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## Fidelity as Synthesis: Colloquy

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## FIDELITY AS SYNTHESIS: COLLOQUY

PROFESSOR ACKERMAN: You will be happy to learn that I am not going to try to respond to all these points. Let me begin with the banal thought that liberal democratic philosophy is universalist—notoriously weak on justification of the nation state. This leads to the question: Who are “we the people of the United States”? My proposal, and I certainly am not a constitutional revolutionary, is one that was described by Mark Tushnet very well in the first half of his remarks.

That is, we are constituted in significant, if diminishing part, by our constitutional narrative, and this is a very distinctive feature of American identity. I mean, the idea that the German people or the French people are constituted by their constitutional narratives would be rejected out of hand. They are constituted instead by their language and culture—but not their legal history. It is true that the centrality of constitutionalism to the national identity of Americans is diminishing. Americans are increasingly constituted by their popular music, by their casual dress, by their manner of speaking of the English language—this is a European kind of nationhood—and diminishingly by their commitment to the narrative project of constitutionalism.

But nonetheless, it remains important. The thing that connects me up to the folks in the Barrio in Los Angeles is this Constitution—this backward-looking set of stories we tell ourselves about our Americanness, not the fact that they speak Spanish and I speak English, or that I wear three piece suits and they don’t, that kind of thing.

It is too neat, to be sure, but nonetheless for these purposes the following will serve: the backward-looking effort to tell us who we are is conceptually antecedent to the problem of governing ourselves. We have to figure out who we are as a people before we can govern ourselves, and my idea is that the fateful history of how Americans have gone about struggling over our constitutional identity *constitutes* us importantly as a people.

I am glad that you got my message about midgets. This implicates, among other things, the authority of scholars. Is there an authority of scholars, and what is it? My answer is that I’ve spent a number of years actually reflecting upon American history—I am a patriot, you see, trying to repay my debts to the American people by a labor of scholarship—and I have been looking at all these yellow pages, and I want to bring this to your attention: there is nobody like Abraham Lincoln around.

Nelson Mandela, perhaps he is like Abraham Lincoln? But no Americans. We’ve had moments, periods of time, when there were such constitutive figures of authority amongst us. But not now. Some of my friends are Republicans, and for them Ronald Reagan—he is a joke for me—is such a figure. But he didn’t make it. He could have

made it, but he didn't make it. How do we know he didn't? Because he couldn't carry his message through Congress and the courts. The American people didn't give him the necessary sustained support for a successful constitutional revolution.

Now, this goes to Michelman's fascinating and fundamental point about agency. He is right. A satisfactory theory must have at least two different dimensions: one, the backward-looking question of identity, who are we as a people; and then, the agency problem, how are we going to debate and define our future destiny?

During much of our history, the principal agent of constitutional redefinition has been the political party. But the last time a political party was a successful agent of constitutional transformation was the New Deal. More recently, a great deal of our transformative energy has been through movements that have detached themselves from party—movements like the NAACP.

Consider Kitty MacKinnon. She is a wonderful representative of a movement which has *not* become a political party. In contrast, the new Gingrich Republican party has become the first party of political agency since the New Deal. This is a very important point—and I will be writing more about its implications soon.

On the problem of reluctant judgment, I certainly agree with Larry [Sager] that the Ackerman-Lessig combo is a combo. I am talking about changes in the foreground, as it were, of constitutionalism; that is, from time to time the American people actually say: "Listen up you folks in Washington, we want to change things in an important way." Americans are always trying to say this, but they only sometimes succeed in organizing themselves with authority. And Professor Lessig is trying to talk about the fact, and I think it is a fact, that the background of constitutional interpretations changes, often in subtle and slow-moving ways. A valid act of constitutional interpretation must take both kinds of change into account.

Another question is, whether the reluctant judgment model is compatible with the abstract character of the constitutional enterprise. I think that's a great question, and I will have to think about it more. Larry, I read your article<sup>1</sup> several times, I should assure you. But I have to think more about it.

Turning to Mark Tushnet, I must say that the news that you would be my commentator struck terror in my heart—I am so glad that, for some reason you are in a charitable mood. Thanks a lot for a miracle. No less remarkable is that Tushnet suddenly sounds like a partisan of the Whig interpretation of history—where the American Telos is established definitively by the Declaration of Independence, and the rest of American history is a story of progress—with fits and starts, of

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1. See Lawrence G. Sager, *The Incurable Constitution*, 65 N.Y.U. L. Rev. 893 (1990).

course—over time. We don't want to be too apologetic, and not too triumphant, but we are getting there, Mark suggests. This feeds into the notion that the judges are in partnership with the people in the pursuit of justice.

I want to make it clear, in contrast, that I believe that American society is profoundly unjust. The Constitution has been a compromise with injustice from the beginning to the end.

This does raise indeed a legitimacy question: why am I spending my time on our Constitution, if it is implicated in deep injustice? I am not going to answer that question right now. But Mark's idea is so Panglossian, so Whiggish. That the Declaration of Independence set our ground plan and we are getting there—well, I just don't think that is true.

I mean, if we compare America to Europe, Europe is more just, however unjust it is, than America. The thing that America has is this tradition of self government and this tradition of constitutional identity. That's what we have. And that's what I have been focusing on. And this goes to Professor's Fleming's question—Why don't I just sign up as a recruit in Ronald Dworkin's army?—a question that I have asked myself any number of times since I was a student of Ronald Dworkin's many years ago. Jim, if you want to make me a recruit, I am happy to serve your purposes as best I can. But there is a disagreement between us nonetheless. My basic thought is that the nerve of America is self government by people who really do disagree a lot about justice, and this disagreement has unfortunately led to the toleration of a lot of injustice. We can never forget that the Declaration of Independence was written by a slaveholder. And profound injustice did not come to an end with the Thirteenth Amendment or the New Deal or the Civil Rights revolution.

Constitutionalism of Ronald Dworkin's kind, or Owen Fiss's, or Jed Rubenfeld's, should be associated with a hegemonic constitutional regime, a regime whose principal participants are very self confident. A kind of constitutionalism like mine is, I think, more appropriate during more uncertain times, like today. In 1997, we recognize that the constitutional regime of the last sixty years, or the last thirty years, might not last forever. This recognition, in turn, leads to my central preoccupation: under what conditions is a change of constitutional regime legitimate?

PROFESSOR FLAHERTY: First, anyone from the panel want to respond? If not, let's ask anyone out here.

QUESTION FROM PROFESSOR GREENE: I just want to press Larry Sager's question a little more. You said you read his article and you wanted to think more of it. The big payoff in your response to him, in the end, is self government. That is, I guess, a descriptive claim. But you know Ronald Dworkin has this nice section in his Introduction [to *Freedom's Law*] about how this accountability democ-

racy, which I call it, is the wrong way to think about democracy, that self government, in this sense, is impoverished. We have to think of preconditions of equality and liberty, etc. So, Bruce, what is your theoretical normative defense of deference to self government and, therefore, having constraints on judgment, rather than allowing yourself to move in Larry's or Frank's [Michelman] direction in terms of a broader interpretive power of the courts?

PROFESSOR ACKERMAN: I don't think my theory is impoverished. I think the sustained effort at a confrontation with 200 years of American experience is anything but impoverished. But it doesn't lead to very happy conclusions.

Now, when we talk about philosophical models of democracy, we can talk a lot about ideals. Any robust philosophically-developed conception of ideal democracy, however, would lead a clear-minded observer to the conclusion that there has never been a truly *legitimate* democracy in the world. It has only been since 1965 that black people in the United States could vote. In our democracy right now, probably thirty-five percent of the population can't read well enough to make informed political judgments. Is *this* a legitimate democracy? This Whiggish idea—we are almost a well-ordered democracy, we are in collaboration with the People, we are almost there—it seems to me so banal, such an obvious form of wish-fulfillment. The truth is that this government does not fulfill the *minimal* conditions presupposed by Habermas or Dworkin—or, for that matter, the conditions I lay down in *Social Justice in the Liberal State*.

Does that mean that we should not continue the constitutional project? Well, I think that's a serious question. My tentative answer is that the constitutional tradition, defective though it is, nevertheless provides the best chance of pursuing justice when compared to the dismal alternatives. But don't suppose that the American project *has already fulfilled* some minimal conditions of genuine democratic legitimacy.

PROFESSOR SAGER: I just want to jump in very quickly. There have been several occasions that Bruce has spoken as though he read what I described as collaboration as in some way dependent on or inclusive of, the proposition that we are almost at a point of ideal justice. Like him, I strongly disavow that. The strongest claim that I want to make about justice-seeking constitutional practices is that they are reasonably good practices compared to other forms of governance that have been devised in the ancient and modern world to bringing us closer to justice than we would be if we had some other set of mechanisms. I don't think that they are infallible, and I don't think that we are anywhere near a state of perfect justice. The claims about the purpose of the Constitution, and the collaborative model that I pressed, don't, I think, depend on those propositions.

PROFESSOR ACKERMAN: We'll have to talk about that over dinner.

PROFESSOR MICHELMAN: Somebody says there must be something that constitutes the present generation of Americans as a political community, as a people, from the standpoint of democracy. Sure. That something has a historical reference. That something is composed in part of a tradition, a narrative, or a set of recollections. I don't have any problem with that. That something is a recollection or a tradition or a narrative of a commitment to an interpretation of the principles of the Declaration. I wouldn't have a problem with that. Or of the principles of which the 1780s Constitution and its subsequent emendations are a series of imperfect tokens or representations. That seems okay to me.

The question for me is—if what constitutes us as a people is a continuous practice of a commitment to contested interpretation of the principles of the Declaration of Independence—what, if anything, issues from that observation as a conclusion about the relationship between a present generation's obligation, from the standpoint of democracy, to find and hammer out its own interpretation, and its obligation to acceptance of a prior generation's interpretation. It seems to me that one could say that what constitutes us as a people, from the standpoint of democracy, is the tradition of each generation's assuming interpretative responsibility for itself. So, it is the intimation of an obligation to acceptance of the earlier generation's interpretation that is sticking in my craw.

PROFESSOR ACKERMAN: But who are we? We are scholars living at a time of political midgets—a generation which, if it had any historical perspective on itself, would know that they have not yet achieved a construction of authority that is analogizable to past successful constitutional solutions. The last time we actually achieved a success was with Martin Luther King. It is no accident that we have had one civic holiday in America in the last generation, and that we could not construct a civic holiday, a credible civic holiday, today.

So, in talking about our responsibilities as constitutional interpreters we should be aware of our place in time—indeed, this awareness marks the authority of the constitutional scholar. If, in contrast, we imagine that we have the authority of Franklin Roosevelt to radically revolutionize the dominant narrative, we are simply fooling ourselves.

