1-1-1991

The Lost Opportunity

Bruce Ackerman
Yale Law School

THE LOST OPPORTUNITY?

BRUCE ACKERMAN*

I. Introduction

Comparative constitutional law is an intellectual embarrassment. Descriptive studies abound: How well do they protect freedom of speech in Israel compared to Turkey? But when we move beyond the description of one or another constitutional doctrine, there is a vacuum: How to characterize the varieties of modern constitutionalism? Which models best express the constitutional experience of which countries?

A comparison with the private law is instructive: scholars here do not content themselves with the comparison of particular doctrines. They regularly concern themselves with entire systems of ideas as they trace the influence of complex entities like the Code Napoleon or the "common law." In contrast, public lawyers lack models that elaborate systematic differences between modern demoratic constitutionalisms in ways that help them understand the very different roles that courts play in different modern systems. My first aim will be to sketch three models that may help fill this gap — taking special care to define the role of the courts in each of the three models.

The first model — dualistic democracy — describes, I think, the basic premises of the American system. After elaborating dualism's distinctive features, I shall compare it to two more familiar conceptions: monistic democracy and foundationalist democracy. These models, I shall suggest, better illuminate the constitutional ideals and practice of other Western systems. Thus, monism captures distinctive features of British constitutionalism, while foundationalism finds a paradigmatic expression in the present

* Sterling Professor of Law and Political Science, Yale University. His book on constututional theory, *We the People*, will be published by the Harvard University Press in the fall of 1991.

West German Basic Law. Having set this background, I will conclude by inviting you to consider how the models help illuminate Israel's constitutional past and future.

II. Dualism

I shall begin with a capsule statement of the dualist project.[1] Above all else, a dualist constitution seeks to distinguish between two different kinds of decisions that may be made in a democracy. The first is a decision by the People; the second, a decision by their government.

Decisions by the People occur rarely, and under special constitutional conditions. Before gaining the authority to enact their proposals into the nation's *higher* law, a political movement must, first, convince an extraordinary number of its fellow citizens to take its proposed initiative with a seriousness that they do not normally accord to politics; second, allow its opponents a fair opportunity to organize their own forces; third, convince a majority of its fellow citizens to support its initiatives as their merits are discussed, time and again, in the deliberative fora provided by the dualist constitutional order for this purpose. It is only those initiatives that survive this specially onerous *higher lawmaking system* that earn the special kind of legitimacy the dualist accords to decisions made by the People.

Decisions made by the government occur daily, and also under special constitutional conditions. Most importantly, key decisionmakers are regularly held accountable at the ballot-box for their performance; moreover, a systematic effort is made to encourage them to take a broad view of the public interest, deliberate seriously as to its evolving implications, and pass legislation that seeks to constrain the efforts by narrow and well-organized interest groups to use the government in ways that unfairly oppress others.

Even when this system is operating well, however, the dualist constitution tries to prevent the daily decisions reached by government from being confused with the rare decisions reached by the People. Despite their ongoing temptation to exaggerate their authority, constitutional officers of government are not to presume that an ordinary electoral victory has given them a mandate to overturn the considered judgments previously reached by the People. They ordinarily enact statutes that do not have the special legal

1. For more elaboration, see "The Storrs Lectures: Discovering the Constitution," 93 *Yale L.J.* 1013 (1984) (hereafter cited as *Storrs*.)

force of constitutional amendments. If they wish to claim a higher form of democratic legitimacy, they must take to the specially onerous obstacle course provided by a dualist constitution for purposes of higher lawmaking. It is only if they succeed in mobilizing their fellow citizens and gaining their repeated support in response to their opponents' counterattacks, that they may finally earn the authority to proclaim that *the People* have changed their mind and have given their government new marching orders.

Such a brief statement raises many more questions than answers. One set involves fundamental issues of institutional design. First, there is the design of the *higher lawmaking system*: how to organize a process that will reliably mark out the rare occasions when a political movement rightly earns the special recognition accorded the products of *mobilized deliberation* associated with decisions by We the People? Second, there is the design of *normal lawmaking*: how to create incentives for normally elected officials to engage in the kind of public-spirited deliberation that will best serve the public interest in daily lawmaking and administration? Third, there is the design of *preservation mechanisms*: how to preserve the considered judgments of the mobilized People from illegitimate erosion by the statutory decisions of normal constitutional government?

And then there are the questions that transcend issues of institutional design: is dualist democracy a good form a government? The best? If not, what is better?

This essay does not aim for final answers. It will be enough to describe how the very questions provoked by dualist theory suggest different inquiries from those motivated by two rival models of democratic constitutionalism.

III. Monism

Monism is the -ism that most people adopt when they think about constitutional theory. While complexities abound, the basic idea is very simple: Democracy requires the grant of plenary lawmaking authority to the winners of the last general election — so long, at least, as the election was conducted under free and fair ground rules and the winners do not seek to use their power to prevent the next free and fair election.

This monistic idea motivates, in turn, a critical institutional conclusion: during the period between elections, any institutional check upon the electoral victors is presumptively anti-democratic. For sophisticated monists, this presumption does not necessarily imply a flat condemnation of any and

all checks on the current legislative majority. Perhaps certain checks may prevent the victors from refusing to call the next scheduled election; perhaps other checks might be justified by the recognition of the deeper ways normal elections fail to satisfy the requirements of a truly "free" or "fair" electoral process. While these exceptions may have great practical importance, monists refuse to allow them to obscure the fundamental point: when the Supreme Court, or anybody else, sets about to invalidate a statute, this action suffers from a "countermajoritarian difficulty" which must be squarely confronted by any thoughtful citizen who considers himself a democrat.[2]

In the work of this school, the brooding omnipresence is (an idealized version of) British parliamentary practice — which demonstrates, at the very least, that monistic democracy is no pipe dream. For more than a century now, the Prime Minister has won her office after a relatively fair and square election, and except in truly exceptional circumstances, the House of Commons has given its unswerving support to the proposals of Her Majesty's Government. If the People of Great Britain do not like what is going on, they will return the Opposition at the next election. Until that time comes, neither the House of Lords, nor the Queen, nor the courts, try seriously to undermine the legislative decisions made by a majority of the Commons.

So far as the monist is concerned, this British design captures the essence of democracy. The problem posed by America is its failure to follow the trans-Atlantic model. Rather than granting a power monopoly to a single, popularly elected House of Representatives, the Americans tolerate a great deal of insubordination from branches whose electoral connection is suspect or nonexistent. While the Senate gets its share of the lumps, the principal object of monistic scorn is, of course, the Supreme Court. Whoever gave Nine Old Lawyers the authority to overrule the judgments of democratically elected politicians?

As suggested, there are monistic answers to this question — which try to reconcile some form of judicial review with the fundamental premises of monistic democracy. Thus, constitutional conservatives like Alexander Bickel,[3] centrists like John Ely,[4] and progressives like Richard Parker,[5] have all proposed roles for the Supreme Court that operate within monistic

2. For a classic statement, see A. Bickel, *The Least Dangerous Branch* (1963) at Chap. 1.
3. *See* Bickel, *supra* note 2; Bickel, *The Supreme Court and the Idea of Progress* (1968).
4. J. Ely, *supra* note 2.
5. Parker, "The Past of Constitutional Theory — And Its Future," 42 *Ohio St. L.J.* 223 (1981).

premises. For present purposes, an analysis of the important answers is not as important as the monistic framework which makes the question seem so critically important. So far as the dualist is concerned, the monist begs a big question when he asserts that the winner of a fair and open election is entitled to rule with the full authority of We the People of the United States. While rule by electoral victors is surely to be preferred to an authoritarian putsch by electoral losers, the dualist denies that all statutes gaining the support of a legislative majority in Washington D.C. represent the considered judgment of a mobilized majority of American citizens. Instead, only those relatively rare successes in constitutional politics deserve the highest form of democratic legitimacy, when codified in American higher law.

It follows that the dualist does not view every American departure from the British parliamentary model as if it suffered from a "countermajoritarian difficulty" threatening the democratic legitimacy of the Constitution. Instead, she can see a profoundly *democratic* point to some of the most distinctive features of American practice. For her, the most fundamental fact about the American system is that, in contrast to British-style monism, the Constitution establishes a two-track law-making system. If elected American politicians hope to win *normal* democratic legitimacy for an initiative, they are directed down the normal lawmaking path and told to gain the assent of the House, Senate and President in the normal ways. If, however, they hope for *higher* lawmaking authority, they are directed down a specially onerous lawmaking path — whose character, and historical development, I have discussed in other works.[6] Only if a political movement successfully negotiates the special challenges of the higher lawmaking system can it *rightfully* claim that its initiative represents the constitutional judgment of We the People of the United States.

Once the two-track character of the American system is recognized, the dualist can propose democratic interpretations of many other institutional features that endlessly puzzle the monist. Most obviously, all the time and effort required to push an initiative down the higher lawmaking track would be wasted unless steps were taken to prevent future normal politicians from enacting statutes that ignored the movement's higher law achievement. If future politicians can so easily ignore the movement's success in gaining higher law recognition for its popular initiative, why would any mass

6. *See Storrs, supra* note 1; "Constitutional Politics/Constitutional Law," 98 *Yale L.J.*, 453 (1989).

movement take the trouble to overcome the special hurdles placed on the higher lawmaking track?

This means that, in order to maintain the integrity of higher lawmaking, all dualist constitutions must provide for one or more institutions to discharge a *preservationist* function. These institutions must effectively block efforts to repeal established constitutional principles by the simple expedient of passing a normal statute, and force the reigning group of elected politicians to take the higher lawmaking track if they wish to question the judgments previously made by the higher law accents of We the People. It is only after negotiating this more arduous obstacle course that a political elite can constitutonally earn the authority to say that the People have changed their mind; and that the constitutional principles that gained the considered support of a mobilized majority of Americans of the past have been tested and found wanting by a mobilized majority of Americans of the present. After succeeding in such an exercise in constitutional politics, the newly ascendant political movement may rightly expect preservationist institutions to change their course and begin to preserve the *new* constitutional solution against erosion by future normal politicians. But it is only after transcending the obstacles of the higher lawmaking system that the present political victors may constitutionally make this demand.

It follows, then, that the dualist will begin her encounter with the American Supreme Court from a very different perspective than the monist. The monist treats *every* act of judicial review as presumptively anti-democratic, and strains to save the Supreme Court from the "countermajoritarian difficulty"[7] by one or another ingenious argument. In contrast, the dualist sees the discharge of the preservationist function by the courts as an absolutely essential part of a well-ordered democratic regime. Rather than *threatening* democracy by frustrating the statutory demands of the political elite in Washington D.C., the courts *serve* democracy by protecting the hard-won judgments of a mobilized citizenry against fundamental change by political elites who have failed to establish the requisite kind of mobilized support from the citizenry at large.

This is not to say that any particular decision by a dualist Supreme Court can be justified in preservationist terms. Before getting down to cases, one would have to consider the terms of the particular constitutional solutions enacted by a particular People during periods of heightened political

7. For the classic statement, see Bickel, *supra* note 2 at 16–23.

mobilization. The key point is that dualists cannot dismiss a good-faith effort by the Court to interpret the constitution as "anti-democratic" simply because it leads to the invalidation of normal statutes; this ongoing judicial effort to look backward and interpret the implications of the great higher lawmaking achievements of the past is an indispensable part of the larger project of distinguishing the will of We the People from the acts of We the Normally Elected Politician.

IV. Rights Foundationalists

In confronting the monistic school of constitutional theory, the dualist's main object is to break the tight link that monists have managed to construct between two distinct ideas: the idea of "democracy," on the one hand, and the idea of "parliamentary sovereignty" on the other. Like monists, dualists are democrats — they believe that the ultimate constitutional authority in America are *the People*. They disagree only about the easy way in which normally elected politicians claim the full authority of We the People.

In contrast, the primacy of popular sovereignty is challenged by a second modern school. Not that any of these theorists completely deny a place for popular government in their scheme of constitutional values; their commitment to democracy is, however, constrained by an even deeper commitment to fundamental rights. Unsurprisingly, members of this school differ when it comes to identifying the rights that are fundamental. Conservatives, like Richard Epstein, emphasize the foundational role of property rights;[8] liberals, like Ronald Dworkin, emphasize each individual's right to be treated as an equal and autonomous moral agent;[9] collectivists, like Owen Fiss, the rights of disadvantaged groups to equal treatment.[10] These transparent differences, however, should not blind us to the idea that binds these disparate positions together. Whatever rights are Right, members of this school agree that the American Constitution is concerned, first and foremost, with their protection. Indeed, the whole point of having Rights is to trump decisions rendered by democratic institutions that otherwise have the legitimate authority to define the collective welfare. To emphasize this common thread, I shall call this group *rights foundationalists*.

8. R. Epstein, *Takings: Private Property and the Power of Eminent Domain* (1985).
9. R. Dworkin, *Taking Rights Seriously* (1978) at chap. 5; R. Dworkin, *Law's Empire*, (1986) at chaps. 10 and 11.
10. Fiss, "Groups and the Equal Protection Clause," 5 *J. Phil. Pub. Af.* 107 (1976).

As with the monists, this school is hardly a trendy creation of yesterday. To the contrary, modern foundationalists assiduously cultivate their philosophical roots — with Kant (via Rawls)[11] and Locke (via Nozick)[12] presently serving as the most important sources of inspiration. The question for us, though, is not the philosophical depth of the competing foundations offered up by rival foundationalists, but the way foundationalists as a group differ in their approach to the Constitution from the more democratic schools we have considered.

Begin with the monists. It is, I think, quite fair to say that they are hostile to rights, at least as the foundationalists understand them. Indeed, it is precisely when the Supreme Court begins to invalidate statutes in the name of Fundamental Rights that the monist begins to worry about the "countermajoritarian difficulty" that renders the Supreme Court presumptively illegitimate.[13]

These "difficulties," however, do not seem so formidable to the foundationalist. Instead, she is more impressed by the fact that even a democratic legislature might endorse any number of oppressive actions — establish a religion, or authorize torture or ... — and when such violations of fundamental rights occur, the foundationalist insists that the Constitution requires the courts to intervene despite the breach of democratic principle: rights trump democracy, so far as she is concerned. Provided, of course, that they are the right Rights.

And there's the rub. While some rights-oriented theorists do not seem overly impressed with the perils of arbitrariness involved in the identification of rights, this anxiety induces more thoughtful members of the school to refer to great philosophers like Kant and Locke in an effort to understand the Constitution. If the Constitution may properly be construed to allow judges to trump democracy in the name of Rights, should not theorists aid in the process by elaborating the constitutional implications of the most profound reflections on rights available in the Western tradition?

For the monist, however, the foundationalist's turn to the Great Books is yet another symptom of her anti-democratic disease. Whatever the

11. Rawls, "Kantian Constructivism in Moral Theory," 77 *J. Phil.* 515 (1980).
12. R. Nozick, *Anarchy, State, and Utopia* (1974).
13. Not that monists necessarily oppose all exercises of judicial review. As I have suggested, the school has been quite ingenious in justifying the judicial protection of one or another right as instrumental for the ongoing democratic functioning of the regime.

philosophical merit of the resulting speculations into the nature of our Rights, the foundationalist's discourse is invariably esoteric — involving encounters with authors and doctrines that most college-educated people successfully avoided during their most academic moments. This elitist talk of Kant and Locke only serves to emphasize the illegitimacy involved in removing fundamental questions from the democratic process.

Such monistic objections, of course, hardly convince the foundationalist. Instead, they only serve to generate further anxieties about the ease with which monistic democracy can be swept by obscurantism and demagogic irrationality. And so the debate proceeds, with the two sides talking past one another: Democracy/Fundamental Rights/ Demo... on and on, point and counterpoint, with all the talk changing few minds.

How does the introduction of dualism change the shape of this familiar conversational field? By offering a framework which allows both sides to accommodate some — if not all — of their concerns. Once again, the basic mediating device is the dualist's two-track system of democratic lawmaking. It allows an important place for the foundationalist's view of "rights as trumps" *without* violating the monist's deeper commitment to the primacy of democracy in the scheme of constitutional values. To see how the accommodation works, suppose that a rights-oriented movement took to the higher-lawmaking track and successfully mobilized the People to endorse one or another Bill of Rights. Given this achievement, the dualist can readily endorse the judicial invalidation of later statutes that undermine these Rights, even when these Rights concern matters, like the protection of personal freedom or privacy, that have nothing much to do with the integrity of the electoral process so central to monistic conceptions of democracy. For, as we have seen, the dualist believes that the Court furthers the cause of democracy when it preserves these Rights against erosion by politically ascendant elites who have yet to mobilize the People to support the repeal of previous higher lawmaking conclusions. Thus, unlike the monist, she will have no trouble supporting the idea that Rights can *properly* trump the conclusions of normal democratic politics. She can do so, moreover, without the need for non-democratic principles of the kinds preferred by the rights foundationalist. Thus, the dualist can offer a deeper reconciliation of democracy and rights to those who find a certain amount of truth in *both* sides of the point/counterpoint that had previously been elaborated in the dialogue between monists and foundationalists.

Not that this reconciliation will prove satisfactory to all members of the

previously contending schools.[14] The problem for the committed foundationalist, unsurprisingly, is the insufficiently deep foundations the dualist has built for the protection of rights. Granted, concedes the foundationalist, the dualist will applaud the judicial protection of rights *if* a warrant for this can be found in prior successful higher lawmaking activity. But that is an awfully big "if." What if the People have *not* adopted the right Bill of Rights? Should the Constitution then be construed in ways that allow the statutory perpetration of injustice?

It is their different answers to this question that continue to distinguish the dualist from the committed foundationalist. So far as the dualist is concerned, the constitutional protection of rights does depend on a prior democratic affirmation on the higher lawmaking track. To put the point in a single line: the dualist's Constitution is democratic first, rights-protecting second. For the committed foundationalist, this priority is reversed. For her, the Constitution is first and foremost concerned with the protection of the right Rights; it is only after these rights-constraints have been satisfied that We the People are constitutionally authorized to work their will.

This fundamental theoretical disagreement has many crucial practical implications as foundationalist and dualist debate the substance of modern constitutional doctrine. This is not the place, though, to get into these vital doctrinal details. The question is whether the dualist can advance some very general argument that will serve to defeat any and all foundationalist interpretations of American constitutional arrangements.

My answer is yes; moreover, the source of this general argument should, by now, begin to seem familiar. Just as in the case with our earlier confrontation with the monist, it is the design of the American two-track lawmaking system that serves as the key to the dualist's response. Thus, just as the monist proved incapable of accounting for the very existence of a higher lawmaking track, so too the foundationalist has trouble accounting for one of the most basic points about the design of the American higher lawmaking system.

This has to do with the fact that the American constitution has never (with two exceptions that I shall consider shortly) explicitly entrenched existing higher law against subsequent revision by the People. Thus, while the

14. I have considered the complaints of the die-hard monist elsewhere — *The Storrs Lectures, supra* note 1 — and so will focus here only on the objections of the strong foundationalist.

original Constitution gave higher law protection to slavery, at least it did not try to make it unconstitutional for Americans of later generations to reconsider the question; similarly, when Americans of the early twentieth century enacted Prohibition into their higher law, they did not seek make their Amendment unamendable. In these two cases, of course, the People have indeed exercised their right to change their mind. And few among us would say that we were the worse for repeal. The general availability of repeal, however, is a very great embarrassment for foundationalist interpretations of the Constitution. For it would seem to authorize amendments to higher law that most modern foundationalists would consider morally disasterous.

A hypothetical case may help make the point. Suppose that the religious revival now so prominent in the Islamic world turns out to be the first wave of a Great Awakening that envelops America. A general revulsion against godless materialism yields mass political mobilization that finally results in a successful campaign for a formal repeal of a part of the First Amendment. With the dawn of the new millenium, Amendment XXVII is proclaimed throughout the land:

> Christianity is hereby established as the state religion of the American people.

The enactment of the Christianity Amendment might well inaugurate a deep transformation of the American constitutional tradition — on more or less the same order, though of a very different kind, from those achieved by the Reconstruction Republicans and New Deal Democrats in earlier generations. Moreover, such an amendment would deeply offend my own commitment to freedom of conscience. Nonetheless, if I were then unlucky enough to be a Justice of the Supreme Court (serving as a hold-over from the last secular Administration of the 1990s), I would have no doubt about my constitutional responsibility. While I hope that I would not change my conviction that the establishment of Christianity had been a terrible wrong, it would now be my judicial responsibility to uphold it as a fundamental part of the American Constitution. Thus, if some die-hard brought a lawsuit in 2001 seeking to convince the Supreme Court to declare the Twenty-seventh Amendment unconstitutional, I would either join my colleagues in summarily rejecting the petition — or resign my office and join in a campaign to convince the American People to change their mind.

The one thing I would not do is the thing suggested by foundationalism:

write a dissent asserting that the First Amendment had not been validly amended. Moreover, I would be very much surprised if many lawyers who presently wrap themselves up in foundationalist rhetoric would do any differently.[15]

I do not suggest that such a dissent would be preposterous under any and all constitutional arrangements. Consider, for example, the entrenching principles deployed in the modern West German Constitution — which explicitly declares that a long list of fundamental human rights *cannot* constitutionally be revised, regardless of the extent to which a mobilized majority of Germans give their considered support to a political movement demanding their repeal.[16] Against this legal background, I would hope that the German constitutional court would respond to a Christianity Amendment in a very different way. If Justices were faithful to *their* foundationalist legal tradition, they should issue a solemn opinion declaring the Christianity Amendment unconstitutional, and challenge the dominant political majority to use physical force to disband the Court if they were intent upon tearing the constitutional fabric apart.

But this only makes it clear how far dualist America is from foundationalist Germany at the present time. Indeed, insofar as America has had constitutional experience with German-style entrenchment, the lessons have been very negative. When the Founders designed the original higher lawmaking system in 1787, they were perfectly aware of the entrenchment device, and used it in a way that should be sobering to foundationalist enthusiasts. Rather than serving the cause of human freedom, the Founders used entrenchment to disable the American People from enacting a constitutional amendment banning the African slave trade until the year 1808.[17] This history of abuse and non-use of entrenchment suggests, to me at least, that the foundationalist interpretation is inconsistent with the basic premises of the *American* higher lawmaking system. The fact that We the

15. For a constitutionalist who may have the courage of his foundationalist convictions, see Murphy, "Slaughter-house, Civil Rights, and Limits on Constitutional Change," 32 *Am. J. Juris* 1. (1987)
16. Basic Law of the Federal Republic of Germany, art. 79 (3); Blaustein & Flanz, 5 *Constitutions of the World* 68 (1968); Wasserman (ed.), 2 Kommentar Zum Grundgesetz fuer die Bundesrepublik Deutschland 1479–86 (1984).
17. The second entrenching provision stipulates that no State shall be deprived of equal representation in the Senate without its express consent. This effort to entrench federalism caused all sorts of trouble in the aftermath of the Civil War.

People *could* constitutionally repeal many[18] fundamental rights eloquently expresses the dualist idea that it is the People who are the source of rights, and not the other way around.

While there is much to be said for this dualist commitment, I do not mean to minimize its dangers. Indeed, I myself would support a political movement that sought to make creative use of the entrenchment device and lead the People of the United States to enact a modern Bill of Rights, and entrench it in the West German way against subsequent revision by a future American majority caught up in some awful neo-Nazi paroxysm.[19]

Not that a decision to entrench a modern Bill of Rights by the year 2000 would be enough to guarantee the enjoyment of these freedoms by Americans in the year 2050. American constitutional history is full of eloquent warnings

18. My purpose in the text is to produce a hypothetical which illuminates the difference between dualist and foundationalist on the nature of constitutional rights. The Christianity Amendment serves this purpose well, since it involves a right that most foundationalists would consider fundamental but that almost all lawyers — and all dualists — would immediately recognize as repealable. While this suffices to distinguish dualism from foundationalism, the hypothetical does not allow us to consider whether dualist theory allows *any* conceptual room at all for entrenchment.
A hypothetical test of this question requires us to imagine that a fundamentalist movement managed to ratify a second amendment along with the first:

> Any American advocating the repeal of the Christianity Amendment is hereby declared guilty of treason and will be subject to capital punishment upon conviction.

This amendment, in contrast to the first, aims to make it impossible for the People to reconsider its commitment to Christianity, and so amounts to the repeal of dualist democracy itself. Would it therefore be *constitutionally* appropriate for judges to declare it unconstitutional? Or would it simply be best for all decent people to quit the regime and struggle for its overthrow?
Such questions are best left to the dark day they arise. For now, it is enough to beware easy answers. Thus, I do not believe that judges would be justified in asserting the *general* authority to protect the fundamental principles of dualist democracy against repudiation by the People. Suppose, for example, that the next round of American constitutional politics was dominated by a mobilized coalition of liberals who sought to entrench a modernized version of the Bill of Rights, as envisioned in the text. *This* act of entrenchment, no less than the one attempted by the hypothetical fundamentalists, would be inconsistent with the principles of dualist democracy, since it would try to make it impossible for the People to change their mind about certain constitutional values. Yet would the judges would have any constitutional authority to force the People to keep *these* possibilities open?

19. My own views concerning the content of a modern Bill of Rights are suggested in *Social Justice in the Liberal State* (1980) especially at part three.

against putting too much faith in one or another rule limiting the way that future Americans might legitimately alter their higher law. While entrenchment would undoubtedly enhance the protection of rights, this is not the only — or even the principal — reason I advocate it here. Even more importantly, a collective effort to enact a modern Bill of Rights could only occur after a long period of debate and decision that would serve to greatly reaffirm and root more deeply the role of fundamental rights in the ongoing life of the American People.

My aim here, however, is hardly to anticipate the outcome of such an exercise in constitutional politics. It is to suggest that, unless and until it occurs, dualism seems to capture the spirit of American constitutional life better than any foundationalist enterprise. In contrast to some other modern constitutions (most notably the West German), Americans hold that their rights are ultimately to be defined by the People acting through the higher lawmaking system, not by some group of philosopher-judges engaged in a deep inquiry into the nature of human rights. They are democrats first, though not democrats of the monistic persuasion.

V. A Lost Opportunity?

And the Israelis? To this American's eyes at least, conditions were ripe at the Founding of the State of Israel for the establishment of a dualist democracy. As a result of generations of struggle, the Zionist leadership at that time could credibly claim the deep support of a mobilized majority of fellow citizens — support that could have been readily used to endow an Israeli constitution with the special kind of democratic super-legitimacy accorded to higher law in dualist constitutional systems.

This road, however, was never taken. On a technical level, the crucial turning point was the decision of the Constituent Assembly to transform itself into the first Knesset without first proposing a Constitution to the Israeli People. If the Assembly had obeyed the instructions of the Declaration of Independence to formulate such a Constitution, its proposal would have doubtless been submitted to the Founding generation for special approval by a plebiscite. If the Constitution had successfully emerged from its plebiscitary test, I believe it may well have obtained by this time the higher kind of democratic legitimacy emphasized by dualist theory. In this scenario, it would by now seem obvious to most Israelis that laws enacted by the Knesset could not pretend to the highest form of democratic legitimacy;

instead, if the reigning coalition in the Knesset wished to revise the legal principles instantiated in the Constitution, it would have to embark on the special plebiscitary procedures similar to the ones required for the original Constitution's initial popular enactment. Within this context of constitutional understanding, the Israeli Supreme Court would not have to struggle against the "countermajoritarian difficulty," whenever they confronted a statute that seemed to violate the provisions of the Bill of Rights or some other part of the constitutional text. Instead, they could have credibly claimed that aggressive judicial review was a necessary part of a functioning Israeli dualism. Given the special plebiscitary affirmation by the People of the Constitution, the judges could have denied that a single parliamentary election authorized the winning coalition in the Knesset to violate constitutional principles that had gained the People's special support during the solemn referendum at the Founding.

Instead of laying the foundations of a functioning dualism, however, the Founding generation allowed their energies to be diverted to other ends that seemed more pressing at the time. Why?

I can think of at least four reasons. First, despite their struggle against the English, the Zionist leadership was profoundly influenced by English constitutional ideas. And, as we have seen, it is monism, not dualism, that is hegemonic in English constitutional thought. Thus, rather than appreciate their special opportunity to gain popular validation for a Constitution that expressed the fundamental elements of their Zionist vision, the Founders were more impressed with the need to create a Knesset that might quickly simulate (more or less) the operations of a House of Commons. After all, didn't the English model represent the best of Western democracy?

A second source of the failure in constitutional lawmaking was the Founders' socialism. The socialist tradition has been weak in recognizing the importance of constitution-writing in particular, law in general. In the traditional Marxist formulation, such matters are mere "superstructure," not to be confused with more foundational matters concerning ownership and control over the means of production. While the founders were by no means hard-line Marxist-Leninists, the center of their concerns also focussed on matters of economic, rather than political, organization: If Histadrut could get these more fundamental matters under control, would not the more superstructural concerns dealing with the Constitution solve themselves over time?

A third source of failure was, of course, the religious problem. Any effort

to define a fundamental law for the State of Israel would have to confront the claims of Orthodoxy to function as a state religion. At a deeper level, the very effort to enact a Constitution for the State of Israel could not help but challenge Orthodox beliefs that traditional Jewish law should serve as *the* fundamental law of Eretz Israel. Since many leading Founders supposed that the Orthodox would dwindle in number and influence over time, it seemed more prudent to defer the struggle over constitutional identity to a time at which the secular forces would be even more dominant than they were in 1950.

And finally, there was the fact of war, which may have made long-run constitutional deliberations seem a luxury at a time when the very existence of the Jewish state remained an open question.

English constitutionalism, socialism, religion, war: a mixed bag. On the causal level, I do not think it very profitable, or even possible, to determine which of these factors was the "most important." The crucial thing is to recognize that they conspired together to divert the Israeli Founders from the task of constitutional construction at a moment when they might have gained specially broad and deep popular support for a Constitution that gave legal form to principles of Israeli national identity.

Looking backward, I myself believe that the consequences of this failure have been profoundly unfortunate. For *if* the Founding generation had taken the task of higher lawmaking seriously, can anyone doubt that their Constitution would have been far more liberal in its definition of fundamental rights than anything likely to come out of the present political system? Once the ground had been laid in a formal Constitution, moreover, the exercise of judicial review in defense of individual rights would have had a much firmer foundation than anything that presently exists.

Worse yet, I do not believe that it will be easy to make up today for the Founding failure. Successful higher lawmaking, for the dualist, is a product of special historical conditions that are not likely to be repeated anytime soon. Before the Framers of a Constitution can *credibly* claim to speak in higher lawmaking accents of We the People, they must undertake a long and difficult task of political mobilization — in which masses of their fellow citizens are finally convinced that the few principles they hold in common are more important to them politically than their manifold differences. Rather than building upon this sense of national unity, the present generation of political leaders seems far more adept in the politics of faction — in which the normal politics of coalition formation dominates any serious effort to

call upon Israelis to undertake a fundamental act of constitutional self-definition. With every passing decade, the monist tradition of parliamentary sovereignty deepens its roots — but in a society that lacks the social homogeneity and elite traditions of Oxford and Cambridge that have allowed the British to provide decent democratic government without the protections of a formal Bill of Rights.

But perhaps I am being too pessimistic?