

Rooted Cosmopolitanism

Bruce Ackerman

Have I been shrinking?

I was a citizen of the world. *Social Justice in the Liberal State* spoke to anybody who cared to listen.¹ It described the struggle for power haunting all earthlings. Not only Americans. Or even Westerners. But everybody.

I knew I would fail. Lots of people would reject my effort to tame power through dialogue as philosophically shallow, impossibly ethnocentric, pathetically antiseptic.

Still, I wasn't trying for exclusivity. My invitation to political dialogue recognized that others differed from me on fundamental questions. And yet, wasn't it possible for us to bracket these differences long enough to talk sensibly about the hard fact of scarcity—that the earth contains too few resources to satisfy our rival projects?

Whatever you think of my answer, I changed my question during the 1980s. I have been thinking through my identity as a citizen of the United States—a big place, no doubt, but lots smaller than the world, with a history that is a hiccup in world time. Nevertheless, *We the People* offered me a new dimension in self-understanding.² By locating myself on a different world-historical stage, I could forge a new set of dialogic bonds with the folks back home. As before, I had no inclination to deny the big differences that divided me from many other Americans. But perhaps the narratives and ideals expressed in our common constitutional history might allow a political dialogue more compelling than the thin bonds generated by the engaged efforts of Enlightenment cosmopolitans?

These newfound prospects of communication-community only came at a price—excommunication of billions who look upon America with indifference or contempt. Many foreigners might find it perfectly

1. Bruce Ackerman, *Social Justice in the Liberal State* (New Haven, Conn.: Yale University Press, 1980), hereafter referred to as *The Liberal State*.

2. Bruce Ackerman, *We the People*, vol. 1, *Foundations* (Cambridge, Mass.: Harvard University Press, Belknap Press, 1991).

meaningful to engage with me in the more universalistic dialogue sketched in *The Liberal State*. But they will predictably balk at my Constitution waving. Why blather on about American symbols and events if this will only alienate lots of reasonable folks? Is there not, as Don Herzog suggests, something irredeemably vulgar about my patriotic enterprise?

No less obvious, to me at least, is the cost of my American turn in terms of personal confusion: When push comes to shove, am I a citizen of the world or a citizen of the United States? Will the real Bruce Ackerman stand up? Is there a real Bruce Ackerman—or only a bunch of multiple, if partial, identities that don't add up over time?

FOUNDATIONALISM?

But let's not get too melodramatic. As multiple identities go, mine is a mild case. You can't engage the American Constitution without confronting the enduring significance of the liberal Enlightenment. Defining myself as both a private citizen of the United States and a liberal citizen of the world isn't as daunting, say, as trying to be an Orthodox Jew and a Roman Catholic at the same time.

Indeed, Miriam and Bill Galston, as well as Don Herzog, think I have been making life too hard for myself. They suggest that I have created too great a divide between the spirit of American constitutionalism and the spirit of universalistic liberalism.

For the Galstons especially, the Constitution is built upon a foundation of inalienable rights—whose content is to be elaborated through appropriate philosophical speculation. Only after this foundation has been secured does the Constitution give leeway to democratic judgment on less-than-foundational issues.

I am more skeptical. My understanding of the Constitution does not begin with inalienable rights; it starts with the effort by the American people to govern themselves. Fundamental rights have constitutional status only if they have their source in a deliberate and mobilized affirmation of principle by the American people. Our constitution is democratic first, rights-respecting second.

On the Galstons' view, this gets things backwards. Citing Lincoln, they view the Constitution as a "picture of silver" framing the "apples of gold" expressed by the inalienable rights proclaimed in the Declaration of Independence. They are puzzled by my reluctance to embrace foundationalist views. After all, *The Liberal State* was itself a foundationalist effort, confronting long-standing suspicions that liberalism was only capable of an instrumental conception of reason. To respond to these suspicions, I developed a model of dialogic rationality that promised a liberal political community sufficient resources to confront the question of political ends as well as instrumental means. To demonstrate the generative power of the model, I wrote lots of dialogues that

could, at least in principle, serve as rational responses to fundamental questions of social justice. My aim was to provoke others to enter into, and enrich, this unfolding liberal dialogue.

My timing turned out to be lousy. The year 1980 was not the best time to publish a ringing reassertion of the constitutive power of liberal reason. I soon found myself navigating a sea of postmodernist and communitarian and feminist writing that looked upon "liberal reason" as a transparent mystification—whose deconstruction served as an elementary warm-up exercise for the main show.

Well, it would have been nice to be trendy. But after reading more than my fair share of recent work, I haven't found it in me to repudiate the claims of liberal dialogue—or the fundamental rights that citizens bound by dialogue are obligated to recognize. Whenever any government denies its citizens these rights, it is doing something very wrong. It is not only oppressing particular individuals or groups. It is rejecting the very idea that power should be mediated through a political dialogue constrained by elementary principles of impartiality and equality.

If, then, I remain committed to the principles of *The Liberal State*, why not join the Galstons in praise of foundationalist constitutionalism? Especially when joining them promises to heal my anxieties about split personality? Especially when I can recruit Lincoln onto my constitutional team?

Because foundationalism blinds us to one large fact about American history: from the Founding to the present, our Constitution has coexisted peacefully with grievous injustice. There has never been a day in the history of the Republic in which all Americans have enjoyed adequate constitutional protection for their "inalienable" rights.

The Galstons cannot bring themselves to mention slavery. But once it is brought into the picture, how can one say that the original Constitution incorporates the Declaration?³

This is, I suppose, why they rely more heavily on Lincoln than Madison. And surely they are right in emphasizing that the Civil War Republicans revolutionized our constitutional values. But how much of a revolution?

Lincoln was dead before the Republicans managed to propose the Fourteenth Amendment.⁴ His views must be integrated into a

3. Robert Cover perceptively describes the predicament of American judges before the Civil War as they confronted the fact that, despite the Declaration's promise, the original Constitution did not free the slaves (see *Justice Accused* [New Haven, Conn.: Yale University Press, 1975]).

4. Lincoln's views, moreover, were far more complex, and less foundationalist, than the Galstons suppose. See David Greenstone, *The Lincoln Persuasion* (Princeton, N.J.: Princeton University Press, 1993), chap. 1.

much more complex legal mosaic. Consider these remarks by Thaddeus Stevens on the day the House of Representatives proposed the amendment to the nation:

In my youth, in my manhood, in my old age, I had fondly dreamed that when any fortunate chance should have broken up for a while the foundation of our institutions, and released us from obligations the most tyrannical that ever men imposed in the name of freedom, that the intelligent, pure and just men of this Republic, true to their professions and their consciences, would have so remodelled all our institutions as to have freed them from every vestige of human oppression, of inequality of rights, of the recognized degradation of the poor, and the superior caste of the rich. In short, that no distinction would be tolerated in this purified Republic but what arose from merit and conduct. This bright dream has vanished "like the baseless fabric of a vision." I find that we shall be obliged to be content with patching up the worst portions of the ancient edifice, and leaving it, in many of its parts, to be swept through by the tempests, the frosts, and the storms of despotism.⁵

These words haunt my daily drive to work, speeding through the slums surrounding Yale in New Haven. What to say to the black kids who are condemned to "schools" in which the liberal spirit has been replaced by police patrols in the corridors and teacher despair in the classrooms? What to say to their parents, who have recently witnessed an increase in the great inequalities of wealth and power that already existed in America?

Not to worry, so long as I follow the Galstons' foundationalist path. If I could only grasp the golden apple, I could stay faithful to *The Liberal State* without calling into question my relationship to the Constitution. If the Constitution is merely a silver frame for the golden truths of the Declaration, why not assert that existing conditions violate the Constitution in depriving black ghetto kids of their inalienable rights to "life, liberty, and the pursuit of happiness?"⁶ Granted that President Clinton, let alone Chief Justice Rehnquist, does not seem to have noticed the exigent character of the legal obligations imposed by the silver frame. But at least right-thinking jurists can continue to lecture them on their constitutional obligations?

This is, I take it, the role that Ronald Dworkin has played to the hilt during the last grim decades. His mythical judge, Hercules, is forever glimpsing the golden apple within the silver frame—so long,

5. Thaddeus Stevens's remarks are reprinted in Michael Les Benedict, *A Compromise of Principle* (New York: Norton, 1974), pp. 186–87. This book still provides the best account of the political background of the Fourteenth Amendment.

6. See my analysis of exploitation in *The Liberal State*, chap. 8.

of course, as we remember to put the picture in its "best light."⁷ Surely there is something heroic in this effort to establish Law's Empire, if only on the pages of the *New York Review of Books*?

SYNTHETIC INTERPRETATION

Heroic in its self-delusion. The gap between American law and liberal justice is too large to be obscured by judicial demigods. Hercules not only mocks us by his absence from the federal bench. He stands as a placeholder for a misconceived theory of constitutional interpretation. Real-world judges should not aim to put the Constitution in its "best light," provided inevitably by their own philosophical convictions. They should be aiming for the most revealing light—the light that displays the strengths but also the weaknesses of the historical achievement of the American people.

The modern Constitution does not express a timeless philosophy of right revealed in the Declaration of Independence or some Herculean labor of philosophical reflection. It is the product of ongoing political struggle—generation after generation mobilizing itself to critique and reconstruct large chunks of the received constitutional understanding. The guiding image should be Neurath's Boat, not Kant's *Critique*. In the aftermath of Civil War, Americans ripped gaping holes in the traditional structure, replacing them with new planks that didn't fit the old design. The question was whether the ship would keep sailing during such a shattering reconstruction, not whether its overall design would survive a philosophy seminar; so too during the Great Depression. Other generations did not attempt such great transformations. Nonetheless, a series of citizen movements have gained popular support for very significant constitutional revisions from the age of Andrew Jackson through the time of Martin Luther King.

This means that the master question of constitutional interpretation is intergenerational synthesis. Each of the popular movements that has won constitutional authority to speak for the People differed from its predecessors in philosophical aspirations as well as concrete achievements. The interpretive challenge is to hear all these discordant voices with sympathetic understanding as we elaborate the legacy of higher law they have left to us. Formally, this challenge looks similar to the one posed by biblical hermeneutics—the ancient Hebrews of the Old Testament spoke with different voices, which differed in turn from those expressed by the romanized Christians of the New Testament, which differed again from the formative Arabic texts of Islam. Here too the interpretive task demands intergenerational synthesis.

7. Dworkin prefers the Fourteenth Amendment's equal protection clause to the Declaration's assertion of inalienable rights. Given his ahistorical approach to the clause, however, his position is not significantly different from that of the Galstons.

There is one big difference. Americans do not believe that the discordant voices expressed in the constitutional tradition ultimately reveal the will of God. Nonetheless, a pragmatic imperative generates a similar need to reconcile these American voices. Since the ideas and achievements of each great lawmaking period are in tension with one another, they provide an enduring source of propulsion for constitutional litigation. Plaintiffs may win, for example, if they can persuade a court to pay greater attention to the voices dominant during Reconstruction, while defendants may win if the courts take the Founding more seriously; in other lawsuits, the tensions generated by principles introduced in the New Deal or the Civil Rights period will take the center of the juridical stage.

The resulting constitutional culture has a distinctive structure. Each lawmaking period from the Founding to the civil rights era contributes leading ideas to the mix of legal argument. In a common law culture, these ideas are concretized in leading cases—each of which serves as a relatively fixed point in the legal conversation. Since different leading cases express different ideational mixes drawn from different periods of constitutional politics, they set up a cultural force field that different litigants seek to manipulate for their own purposes. Everybody agrees that *Brown* is good law, for example, but they disagree about what it means and how it should be reconciled with a host of other cases and principles that synthesize different meanings drawn from different decisive moments of constitutional lawmaking. Over time, even leading cases can take on very different meanings and exert different gravitational pulls over contested areas in which no leading case has decisive authority.

This process of legal development differs from the Dworkinian one presupposed by the Galstons in three ways. It takes its leading ideas from an encounter with historical sources, not philosophical texts. It is a collective creation of real conversations between real interpreters, not an imaginary creation of an isolated Hercules. It does not express the timeless and comprehensive wisdom of some Enlightenment God but is, instead, an exercise in enlightened casuistry. Interpreters are stuck with the historical materials left in the wake of successful episodes of higher lawmaking. They have no right to superimpose a philosophical grid upon them and choose to listen only to those spokesmen for the people whose utterances are compatible with their philosophical preconceptions.

There are better and worse ways of carrying out this distinctive enterprise. The first, and most important, criterion demands charity in interpretation: Have the judges (and the rest of us) made a considered effort to listen to the authoritative voices of the past? Or have they merely imposed presentist moralisms on silent texts? Second, one should aspire toward maturity in the act of synthesis: a sober recognition of the reality

of discordance between the different eras of constitutional creation and a genuine effort to retain the deepest values of each jurisgenerative period, if this is at all plausible. A third criterion does not address each individual's performance but assesses the dialogic responsiveness of the interpretive community as a whole: Are the participants listening to one another, or talking/shouting past one another?

These questions lead me to reject one of Kent Greenawalt's provocative suggestions. He urges us, persuasively, to distinguish between the different groups engaged in constitutional interpretation—ranging from ordinary citizens to Supreme Court justices—and suggests that my own interpretive claims should have a selective appeal. He argues that ordinary citizens may well find that *We the People* provides a persuasive account of American constitutional development but that judges should be very hesitant to adopt it, especially when writing opinions.

His problem concerns my view of constitutional amendment. I claim that both Reconstruction Republicans and New Deal Democrats played fast and loose with the rules of constitutional revision laid down in Article 5 of the original text. Though they broke loose of formalist moorings, the result was not chaos, but the creation of a new institutional system of higher lawmaking, expressing the more nationalistic self-understandings that emerged from the decisive experiences of Civil War and Great Depression. This new nation-centered system for constitutional revision assigns higher lawmaking roles to the president, Congress, the Court, and voters. It enabled both Reconstruction Republicans and New Deal Democrats to win constitutional authority for decisive constitutional transformations despite their end-run around the 1787 text.

Greenawalt responds cautiously to this revisionist account: Does it really give deeper constitutional sense to Reconstruction and New Deal? I agree that caution is in order, since the right decision sets the stage for a strong revision of our understanding of existing case law. As a consequence, I will be devoting the next volume in the series to an analysis of the massive, and largely unknown, evidence surrounding the efforts by nineteenth-century Republicans and twentieth-century Democrats to revise the higher lawmaking system. So let's suspend disbelief on the ultimate validity of my revisionist history until my sequel is published, and consider only Greenawalt's provocative suggestion that, even if my legal arguments turned out to be compelling, they should not be acknowledged publicly by the Supreme Court.

Greenawalt's proposal would have a devastating impact upon the interpretive community. Although the larger community (on Greenawalt's own premises) would conduct its conversation along the lines sketched out in *We the People*, the Court would continue its own conversation on radically different lines. The resulting disruption could not fail to undermine the quality of intergenerational synthesis—when

judged in terms of interpretive charity, synthetic maturity, and especially, dialogic responsiveness. Time and again, the Court would refuse to listen to basic interpretive questions generated by the constitutional narrative embraced by the larger community, and vice versa. Isolating the Court from the community is an especially serious business in a world where judges do not and should not pretend to work in Herculean isolation. Even under optimal conditions, it will be hard to piece together the disparate constitutional meanings forged by spokesmen for the American people over the centuries. Why, then, should judges cut themselves off from the only available source of enlightenment—the conscientious efforts of other Americans to take intergenerational synthesis seriously?

Especially when the existing judicial narrative is seriously defective. Within this familiar story line, the Supreme Court's defense of private property during the early twentieth century was a historical aberration, based on little more than the judicial will to power. In building up a structure of laissez-faire constitutionalism, the justices of the *Lochner* era strayed from ancient truths elaborated by the Marshall Court. Once this point is recognized, Franklin Roosevelt enters the story as an avenging angel of legal tradition—forcing the justices to return to an older and sounder version of the Constitution. It is almost as if John Marshall would have voted for Franklin Roosevelt if only he had a chance!

Jennifer Nedelsky joins me in rejecting this “myth of rediscovery.” Her penetrating work on the early Constitution convinces her that the values of private property and free contract run deep in the American tradition and that the New Deal's success in mobilizing popular support for the welfare state was nothing less than a constitutional revolution.⁸ This means that a sweeping effort at intergenerational synthesis is required to make sense of the post–New Deal Constitution. *Lochnerian* principles of property and contract did much more than create a sphere of protected freedom for market relationships. They provided a framework for broader commitments to personal liberty and equal protection of the laws inherited from the Founding and Reconstruction. Once the New Deal Court had repudiated *Lochner*, it had its interpretive work cut out for it: How to understand the Founding Bill of Rights and the Reconstruction amendments without returning to ideas of property and contract that were self-consciously repudiated by the American people during the New Deal?

This is one of the great questions of modern constitutionalism, and Nedelsky is critical of the Court's effort to answer it. On her strong

8. Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism: The Madisonian Framework and Its Legacy* (Chicago: University of Chicago Press, 1990).

reading of the New Deal Revolution, the Court should not leave it up to a Congressional majority to decide *whether* it will regulate one or another area of social life. It should declare that the government is *always* regulating—either by passing statutes or by authorizing judges to control an area through the common law. Hayekian notions of “spontaneous order” should be rejected wherever they arise in constitutional law. Any form of accommodation represents an unprincipled importation of laissez-faire ideas repudiated by the New Deal. As a matter of constitutional principle, the very notion of state inaction is incoherent: “The presence or absence of the state cannot be the grounds on which we decide what deserves protection.”⁹

For better or worse, my response expresses the split personality that stalks this article. In writing *The Liberal State*, I not only accepted Nedelsky’s principle but made it into an organizing theme of my work. I sought to “denaturalize” all claims to power—whether these were based on the “natural” operation of the marketplace or the “natural” authority of the family. Rather than bowing down before such claims, liberals should expose them as mystifying efforts by those in power to escape legitimate critique. There is nothing natural unless humans make it so.

I am therefore entirely sympathetic with the philosophical point behind Nedelsky’s critique of modern American law. Consider, for example, her treatment of Justice Douglas’s opinion in the landmark “privacy” case of *Griswold v. Connecticut*.¹⁰ She is right to suggest that Douglas treats heterosexual marriage as if it were a spontaneous and natural development unrelated to the exercise of coercive state power. She is therefore also right to suggest that *Griswold* and *Lochner* are philosophical twins, differing only in the particular power structures they seek to mystify. *Lochner* ignored the role of state power in organizing the market; *Griswold* makes the same mistake in dealing with the family. Both mistakes should be condemned—so I argued in *The Liberal State*, so I believe today.

But we are not talking philosophy right now. We are talking about the extent to which Americans have managed to transform the truth into their Constitution. Although Nedelsky’s truth is very different from that of the Galstons, both have a hard time facing some hard facts. The United States is an exception among civilized nations in its limited endorsement of the welfare state. I am not proud of this fact. But it is a fact. While the New Deal was a crucial constitutional breakthrough, it did not go nearly far enough in recognizing the pervasive

9. See Jennifer Nedelsky, “The Puzzle and Demands of Modern Constitutionalism,” in this issue, p. 509. For further elaboration of this view, see Cass Sunstein, *The Partial Constitution* (Cambridge, Mass.: Harvard University Press, 1993).

10. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

capacity of the state to shape and reshape the foundations of social life. The modern Court's restrictive understanding of the limits of "state action" expresses this larger fact about American constitutional politics.

I do not endorse every twist and turn of the modern Court's case law on this complex subject. But Nedelsky is too quick to condemn the very effort by the Court to limit the scope of governmental responsibility for social outcomes. Given the limited historical achievements of the American people, it would have been more arbitrary if the modern Court had "interpreted" the Constitution as if it endorsed the philosophical views that she and I hold in common.

It follows that the modern Supreme Court will continue to build its law of state responsibility on sand. Thanks to the New Deal, it will be closer to the truth when it comes to economic regulation; but in other areas of life, it will continue to mystify itself and fail to perceive the manifold ways in which the coercive power of the state lies behind all forms of "natural" authority.¹¹

I meant to emphasize this disheartening possibility earlier when I described judicial interpretation as an exercise in enlightened casuistry. The casuist is not a philosopher precisely because he refuses the latter's invitation to question his authoritative sources even when they generate paradoxes and contradictions. While the philosopher hopes to use these dialectical tensions as a springboard for the further pursuit of truth, the casuist refuses to abandon his authorities. He merely seeks to accommodate their inconsistencies as thoughtfully as he can. Where the philosopher sees hopeless muddle, the casuist sees a necessary complexity. Where the philosopher sees the Court blinding itself to the state's complicity in grievous injustice, the casuist wonders whether the truth can be as simple as the philosophers make it seem.

I do not suggest that America is fated forever to endure the philosophical contradictions it has inherited from the New Deal. But if Nedelsky and I wish to win our antinaturalist argument in constitutional law, we will have to do more than publish in philosophy journals. Our ideas must ultimately influence the next successful movement in American constitutional politics. It is an elitist illusion to suppose that such a fundamental shift in American public philosophy either could or should be resolved through the guise of judicial interpretation rather than through a renewed popular effort at higher lawmaking.

JUDICIAL SELECTION

Paradoxically, Nedelsky's elitist illusions about courts makes her sometimes sound like a populist: Why not, she asks provocatively, follow the

11. See Cass Sunstein, "Lochner's Legacy," *Columbia Law Review* 87 (1987): 873-919.

proposals of Canadian progressives and reserve one-third of Supreme Court seats to "representatives of disadvantaged groups"?¹² As the nomination of Clarence Thomas suggests, this formula begs a big question: How to decide who represents whom? As the next section explains, the dualist resists the claim of normal politicians to use their last electoral "mandate" to speak as higher lawmaking representatives of the People. Only under very special conditions should the president or the Senate be allowed to use judicial appointments for the avowed purpose of jolting constitutional law into radically new directions.¹³

Putting this (fundamental) point to one side, Nedelsky's proposal suggests another key difference in our approaches to judicial review. Like many other commentators, Nedelsky is a moderate legal realist. She does not deny that principles of constitutional interpretation do and should constrain the Court. But she is more impressed by the reality of discretionary choice. This leads her to fear that the Court will use its discretion for evil purposes and motivates her desire to reserve a certain number of seats for "progressives."

I have a different fear. I believe that American government is losing its historical roots in the practice of popular sovereignty—government by the People, and not merely the mix of politicians and bureaucrats who manage to put together a winning coalition at the last election. While there is no lasting cure for this dis-ease without greater citizen engagement in political life, at least the Supreme Court can bring the power of historical memory into play: There *were* times in the past when citizens hammered out fundamental principles of government, and these times cannot/should not be forgotten simply when they inconvenience present power holders.

This means that the principal qualification of justices should not be the color of their skin nor the "progressiveness" of their politics. While diversity in social background is a good thing, it cannot substitute for depth of legal understanding—a willingness to hear the voices of the past, a sensitivity to the distinctive principles emerging from the disparate historical achievements of the American people, a prudential recognition of the limits of law. The requisite cast of mind is more reflective than the normal politician's, more worldly than the typical philosopher's. It is, however, a recognizable type among lawyers.

What the Court needs, more than anything else, are great men and women of the law, calling government back to its constitutional roots. Nedelsky's quota politics is more a symptom than a cure for the disease.

12. Nedelsky, "The Puzzle and Demands of Modern Constitutionalism," p. 512.

13. See my "Transformative Appointments," *Harvard Law Review* 101 (1988): 1164–84.

INTERTEMPORAL DIFFICULTIES

This is the point at which Don Herzog's pointed questions engage Jennifer Nedelsky's progressive agenda: "Granted for the moment that the New Deal was a successful constitutional moment—and the last one. Then it is one thing to defend the democratic legitimacy of judicial review in 1937, another in 1947, and so on. How many living citizens took part in the New Deal? Can we tell today's citizens that we respect their democratic action by overturning the acts of their elected representatives in the name of what 'they' did decades ago? (What I did before I was born, eh?)"¹⁴ Ignore Herzog's slip: I think the civil rights movement, not the New Deal, represents the last successful example of constitutional politics.¹⁵ His basic point still stands: "Doesn't the earth belong to the living?"

Absolutely. But the paragraph moves too quickly to the conclusion marked by Herzog's emphatic parenthesis. Even though the "earth belongs to the living," each generation begins with a historically given baseline. The question is, How is this baseline to be defined?

One answer: by the invisible hand. Whatever has managed to survive from the past can rightfully serve as the baseline for the present. Another answer: Courts should be authorized to test the dead hand of history against their understanding of the past decisions of the American people. It is quite true that the citizens who hammered out these decisions are dead, but it is better to construct the juridical baseline by interpreting the meaning of their self-conscious and mobilized actions than by bowing before the invisible hand.

So much for step 1 of my argument. Step 2 proceeds to the explicit objection presented in Herzog's paragraph: some (but not all) of the time, judicial review involves the invalidation of statutes passed by Congresses that have met within living memory. At least in these cases, hasn't Herzog identified an insuperable democratic difficulty?

Only if you indulge the constitutional presumption that Congress unproblematically represents the considered judgments of a majority of today's Americans. I deny, however, that the American Constitution indulges such an unrealistic view. The most fundamental problem: today's Americans do not have considered judgments on many important matters. And it is hard for Congress to "represent" judgments that citizens do not have. Second: even when lots of citizens do take the time and effort needed for considered judgments, there are lots of problems involved in aggregating these judgments into a social decision, ranging from theoretical difficulties like Arrow's Theorem

14. Don Herzog, "Democratic Credentials," in this issue, p. 473.

15. See *We the People*, pp. 108–11, 136–38.

to more practical ones involving the nonideological organization of American political parties.

In pointing to this formidable array, I do not deny the legitimacy of decisions reached by Congress during normal politics. The Churchillian answer retains its force: modern democracy seems a shoddy affair except when it is compared with the alternatives. The democratic balance has to be recalibrated, however, when a congressional enactment offends the considered judgments enacted into higher law by previous generations of Americans. Herzog begs the question in remarking that present-day citizens haven't consented to the constitutional solutions of the distant past. It is no less true that a majority haven't given their *considered* consent to the political solutions that are daily pronounced in their name from the corridors of power in Washington, D.C.

The question is not whether the dead shall stifle the living will of the American people. It is how the living should go about forming their political will. By invalidating a suspect congressional statute, the Court is putting ordinary citizens on notice that something special is happening in Washington, D.C. Elected representatives are not merely trying to govern within the framework of principle that is the legacy of earlier political mobilizations. They are claiming the authority to shape new fundamental principles in the name of the People. Before gaining a mandate for this kind of change, shouldn't the politicians do more than win a single election?¹⁶

The dualist Constitution offers a more dialogic alternative to the overly decisionistic system implicitly endorsed by Herzog. Instead of cheap and easy talk of a "mandate from the people," presidents and representatives must earn the constitutional authority to speak in a higher lawmaking voice—by engaging in specially arduous processes of public persuasion and citizen mobilization that require repeated returns to the electorate for popular support for a change in fundamental principle.

If the dualistic system is operating well, the ongoing judicial effort at intergenerational synthesis enhances the quality of the effort by today's Americans to express their constitutional will. By re-presenting the constitutional meanings of the past, and giving them modern significance in concrete cases, the courts hold up a mirror to the present generation: Do the men and women of today like what they see? If not, which features of the prevailing legal re-presentation are no longer acceptable, which seem to be of enduring significance? After looking at themselves in the mirror, are Americans prepared to engage in the arduous task of hammering out new constitutional meanings?

16. For more on this point, see *We the People*, chaps. 9 and 10.

When the People respond by mobilizing themselves for action, the result may well be surprising, even dismaying. There is no guarantee that the new constitutional solutions will satisfy philosophical convictions better than the old. You or I may well find ourselves in the minority, and look with despair as American constitutionalism spins off in the wrong direction.

But I don't think I'm kidding myself in thinking that the backward-looking exercise of the legal community can contribute positively to the democratic process even when the People respond to the Court by destroying large chunks of the received understanding. By focusing attention on a reflective understanding of the past, the Court encourages a more reflective stance from present-day constitutional movements. If they hope to succeed in mobilizing citizenship support, they will be obliged to explain what's wrong in a focused way: Is it merely a particular constitutional decision? Or is there a deeper pathology at work? If so, what is it?

Granted, this focus on constitutional principle may make it harder for today's politicians to carry off sweeping transformations in the structure and ideals of American government. But this difficulty represents the deeper problems involved in collecting a considered democratic judgment from a quarter of a billion people living out a bewildering diversity of lives in a pluralistic social world.

CONSIDERED JUDGMENT

There are two ways of questioning my emphasis on considered collective judgment. The first line attacks the idea as hopelessly naive. Modern democracy has nothing to do with genuine rule by the people. True, we insist that rulers expose themselves to the hazards of regular elections. But this is not because the people can ever use the tools of democratic politics to express affirmatively their considered judgments. The demand for free and fair elections is grounded in a much more modest, if no less fundamental, objective: assuring the circulation of governing elites.

While powerful ins may beat power-lusting outs once or twice or thrice, the democratic electorate will eventually turn against its masters—and put another set in their place. Although the new rulers may have squeaked into office by virtue of the freshness of their smiles or the vagueness of their promises, they have nonetheless disrupted the authoritarian tendencies of all groups that stay in power too long. This point may seem trivial to romantics who long for the People to reveal themselves in all their glory, but it is fundamental for liberal realists who appreciate the facts of life in modern government. Regular elections ameliorate the worst pathologies of elite rule: that is all we know and all we need to know.

This skeptical theme has been played out in many modern variations during the half-century that divides Schumpeter from Riker.¹⁷ While I am sure that many readers hold similar views, they are not represented in this symposium. The critique emerging here is overly lofty rather than dismissively cynical. For the Galstons, it is not enough for the Constitution to encourage sustained and mobilized deliberation; the People must reach the right answers (at least on the really important questions). There "is no obvious way of giving normative priority to considered judgments without acknowledging the autonomous force of reason as well as popular will."¹⁸

I agree, but there are two different ways of "acknowledging" the rationality prized by the Galstons. The power of reason is most obviously in evidence when somebody actually convinces us to change our mind. When this doesn't happen, there is still a big difference between people who have listened to one another and those who haven't even made the effort. In the first case, the very effort at communication establishes a sense of rational community between us. Even as we disagree, our dialogic exercise presupposes a mutual recognition of one another as fellow strugglers in the search for political meaning, as members of a community seeking to reach a common understanding of the appropriate terms for our coexistence. In the second case, we treat one another as incomprehensible and alien beings, whose political coexistence is consigned to the arena of force, fraud, and the sheer exercise of will.

Now this sense of rational-community-in-difference is most vivid in the case of face-to-face communication. In everyday life, there are countless telltale signs indicating whether we are talking to one another or at one another: Are you responding to my claims with questions and comments that indicate an understanding of my own point of view? When you speak, do I pay attention or does my spirit wander? Even in face-to-face relationships, the impact of particular conversations cannot be assessed immediately. I have often stubbornly resisted somebody's insights, only later to find myself repeating them in another conversation with somebody else. Sometimes, to my great surprise and delight, I hear others say things that mark the unacknowledged sediments of my previous dialogues with them. The power of reason works itself out in complex ways, always heavily laden with egocentric preening and unacknowledged passion—but visible to those who care to look.

17. Compare Joseph Schumpeter, *Capitalism, Socialism and Democracy* (New York: Harper, 1942), with William Riker *Liberalism against Populism* (San Francisco: Freeman, 1982).

18. Miriam Galston and William Galston, "Reason, Consent, and the U.S. Constitution," in this issue, p. 449.

Organizing a political conversation among hundreds of millions of Americans is infinitely more complex—and more precarious—than sustaining the small-scale rationalities of daily life. The manipulative aspect of speech is inevitably more pronounced when we talk to one another over great distances. The great crises that often serve to mobilize masses of private citizens into serious civic engagement bring out the worst, as well as the best, in all of us. Swept up by the passions of the moment, we may reject the very idea of a collective conversation aimed to elaborate the “permanent interests of the community and the rights of all citizens.”¹⁹ It is so easy to take up the factional perspective described by Madison in *Federalist* 10 and view state power as a tool for repressing hostile points of view and implementing our narrow self-interest and particularistic ideals.

Given this fact, the Galstons’ enthusiastic insistence on right answers can degenerate into a kind of rationalistic fundamentalism. Rather than listening to others’ objections, and talking to them in a language *they* understand, it is tempting to stop the conversation with talk of “self-evident truths”—Tom Jefferson’s or somebody else’s. But the truth is that nothing is self-evident. Every truth is sustained by a web of conversation that links it to other truths. And it is more important to sustain the conversation itself than any particular truth.

THE DUALIST PATH TO INALIENABLE RIGHTS

But doesn’t this emphasis on dialogue and deliberation suggest a final way to entrench fundamental rights—even against the decision by the People to do away with them? What if the People decided to deprive some or all citizens of strategic resources they require for future participation in the ongoing conversation? Wouldn’t the Supreme Court, operating within the premises of dualist theory, be within its rights to invalidate constitutional amendments that stripped away these fundamental dialogic rights—even if the majority decided to strip away these rights after “due deliberation”?

This line of argument leads both Don Herzog and the Galstons to suggest that dualist theory is not unalterably opposed to the protection of (a narrow set of) inalienable rights. I agree, and said as much in an agonized footnote.²⁰ At the same time, it is also perfectly possible for the committed dualist to refuse to travel down this last path to inalienable rights. On this view, if the people wish to commit suicide by stripping its members of their participatory rights, popular sover-

19. Even though this precise formulation does not appear in *Federalist* 10, I use quotation marks to acknowledge its Madisonian inspiration. See Jacob Cooke, ed., *The Federalist* (Middletown, Conn.: Wesleyan University Press, 1961), pp. 56–65.

20. *We the People*, pp. 15–16 n.

eignty has already died and elites would make matters even worse by pretending they could breathe life back into the corpse.

Let me make one thing clear: if it were up to me, I would reject this second view and write a dualist Constitution that expressly embraced my commentators' suggestions. This is not, however, the task I took upon myself in *We the People*. Rather than writing a new Constitution, I was trying to read an old one—as it has developed over two centuries of practice. And this effort tends to support the second reading.

Consider, for example, the recent flap over flag burning. From a constitutional point of view, this was George Bush's darkest hour. It didn't take a rocket scientist to recognize that criminalizing flag burning goes to the very core of the deliberative process protected by the First Amendment. After all, we aren't dealing with arguably peripheral matters—obscenity, commercial advertisements, and the like. The Bush administration was aiming to throw dissenters in jail for their political expression—for conduct which endangered no interest other than the symbolic. Even the present Supreme Court struck Bush's statute down, if only by a vote of five to four. But the visionary in the White House was not to be denied: he demanded a constitutional amendment to save Old Glory from desecration.

On my commentators' line of thought, Bush was doing something more at this point than playing demagogue. He was proposing a constitutional impossibility. But the fact is that Americans did not suppose that Bush was engaged in a harmless gesture. They recognized that he was launching a profoundly dangerous initiative.

Happily, the House of Representatives rejected Bush's amendment. But suppose it had been otherwise, and the Flag Burning Amendment were now ratified by the states? Do Herzog or the Galstons really believe that the Court, or the rest of us, would have considered the constitutional amendment unconstitutional?

If so, they are in a very distinct minority.²¹ Much more than flag burning is at stake. Bush's success in amending the First Amendment would have served as a precedent for more, and more sweeping, amendments to the Bill of Rights. This suggests that our present Constitution authorizes the People to commit suicide without the Supreme Court taking heroic steps at artificial respiration on the corpse.

But surely we should not allow the tragicomic misadventures of George Bush to weigh too heavily on our minds? Unfortunately, how-

21. The Yale Law School being what it is, a student of mine responded to my confident analysis of the flag-burning episode by blasting it in print. See Jeff Rosen, "Was the Flag Burning Amendment Unconstitutional?" *Yale Law Journal* 100 (1990): 1073–92, though the author recognizes that he is defending a view that others would find "bizarre" (see p. 1073).

ever, there are other historical precedents that point in the same direction.²² I do not wish to exaggerate the state of the law. If I were of a Herculean disposition, I might brush these precedents aside with a few clever distinctions and proceed to put the Constitution “in its best light”—proclaiming that it does indeed contain the restrictions on amendability that Herzog, the Galstons, and I would like to put there.

But this is a game I refuse to play. Once again, it seems far more revealing to remark upon the limits of the American achievement than to celebrate its perfection: while the American Constitution ought to entrench some participatory rights against abridgment by the People, it is not at all clear that it does so. This is a very bad thing, but it doesn't make it better by pretending it isn't so.

I would go further. The Constitution is not only defective in failing to protect a narrow set of participatory rights against subsequent revocation by the People. We should follow the lead of the modern German Constitution. This document makes it unconstitutional for the *Volk* to strip individuals of a much broader set of rights—ranging from the protection of personal privacy to the guarantee of a minimum income.²³

The Germans entrenched these wide-ranging protections in response to their Nazi nightmare. This experience led them to reject the basic premise of dualist theory—that, in the final analysis, one should trust in the higher lawmaking power of the People. Instead, modern German law adopts the kind of liberal foundationalism endorsed by the Galstons and elaborated by much modern liberal political philosophy.

Americans won the fight against the Nazis, but they have not taken the constitutional lessons of the Second World War to heart. We should self-consciously amend our constitution along German lines and make it clear that democracy is not our ultimate constitutional value, that human dignity and social justice come first. It should not require the horror of a holocaust before Americans recognize that dualist democracy is *not* the best form of government available for modern society.

ROOTED COSMOPOLITANISM?

But it is a pretty good one. Moreover, dualist constitutionalism does have one priceless advantage: it allows Americans to talk to one another in a language they already understand. Granted, the things we say to one another in this language do not measure up to justice—not

22. See, e.g., the Supreme Court's decision in *Coleman v. Miller*, 307 U.S. 433 (1939). I discuss the case, though not its precise implications for the problem at hand, in my “Constitutional Politics/Constitutional Law,” *Yale Law Journal* 99 (1989): 492–97.

23. See the Basic Law of the Federal Republic of Germany, articles 1, 2, 20.

by a long shot. But doesn't the language allow for a great deal of moral growth?

We must resist the temptation, strongly in evidence in this symposium, to answer this question with an easy yes. The last decade's communitarian turn has led particularists to imagine that their own community is miraculously endowed with imminent structures that are fundamentally sound. Otherwise, their disdain for more universalistic criteria of assessment might be nothing more than a fashionable cover for old-fashioned moral obtuseness.

Or worse. If, as the trendy cant assures us, our very identities as persons are constituted by the local practices in which we find ourselves, the particular evils rooted in our particular communities are irretrievably rooted in our very souls as well. With the stakes as high as this, little wonder that there is a drive to put local mores in their very best light?

But the fact is that political and social life is pretty crummy everywhere—ranging from not-so-bad to horrific. Of course, it is terribly important to distinguish shades of gray from pitch black. And it is obvious enough that the American Constitution belongs on the gray scale of the spectrum. But that hardly implies that this local practice is capable of enough growth to justify a sharp spiritual turn away from the rest of humanity.

Wouldn't it be exhilarating, especially amid this flood tide of parochialism, to reaffirm the relevance of rootless cosmopolitanism? Here I stand and say to you that we *can* construct a better political life if we did not rely so heavily on building materials out of the flotsam and jetsam of history—even those that have floated down to us from the headwaters of the Enlightenment.

Not that we can ever liberate ourselves from the past. But we should not imagine that history holds the answer to the challenges of the twenty-first century. The times call for something bolder than a cautious incrementalism. We will have to be a lot more creative and take lots of risks if liberalism is to survive and prosper. Isn't this a time for liberal *revolution*?²⁴

If I were European right now,²⁵ I hope I would have the guts to stand up for rootless cosmopolitanism: forget this nationalist claptrap, and let us build a world worthy of free and equal human beings. Surely we can find materials in our own traditions in which this aspiration can be cogently expressed? If not, so much the worse for our traditions

24. See my *The Future of Liberal Revolution* (New Haven, Conn.: Yale University Press, 1992).

25. Since I spent a year in Europe recently, I limit myself to an area I know something about. But I would like to think that the appeal of liberal values is far, far broader than the range of my own experience.

of repression. We cannot allow them to provide the script for a repetition of the crazy nationalistic mistakes of the past.

But as an American, I will be more cautious. For all its serious inadequacies, the existing Constitution does permit, though it does not require, Americans to mobilize themselves to express fundamental liberal truths—truths that might allow them to penetrate the parochial barriers that divide them from one another and the rest of the world. Granted, my participation in this project may turn out to be a grievous disappointment. But all things considered, it would be foolish to repudiate America's experiment in dualist democracy and rebel in the hope of achieving something better—when we could do a lot worse.

This commitment is distinctly provisional. It is perfectly possible that America may move in the wrong direction. At some point, I would prefer to save my soul and issue a declaration of personal independence—calling on others to begin a new and better political dialogue without giving the established constitutional tradition the benefit of the doubt.²⁶

This is the philosophical stance I took in *The Liberal State*, and it remains my ultimate political resource. When push comes to shove, I remain an unrepentant cosmopolitan. But there are risks lurking in this existential stance—a clear and present danger of pretentiousness, preciosity, and solipsism, as I find that others refuse to engage on the terms that ego finds so reasonable. For the foreseeable future, I propose to throw myself into the effort to talk to my fellow Americans in the constitutional language they already understand, rather than seeking to rebuild our political language and practice from its very foundations.

I stand before you, then, as a rooted cosmopolitan. While I embrace the American Constitution, I refuse to transform it into an idol of Enlightenment. I do not imagine that I will hear the music of the spheres if only I penetrate its deepest recesses. If American government will ever realize the ideals of liberal democracy, its citizens must do more than project their highest hopes upon the Founders of the Republic and imagine that these old timers have done their own work for them.

We must move beyond constitutional interpretation to constitutional politics.

26. Not, mind you, that I was engaged in something like a transcendental deduction when writing *The Liberal State*. Though I often find my name on the standard list of "neo-Kantians," may I urge the commentators to glance again at the final part of the book? If I had to drop a heavy Teutonic name, I would say these chapters looked more neo-Hegelian than neo-anything—though what is left of Hegel without the idea of *Geist* rolling its way through history?