹⁴

In mentioning Dworkin's theory as a way of explaining Publius's thought, I am not trying to impose an external order on Publius's beliefs. Dworkin is but one of several contemporary theorists who claim to account for the way ordinary lawyers, judges, and citizens generally think about legal-moral controversies and decisions. Another such theorist is Michael Moore. Moore maintains that ordinary men and women (and academics too, despite their disclaimers) take seriously the real existence of values like justice. Moore concludes that the true nature of these values is important to us. He argues that we pursue their nature not through stipulating or reporting conventional definitions or examples, which are always defeasible in light of what we take to be the real standards themselves, but through what we hope will be progressively better theories of the real ideas.¹¹⁵

Moore's "moral realist" (as opposed to "moral conventionalist") account both fits and justifies Publius's well known avoidance of attempts to reduce general normative ideas to clear definitions and examples.¹¹⁶ To mention well discussed examples, *Federalist* 10 leaves undefined such notions as "the permanent and aggregate interests of the community," and *Federalist* 84 cautions against any attempt to specify a finite number of constitutional rights. Lack of definition and specification hardly inhibits Publius's use of

¹¹⁴ Dworkin, *Taking Rights Seriously* at 31-39, 136-37 (cited in note 102).

¹¹⁵ Moore, 58 S.Cal.L.Rev at 288-338, 371, 379-81, 393-96 (cited in note 4).

¹¹⁶ See White, *Philosophy, The Federalist, and the Constitution* at 194 (cited in note 12).

normative terms; he seems to take for granted that his readers have an idea of what he is talking about. Such moral realist assumptions are evident throughout his work. Perhaps the clearest evidence is his statement in *Federalist* 51 that "Justice is the end of government. It is the end of civil society. It ever has been, and ever will be pursued, until it be obtained, or until liberty be lost in the pursuit."¹¹⁷ And, of course, the constitutional document Publius proposes neither defines nor illustrates its normative terms. On its face, the document and its amendments refer to ideas like free speech and due process, not this or that version of such ideas.

Publius's philosophic realism is evident also in the account he gives in *Federalist* 37 of one of the difficulties faced by the constitutional convention: the "arduous . . . task of marking the proper line" between the powers of the national and state governments. Publius treats this task as akin to the attempts by "metaphysical Philosophers" to "distinguish. . . and define . . ., with satisfactory precision" such objects as "[t]he faculti[es] of the mind" (for example, "perception, judgment, desire") and the "great kingdoms of nature" (for example, "vegetable life," "unorganized matter," "the animal empire"). Though these distinctions have eluded the "most sagacious and laborious" efforts, they remain "pregnant source[s] of ingenious disquisition and controversy."¹¹⁸ The fact that Publius accepts the value of continuing controversy and experiment in both the natural and social spheres suggests that Publius entertains the philosophically realist assumptions of everyday life.

Publius thus goes on to say that although nature's own "delineations are perfectly accurate" in themselves, they "appear to be otherwise only from the imperfections of the eye which surveys them." When it comes to "the institutions of man," on the other hand, "obscurity arises as well from the object itself, as from the organ by which it is contemplated." Hence, "no skill in the science of Government has yet been able to discriminate and define, with sufficient certainty, its three great provinces, the Legislative, Executive and Judiciary." Nor have the "continued and combined labors of the most enlightened Legislators and jurists" been successful "in delineating the several objects and limits of different codes of laws and different tribunals of justice." Though Britain has pursued these matters "more industriously" than other nations, the "jurisdiction of her several courts . . . is not less a source of fre-

¹¹⁷ *Federalist* 51 at 347, 352 (cited in note 15).

¹¹⁸ *Federalist* 37 at 231, 234-35.

quent and intricate discussions."¹¹⁹

Compounding "the complexity of objects, and the imperfection of the human faculties" is the "cloudy medium" of language through which "ideas" are communicated.¹²⁰ Yet Publius assumes the ideas themselves exist independently of the words that would pick them out when he says, "no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas[,] . . . however accurately objects may be discriminated in themselves."¹²¹ And when he praises such things as recent improvements in "[t]he science of politics" and "most other sciences,"¹²² the American love of political innovation and experiment in general,¹²³ and the Convention's intellectual and moral virtues,¹²⁴ he takes for granted the possibility and the value of improving our knowledge of a complex reality in the face of human imperfections and inveterate controversy.

This is not the place to defend Publius's philosophic assumptions. I mention them in connection with Moore and Dworkin only to show that contemporary philosophy supplies us with theories that purport to account for the everyday assumptions of ordinary men and women that it is possible to avoid willful impositions in our attempts to resolve controversies over the practical implications of general normative ideas.¹²⁵ Until we manage to escape these ordinary presuppositions by persuasively answering Moore's and Dworkin's contributions to contemporary constitutional thought, saving Publius from contradiction does not necessitate grounding his distinction between judgment and will in unworkable formalist assumptions. Not only are we not compelled to label Publius a legal formalist, but viewing him as a formalist would require us to ignore the bulk of what he says about language, human cognition, and judicial decision.

Nevertheless, some readers will say that parts of *The Federal-*

¹¹⁹ Id. at 235-36.

¹²⁰ Id. at 236-37.

¹²¹ Id. at 236.

¹²² Federalist 9 at 50, 51.

¹²³ Federalist 14 at 83, 88-89.

¹²⁴ Federalist 37 at 231, 238-39.

¹²⁵ For statements of the conflict between Moore's realism and Dworkin's "deep conventionalism," see Moore, 58 S.Cal.L.Rev. at 298-301, 309, 363-66, 373 (cited in note 4); and Michael S. Moore, *Metaphysics, Epistemology and Legal Theory*, 60 S.Cal.L.Rev. 453 (1987). See also Ronald Dworkin, *Law's Empire* 135-39 (1986). This conflict need not concern us here, for both theories purport to account for the sense that legal-moral questions are amenable to reason and need not be answered by willful imposition.

ist do suggest a formalist's opposition to judicial discretion, or a formalist equation of discretion with willfulness. There may be three such sections. They involve (1) the principle of stare decisis; (2) the distinction between the letter and the spirit of the law; and (3) the adoption of the bill of rights. I shall discuss these sections briefly.

Toward the conclusion of *Federalist* 78, Publius adds as "a further and a weighty reason" in behalf of his proposal for judicial tenure that such tenure enhances judicial expertise in ever swelling bodies of statutes and case law. And since "strict rules and precedents" should govern judicial decision, life tenure helps to avoid "an arbitrary discretion in the courts."¹²⁶

Commentators who would consider taking *The Federalist* seriously might have been spared the statement that judges "should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case."¹²⁷ For the unconstraining qualities of precedent and the question of where to locate the *ratio decidendi* of a case are major problems of modern jurisprudence.¹²⁸ Modern friends of Publius might therefore be moved to further therapeutic construction of his remarks. They might begin by noting that in the passage just quoted, Publius speaks of avoiding "an arbitrary discretion." "Arbitrary" here could signify an attribute of some, not all, acts of discretion, for, as we have just seen, in the same number of *The Federalist*, Publius refers to "judicial discretion" approvingly and as a term descriptive of the general process of deciding between conflicting laws.¹²⁹ So while some discretion can be arbitrary and improper, some discretion is an aspect of what judges are supposed to do.¹³⁰ Thus, we could see Publius in need of a theory of precedent that could reconcile discretion and the values served by the rule of precedent. Such theories are available, and we might look for the one that best fits Publius.¹³¹ Alternatively, we might change the subject

¹²⁶ *Federalist* 78 at 521, 529.

¹²⁷ *Id.*

¹²⁸ For an overview, George C. Christie, *Jurisprudence* 919-60 (1973); Michael S. Moore, *Precedent, Induction, and Ethical Generalization*, in Laurence Goldstein, ed., *Precedent and Law* 183 (1987). Powell shows the limited constraining power of rules of interpretation in the founding period and in 65 *Tex.L.Rev.* at 862-89 (cited in note 9).

¹²⁹ *Federalist* 78 at 521, 525 (cited in note 15).

¹³⁰ Dworkin, *Taking Rights Seriously* at 31-39 (cited in note 102).

¹³¹ For a review of the options, see Moore, *Precedent, Induction, and Ethical Generalization* (cited in note 128). For an application in constitutional criticism of what Moore calls a "pure natural law theory" (a theory Moore rejects), see Barber, *On What the Constitution Means* at 4-7 (cited in note 2).

(from normative theory to history) by describing Publius's promise of more or less mechanical decision as an attempt to defend the Constitution by misleading the uninformed.

I shall attempt neither of these moves. Construing Publius's statement about *stare decisis* in a manner most unfavorable to my position, I simply conclude that the statement conflicts with the larger thrust of Publius's views on the human propensity to disagreement and error and the discretionary aspects of legal interpretation. It may even conflict with Publius's assurances of the Constitution's supremacy over the judges. At best, precedent constrains individual judges, not the judiciary as an institution. Far from reinforcing the belief in the supremacy of a constitutional document and its power to control events, a strict regime of precedent suggests that constitutional meaning is a product of the interpretive power of the courts, and perhaps of changing historical usage generally.¹³²

Publius's friends may want to avoid imputing an unreasonable ignorance to him and to account for what he says as calculated to achieve some recognizable good—ratification of the Constitution, for example. But they cannot accept his contradictions as part of an authoritative interpretation of the Constitution. Though there are important reasons for distinguishing interpretations of the law from the law itself, as Publius does when he acknowledges that judges can err, some interpretations of the law function as normative statements. These interpretations must be internally consistent with respect to their implications for specific actions, since statements that indicate contradictory actions fail as prescriptions. Accepting Publius's inconsistencies forces a quest for other normative authority (or movement from normative thought to condescending antiquarianism, descriptive history, or explanatory sociology) for it defeats the initial decision to treat *The Federalist* as a prescriptive interpretation of the Constitution. What Publius says about conflicts among laws applies to conflicting elements of prescriptive interpretations of the law: "So far as they can by any fair construction be reconciled to each other; reason and law conspire to dictate that this should be done. Where this is impracticable, it becomes a matter of necessity to give effect to one, in exclusion of the other."¹³³

As fidelity to the law requires (among other things) excluding parts that are inconsistent with the dominant thrust, fidelity to

¹³² See Powell, 98 Harv.L.Rev. at 910, 940-41 (cited in note 9).

¹³³ Federalist 78 at 521, 525-26 (cited in note 15).

Publius as a framer or authoritative interpreter of the law requires a theory of his principal thrust, and a willingness to exclude or cabin irreconcilable parts. So one must exclude Publius's statement about *stare decisis* if one is to accept Publius's implicit claim to be an authoritative interpreter of the law. Accepting his statement about the binding character of precedent entails rejecting his more fundamental contention that judicial review does not imply judicial supremacy as well as all that he says about discretion, the controversial qualities of legal interpretation, and the judicial obligation to mitigate the injustices of positive law. Fidelity to Publius as a framer is fidelity to the most praiseworthy account of what he stands for generally; it cannot mean fidelity to everything he might say.

In a second statement suggesting a mechanical approach to judicial decision Publius responds to a charge involving the distinction between the letter and the spirit of the law.¹³⁴ Publius paraphrases the charge as follows:

The power of construing the laws, according to the *spirit* of the constitution, will enable that [the Supreme] court to mould them into whatever shape it may think proper; especially as its decisions will not be in any manner subject to the revision or correction of the legislative body. This is as unprecedented as it is dangerous. In Britain, the judicial power in the last resort, resides in the house of lords, which is a branch of the legislature; and this part of the British government has been imitated in the State constitutions in general.¹³⁵

To this Publius replies,

there is not a syllable in the plan under consideration, which *directly* empowers the national courts to construe the laws according to the spirit of the constitution, or which gives them any greater latitude in this respect, than may be claimed by the courts of every state.¹³⁶

The evasive character of this response is plain, for Publius avoids explicit comment on the *indirect* powers of courts, while inviting questions about these powers by underscoring the courts'

¹³⁴ See Herbert J. Storing, 2 *The Complete Antifederalist* 417-19 (1981)(essays of Brutus).

¹³⁵ Federalist 81 at 541, 542 (original emphasis) (cited in note 15).

¹³⁶ Id. at 543 (original emphasis).

lack of direct power. And in the sequel he implicitly concedes that judicial decision may be guided by the spirit of the law. After his initial response to the charge in question, Publius admits that "the constitution ought to be the standard of construction for the laws, and that wherever there is an evident opposition, the laws ought to give place to the constitution."¹³⁷ He adds immediately that "this doctrine [of judicial review] is not deducible from any circumstance peculiar to the plan of the convention; but from the general theory of a limited constitution; and as far as it is true, is equally applicable to most, if not to all the state governments."¹³⁸ Thus does Publius himself decide an issue—the propriety of judicial review—by invoking "spirit" in the sense of "the general theory of a limited constitution."

Three paragraphs later Publius denies that either Parliament or the state legislatures "can rectify the exceptionable decisions of their respective courts, in any other sense than might be done by a future legislature of the United States." Notwithstanding final judicial authority in a committee of the Lords, "[t]he theory neither of the British, nor the state constitutions, authorises the revisal of a judicial sentence, by a legislative act." And the "impropriety of the thing" in all these constitutions results from "the general principles of law and reason," not from "any thing in the proposed constitution more than in either of them, by which it is forbidden."¹³⁹ Here, then, is inference from spirit in a sense similar to the first, namely, inference from general principles of law and reason. Publius's pointed statement that the Constitution does not "*directly*" authorize construction according to the spirit should be read in this context of reiterated inference from considerations beyond the letter. The letter does not anywhere authorize inference from the spirit; it is the spirit that does so.

A third possible basis for contending that Publius holds a mechanistic view of judicial decision is one of his comments in opposition to the adoption of a bill of rights. Like the preceding attempts to quiet fears of judicial discretion, Publius's opposition to the bill of rights is at least in part a tactic for securing the Constitution's ratification. The Federalists realized after ratification that a bill of rights could be made consistent with their constitutional philosophy.¹⁴⁰ But during the ratification campaign the Anti-Fed-

¹³⁷ Id. at 543.

¹³⁸ Id.

¹³⁹ Id. at 545.

¹⁴⁰ Storing, *The Constitution and the Bill of Rights* at 18 (cited in note 13).

eralists invoked a tradition favoring bills of rights to demand that ratification be conditioned on a bill of rights. This would have required a new constitutional convention or some other way to reopen the proposal of the Philadelphia Convention. And if some of those most vocally demanding a bill of rights should have had their way, reopening the proposed constitution would have undone the basic plan.¹⁴¹ Opposing the basic idea of bills of rights was one way to forestall this result.

Publius argues in *Federalist* 84 that bills of rights are both unnecessary and dangerous. They are unnecessary as limitations on government where government cannot lawfully act without affirmative grants of authority. They are dangerous because prohibiting measures that are not authorized in the first place "would afford a colourable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do?"¹⁴² Publius also suggests some doubt about the propriety of general normative ideas as judicially enforceable limitations on governmental power. He says bills of rights are more appropriate in monarchies than in democratic republics where electoral accountability "is a better recognition of popular rights than volumes of those aphorisms" found in several state bills of rights "and which would sound much better in a treatise of ethics than in a constitution of government."¹⁴³ He says no one can define "liberty of the press" in a way that "would not leave the utmost latitude for evasion . . .; and from this, I infer, that its security, whatever fine [constitutional] declarations . . ., must altogether depend on public opinion, and on the general spirit of the people and of the government."¹⁴⁴ He says that "the constitution is itself in every rational sense, and to every useful purpose, A BILL OF RIGHTS."¹⁴⁵

Modern critics of judicial power have invoked these statements to argue for a judiciary concerned not primarily with substantive rights—especially substantive fourteenth amendment rights like property and privacy—but with those individual and minority rights that seem essential for the successful operation of the Constitution's system of representative democracy.¹⁴⁶ This may

¹⁴¹ Id.

¹⁴² *Federalist* 84 at 575, 579 (cited in note 15).

¹⁴³ Id. at 579.

¹⁴⁴ Id. at 580.

¹⁴⁵ Id. at 581 (original emphasis).

¹⁴⁶ See John Hart Ely, *Democracy and Distrust* 93-94 (1980); Walter Berns, *Taking the Constitution Seriously* 124-29, 214-29 (1987). The difficulties of these theories beyond their

be one way of reconciling *Federalist* 84 with Publius's definition in *Federalist* 78 of "limited constitution" in terms of judicially enforced exemptions from governmental power.¹⁴⁷ Another way would be to acknowledge the importance of structure, but to recognize a full-fledged judicial power as an essential part of a structure whose very purpose is to make democracy defensible by reconciling it to justice.

In this connection one can observe that *Federalist* 84 is not really opposed to a judicially enforced bill of rights as part of a broader structure. What Publius opposes are the proposals for a separate bill of rights, perhaps as a condition for ratification, and preoccupation with a bill of rights as a substitute for the other structural means for protecting rights. When he says the Constitution is itself a bill of rights he can hardly mean that the Constitution would be adequate to its purposes without a practice of judicially enforced rights, for he immediately proceeds to describe in a general way the judicially enforceable rights that the unamended constitution already recognizes. Thus, the Constitution already secures "one object of a bill of rights" when it "declare[s] and specif[ies] the political privileges of the citizens in the structure and administration of the government."¹⁴⁸ The unamended constitution serves "another object of a bill of rights" by protecting "certain immunities and modes of proceeding, which are relative to personal and private concerns."¹⁴⁹ These things have "been attended to, in a variety of cases," in the unamended plan, says Publius. And as we read the unamended plan, we find support for his claim in the document's listing of such exemptions as the prohibition against titles of nobility and religious tests for office; a guarantee of the Confederation's debts; a jury trial provision; a narrow definition of treason, prohibitions against bills of attainder, ex post facto laws, and state impairments of contractual obligations; and a habeas corpus guarantee. These existing provisions entitle Publius to say: "Adverting therefore to the substantial meaning of a bill of rights, it is absurd to allege that it is not to be found in the work of the convention. It may be said that it does not go far enough, though it will not be easy to make this appear; but it can with no propriety be contended that there is no such thing."¹⁵⁰ And he

relevance to *The Federalist* do not concern me here.

¹⁴⁷ *Federalist* 8 at 521, 524 (cited in note 15).

¹⁴⁸ *Federalist* 84 at 575, 581.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

adds that "[i]t certainly must be immaterial" whether the rights that a constitution contains be listed as a separate bill of rights or incorporated in the document some other way.¹⁵¹

When modern critics of judicial power invoke *Federalist* 84 against judicially declared substantive rights under open-ended constitutional provisions, they ignore the implications of Publius's concession that the rights of the unamended constitution "may . . . not go far enough."¹⁵² This statement further attests Publius's appreciation of the Convention's "fallibility" and the resulting need "to provide a convenient mode of rectifying their own errors, as a future experience may unfold them."¹⁵³ Whether Publius and his generation went far enough in their declaration of rights—whether, in other words, they gave enough power to judges—must depend in part on whether the structure they provided proves adequate to the ends they sought. This approach to the question is consistent with Publius's understanding of structures as means, his belief that an independent and permanent judiciary is consistent with republicanism, his realistic view of the nature of judicial decision, and, above all, his view that democracy unreconciled to higher standards is indefensible.

Yet this conclusion may beg the question whether Publius could have approved the kind of judicial discretion that the Supreme Court has thought the fourteenth and ninth amendments require. Critics of judicial power are entitled to ask what we are to make of Publius's statement that the typical provisions of bills of rights are more appropriate in treatises on ethics than in constitutions of government. Does this not imply that Publius looked on decisions in constitutional cases as excluding moral judgments, deriving instead from essentially factual judgments about the meaning of legal provisions, or the implications of the Constitution's arrangement of offices and powers, or the specific intentions of those whose authority the Constitution asserts, no matter how corrupt? These matters may be controversial, as any allegedly factual matter may be, but does not Publius's belittling reference to treatises of ethics suggest that these facts are noncontroversial in principle? Moreover, is not the task of judges essentially one of historical research and conceptual inference unmixed with inquiry into the best understanding of the ends of government? I have contended here that Publius's strong support of judicial independence does

¹⁵¹ Id.

¹⁵² Id.

¹⁵³ *Federalist* 37 at 231, 233.

not presuppose that the application of constitutional provisions and other laws are matters free of controversy. But are the controversies whose propriety Publius acknowledges essentially factual controversies and matters of inference that would exclude reflection and judgment about the ends of government as such?

Our question at this point, then, is whether one can weigh all that Publius says and impute to him a theory that excludes moral judgments from decisions in constitutional cases. I think the answer is no. To show this I shall put aside what he says about judges protecting constitutional rights and his approval of judges "mitigating the severity" of "unjust and partial laws" even where there is no question of constitutional infraction.¹⁵⁴ Instead, I shall limit the present part of my argument to issues involving not rights, but the scope of governmental powers. I do this because Publius's argument against a bill of rights includes the claim that the enumeration of powers renders a bill of rights unnecessary.¹⁵⁵ Since he says nothing about a bill of rights to suggest that he abandons his earlier argument for judicial review, one can infer that Publius would at least support adjudication of claims involving the enumeration of powers, like the scope of the commerce power and the powers to tax and spend.

I have argued above that power for Publius implies governmental duty in behalf of ends that the grants of power envision. A court cannot address questions of power, therefore, without forming judgments about ends. "Not to confer in each case a degree of power, commensurate to the end, would be to violate the most obvious rules of prudence and propriety," says Publius, "and providently to trust the great interests of the nation to hands, which are disabled from managing them with vigour and success."¹⁵⁶ And his own description of the ends of power goes considerably beyond what is explicit in the enumeration of powers of Article I, § 8. He says, for example, that one of the "principal purposes to be answered by Union" is "the common defence of the members," and that the national government "ought to be cloathed with all the powers requisite to complete execution of its trust," presumably no matter what inherently unpredictable circumstances might require, and regardless of conflicting claims of states' rights.¹⁵⁷

Of course, the few separate provisions of Article I, § 8 that

¹⁵⁴ Federalist 78 at 521, 528.

¹⁵⁵ Federalist 84 at 575, 579-80.

¹⁵⁶ Federalist 23 at 146, 149.

¹⁵⁷ Id. at 146-47. See also Federalist 34 at 209, 210-12.

mention power over the armed forces, taxing and spending for national defense, and other relevant powers do not and cannot add up to all that it would take to defend the nation in all circumstances.¹⁵⁸ Nor must the supremacy clause of Article VI be read to say that the national government can serve its conceptions of national defense without regard for the values arguably served, and served exclusively, by the states, like those aspects of community autonomy and aspiration that determine how properly to educate the youth. The states could, of course, exercise such powers to the detriment of what Congress might believe to be skills and attitudes essential to the national defense, a national market, an ever expanding gross national product, or what Publius calls "the public peace" of the nation as a whole.¹⁵⁹ The Supreme Court cannot simply elevate national power over state power. It can only recognize the supremacy of "this Constitution, and the laws of the United States which shall be made in Pursuance thereof," as Article VI states. And this language presupposes some general conception of what state of affairs the Constitution, as a whole, envisions. Questions of constitutional power always proceed from such conceptions; all such conceptions are controversial, and no one conception can be defended as a matter of objective fact unmixed with controversy over better and worse results.¹⁶⁰

Thus, in commentary on John Marshall's famous exposition of the general principles of federal power in *McCulloch v. Maryland*, even a modern critic of judicial power like Walter Berns can acknowledge that the issue between a strict and liberal construction of national power requires nothing less than a judicial choice between Hamiltonian and Jeffersonian conceptions of "the purposes of the Constitution or, in short, the kind of country the United States was intended to be." Berns correctly says the options facing Marshall embraced different ways of government and even ways of life. Marshall thus favored the Hamiltonian vision, requiring an industrial society and a powerful, executive-centered national government, not the older, agrarian-based republicanism valued by Jefferson.¹⁶¹

Little argument remains among contemporary constitutional

¹⁵⁸ Louis Henkin, *Foreign Affairs and the Constitution* 15-19 (1972).

¹⁵⁹ Federalist 23 at 146, 147 (cited in note 15).

¹⁶⁰ This fact may be reflected in Publius's own suggestion of similarities between the convention's task of drawing lines between state and national powers and some of the difficulties confronting "metaphysical Philosophers." Federalist 37 at 231, 234-35.

¹⁶¹ Walter Berns, *The Meaning of the Tenth Amendment*, in Goldwin, ed., *A Nation of States* at 141-43 (cited in note 20).

theorists that controversial philosophic considerations are also present in interesting "structural" questions, like the bases for legislative appointment and the extension of the franchise.¹⁶² At the heart of his general theory of constitutional structures, Publius himself says that the system of checks and balances is designed to supply "the defect of better motives,"¹⁶³ which suggests that a grasp of these better motives, even a theory of the virtues, is essential to a full understanding of Publius's theory of checks and balances. As he explains the structural differences among the branches of the national government and between the national government and the state governments, he consistently refers to the ends that such differences are likely to effect. Thus the structure of the national government will, he says, mitigate the impact of majority faction on minority rights and the community's long term interests.¹⁶⁴ And the structure of the Senate will compensate for the House's insensitivity to world opinion and what would otherwise be the absence in the government "of a due sense of national character."¹⁶⁵

The substantive moral dimension of structural considerations also appears when Publius interprets the executive as placed in a strategic position to act, perhaps beyond expressly granted powers, in ways that educate the public to the difference between its objective interests and its immediate inclinations.¹⁶⁶ More generally, as we have seen, Publius says "[j]ustice is the end of government," and whatever the institutional arrangement, "[i]n a society under the forms of which the stronger . . . oppress the weaker, anarchy may as truly be said to reign, as in a state of nature."¹⁶⁷ When the American Revolution rejected "the impious doctrine . . . that the people were made for the kings," it rejected all forms of the doctrine "that the solid happiness of the people is to be sacrificed to the views of political institutions"¹⁶⁸

Statements like these and the general tenor of Publius's defense of the Constitution leave little doubt that he understands in-

¹⁶² For criticisms of Ely's attempt to separate structural issues from substantive moral questions, see Dworkin, 56 N.Y.U.L.Rev. at 500-16 (cited in note 1); Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 Yale L.J. 1063 (1980). For the connection between structural questions and more fundamental metaphysical issues, see Epstein, *The Political Theory of The Federalist* at 116-17 (cited in note 12).

¹⁶³ Federalist 51 at 347, 349 (cited in note 15).

¹⁶⁴ Federalist 10 at 56, 57.

¹⁶⁵ Federalist 63 at 422, 422-23.

¹⁶⁶ Federalist 71 at 481, 482-83.

¹⁶⁷ Federalist 51 at 347, 352.

¹⁶⁸ Federalist 45 at 308, 309.

stitutions as means to ends. In accordance with general principles of legal construction, which he recognizes in several places, questions concerning means are resolved by considering the ends envisioned.¹⁶⁹ And since Publius's formulation of the ends ("the common defense," "the public happiness," the "public peace") is as general as the language of the Preamble, judges deciding structural questions face unavoidable philosophic choices among such competing versions of those ends as the different versions favored by Hamilton and Jefferson. If we grant that Publius's judiciary would have taken up questions involving the scope of granted powers, we are left with no principled and consistent understanding of judicial power upon which Publius might have opposed judicial consideration of questions arising under the ninth and fourteenth amendments.

Publius can support an independent judicial power and still agree that, ultimately, the effective enjoyment of constitutional rights will depend on public opinion. His statements that federal judges will not share the public's prepossessions as much as elected officials¹⁷⁰ need not mean that judges will be completely insulated. When he predicts the influence of public opinion on the judiciary in *Federalist* 84, he implicitly recognizes the obvious vulnerability of all parts of the system to a sustained public sentiment.¹⁷¹ That public opinion can influence what judges say about general constitutional standards says nothing about the proper interpretation of those standards, however, nor does it preclude a judicial role in educating public opinion to better conceptions of constitutional meaning. Recall the parallel cases of senatorial and executive responsibility. Publius is clear that sooner or later presidents and senators will have to answer to the electorate. Yet he values the presidency and the Senate partly for their capacity to transform public opinion.

There is no compelling argument that Publius's constitutional philosophy excludes a leadership role for the judiciary in behalf of constitutional standards. I emphasize in this connection his treatment of the standards of public morality as conceptually independent of public opinion. We have also seen that these independent standards are essential ingredients of his general theory of respon-

¹⁶⁹ *Federalist* 40 at 258, 259-60.

¹⁷⁰ *Federalist* 49 at 338, 341.

¹⁷¹ Publius says "the cool and deliberate sense of the community ought in all governments, and actually will in all free governments ultimately prevail over the views of its rulers." *Federalist* 63 at 422, 425.

sible government. If the effective enjoyment of constitutional rights depends on public opinion, and if the standards for defining rights are conceptually independent of public opinion, it follows that a responsible government will have to educate public opinion to right opinions of those standards. As Publius conceives government's responsibilities, the ultimate influence of public opinion in a constitutional democracy argues for turning public opinion around, not following wherever it might lead.

II.B.1. Constitutional Supremacy as Popular Supremacy.

We come now to the final proposition of Publius's argument for judicial review: constitutional supremacy means the supremacy of the people. This proposition presupposes that (1) as a matter of fact, all generations of Americans will share the same fundamental political values, and (2) as a normative matter, the specific fundamental values that Americans share are, objectively, the right values. I shall examine each of these presuppositions.

An obvious objection to Publius's statement in *Federalist* 78 that the Constitution expresses the supremacy of the people¹⁷² is the statement's failure to acknowledge a distinction between the founding generation and subsequent generations—between the people who established the Constitution and those who are to live under it without enjoying the option of debating and ratifying it as a whole. The founding generation itself recorded this difference in the Preamble's paternalistic reference to "ourselves and our Posterity." And Publius draws a sharper distinction in *Federalist* 49 when he suggests that the patriotic character of the founding generation will separate it from the generations of self-serving individuals that will follow.¹⁷³ From statements like this it would seem that the Constitution is the will of the people of 1789 only, not the people of subsequent generations. By Publius's own testimony, therefore, he cannot claim that the Constitution is simply the will of one people. And the unhappy facts of American history belie Publius's implicit claims for the unity of his own generation and subsequent generations, as well as a continuity of fundamental values from one generation to the next. How might Publius and his modern defenders respond to this objection?

To see why Publius might have assumed a unity of values in the face of apparent disunity, we should consider the implications of his distinction between a people's objective interests and the in-

¹⁷² *Federalist* 78 at 521, 525.

¹⁷³ *Federalist* 49 at 338, 341.

clinations of its factional parts. We have seen this distinction at work in Publius's basic understanding of responsible government: "When . . . the interests of the people are at variance with their inclinations," responsible "guardians of those interests" have a duty to resist public opinion in order to give the public "time and opportunity for more cool and sedate reflection."¹⁷⁴ How much time that might take is impossible to tell, for despite inevitable concessions to time in a democracy, the real test of duty is not time, but a certain result: the convergence of inclination and objective interest or the reconciliation of majoritarianism to the permanent and aggregate interests of the community and minority rights conceived independently of majority will. Thus, five paragraphs after the sentence just quoted Publius says: "It cannot be affirmed, that a [presidential] duration of four years or any other limited duration would completely answer the end proposed."¹⁷⁵ As a general principle of constitutional duty, constitutional officials should try to change public opinion for the better no matter how long it might take, and even if success is never fully realized.

This principle of constitutional duty enters into the intention that Publius imputes to "the people" as a whole. He describes elected officials as persons whom the people have appointed the guardians of their objective interests. He says the people commonly intend the public good, acknowledge their capacity for error, and despise adulators who pretend that they always reason correctly about the means of promoting their common interests.¹⁷⁶ One can express Publius's distinction between inclinations and interests as that between what one initially thinks one wants and what one really wants, the latter being what remains desirable after a process of deliberation and reflection. The distinction remains useful today, for most would not contend that elected officials should act on their perceptions of their constituents' immediate wishes without deliberating medium-to-long-range consequences and consulting further with elements of the public in light of those consequences. Grant Publius's distinction between interests and inclinations and it becomes difficult to deny that what the public really wants for itself is what will survive the transient moment as *really* good. If the people really want what is in their interest, and if what is in their interest is determined by objective standards, then the people really want nothing less than

¹⁷⁴ Federalist 71 at 481, 482-83.

¹⁷⁵ Id. at 484.

¹⁷⁶ Id. at 482-83.

what is objectively in their interest. Sensing this, the people approve a system whose officials will tend to "withstand the temporary delusion, in order to give them time and opportunity for more cool and sedate reflection."¹⁷⁷ Such is Publius's view of how it is possible for popular will to take the form of constitutional government.

In light of Publius's view of the difference between the public's interests and inclinations, determining the public's wants is no simple matter. An observer like Publius would first have to discover what objectively serves minority rights and the "permanent and aggregate interests of the community." This knowledge would proceed not from purely subjective preferences but from a philosophic-scientific grasp of the ends of government and their effective implementation. That objectively better and worse grasps are possible is a presupposition of the distinction between interests and inclinations and its corollaries, like Publius's conception of responsible government and his definition of faction. Because Publius calls for reconciling inclinations to interests, our observer would have to form speculative factual judgments concerning the public's capacity to appreciate and act consistently with economic and social arrangements that are conducive to the public good. From premises concerning the ends of government and the public's capacities, our observer would form a theory of the best in us, and that theory would include a statement of our fundamental values. Such a theory would be an exercise in political philosophy as a practical science of human affairs. It would utilize knowledge of the kind Publius proudly claims when referring to the new "science of politics."¹⁷⁸

Assuming, then, that our fundamental values would be given by a valid theory of the best in us, not by variable expressions of public sentiment, one basic set of values could lie behind the conflicts that mark American history. Thus, some writers argue that the republic has from the beginning been committed to the secular pursuits and democratic social relationships of an urban-industrial society devoted primarily to individual economic gain and an ever expanding GNP.¹⁷⁹ I am not interested here in the truth of such

¹⁷⁷ *Id.* at 482.

¹⁷⁸ *Federalist* 9 at 50, 51.

¹⁷⁹ See, for example, Martin Diamond, *The Federalist*, in Leo Strauss and Joseph Cropsey, eds., *History of Political Philosophy* 631 (1972); Barber, *On What the Constitution Means* at 63-168 (cited in note 2); Berns, *Taking the Constitution Seriously* at 173-80 (cited in note 146); Jeffrey K. Tulis, *The Modern Presidency and the Constitution*, in Martin L.

theories. Our question is how Publius might assume a single set of fundamental values in the face of historical disagreements, and the answer lies in what kind of thing "fundamental values" might be and how one discovers them. Because fundamental values are given only by political theories of the best in us, their existence depends on the possibility of a successful theory, a possibility whose meaning is itself a theoretical matter.

Granting that in a democracy the success of a theory would depend in part (and only in part, for objective values would be at stake) on the public's recognition, Publius, as we have seen, would not demand immediate public recognition. A successful theory would depend, therefore, on its accessibility to the general public, or on the capacity of the public to be brought by political leadership to accept a true account of its real values.

The facts of historical conflict alone would not be enough to decide the question whether the public's potential included an appreciation of its better self. Publius does seem to recognize that it is impossible as a practical matter indefinitely to delay government's accountability to the electorate's immediate inclinations. If government does not succeed in turning public opinion around, officials of all sorts, including judges, pay the price. Nothing guarantees success; government can fail to make the public sensible of its true interests and its higher constitutional aspirations. But government's failure is not enough to settle questions of what the public's true interests and constitutional aspirations are. If these values exist, and Publius assumes that they do exist, their content is a philosophic question. Popular government is far from competent to determine the content of fundamental values; it is rather the case that the cause of popular government depends on the people's capacity to live up to those fundamental values, or so Publius holds. Historical conflict may therefore catch up with and defeat constitutional government without invalidating a theory of what our constitutional values are.

Rather than undermining the proposition that a people value certain fundamental principles, historical conflict is itself an essential condition for the significance of that proposition. Clearly, persons who actively debate normative questions presuppose answers that are objectively correct, either by nature or at least with reference to some unquestioned or posited conventional foundation. "Norms" that are unquestionable or unquestioned by a given peo-

ple are behavioral regularities, not norms, since any form of words that would guide conduct presupposes the possibility of deliberate deviation, and awareness of that possibility is sufficient to render the form of words debatable.¹⁸⁰ A people holds a norm as such not through unquestioning adherence, but through some process of reaffirmation or aspirational striving, both of which entail some kind of disagreement.¹⁸¹

That an observer of a people can sometimes interpret its conflicts as forms of reaffirmation and striving is familiar enough, both from the rhetoric of our politicians and the commentaries of scholars. The Gettysburg Address is a clear example of interpreting conflict as striving to realize fundamental national aspirations. And John Hart Ely has recently interpreted virtually the entire course of American history from the Declaration of Independence as the progressive fulfillment of an "original commitment to control by a majority of the governed."¹⁸² The reader should note that Ely imputes this majoritarian aspiration to all generations of Americans despite the continuing and sometimes violent controversy over its validity. Without debating the merits of such imputations here, I note only that people do make them; it is possible, and perhaps fairly so, to impute underlying values to a people despite their conflicts and in the face of historical change.

II.B.2. Are Our Values Really Worth Holding?

The second presupposition of Publius's argument that constitutional supremacy insures popular supremacy concerns the normative status of the fundamental values involved. The presupposition just discussed raises a different kind of question; though mixed with normative judgments, it has a factual side in that it identifies the political aspirations of a historical community and its posterity. Although this "factual" presupposition does involve philosophic inquiry into the public interest and analysis of historical statements about the common good and its institutions, its dominant thrust is nevertheless descriptive; it is not immediately hortatory. "Such and so is what this people stands for," says the first presupposition. "And that's good," says the second, "that's what they ought to stand for."

¹⁸⁰ See generally, Richard E. Flathman, *Political Obligation* 156-58 (1972).

¹⁸¹ See Barber, *On what the Constitution Means* at 59-61, 84-85 (cited in note 2). See also Michael J. Perry, *Moral Knowledge, Moral Reasoning, Moral Relativism: A "Naturalist" Perspective*, 20 *Ga.L.Rev.* 995, 1030-39 (1986).

¹⁸² Ely, *Democracy and Distrust* at 5-7 (cited in note 146).

That Publius assumes this second proposition is evident from two considerations. First, his argument for judicial review is part of a broader argument in behalf of ratification. He is not just commenting on a people and its institutions. He is proposing a course of action and thereby assuming a good to be achieved by all to whom his proposal is addressed, namely, the founding generation and its posterity. Second, Publius recognizes a right of the people to alter any form of government that proves oppressive or inadequate to their happiness. An aspect of this right of revolution is a right of one part of a single people to separate itself from other parts. In a passage of *Federalist* 14, Publius argues that adoption of the proposed constitution is essential to the union's survival, and he entreats his audience to "[h]earken not to the unnatural voice which tells you that the people of America, knit together as they are by so many cords of affection, can no longer live together as members of the same family."¹⁸³ This passage presupposes a right to do what it prays not be done, as does *The Federalist* as a whole in submitting a proposal for the public's adoption or rejection. By proposing something based on beliefs which can, but need not, unite all generations of Americans, Publius recommends these beliefs to all.

But if Publius did affirm one set of fundamental values, we can ask whether it was reasonable to have done so and what his values might have been. Although the fundamental values of a people are given by a theory of the best they are capable of—i.e., the closest their collective capacities and material conditions can bring them to an ideal state of affairs—the prospect of technological, attitudinal, environmental, and other forms of change renders problematic any particular version of a people's ultimate capacities. And as their capacities change, so might their views of the ideal state to which they refer those capacities in arriving at theories of their fundamental values. How, then can Publius reasonably assume that one set of values ought to unite all generations of Americans? I address this question here not so much to defend any particular conception of America's fundamental values, but to defend the proposition that Publius presupposes one set of fundamental values. The reasonableness of Publius's presupposition depends on whether any of his values can claim transhistorical status.

Now, recalling Publius's belief in the rights of a people to revolt against their traditional political authorities and to dissolve

¹⁸³ *Federalist* 14 at 83, 88 (cited in note 15).

even some of their social relationships, our question is whether there is a set of values that, whatever its precise social and institutional manifestations, (1) characterizes America, yet (2) remains open to the need to reexamine established ways of life and government *and* the values that ground them. If there is such a set of values, perhaps it has to do with *reason* in public affairs, the value to which Publius appeals in *Federalist* 1 as the object of this country's aspirations, the source of its status among nations, and its greatest contribution to humankind.¹⁸⁴ The practice of reasoning in public affairs is the value that he continually invokes throughout his justifications of a strong national government. Publius defends that government as an institutional arrangement which manifests his belief that "it is the reason of the public alone that ought to controul and regulate the government," while "[t]he passions ought to be controuled and regulated by the government."¹⁸⁵ And the connection between reason and the national character that one finds in *Federalist* 1 is echoed from Publius's praise of the nation's experimental attitude toward forms of government,¹⁸⁶ to his call for a Senate capable of assessing policy against "the presumed or known opinion of the impartial world."¹⁸⁷

Passages like these enable one to propose that the fundamental values of Publius's regime would center on the aspiration *to be and to appear reasonable* to all who might be affected by the regime or take an interest in it—potentially, to all of humankind. An aspiration to be and appear reasonable is certainly a commonplace of Enlightenment liberalism and one way to label the common ground of moral realists as diverse as Plato and Kant. It is a commonplace, in other words, that would paper over mountains of philosophic and institutional problems, for it is one thing to name a value, but quite another to grasp its intrinsic nature and explicate its practical implications. Yet, in this case, there may be more to a name than just a name, for debates over the nature and manifestations of reason in public affairs typically proceed through exchanges of what are called reasons. And perhaps they must proceed in this way, for it is at least arguable that one cannot have a reasoned rejection of reason's authority.¹⁸⁸ We may thus be thrown back upon our commonsense intuitions about reason, reasoning

¹⁸⁴ *Federalist* 1 at 3, 3-5.

¹⁸⁵ *Federalist* 49 at 338, 343.

¹⁸⁶ *Federalist* 14 at 83, 88-89.

¹⁸⁷ *Federalist* 63 at 422, 423.

¹⁸⁸ Barber, *On What the Constitution Means* at 224-25 n.43 (cited in note 2).

and reasonable people in our philosophic quests for the nature and practical implications of reason. The empirical fact seems to be that we do start out with a general idea of what reason imports—for example, its opposition to religious zealotry and its indifference to personalities, or so Publius suggests.¹⁸⁹ We also know what, in principle, a reasonable resolution would be—one in which reasonable persons can concur. The circularity of thought about reason may of course indicate the limits of thought, but it may also suggest the irreducible, and therefore imperfectly describable, capacity that we all typically possess in some measure—our nature, so to speak. In any case, for all the unresolved problems, the value of reason can at least claim transhistorical status. It also seems opposed to some political and social possibilities, and it is certainly plausible to say that the authors of *The Federalist* fancied themselves committed to it.

VI. CONCLUSION

Publius's treatment of the Articles of Confederation raises one final problem for consideration in this paper: the relationship between fundamental values and the constitutional document. Does Publius assume that the written constitution successfully embodies his commitment to reason in public affairs? In saying that the Constitution is the most authoritative voice of the people, can Publius reasonably suppose that the Constitution's institutional arrangement will continue to manifest the commitment to reason that makes his generation and the generations that follow one people, to the extent that they are and will remain one people?

If by "the Constitution" we refer to the document of 1789 and its amendments, the answer to our question must be no, for at least two obvious reasons. First, Publius acknowledges that political exigencies forced the delegates at Philadelphia to depart from standards of just and even civilized conduct in several respects, like provisions respecting slavery¹⁹⁰ and equal representation of the states in the Senate regardless of their size.¹⁹¹ Second, as the subject of a mere political proposal, the document is to be tested against the requirements of reason, and therefore cannot itself be a simple manifestation of those requirements. Thus, it will always make sense to ask whether the document is as good as it can be.

¹⁸⁹ Federalist 1 at 3, 5-6 (cited in note 15).

¹⁹⁰ Federalist 42 at 279, 281-82.

¹⁹¹ Federalist 62 at 415, 416.

Publius expressly submits the document to the electorate partly as a means to the ends of government, and though ratification will make the document "supreme Law," Publius's treatment of the Articles supplies a precedent, if one is needed, applicable to all partially instrumental institutions. Answering criticism of the Philadelphia Convention's disregard of the original charge merely to amend the Articles of Confederation, Publius insists, at bottom, that "the happiness of the people of America," is simply more important than preserving the Articles.¹⁹²

Publius also believes the "successors" of those "leaders" who first "accomplished a revolution" and subsequently "formed the design of a great confederacy" are obligated to "improve and perpetuate" it.¹⁹³ This obligation is higher in authority than the positive law it disregards, and Publius accepts it as consistent with a tradition which is praiseworthy for its capacity to disregard conventional barriers to what reason recognizes in changing circumstances as arrangements conducive to "private rights and public happiness." As a proposal originally submitted to the reasoned deliberation of the public, there is a sense in which the Constitution originates in an act of deliberate public choice and remains subordinate to that authority. So, as a document, the Constitution cannot fully embody reason in public affairs.

How, then, if reason remains the highest authority, can Publius believe that the Constitution is the people's most authoritative voice? If there is an answer to this question it may be that the amendable, defeasible document is not the real constitution for Publius, or at least not the heart of it. The essential dimension of the complex totality we call "the Constitution" would be the abstract idea of popular self-government in which the reason of the public rules the passions. This general idea would entail no particular arrangement of offices and powers. And it would be unconstitutional to deny its influence on the construction of subordinate arrangements. Publius's thought and Publius's example lead us in this direction.

In any case, I have taken *The Federalist* as a leading source of evidence for "framers' intent." Acknowledging that its general import is a subject of controversy, I have outlined what I believe to be a plausible interpretation. I think there is much evidence that Publius does not regard majoritarian democracy as the primary political value. He rejects government by majority faction. He claims

¹⁹² Federalist 40 at 258, 260.

¹⁹³ Federalist 14 at 83, 89.

that it is his great objective to reconcile popular government to higher standards of political morality. He considers democracy worth saving only if he can replace unrestrained majoritarianism with self-restrained or *constitutional* democracy. His plan for achieving this objective depends in part on a strong and independent judiciary charged with both the duties of judicial review and the mitigation of majoritarian injustices. Though he leaves some room for other entities to oppose judicial interpretations of the Constitution, he seems willing to err on the side of judicial power because he connects the judiciary with the value of reason and the function of maintaining governmental responsibility to higher standards. He hardly seems willing to sacrifice or subordinate this higher constitutional responsibility to democratic responsiveness. The presuppositions of Publius's plan are still worth debating, for although they are controversial, they are hardly without formidable modern support. We therefore have no compelling theoretical reason to construe Publius as a majoritarian democrat or in any other manner that denies the institutional implications of his theory of governmental responsibility to higher standards.