

California Law Review, Inc.

Brennan and Democracy: The 1996-97 Brennan Center Symposium Lecture

Author(s): Frank I. Michelman

Reviewed work(s):

Source: *California Law Review*, Vol. 86, No. 3, The Brennan Center Symposium on Constitutional Law (May, 1998), pp. 399-427

Published by: [California Law Review, Inc.](#)

Stable URL: <http://www.jstor.org/stable/3481113>

Accessed: 04/01/2013 14:16

Your use of the JSTOR archive indicates your acceptance of the Terms & Conditions of Use, available at <http://www.jstor.org/page/info/about/policies/terms.jsp>

JSTOR is a not-for-profit service that helps scholars, researchers, and students discover, use, and build upon a wide range of content in a trusted digital archive. We use information technology and tools to increase productivity and facilitate new forms of scholarship. For more information about JSTOR, please contact support@jstor.org.



California Law Review, Inc. is collaborating with JSTOR to digitize, preserve and extend access to *California Law Review*.

<http://www.jstor.org>

BRENNAN AND DEMOCRACY

The 1996-97 Brennan Center Symposium Lecture

Frank I. Michelman†

I

INTRODUCTION

American constitutional theory has over its life span been hounded and preoccupied, if not totally consumed, by a search for harmony between what are usually heard as two clashing commitments: constitutionalism and democracy. The search is one with which no partisan of democracy can proceed today without reckoning with the judicial career of William Brennan.

Do we see some slight to democracy, some “Counter-Majoritarian Difficulty,” to recall Professor Bickel’s famous phrase, in unelected judges deciding the legal validity of the enactments of popular assemblies and thereby effectively ruling the country? If we do, then Justice Brennan, perhaps before all other American judges, personifies the difficulty we see. I am one who does see the difficulty, who tries to take democracy seriously, and yet who counts the country gloriously well-served by Brennan’s career. I therefore feel bound, on this occasion of academic exchange in the Justice’s honor, to return to the question that keeps the Constitutional Theory department in business: Brennan and democracy—how to have both?¹

Copyright © 1998 California Law Review, Inc.

† Robert Walmsley University Professor, Harvard University.

1. The Brennan Symposium Lectures are sponsored by the Brennan Center for Justice at the New York University School of Law and funded by a gift from Professor Thomas Jorde of the University of California, Berkeley School of Law (Boalt Hall). My thanks to Professor Jorde, the Center, its staff (especially Marcy Schuck) and its director Joshua Rosenkrantz, Deans Herma Hill Kay and John Sexton of the law schools at Berkeley and N.Y.U., and the four commentators for providing occasion and support for this offering of mine in honor of a man I have loved and enormously esteemed. Thanks go, as well, to Professors Larry Kramer and Kenneth Winston for valuable comments on prior versions.

I end with a surmise about what might have been Brennan's answer, drawn from his words and deeds. I am more concerned here, though, with restating the question. A chief aim of these remarks is to push discussion of the conflict between constitutionalism and democracy beyond the Bickelian Difficulty, for the conflict has a depth and a poignancy that Bickel's delicately understated formulation fails to capture.²

"Constitutionalism" appears to mean something like this: The containment of politics by a supervening law that stands beyond the reach of the politics it is meant to contain—a "law of lawmaking," we may call it—that controls which further laws can be made and by what procedures. "Democracy" appears to mean something like this: Popular political self-government—the people of a country deciding for themselves the contents of the laws that organize and regulate their political association. If these two rough definitions fairly capture what we mean by "constitutionalism" and "democracy," then the two principles do indeed appear to be in relentless conflict. By the principle of democracy, people ought to decide for themselves all the politically decidable matters about which they have a good moral and material reason to care. But quite obviously falling among such matters are the contents of the laws of lawmaking which, by the principle of constitutionalism, must set limits and bounds on democratic authority.

To illustrate, consider the following politically decidable questions:

- Shall there or shall there not be in your country a law of lawmaking that all but prohibits government from any kind of race-conscious legislation or administration, in any circumstances, for any reason?
- Shall there or shall there not be in your country a law of lawmaking that narrowly restricts the ability of the government to regulate the flow of money in political campaigns?

This baby *tome* can't actually have been delivered as a *lecture*, you say? Right you are. First at Berkeley on November 4, 1996, then at N.Y.U. on March 10, 1997, I gave talks drawn from manuscripts that had been furnished in advance to commentators: Professors Robert Post and Kathleen Sullivan at Berkeley, Professors Ronald Dworkin and Don Herzog at N.Y.U. The manuscripts and talks were somewhat different on the two occasions, although addressed to similar concerns, in order to take advantage of the participation at Berkeley of Professor Post and at N.Y.U. of Professor Dworkin, two scholars whose current writings on constitutional theory I found myself drawn to consider at some length by my general theme. I delivered the "Post" part at Berkeley and the "Dworkin" part at N.Y.U., then pulled the two parts together and rewrote the whole for publication along with the comments of Professors Dworkin, Herzog, Post, and Sullivan. You should expect, therefore, to find some reverberation—I certainly hope that you will—between Parts III (re: Post) and IV (re: Dworkin) of what follows.

In order to convey a fair sense of the occasions as they actually occurred and also leave the commentators with a steady target, I have tried in the rewriting to stand by everything to which the trenchant comments were directed.

2. Others, by comparison, have spoken of "government by judiciary." See RAOUL BERGER, *GOVERNMENT BY JUDICIARY* (1977); 2 LOUIS B. BOUDIN, *GOVERNMENT BY JUDICIARY* 12 (1932).

- Shall there or shall there not be in your country a law of lawmaking that narrowly restricts the ability of government to regulate what people do about having sex, becoming pregnant, remaining pregnant, or becoming a parent?

The choices posed by such questions are so obviously important to so many people, materially and morally, that it seems they must fall within democracy's reach if we take democracy seriously at all. But they are also choices about the laws of lawmaking, and the principle of constitutionalism suggests that at least some choices about the laws of lawmaking must be placed securely beyond the reach of democratic politics to decide. In fact, the choices I posed are decisions that the United States Supreme Court currently makes for this country, in the course of interpreting and applying the country's established code of laws of lawmaking, the Constitution.³ We confront a spectacle of judges explicitly holding themselves responsible, according to what they believe to be an inevitable inference from the notion of constitutional government, to pronounce with finality on the country's laws of lawmaking. The nine-justice opinion in *Cooper v. Aaron*, written mainly by Brennan, declares the justices "supreme in the exposition of the law of the Constitution."⁴ Similarly, but even more assertively, the decisive plurality opinion in *Planned Parenthood of Southeastern Pa. v. Casey* claims for the justices the role of "speak[ing] before all others for [the] constitutional ideals" (not just the laws) of American government.⁵ The authors of those manifestos don't seem particularly worried about the people deciding for themselves the contents or even the spirit of the fundamental laws. Must we then count them as foes of democracy?

Not necessarily, it is said; they may be democracy's friends, depending on the spirit and content their interpretations accord to the laws of lawmaking. There are in circulation two main variations on that theme. One variation construes democracy as a procedural ideal, the other construes it as a substantive ideal. Each variation, providentially, has a champion among the appointed commentators—Professor Robert Post for procedure, and Professor Ronald Dworkin for substance. I want to accompany each on his journey from one of the poles of this terrain to the point where the two meet up in paradox. Initially, however, I need to point out how controversial and problematic is the quest on which

3. See, e.g., *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604 (1996); *Miller v. Johnson*, 515 U.S. 900 (1995); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *Bowers v. Hardwick*, 478 U.S. 186 (1986); *Buckley v. Valeo*, 424 U.S. 1 (1976); *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

4. 358 U.S. 1, 18 (1958); see David H. Souter et al., *In Memoriam, William J. Brennan Jr.*, 111 HARV. L. REV. 1, 6-7 (1997) (remarks of Chief Judge Richard S. Arnold).

5. 505 U.S. 833, 868 (1992) (plurality opinion). For an endorsement, see RONALD DWORKIN, *LIFE'S DOMINION* 120, 126 (1993).

both ventures are embarked. Reconciling constitutionalism with democracy is especially hard when one takes the point of democracy—as both our champions do—to be the realization of individual self-government in public affairs.

II

DEMOCRACY AND INDIVIDUAL SELF-GOVERNMENT: THE INSTITUTIONAL DIFFICULTY

Why do we care about the prevalence of ostensibly “democratic” political arrangements? Perhaps some people who care about this do so only because they want people to be governed, by whoever governs them, in accordance with their interests. The rough idea is that if those who govern the people hold office on sufferance of popular majorities, and if the electoral and representational schemes for toting those majorities are geared to a fair reflection of the assortment of interests in the population, then government will tend to respond decently to the interests of the governed. We may call this an “accountability” or “welfare” view of democracy.

But it seems that some people, Professors Post⁶ and Dworkin⁷ and myself included, care about democracy for reasons that go beyond accountability and welfare. We care about democracy because we care about people governing themselves politically, exercising their own charge over the politically decidable conditions of their lives. In other words, we care about democracy for the sake of that aspect of human dignity and freedom that is sometimes called positive liberty.⁸

I will call this a “self-government” conception of democracy. According to it, a political arrangement is defective if it fails to serve self-government in roughly the way that democracy, according to some theory, is supposed to serve it. Consider, for example, the following account of how democracy serves self-government (on which we’ll see Post and Dworkin converging from their opposite-looking initial conceptions): Democracy serves self-government by providing each individual with reason to identify his or her political agency with the lawmaking and other acts of political institutions, or to claim such acts as his or her own.

In the views of both Post and Dworkin (as well as in my own), the reference to individuals is crucial. Self-government conceptions of democracy divide into two sub-categories, according to who or what is the agent whose self-government concerns us. Some theorists hold the “populist” view, as we may call it, that what finally, morally matters is

6. See, e.g., ROBERT C. POST, CONSTITUTIONAL DOMAINS 273, 278, 283-84 (1995).

7. See, e.g., RONALD DWORKIN, FREEDOM'S LAW 21-22 (1996).

8. See *id.* (valuing positive liberty as self-determination).

giving effect to the political will of the people of a country as one unified "self." Populists experience only moderate difficulty explaining how majoritarian decision processes translate into a self-governed political collective.⁹

However, theorists like Post, Dworkin, and myself, have a great deal more trouble with this question because we are committed to the standard liberal view that what finally, morally matters is the agency, the freedom, the dignity, the self-government of individuals. We all believe that there are such things to speak of as nations and peoples and political communities, and that there are reasons to care about the histories and fates of these entities.¹⁰ But I confess I do not believe, and I doubt that any commentator does, that a nation, a people, or a political community is a being possessed of a mind or any of the five senses, or hence, of a capacity for consciously self-directive agency for which we have any final, moral reason to care.¹¹ So when I (perhaps too loosely) speak of a country's self-government, you must understand that I have in mind the government of "everyone," that is, of each person taken severally.

Perhaps individuals can be more or less self-governing in some departments of life. But it is not easy, to put it mildly, to explain how "everyone" can conceivably be self-governing on the field of politics, where laws are made. Lawmaking is by its nature an institutional, in other words, a collective, endeavor. How is everyone to regard himself or herself as self-governing through institutional events from which he or she dissented, and in which there is no real chance that any single individual's vote or other political action decided the outcome? How is a person self-governing through political enactment of laws that are revolting to him or her? Of this Institutional Difficulty, the judicial role of the Brennans is certainly not the cause. Indeed, both Professors Post and Dworkin pose the question: Is it the cure? Post and Dworkin say democracy provides an answer to the puzzle of self-government that is both individual and collective. Democracy, they insist, provides a warrant in reason for the individual's identification of his or her political agency with the acts of majoritarian institutions.

9. See, e.g., RICHARD D. PARKER, *HERE THE PEOPLE RULE* (1994); Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 503 (1994).

10. As to Dworkin, see *infra* Part IV.C. As to Post, see Frank I. Michelman, *Must Constitutional Democracy Be "Responsive?"*, 107 ETHICS 706, 710-12 (1997).

11. Cf. Post, *supra* note 6, at 306 ("Groups neither reason nor have an autonomous will; only persons do.").

III

DEMOCRACY AS A PROCEDURAL IDEAL

A. *Post's Account of Political Agency*

Robert Post puts before us the ideal of “responsive democracy.”¹² This ideal envisions a set of social and legal conditions in which each individual who cares to may exercise actual self-rule through his or her respective contributions to collective determinations of the “national identity” or “social order.”¹³ These latter terms encompass the country’s basic lawmaking institutions and practices. But I further take them to include the reflection in and through those institutions of major, prevailing political-cultural dispositions—for example, American affinities for personal sturdiness and independence, competition, and rewards to merit. I take Post to be urging that a national identity and social order visibly forged in radically free public discourse is one with which inhabitants can effectively identify as “owners,” responsible as such for the general social regulations that issue from this national character, because everyone can see in it a true and fair representation of the sum of preferences and opinions that individuals severally and freely contribute to its formation.¹⁴ According to responsive democracy theory, in other words, democratic political legitimacy consists in each individual’s warranted sense of autonomous participation in the process of creating the social order in which we live.

For liberals who care about individual self-government, the problem of politics is that pure self-determination by everyone, with respect to the social order and fundamental laws, is unattainable in a world where deep divergences of experience and valuation preclude consensus on every major question of social ordering. Responsive-democracy theory posits that the best available substitute for the pure self-determination that we cannot have is unprejudiced participatory access for all to a ceaseless communicative process—a process in which individuals contribute their opinion and preference vectors to a summation that decides for the time being the fundamental dispensations of social life. The overriding commitment is to conditions in which every individual can have a warranted sense of autonomous and effective contribution to this creative process. As Post argues, that is why we ought to strive, above all else, rigorously to maintain “a structure of [political] communication” that is absolutely unrestricted, open to all views that anyone might hold regarding the social order.¹⁵ As Post says, “[i]f the

12. See generally POST, *supra* note 6. I consider responsive-democracy theory at greater length in Michelman, *supra* note 10, at 706-23.

13. See POST, *supra* note 6, at 275, 185.

14. See *id.* at 273, 311-12.

15. See *id.* at 185-86.

state were to forbid the expression of a particular idea, the government would become, with respect to individuals holding that idea, heteronomous and nondemocratic.”¹⁶ But if, the theory runs, we do as we ought by maintaining a reasonably spacious sphere of absolutely unrestricted public discourse, then the national identity that is constantly being hammered out in this public space can be said to be one that we all have freely chosen. Only then may it be said that the legal regulations of social life that issue from (and “reflect”) this freely chosen national identity are consistent with self-determination.¹⁷

B. Post's Procedural Conception of Democracy

With clear purpose, Post presents this theory of responsive democracy as bottomlessly procedural, resting on no substantive foundation and implying no substantive presupposition. Recalling the fine formulation of Claude Lefort, Post speaks of “a regime founded upon the legitimacy of a debate as to what is legitimate and what is illegitimate—a debate which is necessarily without any guarantor and without any end.”¹⁸ These words suggest that if we are truly self-governing, then proceduralism goes all the way down: the debate itself, its framing and its procedural norms, are and can only be what we democratically make them.

One can see what might be prompting Post and others to take this view. Suppose we distinguish between “pure-procedural” and “procedure-independent” standards of rightness for fundamental laws. An example of a pure-procedural standard is this: Fundamental laws are right when they accurately represent the summation of each person’s duly expressed preferences or opinions. An example of a procedure-independent standard is this: Fundamental laws are right when they express and further a moral mandate of equal respect and concern for every citizen.¹⁹ Resort to procedure-independent standards of political rightness strikes some theorists, Post included, as deeply at odds with self-government. The intuition behind this position is understandable. If

16. *Id.* at 304.

17. *See id.* at 274.

18. *Id.* at 186 (quoting CLAUDE LEFORT, *DEMOCRACY AND POLITICAL THEORY* 39 (David Macey trans., 1988)).

19. My category of a “pure-procedural standard” corresponds directly to the case of what John Rawls calls “pure” procedural justice, where justice or rightness is directly equated with performing the procedure and abiding by its outcome. My category of “procedure-independent standards” includes (although it certainly is not limited to) Rawls’s cases of “perfect” and “imperfect” procedural justice, because those are both cases in which the conception of rightness refers to outcomes (e.g., the same size piece of cake for both of us) and not to any procedure (you cut, I pick), even if commitment to the conception carries with it an obligation to use a certain procedure because of the procedure’s known superior propensity to arrive at the desired outcome. *See* JOHN RAWLS, *A THEORY OF JUSTICE* 85-86 (1971).

there is some substantive content that the laws must possess to be right, then to that extent it is not rightfully up to any of us, much less all of us, to say what the laws in substance shall be. Thus, we cannot be self-governing, or at least not rightfully so.

How should admirers of Justice Brennan's career respond to such a radically proceduralist understanding of responsive-democracy theory? Are Brennan's free-speech decisions directed to establishing the very sphere of absolutely unrestricted public discourse that a pure-procedural understanding of responsive democracy theory requires?²⁰ That is surely not an incongruous reading.²¹

However, there is a great deal more in Brennan's work that a radically proceduralist conception of democracy theory cannot explain. At the core of his constitutional jurisprudence apparently stands a fairly thick substantive idea: the inestimable value of the ever-redeemable dignity of the individual.²² This idea, in Brennan's hands, implies a set of basic human rights that are both full of content and strongly foundational, respect for which is a prerequisite to the legitimacy of political power. Most dramatically, it motivates Brennan's death-penalty jurisprudence.²³ It also obviously inspires many of his other interpretive convictions, including his views that the Constitution must mean to guarantee rights to individualized hearings to those asserting eligibility for government benefits,²⁴ to confer expansive rights against self-incrimination and double jeopardy,²⁵ to guarantee the right to receive assistance in voluntarily bringing one's life to an end,²⁶ to confer rights of sexual and procreational self-determination,²⁷ to provide freedom to engage in intimate association²⁸ or to read whatever one wants in one's

20. See *Texas v. Johnson*, 491 U.S. 397 (1989). Brennan joined the opinion of the Court (per Rehnquist, C.J.) in *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), to which Professor Post accords a central place in his reading of our free-speech jurisprudence. See POST, *supra* note 6, at 119-78.

21. Some have found cause for worry in the Meiklejohnian rhetoric of Brennan's most famous free-speech decision, *New York Times Co. v. Sullivan*, 376 U.S. 254, 269, 274-75 (1964). Both Professors Post and Dworkin see an opening to restraint of public discourse in Meiklejohn's "it serves the course of wise decisions" rationale for constitutional protection of freedom of expression. See DWORKIN, *supra* note 7, at 199-205; POST, *supra* note 6, at 268-89; Michelman, *supra* note 10, at 707-08, 710. For example, consider Meiklejohn's remark that "[w]hat is essential is not that everyone shall speak, but that everything worth saying shall be said." ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* 26 (Oxford Univ. Press 1965) (1948).

22. See Frank I. Michelman, *Super Liberal: Romance, Community, and Tradition in William J. Brennan, Jr.'s Constitutional Thought*, 77 VA. L. REV. 1261, 1268-69 (1991).

23. See *id.*; William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 436 (1986).

24. See *Goldberg v. Kelly*, 397 U.S. 254 (1970).

25. See *Malloy v. Hogan*, 378 U.S. 1 (1964).

26. See *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 301-30 (1990) (Brennan, J., dissenting).

27. See *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

28. See *Roberts v. United States Jaycees*, 468 U.S. 609, 612-23 (1984).

home,²⁹ and to allow criminals to contest the merits and procedures of a conviction over and over again.³⁰ These stances cannot be explained by any pure-procedural ideal of democratic government, nor could such an ideal accept that the word of judges in such matters should prevail over popular opposition.

The question remains whether Post's conception of responsive democracy is as purely proceduralist a conception as he says. It appears to involve at least some substance. Indeed, responsive-democracy theory rests the possibility of individual self-government in politics on a principle loaded with normative content, that of absolutely unrestricted access to public discourse for every person and every view. Although this principle is *about* a procedural matter, it is itself a matter of substance; it propounds a foundational norm of right government that must be regarded as beyond all debate by those who hold it. It is, after all, precisely (and only) because responsive-democracy theory rests on this principle that Professor Post can use the theory to support the correctness of some constitutional interpretations against others, beginning with interpretations that hold the line stoutly against the least restriction of the content or pitch of expression in public discourse.³¹

If responsive-democracy theory does rest on a foundational presupposition, perhaps it is a closer cousin to Brennan's constitutional theory than we have yet noticed. Indeed, I believe it is. But then we are back to the question of whether any conception of right government that rests on a non-negotiable, non-debatable, normative presupposition—even such an ostensibly structural or formal one as absolutely unrestricted public discourse for the sake of self-government—can answer the question how everyone is truly self-governing in the field of law-making.

C. Interpretation: The Paradox of Constitutional Democracy

I will use an argument of Professor Post's to illustrate the problem.

Beyond question, the fundamental laws of this country include an article of assurance to all of "the freedom of speech."³² A very large majority of Americans would doubtless endorse this article as correct. Controversy breaks out, though, over some of its applications. A recent example is the question of constitutional protection for virulently racist expression on state university campuses or in other public areas. The country's unanimous commitment to "the freedom of speech" is now up for interpretation. We may assume that everyone loyally holds to the

29. See *Stanley v. Georgia*, 394 U.S. 557 (1969) (opinion of Marshall, J.).

30. See *Fay v. Noia*, 372 U.S. 391 (1963).

31. See POST, *supra* note 6, at 119-78.

32. U.S. CONST. amend. I.

view that there is a correct interpretation of the commitment, a “right” answer to the question of what the commitment means, specifically, with respect to whether government actions restricting racially virulent speech in public are prohibited, required, or permitted. The trouble is that people divide sincerely and, within real political time, irresolvably over what is the right answer.

Since there is no escaping the question, someone will have to decide it over opposition. In our system, that would be someone like Justice Brennan. But what then becomes of “everyone’s self-government?” Can everyone’s self-government possibly be preserved in Brennan’s resolution? It seems not, except on the condition that Brennan’s resolution, once sufficiently explained, could be seen by everyone to issue straightforwardly from some still loftier principle for government, some metaconstitutional principle, that everyone endorses as right. If that condition is not met, then the fundamental law controlled by Brennan’s resolution would, under guise of interpretation, be written by Brennan and not, as everyone’s self-government requires, by everyone.

What Post proposes, in effect, is a certain content for the needed metaconstitutional principle to which he believes those concerned about self-government in politics presumably have reason to agree, to wit: assurance to all persons and all views of unprejudiced access to unrestricted public discourse in which a national identity is constantly being forged. Let that assurance stand, then, as the “Really High Law” for which we can all take authorship responsibility. Brennan will apply this Really High Law to decide whether the intermediately high law of the textual Constitution—in our example, the guarantee of “the freedom of speech”—means to prohibit, require, or permit government actions restricting racist speech in public. This reassuringly makes the question that Brennan decides one of law-application rather than one of law-making.

Or does it? Ostensibly, Brennan will apply the Really High Law of unrestricted public discourse to decide the textual Constitution’s meaning with regard to government regulation of racist speech. The trouble is that he cannot hope to do so uncontroversially, in view of claims, not easily brushed aside by those who do not share the life experiences on which they are based, that racist speech itself restricts some people’s access to public discourse as a medium of self-government.³³ It seems, moreover, that this question about the Really High Law’s application is inseparable from the question of its identity (i.e., its definition or content, the question of what the Really High Law really “is” or means). To put it another way: it is not clear how the notion of “unrestricted

33. See POST, *supra* note 6, at 319-20.

public discourse” can be said to be one and the same notion, reflecting the same large moral, metaphysical, or ideological commitments, under alternative interpretations of it to decide the textual “freedom of speech” guarantee’s application to government restriction of racist speech. Yet that interpretative question, involving a morally and ideologically loaded practical question, is sharply contested in our society now. It seems not to be the case, then, that everyone agreed to the same Really High Law, at least not in any sense that could make everyone self-governing through authorship of that Really High Law. Thus, the Really-High-Law principle of absolutely unrestricted public discourse seems to be either too indeterminate or too partisan to qualify as an exercise of everyone’s self-government.

This is the paradox of constitutional democracy, and it appears to be generalizable. On the one hand, we are driven to locate the possibility of a lawmaking consensus—the possibility of everyone’s self-government by and through law—at the level of “higher” as opposed to ordinary lawmaking, precisely on the understanding that fundamental laws prescind from the concrete conflicts of interest, belief, and valuation that ordinary lawmaking cannot consensually resolve. The hope is that everyone can autonomously judge the lawmaking *system* fair, and thus count themselves the authors of even specific outcomes with which they deeply disagree. The theory of “everyone’s self-government” through responsive democracy rests on exactly such a hope: in Post’s words, that “citizens can . . . embrace the government as rightfully ‘their own’” because they accept the fairness of the system of national identity formation through absolutely unrestricted public discourse—because, as he says, the maintenance of the system instills in citizens “a sense of participation, legitimacy, and identification.”³⁴

On the other hand, this abstraction of the fundamental laws from specific controversies creates a problem. The matters to be resolved by interpretation of these abstract laws are characteristically themselves such major political-moral issues that resolutions of them one way or the other cannot be separated from determinations of the fundamental laws themselves. It seems that the quest for individual self-government in politics—the commitment to select the fundamental laws in a way that responds to and satisfies everyone’s interest in self-government—requires that not only the initial, abstract formulations of the fundamental laws be accomplished in such a way, but also all major interpretations of them. But the only way to arrive at effectively authoritative (law-like) interpretations is institutionally, by some non-unanimous, collective process. Thus, there is only one way in which such interpretations can be compatible with everyone’s self-government: standing be-

34. *Id.* at 273.

hind the fundamental laws that are up for interpretation at any given time must be a still more abstract and fundamental set of principles, the Really High Laws. These laws must be attributable to everyone's authorship, and at the same time be capable of deciding objectively among contesting interpretations of the fundamental laws. But the Really High Laws, being even more abstract than the merely fundamental laws, will even more certainly require controversial interpretation on the way to deciding what we need for them to decide. We are faced with an infinite regress.³⁵

That may all be just a long-winded way of taking issue with any proposed "non-foundational" conception of constitutional rightness. It appears that constitutionalism—the endeavor to place government under reason expressed as law—inevitably means the establishment of some *a priori* fixed, non-negotiable, non-debatable set of normative prerequisites. For present purposes, it does not matter whether we call them prerequisites to the legitimacy of power or prerequisites to the legitimacy of a debate that determines the legitimacy of power. Examples of such prerequisites include absolutely unrestricted public discourse and unyielding respect for the ever-redeemable dignity of individuals. One could see these as cultural commitments of constitutional democracy, and be driven toward the conclusion that only in the happy circumstance of their general *a priori* acceptance by the people of a country can there possibly be both self-government and constitutional government.³⁶ On this matter, it seems to me that Brennan's career points in the right, the inevitable direction. Notice, however, that on this pleasant assumption of an *a priori* convergence among a country's people on the basic normative principles of right government, it is no longer evident that there is a place for *democracy* at the level of fundamental law determination.

IV

A DEMOCRACY AS A SUBSTANTIVE IDEAL

Recall the questions that need to be answered. First, how might one simultaneously embrace both Brennan and democracy? Second, how might one be considered "self-governing" through political enactment

35. Compare the objections of critical legal theorists to what they used to call "liberal legalism." See Frank I. Michelman, *Justification (and Justifiability) of Law in a Contradictory World*, in JUSTIFICATION 71, 79-81 (J. Roland Pennock & John W. Chapman eds., 1986) (describing the argument in Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205 (1979)).

36. Compare the pivotal role in John Rawls's more recent political theory of the latency in the public political cultures of some countries of a conception of everyone as free and equal at the bar of politics. See STEPHEN MULHALL & ADAM SWIFT, LIBERALS AND COMMUNITARIANS 189-90 (2d ed. 1992); JOHN RAWLS, POLITICAL LIBERALISM 13-14 (1993).

of a law to which he is opposed? Remember also the form of the answers posed by both Post and Dworkin: Brennan may be a friend to both democracy and self-government. It may be that Brennan as a judge is uniquely well-situated to ensure provision of something, some quality or feature, that is required of majoritarian political institutions in order to make them into vehicles of self-government. For Post, following that line of thought, democracy is a procedural ideal, the pursuit of which lands him (I have argued) in substance. For Dworkin, democracy is a substantive ideal. Will the pursuit of it land him in procedure?

A. Dworkin's Substantive Conception of Democracy

At the level of the fundamental laws or laws of lawmaking, Dworkin argues, the question of democracy is not answerable in procedural terms, by finding out who makes the laws say what they do; it is answerable only in substantive terms, by finding out what those laws in fact say. Some fundamental-legal content serves democratic ends, and some does not. The content of *Brown v. Board of Education*³⁷ does; the content of *Plessy v. Ferguson*³⁸ did not. Fundamental-legal content serves democratic ends and values only when it rules out caste, guarantees a broad and equitable political franchise, prevents arbitrary legal discriminations and other oppressive uses of state powers, and assures governmental respect for freedoms of thought, expression, association, and for the intellectual and moral independence of every citizen.³⁹

Dworkin thus presses the point, as others have in the past,⁴⁰ that one can speak of a constitution that is democratic in virtue of its content, as well as of one that is democratic in virtue of its authorship. His point, unassailable as far as it goes, is that allowing the country to be governed in part by judges is not necessarily anti-democratic, once you accept that the objective for democracy must be to get the choices among the laws of lawmaking resolved in accord with the right or best conception of a democratic political regime. To accept that as the objective is also to accept that indeed there is such a thing to speak of as this "right" or "best" conception of a democratic political regime.⁴¹ But then you have to accept as well the practical possibility that the constitutional

37. 347 U.S. 483 (1954).

38. 163 U.S. 537 (1896).

39. See DWORKIN, *supra* note 7, at 16-18, 24-26; Ronald Dworkin, *Equality, Democracy, and Constitution: We the People in Court*, 28 ALBERTA L. REV. 324, 337-42 (1990).

40. John Hart Ely has advanced a similar argument in his writings, *see, e.g.*, JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980), though there are important differences between the constitutional theories of Dworkin and Ely. See RONALD DWORKIN, *A MATTER OF PRINCIPLE* 33-71 (1985).

41. As, of course, Dworkin does. *See, e.g.*, RONALD DWORKIN, *LAW'S EMPIRE* 76-86 (1986); DWORKIN, *supra* note 40, at 33-71.

interpretations reached by an independent judiciary might be closer to the right conception of democracy than those proposed by the people and their tribunes. Therefore, Dworkin argues, concession to the judiciary of final constitutional-interpretive authority cannot be classified as counter-democratic “in principle,” just as such.⁴² An intended consequence of this argument is to provide a defense of Justice Brennan’s career against charges of riding roughshod over democracy. Of course, it is not Brennan by name that Dworkin defends but the mode of constitutional adjudication that Brennan’s career represents. Assuming Brennan’s constitutional adjudications match up well with what *you* think makes for a substantively democratic regime, you should have no trouble counting him a monumental contributor to the project of democracy in America.

If you are one of those who think that accountability and welfare are all that democracy might be good for, then Professor Dworkin’s argument should go down easily with you. The American system of divided government, including its provision for partial government by the judiciary, has from the beginning been plausibly and indeed brilliantly defended on the ground that it will probably respond better to the true interests of the governed⁴³ than would a more purely populist system.⁴⁴ Dworkin is extending that argument to include people’s interests in the prevalence of a democratic state of political affairs in their country. Divided government, he is saying—partial government by judiciary—might very well serve that interest better than would a more purely procedural democratic regime.

But matters are not so straightforward for Professor Dworkin himself, because for him the point of democracy is not just accountability or welfare, it is also self-government. It is not clear how a self-government view of democracy can coexist with the notion that democracy is a matter only of the content of the laws and not of their authorship, a matter only of substance and not of procedure. The problem is that self-government is indisputably an activity, a procedure, and it therefore seems that a self-government view of democracy simply cannot escape the use of a procedural test for the presence or absence of the democracy it envisions. According to a self-government view, democracy is at its fullest when a country’s people decide for themselves, by democratic political procedures, all of those conditions of their lives that are politically decidable.

42. See DWORKIN, *supra* note 7, at 32-35.

43. This includes any interests they may have in the joys and indulgences of political speech and association, of voting and office-holding.

44. See, e.g., THE FEDERALIST NOS. 10, 46, 51 (James Madison), No. 78 (Alexander Hamilton).

But is it really so? Does a self-government view of democracy really require that the people decide *all* the politically decidable questions? Must the procedures of political self-government, in all consistency, really extend to deciding the fundamental laws of the country, the rules and norms that set the aims and limits of governmental powers and establish the system for any and all further lawmaking? The answer seems inescapably to be “yes,” in view of the moral and material importance that people quite reasonably attach to the content of many of these laws of lawmaking. Even so, we will always feel an impulse to hive off the fundamental laws from democracy’s procedural purview, to restrict the domain of procedurally democratic decision to whatever *further* political choices the laws of lawmaking leave open, while assigning determinations of those laws themselves to some other jurisdiction. The impulse is to allow some other, pre-democratic authority to apply moral reason, rather than political will, to decide the fundamental-legal preconditions of justice or prosperity or liberty or even, as Dworkin is rightly bent on showing, democracy itself. And it is this impulse we see exemplified in Dworkin’s proposition that we judge the democratic credentials of a constitution by reference to its content rather than its authorship. Behind the impulse stands an apparently crushing logical objection to the alternative, that the contents of the laws of lawmaking could be within the keeping of a democratic procedure to decide. We will get to that objection in Part V, but first we need to notice another reason why Dworkin is led to seek the American Constitution’s democratic credentials in its regulative content and not in the procedures used in that content’s creation.

B. Interpretation: “Moral Reading” versus Procedural Legitimation

Some theorists take an opposite tack, seeking to uphold the Constitution’s democratic credentials in strictly procedural terms. The people, they say, directly choose the laws of lawmaking through the political procedures of constitutional ratification and amendment. One could cite a number of grounds for doubting the credibility of this view,⁴⁵ but here I only want to make the point that it is closed off to Dworkin, and whoever else shares the depth of his commitment to the interpretive character of law.

At the point of application, constitutional law is always a product of someone’s interpretation of the texts, traditions, and precedents of which this law is formed. So argues Dworkin, and I agree; perhaps most lawyers would as well. But Dworkin carries this point to lengths where not everyone would follow. He finds no escape from what he calls a

45. See, e.g., DWORKIN, *supra* note 40.

“moral reading” of the Constitution’s abstract rights-declarative words and phrases, including “freedom of speech,” “liberty,” “due process” and “equal protection” of law. A legal interpreter of these expressions, he contends, has no choice but to treat them as “invocations” of political-moral values or principles that the interpreter must distill from what she finds to be major fixed points in the American constitutional tradition. Such a distillation simply cannot be accomplished without introducing one’s own substantive vision of the ends and ideals of constitutional government.⁴⁶

Much of Justice Brennan’s work exemplifies the moral reading approach to constitutional interpretation. A good exhibit is the case of *Michael H. v. Gerald D.*⁴⁷ An unwed natural father seeks a right to visitation with a child whose mother was married to another man at the time the child was born. State law has long denied the natural father any visitation right in these circumstances. This father seeks relief from the state law, claiming that his visitation interest is a constitutionally protected component of fourteenth amendment “liberty.” In his majority opinion, Justice Scalia concludes that such an interest cannot be a constitutionally protected one because American law typically and traditionally never granted visitation to men in the petitioner’s position.⁴⁸ Brennan, dissenting, protests against this method of decision. He recalls prior Court decisions extending the protection of fourteenth amendment “liberty” to a class of what he calls “generalized interests” that society traditionally has thought important. Among these generalized interests, he lists “freedom from physical restraint, marriage, childbearing, [and] childrearing.”⁴⁹ Brennan says that the decisive question must be whether the natural father’s visitation interest falls under a general principle of liberty that these traditionally esteemed, generalized interests instantiate. For Brennan, the law’s preexistent refusal to respond to an unwed natural father’s visitation interest could be explained as a failure on the law’s part to measure up to its own immanent standard of reason. Correcting for such failures was, in his view, a chief mission of the office he held.

Nothing could better exemplify what Dworkin commends as a “moral reading” of the Constitution. But, as the case also illustrates, and as Dworkin himself explicitly recognizes, moral readings of constitutional law inevitably involve the readers in resolutions of innumerable issues that involve major political-moral controversies. And on these controversies, sincere and thoughtful people can and do differ. Dworkin

46. See DWORKIN, *supra* note 7, at 2-4.

47. 491 U.S. 110 (1989).

48. See *id.* at 124.

49. *Id.* at 139 (Brennan, J., dissenting).

refers to such controversies as “great and defining issues,”⁵⁰ and “intractable, profound questions of political morality that philosophers, statesmen, and citizens have debated for many centuries with no prospect of agreement.”⁵¹ I mentioned examples of such issues earlier when I discussed interpretations of our Constitution’s equal protection, due process, and free expression principles—*Adarand*, *Miller v. Johnson*, *Griswold*, *Roe*, and *Buckley v. Valeo*. Notions of equality and democracy and freedom and fairness can doubtless help frame debate over such morally fateful interpretive issues, but the sincerest commitment to such ideals cannot incontrovertibly settle these issues. Such a possibility is precluded by diversities of experience and vision and the thousand shocks to which human interpretive judgment is heir—what John Rawls calls the “fact” of reasonable pluralism and the burdens of judgment.⁵² In the face of irresolvable, reasonable disagreement, someone must decide these interpretive questions. Whoever does not participate in the decision, for whatever reason, is to that extent governed by those who do.

It is now apparent why the moral-reading theory of constitutional adjudication debars its partisans from the procedural way of defending the Constitution’s democratic character—by pointing to the historical facts of popular enactment of the laws that the Brennans interpret. It does so because, on the moral-reading theory, the people’s enactments contain too small a share, and the moral readings of them by the Brennans contain too large a share, of the total sum of operative constitutional meaning that is to be made. There is too much meaning left politically unresolved at the point of promulgation and ratification of constitutional text. According to the self-government view, democracy means the people deciding for themselves by political procedures the politically decidable conditions of social life in which they have moral or material reason to take an interest. It follows that if someone is going to undertake moral readings of constitutional texts in order to resolve for the country such basic and contested issues of political morality as those presented by affirmative action, racist speech, political finance, term limits, physician-assisted suicide, abortion, gay rights, and gun control, the people acting democratically ought to be that someone. The main work of constitutional interpretation, cannot lie beyond democracy’s purview.⁵³

50. See DWORKIN, *supra* note 7, at 46.

51. DWORKIN, *supra* note 5, at 120.

52. See RAWLS, *supra* note 36, at 36-37, 54-58.

53. I expect some resistance to this conclusion, although not much from Professor Dworkin, so I want at least to indicate briefly how I would go about heading off the three likeliest lines of objection to it, which I will call the objections from abstraction, from concretion, and from right-answerism.

Nevertheless it may have to, for the story is not over yet.

C. Dworkin's Account of Political Agency

Remember the Institutional Difficulty: How might one be self-governing through institutional enactment of a law to which he is opposed? (Why not rather say that constitutional restrictions on majoritarian lawmaking support positive freedom, considering that such restrictions, while not measurably detracting from any individual's "control of his own fate," are quite likely to enhance such control in many of their applications?⁵⁴) Professor Dworkin says that there is only one agency in sight that can honestly be said to make law, the collective that we call a people or a citizenry. Therefore, he continues, the individual's identification with that collective lawmaking agency would be the only way in which there could be satisfaction of each individual's interest in being a self-governing person. It follows that a solution to the In-

Here is a schematic rendition of the objection from abstraction: It should not be insuperably difficult for a constitutional interpreter to document a finding that the people have, or have not, ever enacted into their constitutional instrument an expression of one or another abstract political-moral principle—for example, the principle of political equality. Suppose they have. Then to that extent the question of the people's self-government depends strictly on whether the government they receive back from judges and others does or does not proceed in accord with the principle of equality that the people enacted. In theory, as long as it does, all is well; the people govern themselves.

I don't believe it. It appears to me that self-government is too gravely compromised by the range and gravity of the questions that the abstract principle of political equality leaves open to debate and resolution. Consider the current controversy in America over governmental "colorblindness" as an uncompromisable principle of constitutional law. Issues of this magnitude are too fraught with moral and material significance to allow us to say that constitutional law is democratic in virtue of the people themselves having written the equal protection or due process clause into the Constitution. See *supra* Part III.C.

But a principle of political equality (to continue with the example) is surely not the only one that the people may be found to have enacted into their governing instrument. This brings us to the objection from concretion, or as it might be called, the objection from integrity. The question for a constitutional interpreter is always one of how best to synthesize *numerous* abstract principles that the people over time enacted into their constitution, adding to the normative mix whatever past synthetic interpretations have proven themselves to be enduring ones. This exercise is more thickly informed and constrained than determining the application of any single abstract principle taken alone. But it is not constraining enough to abate the problem I am posing. Dworkin himself has characterized these synthetic normative judgments of legal interpretation as both bottomlessly political and as having components of aesthetic judgment. See DWORKIN, *supra* note 41, at 73-76, 87-93, 229-32. In short, among sincere and reasonable disputants, there are bound to be a plurality of constructions of the data—a duck perceived here, a rabbit perceived there; a social-realist tragedy here, a playful *roman à clef* there—that leave in dispute the sorts of morally and materially freighted issues that people cannot leave to be resolved by others and still seriously claim to be self-governing.

This brings us to the objection from right-answerism. It is arguable that the real-time interminable disputability of constitutional issues does not mean there is no such thing as getting them right. I accept that premise without reservation. From it, someone might argue that people are self-governing as long as they enact the grist of the principles that go into an interpretation mill which is itself as aptly designed as we can make it to turn out true interpretations of the principles. My complex response to this claim appears in Parts V and VI below.

54. DWORKIN, *supra* note 7, at 21.

stitutional Difficulty would depend on the following sort of possibility: Observing a surrounding political community making laws through majoritarian political processes, a person can, by counting herself a member of that community, claim ownership of its lawmaking acts—can regard its acts as her own.⁵⁵ Democracy, it might be said:

[A]ttempts to reconcile individual autonomy with collective self-determination by subordinating governmental decision-making to communicative processes sufficient to instill in citizens a sense of participation, legitimacy, and identification. Although . . . there may be no determinative fusion of individual and collective will, citizens can . . . embrace the government as rightfully “their own” because of their engagement in these communicative processes.

But of course it is not Professor Dworkin who wrote that; it is Professor Post.⁵⁶

Professor Dworkin proceeds to state certain rational preconditions for this sort of identification. I cannot, he says, reasonably ally my political agency with that of any collective that does not by its actions maintain a due respect for my own moral and intellectual singularity, and for the interest I accordingly take in both the content of collective outcomes and my capacities to influence these outcomes. What is required, then, is the collective’s assurance to each member of: (1) unhindered and equal access to wide-open and effective channels of public-opinion formation; (2) an equal measure of consideration for the interests of each in decisions of public policy; and (3) insulation from collective control of each individual’s capacities for self-responsible moral and intellectual reflection and judgment.⁵⁷ This list looks much like what is guaranteed by our Constitution’s first, fifth, and fourteenth amendments—or, rather, it looks like what is found in those texts by constitutional interpreters such as Brennan. Professor Dworkin meant precisely that it should. His claim is that an independent judiciary can, by rightly construing and effectuating constitutional law, secure fulfillment of certain rational preconditions for an individual to identify his or her political agency with the political community’s lawmaking acts. By thus securing the possibility of everyone’s self-government on the field of lawmaking, the practice of judicial review can, if well conducted, solve the Institutional Difficulty. Wow!

Yes, okay, wow. But I do not think this stunning argument succeeds. Professor Dworkin says that certain constitutional guarantees give individuals a warrant in reason for a kind of self-identification with cer-

55. See *id.* at 21-22.

56. POST, *supra* note 6, at 273.

57. See DWORKIN, *supra* note 7, at 24-26.

tain political events. That identification must reside in individual consciousness, as either a belief or a feeling. Say it is a belief. What belief? Not the belief that I, the individual, actually make the laws or exert detectable influence on legislative outcomes, because one of Dworkin's starting points for this whole discussion is that no one in large-scale democratic conditions can reasonably believe that. Even so, of course, I might believe that I have reason to abide by the laws that are collectively made. That belief is not, however, sufficient to Dworkin's purpose. It leaves us with an account of how we might reasonably come to respect and accept laws made by others, which seems quite different from an account of how we might reasonably come to regard ourselves as lawmaker to ourselves.

Say, then, that it is not a belief that Dworkin has in mind, but a feeling. Say it is a feeling of satisfaction or even pride that I might take in lawmaking done by an organization that treats me and my independence and my interests with the kind of respect that is due an individual member. Or say that such treatment engenders a feeling that I *did* the lawmaking. Neither of those feelings is the same thing as my actually having done the lawmaking. Dworkin, on this account of his view, seems to have mistaken a case of affect or attitude for a case of agency. For me to "identify" sympathetically with the doer of an act is not for me to have done the act. I understand that one might speak here of an "identification" that is more than sympathetic, an identification that is ontological in some way that is supposed to allow the collective's action to "pass through" to the member. But talk of that organicist kind would be wildly out of temper with the rest of Ronald Dworkin's legal and political philosophy.⁵⁸ Walt Whitman was large, or so he claimed, and contained multitudes. I happen to think that, among judges, Brennan was large and contained multitudes. That, however, does not make Brennan everyone, or allow me to say that through his government I govern myself.

On the face of it, Dworkin's message is a happy one. It offers to resolve an apparent conflict between two of our deepest professed political desires. His argument seems meant to reassure and persuade us that we really can reconcile a democratic aspiration for political self-government by everyone with the practice of allowing a few judges to determine the operative contents of the country's basic laws. But I think the deeper and darker-hued message is that there is no such reconciliation to be had. And this brings us back to the crushing logical objection I mentioned before, the objection to the idea that the contents of the

58. See, e.g., RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 172 (1977) ("Right-based . . . theories . . . place the individual at the center, and take his decision or conduct [and independence] as of fundamental importance.").

laws of lawmaking could themselves be within the keeping of a democratic procedure to decide.

V

THE PARADOX OF CONSTITUTIONAL DEMOCRACY

If you care about democracy at all, if democracy is a fighting issue for you, *you have to mean something by it*. Your commitment to democracy means that you strive to make the laws of lawmaking in your country conform to the requirements of whatever it is that you mean by “democracy.” How can you possibly—how can you conceivably—leave democracy to decide the question of what democracy means in the first place?

No procedure can decide the question of that procedure’s own fitness to decide either that or any other kind of question.⁵⁹ One can always propose a historical account of how our extant constitutional law came to have its present regulative content, and one can always claim that the history is a democratic one. But we cannot cite that history, no matter how exquisitely democratic we may claim it to have been, as a basis for affirming or demanding respect for the extant constitutional law. We cannot, that is, without presupposing that it is right to enforce on a country whatever constitutional law may have issued from that particular sort of assertedly democratic history. And that presupposition cannot itself be grounded in any fact of *its* having issued from a democratic history, without landing us in a bad infinite regress.

The point is important enough to restate in different terms. Democracy is a demanding normative idea, an idea with content, however uncertain or disputable that content may be. Maybe everyone agrees that democracy connotes a procedure of joint decision by many persons somehow acting together. But no less essentially, it connotes a socially constituted relationship among parties to the procedure. You will not, I hope, regard a political procedure as democratic—and this is what I take to be Dworkin’s darker-hued message—unless participants enter the procedure in the appropriate relations of equality, independence, freedom, and security, *vis-à-vis* one another and *vis-à-vis* the political collective and its powers. So there can be no democracy without first positing what is to all intents and purposes a bill of rights having an operational content corresponding to these relations of democracy according to some more-or-less definite understanding of that idea.⁶⁰ Whatever may be the content of that more-or-less definite

59. As Professor Dworkin says, democracy “cannot prescribe the procedures for testing whether the conditions for the procedures it does prescribe are met.” DWORKIN, *supra* note 7, at 33.

60. This says nothing about the institutional arrangements for applying or “enforcing” the bill of rights.

understanding, it can never be allowed to vary with the outcome of any vote or other collective-decision procedure.⁶¹ Nor can there ever be any guarantee that the given procedure will decide a particular fundamental-legal question in the way that is required by that understanding of democracy, not even a vote taken under what you or anyone else considers to be ideal democratic conditions. It evidently follows that whoever cares about democracy has to take responsibility for deciding such issues independently of any putatively democratic procedural endorsement, or else hand that responsibility over to the judges. Or to the philosophers.

It is necessity, then, that explains the irrepressible impulse to hive off fundamental-law determinations from the procedural purview of democracy. This impulse does not ultimately spring from reflection on what it is prudent or desirable for democracy to do. Rather, it springs from logic. This logic, unhappily for some, entirely bars democracy from a decision-space where it would seem urgently and rightly to want to go, that of deciding the contents of a country's most basic laws, its laws of lawmaking.

VI

THE DEMOCRATIC PURSUIT OF DEMOCRATIC JUSTICE?

I will return to Brennan soon, but I want to open the way back to him by considering briefly how it might be possible to redeem in theory not only the logical possibility but the moral necessity of democratic procedures in determinations of even the most fundamental laws of a country. Let us start from what I take to be the well-spring of liberal political thought, the problem of power and force. Any established political order sooner or later threatens force against individuals within its range of authority. Committed to regarding those individuals as normatively and primordially free and equal, liberal thought is driven to conclude that such a regime of force can be right only insofar as everyone subject to it has his own reasons for agreeing to its basic terms, including its laws of lawmaking.⁶² For such laws to be right and just, to be as they morally ought to be in a liberal view, they must respond to everyone's reasons (although not everyone may be conscious of having such reasons)—reasons that are objectively consonant with everyone's interests or that are in accord with what everyone, being reasonable, would

61. Cf. RAWLS, *supra* note 19 (describing "pure procedural justice").

62. As John Rawls puts the matter: "[O]ur exercise of political power is . . . justifiable only when . . . in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational." RAWLS, *supra* note 36, at 217; see also MULHALL & SWIFT, *supra* note 36, at 190.

agree to in a proper normative discourse.⁶³ Justice, as thus liberally conceived, sets an objective standard for constitutional law. Allowing, optimistically perhaps, that some constitutional-legal content may satisfy the standard, some certainly does not.

Which constitutional-legal content, if any, satisfies the standard is a question not finally decidable by the procedure of democratic self-government. However, and I might say luckily for democracy, this objective question of true justice is not and indeed cannot be the foremost question of political morality for liberal-minded citizens. The foremost question for us has to be that of the moral justifiability of the support we give the prevailing regime by our daily acts of collaboration with it. That question is certainly related in some way to the question of the regime's true liberal justice, its true compatibility with everyone's reasons, but for liberals, the two questions cannot be identical.

They cannot because of what I shall call (in the style of John Rawls) the fact of reasonable interpretive pluralism—the fact of inevitable irresolvable uncertainty and irreparable reasonable disagreement among inhabitants of a more-or-less free country about the fundamental-legal interpretations that justice requires.⁶⁴ Here I am not strictly following Rawls. What he posits is a “reasonable pluralism” of comprehensive ethical views,⁶⁵ whereas I am positing a reasonable pluralism of (morally crucial) interpretations of those liberal constitutional principles on which the participants in Rawls's ethical pluralism may all have reason to agree, taking the very fact of their ethical pluralism centrally into account.

For Rawls, a reasonable pluralism of comprehensive ethical views is one of those “general facts” (or “circumstances of justice”) that bear crucially upon people's reasons for agreeing or not to a set of public practical norms affecting the very content of constitutional justice.⁶⁶ But it seems to me that reasonable pluralism, coupled with the “burdens of judgment” that are said to underlie this social condition,⁶⁷ cuts deeper.

63. See JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS* 107, 447-48, 459, 566 n.15 (William Rehg trans., 1996).

64. See *supra* Part III.C, IV.B.

65. A “comprehensive view” is a conception of “what is of value in human life, and ideals of personal character, as well as ideals of friendship and of familial and associational relationships, and much else that is to inform our conduct, and in the limit to our life as a whole.” RAWLS, *supra* note 36, at 13.

66. See RAWLS, *supra* note 36, at 36-37, 66. The fact of reasonable pluralism is said, for example, to give people reasons that they might not otherwise have for accepting entrenched norms of toleration.

67. Rawls calls “burdens of judgment” the causes of unliquidatable disagreement about justice among persons who, being reasonable, all observe and report honestly, argue cogently, and share a “desire to honor fair terms of cooperation.” RAWLS, *supra* note 36, at 54-55. Among the causes he posits is the following:

It cuts to the depth of making non-demonstrable by public reasoning any authoritative truth about what justice requires of constitutional law and its interpretation.⁶⁸ Reasonable pluralism does not make truth in this matter philosophically unavailable, or beyond reasoned argument. Rather, it makes it politically unavailable among people who, aware of human frailty and respectful of human difference, all perhaps sharing belief that there is a truth of the matter, can neither agree on what that truth is nor dismiss as unreasonable all positions opposed to their own. Reasonable interpretive pluralism thus opens a gap between the question of true justice in politics and the question of what it is morally right or justifiable for a citizen to do about the matter of political force. What is worse, liberals, by affirming reasonable (interpretive) pluralism, present themselves with the possibility that there is no answer at all to the question of what it is right to do about this matter of force. In other words, they present themselves with the possibility that nothing that is done about it can be right or morally justifiable, that all there can be is facts of power. This is what John Rawls calls "the problem of political liberalism."⁶⁹

For liberals, this problem must be solvable; but how can we solve it? Only, it appears, by specifying some attribute in a currently prevailing set of fundamental-legal dispensations that could morally justify anyone's acts in support of the always contested regime of force that this set constitutes. But what could this legitimating attribute be?

It must be one that responds in some way to the issue of force. It must, in other words, be one that enables people subject to the regime to abide by its laws, not just out of desire to avoid painful applications of force, but also out of consciously-held "respect for" the lawmaking regime itself.⁷⁰ What attribute in a political regime could attract such respect? Public knowledge that the regime accords with true justice would surely suffice, but it is exactly this possibility that the fact of

To some extent (how great we cannot tell) the way we assess evidence and weigh moral and political values is shaped by our total [life] experience, . . . and our total experiences must always differ. Thus, in a modern society with its numerous offices and positions, its various divisions of labor, its many social groups and their ethnic variety, citizens' total experiences are disparate enough for their judgments to diverge, at least to some degree, on many if not most cases of any significant complexity.

Id. at 56-57.

68. Joseph Raz has somewhat similarly doubted that "there is reason to think that one is more likely to be wrong about the character of the good life than about the sort of moral considerations which all agree should influence political action such as the right to life, to free expression, or free religious worship." JOSEPH RAZ, *THE MORALITY OF FREEDOM* 160 (1986).

69. RAWLS, *supra* note 36, at vxiii. Just so, the descent of reasonable pluralism from the level of comprehensive ethical views to that of interpretation of the principles in a political conception of justice (or a corresponding political constitution) has apparent subversive implications for Rawls's "political liberal" response to the problem, a fact about "reasonable interpretive pluralism" that makes me nervous.

70. See HARERMAS, *supra* note 63, at 447-48.

reasonable interpretive pluralism precludes. Consider, then, another possibility. Perhaps the continuous and credible exposure of the regime's fundamental-legal dispensations to the critical rigors of democratic politics could allow everyone subject to the regime to abide by it out of respect for it.

To explain briefly: We find ourselves forced to agree both that ultimate standards of fundamental-legal rightness cannot be left to democracy to decide, and that some official organ or organs have to be authorized to decide and construe from time to time the content of the fundamental laws. Yet we cannot admit that any official's judgment is a reliable guide to what is rightly required of a set of fundamental laws for our country. We might nevertheless believe that the most respectable judgments will come from official bodies whose members are constantly exposed to the full blast of the sundry opinions on such questions, freely and uninhibitedly produced by assorted members of society out of their diverse experiences, positions, and reflections. Such a belief could be rooted in a tight mix of epistemic and dignitary considerations. In conditions of doubt concerning the reliability of any official's judgments of fundamental-legal rightness, and given some reasonable basis for hope that officials' judgments will be in some measure enlightened by exposure to democratic "critical interaction" (as Robert Post nicely calls the process),⁷¹ why should we not reserve our respect for public decision-making arrangements that display respect for us, the citizens, as potentially competent and sincere contributors to political enlightenment? Why should we not reserve our respect for official efforts that are always working toward the end of making themselves available to be influenced by public deliberations and debates that are fully and fairly receptive to everyone's opinions about justice?

Yet, a response in that form, to someone demanding justification for support of a given, current regime of fundamental-legal dispensations, can never be complete. The response speaks of a process that is "fully and fairly receptive" to everyone's views, but such a process is always, inescapably, a legally constituted process. It is constituted not only by laws regarding political representation and elections, but by laws regarding civil associations, families, workplaces, speech, property, the media, and so on. Thus in order to justify my support of a set of fundamental-legal dispensations on the ground that everyone can abide by them out of respect for them, I would have to establish that those laws are what they democratically ought to be. The laws regarding elections, representation, families, workplaces, associations, speech, property, and so on, would have to constitute a process of more-or-less "fair" or "undistorted" democratic political communication, not only in the

71. See POST, *supra* note 6, at 142-48.

formal arenas of legislation and adjudication but also in civil society at large. Democracy would have to be, in that sense, “social.” But, alas, according to the liberal premise of reasonable interpretive pluralism, the question of whether the laws do or do not satisfy this social-democracy-constitutive standard is always bound to be a matter of contentious but reasonable disagreement. We seem to have landed right back in the fix from which we seek escape.

Perhaps, though, we have not landed back in exactly the same spot. I hope that I have recast the problem of political legitimacy in such a way that conditions are imaginable—conditions of apparent near-democracy, political and social—in which reasonable citizens can call upon one another to agree that the country is pursuing (in good faith and decently well) a political project in self-government for which there can be no final end, but for which there is nevertheless a foundational standard. The democratic pursuit of democratic justice would be that project. Its first and constant requirement would be this: Decisions that have to be reached about the rightness of basic political arrangements, that cannot be consensually reached, are nevertheless reached by institutions that are always effectively subjected to the pressures of a public-opinion-in-formation that is bent on democratizing itself and the legal and social conditions of its production.

VII

BRENNAN ON DEMOCRACY

If we turn now for one last time to Professor Post, that will lead us, finally, back to Justice Brennan.

We left Post, remember, saddled with the “intuition” that any procedure-independent standard of political rightness subverts self-government. As I put the intuition: If there is some substance that laws must contain in order to be right, then to that extent it is not rightfully up to any of us to say what the laws in substance shall be.⁷² Thus, we cannot be self-governing, or at least not rightfully so. That intuition, I said, was understandable. But I now want to say that it may nevertheless be mistaken. One might think it possible for a person to be self-governing without that person’s having any moral right, or conceiving herself to have any moral right, to make the laws be whatever she may decide.

Consider, for example, a person willingly abiding by a set of fundamental laws, “out of respect for” them, because she finds on reflection that they are just, or fair, or in some other sense as they ought to be. It might be said that this person is in a state of self-government, in as

72. See *supra* Part III.B.

full a sense as we can reasonably hope to find in politics. As always, the question is: What might it be about a set of fundamental laws that would enable a person to abide by them out of respect for them? One could take responsive-democracy theory to say that she can respect those laws (and only those laws) the content of which she may influence directly, albeit fractionally, by her contributions to public discourse. This interpretation, however, will not work for anyone believing in the existence of procedure-independent standards of rightness. If I believe there are such standards, then the possible attribute in a set of fundamental laws that would command my respect for them cannot be my retention of a shred of control or influence over what the laws say; it must rather be that I have reason to believe that the laws are right, which is not at all the same thing, unless I believe myself to be exceptionally immune to moral misjudgment.

Now complicate the situation. Suppose you believe that there are procedure-independent standards of rightness for fundamental laws in this country now. And suppose you think these standards involve commitments both to political self-determination through free public discourse and to respect for individual human dignity. You do not believe, however, that *anyone* judging in isolation—not yourself, not Justice Brennan—is a reliable authority as to exactly what these standards of rightness require of an interpreted set of fundamental laws in this country. In fact, you believe that the most reliable judge must be someone who is constantly exposed to the full blast of the sundry opinions on such questions, freely and uninhibitedly produced by assorted members of society out of their diverse experiences, positions, and reflections.

If you hold this set of beliefs, then the attributes in a set of fundamental laws that would command your respect would be as follows: First, it would have to appear to you that a maximum feasible effort is constantly being made to get the fundamental laws right. This, I have argued, includes getting their major interpretations right. Quite conceivably, this maximum feasible effort could (as Dworkin contends) include provision for a tribunal whose special business and concern it is to decide the interpretations. Second, this maximum feasible effort to get the fundamental laws right would have to include arrangements for exposing the empowered fundamental-law deciders to the full blast of sundry opinions and interest-articulations in society, including everyone's opinions and articulations of interests. Note that what now matters to you about having your own opinions and interest-articulations registered is not some bit of leverage you exercise over what gets decided, but rather the presumptive epistemic value of your contributions to the debate, a value which you will not self-respectingly suppose less than equal to that of others.

Suppose you hold this set of beliefs, including the belief that the preceding two conditions for the production of fundamental laws (and their interpretations) are currently satisfied. You, then, can abide by the fundamental laws (including major interpretations) willingly, out of respect for them. Are you not then freely governing yourself, at least so far as politics are concerned?

Justice Brennan may well have believed something along these lines. Without a doubt he believed that constitutionalism both presupposes procedure-independent standards of fundamental-legal rightness and requires that some non-consensual organ or organs act as social authorities for the determination of what those standards require when applied to concrete issues and disputes. Among such organs, he would have included, in due order of rank, Congress and state legislatures (or conventions) enacting constitutional amendments, conceivably an Article V constitutional convention, constitutional courts, and national and state legislatures enacting ordinary legislation. But Brennan evidently also believed that self-government exists only when people abide by the nonconsensual resolutions of such bodies out of respect for them, and that nothing can warrant the requisite respect short of the authorities' exposure, guaranteed by their own fundamental legislative and interpretative acts, to the full blast of sundry opinions in society.

In this way, Justice Brennan's judicial career reflected a commitment to self-government through democracy. It seems that every major aspect of Brennan's constitutional jurisprudence coheres with this set of commitments and beliefs.⁷³ There can be no doubt that Brennan saw his Court as invested with authority and responsibility to interpret for the country a procedure-independent standard of rightness, justice, and democracy for its political regime. But it is enormously to his credit that he saw the Court as thus empowered only as long as it exercised its power with a view to protecting and expanding the rights and opportunities of everyone to impress their views upon the Court and other social authorities, democratically.

In his 1985 "Defense of Dissents," Brennan denied that shows of disagreement among high court judges disrupt public acceptance of

73. See Michelman, *supra* note 22, at 1268-83. Indeed, one striking feature of the jurisprudence might be called emblematic of it. I mean Brennan's insistence, in his opinion for the Court in *NAACP v. Button*, 371 U.S. 415 (1963), and his dissenting opinion in *Walker v. Birmingham*, 388 U.S. 307, 346-49 (1967) (Brennan, J., dissenting), that the courts themselves are legitimate sites of politics and not just of politics but of political agitation. See Michelman, *supra* note 22, at 1269-74. I mean his remarkable and highly controversial proposal that a courtroom, even an appellate courtroom, is a site of passionate encounter between judge and litigant, or as he put it, between "one human being and another," and that judicial judgment is, accordingly, *human* judgment, informed by the judge's reach for a sympathetic grasp of the parties' experiences of the case. See William J. Brennan, Jr., *Reason, Passion, and 'The Progress of the Law,'* REC. ASS'N. B. CITY N.Y. 948, 966 (1987).

judicial interpretive authority. To the contrary, he said, Americans are able to know themselves as a free people precisely because and only insofar as their lawmakers, judges included, “not only allow, [they] encourage debate;” they “do not shut down communication as soon as a decision is reached.”⁷⁴ “As law-abiders,” Brennan said, Americans accept as binding the conclusions of their decision-making bodies, but only in the confidence that “our right to continue to challenge the wisdom of [any] result [is] accepted by those who disagree with us.”⁷⁵ This is why, for Brennan, the greatest dissents are the prophetic ones, “the ones . . . that seek to sow seeds for future harvest.”⁷⁶ As the Justice said late in his judicial career, “it is only as each generation brings to bear its experience and understanding, its passion and reason,” that there is “hope for progress in the law.”⁷⁷

If that be Brennanism, though, it still falls short of everyone’s self-government. To press your views upon ruling authorities is not yet to rule. To find the laws deserving of your respect is not yet to decide the laws. Maybe we need a bit of Churchillian irony here. Maybe, indeed, Brennanism is the worst form of democracy except all the others that have been tried from time to time. And all the others that have yet to be tried? Not finding that a welcome conclusion, I would rather end by saying that Justice Brennan provided us with a fair test. He gave us the best exhibition of his version of democracy that we and our posterity are ever likely to see.

74. Brennan, *supra* note 23, at 437.

75. *Id.*

76. *Id.* at 430-31.

77. Brennan, *supra* note 73, at 962; *see also* Michelman, *supra* note 22, at 1271-72.