

1998

Up from Individualism (The Brennan Center Symposium on Constitutional Law)."

Donald J. Herzog

University of Michigan Law School, dherzog@umich.edu

Available at: <https://repository.law.umich.edu/articles/141>

Follow this and additional works at: <https://repository.law.umich.edu/articles>

 Part of the [Jurisprudence Commons](#), [Law and Society Commons](#), and the [Public Law and Legal Theory Commons](#)

Recommended Citation

Herzog, Donald J. "Up from Individualism (The Brennan Center Symposium on Constitutional Law)." *Cal. L. Rev.* 86, no. 3 (1998): 459-67.

This Article is brought to you for free and open access by the Faculty Scholarship at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Articles by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

Up from Individualism

Don Herzog†

I was sitting, ruefully contemplating the dilemmas of being a commentator, wondering whether I had the effrontery to rise and offer a dreadful confession: the first time I encountered the counter-majoritarian difficulty, I didn't bite. I didn't say, "Wow, that's a giant problem." I didn't immediately start casting about for ingenious ways to solve or dissolve it. I just shrugged. Now I don't think that's because my commitments to either democracy or constitutionalism are somehow faulty or suspect. Nor do I think it's that they obviously cohere. It's rather that the framing, "look, these nine unelected characters can strike down a statute passed in procedurally valid ways by a democratically elected legislature," struck me as unhelpful.

As I say, I was wondering whether I had the effrontery to rise with this dreadful confession. I decided that I didn't. I'm just a commentator, after all, and I'm not allowed to suggest that we change the subject. Besides, to be more serious, I admire Professor Michelman for having the courage of his convictions. He is relentless in pursuing the implications of his starting premises. So I want to suggest several ways in which his problem is both more and less complicated than he believes. Identifying the political and conceptual price we pay for framing matters this way, seeing to just what extremes we are driven, might help persuade us to step back and try to frame things differently.

Recall Frank's distinction between liberal and populist theories of self-government. The liberal holds that each and every individual must be self-governing; the populist holds that it's enough if we are members of a community that is self-governing.¹ I want to underline a point that Frank concedes: what he styles the liberal view is impossible. That has nothing to do with judicial review. It has only to do with minorities. Every time the state acts against my will—indeed every time the state acts in ways I haven't commissioned—I am not self-governing. Not, at least, on a captious account of self-government. If I may tease Frank just a bit on the strange ideological company he's keeping here, this is just the view that drove Lysander Spooner, nineteenth-century lawyer and

Copyright © 1998 California Law Review, Inc.

† Professor of Law and Professor of Political Science, University of Michigan. My thanks to Frank Michelman, generous and perceptive as ever in his conversations about this comment.

1. See Frank I. Michelman, *Brennan and Democracy*, 86 CALIF. L. REV. 399, 402-03 (1998).

hero of today's libertarians, to the eccentric views that ballots are morally indistinguishable from bullets and that the Constitution wasn't intended to establish a government.²

Nor do I see any reason to take Frank's liberal—I'd rather say "liberal"—account as an ideal, worth striving for even if we can't ever attain it, for the only strategies I can imagine for pursuing it are viciously anti-liberal: we could stifle dissent, brainwash people, and so on. How else could we eliminate minorities? The populist account, seeing us as members of a community that taken collectively governs itself, is the only viable account on offer. (Thus my title: the "individualism" to be jettisoned is a methodological position, not any first-order moral or political view. I am as devoted to autonomy, to the right of the gutsy or downright deviant to do their thing—provided of course they don't harm others etc. etc. ad nauseam—as anyone I know. But *that* kind of individualism is a political view, to be exhibited and defended in richly sociological terms.³ The suspect form of individualism dictates that we must always reduce talk of such social collectives as communities and institutions to talk of individuals.)

But does the populist account settle for something crummy? Does it fail to redeem what's intuitively attractive in the promise of democratic self-government? (A historical point to ponder: Self-government has had two antonyms, being ruled by foreign armies and subjects being ruled by aristocrats and kings. The populist account surely is the opposite, or an opposite, of those two distinguished traditions.) Frank complains that seeing us as identifying with a community that collectively makes these decisions turns democratic self-government into feeling, not action; identity, not agency. I think not; at any rate I think he's moving too quickly. Consider:

- The sports fan jumps up from his couch at the buzzer, turns off the TV, and screams, "We won!" This seems to me feeling, not action; identity, not agency. (But what if he jumps up in the stands after cheering himself hoarse, thinking about the home-team advantage and his instrumental role in helping the team keep an emotional edge?)
- You are an American citizen, with no dual nationality. But you happen to be obsessed with Irish politics. You huddle over your short-wave radio listening to the news; you rejoice at the introduction of divorce; you curse Ian Paisley; you wonder about the precise nature of your affection for Mary Robinson. Now you're like the sports fan, passively watching a game in which you have no role.

2. See LYSANDER SPOONER, NO TREASON (1867).

3. That's one way of putting the central aspiration of DON HERZOG, HAPPY SLAVES (1989).

- The democratic citizen works hard on a measure: she argues with her friends and coworkers, stuffs envelopes, attends meetings, and donates unseemly scads of money to an unseemly PAC. The measure prevails. “We won!” she says. Here there is action, for sure, but the *we* refers to the prevailing majority. What about the minority? Are they victims, succumbing to heteronomy, not enjoying self-government?
- A limousine liberal, fine representative of an endangered species, notices to his chagrin that the federal government is aggressively promoting the marketing of US cigarettes in foreign countries. He thinks this a decidedly bad thing, but hasn’t done anything at all about it. Sadly, he murmurs, “We’re killing foreign teenagers to make money.” Here the *we* refers to all of us Americans, regardless of our views on the issue, regardless of whether we even are aware of it, regardless of what we might have done: state action implicates all of us. This case is tricky. Is the *we* the same as that invoked by the sports fan on the couch? I’m inclined to say no, because the sports fan can’t get in the game but the citizen can. Remember that we routinely extend agency to hold people accountable for things they haven’t done but could and should have done.
- Because of her staunch Christian commitments, a citizen believes that abortion is the murder of innocent human life. She pours her heart into campaigning for a constitutional amendment banning abortion. She fails. Need she identify willy-nilly with the prevailing legal view? Couldn’t—wouldn’t—she urge that she is heteronomous, forced to submit to a will very much not her own? Maybe so: I don’t think there’s some brute fact of the matter about these things. It depends in part on how she conceives of herself, how she draws the boundaries of her own identity, or, if you like, the nature of her allegiances. It would be reasonable for her to feel implicated by the current view: and I wouldn’t want *feel* here to summon up the sort of thing Frank characterizes—or lampoons—as a mere mood or emotional fancy.⁴ (Contrast how she might respond to learning that Sweden permits abortion.) It would be reasonable for her not to feel implicated. Arguably—but it’s an argument that would take too long here—people lead richer lives when they refuse to secure their autonomy by shrinking the scope of their commitments to others: Grettir shouldn’t be the ideal of individual autonomy.⁵

I mean these crude vignettes to suggest that genuinely collective action isn’t the least bit mysterious. Otherwise subtle legal theorists

4. See Michelman, *supra* note 1, at 418.

5. I’m thinking of the medieval Icelandic saga, whose strength hero isn’t just outlawed but shuns all social contact as a threat to his independence. For a translation, see GRETIR’S SAGA (Denton Fox & Hermann Palsson trans., 1974).

routinely lapse into crass skepticism here, summoning up scarecrow images of group consciousness, organicism, and the like. One doesn't have to believe in Casper the Social Ghost to think that groups can act.⁶ In fact, I find it impossible to lend any clear sense to the thought that individuals are finally prior to institutions. Methodological individualists in the social sciences proclaim that there's no such thing as Congress, no possibility of Congress, without 535 individual Congresspersons. Sure, but there's no possibility of being a Congressperson without the institution of Congress. Or again, if 100 Senators and the Vice President find themselves at a Georgetown cocktail party, they simply cannot pass legislation or censure a colleague or even, strictly speaking, debate a bill on the merits. They cannot do these things even if each and every one of them sincerely believes that is what they are doing, not even if each and every one of them knows that all the others share the belief. Instead, a series of conventions, including calling the group to order in the chamber, are required to mark off the possibility of their acting as a group. So their mental states aren't decisive, aren't even particularly relevant. Notice that they can also be acting as Senators—say, placing remarks formally on the Congressional Record—without knowing or believing that is what they are doing, say while they think they are just clowning around. Yet again, think of the everyday social practice of introducing yourself, offering a quick sketch of your personal identity. What you do, in fact, is rattle off a series of social roles you occupy: you're a professor, a husband, and so on. But roles are just defined by their places in institutions.

So too, groups can have a genuinely common good that isn't the sum of their individual members' goods: contrast how easily Frank falls into the summation of people's expressed preference vectors.⁷ Indeed, groups can have a common good that isn't good for *any* individual. Suppose that not a single member of your law school faculty finds it worthwhile, all things considered, to pitch in and do a conscientious job helping govern the school, since serving on committees or showing up at job talks and faculty meetings is too cumbersome. Still the school will be better off if its members are reasonably conscientious; it will run better. A law school is in fact the sort of thing that can flourish. Sometimes its members will flourish as it does: their careers will go swimmingly, they will relish teaching newly improved students, and so on. But its flourishing doesn't *consist* in the members' flourishing. And again, sometimes its members will not flourish as it does: sometimes the

6. For a useful corrective to the usual skepticism, see MARGARET GILBERT, *ON SOCIAL FACTS* (1989); GILBERT, *LIVING TOGETHER* (1996).

7. See Michelman, *supra* note 1, at 404.

school's flourishing will be purchased at the price of the members' doing badly.

I think, then, that we should abandon Frank's stringently individualistic reading of self-government and that we shouldn't be the least bit forlorn about doing so. But I'm jumping a bit ahead of myself; I want to pay more sustained attention to Frank's discussion. So let's ask: What's so special about judicial review? Other institutional arrangements of the modern state raise very much the same problem that tantalizes those riveted on individual autonomy. In this sense, the problem is *worse* than Frank suspects.

Consider the administrative state. Decades ago, the political scientist Ted Lowi urged that the rule of law was dead, destroyed by bureaucracy.⁸ Legislatures, he railed, didn't pass real laws any more. They threw up their hands and delegated authority to unaccountable bureaucrats: "Whereas," he imagined modern laws saying, "this is a huge problem, and whereas we haven't got the time or information to figure out what the hell to do about it, we hereby broadly empower some new agency to take the invidiously abstract and flaccid language we will now write and turn it into real rules." There is something grand, to be sure, in the spectacle of the Supreme Court wrestling with abortion or hate speech. (But they wrestle too with the interstate commerce clause and the tax code.) Still, bureaucrats are out there drafting rules on zillions of subjects, rules that will have the force of law—rules that, in the post-*Chadha*⁹ world, our elected legislatures can't even overrule, and that, in the post-*Chevron*¹⁰ world, officially require extraordinary deference from courts. Notice that the situation Lowi describes might be taken simultaneously as a challenge to the rule of law and a challenge to democratic self-government.

Or consider the Federal Reserve Board. The Board has a remarkable level of autonomy in its decision making, and what Congressional oversight is imposed in committee hearings and the like tends to be remarkably deferential. (Recall Supreme Court confirmations in the good old days.) The stuff that Alan Greenspan has to worry about daily—here's a confession I will publicly make—turns my eyelids into a lead alloy at a moment's notice. But it is politically crucial. And I can't do a thing about it. Notice too that economists might not give a damn about topics that happen to engage me, like contempt for pariah groups and the conservative assault on democratic debate, but be passionately interested in the prime interest rate.

8. See THEODORE LOWI, *THE END OF LIBERALISM* (1969).

9. *INS v. Chadha*, 462 U.S. 919 (1983).

10. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Now one could say about both the bureaucrats and the Fed that they are enabling conditions of democratic self-government. Forcing Congress to draft administrative rules themselves wouldn't be a triumph of democratic self-government. It would instead grind the legislature to a halt. (This is just an application of a point about power: Aggregating all power to yourself makes you less powerful, not more. To be powerful, a principal requires powerful agents. So too with the people: imagine the so-called direct democrat who thinks it would enhance our autonomy if we could draft—or had to draft—bureaucratic regulations in mass popular conventions.) In a roughly similar way, one might argue that taking the decisions of the Fed out of the hands of the legislature is of course a constraint, but it's a constraint that opens up possibilities that would otherwise be unavailable. *Whatever* one is inclined to argue, those with Frank's individualistic concern for self-government have no reason to restrict their attention to judicial review.

I want to turn finally to Frank's concluding comments on epistemic interaction, the it-ain't-everything-but-it's-better-than-nothing solution that he thinks comports in the main with Brennan's jurisprudence.¹¹ I want to link these comments to a contrast Frank invokes in passing. I'm not sure how deliberate his invocation is—the contrast in question is many centuries old now and it springs to tongue or pen or computer rather more easily than it actually springs to mind—but it's his contrast nonetheless: I have parol evidence. Frank tends to gloss constitutionalism and the rule of law in terms of reason, self-government and politics in terms of preference or desire. I'm inclined to doubt the contrast, so put. Not, I should emphasize, for the reason we associate with the crass side of legal realism, with Jerome Frank (and not, alas, Holmes or Cohen or Llewellyn)—that judicial interpretation might be unmasked as the imposition of the judge's preferences.¹² That line of argument is unutterably crude; on these matters, Professor Dworkin's views are infinitely better.¹³ Instead, I doubt the contrast because democratic politics is ordinarily chock full of reason-giving, argument, and deliberation. (So Frank himself noticed some years ago, though he then thought of this in terms of republicanism.¹⁴) But maybe, then, the counter-majoritarian difficulty is a real difficulty for people who believe democracy is fundamentally a matter of preference aggregation. Maybe those of us inclined to think of democracy as government by discussion shouldn't take the bait.

Anyway, the Supreme Court, Frank suggests, might be taken as duly considering the reasons offered by far-flung and diverse social

11. See Michelman, *supra* note 1, at 420-27.

12. JEROME FRANK, *LAW AND THE MODERN MIND* (1930).

13. I prefer the statement in RONALD DWORKIN, *LAW'S EMPIRE* (1986).

14. See Frank I. Michelman, *Law's Republic*, 97 *YALE L.J.* 1493 (1988).

actors. So they might. But reasoning, I want to suggest, must already be deeply political, in ways further radicalizing the implications of Frank's starting premises. Here's why.

Classical empiricists of the Enlightenment were fond of urging people to think for themselves. Don't defer to others, they insisted; don't take things on faith; be skeptical, be critical, think things through for yourself; make sure you justify your beliefs, because only justified beliefs qualify as knowledge. This is invigorating advice. It is epistemic self-government. But—if we construe it on the model of Frank's "liberal" reading of self-government—it's impossible.

As a matter of brute fact, we are hugely and irrevocably dependent on others for what we know. I believe the Soviet Union fell in 1989 because I read about it in the newspapers: that is, because other people told me. "But you saw a bit of it, with your own eyes, on TV!" That is, I saw scenes that other people told me were the fall of the Soviet Union. "You could fly there yourself!" That is, I could get on a plane and fly to a place that others would tell me is Russia and the people there would tell me about what happened in 1989. And I would believe them. I believe that this is Frank Michelman and that this is Ronald Dworkin and that this is the inaugural lecture of the Brennan Institute at NYU, all because people have told me so. I have no reason to doubt them, of course, but that doesn't mean I somehow made up my mind for myself. I also believe that $2 \times 2 = 4$, but only because it was drummed into my head when I was a kid. I happen to know enough philosophy of mathematics to know that I can't myself justify the belief.

Now suppose that we construe politics as the realm of controversy over legitimate authority. Notice that we have controversies about epistemic authority: about who to believe, in what ways, on what subjects, and so on. Are moral philosophers' views on abortion more credible than those of the Roman Catholic Church? than those of the fabled man on the street? than those of doctors who administer abortions? or those of women who have had them? Whose views on political economy should we adopt, those of the *Economist* or those of the *Nation*? And so on. We have a division of epistemic labor. Some of it seems relatively uncontroversial. It is better to believe what Frank tells you about public law on welfare entitlements than it is to believe me. But some of it is bitterly controversial, and rightly so.

What you believe depends on who you believe. (But there's no strict priority relationship: who you believe depends on what you believe, too.) Worse, what you know depends on who you know. (And again, who you know depends on what you know.) Now we can see a new threat to individual autonomy (on Frank's Spooneresque reading of it): Every day, you accept beliefs from others who don't share your

preferred account of epistemic authority. Worse, you live under the reign of social institutions with their own official accounts. Epistemic authority, too, isn't a natural fact; it is, in Frank's fine phrase, politically decideable.

Frank imagined the Supreme Court as the tribunal of reason, democratic in being epistemically responsive to a wide range of views. Here, alas, I have to dissent not just from Frank but apparently also from Brennan. The Court manifestly isn't and shouldn't be a freewheeling arena of political agitation. If it were, Frankfurter's old worries about super-legislatures would apply in force.¹⁵ (I say this ruefully. It is not easy to make me sympathize with Frankfurter or disagree with Brennan.) Existing law constrains who can come to the Court and what they can talk about. Think of rules of standing, the law of evidence, the treatment of amici briefs, as the law's internal account of epistemic authority.

Is there a democratic account of epistemic authority? Sure: it requires sneering at self-appointed poohbahs and pompous asses, being skeptical of the self-interested claims of the wealthy and powerful, and so on. And there is a tempting first pass at a more inclusive norm: Pay attention to the merits of the argument, not the status of the speaker. But that one looks perilously like returning us to the paralysis of the individualistic reading of classical empiricism, making up one's own mind on everything for oneself. Here I will shamelessly ask for your own epistemic deference—trust me, I've thought a lot about this: our controversies about epistemic authority are remarkably detailed and complicated.

Could we resolve them democratically? Well, we can and do discuss them in public. At any moment in the discussion, each of us is implicitly relying on a set of background beliefs about epistemic authority: we eagerly attend to some speakers, yawn at others. We can and do revise those beliefs over time. They are provisionally fixed; some are more entrenched than others (recall Quine¹⁶); but they can always be criticized and revised. We just can't revise them all at once, for then we would have nowhere to stand, no other beliefs to rely on in evaluating the ones we're doubting.¹⁷ *We can change them if we want to.* This, I suggest, is

15. See Frankfurter's dissent in *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 648 (1943). The original reference to "super-legislature" seems to be Brandeis's dissent in *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504, 524 n.36 (1924). Some such distinction between courts and legislatures is essential, though of course its content must remain controversial; thus the point has been routinely invoked by those otherwise sharply at odds with Frankfurter. See for instance Black's dissent in *Southern Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 788 (1945), and Douglas's opinion in *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 422 (1952).

16. For a useful introduction, W. V. QUINE, *THE WEB OF BELIEF* (1970).

17. The crucial text remains LUDWIG WITTGENSTEIN, *ON CERTAINTY* (1969) (exploring limits of Cartesian skepticism and failures of some rejoinders to it).

what properly bears the weight of popular autonomy. Not just for epistemic authority, but for social and political practices more generally.

That old pragmatist or antifoundationalist sentiment brings me back full circle to the problem that so worries Frank, that of reconciling constitutionalism and democracy. Both constitutionalism and democracy are arenas of argument *and* arenas of action. In both we've adopted all kinds of division of labor: we have tort lawyers and people doing jurisprudence, subcommittees hearing expert testimony, and so on. In both we can and do revise what we're up to as we go. We can change our minds, change the ways we make up our minds, change our practices, you name it. At a particular moment, a particular citizen might be appalled at a decision of the Supreme Court, true. And she might be appalled at the considerations that Supreme Court justices find dispositive or whose views they find authoritative. But so too she might be appalled at a decision of Congress or the Federal Reserve Board or a bureaucrat drafting rules for OSHA. So too she might suspect that the consensus among evolutionary biologists on male aggression is infected with misogynist politics and misogynist epistemic norms. Provided all these views and practices are reasonably open to public scrutiny and revision, I claim, they meet the test of democratic self-government. And the Supreme Court—showered with news coverage, popular and scholarly commentary, amici briefs, you name it—is anything but the most intransigently antidemocratic institution around. In this way, Frank's radicalization of the counter-majoritarian dilemma is singling out an inappropriate target.

Like Quinean beliefs, many practices are pretty deeply entrenched. It would be very hard—politically hard and legally hard alike—to get rid of the Federal Reserve Board. But we could, eventually, if we decided it made sense. There is then nothing special here about judicial review, no special reason to be anxious about the so-called counter-majoritarian difficulty. What's the worry?