REJOINDERS

Frank I. Michelman†

I am grateful for the comments. All contain a great deal with which I agree, but I shall not consume space or try patience by noticing every point of agreement (or concession). In a short reply, I can only pick out a few matters for rejoinder, from among those that especially worry me and are susceptible of fairly direct response. Professor Post's comment, in particular, goes into dimensions of our problem that are beyond the scope of what I tried to discuss in the lecture (although they are certainly not beyond what a full treatment of the issues requires), and I shall mainly leave it to readers to gain from what he so ably and interestingly adds to the discussion.

I

Is Kathleen Sullivan right to suggest that Justice Brennan's special regard for "the minority perspective" is in some way at odds with my construction of his implicit theory of constitutional democracy? The theory as I constructed it—"my" model, as Professor Post dubs it—is one that places weight[1] on the epistemic value of the exposnre of decisionmakers to "the full blast of sundry opinions" about justice and the social conditions of democracy. Brennan's looking out for the minority perspective is not inconsistent with this theory, because Brennan plainly shared Don Herzog's view that "epistemic authority" is a matter, in part, of withstanding undue influence by better equipped and better established voices.[2]

A similar consideration suggests caution about Sullivan's remark that "Brennan cannot simultaneously behave as an epistemic egalitarian and overturn the majority's will in the name of minority rights."[3] In Ronald Dworkin's paraphrase of "my" model, "people govern

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1. As Sullivan is careful to say, I did not say sole or exclusive weight.

2. *See* Frank I. Michelman, *Super Liberal: Romance, Community, and Tradition in William J. Brennan, Jr.'s Constitutional Thought*, 77 VA. L. REV. 1261 *passim.* (1977) You can also find in the cited article my agreement with Sullivan's praise of Brennan's appeal to "constitutional tradition writ large." *See id.* at 1312-20.

3. Kathleen M. Sullivan, *Epistemic Democracy and Minority Rights*, 86 CALIF. L. REV. 445, 450 (1998).

themselves when they obey the laws of their community out of a respect for those laws that is generated by confidence in the fundamental constitutional structure, and . . . the role of justices like Brennan [is] contribnting to that confidence."[4] Although Dworkin is correct that nothing in this view of political self-government logically entails democracy, I did propose a mix of epistemic and dignitary reasons for a belief that constitutional support of a democratically structured civil society would be, in practice, a necessary prop to the requisite confidence. What I ask Professor Sullivan to notice is that the epistemic part of the model does not demand anything like equality in the sense of letting the majority opinion always rule. Such a requirement seems more in the spirit of "responsive democracy" theory which, as Professor Post's comment makes clear, wants no part of an epistemic justification.

The epistemic part of "my" model does, to be sure, require some measure of respect for majority opinion by fundamental-legal decisionmakers. But what it first and foremost requires is *exposure*, a desire on the decisionmakers' part to hear and be moved by everything that variously situated people—some of whom may at times be prevented by social conditions from effectively broadcasting or making heard their messages and views—are thinking and feeling and trying to express about justice, injustice, and the social conditions of democracy.

Now let me turn to two of the many points about which Sullivan is surely right. First, she is right that, taking my presentation as a whole, I should be looking for ways to "shrink the amount of fundamental-law interpretation done by courts in relation to that done by the people."[5] Second, she is right that no amount of exposure of high court judges to what I called "the full blast of sundry opinions" about justice and the social conditions of democracy can change the fact that it is they who "will still have to decide . . . which of [those opinions] best conform to the principles of constitutional democracy."[6] In other words, she is right (as is Post) to insist that serving as an informant is not enough for self-government.

Professor Snllivan is right about those matters on the merits. But she is not right if she means to suggest I am in disagreement with what she says, althongh the blame may be mine for conveying that impression. In my lecture, I did not address the first point, that of

4. Ronald Dworkin, *The Partnership Conception of Democracy*, 86 CALIF. L. REV. 453, 454 (1998).

5. Sullivan, *supra* note 3, at 449.

6. *Id.* at 448.

getting people more involved in constitutional interpretation.[7] My lecture did address the second point. As I said, by way of conclusion: "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."[8]

For some reason, Professor Sullivan did not take those words of mine at face value. Perhaps she found it hard not to picture me, despite *pro forma* disclaimers, as bound and determined to offer a solution to the paradox of constitutional democracy. If she did, she was not alone; all the commentators so construed me (Professor Post with reservations). Maybe they did so because my academic career has been so inveterately "normative" that my friends just cannot recognize me in a different posture.[9] But let me, in any case, try to make clear now, having failed to do so before, that I do not believe the problem as I framed it is one that anyone can solve. All we can do is recognize it and then try to live with it as best we can in light of our current goals and ideals for political arrangements.

If it is true, as I suggested, that (1) constitutionalism means to us the containment of politics by laws of lawmaking that themselves stand beyond reach of the politics they are meant to contain; (2) democracy means to us the people of a country deciding for themselves, politically, the politically decidable matters about which they have good moral and material reason to care; and (3) in any set of laws of lawmaking there must be some laws with content about which people have good moral and material reason to care; then (4) we cannot have both constitutionalism and unsullied democracy. If it is further true, as Professors Post and Dworkin and I all agree,[10] that we cannot have democracy without constitutionalism, then it follows that we cannot have democracy unsullied. Period.

It was with that sort of conclusion in mind that I began the lecture by rejecting, as too gentle, the Bickelian formulation that leaves Don Herzog bemused, the "Counter-Majoritarian Difficulty." That formulation is too gentle in two respects. In the first place, to bemoan constitutionalism as "counter-majoritarian" is to suppress the opposite, "institutional" difficulty—to paraphrase Herzog, whenever the state acts in ways I have not commissioned, I am not self-governing. Whereas Herzog says I "conceded" that point, I thought I was insisting on it, as an affirmative premise for my argument. This brings me to my second

7. I did address this question, along the lines Sullivan predicts, in Frank I. Michelman, *Judicial Supremacy, the Concept of Law, and the Sanctity of Life, in* JUSTICE AND INJUSTICE IN LAW AND LEGAL THEORY 139, 145-47 (Austin Sarat & Thomas R. Kearns, eds., 1996).

8. Frank I. Michelman, *Brennan and Democracy*, 86 CALIF. L. REV. 399, 427 (1998).

9. "'What should we do? What should the law be? What do you propose?' . . . asks normative legal thought." Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167, 177 (1990).

10. Confirmed by their comments.

objection to Bickel's phraseology. "Difficult" insinuates "possible," and I think we do better to proceed by rigorously doubting whether constitutional democracy is possible, at least insofar as we take the point of democracy to be the self-government of individuals.

Doing so should chasten our imaginings of, and our hopes for, all the ideals in play here—constitutionalism, democracy, and individual self-government. That does not mean we give up the ideals. It does mean we never let ourselves forget that any society's goals respecting democracy and self-government must be ones of approximation, of holding in check the misfortune of how things are, of choosing among offerings of damaged goods. American constitutional democracy is not immune to social fact or the laws of logic; it is not the little engine that could. Teaching ourselves to see our conntry's constitutional democratic practices as, at their best, sisyphean attempts to approximate impossible ideals of democracy and individual self-government—not jnst technically, but logically and conceptually impossible—inay help us steer clear of foolish acts and proposals in the name of ideals we continue to hold. It may also sharpen both appreciation and criticism of those practices, and of justification-intended interpretations of them such as those offered by Robert Post and Ronald Dworkin.

II

Nothing in my presentation of the paradox of (constitutional) democracy depends on a view of the Supreme Court as a haven of reason above politics, nor does anything in it depend on an opposing view of legislatures as devoid of sincere, public-spirited reason-giving. Of course, if one wants to keep open a possible place for jndicial review in a society's attempts to cope with the paradox of democracy,' one will have to find some kind of special contribution flowing from oversight of legislation by an institutionally independent judiciary.[11] That is as plainly true of Brennan's implicit (partial) reconciliation of the Court with democracy as of Dworkin's explicit one. By treating both accounts as legitimate competitors for our affections, therefore, I treated the notion of the judicial institution's special contribntion to democracy as one to which we need to keep our minds open.

It should be equally obvious, thongh, that there are potentially many theories of contribution to democracy fronn review by an inde-

11. To argue for giving an independent judiciary *a place* in a total institutional system of democratic resolution of fundamental-legal content is by no stretch to suggest that all the democracy occurs in court. My lecture contemplates (or at any rate I was contemplating) a circulation (to use Jürgen Habermas' phrase) of opinion-formation and decision making between a democratically structured civil society and the Court among other decision-making bodies. I do not see, therefore, the force of Kathleen Sullivan's point about the limited jurisdiction of the Court.

pendent judiciary. Two simple ones that spring immediately to mind are (1) institutional specialization (of focus, responsibility, or competence), and (2) the benefits of two heads, that is, of an institutionalized second opinion. These explanations of the independent judicial contribution place no reliance on the crudities mentioned by Don Herzog: imagining a judicial reason (or anyone's reason) unconditioned and uninfected by politics, or partitioning reason and desire between the Court (pure reason) and the legislatures (pure desire)—to which one might add, although Herzog did not, the crudity of placing reason hierarchically above desire. I welcome and applaud Professor Herzog's spirited warnings against going off half-cocked about the oppositions of reason and politics, reason and desire. I am unclear, though, about how or why Professor Herzog thinks I did so on this occasion—given not only the contrary stance he cites in previous writings of mine,[12] but my insistence in the lecture on the irrepressibility of a judge's "own substantive vision" from her constitutional interpretations and my refusal to credit the judgment of any official, "Brennan" included, as a "reliable guide" to constitutional-legal rightness.

III

What about the Federal Reserve?
"We are driven," I said,

> 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 lawmakings 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.[13]

In other words, in a technically complex and ethically diverse modern country, the hope for individual self-government through democracy rests on a frail reed: our ability as individuals to persuade ourselves that the laws of lawmaking (the "lawmaking system") are our own doing, and that, because they are, whatever political actions issue from the due operation of those higher laws (which would include the creation and empowerment of a Federal Reserve Board) are also, in a sufficient sense, our doing.

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12. In addition to my *Law's Republic*, 97 YALE L.J. 1493 (1988), cited by Herzog, see Frank I. Michelman, *Bringing the Law to Life: A Plea for Disenchantment*, 74 CORNELL L. REV. 256 (1989).

13. Michelman, *supra* note 8, at 409.

Looking at the matter that way, the dictatorship of Chairman Greenspan and company cannot stand on the same level of concern with fundamental lawmaking by the judiciary. If everyone's self-government cannot be redeemed on the level of the laws of lawmaking, then it certainly cannot be redeemed at the level of the Federal Reserve. But conversely, if everyone's self-government *could* be vindicated on the level of the laws of lawmaking, then that *might* (although by no means necessarily) quiet concerns about the Federal Reserve.

It thus appears to be a mistake for Don Herzog to offer the Federal Reserve as an example of how the problem is worse than I suspect. What I suspect is that self-government through democracy is *especially* not possible on the level of the laws of lawmaking,[14] and, by my analysis, it doesn't *get* any worse than that.

IV

Am I an individual autonomy nut? I am relieved to find that neither Robert Post nor Ronald Dworkin, whom I claimed as normative-individualist fellow travelers, has repudiated the view, as I put it, that "what finally, morally, matters is the agency, the freedom, the dignity, the self-government of individuals," and that we lack a "final, moral reason to care" for the self-directive agency of any group.[15] (To be clear: I did not say, and I did not mean, that individual autonomy is all that matters morally. I did not say that we lack reason to care for the flourishing of groups. My point was that insofar as there is something under the head of "self-government" that matters morally—and there is—that something is and can only be the self-government of individuals.)

I want to stress that the individualism here is normative, not anthropological nor (Herzog's term) "methodological." It is not atomism. It is not a claim that individuals can possibly exist, come to consciousness, form identities, acquire values and ends, or live decent lives, except as socially situated beings enmeshed in institutions, cultures, vocabularies, relationships, and communities, and dependent on them for the conditions of flourishing. It does not assert the reducibility of groups to individuals, nor does it deny that one can intelligibly speak of the flourishing of an institution without meaning the flourishing of its members. Normative individualism does mean, however, that the institution's flourishing is of no moral consequence except as it may bear in some way on the flourishing of individuals (not necessarily the members). It also means that institutional flourishing is not a goal for anyone

14. See Part V of the lecture, *id.* at 419-420.
15. *Id.* at 403.

who has not adopted it as such or otherwise acquired some responsibility for it by his or her actions.

Undoubtedly, institutions and other collectivities can flourish independently of the flourishing of any or all of the members. It does not follow that institutions and other collectivities can therefore be subjects of positive liberty. Positive liberty is a value in its own right, one that cannot be substituted for by freedom from foreign occupation or freedom from tyrannical rule, both of which I happily grant are genuine human goods that can accrue to peoples taken collectively. I simply do not grasp how the distinct value of positive liberty can accrue to anyone or anything that, try as I might, I cannot see as possessed of a consciousness and a will of its own. If, therefore, we take the point of democracy to be positive liberty, it will have to be everyone's positive liberty—everyone's self-government—that we mean.

V

Ronald Dworkin explains that he does not intend to equate a person's self-government with any *feelings* the person might hold of having done actions himself that were in fact accomplished collectively by or on behalf of some group of which he is a member. Dworkin says it is significant that we have feelings of responsibility for collective acts, despite awareness of not having done them, but the significance of this psychological fact lies in its pointing to a certain *moral* fact. The crucial moral fact is this: Persons are responsible for collective actions of groups that treat them in the way that is due to a member if that member is to have a share of the responsibility for the group's collective actions.

I cannot quarrel with Dworkin's explanation of his view. I wonder, though, whether a moral fact about *responsibility* for collective action can really give us much help in finding *self-government* in that action. An individual's responsibility for an act is one thing, the character of the act as one by which the individual is governed is another. And its character as an act by which the individual governs herself is another still. The apparent notional gap between responsibility and self-government is exceptionally glaring in a case, such as Dworkin presents, of "responsibility without causal impact." Seeing how responsibility sometimes can accrue to someone who has not done or decided anything does not help me see how anyone can ever be self-governing without doing or deciding anything.

Dworkin is very much aware of the problem. His most direct response consists in what might appear to be a retreat from moral and political analysis to linguistic analysis, although the appearance may be deceptive. Dworkin offers an explanation for what he calls our "temptation" to treat the case of responsibility-without-causal-impact

(for the collective actions of a group to which one belongs) as a case of "agency," albeit of a "special and limited" kind. In the normal case, Dworkin says, responsibility is ascribed on the basis of causal impact and we speak of "agency." When we run into outlying cases of responsibility that do not rest on causal impact, we simply extend the coverage of "agency" to include them.

Although this looks like an account of linguistic practice, it may also be intended as a moral argument. Regarding it as such, its gist must be something like this: Linguistic usage discloses moral fact. If, linguistically, the normal case of responsibility qualifies as a case of "agency," that should serve as a clue that, in point of moral fact, responsibility *is* agency. Wherever responsibility is recognized, "agency" applies. That goes for whatever cases we may discover of responsibility ascribed without causal impact. Perhaps the detection of agency in that latter class of cases is initially counter-intuitive, but this would not be the first time that we learned something new about moral concepts and moral facts through close linguistic analysis.

Such an argument, if intended, would be open to a rather serious objection. In the normal case of ascribing responsibility, we do so on the basis of causal impact and we call it a case of "agency." But notice that our application of "agency" to that normal case could be occurring in response to any of three features of the case: the appearance there of responsibility (a moral judgment), the appearance there of causal impact (a factual observation), or the appearance there of responsibility based on causal impact (a moral theory). When Dworkin maintains that our application of the term "agency" to the normal case of responsibility based on causal impact gives us reason to apply that term to the abnormal case of responsibility without causal impact, he is necessarily supposing that our use of "agency" in the normal case responds to the appearance there of the moral judgment of responsibility, not to the appearance there of the factual observation of causal impact or of the moral theory of responsibility based on causal impact. But that seems on its face an unlikely, even perverse interpretation of the linguistic practice in the normal case, for which Dworkin has supplied no defense.

Or has he? Dworkin did begin by saying that the idea (which he endorses) of democracy being valuable for the sake of individual self-government poses an "interpretive challenge." We cannot blame him for rising to the challenge as best he is able. But when he says our choice lies between "developing" and "conceding"—either *develop* "an account or conception of democracy that redeems the rhetoric of self-government" or *concede* that "that rhetoric is empty"[16]—how far

16. Dworkin, *supra* note 4, at 453.

is he, really, from the somewhat pessimistic view with which I charged him, that there can be no fully satisfying reconciliation between the practice of constitutional democracy and the aspiration to political self-government by everyone?

In this matter as in others, interpretation and moral reading are powerful tools in Dworkin's hands. Political partnership, he says—working together with other citizens toward something all regard as important—is a genuine human good or source of value. I agree. That being so, Dworkin continues, maybe we ain't just whistlin' *Dixie* by the claim that democracy supports self-government. We might rather be saying something "large and important" by that claim. We would be, if by uttering the words "democracy supports self-government" we intended to say that democracy affords us the good of political partnership. Thus to understand the utterance would be to make of it the best that it can be. And that—I understand Dworkin to be urging—is how we ought to understand it.

Interpretability, however, does not mean infinite license. In a recent work, Dworkin echoed Isaiah Berlin's warning against confusing one kind of genuine human good with another, perhaps sometimes incompatible kind. The good of positive liberty, Berlin and Dworkin both say, ought never to be confused with the good of negative liberty.[17] May I now add: Neither ought the good of positive liberty to be confused with the good of political partnership. Political partnership, a genuine human good in its own right, is not the good of positive liberty and cannot be substituted for it.

VI

Robert Post's agreement with that last proposition appears to be complete. The sensible and attractive anthropological communitarianism of Post's thought should be plain for all to see. Yet so should his certainty that the only self-government worth speaking of is the self-government of individuals (albeit of individuals in groups). Despite Post's rejection of epistemic justifications of democracy, and mine of the rhetorics of antifoundationalism and "identification," I suspect there is far less difference between us than both his comment and my lecture may at some points suggest.

Here I will take issue with Professor Post over one point only. Despite the care he took in developing and qualifying his case, I believe Post still overstates the degree to which "my" model makes every individual's self-government depend on his or her agreement with the substantive rightness of the decisionmaker's or interpreter's decisions

17. RONALD DWORKIN, FREEDOM'S LAW 215-16 (1996).

and interpretations. I tried hard to present a "model" that takes in reasonable interpretive pluralism by making it decidedly *not* the case that "citizens . . . can be said to be governing themselves only to the extent that they agree with the constitutional judgments of the court."[18] I tried to develop a "model" in which respect for laws did not have to depend on agreement with their rightness, but might rather depend on a perception of good-faith effort in that direction in the design and operation of the system, a perception based in part on the system's commitment to keep decisionmaking perpetually open, and perpetually exposed to the impact of everyone's views.

Granted, the stipulation of a perception of good faith effort has to carry a lot of weight here. Granted, one's perception of a good faith effort cannot be entirely independent of one's agreements and disagreements with the substance of what the system actually decides from occasion to occasion. Nevertheless, agreement-in-substance and perception of good faith are not the same things, and the latter can exist in full where the former does not. If you keep that in mind, then "my" model can cope nicely with the case of the nine McReynoldses. A Court of nine McReynoldses? What kind of good faith effort would that be?

18. Robert Post, *Democracy, Popular Sovereignty, and Judicial Review*, 86 CALIF. L. REV. 429, 436 (1998).