Law's Republic

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Recent years have witnessed several proposals to reconsider American constitutionalism in light of the "civic republican" strain identified by historians in the political thought of the founding era. This new republicanism must meet (among others) two objections. First, that traditional republicanism was a solidaristic doctrine presupposing a degree of moral consensus that is nonexistent in a modern, diverse, liberal society. Second, that it was a majoritarian doctrine of popular legislative supremacy that is fundamentally incompatible with the modern constitutionalist aim of securing, by judicially enforced higher law, individual rights against political oppression. Professor Michelman takes up these two objections to the "republican revival," contending that only through a modern reconsideration of republican constitutional thought can we hope to make sense for our age of Americans' persistent beliefs and avowals that political liberty calls for both "a government of the people, by the people" and "a government of laws and not of men." Drawing support from both traditional republican sources and contemporary readings, the author argues that these two demands are jointly satisfiable only by ideally conceiving of both legislative politics and constitutional adjudication as forms of

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self-revisionary normative dialogue through which personal moral freedom is also achieved. Using Bowers v. Hardwick as an example, he suggests that such a dialogic-republican constitutional theory can inspire stronger judicial protection of individual rights than do competing theories.

I. INTRODUCTION: REPUBLICAN CONSTITUTIONALISM

A. Bowers v. Hardwick: Authority vs. Freedom

I begin with three premises: First, the Supreme Court's analysis and decision in Bowers v. Hardwick are strikingly resistant to obvious claims of political freedom. Second, judicial constitutional analysis ought to be receptive to such claims. Third, constitutional analysis is rooted in underlying, often tacit, sensibilities and understandings regarding the larger aims and methods of constitutionalism. Prompted by Hardwick's case, I will consider how contemporary American constitutional understanding and analysis might benefit from serious and sympathetic (but not uncritical) reflection upon the civic-republican strain in political thought that has been identified, traced, and analyzed in much recent writing on history, social and political theory, and American constitutionalism.

1. 478 U.S. 186 (1986) (upholding Georgia law criminalizing homosexual sodomy, as applied to adult defendant's conduct in his own home with consenting adult partner).
2. See, e.g., Richards, Constitutional Legitimacy and Constituional Privacy, 61 N.Y.U. L. Rev. 800, 852-57 (1986); Note, The Supreme Court: Leading Cases, 100 HARV. L. Rev. 210, 215-18 (1986). By "political freedom" I mean the redemption or achievement of personal freedom from or through the institutionalized social power that regulates social conflicts, given a perception of need for some form of such power. To perceive such a need, as I do, is to open oneself to the experience of "dilemma"—"either resign yourself to some established version of social order, or face the war of all against all"—that, as Roberto Unger says, prompts many to believe that legal-doctrinal practice must somehow be kept insulated from genuine "controversy over the basic terms of social life." This essay concurs in Unger's rejection of that view: An order or practice may retain its identity while undergoing transformation through a process of reflexive criticism. See R. Unger, The Critical Legal Studies Movement 15 (1986). Indeed, as Unger says, it is only such an expanded notion of the identity and continuity of a doctrinal order that can sustain "the validity of normative and programmatic argument itself; at least this must be true when such argument takes the standard form of working from within a tradition rather than the exceptional one of appealing to transcendent insight." Id. at 15-16.
5. See, e.g., D. Epstein, The Political Theory of the Federalist (1984); G. Stone,
task is to explain how an examination of our constitutionalism from a republican-inspired standpoint might help invigorate a constitutional discourse that would steel judges against the desertion of claims like Hardwick's.

To many readers this may seem a lunatic undertaking. Classical republicanism, with its legacy of excluding from the political community all those whose voices would—by reason of supposed defect of understanding, foreignness of outlook, subservience of position, or corruption of interest—threaten disruption of a community's normative unity, will seem sadly consonant with the result in Bowers. "Republicanism" conjures up just that strain in the history of political thought that would defend a repressive and discriminatory law for which there is no justification save "majority sentiments about . . . morality," for the simple reason that "[t]he law . . . is constantly based on notions of morality." Even worse, republicanism suggests justification of such a law on the frightening ground that its specific moral motivation "is firmly rooted in Judaeo-Christian moral and ethical standards"—standards to which (it seems to be implied) the entire political community is forever committed by the community's history as read from a particular moral-majoritarian perspective.

I will contend, to the contrary, that republican constitutional thought is not indissolubly tied to any such static, parochial, or coercive communitarianism; that, indeed, reconsideration of republicanism's deeper constitutional implications can remind us of how the renovation of political communities, by inclusion of those who have been excluded, enhances everyone's political freedom. Republican constitutionalism, I will argue, involves a kind of normative tinkering. It involves the ongoing revision of the normative histories that make political communities sources of contestable value and self-direction for their members. This tinkering entails not only the recognition but also the kind of re-cognition—reconception—of those histories that will always be needed to extend political community to persons in our midst who have as yet no stakes in "our" past because they had no access to it.8

If republican thought does thus, as I believe, contain visionary resources of use to modern liberal constitutionalism, we need not fear drawing upon those resources because of their sometime historical connection with an obnoxiously solidaristic social doctrine. Contemporary American liberals have less to fear from lurking social solidarism than from a constitutional jurisprudence that debases the community by slighting its self-transformative capacity, and abets the community's self-betrayal through lapse of commitment to extension of membership to persons who, at many historical moments, could not count themselves heirs to traditions whose meanings did at those times involve the exclusion or subordination of just those persons.

What ought chiefly to alarm liberals about the Bowers decision, then, is not a judicial affection for moral majoritarianism that the Justices collectively almost certainly do not hold and could not propagate if they did. Rather, it is the decision's embodiment of an excessively detached and passive judicial stance toward constitutional law. The devastating effect in Bowers of a judicial posture of deference to external authority appears in the majority's assumption, plain if not quite explicit in its opinion, that public values meriting enforcement as law are to be uncritically equated with either the formally enacted preferences of a recent legislative or past constitutional majority, or with the received teachings of an historically dominant, supposedly civic, orthodoxy. I will call such a looking backward jurisprudence authoritarian because it regards adjudicative actions as legitimate only insofar as dictated by the prior normative utterance, express or implied, of extra-judicial authority.


To say that blacks never fully believed in rights is true; yet it is also true that blacks believed in them so much and so hard that we gave them life where there was none before. . . . This was the resurrection of life from 400-year-old ashes; the parthenogenesis of unfertilized hope. See also infra text accompanying notes 117–23; id, 152–56.

11. "Originalists" such as Robert Bork are one camp within authoritarianism. See, e.g., Dronenburg v. Zech, 741 F.2d 1388, 1396–97 (D.C. Cir. 1984) (Bork, J.) (only fresh expression of "the moral choices of the people and their elected representatives" can justify court in "protect[ing] from regulation a form of behavior [i.e., homosexual sex] never before protected, and indeed traditionally condemned" when claimed right to protection has "little or no cognizable roots in the language or
Justice White’s opinion for the Court in Bowers wears its positivistic constitutional theory on its sleeve: It is not for the Court to “impose” its members’ “own choice of values” on the people by “announc[ing] . . . a fundamental right to engage in homosexual sodomy,” contrary to both the formally legislated will of the Georgia majority and (as the Court believed12) “the Nation’s history and tradition” as manifested in state legislation widely in force when both the Ninth and Fourteenth Amendments were ratified.13 If the Court declares the existence of fundamental constitutional rights “having little or no cognizable roots in the language or design of the Constitution,” says the Justice, it wrongly assumes power “to govern the country without express constitutional authority.”14

The deeper premises of the Bowers majority, although unstated, are clear enough: Most fundamentally, the Court is the servant, not the author, of a prescriptive text. As such, it inquires into meaning—signification—not into reason or value. Justice Blackmun’s plea for evaluating Hardwick’s claim “in the light of the values that underlie the constitutional right of privacy”15 thus fails, in the majority’s view, because the values on which Blackmun would base protection of Hardwick’s privacy against the declared will of the current legislative majority of Georgia cannot be credibly traced to any historical occasion of popular higher law-making. Even granting that the people speaking through the Ninth and Fourteenth Amendments meant to insulate a traditional regard for family privacy from the general norm of rule by contemporary majorities, it is “facetious,” says Justice White, to suggest that they meant that exception to cover the right to engage in homosexual sodomy.16 The people’s duly registered constitutional and legislative choices to protect certain privacies and not others is their own political matter with which the Supreme Court has nothing to do; the Court engaged in constitutional adjudication is an organ of law, and therefore not of politics.

14. Id. at 194-95.
15. Id. at 199 (Blackmun, J., dissenting).
16. Id. at 194.
Dare one ask: Why ought the Supreme Court not be an organ of politics, if that is what it takes to secure liberty and justice for Hardwick and those for whom he stands? Because—so runs the answer clearly implied by Justice White’s opinion and the familiar constitutional dogma that informs it—for the Court to act politically, as a law-maker and not just a law-finder, would amount to a judicial usurpation of power that belongs by right to others, to “the people” acting through their electorally accountable representatives. But again, why? Why by right to others? Why ought popular-majoritarian preference rather than judicial argument ultimately determine the question of law controlling Hardwick’s liberty?

While the Court’s opinion does not directly speak to this question, we already know the answer. It is, of course, democracy. But that answer without more is both lazy and presumptuous. It conjures with a term that rings of sovereign value, but too often does so without pausing to consider what that value is. Too often, indeed, the invocation of democracy in defense of judicial restraint signifies little more than faute de mieux; too

17. See, e.g., Bork, Neutral Principles and Some First Amendment Problems, 47 IND. L.J. 1, 2-4 (1971) [hereinafter Bork, Neutral Principles]; Bork, supra note 11, at 9, 11 (“Constitutional scholarship today is dominated by the creation of arguments that will encourage judges to thwart democratic choice. . . . In a constitutional democracy, the moral content of law must be given by the morality of the framer or legislator, never by the morality of the judge.”).

Earl Maltz denies that the case for originalism need rest on any notion of democracy. According to Maltz, “the originalist position is . . . grounded [not] on democracy . . . but on the concept of law” and on a corresponding “view[] of the appropriate function of judges in a well-ordered society.” Maltz, The Failure of Attacks on Constitutional Originalism, 4 CONSTITUTIONAL COMMENTARY 43, 53, 56 (1987). With respect, I find Maltz’s distinction puzzling. It is by now widely recognized that concepts of law, views of judicial function, and related notions of social well-orderedness are all embedded in some substantive political-moral conception, tacit or explicit, see, e.g., R. DWORKIN, The Forum of Principle, in A MATTER OF PRINCIPLE 33, 34-57 (1985), and indeed Maltz himself acknowledges this. See Maltz, Foreword: The Appeal of Originalism, 1987 UTAH L. REV. 773, 774-75.

I understand that an originalist approach to constitutional adjudication might suggest itself to those holding certain notions about legality and judicial role, but I cannot see how the connection between legality and originalism could be persuasively drawn within the context of American constitutionalism without at some point appealing to a normative notion of democracy or self-government by the people. Maltz himself argues that “constitutional [like statutory] supremacy derives from the intuition that the Constitution embodies the will of a [legitimate] governmental body whose authority is superior to . . . courts . . . .” Id. at 789. It’s true that Maltz also suggests that conventional belief in the legitimacy of these law-giving assemblies is independent of any concern about “whether [they are] democratically selected.” Id. at 783. But if Maltz means by this that the conventional legitimacy of these bodies has nothing to do with their being perceived as representative of the people and their will(s), he has simply posted their legitimacy while repudiating the only explanation of it that the discourse of constitutionalism has ever, to my knowledge, entertained. See, e.g., Bork, Neutral Principles, supra, at 3-4.

18. See Posner, The Constitution as an Economic Document, 56 GEO. WASH. L. REV. 4, 21-22 (1987) (criticizing “aggressive constitutionalism” for “diminish[ing] the role of democracy” while hazarding no affirmative account of democracy’s value); Bork, Neutral Principles, supra note 17, at 2-3 (asserting that “it is a ‘given’ in our society” that “in wide areas of life majorities are entitled to rule for no better reason than that they are majorities”); cf. Lyons, Substance, Process, and Outcome in Constitutional Theory 72 CORNELL L. REV. 745, 754 (1987): Most constitutional scholars seem to believe . . . that a theory concerning the character of constitutional institutions must guide an interpretation of the Constitution itself. But these scholars usually limit their general theories to simple talk about “democracy” or “majoritarianism.” They fail to explain what that means, in part because they do not address the question of what values a constitutional system like ours should serve.
often, it means merely that if a determination of law can only, at bottom, be a matter of acceding to someone’s preferences, then the people should be ruled by the sum of their own preferences (as mediated by the system of representation) rather than by the preferences of a few judges. Democracy thus conveniently answers to the need for authority: When the social determination of disputed questions of value is imaginable only as a battle of preferences or as the exertion of an arbitrary, dominant will, then law—the adjudicative act—tends to be understandable only as the unquestioning and uncreative (which is not to say necessarily wooden or unintelligent) application of the prior word of some socially recognized, extra-judicial authority.

I believe that a close consideration of certain implications of historical republican constitutional thought can point us toward an account of the relations among law, politics, and democracy that not only would have called for the opposite result in Bowers, but that Americans also will, on reflection, recognize as truer in other respects to their most basic understandings of what constitutionalism is all about. This is the republicanism I advocate.

B. Constitutionalism: Self-Rule As Law-Rule

I take American constitutionalism—as manifest in academic constitutional theory, in the professional practice of lawyers and judges, and in the ordinary political self-understanding of Americans at large—to rest on

19. See, e.g., Bork, Neutral Principles, supra note 17, at 3.

20. Thus, when Judge Posner suggests that, in the popular understanding, our only choice lies between having judges “decide cases in accordance with law, viewed as a body of principles external to the policy preferences of the individual judges” and letting judges decide in accordance with their own “views of public policy,” Posner, supra note 18, at 33, many readers will rush to construe the Judge’s words as meaning that the only perceived alternative to illegitimate judicial self-indulgence is judicial deference to objective, determinate and determining, positive-legal authority. On that construction of it (which does not, in fact, accord with the Judge’s view, see Posner, The Jurisprudence of Skepticism, 86 MICH. L. REV. 827 (1988)), Judge Posner’s analysis would allow no space for the possibility of a judicial decision according to persuasive and disciplined argument in which the governing principles are themselves determined in the course of the argument. See, e.g., Farber & Frickey, Practical Reason and the First Amendment, 34 UCLA L. REV. 1615, 1645–56 (1987); Michelman, supra note 5, at 28–29.

Owen Fiss and Robin West both draw the connection between a conception of politics as the registration of preferences (as opposed to the determination of values) and a deferential/authoritarian judicial attitude towards constitutional adjudication. See Fiss, Foreword: The Forms of Justice, 93 HARV. L. REV. 1, 15 (1979); West, The Authoritarian Impulse in Constitutional Law, 42 U. MIAMI L. REV. 531, 535–37, 541–45 (1988).

21. In Reconsidering the Rule of Law (forthcoming 1989), Margaret Jane Radin approaches from the opposite direction the possibility of a “modern reinterpretation” of “the rule of law” that is strikingly convergent with the “republican” interpretation offered in this Article. Radin launches her inquiry from a Wittgensteinian critique of the idea that verbal rules could possibly govern us, whereas I launch mine from the conundrum of government-of-laws versus government-by-the-people. We seem to meet at a common destination, and it is easy to see why. Radin concludes that “if law cannot be formal rules its people cannot be mere functionaries.” The flip side of that is that if the people are not mere functionaries (but rather are self-governing), then their law cannot be formal rules.
two premises regarding political freedom:\(^2\) first, that the American people are politically free insomuch as they are governed by themselves collectively,\(^2\) and, second, that the American people are politically free insomuch as they are governed by laws and not men [sic].\(^4\) I take it that no earnest, non-disruptive participant in American constitutional debate is quite free to reject either of those two professions of belief. I take them to be premises whose problematic relation to each other, and therefore whose meanings, are subject to an endless contestation that always organizes, sometimes explicitly but always implicitly, American constitutional argument.\(^5\)

The problematic relationship between the two American constitutionalist premises—the government of the people by the people and the government of the people by laws and not men—is subject to an endless contestation that always organizes, sometimes explicitly but always implicitly, American constitutional argument.

22. For a rough definition of political freedom, see supra note 2.

It is evident that no [nonrepublican] form [of government] would be reconcilable with the genius of the American people; with the fundamental principles of the Revolution; or with that honorable determination which animates every votary of freedom to renounce all our political experiments on the capacity of mankind for self-government.

It is enough for my purposes that Madison and his fellow federalists “agreed, explicitly, that the people could create, alter, or abolish their government whenever they chose to do so,” and that they did so by way of concession to the country’s prevailing democratic-republican sentiment. See Miller, The Ghostly Body Politic: The Federalist Papers and Popular Sovereignty, 16 Pol. Theory 99, 104 & passim (1988). Professor Miller goes on to urge that the Federalists made this concession only rhetorically, and only subject to the stipulation that:

for the acts of ‘the people’ to be valid, they had to act all at once and together. Thus the Federalists rendered the democratic vocabulary of popular sovereignty harmless by invoking a fictitious people who could not possibly act together. The Federalists ascribed all power to a mythical entity that could never meet, never deliberate, never take action. The body politic became a ghost.

Even after allowing for the obvious hyperbole of Professor Miller’s reading of the framers’ design with respect to popular sovereignty (how did they regard the initial ratification, then?), that reading is subject to strong contestation. See infra text accompanying notes 106–12 (describing Ackerman’s two-track theory). Even were it not, its deepest premise would remain that of the recognized commitment of Americans to the principle of popular self-government. See Zuckerman, Charles Beard and the Constitution: The Uses of Enchantment, 56 Geo. Wash. L. Rev. 81, 95, 99 (1987):

[The founders] were realists ... in their experience of their social milieu. They moved in a world in which rhetoric bore some reasonable relation to reality, a world especially in which political language bore some substantial resemblance to political life. . . .

... The Federalist Papers were written [by the founders] precisely out of passion and necessity to take [their] acquired expertise to the people and share it with them, rather than shut them out of it.


The course of democratic thought over the past two centuries . . . makes plain that there is no agreement on the way the basic institutions of a constitutional democracy should be arranged. . . . [W]e may think of [the] disagreement as a conflict within the tradition of democratic thought itself, between the tradition associated with Locke, which gives greater weight to what Constant called “the liberties of the moderns,” . . . certain basic rights of the person . . . and the rule of law, and the tradition associated with Rousseau, which gives greater weight to what Constant called “the liberties of the ancients,” the equal political liberties and the values of public life.
ment of the people by laws—should be evident. We ordinarily think of ourselves (qua "people") and laws as being entirely different orders of things. Yet if we are sincerely and consistently committed both to ruling ourselves and to being ruled by laws, there must be some sense in which we think of self-rule and law-rule (if not exactly of "people" and "laws") as amounting to the same thing. It should be apparent that the problem is not just a verbal artifact. Each of the two constitutionalist formulas—self-government and a government of laws—seems to express a demand that we are all bound to respect as a primal requirement of political freedom: the first demands the people’s determination for themselves of the norms that are to govern their social life, while the second demands the people’s protection against abuse by arbitrary power. Reconciliation is not accomplished simply by regarding the people as making or consenting to their own laws. The process of popular law-making is what we call politics; and politics is, in the traditional (and healthy) American understanding, a theater of power in which some people stand always in danger of abuse by others. If “a government of laws” stands—as surely it does—for the institutionalized discipline that would render legislative politics trustworthy, then “law” in the “government of laws” formula must stand in a circular relation with politics as both outcome and input, both product and prior condition.

26. See, e.g., G. Wood, supra note 3, at 362:

“Civil liberty” became for Americans “not a government of laws,’ made agreeable to charters, bills of rights or compacts, but a power existing in the people at large, at any time, for any cause, or for no cause, but their own sovereign pleasure, to alter or annihilate both the mode and essence of any former government and adopt a new one in its stead.” (quoting Hichborn, Oration, March 5th, 1777, in Principles and Acts of the American Revolution, 1750–76, at 47 (H. Niles ed. 1876)).

27. Moreover, if we are serious about opposing the government of laws to that of men [sic], yet at the same time insist upon having a government of the people by the people as well as a government of laws, then we must be using “men” in some sense opposed to that in which we use “people” when we think of people-rule as consonant with law-rule.

28. It would be a plain misreading to reduce the American constitutionalist premise of the government of laws to the “rule of law” or Rechtsstaat idea concerned only with the regularity of legal administration and, derivatively, with the form of legislation. Accord Epstein, Beyond the Rule of Law: Civic Virtue and Constitutional Structure, 56 Geo. Wash. L. Rev. 149, 154, 162, 169 (1987). On the Rechtsstaat view, the demand for a rule of law is satisfied by certain conditions of legal administration and derivatively of legal form, without regard to normative content. The rule of law then exists as long as all legislative enactments, whatever their content, are rigorously and impersonally applied to all cases falling within their terms, and those terms are sufficiently abstract and decisive (“formally realizable”) to support the requisite degree of impersonality and predictability in administration. See F. Hayek, The Constitution of Liberty 193–204 (1960) (describing Rechtsstaat ideal and its history). If this purely formal conception of the rule of law were all that were meant by the constitutionalist demand for a “government of laws,” then that demand would be easily reconcilable with the demand for popular self-government: The people make the laws politically, subject to certain demands of formality in both the terms in which the laws are couched and the manner in which they are administered. Doubtless we do sometimes use the term in that sense, as, for example, Chief Justice Marshall may perhaps be taken to have done in Marbury v. Madison, when he wrote that our government would cease to deserve the name of “a government of laws, and not of men” if its “laws furnish no remedy for the violation of a vested legal right.” 5 U.S. (1 Cranch) at 163. But surely it will be agreed that in American constitutional rhetoric the notion of “a government of laws” has also shared the meaning of formulas like “higher law,” see, e.g., Corwin, The “Higher
Perhaps we can think our way through this difficulty by taking seriously the cue we have already noticed in our constitutionalist formulas, that is, the conceptual identification (although of course not outright identity or equivalence) of “people” with “laws,” which at the same time holds “people” distinct from mere “men.” One possible way of making sense of this is by conceiving of politics as a process in which private-regarding “men” become public-regarding citizens and thus members of a people. It would be by virtue of that people-making quality that the process would confer upon its law-like issue the character of law binding upon all as self-given. A political process having such a quality is one that, adapting a term of Robert Cover’s, we may call jurisgenerative.29 Reconciling the two premises of constitutionalism seems to require that we entertain the possibility of a jurisgenerative politics, capable of imbibing its legislative product with a “sense of validity” as “our” law.30 The idea of jurisgenerative politics is historically recognizable as an idea of republican lineage.31 Yet it isn’t some nostalgic “republican revival,” but rather American constitutionalism as we have all along thought it, that we lose—or at any rate lose the ability to explain and justify—if we cannot now reclaim that idea on terms we can accept.32 Republican-


30. S. Benhabib, Critique, Norm, and Utopia 272 (1985). Benhabib apparently draws her notion of validity from her critical examination of Habermas’ theory of communicative reason. Habermas has contended that only “unconstrained dialogue” conducted under certain “ideal” conditions can hope to produce socially “valid” resolutions of controversial claims—that is, resolutions consisting of “rationally motivated consensus” as distinguished from “mere compromise or . . . agreement of convenience.” Benhabib draws a special connection between this idea of “discursive justification of validity claims” and the normative self-understanding of democracies that public decisions are reached by autonomous . . . citizens in a process of unconstrained exchange of opinions. . . . [T]he theory of communicative ethics is primarily concerned with norms of public-institutional life.” Id. at 283; see also id. at 284–85 (explicating Habermas’ theory of communicative competence). For a quite different—non-discursive—theory of public or social normative validation, see infra note 53.

31. See infra text accompanying notes 37–43. Ancient and early modern republican influences and inspirations are manifest in recent evocations of variants of this idea. See, e.g., H. Arendt, The Human Condition (1958); B. Barber, supra note 4; H. Pitkin, Fortune Is a Woman: Gender and Politics in the Thought of Niccolo Machiavelli (1984); Cover, supra note 29.

32. See B. Barber, supra note 4, at 118: Strong democracy has a good deal in common with the classical democratic theory of the ancient Greek polis, but it is in no sense identical with that theory. . . . [I]n practical terms it is sometimes complementary to rather than a radical alternative to the liberal argument. . . . It incorporates a Madisonian wariness about actual human nature into a more hopeful, Jeffersonian outlook on human potentialities. . . . [I]t is drawn from a variety of established practices
ism, I mean thus to argue, is not optional with us. Whatever else the term may or may not fairly signify as a category in the history of political thought, "republicanism" does, I take it, signify the sort of belief in juris-
generative politics that it seems must play a role in any explanation of how the constitutionalist principles of self-rule and law-rule might coincide.

C. Republicanism and Modernity

1. The Dialogic Tradition

In the strongest versions of republicanism, citizenship—participation as an equal in public affairs, in pursuit of a common good—appears as a primary, indeed constitutive, interest of the person. Political engagement is considered a positive human good because the self is understood as partially constituted by, or as coming to itself through, such engagement. This view opposes the "pluralist" view in which the primary interests of individuals appear as pre-political, and politics, accordingly, as a secondary instrumental medium for protecting or advancing those "exogenous" interests.

A related opposition of ideas is that between "negative" and "positive" liberty. Negative liberty refers to absence of restraint against doing as one wants, while positive liberty implies action governed by reasons or laws that one gives to oneself. The two concepts of liberty differ hugely in their implications respecting the good of citizenship. From a negative-libertarian standpoint, participation in politics is not a good (except upon the sheer accident of a given person's happening to like it). But positive liberty is hardly conceivable without citizenship. Hanna Pitkin still offers the best contemporary statement of the position I know:

What distinguishes politics, as Arendt and Aristotle said, is . . . the possibility of a shared, collective, deliberate, active intervention in our fate, in what would otherwise be the by-product of private deci-

and nourished by classical theories of community, civic education, and participation. . . . It has no share in the republican nostalgia of such commentators as Hannah Arendt or Leo Strauss.

33. See, e.g., id. at 132–33.

34. See infra text accompanying notes 50–51.

35. See, e.g., I. BERLIN, Two Concepts of Liberty, in Four Essays on Liberty 118 (1969); I. BERLIN, Introduction, in id. ix; C. TAYLOR, What's Wrong With Negative Liberty, in C. TAYLOR, supra note 4, at 211.

36. Advocates of strong republicanism have historically emphasized various kinds of reasons for tying the personal and the political so closely together. Hannah Arendt, for example, has expounded on the Aristotelian notion of civic action as good for the soul—as, indeed, the distinctively human mode of excellence or "public happiness." See H. ARENDT, supra note 31; H. ARENDT, On Revolution (1963). Others, notably Rousseau and Kant, have stressed the ethical importance of governing oneself. Motivation by pre-reflective, uncriticized inclination is, they contend, a kind of enslavement, not of freedom, and we are free only insofar as we direct our actions in accordance with reasons or ends that we, as it were, legislate to ourselves upon conscious, critical reflection. See, e.g., C. TAYLOR, supra note 4, at 318 (discussing Rousseau as well as Kant).
sions. Only in public life can we jointly, as a community, exercise the human capacity to "think what we are doing," and take charge of the history in which we are all constantly engaged by drift and inadvertence. . . . [T]he distinctive promise of political freedom remains the possibility of genuine collective action, an entire community consciously and jointly shaping its policy, its way of life. . . . A family or other private association can inculcate principles of justice shared in a community, but only in public citizenship can we jointly take charge of and responsibility for those principles.

Kant suggests something analogous in his concept of moral autonomy: that we are not mature as moral actors until we have become self-governing, have [taken] . . . responsibility not only for our actions but also for the norms and principles according to which we act. As long as we live only by habit or tradition, unaware that they mask an implicit choice, there is something about ourselves as actors in the world that we are not seeing and for which we are not acknowledging our responsibility.37

I am not here recommending strong republicanism. I do not know what is good for the soul. I do not know in what (if anything) personal freedom essentially consists. I do not know whether citizenship is a fundamental human good. What I do claim is that the republican conception of politics, a conception that has apparently been motivated historically by certain convictions about those matters that we may or may not be able to share, is one that good, contemporary constitutional explanation and analysis cannot do without.

2. The Dialogic Constitution: Republicanism and Jurisgenesis

In republican thought, the normative character of politics depends on the independence of mind and judgment, the authenticity of voice, and—in some versions of republicanism—the diversity or “plurality” of views that citizens bring to "the debate of the commonwealth."38 Republicanism has been, par excellence, the strain in constitutional thought that has been sensitive to both the dependence of good politics on social and economic conditions capable of sustaining “an informed and active citizenry that would not permit its government either to exploit or dominate one part of society or to become its instrument,” and the dependence of such condi-

38. See Michelman, supra note 5, at 41-47. We shall see below how an inclusory, plurality-protecting conception of republican citizenship can anchor Justice Blackmun's account of the value of intimate association, the heart of his powerful dissenting opinion in Bowers. Inclusory republicanism seems especially pertinent to the opinion's evocative references to "association that promotes a way of life," Bowers v. Hardwick, 478 U.S. 186, 205 (1986) (Blackmun, J., dissenting) (quoting Griswold v. Connecticut, 381 U.S. 479, 486 (1965)), and to "self-definition" dependent upon "close ties with others," id. at 2851 (quoting Roberts v. United States Jaycees, 468 U.S. 609, 619 (1984)).
tions, in turn, on the legal order. These perceptions irresistibly motivate a republican attachment to rights. These include, most obviously, rights of speech and of property. They may also include privacy rights—perhaps stronger ones than many contemporary liberals would welcome.

Yet republican thought is no less committed to the idea of the people acting politically as the sole source of law and guarantor of rights, than it is to the idea of law, including rights, as the precondition of good politics. Republican thought thus demands some way of understanding how laws and rights can be both the free creations of citizens and, at the same time, the normative givens that constitute and underwrite a political process capable of creating constitutive law. Perfectly prefiguring the American constitutionalist dilemma I have already described, classical republican constitutional jurisprudence evidently depends on the possibility of juris-generative politics.

3. Modern Republicanism and Liberal Plurality

It is certainly true that not all historical versions of republicanism have reflected the inclusory, plurality-protecting ideal that arguably character-


40. See Sunstein, supra note 5. Pocock has noticed the way in which the constitution of both the republic and of citizenship—the grounding in practical imagination of the republic's external relations, its membership boundaries, and the virtuous independence of its citizens—seems to demand expression in a juristic language of law and rights that sits problematically with the “humanist” vocabulary of civic virtue:

C]itizenship in the Italian republics was for the most part defined in jurisdicational and jurisprudential terms. . . . An Italian commune was a juristic entity, inhabited by persons subject to rights and obligations; to define these and to define the authority that protected them was to define the citizen and his city, and the practice as opposed to the principles of citizenship was overwhelmingly conducted in this language.

Pocock, Virtues, Rights, and Manners: A Model for Historians of Political Thought, 9 Pol. Theory 353, 355 (1981); see id. at 357, 360.


42. See Michelman, Possession vs. Distribution, supra note 39, at 1329-34.

43. For a discussion of Arendt's defense of familial and local-communitarian “privacy” rights, including the exclusionary rights of racial-segregationist communities, as protecting “plurality”—and hence fending off totalitarianism and visionary stasis—in civic debate at the state level, see Failinger, Equality Versus the Right to Choose Associates: A Critique of Hannah Arendt's View of the Supreme Court's Dilemma, 49 U. PITT. L. REV. 143, 158-62 (1987); see also infra text accompanying notes 134-44 (discussing value of plurality in republican constitutional theory).

44. "Law . . . is the creation of the free citizenry. Yet law is valued for its role in protecting the public realm." Cornell, Should a Marxist Believe in Rights?, 4 Praxis Int'l 45, 50 (1984); cf. Pocock, Cambridge Paradigms and Scotch Philosophers: A Study of the Relations Between the Civic Humanist and the Civic Jurisprudential Interpretation of Eighteenth Century Social Thought, in WEALTH AND VIRTUE 255, 248-49 (I. Hont & M. Ignatieff eds. 1983) ("[I]n republican thinking . . . the rights exist for the sake of the equality and the virtue which is its expression, not the other way round.").
izes the tradition at its best. It is also true that extension of the circle of citizens to encompass genuine diversity greatly complicates republican thinking about the relation between rights (or law) and politics. For if republican jurisprudence depends on jurisgenerative politics, jurisgenerative politics in turn seems to depend on the existence of a normative consensus that can hardly survive the diversification of the political community by inclusion of persons of widely and deeply differing experiences and outlooks.46

What, after all can jurisgenerative politics be, if not a process of disclosing a latent, pre-existent, actual societal consensus respecting the right terms of social ordering?46 What are the social conditions of such an effective, pre-existent consensus? Historically, those conditions have been conceived as devices for avoiding or denying plurality in the political sphere, usually involving some combination of political hierarchy, civic regimentation, and organicist culture.47 Modern American political culture is militantly anti-organicist, committed to political democracy, hostile to social-role constraint, and broadly reconciled to deep and conflictual diversity of social experience and normative perspective.48 If any social condition defines modern American politics, plurality does. How, then, might modern American politics be jurisgenerative? What is it, in particular, that we might think that could make a jurisgenerative virtue of plurality?

Perhaps the answer is that republican constitutionalism as I have presented it is just not possible any more, or for us: either not at all (that is, its possibility depends on false or incredible assumptions about social facts), or only on conditions of social ordering or control that are too onerous or repellent to accept.49 Such a demonstration I would regard as neither a refutation of this essay nor a sign of its failure; if republican constitutionalism isn’t possible for us then it isn’t, and we may as well know plainly on what rock our ship has for some time been foundering.

If I have not grossly misread the aspirational content of American constitutional discourse, expressed in its organizing tension of self-rule and law-rule, denials of republican constitutionalism’s modern possibility will

48. This assessment is generally borne out by R. Bellah, supra note 4. But see id. at 277 (people realize that “though the processes of separation and individualization were necessary to free us from the tyrannical structures of the past, they must be balanced by a renewal of commitment and community if they are not to end in self-destruction”).
49. See, e.g., Zuckerman, supra note 23, at 95–100 (arguing that specialization of life in modern “technological order” is at odds with “the human integrity at the heart of Madisonian assumptions,” is “antithetical to the classical conception of self-government,” and “precludes . . . the informed and active citizenry whose part in the political process the framers presupposed”).
at any rate not be lightly entertained. The next three parts of this essay are, accordingly, devoted to the “deduction” of a set of understandings capable of sustaining that possibility as a credible aspiration worthy of a modern, plural society. In Part II, I consider whether the republican synthesis of self-rule and law-rule is sustainable strictly within the understanding of modern pluralist political science according to which all social interaction is insuperably private-regarding or strategic; I conclude that it is not. In Part III, I consider whether the synthesis is sustainable on the classical American understanding—that of Federalist No. 78, as recently refurbished by Bruce Ackerman—according to which periodic, exceptional episodes of relatively public-regarding popular politics issue in higher-law declarations that become and remain fixed as constitutional-legal authority until revised by another such episode. Again, I conclude that it is not. In Part IV, I offer a more thoroughly dialogic and non-authoritarian conception of constitutionalist practice—one that responds affirmatively rather than negatively to social plurality, and also one in which courts play an active and generative role. In developing the dialogic conception I both draw upon the literature of the classical republican tradition and also trace some connections between it and contemporary work on both legal interpretation and the theory of self-government. Finally, in Part V, I return to Bowers v. Hardwick and sketch the republican-inspired argument for an opposite result in that case—an argument whose familiar feel I hope will help provide some sense of validation for the whole effort.

II. CONSTITUTIONALISM VS. PLURALIST POLITICAL SCIENCE

A. Pluralism

By “pluralism” here I don’t mean the acceptance and celebration of diversity within a society. It should already be plain that nothing could be further from the aim and spirit of this essay than to question the value of pluralism in that sense. Rather, I mean by pluralism the deep mistrust of people’s capacities to communicate persuasively to one another their diverse normative experiences: of needs and rights, values and interests, and, more broadly, interpretations of the world. Pluralism, that is, doubts or denies our ability to communicate such material in ways that move each other’s views on disputed normative issues towards felt (not merely strategic) agreement without deception, coercion, or other manipulation.  

50. See, e.g., S. Benhabib, supra note 30, at 313–15, 320–21, 332–36 (holding open communicative possibility that pluralism denies, while noting situations—involving “those who feel that the reconciliation in social life has been achieved at their expense”—in which nature of conflict between parties is such that they cannot mutually recognize each other as “discursive partners,” and thus can have no dialogue); J. Buchanan, Freedom in Constitutional Contract 11–24 (1977) (expressing pluralist attitude); Minow, The Supreme Court 1986 Term—Foreword: Justice Engendered, 101 Harv. L. Rev. 10, 57–60, 70–74 (holding open communicative possibility in specific context of constitutional adjudication).
follows that in pure pluralist vision, good politics does not essentially involve the direction of reason and argument towards any common, ideal, or self-transcendent end. For true pluralists, good politics can only be a market-like medium through which variously interested and motivated individuals and groups seek to maximize their own particular preferences. Yet pluralist politics, in short, seems the negation of jurisgenerative politics.

Yet the pluralist picture of politics as market cannot do without higher law. From the pluralist standpoint, constitutional law is to politics what private law is to free-market activity: a body of governing rules that stands outside the process, conferring upon the process not only its intelligibility but also its beneficence—not only its structure and order but also its promise of safety, fairness, and utility for participants. I want now to consider whether pluralism unmodified can explain the origins and normative authority of the Constitution, without contravening one or the other of the underlying commitments of constitutionalism, that is, without violating either self-government or the government of laws.

B. Self-Limiting Power, Higher Law, and Jurisgenesis

The first requirement for any such explanation is that it make sense of the centrality and constancy in American constitutional practice of the remembrance of its origins in public acts of deliberate creation; for that remembrance both deeply reflects and deeply informs American understanding of what it means for a people to be both self-governing and under law. It is, accordingly, an accepted fact of American constitutional history that the founders, republically sensitive to the American ideology of popular self-government but also intent upon curbing popular power for the sake of liberty (or, it may be, for the sake of interest), conjured with

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53. See, e.g., S. Levinson, supra note 28, at 180-94 (on "adding one's signature to the Constitution"). Doubtless one can envision the possibility of a constitutional practice evolving without benefit of focal, human deliberation and evolving, moreover, in such a way as to satisfy the demand for a rule of law—and even also, in a certain, attenuated sense, the demand for self-government. Hayek, for example, explains law as the progressive codification of the informally originating and accumulating moral experience and practice of a successful civilization. The result could be described as a kind of behind-our-backs self-government: the law would be "ours" although we never deliberately gave it to ourselves. See 1 F. Hayek, LAW, LEGISLATION AND LIBERTY: RULES AND ORDER (1973); 3 F. Hayek, LAW, LEGISLATION, AND LIBERTY: THE POLITICAL ORDER OF A FREE PEOPLE 153-76 (1979). That is not, however, how American constitutional practice professes to understand itself. Rather, our practice insistently traces its origins to deliberate human action. See, e.g., 2 J. Wilson, THE WORKS OF JAMES WILSON 762 (R. McCloskey ed. 1967) ("The United States exhibit to the world the first instance . . . of a nation . . . assembling voluntarily, deliberating fully, and deciding calmly, concerning that system of government, under which they would wish that they and their posterity should live.").
the notion of popular sovereignty in order to produce the magic of power binding and limiting itself. In the most extreme account, the founders induced the popular sovereign to recognize itself for the one-time purpose of legislating its own irrevocable future disappearance from the scene. Less luridly, we think of the founders envisioning the people both constituting themselves as sovereign and, by that same self-constitutive act, entrenching substantive limits on the reach of their own sovereignty, thereby demarcating spheres of private right into which they, the people acting collectively through the agency of their government, might never intrude for the duration of the entrenchment.

The strategy of entrenchment thus implies—at least for pluralists—the radical separation of law from politics. Granting that the constitutionally entrenched law of a self-governing people must originate in popular politics, if that law is also to serve the idea of an effectively self-limiting political will, then that law, once enacted, must immediately abscond from politics to higher ground. It must become an autonomous force against politics, a force elaborated through its own nonpolitical modes of reason by its own nonpolitical, judicial organ. Again we find the republican problem of law-politics circularity lying at the core of American constitutionalism.

While there may be some semblance of mystery here, there is none to which Publius is not equal, by the stroke of Federalist No. 78. At the constitutional moment, We The People establish our own sovereignty by legislating to ourselves a supreme law. We thereby create and authorize certain executive and sub-legislative agencies to act, subject to that law’s limitations, on various matters of concern to Us, and also certain judicial agencies to enforce those limitations on Our behalf. This Publian reconciliation of people-rule with law-rule obviously reposes on a belief that a political process—specifically, the constitution-making process of We The People—can produce a normative doctrine that commands respect as law. The question now before us is whether it is possible to envision that constitution-creating political process strictly within the terms of pluralist political psychology, without contravening one or the other of our

55. See Miller, supra note 23.
58. See supra text accompanying notes 25–29.
59. See J. Nedelsky, supra note 56, on “the irreducible problem of a government setting and enforcing its own limits” (manuscript at 1–8), and “the dilemma of self-limiting government—of the political entity requiring limits being the one to set those limits” (manuscript at 1–11).
60. The Federalist No. 78 (A. Hamilton).
61. “Publian” is, I believe, an Ackermanian coinage. See Ackerman, supra note 5, at 1023 n.17. For another contemporary strong reminder of the Publian answer, see Amar, Of Sovereignty and Federalism, 96 Yale L.J. 1425 (1987). For the historical necessity and invention of popular sovereignty theory, see G. Wood, supra note 3, at 462–63, 530–32, 599–600.
constitutionalist premises—either the government of laws or popular selfgovernment. Can pluralist political science account for the possibility of jurisgenerative politics that lies at the problematic core of American constitutional thought?

C. Pluralist Higher Law: "Political" or "Metaphysical"? 62

The question here is not whether the Constitution's content is well explained, in the sense of rationally justified, as having been aptly devised for a country whose future politics were expected to be pluralist in character. Instead, it is whether and how the legitimate authority—the "sense of validity"—of the political event consisting of the Constitution's enactment might be brought within the terms of pluralist explanation.

Pluralist-inspired rationalizations of constitutional content are certainly not unknown to the literature. 63 All such accounts have at their core a line of argumentation designed to show something like the following: Given the various, partly complementary but partly conflicting, pre-political aims and interests of the individuals concerned, and given also the inevitably competitive and strategic motivational realities of social (including political and economic) interaction, 64 it is rational for everyone concerned to prefer the constitution in question to the next best practically attainable alternative. 65 Such arguments are thus based on a set of characteristically pluralist premises, some of which are descriptive or social-scientific in content, while others are normative or philosophical insofar as they posit a particular notion of rationality rooted in a certain conception of the self, its ends, and its relations with others. 66

Insofar as such an argument stands outside of actual, political history, it


63. See, e.g., R. Epstein, Takings: Private Property and the Theory of Eminent Domain (1986); Epstein, supra note 28; Macy, Competing Economic Views of the Constitution, 56 Geo. Wash. L. Rev. 50 (1987); Posner, supra note 18, at 5–19. Pluralistic justificatory accounts of constitutional content may also be constructed out of such large and notable (and otherwise diverse) works of political and constitutional theory as J. Buchanan & G. Tullock, supra note 52; J. Ely, Democracy and Distrust: A Theory of Judicial Review (1980); and J. Rawls, A Theory of Justice (1971).

64. See supra text accompanying notes 50–51.

65. Such an account might point to (i) the overwhelming productivity advantages attributed to capitalist (competitive, market-based) economic organization; (ii) a perceived dominance (at least, or especially, in a successful capitalist society) of private-regarding political motivations over public-regarding ones; (iii) deep diversity and conflict among the values and self-perceived interests of citizens and factional groups (at least, or especially, in a modern capitalist society); and (iv) the resultant dangers of grievous oppression, exploitation and waste inherent in majoritarian politics unless effectively regulated by a protective constitution. A pluralist constitutional explanation might undertake to show that on such a set of assumptions, a chief virtue of the constitution in question is its expected effect of constraining private-regarding political motivations into simulatedly public-regarding channels, through both its structure and process rules for majoritarian legislative action, and the substantive limits it sets for such action. See, e.g., Macy, supra note 63, at 54–59, 71–76; Epstein, supra note 28.

has a transcendental (or what Rawls calls a "metaphysical") character.\(^6\)

Taking its scientific and philosophical premises as given, the argument's gist then is that each person, whether she knows it or not, ought to accept the law in question as conformable to some assertedly objective notion of reason, nature, fairness, utility, or other criterion of rightness. For example, the contention may be that the law ought to be accepted by everyone because it would be accepted by strategically motivated, rationally self-regarding social contractors hypothetically abstracted—or imaginatively separated by a "veil of ignorance"—from their actual worldly situations and perspectives.\(^6\)

No such purely transcendental argument can by its own force confer upon any constitution or other law the validity of self-givenness.\(^9\) Lacking actual societal consensus on its premises both descriptive and normative, such an argument by itself does nothing, from a republican standpoint, to remove the law it rationalizes from the long list of instances of government by some "men" (those who accept the argument's premises) of others (those who reject those premises).\(^7\) Whatever kind of authority a law may possess by force of transcendental justifiability, it is not the authority of self-government. In order to approach republican validation of a law, justificatory argument must at least begin to explain how that law might have been actually regarded by the people subject to it, in all their actual social and experiential situations, as deserving acceptance by them.\(^7\)

Perhaps it is possible by historicization to convert to such purposes what first appears as a transcendental justification.\(^7\) For example, one

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67. See Rawls, supra note 25, at 223.
70. See S. Benhabib, supra note 30, at 313–14; Rawls, supra note 25, at 225–26. This is not to deny that "hypothetical abstraction about what individuals could accept is [capable] of illuminating moral responsibilities or rights," Allen, Taking Liberties: Privacy, Private Choice, and Social Contract Theory, 56 U. Cin. L. Rev. 461, 489–90 (1987), or at least of clarifying controversies about those matters.
71. See S. Benhabib, supra note 30, at 310–11, 341–42.
72. See Rawls, supra note 25, at 231 (seeking to "conceive how, given a desire for free and uncoerced agreement, a public understanding could arise consistent with the historical conditions and constraints of our social world"); Richards, supra note 2, at 820.

The argument I sketch here on behalf of the possibility of pluralist jurisgenesis is adapted from
might try to show that the actual historical conditions under which people had to decide whether to approve our Constitution approximated a hypothetical "veil of ignorance";\(^73\) that the actual ratification procedures approximated consensual approval;\(^74\) and that the requisite consensus was actually obtained by the use of argument to convince voters that the proposed Constitution would indeed serve their several and various, privately conceived interests better than any available alternative.\(^76\) To show that such an account could possibly succeed would apparently be to establish the conceptual possibility, at least, of describing a jurisgenerative political process without ever stepping outside the terms of pluralist political psychology.

We have already noted, however, that the success of any such account depends on giving credible content to the notion of everyone's coming to accept, as his or her own, all the normative and scientific beliefs underlying the supposedly persuasive demonstration that this is the right or the best constitution from anyone's private-regarding standpoint. It is obvious that not nearly all Americans have ever deeply agreed on any set of beliefs capable of supporting any such demonstration. Perhaps we can imagine people being persuaded to accept the requisite beliefs \textit{arguendo}, as suitable to the immediate, urgent, practical work of resolving upon some constitution, while continuing to doubt or deny their deep truth (or rightness, or inevitability).\(^78\) But at just that point in our imaginings, the ethos of the ratification debates would have passed from pluralist to republican.\(^77\) We would be envisioning some participants appealing to others to agree either that (i) the others, allowing for their differences in needs and outlooks, have what they ought for their own sakes to regard as good reasons for adopting, at least provisionally, the assumptions (however competitivist) and norms (however calculative) presupposed by the pluralist rationalization of the constitution's merit from everyone's standpoint, or else that (ii) due consideration for the overriding interest of "the whole" requires that they do so. Participants, then, would be regarding themselves and each other as arguing sincerely on behalf of one another or of every-

\(^73\) See Macey, supra note 63, at 72–75. Macey in effect suggests that the veil of ignorance was simulated by a combination of two factors: (i) the proposed Constitution's having been cast in the form of general-structural (as opposed to policy-specific) provisions whose long-range consequences for specifically partisan interests (as opposed to general interests in social order and prosperity) were virtually impossible to predict, and (ii) the pressure for concession to the demands of general order and prosperity, and to the vital interests of others, exerted by awareness of the super-majoritarian, quasi-consensual ratification procedure. I think that any reliance on the second of these factors would take Macey's account of the Constitution's "public-regarding" origins and character beyond the limits of strictly pluralist explanation, into republican territory. \textit{See infra} text accompanying notes 76–78.

\(^74\) See Macey, supra note 63, at 76, 79.

\(^75\) See id. at 77–79.

\(^76\) See Rawls, supra note 25, at 229–30, 245–46.

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one, or as each adopting the interest of the whole as his own interest—an understanding that certainly seems confirmed by much of the actual rhetoric of the debates.

Such a round of persuasive arguments and discussions seems inconceivable without conscious reference by those involved to their mutual and reciprocal awareness of being co-participants not just in this one debate, but in a more encompassing common life, bearing the imprint of a common past, within and from which the arguments and claims arise and draw their meaning. The persuasive character of the process depends on the normative efficacy of some context that is everyone's—of the past that is constitutively present in and for every self as language, culture, worldview, and political memory. Is this not, for example, how we almost irresistibly recall successive generations of Americans arguing to each other that “we” are already committed to religious plurality, toleration, and privacy—and by extension to some broader if still limited libertarian principle—by common narratives of refuge explaining how “we” came to be here, in this country?

What we thus imagine, remember, and chronicle is republican political conversation.

D. Republican Jurisgenesis: A Politics of Law

Jurisgenerative political debate among a plurality of self-governing subjects involves the contested “re-collection” (in Drucilla Cornell's telling phrase) of a fund of public normative references conceived as narratives, analogies, and other professions of commitment. Upon that fund those subjects draw both for identity and, by the same token, for moral and political freedom. That fund is the matrix of their identity “as” a people or political community, that is, as individuals in effectively persuasive, dialogic relation with each other, and it is also the medium of their political freedom, that is, of their translation of past into future through the dia-

78. See, e.g., The Federalist passim.
79. See R. Bellah, supra note 4, at 281–82; B. Fay, supra note 69, at 160–61, 163–64.
80. See, e.g., McGowan v. Maryland, 366 U.S. 460, 461, 463–66 (1961); Everson v. Board of Educ., 330 U.S. 1, 8–16 (1947); Cover, supra note 29, at 26–29 (quoting and discussing amicus briefs filed on behalf of Mennonites in Bob Jones Univ. v. United States, 461 U.S. 574 (1983), and on behalf of the Amish in Wisconsin v. Yoder, 406 U.S. 205 (1972)); cf. Rawls, supra note 25, at 225, 228–29, 240–42, 249 (arguing thusly to us, now); Cover, supra note 29, at 4–5 (“For every constitution there is an epic . . .”).
82. Hanna Pitkin endorses this view: “We are human selves, capable of choice and action, precisely insofar as we are part of a human culture which has, in our time and in us, a specific, determinate form that cannot be wished away but must be recognized if we are to act.” H. Pitkin, supra note 31, at 279 (offering “republican interpretation” of thought of Machiavelli); see also M. Sandel, Liberalism and the Limits of Justice 179–83 (1982) (affirming relation between moral freedom and socially and historically situated nature of self).
logic exercise of recollective “imagination.” The republican idea of political jurisgenesis thus presupposes (in what might be called a transcendental moment of republican constitutional thought) that such a fund of normatively effective material—publicly cognizable, persuasively recollectible and contestable—is always already available.

Interestingly, the idea of such a fund, together with that of the persuasive process of its contested recollection, seems all but indistinguishable from one of our most influential contemporary conceptions not of politics but of law. Ronald Dworkin’s linked notions of law “as integrity,” of law as the medium of the community’s constitutive commitment to “consistency in principle” in its treatments of its members, and of law as the “personification” of the community itself (that is, as the institutional manifestation of the political community’s existence and identity as such) all emphasize law’s historical aspect. They all present law as the institutionalized form of self-consciousness on the part of community members about their situatedness in a common past, required by a conception of personal and political freedom that involves our continuing to be ourselves even as we reconsider what we are and ought to be about. At the same time, Dworkin’s insistence on the bottomlessly interpretive nature of law, on the pervasively political character of legal interpretation, and on the necessity of political-moral choice that befalls judges adjudicating “hard” cases, reminds us of law’s self-revisionary aspect, echoing the self-critical dimension of moral and political freedom. Perhaps it should come as no surprise that what appears under the name of politics in this essay’s republican-inspired account of the validity of law should appear under the name of law in another’s study of political legitimacy from the standpoint

83. Cornell, supra note 81, at 1204.
84. See R. DWORKIN, LAW’S EMPIRE 348 (1986) (“Hercules interprets not just the statute’s text but its life, the process that begins before it becomes law and extends far beyond that moment.”); cf. B. Fay, supra note 69, at 174:

The understanding which we can have of ourselves is always ‘in the middle of the way’: there are no absolute beginnings and absolute endings. . . . This is because we are always interpreting ourselves in the light of anticipations of what we will do and what the outcomes of this activity will be, and because we are always interpreting our deeds and thoughts in light of our present understandings—understandings which themselves are always changing in the course of our own and others’ history.

86. See id. at 62–68 (interpretive nature of law), 73–76 (political character of legal interpretation), 87–93 (political choices), 189 (self-revisionary aspect), 359–60 (interpretive nature of law), 413 (describing law’s role in constructing new community by helping old community revise itself); see also Dworkin, Law as Interpretation, 60 Tex. L. Rev. 527 (1982) (political character of legal interpretation). Cornell’s critique of Dworkin helps us retrieve this reminder from partial obfuscation by the lingering remnant of authoritarianism (or “positivism”) in Dworkin’s jurisprudence. See Cornell, supra note 81, at 1141. Lipkin, Conventionalism, Pragmatism, and Constitutional Revolutions, 21 U.C. Davis L. Rev. 645, 731–32, 753, 757–60 (1988), denies the compatibility of Dworkin’s theory of law as integrity with the transformative aspect of constitutional adjudication as Cornell and I both conceive of it. See infra notes 145–47 and accompanying text.
of jurisprudence. We already knew, after all, that republican constitution-
alism implied a politics of law.\textsuperscript{87}

So what began as pluralist constitutional explanation has now ended by
returning us to the indispensable premise of Publian history: that Amer-
icans once rose to the republican achievement of popular self-creation—of
recollecting themselves as a people—through a politics of partial self-trans-
scendence and of law.

Once, however, is hardly enough.

III. POPULAR AUTHORITARIANISM

A. Founders and Citizens: Of Constitutional Time and Alienated
Authority

1. Founders

"Proclaiming its desire to ‘secure the Blessings of Liberty to ourselves
and our Posterity,’ the Constitution took the liberty of speaking for that
posterity."\textsuperscript{88} Such authoritarian posturings by American founders and
their reflection, on occasion, by a respectful judicial posterity are, on one
view of the tradition, a classical republican reminiscence. For there is no
denying that the tradition has its authoritarian side, symbolized by the
classical republican figure of the heroic Founder or Legislator;\textsuperscript{89} the
historically singular figure who by extraordinary force of intellect, will, and
personality has succeeded in imposing upon a turbulent and endangered
country a political regimen, in the form of a constitution, so designed that
faithful adherence to its precepts will tend to reproduce the civic virtue
required to sustain that very adherence.\textsuperscript{90} The myth of the Founder ap-
parently describes an ideal history of the republic in which there was and
will be only one act of political-moral originality; in which all the political
freedom belongs for all time to a single heroic individual, or perhaps gen-
eration;\textsuperscript{91} and in which the only act of political valor or worth remaining

\textsuperscript{87} See supra text accompanying notes 39–43.


\textsuperscript{89} See, e.g., H. Pitkin, \textit{supra} note 31, at 52–55, 68–69; J. Shklar, \textit{Men and Citizens: A
Study of Rousseau’s Social Theory} 165–69 (1969).

\textsuperscript{90} See H. Pitkin, \textit{supra} note 31, at 75–77; see also Appleby, \textit{The American Heritage: The
Ct. 849, 864 (1988) (Scalia, J., dissenting) ("The fostering of an intelligent democratic process is one
of the happy effects of the constitutional prescription [of compensation for property taken]—perhaps
accidental, perhaps not."); R. Epstein, \textit{supra} note 63, at 344–46.

\textsuperscript{91} See H. Pitkin, \textit{supra} note 31, at 79:

The Founder . . . must generate in his "sons" . . . piety toward his initiative. He must be the
very opposite of a parrricide because he must embody filial piety for them to emulate. And he
must slay his sons because if they sought to be fully alive and autonomously follow his exam-
ple, no lasting institution would be constructed by him.

This is Pitkin’s rendition of the lesson drawn by Machiavelli from Livy’s account of the public execu-
tion of the rebellious sons of Junius Brutus, founder of the Roman republic, over which their father
presided. See id. at 59–61; N. Machiavelli, \textit{Discourses on the First Ten Books of Titus
to the denizens of posterity is, from time to time, when by fault of corruption things threaten to fall apart, to assert a grip on themselves and, in the Machiavellian formula, return the country to its origins by rededicating themselves to the founding principles.

2. The Question of Constitutional Duration

Consider, now, the American founders' debate over the permanence of their own foundations. Restaging that debate, it is tempting to cast Jefferson as Pluralist, playing opposite Madison's Republican. Jefferson's protest against the inter-generational tyranny of constitutional permanence seems most compelling on a view of constitution-making as just another round of pluralist politics-as-usual, while Madison's protest against the disruptive effects of repeated future constitution-making might be taken to valorize the Constitution—"this Constitution"—as the exceptionally meritorious product of a peculiarly virtuous historical event.

Consider, however, a somewhat different interpretation of the dispute. We have seen that for pluralist political science—based as it is on a political psychology that cannot entertain the possibility of jurisgenerative politics—the only form of discursive validation available for a constitution is the metaphysical-not-political appeal to rationality or natural law: that is, the appeal to that constitution's just being, as a demonstrable matter of objective reason, the right constitution for a country such as ours is fated to be, populated by folk such as we by nature are. On this view of the matter, Madison's sense of the Constitution's exceptionality, inspiring his defense of its permanence, would rest not on its special provenance in jurisgenerative politics but on its special conformity to right reason. For insofar as a law's special authority is felt to derive from its informing reason, that law presumably ought to be left unmolested until, if ever, it is determined (by whoever or whatever we imagine determining these

92. See, e.g., N. Machiavelli, supra note 91, at 385–90 (bk. II, ch. 1).


96. See supra text accompanying notes 62–71. By "discursive validation" I mean reasons for respecting the Constitution as law other than the brutally positivistic reason that the Constitution just is the law in force. See supra notes 30, 53.
Conversely, to trace a constitution's validity as the people's law to its republican political origins would evidently imply that constitution's impermanence. For we have seen that the requisite context of jurisgenerative political conversation is a prior deposit of normative references composing the imprint of a people's history as a normatively self-directing political community, and of course the history of a contemporary people can never have been completely contained in the history of an ancestral generation. A constitution cannot retain its claim to republican validity without changing in response to historical change in the people's composition and values, its identity and "fate as a People." 

3. Citizens

Taken as a self-sufficient emblem of the republican constitution, the figure of the once-and-future Founder would thus be both puzzling and disheartening—an epitome of both alienated authority and political-moral stasis, in both respects antithetical to a modern sense of personal and political freedom. Happily, the tradition's figurative vocabulary supplies the additional component needed for a more satisfactory view in its image of the Citizen.

Granted, the traditional republican image of the Citizen contains its

97. Madison expressed himself on this point with an easy and elusive ambiguity—nicely echoed in David Richards' reprise of Madison's view. See Richards, supra note 2, at 818-20. In The Federalist No. 49, Madison presented three arguments, in ascending order of importance, against Jefferson's proposal for constitutional conventions upon the call of any two of the three branches of the central government. See T. Jefferson, supra note 93. First, frequent proposals for repairing the Constitution would imply its imperfection and thereby tend to undermine its veneration by public opinion. "In a nation of philosophers, ... [a] reverence for the laws would be sufficiently inculcated by the voice of an enlightened reason. ... In every other nation, the most rational government will not find it a superfluous advantage to have the prejudices of the community on its side." The Federalist No. 49, supra note 23, at 315 (J. Madison). Second, the successful round of constitution-making recently completed in America occurred in conditions of emergency that tended to suppress the worst of public passions and stimulate civicly virtuous devotion to the work—a set of conditions that may not attend future constitution-making. Id. Third, "the decisions which would probably result from such appeals would not answer the purpose of maintaining the constitutional equilibrium of the government." Id. For various reasons, Madison expected that "the passions, ... not the reason, of the public would sit in judgment. But it is the reason, alone, of the public, that ought to control and regulate the government." Id. at 317 (emphases in original).

98. See B. Fay, supra note 69, at 173;

The narratives intent on illuminating human lives are historically sensitive in that their nature changes in relation to the historically changing circumstances of both the narrators and the narratees. This historical sensitivity means that the ideal of a perfectly clear self-knowledge deriving from knowing 'the genuine narrative' of one's life is not compelling. Who humans are and what roles they play are continually shifting because of their ever-changing location in history and because of the ever-changing perspective of those trying to tell their story.

99. Ackerman, supra note 11, at 1180; see Brennan, supra note 28, at 438; Lipkin, supra note 86, at 706-11.
own ambiguity. But from a modern standpoint, it seems a disservice both to republican thought and to ourselves—it seems our failure to extract from that thought the best it has to offer us—to regard the Machiavellian doctrine of return to origins as attributing distinct and complementary kinds of republican virtue to the founder inventing the social order and to the citizens reciprocally submitting. The more challenging reading, recently clarified by Hanna Pitkin’s probing of Machiavelli’s own thoughts on the matter, sees citizens as founders, corruption as alienation of authority, and virtue as the spirit of constitutional renovation. The republican images of founder and citizen may in this way be used to express the generative tension of political freedom. Foundership stands for freedom as security—the security of the people, of their lives and of their society, against annihilation by enemies external and internal: domination, corruption, entropy, chaos. A founding unifies, invents ex nihilo, thrives as authority, requires submission, succeeds by endurance. Citizenship stands for freedom as activity: the constant redetermination by the people for themselves of the terms on which they live together. Citizens are a plurality, appeal argumentatively to available reasons, thrive on contestation, require mutuality, succeed by self-recollection. In sum, the dialectic of foundership and citizenship may be taken as republicanism’s traditional, figurative expression of what I have presented as American constitutionalism’s problematic and dynamic core—that is, its endless interplay between the principles of legality (entailing respect for historical commitment) and self-government (entailing respect for the human capacity for self-renewal).  

100. See, e.g., J. Shklar, supra note 89, at 180-83 (presenting Rousseau’s image of citizenship as epitomizing motivation to abide by founding principles).

101. Pitkin writes: Perhaps one should construe the forgetfulness that gradually corrupts a composite body as reification: a coming to take for granted as “given” and inevitable what is in fact the product of human action. Thus people may come to consider their civic order beyond their choice or control and, therefore, beyond their responsibility, secure without any special effort on their part. Then each may feel free to poach on the public spirit . . . of others, behaving as if someone else were in charge and losing touch with his own stake in public life, [perhaps succumbing to] . . . the existential fear inherent in recognizing the full extent of human responsibility, the fragility of human order and its dependence on our commitment. From that perspective, the return to origins would be a return not to the initial institutions but to the spirit of origins, the human capacity to originate . . . . As Strauss says, Machiavelli eventually reveals that “foundation is, as it were, continuous foundation” and is carried on jointly by many. . . . From this perspective, believing in the superhuman Founder and seeking to imitate him by dutiful obedience rather than by discovering one’s own capacity to found are not merely failures to recognize the actual origins of one’s community and its tradition, but also failures in self-knowledge. H. Pitkin, supra note 31, at 276-78.

102. Again, Pitkin finds the makings of this view in the republican thought of Machiavelli: [I]f the discovery of this capacity in ourselves [to create and sustain civilization] is a self-recognition, it is accompanied by a simultaneous discovery of our particular, historically shaped selves, and the particular, historically shaped way of life of our community. . . . The community, like the choosing self, already exists in its historical particularity. Both can
B. **Periodic Citizenship**

One all-conditioning, prepossessing fact—the fact of history, or temporality—invites us to use sequential alternation to preserve both principles of the republican constitutionalist antithesis. Nothing, it seems, could be simpler: From time to time refoundings occur, and in the wake of each follows a period of law-abiding citizenship.\(^{103}\)

Insofar as our own Constitution expressly contemplates anything like occasional refoundings, it does so in article V. But article V seems, upon consideration, decidedly not a license to refound. If article V seems from one standpoint the Constitution's admission of its own alterability,\(^{104}\) from another standpoint article V seems the Constitution's presumption of its own entrenchment. We might, indeed, regard article V as the epitome of the founding arrogance: the arrogance not just of qualified entrenchment of the founders' ideas about constitutional-legal content, but absolute entrenchment of their ideas about constitutional-legislative process.\(^{105}\)

Bruce Ackerman's elaboration of Publian popular-sovereignty theory is commendable for its special sensitivity to such an encroachment by article V on the preserve of republican citizenship.\(^{106}\) Out of that sensitivity comes Ackerman's insistence upon judicially cognizable constitutional alteration whenever a civically aroused constitutional majority of the people and their leaders have found a way to adapt—or bend, or stretch—the Constitution's institutional forms, especially those providing for the separation of powers (whose use for this constitutional-legislative purpose may be changed, and some changes will be an enhancement of the self, a return to fundamental principles. Becoming aware that one has a choice about one's habits and commitments need not mean abandoning them but may equally well lead to their reendorsement, to holding the same commitments in a new way.

*Id.* at 279.

Pitkin suggests that in a certain equivocation in Machiavelli's account of the history of Florence—between the city's origin as a colonial outpost under Caesarist imperial auspices and its earlier origin as an indigenous Tuscan creation—there is a lesson to be read about an important avenue for self-recollection by citizens: "Perhaps it would be enough—would in important ways even be preferable—to be merely Tuscan and Florentine rather than Roman, to be oneself rather than bound to a mythical hero?" *Id.* at 95; *see also id.* at 259-62. In other words, citizens can redefine their political community by discovering or remembering new or different founders and founding moments. *See infra* text accompanying notes 117-23, 150-56; *see also Minow, supra* note 10, at 1877:

The civil rights movement . . . created a legacy of meanings for the Fourteenth Amendment, reflecting the commitment of civil rights activists and the officials persuaded by them to incorporate elements of the movement into the formal legal system. Invocation of . . . that history can add to the persuasive force [of] rights discourse even when that discourse depends on nothing beyond current and future human choices.

Pitkin argues that such a sequential deployment of the images risks losing touch with citizenship, for reasons that recall the familiar Thayerite objection to activist judicial review. *Compare H. Pitkin, supra* note 31, at 97-98 with J. Thayer, JOHN MARSHALL 106-07 (1901). *See infra note 127* and accompanying text.

*103.* Pitkin argues that such a sequential deployment of the images risks losing touch with citizenship, for reasons that recall the familiar Thayerite objection to activist judicial review. *Compare H. Pitkin, supra* note 31, at 97-98 with J. Thayer, JOHN MARSHALL 106-07 (1901). *See infra note 127* and accompanying text.

*104.* *See Schneiderman v. United States, 320 U.S. 119, 137 (1943)* (relying on Article V to "refute the idea that . . . one who advocates radical changes" in the Constitution cannot honestly swear loyalty to it); S. Levinson, *supra* note 28, at 135-36.

*105.* *See Ackerman, supra* note 5, at 1059-60.

*106.* *See id.* at 1057-63.
bear no more than a remote analogical resemblance to the procedures prescribed for the same purpose by article V) to the conduct of what Acker-
man calls constitutional, and I call republican and jurisgenerative, politics: the mobilization, formation, and expression of a public-regarding, popular determination to legislate a “decisive break with [the country’s] constitu-
tional past.” Ackerman’s is the most deeply popularist, and genuinely republican, constitutional theory now going. In its popularism lies its appeal; but therein also lies, I am afraid, its danger from the standpoint of a concern about the excessively authoritarian jurisprudence of *Bowers v. Hardwick*. From that standpoint, the objection to deep popularism as a validating constitutional premise is that when translated into the form of a historical sequence, that premise finds expression—at least in the current Ackermanian version—as authoritarian constitutional jurisprudence.

Let us consider what motivates Ackerman’s inquiry into the possibility of non-formal, “structural” amendment of the people’s Constitution. Ack-
erman asks how one might justify historic Supreme Court decisions that have given effect to constitutional change in what he takes to be a progressive direction. Specifically, he seeks a way of justifying these decisions by arguments that maintain the republican sense of the validity of constitutional law not only as popularly self-given but also as always above and prior to arbitrary, personal will or preference. Accordingly, he demands arguments that steer clear of the “legal nihilism” courted by readings of constitutional text and precedent that purport to be interpretations but are so “fast and loose” that they smack of interpretative fraud.

Without assistance from the notion of informal amendment, Ackerman believes, we cannot explain the legitimacy of judicial revolutions like the New Deal Court’s wholesale rejection of *Lochner* -era jurisprudence in favor of judicial affirmation of the constitutional rectitude of the welfare state, and the Warren Court’s detection of thitherto unrecognized mean-
ings in “the equal protection of the laws.” This is so, in Ackerman’s view, because only the people speaking in their higher law-making modal-
ity—only the legislative utterance of a “mobilized constitutional major-
ity”—can authorize a sharp judicial departure from a prior constitutional-legal understanding that itself must be taken, for the sake of its own some-
time legitimacy, as having emanated from the still prior law-making pro-
nouncements of a civically mobilized citizenry. Without an actual, inter-
vening event of jurisgenerative popular politics, Ackerman can see no solution to what he perceives as an otherwise insoluble problem of legiti-
macy: the legitimacy, that is, of the judicial creativities of both the New Deal and the Warren Courts, which he believes must, without his solution

107. Ackerman, supra note 11, at 1172; see also Ackerman, supra note 5, at 1053-56.
108. See Ackerman, supra note 5, at 1070.
109. Id. at 1053, 1070-71.
of recognizing intervening constitutional amendments authored by the people informally, stand condemned as constitutionally unauthorized judicial usurpations of democratic authority.

Now consider what Ackerman's position says about how the Supreme Court should dispose of Bowers v. Hardwick. Straightforwardly, it implies that the judiciary can never take upon itself the instigation of a constitutional moment by proposing, in the form of a renovative judicial decision, a "decisive break" with the people's prior pronouncements on political morality. In Ackerman's theory, the judiciary is cast as the agent of our constitutional past. What is more to the point, Ackerman, evoking the nihilist menace, leaves us to infer that as the faithful agent of our past the judiciary cannot also be a spontaneous agent of our future. The judiciary appears in the theory as the specially entrusted agent and organ of the people's past law-giving, as such the special guardian of the very principle of legality—of its credibility—against corrosion by suspicious interpretation or pseudo-interpretation. It would seem that a court outspokenly "recollecting" the authorities with a conscious eye on the future would be dangerously consorting with "legal nihilism." From that it would seem to follow that the judiciary's role in the process of constitutional change can only be benedictory, never prophetic. A justice conscientiously committed to that theory must have, so far as I can see, a hard time escaping the authoritarian logic of Justice White's majority opinion in Bowers. Moreover, that condition must last until, if ever, there occurs a nationally organized, popular political mobilization that can fairly be said to have resolved the issue of political morality presented in that case. Hardwick must abide an historically concrete occasion of constitutional politics, articulated in highly visible and contentious official (or better, for Ackerman's theory, debatably official) acts of the legislative and executive branches (perhaps enriched and propelled by backward-looking judicial reactions thereto), capable of engaging a decisive popular response to his appeal to political freedom.


111. In Ackerman's New Deal paradigm of structural amendment, the Court's crucial role is precisely that of putting up a very public and articulate defense of the old order against the futuristic pretensions of the political branches—a barrier of resistance for the political branches to overcome, if they can, by successfully evoking a decisive popular endorsement of their assault on the Court's guardianship of the hitherto established understanding. Only after such a popular mandate has been delivered does the acquiescent Court officiate over the final consolidation of the change. See Ackerman, supra note 5, at 1153-57; Ackerman, supra note 11, at 1174. When Ackerman does expressly contemplate the possibility of "Court-led constitutional transformation," he restricts that possibility to the case in which an already successfully consummated series of "transformative" judicial appointments has disclosed a popular will in favor of change, leaving us to puzzle over what he means in this context by judicial leadership. See Ackerman, supra note 11, at 1172 n.11 (emphasis in original).

112. Ackerman declines to suggest that the events surrounding the Senate's rejection of President Reagan's nomination of Robert Bork to a seat on the Supreme Court might amount to that occasion,
In his perception that the judicial creativities of the New Deal and Warren Courts present a legitimacy problem otherwise insoluble, Ackerman stands on common ground with Robert Bork. He shares Bork’s insistence on the authoritarian character of the law—on the anteriority to the case and exteriority to the judge of the arguments that determine judicial action. Ackerman shares with Bork the view that judicial power cannot be legitimate unless its exercise consists, in the final analysis, of the translation of directions uttered in the past by someone else—the people acting in a suitably organized and galvanized jurisgenerative political modality.

As we know, actual episodes of such constitutional politics—of republican popular mobilization—have been and probably must forever be rare on the national scale. In effect, then, Ackerman seems to condemn the history of the country’s normative contention to the pattern once imposed by Thomas Kuhn (on what I suppose may be called the vulgar reading of Kuhn’s view) on the history of science: we have extended periods of normal practice punctuated by occasional moments of revolutionary up-

rather construing the Bork nomination as a failed occasion of conservative constitutional transformation. See id. at 1178.

Against my pessimistic appraisal of Ackerman’s theory’s implications for the Bowers case, it might be urged that the relevant values endorsed by American constitutional moments past are not limited to the homophobic and moral-majoritarian values inspiring the majority and concurring opinions in that case, but include also the libertarian, tolerationist, and anti-arbitrariness values inspiring the dissents. I certainly agree that the tradition can actively be read to contain all of these values. See infra text accompanying notes 175–80. The difficulty remains, however, that Ackerman has presented his constitutional theory as specifically meant to dissuade judges from challenging currently prevailing constitutional-legal common sense with intellectually strenuous readings of the constitutional past.

It seems that such dissuasion must be what Ackerman intends by his insistence on the extraordinary and episodic character of “transformative” or “constitutional” politics, and on the need for finding such an extraordinary constitutional-political event intervening between (say) Lochner v. New York, 198 U.S. 45 (1905), and West Coast Hotel v. Parrish, 300 U.S. 377 (1937), in order to justify the decision in West Coast Hotel as properly judicial. See Ackerman, The Storrs Lectures, supra note 5, at 1070. It seems no less true of the actual decision in West Coast Hotel than of a hypothetical opposite decision in Bowers that (quite apart from any New Deal “structural amendment”) the American constitutional past contained ample argumentative resources with which to justify that decision and its reversal of Lochnerian conventional wisdom. See, e.g., Holmes, Liberal Guilt, in RESPONSIBILITY, RIGHTS AND WELFARE: THE THEORY OF THE WELFARE STATE (J. Moon ed. 1988); Michelman, supra note 39. What is, however, also plainly true of both the constitutional arguments favoring the Court’s actual result in West Coast Hotel (pace structural amendment) and the arguments favoring an opposite result in Bowers is that these arguments ran or would run strongly counter to contemporarily regnant, conventional constitutional-legal wisdom. They were or are experienced as hard arguments—elaborate, venturous, “fancy.” It must be just such a perception of West Coast Hotel that prompts Ackerman to say that, without help from structural amendment, any attempts to justify the result in that case must be invitations to legal nihilism. But then it is quite unclear how this would be any less true (assuming there is any truth in it) as applied to a hypothetical opposite result in Bowers.

In order to dispel my inference about what his position implies regarding the correct judicial decision in Bowers, Ackerman would at the very least have to speak to the questions of (1) whether and how a “re-collective” (or comparably strenuous) judicial approach to constitutional interpretation might avoid or control the damage consisting of destruction of public confidence in the principle of legality, and (2) how much, if any, risk of such damage is acceptable as the accompaniment of (otherwise welcome) venturous constitutional adjudication. Perhaps Ackerman will in due course address these questions successfully. Or perhaps it will turn out, when he does address them, that he has thus far been too hasty in naming legal nihilism—rather than, say, legal authoritarianism, the equation of legality with instruction-following—as the enemy his theory aims to stay.
Kuhn's normal science is Ackerman's popular-authoritarian law; Kuhn's paradigm shift is Ackerman's "transformative" moment of civically aroused popular politics.

The comparison suggests what is troubling about Ackerman's theory. Kuhn's original statement came in for strong criticism on the ground of its excessively authoritarian rendition of the proprieties of normal-scientific practice, as too unquestioningly deferential to the regnant paradigms. As Kuhn himself has acknowledged, normal-scientific consensus is always in some degree spurious, and normal-scientific practice is always in some degree nurturing the development of its own impending transformation. Science, on this more sensitive account, includes the work of what might be called marginal or deviant practitioners aimed at undermining rather than shoring up the currently dominant worldview. A shift from pre- to post-transformation practice is more like a movement from margin to center—a shift of attention—than it is like the total replacement of one "world" by another. Through the critique of Kuhn, we reach an appreciation of scientific practice as cherishing all moments as potentially transformative, so that it would be anti-scientific to exclude marginal or deviantist investigators, as such, from the precincts of science.

Of course, where Kuhn's topic is the career—not to say the progress—of scientific understanding, Ackerman's is that of political freedom. Whatever difference this makes seems unlikely to help Ackerman. It will not be less strongly said of political freedom than of scientific understanding that all moments are potentially transformative, so that the only way to tell is to try.

To try is precisely to take leave of prior authority and of authoritarian jurisprudence. If Michael Hardwick's case leaves the matter in doubt, Linda Brown's should settle it. Although I suppose one could strain to describe the series of judicial decisions from Brown to Loving as reactively marking and consolidating the "final victory" of a constitutional transformation already effectively wrought by the people, that is not

113. See T. Kuhn, The Structure of Scientific Revolutions (2d ed. 1970). Lipkin, supra note 86, at 734–50, similarly insists on a sharp differentiation between "revolutionary" constitutional adjudication, involving a reversal of some "foundational" constitutional-legal precept, and "normal," intra-paradigmatic constitutional adjudication, and on the impossibility of explaining or justifying revolutionary adjudications—Brown v. Board of Educ., 347 U.S. 483 (1954), is the chief example—without appeal to normative resources "extrinsic to the Constitution" such as a "critical-cultural" or an "abstract" moral-political theory. For this essay's alternative account of Brown, see infra text accompanying notes 117–22, 148–56.

114. See, e.g., Feyerabend, Consolations for the Specialist, in Criticism and the Growth of Knowledge 197 (I. Lakatos & A. Musgrave eds. 1970); Popper, Normal Science and its Dangers, in id. at 51.


116. See, e.g., Feyerabend, supra note 114, at 207–10.


119. See Ackerman, supra note 11, at 1173.
how we best describe these events. Surely the Court’s role in them was more prophetic—even if equivocal—than beneficent.\footnote{120}

The Court did not, of course, prophesy in a vacuum, but rather in a context of changes in self-understanding pursued over the years by Black Americans.\footnote{121} Black Americans, however, were not tantamount to “the people,” and there is no telling how long it would have taken for their new foundations to have risen to the level of constitutional significance for a Court following Ackerman’s argument. Rather, they were, as of 1954, still the marginalized and deviationist cultivators of transformative potential, a potential that both had been developed\footnote{122} and would come to such partial fruition as it has in part through the willing enlistment of the Court. If we imagine the Brown Court acting in accordance with the understanding (to which Ackerman and I are both committed) of constitutional adjudication as always proceeding from within an on-going normative dialogic practice, then that Court’s willingness to be thus enlisted must signify its grasp of the enlists and their work as lying within the bounds, if away from the center, of our then constitutional practice. Thus informed, the Brown Court spoke in the accents of invention, not of convention; it spoke for the future, criticizing the past; it spoke for law, creating authority; it engaged in political argument. In Hardwick’s case the Court did the opposite. It thus did, I have felt bound to suggest, what Ackerman’s theory apparently would have it do.\footnote{123}

IV. TOWARDS DIALOGIC CONSTITUTIONALISM

A. Republican Process and Judicial Role

I launched this essay by suggesting two reasons for trying to refocus constitutional vision on a republican notion of jurisgenerative politics as the crux of political freedom: first, that such a notion would fortify constitutional adjudicators against a liberty-deferring, authoritarian stance towards constitutional law;\footnote{124} and, second, that American constitutionalism requires such a notion to redeem its problematic, dual promise of popular...

\footnote{120. For equivocation, see Brown, 347 U.S. at 494–95 (declining to overrule Plessy v. Ferguson, 163 U.S. 537 (1896), thereby arguably sanitizing Plessy). Perhaps we should say that by this equivocation the Brown opinion augured (as it by the same token recalled) an unfinished emancipation. See, e.g., Crenshaw, supra note 10, at 1332–33, 1333 n.3; Cornell, supra note 81, at 1176–70 (criticizing Brown on this ground as insufficiently prophetic).


123. In his entertaining the possibility of “court-led . . . transformation,” there is indication that Ackerman himself does not accept the attribution of such an implication to his theory. See supra note 111.

124. See supra text accompanying notes 1–5.
self-government and a government of laws. I then developed a certain conception of jurisgenerative politics as an historically situated, recollective process of normative contention; noticed the close resemblance between that idealized account of politics and Dworkin's idealized account not of politics but of adjudication; and contended that no appreciation of jurisgenerative political possibility will drive out constitutional-legal authoritarianism without a further commitment to political jurisgenesis as a constant, not an episodic, activity. How, then, does my work-up of these implications of republican constitutionalism not end by subverting the entire practice of judicial review—implying its total subordination to popular politics—rather than by emboldening the independent spirit in which that practice sometimes is carried on?

Certainly I have ventured far from the haven of Federalist No. 78. Publius envisioned, and Ackerman still explains, the judiciary adjudicating constitutional cases as the vicariate of We The People, the founding authority, during Our long vacations. If now we are to spread founding moments over continuous political time, and if now we are to locate the political virtue of a republicanly self-governing citizenry in its constant cultivation of revisionary potential, then it seems that not only have we lost the explanation for judicial review we thought we had, we have also activated a heavy count against it: the Thayerite objection is now upon us with a vengeance.

The work of John Ely points the way toward one line of response. If republican constitutional possibility depends on the genesis of law in the people's on-going normative contention, it follows that constitutional adjudicators serve that possibility by assisting in the maintenance of jurisgenerative popular engagement. Republican constitutional jurisprudence will to that extent be of the type that Laurence Tribe calls (and criticizes as) "process-based," recalling Ely's well-known and controversial justification of judicial review as "representation reinforcing."

There will, however, remain a difference of substance between Ely's process-based theory of judicial review and the one I have in mind, reflecting the difference between the conceptions of political possibility respectively informing our two accounts—pluralist in Ely's case, republican in mine. Ely's theory would attack Georgia's morality-based justifica-

125. See supra text accompanying notes 29–30.
127. "[T]he tendency of a common and easy resort to [judicial review is] to dwarf the political capacity of the people, and to deaden its sense of moral responsibility" that comes from "fighting the question out in the ordinary way." J. THAYER, supra note 103, at 106-07.
130. See, e.g., J. ELY, supra note 63, at 77–84, 151–53 (presenting Ely's pluralism).
tions for its discriminatory sodomy law on the ground that homosexuals as a group are victimized by societal prejudice denying to their special interests a fair shake in the rounds of give-and-take comprising pluralist politics. That argument has nothing to say against outright rejection of its pluralist premises by Justices disposed—on occasion—toward a republican conception of law as an expression of public values springing from the historically conditioned, normative persuasions of "the people." Such a disposition always lurks in American constitutional sensibility; witness Bowers v. Hardwick. Only a constitutional jurisprudence that takes it seriously can hope to provide effective defense against its popular-authoritarian excesses and perversions. But what, then, would a process-based, republican-not-pluralist constitutional jurisprudence be like?

For the beginning of an answer, we must return finally to the challenge of reclaiming the idea of jurisgenerative politics from its ancient context of hierarchical, organicist, solidaristic communities for the modern context of equality of respect, liberation from ascriptive social roles, and indissoluble plurality of perspectives.

B. Plurality: Public Vice to Public Virtue

Start again with the basal requirement for republican jurisgenerative politics: that both the process and its law-like utterances must be such that everyone subject to those utterances can regard himself or herself as actually agreeing that those utterances, issuing from that process, warrant being promulgated as law. Given the modern supposition of pre-political dissensus, it seems that no set of procedural conditions—no "ideal speech situation"—can suffice to guarantee the requisite validation. Or rather, to speak more carefully, this impossibility obtains as long as we suppose that all of the participants' pre-political self-understandings and social perspectives must axiomatically be regarded as completely impervious to the persuasion of the process itself. Given plurality, a political process can validate a societal norm as self-given law only if (i) participation in the process results in some shift or adjustment in relevant understandings on the parts of some (or all) participants, and (ii) there exists a set of

131. See id. at 162–64.
Legislators may see homosexuals as "different" not out of [prejudice], but on . . . the basis of a morality that treats certain sexual practices as repugnant to a particular view of humanity . . . . Such legislation can be rejected only on the basis of . . . a [substantive] view of what it means to be a person . . . .
133. See supra text accompanying note 32.
134. See supra text accompanying notes 30, 69–71.
135. An "ideal speech situation" is a setting in which everyone, free of domination and false consciousness, speaks out, listens, gives and is given reasons to and by everyone else. See, e.g., J. Habermas, Legitimation Crisis 107–08 (T. McCarthy tr. 1975); T. McCarthy, The Critical Thought of Jurgen Habermas 305–07 (1978).
prescriptive social and procedural conditions such that one's undergoing, under those conditions, such a dialogic modulation of one's understandings is not considered or experienced as coercive, or invasive, or otherwise a violation of one's identity or freedom, and (iii) those conditions actually prevailed in the process supposed to be jurisgenerative.\footnote{137}

Of these three stipulations, the crucial and obviously problematic one is stipulation (ii). To imagine that stipulation (ii) might be satisfied is not, I want now to suggest, necessarily to imagine the possibility of dissolving to the bottom rational (and passionate) disagreements attendant upon perspectival differences.\footnote{138} Perhaps such a final dissolution of difference is not required in order to meet the validity condition that everyone subject to a law-like utterance can actually agree that the utterance warrants being promulgated as law. In speaking of dialogic “modulation” of participants’ pre-political understandings, I have meant to allow—as the American constitutional tradition evidently enjoins us to allow—for the possibility of cases in which validation occurs when participants, rather than “abandoning” their commitments, come to “hold the same commitments in a new way.”\footnote{139}

If gaining a secure grasp on such a possibility stretches to the limits our powers of comprehension, it may help to recall how we have come to be making the attempt. I undertook in this essay to clarify certain conditions of republican constitutionalism’s possibility in a modern, liberal society—to uncover certain beliefs we must hold regarding ourselves, our social relations, and specifically (as it turns out) our capacities for dialogic self-modulation, as long as we profess commitment to both popular self-government and a government of laws. Rather than claiming to establish unconditionally that republican constitutionalism is possible for us, or that we can coherently hold to both commitments, my strategy has been to start with the actual, problematic experience of the dual commitments (I trust that the experience is widely shared by readers) and from it derive a normative idea of dialogic constitutionalism as consistent, at least, with this problematic experience.\footnote{140} That derivation is now essentially com-

\footnote{137. See id. at 312-16.}
\footnote{138. See id. at 230 (accepting limitations on possibility of eliminating disagreements about justice).}
\footnote{139. H. Pitkin, supra note 31, at 279; see also Schneiderman v. United States, 320 U.S. 119 (1943), discussed supra note 104. As an example of this possibility, consider Rawls’ distinctions among three grounds for commitment to a constitutional principle of freedom of conscience—(i) adherence to a particular sect’s tolerationist doctrine, (ii) adoption of a “comprehensive liberal moral doctrine such as those of Kant and Mill,” and (iii) belief that such a principle “expresses[] political values that, under the reasonably favorable conditions that make a more or less just constitutional democracy possible, normally outweigh whatever other values may oppose it”—and his discussion of the difference it makes which ground is operative. See Rawls, Overlapping Consensus, supra note 68, at 9-15; see also H. Pitkin, supra note 31, at 102 (Machiavelli’s equivocation between founders suggests how individuals can experience shift in perspective on their traditions or values without being disloyal to those traditions or values).}
\footnote{140. See supra text accompanying notes 48-49.}
complete, and its crucial result is stipulation (ii). But stipulation (ii), then, does not occupy the status of an independent assertion, standing on its own bottom so to speak, about actual or possible experience. Its status is rather that of an inference about what we have to regard as possible as long as we do not give up the historic American idea of constitutionalism.

What stipulation (ii) apparently describes is a process of personal self-revision under social-dialogic stimulation. It contemplates, then, a self whose identity and freedom consist, in part, in its capacity for reflexively critical reconsideration of the ends and commitments that it already has and that make it who it is.\textsuperscript{1} Such a self necessarily obtains its self-critical resources from, and tests its current understandings against, understandings from beyond its own pre-critical life and experience, which is to say communicatively, by reaching for the perspectives of other and different persons.\textsuperscript{1} If my argument to this point has held together, then these dialogic conceptions of self and freedom are implications of the republican—the American—ideal of political freedom in a modern liberal state.\textsuperscript{1} Thus might a modern republican conception of political freedom make a virtue of plurality.\textsuperscript{1}

C. The Dialogic Forum: Law and Politics, State, and Society

The legal form of plurality is indeterminacy—the susceptibility of the received body of normative material to a plurality of interpretive distillations, pointing toward differing resolutions of pending cases and, through

\begin{itemize}
\item \textsuperscript{141} See S. Benhabib, supra note 30, at 332-33; M. Sandel, supra note 82, at 179.
\item \textsuperscript{142} See S. Benhabib, supra note 30, at 333-34, 348-49.
\item \textsuperscript{143} Cf. Cornell, supra note 81, at 1220-24 (explaining personal identity and freedom via law as grounded in interpersonal “dialogic reciprocity”).
\item \textsuperscript{144} See S. Benhabib, supra note 30, at 348-49:
By “plurality” I . . . mean . . . that our embodied identity and the narrative history that constitutes our selfhood give us each a perspective on the world, which can only be revealed in a community of interaction with others. . . . A common, shared perspective is one that we create insofar as in acting with others we discover our difference and identity, our distinctiveness from, and unity with, others. The emergence of such unity-in-difference comes through a process of self-transformation and collective action. . . .
\end{itemize}

Through such processes we learn to exercise political and moral judgment. We develop the ability to see the world as it appears from perspectives different from ours. Such judgment is not merely applying a given rule to a given content. In the first place it means learning to recognize a given content and identifying it properly. This can only be achieved insofar as we respect the dignity of the generalized other, who is our equal, by combining it with our awareness of his or her concrete otherness. What we call content and context in human affairs is constituted by the perspectives of those engaged in it.

At any point in time, we are one whose identity is constituted by a tale. This tale is never complete: the past is always reformulated and renarrated in the light of the present and in anticipation of a future. Yet this tale is not one of which we alone are the authors. Others . . . often tell our stories for us and make us aware of their real meaning. . . . The interpretive indeterminacy of action arises from the interpretive indeterminacy of a life-history.

Benhabib’s notion of plurality is strongly reminiscent of the linked ideas of plurality and natality derived by Hannah Arendt from her reflections on ancient republicanism, see, e.g., H. Arendt, supra note 31, at 8-9, although distinctly marked by Benhabib’s emphasis on “concrete otherness”—our immediate experiences of encounter with the specific people who happen to belong to our particular communities.
them, toward differing normative futures. Legal indeterminacy in that sense is the precondition of the dialogic, critical-transformative dimension of our legal practice variously known as immanent critique, internal development, deviationist doctrine, social criticism, and recollective imagination.

But the generative indeterminacies are not just there as secrets awaiting random discovery. Rather they are products of action, the creations of motivated acts of perception and cultivation. Action by whom, then? Most likely, it would seem, by those who enter the conversation—or, as we may sometimes feel, seek to disrupt it—from its margins, rather than by those presiding at the center. So the suggestion is that the pursuit of political freedom through law depends on “our” constant reach for inclusion of the other, of the hitherto excluded—which in practice means bringing to legal-doctrinal presence the hitherto absent voices of emergently self-conscious social groups.

Take for example the indeterminacy (as it became for a crucial moment of time) of the American constitutional-legal principle of “equal protection of the laws” in its application to separate-but-equal public facilities

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145. See R. Dworkin, supra note 84, at 413; Cornell, supra note 81, at 196–98, 1201–04; cf. B. Fay, supra note 69, at 169–73; id. at 168: “[T]he narrative of a person’s life can never be settled because the causal repercussions from it will continue indefinitely into the future, and because the story which ought to be told about this life will be deeply affected by these repercussions.”

146. See, e.g., R. Unger, supra note 2, at 15–19; M. Walzer, Interpretation and Social Criticism 20–22, 25 (1987); Cornell, supra note 81, at 1204–06.

147. See Cornell, supra note 81, at 1202–04.

148. See supra text accompanying notes 113–16 (critique of Kuhn); B. Hooks, Feminist Theory: From Margin to Center ix (1984):

To be in the margin is to be part of the whole but outside the main body. . . . Living as we did—on the edge—we developed a particular way of seeing reality. We looked both from the outside in and from the inside out. . . . This mode of seeing reminded us of the existence of a whole universe, a main body made up of both margin and center. Our survival depended on an ongoing public awareness of the separation between margin and center and on ongoing private awareness that we were a necessary, vital part of that whole. This sense of wholeness . . . provided us an oppositional world view—a mode of seeing unknown to most of our oppressors, that sustained us . . . in our struggle to transform poverty and despair, strengthened our sense of self and our solidarity.


How do we arrive at a new concept such as [the positive liberty of genuine opportunity, as opposed to the negative liberty of absence of restraint]? Although we might get there by a process of abstract philosophical reflection, most of us would initially take a different route. The concept of positive liberty is easily arrived at by considering the plight of an employee whose one “choice” is between working the hours the employer demands and not working at all. . . . Only by remaining open to the entreaties of reason and passion, of logic and experience, can a judge come to understand the complex human meaning of a rich term such as “liberty”. . . . If due process values are to be preserved in the bureaucratic state of the late Twentieth Century, it may be essential that officials possess passion—the passion that puts them in touch with the dreams and disappointments of those with whom they deal.

149. See Minow, supra note 10, at 1867 (“cognizance of rights . . . is . . . knowledge of the process by which hurts that once were whispered or unheard have become claims, and claims that once were unsuccessful have persuaded others and transformed social life”); see also Hartog, The Constitution of Aspiration and “The Rights That Belong to Us All”, 74 J. Am. Hist. 1013, 1014–17, 1024 (1987).
or formally neutral interracial sex and marriage laws.\textsuperscript{150} That indeterminacy arose along with the rise in American legal culture of belief (always contested) in such factors as the social construction of race, the subordinative motivations and meanings built into that construction, the efficacy of subordinative cultural meaning as race-specific harming, and the injustice of a legal order (including legal doctrines of formal equality) sustaining and reproducing the constructions and meanings that wreak such harms.\textsuperscript{151}

How does such a new slant on the world penetrate the dominant consciousness? Without belaboring the point, does anyone doubt the primary and crucial role in this instance of the emergent social presence and self-emancipatory activity of Black Americans?\textsuperscript{152} Does anyone doubt that their impact on the rest of us has reflected their own oppositional understandings of their situation and its relation to our (and increasingly their) Constitution\textsuperscript{153} —developed, in part, through conflict within their own community,\textsuperscript{154} in a process that both challenged and utilized such partial citizenship as the Constitution granted and allowed them\textsuperscript{155} (and left its clear imprint on constitutional law both within and beyond the topical area of race\textsuperscript{156})? Does anyone doubt that the judicial agents of the challengers' accumulating citizenship drew on interpretive possibilities that the challengers' own activity was helping to create?


\textsuperscript{153} See Lawrence, Promises to Keep: We are the Constitution's Framers, 30 How. L.J. 645 (1987).

\textsuperscript{154} See, e.g., Norwalk CORE v. Norwalk Bd. of Educ., 423 F.2d 121 (2d Cir. 1970) (involving conflict between cause of desegregation and concern for educational effectiveness and minority control in community schools); D. Bell, RACE, RACISM AND AMERICAN LAW 424–31 (2d ed. 1980) (recounting arguments in this conflict and citing authorities).

\textsuperscript{155} See Crenshaw, supra note 10, at 1364–65 ("Blacks' assertion of their rights constituted a serious ideological challenge to white supremacy. . . . In asserting rights, Blacks defied a system which had long determined that Blacks were not and should not have been included."); see also id. at 1381–82.

The full lesson of the civil rights movement will escape whoever focuses too sharply on the country's most visible, formal legislative assemblies—Congress, state legislatures, the councils of major cities—as exclusive, or even primary, arenas of jurisgenerative politics and political freedom. I do not mean that those arenas are dispensable or unimportant. Rather I mean the obvious points that much of the country's normatively consequential dialogue occurs outside the major, formal channels of electoral and legislative politics, and that in modern society those formal channels cannot possibly provide for most citizens much direct experience of self-revisionary, dialogic engagement. Much, perhaps most, of that experience must occur in various arenas of what we know as public life in the broad sense, some nominally political and some not: in the encounters and conflicts, interactions and debates that arise in and around town meetings and local government agencies; civic and voluntary organizations; social and recreational clubs; schools public and private; managements, directorates and leadership groups of organizations of all kinds; workplaces and shop floors; public events and street life; and so on. Those are all arenas of potentially transformative dialogue. Understandings of the social world that are contested and shaped in the daily encounters and transactions of civil society at large are of course conveyed to our representative arenas. They also, obviously, enter into determinations of policy that occur within nominally private settings but that can affect people's lives no less profoundly than government action. Those encounters and transactions are, then, to be counted among the sources and channels of republican self-government and jurisgenerative politics. They are arenas of citizenship in the comparably broad sense in which citizenship encompasses not just formal participation in affairs of state but respected and self-respecting presence—distinct and audible voice—in public and social life at large.

Such a non-state centered notion of republican citizenship is, of course, both historically American and congenial to a characteristic strain in contemporary civic revivalism. My argument in this essay leads to it by way of two distinct but related considerations. One is that a notion of republican dialogue not exclusively and immediately tied to the coercive exercise of centralized majoritarian power can help make credible for contemporary Americans the idea of social and procedural conditions.

157. See Minow, supra note 10, at 1861–62. In what follows I continue in the spirit of Bruce Ackerman's urging of an anti-formalist understanding of constitutional "conventions," only carrying it further. See supra text accompanying notes 105–109. I also offer some vindication for Laurence Tribe's superficially implausible assertion that we are all constantly engaged in "constitutional choices." See L. Tribe, supra note 132, at vii.


159. See, e.g., Frug, supra note 5.

160. See supra text accompanying notes 138–44 ("Stipulation (ii)").
under which communicative revision of a citizen’s normative understandings escapes condemnation as oppression.\[161\]

The other is that by noticing how some of the well-springs of republican politics are separated from the ultimate political process—by locating them in extra-governmental social processes that state law, therefore, may either nurture or suppress—we obtain a non-Publian but still republican rejoinder to the Thayerite objection to judicial review. The Court helps protect the republican state—that is, the citizens politically engaged—from lapsing into a politics of self-denial. It challenges “the people’s” self-enclosing tendency to assume their own moral completion as they now are and thus to deny to themselves the plurality on which their capacity for transformative self-renewal depends.\[162\]

V. CONCLUSION: LAW’S REPUBLIC

All the components of the republican constitutional argument for an opposite result in \textit{Bowers v. Hardwick} are now before us. The argument construes Hardwick’s complaint as, in essence, one of unjustified denial of due citizenship (or is it due foundership?) by reason of denial of liberty, and specifically of that aspect of liberty we have come to know as privacy; its text is section 1 of the Fourteenth Amendment.\[163\] The argument ac-

\[161\] See, e.g., Cover, \textit{supra} note 29, at 11–19, 40–44 (comparing “jurisgenerative” local and voluntary communities with “jurispathic” central, court-administered law); Cover, \textit{Violence and the Word}, 95 \textit{Yale L.J.} 1601, 1628 (1986) (warning against “exaggerating the extent to which any interpretation rendered as part of a state act of violence can ever constitute a common and coherent meaning”). Consider American Booksellers Ass’n v. Hudnut, 771 F.2d 323, 332 (7th Cir. 1985) (holding anti-pornography ordinance violative of First Amendment), \textit{aff’d} \textit{per curiam}, 475 U.S. 1001 (1986), where Circuit Judge Easterbrook, writing for the Seventh Circuit panel, accepted the city’s argument that pornography, like other communication, can affect its readers’ attitudes and behaviors in ways that are harmful to others, but reasoned from this premise to an anti-censorship conclusion: “Change in any complex system ultimately depends on the ability of outsiders to challenge accepted views and the reigning institutions. Without a strong guarantee of freedom of speech, there is no effective right to challenge what is.” See \textit{Baker, The Process of Change and the Liberty Theory of the First Amendment}, 55 \textit{S. CAL. L. REV.} 293 (1982). Judge Easterbrook unfortunately offered only an authoritarian response (see \textit{Booksellers}, 771 F.2d at 325, 327) to the argument that in some circumstances \textit{too strong}—\textit{too absolute}—a free-speech guarantee can itself result in denial of an effective right to challenge what is. See C. MACKINNON, \textit{Frances Biddle’s Sister: Pornography, Civil Rights, and Speech}, in \textit{FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW} 163, 192–95 (1987); Fiss, \textit{Why the State?}, 100 \textit{Harv. L. Rev.} 781 (1987); Sunstein, \textit{Pornography and the First Amendment}, 1986 \textit{Duke L.J.} 589, 618–24.

\[162\] “The Constitution demands the full measure of \textit{all} our human capacities, not merely from judges, nor from rulers, but from our ultimate sovereign—the people.” Brennan, \textit{supra} note 148, at 975.

To allay any possible misunderstanding, I do not mean to be offering here a complete or exhaustive theory of judicial review, in which counter-action against popular self-enclosure is all there is for the Court to do—anymore than even Ely can plausibly claim that “representation-reinforcement” exhausts the meaning of the Constitution. See J. ELY, \textit{supra} note 63, at 88–101; Brennan, \textit{supra} note 28, at 437.

\[163\] It reads:

\textit{All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process}
cepts without question Georgia's explanation of the meaning and purpose of its challenged law: the meaning is to brand and punish as criminal the engagement by homosexual partners, but not heterosexual partners, in certain forms of sexual intimacy, and the purpose is to give expression and effect to a legislative majority's moral rejection of homosexual life.

Such a purpose is deeply suspect under the modern republican commitment to social plurality. In the circumstances of contemporary society, homosexuality has come to signify not just a certain sort of inclination that "anyone" might feel, but a more personally constitutive and distinctive way, or ways, of being. Homosexuality has come to be experienced, claimed, socially reflected and—if ambiguously—confirmed as an aspect of identity demanding respect. What is more, by its very emergence as an aspect of ways of living and not just an inclination or taste, homosexuality challenges established orders.

It seems very likely that among the effects of a law like Georgia's on persons for whom homosexuality is an aspect of identity is denial or impairment of their citizenship, in the broad sense which I have suggested is appropriate to modern republican constitutionalism: that of admission to full and effective participation in the various arenas of public life. It has this effect, in the first place, as a public expression endorsing and reinforcing majoritarian denigration and suppression of homosexual identity. It also—and for my purposes more interestingly—denies citizenship by violating privacy.

The Bork nomination hearings have made clear that "privacy" (in a sense directly implicated by Hardwick's claim) enjoys broad popular support as a constitutional value. Yet the notion remains suspect, for differing reasons, among constitutional commentators of widely differing persuai-

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165. See Law, supra note 164, at 20-31.

166. Sylvia Law writes:

Lesbians and gay men pose a formidable threat to the classic gender script. They deny the inevitability of heterosexuality. . . .

[W]hen homosexual people build relationships of caring and commitment, they deny traditional belief and prescription that stable relations require the reciprocity of male/female polarity. In homosexual relationships, authority and hierarchy cannot be premised on the traditional criteria of gender. For this reason lesbian and gay couples who create stable loving relationships are indeed more threatening to conservative values than mere isolated violators of the ban on non-marital sex.

Id. at 24, 31-32; see also Note, supra note 164, at 1307.


168. See Law, supra note 164, at 4, 6-8; cf. Lawrence, supra note 151 (explaining injurious impacts of laws' "cultural meanings" in racial contexts).
sions. Conservative originalists of course condemn it as illegitimate judicial invention. What is more striking is that some strong supporters of women’s rights of choice in regard to child-bearing have cogently criticized the Supreme Court’s decisions affirming such rights for basing them on a constitutional principle of privacy. The core of the criticism is that the privacy rationale conceptually separates this aspect (and by implication others) of the problem of women’s subordination from the domain of public or political concern. The privacy rationale, it is argued, implies that the choice, or the problem, is, precisely, the individual woman’s own concern—an implication that has untoward political and doctrinal ramifications, one of which is the unconditional release of the state (that is, the political public at large) from any responsibility for assuring or supplying resources needed by poor women to make practically effective their putative choices for abortion.

In somewhat similar fashion it has been argued that a constitutional privacy principle would be a poor basis on which to ground judicial invalidation of laws, such as Georgia’s, penalizing homosexual sex. To base such a decision on privacy, it is said, would be to reinforce the idea “that homosexuality is merely a form of [bedroom] conduct . . . rather than a continuous aspect of identity” demanding public expression; it would be to fail to recognize that “freedom to have impact on others—to make the “statement” implicit in a public identity—is central to any adequate conception of the self.” Such a decision would do little to allay “pervasive discrimination against gays” in public society; it would not itself contribute, nor would it directly empower its beneficiaries to contribute, to “heightening public awareness of homosexuality and thus broadening public acceptance of gay lifestyles.” To the contrary, it would burden homosexuality with the stigma of the quarantine.

These critiques of constitutional privacy doctrine reveal the dangers of reliance on such a doctrine as long as privacy stands for an attitude of hostility towards public life and a need for refuge from and protection against public power. This way of valorizing a legally protected, private realm, as the counter to a state regarded solely as a dangerous instrumentality whose tendencies to overreach must be curbed even at some significant cost in policy goals foregone, has been salient in American constitutional thought. By contrast to this oft-used strategy of carving a private space to defend against the public, a republican slant on the same issues

172. See Note, supra note 164, at 1290–91 (quoting L. Tribe, American Constitutional Law § 15–1, at 888 (1st ed. 1978)).
produces a reoriented understanding: not only an appreciation of the active state’s potential as an affirmative friend to effective liberty as political freedom, but an appreciation of privacy as a political right.

Just as property rights—rights of having and holding material resources—become, in a republican perspective, a matter of constitutive political concern as underpinning the independence and authenticity of the citizen’s contribution to the collective determinations of public life, so is it with the privacies of personal refuge and intimacy. Justice Blackmun’s dissenting opinion in Bowers at least begins to articulate this republican appreciation of the political significance of privacy, both by itself explaining the value of intimate association as formative and supportive of personal identity, of self-understanding, and thus of diverse ways of life, and by its reference to the Court’s earlier rumination, in Roberts v. United States Jaycees, on the “central[ity] to our constitutional scheme” of a protected sphere of intimate association. This cross-fertilization of the constitutional-legal notion of autonomy—simple personal liberty—by the first-amendment inspired value of freedom of association nicely represents the republican penchant for rights that bridge the personal and the political.

The argument also nicely illustrates the re-collective aspect of constitutional-legal interpretation. The argument realigns our accustomed sense of the relation between privacy and political freedom by regarding privacy not only as an end (however controversial) of liberation by law but also as such liberation’s constant and regenerative—jurisgenerative—beginning. The argument forges the link between privacy and citizenship. It attacks the Georgia law for denying or impairing citizenship by exposing to the

173. Such appreciations are manifest in Fiss, supra note 161, and Tribe, supra note 170, although not linked by either author to republican credentials.
174. See, e.g., Michelman, Possession vs. Distribution, supra note 39, at 1329.
175. See supra notes 43 & 142 and accompanying texts. Such an understanding of the political significance of privacy seems to have been deep in ancient, classical republicanism, although institutionalized in a way repellant to us: that is, in the idea of the oikos, the dominated household to which the independent citizen retired for service (by noncitizens) to his bodily needs for sustenance and release, and his spiritual need for replenishment (by the daily experience of his domestic mastership) of his sense of independent self-direction. See Michelman, supra note 5, at 29-30 n.138.
176. See supra note 38.
177. See Bowers, 478 U.S. at 204 (Blackmun, J., dissenting).
179. Justice Blackmun explains: [W]e have noted that certain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State.
180. See, e.g., NAACP v. Alabama, 357 U.S. 449, 462-63 (1958) (granting constitutional protection to “freedom to engage in association for the advancement of beliefs and ideas [as] an inseparable aspect of the ‘liberty’ assured by the Due Process Clause of the 14th Amendment,” against regulation that would “affect adversely the ability of [the NAACP] and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate”).
hazards of criminal prosecution the intimate associations through which personal moral understandings and identities are formed and sustained.181

Doubtless an argument along these lines involves a degree of reinterpretation, or reorientation, of constitutional history. It involves, for example, a definitive decoupling of rights of “privacy” and “intimate association” from a certain “traditional” cult of the family. The argument re-collects the authorities and recasts the tradition along the axes of self-formation and diversity rather than those of dominant social expectation and conformity.

Such a re-collective form of argument is, of course, not in the least foreign to ordinary American constitutional-legal practice; the example I have just presented is, after all, drawn in part from Justice Blackmun’s Bowers dissent. Thus, in appropriating for “republican” constitutional theory Cornell’s idealization of that practice as the exercise of “recollective imagination,” I do not mean to be describing or prescribing a novel set of legal-doctrinal operations, by which lawyers and judges would refer to different kinds of sources, or say different kinds of things about them, than they now do. What is rather at issue is one’s comprehension of the “point” of the practice182—one’s sense of an underlying “best theory of law”183—that gives shape and orientation to these familiar operations.

My work-up of the republican case for Hardwick’s right thus exhibits the disputatious activity of constitutional interpretation as a Machiavellian practice of return-to-the-founding-principles in which the first principle of the founding—the “point” of the practice—turns out to be just that of the constant value of (re)foundation (renewal, renovation) itself. In the larger frame of history, the ascription of such a “point” to American constitutionalism can hardly be called non-interpretive. I have presented the argument as motivated by a republican commitment to social plurality, but the larger contention of this essay has been that the same commitment is implicit in American constitutionalism’s most basic professions of attachment to both self-government and a government of laws. In that sense, I claim, republican inspiration enters the privacy-based argument for a reversal of Bowers along with the deepest, organizing premises of American constitutional discourse. Precisely because it is a problem, not a solution, that those premises construct—and because, further, it is the problematic character of that central constitutional construct that allows the Constitution to ground our identity as a political community by also inviting us to self-

181. See Karst, The Freedom of Intimate Association, 99 Yale L.J. 624, 635–37 (1980); Law, supra note 164, at 38–40; Richards, supra note 2, at 843–45, 852–53, 855–56. For a defense of a decisional-privacy rationale for permissive abortion rights resting on a contractarian argument that starts with the idea of such privacy as a pre-political moral right of any individual—an aspect of the individual’s right to equal respect and concern—but also adverts to the instrumental relation between privacy and citizenship, see Allen, supra note 70, at 462, 473 & passim.


revision through debate over its meaning—there is no demonstrating that the republican-inspired, process-based, reverse-Bowers argument I have presented is what the Fourteenth Amendment has always meant or always will mean, or is all and only what it means today.\textsuperscript{184} All that I, or anyone, can offer is an argument, not a demonstration, about the Constitution's meaning in this context, now, as both ours and law.

The difficulty remains of explaining how it can be right to address such a non-demonstrative argument about the impermanent meaning of the people's law to any body other than the People. Judges perhaps enjoy a situational advantage over the people at large in listening for voices from the margins.\textsuperscript{185} Judges are perhaps better situated to conduct a sympathetic inquiry into how, if at all, the readings of history upon which those voices base their complaint can count as interpretations of that history—interpretations which, however re-collective or even transformative, remain true to that history's informing commitment to the pursuit of political freedom through jurisgenerative politics. Still, a judicial constitutional convention is not equivalent—indeed, it is contrary—to actual democracy. That difficulty, too, must yield (if at all) to a pragmatic consideration: Actual democracy is not all there is to political freedom, and Hardwick is before us, appealing to law's republic.

\textsuperscript{184} See Hartog, supra note 149, at 1032.

\textsuperscript{185} See Minow, supra note 50, at 74-95; Minow, supra note 10, at 1880-81: The interpretive approach construes a claim of right, made before a judge, as a plea for recognition of membership in a community shared by applicant and judge. . . . The use of rights discourse affirms . . . a community that acknowledges and admits historic uses of powers to exclude, deny, and silence—and commits itself to enabling suppressed points of view to be heard, to make covert conflict overt.