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The Empty Circles of Liberal Justification

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THE EMPTY CIRCLES OF LIBERAL JUSTIFICATION

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> Myth does not deny things, on the contrary, its function is to talk about them; simply, it purifies them, it makes them innocent, it gives them a natural and eternal justification, it gives them a clarity which is not that of an explanation but that of a statement of fact. . . . In passing from history to nature, myth acts economically: it abolishes the complexity of human acts, it gives them the simplicity of essences, it does away with all dialectics, with any going back beyond what is immediately visible, it organizes a world which is without contradictions because it is without depth, a world wide open and wallowing in the evident, it establishes a blissful clarity: things appear to mean something by themselves.
>
> — Roland Barthes[1]

American liberal thinkers are fascinated with the justification of the liberal state. It is this question of justification that inspires and organizes the work of such leading liberal thinkers as John Rawls, Ronald Dworkin, Frank Michelman, and Bruce Ackerman.[2]

The manifest import and prevalence of the question of justification among liberal thinkers makes it possible to speak here of a certain "practice of liberal justification." This practice displays a certain order and certain recursive characteristics. It is composed of a common ontology and a common narrative. It poses for itself a series of recursive intellectual problems answered with a stock set of rhetorical moves, aimed at achieving certain key political objectives.

Here I wish to explore the character and identity of this practice of liberal justification. What sort of world does it offer us? And how does it do its work?

The inquiry is thus twofold. In one aspect, the aim is to reveal the practice of liberal justification — to reveal its organizing character, its pathways, and its problems. In another aspect, the effort

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1. ROLAND BARTHES, MYTHOLOGIES 143 (Annette Lavers trans., Hill & Wang 1972) (1957).

2. *See, e.g.,* 1 BRUCE ACKERMAN, WE THE PEOPLE — FOUNDATIONS (1991); RONALD DWORKIN, LAW'S EMPIRE (1986); JOHN RAWLS, POLITICAL LIBERALISM (1993); JOHN RAWLS, A THEORY OF JUSTICE (1971); Frank I. Michelman, *The Supreme Court, 1985 Term — Foreword: Traces of Self-Government,* 100 HARV. L. REV. 4 (1986).

here is to try to understand this practice — to appreciate why and how it comes to have the distinctive identity and character it does.

Here, we will encounter a number of familiar leading liberal thinkers and philosophers. We will not, however, encounter them in the usual way. We will not attempt to join or to participate in the practice of liberal justification. Hence, we will not pay much attention to the intricate differences and disagreements that characterize the various attempts at liberal justification. On the contrary, because it is the practice of liberal justification as a whole that we seek to reveal, this inquiry will focus on the broad — sometimes loose — commonalities that sustain the intricate differences and disagreements, the broad-scale frames and orientations within which liberal thinkers strive to set out and to resolve their problems.

Thus, the inquiry itself will deliberately fail to honor some of the received categories and operations of Anglo-American analytical philosophy. For one thing, the categories and operations of Anglo-American analytical philosophy are not helpful to the enterprise pursued here. For another, those categories and operations are, as a general matter, less an aid to explanation than they are in need of explanation themselves.

We will also elide what are, for some other purposes, significant differences in the objects and missions of the liberal versions of political philosophy (Rawls), legal philosophy (H.L.A. Hart), constitutional theory (Ackerman and Michelman), theories of adjudication (Dworkin), and theories of interpretation (Owen Fiss).

The point of this elision is *most definitely not* to suggest that these various enterprises are all the same. Rather the elision here enables a demonstration that the same aesthetic, the same ontological and narrative forms traverse these different liberal versions of politics, legalism, constitutionalism, adjudication, and interpretation. Here, as in other contexts, form not only anticipates substance; but, in important ways, *the form is the substance*.[3]

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3. The practices of normative legal thought and Langdellianism institute, rehearse, and entrench *an aesthetic* of self, social life, political engagement, and the like. *See* Pierre Schlag, *"Le Hors de Texte, C'est Moi": The Politics of Form and the Domestication of Deconstruction*, 11 CARDOZO L. REV. 1631 (1990) [hereinafter Schlag, *"Le Hors de Texte"*]; Pierre Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801 (1991); Pierre Schlag, *The Problem of the Subject*, 69 TEXAS L. REV. 1627 (1991).

THE POPULAR CONSTITUTIONAL MYTHOLOGY — ONTOLOGICAL
IDENTITIES AND NARRATIVES

In America, much of the practice of liberal justification is
shaped by, and organized around, the aspirations and problems of a
popular constitutional mythology. This conflation of liberalism
with constitutionalism is hardly surprising. For one thing, the
American constitutional mythology was itself very much influenced
by liberal thought as expounded by Montesquieu and Locke.[4] For
another, contemporary American liberal thinkers are very much
oriented to the practical task of justifying and defending what they
see as an extant (and almost perfected) liberal state — namely,
their own.[5]

The popular *narrative* recounts the story of a sovereign people
who in a foundational moment established their own state by set-
ting forth in a written constitution the powers and limitations of
their government. The very identity, content, and character of this
government is established by the Constitution itself. In turn, the
authority of this Constitution stems from the consent of the gov-
erned — their acquiescence in a limited surrender of their sover-
eign power in return for the benefits of a limited, representative
government.

This narrative ostensibly establishes the authority of the Consti-
tution, justifies that authority through reason, and achieves both
tasks in a such a way as to demonstrate the consent of the governed
to constitutional rule. The achievement of these tasks effectively
requires a narrative that reconciles reason with authority, authority
with freedom, and freedom with reason. The attempts to achieve
such a reconciliation confront a series of recurrent liberal conun-
drums that themselves give shape to the drama of liberal
justification.

This constitutional narrative, as expressed in both the popular
constitutional mythology and in the more intellectualized efforts at
liberal justification, revolves around certain key *ontological
identities*:

"The Constitution"
"The Founding"

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4. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett ed., Cambridge
Univ. Press 1988) (1690); MONTESQUIEU, THE SPIRIT OF LAWS (David Wallace Carrithers ed.
& Thomas Nugent trans., University of Cal. Press 1977) (1748).

5. As but one instance among many, the very influential work of John Rawls conflates
questions about fundamental constitutional principles with the basic organization of the
state. *See* RAWLS, POLITICAL LIBERALISM, *supra* note 2, at 227-28.

"The People"

"The Consent of the People"

These key identities comprise a constitutional ontology: they are the fundamental and enduring "beings" of the constitutional narrative and feature repeatedly in the drama of popular constitutional mythology.

To be sure, the precise character of these identities can vary somewhat. Indeed, it is precisely this genial flexibility that enables these crucial identities to work as mythic referents. Yet, even as their character and content may be "reconstructed," they endure as the origins, boundaries, structures, and levers through which the normative constructions of American liberal justification take place — over and over again. American political-legal imagination is forever circling around and returning to these crucial ontological identities. Consider then a brief description of these identities.

The Constitution is, in American popular and legal culture, an authoritative paramount norm — hierarchically superior to any other legal or political authority, save perhaps one (soon to be mentioned). The Constitution is held to be the ultimate authority — the frame of reference of last resort. All political and legal acts must ultimately conform to this authoritative source. It is a mark of the authoritative character of this source that it is invoked in all manner of ways — as icon, symbol, plan, rule, argument, text, spirit — to perform a variety of actions — constitute, organize, control, regulate, inspire, justify. It is a measure of the paramount character of this authoritative source that very often it is taken to be the final word, the ultimate frame of reference, the last recourse, the very limit of possible political-legal contestation.[6]

The foundational moment is an aspect of the politics of time. In American popular culture, the founding in 1787 has special significance. While the point would seldom be expressed this way, the foundational moment is a breach in time. It is an origin that signals a discontinuity between all that has happened before and all that will happen after that moment. With respect to what happened before, the foundational moment acts as a rupture. Prior history, prior practices, prior beliefs lose their *intrinsic* authority. Whatever authority they retain after 1787 — and in some cases it is considerable — stems from the fact that they are explicitly or tacitly incorporated by the Constitution at the moment of foundation. Certain

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6. Indeed, among lay people, arguments that the constitution requires thus and such are often taken to be definitive invocations of the final authority.

formulae and devices are explicitly used to refer back to the pre-Constitutional age. Hence, for instance, the liberty of the Due Process Clause of the Fourteenth Amendment is said to refer to the liberties recognized historically by "the collective conscience of our people."[7] This formula and others like it serve as a bridge between the meaning of the Constitution and antecedent beliefs and traditions. But even so, this *renvoi* confirms the originating and self-constituting character of the foundational moment.

The People also occupy a special place in the popular American constitutional mythology. From the high school civics classroom to the most intellectualized law school seminar, the People is held to be sovereign. The Constitution — and thus the powers of government — is held to stem from the People. The People are a mythic subject, a mythic agency. The precise identity of the People remains largely undetermined. In part that is because since 1787, we have not heard a whole lot from "The People" — there has been no widespread recognition of any action by the People.[8] The popular view that the Constitution at once stems from the People and yet is the final, paramount authority creates the potential for a certain undecidability in the hierarchy of the liberal state. Is it the Constitution that is paramount or the People?

Consent is a fourth identity crucial to the liberal constitutional narrative. The legitimacy of the paramount norm, of the Constitution, depends upon the consent of the People. It is the historical or mythic fact of consent to limited government that produces the legitimacy of the liberal state and its actions. Consent works both in a positive and in a negative sense. In a positive sense, consent means that there is a fundamental identification between the People and the State such that the actions of the State become the actions of the People. The question of political legitimacy is seemingly resolved as the opposition between the People and the State disappears. In a negative sense, consent functions to disable the People from objecting to the actions of their government. The government becomes an agent of the People, and so long as the agent acts in accordance with the directions of the principal, there

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7. Griswold v. Connecticut, 381 U.S. 479, 493 (1965) (Goldberg, J., concurring) ("In determining which rights are fundamental, judges . . . must look to the 'traditions and [collective] conscience of our people' to determine whether a principle is 'so rooted [there] . . . as to be ranked as fundamental.' " (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934))).

8. Any number of political actions — from the ratification of the Civil War Amendments, to popular protests such as those during the Vietnam war, to the routine voting on state referenda and initiatives — might well be considered actions of "The People." But the fact is that they have not been considered actions of the People on any significant scale.

are no grounds for complaint. Either way, positively or negatively, consent operates to produce a mythic belief in self-rule.

CRUCIAL QUESTIONS

This deeply ingrained set of identities, and the constitutional narrative they enable, exhibit a certain aesthetic — one that is replicated in more intellectualized efforts at liberal justification. Indeed, one can consider the intellectualized efforts at liberal justification as attempts to rework the popular constitutional mythology in ways that strive to avoid some of its intellectual shortcomings. These shortcomings are in part linked to the exigent demand for a justification of the liberal state as a form of self-government.

The representation of the liberal state as a form of self-rule means that the liberal state must somehow be accepted, ratified, or consented to by those who are ruled. This logic of self-rule and self-government is exceedingly demanding. Accordingly, as a form of justification, popular constitutional mythology confronts a number of familiar problems. Why, for instance, should a constitution adopted more than two centuries ago in the pre-industrial age bind generations living in postindustrial conditions? Why should subsequent generations honor the actions and political determinations of the generation of 1787? And in what way does past consent to constitutional government suffice to establish consent in the present?

These questions are closely related. Perhaps they are even different ways of asking the same question. If so, the question is somewhat nebulous: it is not always clear what the problem is. In one sense, one might say that the problem is one of *authority.* What is it that endows a peculiar generation — the generation of 1787 — with the authority to prescribe the limits and channels of political possibility for subsequent others? But one could also frame the problem as one of *reason.* What reason is there to follow the proclivities, fears, and hopes of a pre-industrial generation in the context of a technological postindustrial society? Why is this constant reference to an unruly and scatter-shot array of documents from the past a reasoned way of fashioning the politics and the law of the present? So too, the problem might be framed as one of *freedom.* What precisely allows some to delimit the freedom of others when these others have not been consulted? In what sense is their freedom honored and observed?

To frame these questions in the idioms of authority, reason, and freedom seems quite natural. That is because liberalism itself de-

mands observance of these three requirements. Indeed, it is the hallmark of liberalism to seek reconciliation of authority, reason, and freedom in terms that are consonant with each.[9]

The popular mythology promises to reconcile these three requirements by reference to the idea of self-government. The popular mythology, of course, only works to the extent that individuals understand themselves within the terms set forth in the myth. Once intellectual, social, or political doubt discredits the myth, it becomes the task of liberal justification to refashion the crucial ontological identities and their relations in a refurbished narrative. Liberal justification devotes itself to reconstructing the myth so that it achieves credibility once more, even to the more discerning and critical of subjects — namely, the political losers and the skeptical intelligentsia.

Liberal justification thus attempts to produce an identification between the rulers and the ruled. But this cannot be just any identification. It must be a liberal identification — an identification that itself comports with liberal precepts — one that can be achieved through liberal *reason,* while respecting the *freedom* of the liberal individual subject, and yet emerging at the end as nonetheless *authoritative.*

Liberal Conundrums

Achieving a liberal identification between the rulers and the ruled is surely no easy task. There are many ways in which even the best liberal efforts can go wrong.

Why, for instance, should a reasoning subject consider the Constitution to be authoritative? To ask this question is to ask for *the justification of authority.* Already this produces a quandary. For one thing, to ask for a justification in support of an authority can already displace the authoritative status of the authority. As Kierkegaard observed:

> To ask if Christ is profound is a blasphemy and an attempt to destroy him with ruse (either with consciousness or unconsciously) since the question contains doubt concerning his authority. . . . To ask if a king is a genius — for him to be obeyed in the case of a positive answer — is actually a *lèse-majesté* since the question contains the doubt in the sense of submission to his authority.[10]

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9. *See generally* GERALD F. GAUS, JUSTIFICATORY LIBERALISM: AN ESSAY ON EPISTEMOLOGY AND POLITICAL THEORY (1996).

10. Soren Kierkegaard, *"The Notion of the Chosen One,"* quoted in SLAVOJ ZIZEK, FOR THEY KNOW NOT WHAT THEY DO: ENJOYMENT AS A POLITICAL FACTOR 236 (1991).

The request for a justification to support an authority is already a demotion of the authority in question; it is already an acknowledgement that the authority is in need of further support. It is an acknowledgement that an authority is authoritative only so long as it is consonant with a higher order justification.

To ask for a justification of authority thus already bespeaks a loss of authority. In certain political regimes of a theocratic or autocratic character, the justification of authority is a question that need not arise. In theocratic political thought, God is His own *raison d'être* and is not in need of any further justification. In liberal thought, however, the conundrum of reason and authority must be confronted. For it is an aspect of liberalism itself that it cannot abide dogma, but must show that its authority is justified.

To simply assert that the Constitution is authoritative and in need of no justification will not do.[11] On the contrary, the Constitution must always be justified as an authority that can be made to answer in the court of reason. This, of course, is an extremely difficult task. Indeed, the rhetoric of reason and the rhetoric of authority are hardly congruent. Reason demands argument and justification. Authority demands submission and obeisance. The irony is that there is an inverse relation between the reasoned character of justification and the authoritative character of authority. The more one insists on a justification of authority, the less authoritative authority will be. Whatever power authority has will stem not from its authoritative status, but rather from the strength of the justification that supports it. Correspondingly, the more one insists on the authoritative character of a justification, the less reasoned it will be. This is a point to which we shall return.

In liberal thought, it is not just authority and reason that must be reconciled, but each of them must in turn be reconciled with freedom. The Constitution must be the product of reason and it must be authoritative. But, according to the popular mythology, it must also be the kind of reasoned authority to which the governed freely consent.

Authority and freedom may perhaps be compatible, but not obviously so. A political authority that one freely chooses, to which one freely submits, is, of course, not much of a political authority. It lacks certain crucial aspects of political authority — including the power to command from out of its own identity the submission of

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11. Sometimes, however, it is asserted that the question of justification is a matter of philosophy not law. *See, e.g.,* Henry P. Monaghan, *Our Perfect Constitution,* 56 N.Y.U. L. REV. 353, 383-84 (1981).

those subject to authority. An authority that can be freely accepted or rejected does not have much in the way of authoritative force. In a word, it is hardly compelling. Correspondingly, the more power an authority has to command the submission of its subjects, the less they will be free in choosing to submit to this authority.

Reason and freedom are also in tension. Reason — at least within the liberal vision — has its own requirements and its own procedures that demand observance regardless of whether a subject accepts reason in substance. Reason demands that the addressee become a certain kind of person — a reasonable one — that accedes to all reasoned arguments. Reason, for good or ill, demands at the outset that one take a certain attitude and orientation towards deliberation and decisionmaking. This point is familiar to all who have seen parents reasoning with their child or philosophy professors reasoning with their students. The first demand is always that the addressee become a subject who listens and reasons. One need not be an aficionado of Nietzsche or Foucault to recognize that in this demand there may be a restriction of freedom, a reduction of the possibilities of the subject. To be sure, one can answer in a Kantian vein that only the subject capable of reasoning is truly capable of freedom. But this answer begs the question, for it presumes that in reason's demand that the individual subject submit to reason there is no freedom lost. Whether there is — as a Nietzsche or a Foucault might claim — or there is not — as a Kant would maintain — is precisely the question.

These are rather exigent demands. Reason, authority, and freedom must be reconciled with each other so as to induce the consumers of the liberal myth to embrace the proffered justification as an articulation of their own beliefs. The drive in each case is to persuade the consumers of the liberal myth that, informed by *reason, they freely choose an authoritative,* constitutional liberal state.

One way of achieving this objective is simply to relax liberalism — to soften the intellectual medium or the intellectual milieu within which the work of liberal justification is performed. Another way is to rework the fundamental ontologies and narratives. Liberal thinkers, as a group, do both.

RELAXING LIBERALISM

One of the ways in which liberal thinkers facilitate their task of justification lies in the use of accommodating metaphors to describe and enable their reconciliation of reason, authority, and freedom. Hence, for example, the popularity among liberal intellectuals of

such fashionable terms as "reconstructing," "reconstituting," "rethinking," or "re-"virtually anything.

The "re" allows liberal thinkers the latitude to represent the productions of liberal justification as at once the *same* and yet *different* from the original. The liberal production is the *same* in that the authority, the institutions, and the practices of the "original" popular mythology remain intact. The liberal production is *different* in that the intellectual embarrassments of the original popular mythology are repaired, excised, exorcised, or redeemed by the "higher order" liberal justification. It is the genial ambiguity of terms like "reconstruction" that at once obscures and enables the coexistence of sameness and difference. Another contemporary metaphor — equally accommodating — is the trope of "translation."[12] Translation implies the bringing of an original into a new context such that the original is at once the same — as original as the original can be given the new context — and yet different — no longer as original as the original. Ultimately, these generous metaphors authorize liberal intellectuals to establish a parallel universe.

A Parallel Universe

In terms of resolving the conundrums posed by the conjunction of reason, authority, and freedom, the rhetorical strategy of liberal justification is almost always the same. As we shall see, the tensions between the three terms — reason, authority, and freedom — dissipate as the identities of the three terms are refashioned such that they are consonant and harmonious.

Thus, thinkers like Rawls, Ackerman, Michelman, and other leading American liberal thinkers attempt to refashion the constitutional mythology so as to avoid its inadequacies, but to do so in a way that nonetheless continues to resonate with the popular constitutional ontology and the popular constitutional narrative. Those who are engaged in the enterprise of liberal justification seek an understanding that will be *different* enough to be intellectually respectable but sufficiently the *same* so as to reinforce — rather than supplant — the popular constitutional mythology.

Here the hermeneutically generous metaphors, such as reconstruction, reconstitution, translation, and so on, serve to enable liberal thinkers to abstract, dehistoricize, decontextualize, and detemporalize the popular constitutional mythology. This abstrac-

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12. *See* Lawrence Lessig, *Fidelity and Constraint*, 65 FORDHAM L. REV. 1365, 1368-76 (1997); *see also* Lawrence Lessig, *Fidelity in Translation*, 71 TEXAS L. REV. 1165 (1993).

tion, dehistoricization, decontextualization, and detemporalization is visited upon any or all of the key ontological identities:

The Constitution

The Founding

The People

Their Consent

Liberal justification thus attempts to refurbish the popular constitutional mythology by rendering the key ontological identities and narratives more capacious and appealing than the historical originals.

REMODELING THE CONSTITUTION

In place of the Constitution, liberal justification substitutes a more malleable and more capacious *paramount norm*. The paramount norm is an abstracted and decontextualized version of the Constitution itself. In Rawls, for instance, the paramount norm takes the form of two highly abstract principles of justice: an injunction to (1) maximize the total system of liberty, and (2) arrange inequalities in wealth and other such "primary goods" so that the arrangement redounds to the advantage of the least well off.[13] In Ackerman's work, the paramount norm is cast as instances of "higher lawmaking."[14] In Dworkin's work, the paramount norm consists of the best theory that best fits the institutional materials.[15] In Hart, following perhaps a more English than American model, the paramount norm is a hypothetical and unspecified master rule of recognition.[16]

The capacious and indeterminate identity of the paramount norm is a response to certain rhetorical pressures. Inasmuch as the

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13. The Rawlsian theory of justice is famous for the articulation of two fundamental principles of justice that the state must satisfy in order to be just. Roughly stated, the first principle requires a maximization of the total system of liberties. The second principle requires that inequalities in wealth, income, and other such primary goods should be distributed so as to redound to the least well advantaged. *See generally* RAWLS, POLITICAL LIBERALISM, *supra* note 2.

14. The hallmark of Bruce Ackerman's recent work is a distinction between normal and higher lawmaking. Normal lawmaking occurs when competing interest groups jostle with each other in attempting to further their different agendas. There is no great consensus on future change. Higher lawmaking, by contrast, occurs when a significant part of the citizenry is able to mobilize itself and others for a significant change in the political character of the nation. *See* ACKERMAN, *supra* note 2, at 270-72.

15. *See* DWORKIN *supra* note 2, at 255, 405-06. Ronald Dworkin's work is characterized by an attempt to fuse moral philosophy with the authoritative materials of law. Both are anchored and reflected in the other and each is reconciled with the other according to various aesthetic criteria such as "coherence" and "fit." *See generally* DWORKIN, *supra* note 2.

16. *See* H.L.A. HART, THE CONCEPT OF LAW 92 (2d ed. 1994).

paramount norm must, one way or another, be chosen or accepted by its subjects, there is great rhetorical pressure to make this paramount norm as inclusive as possible. There is, in short, a tremendous pressure to produce an exceedingly abstract, capacious, and perhaps even mystical norm — the kind of norm that will allow each of us to read into it whatever we wish to find there. The more abstract, mystical, or capacious the paramount norm, the less it will exhibit concrete features that might trigger the objection of any particular reader. Thus, Dworkin's paramount norm of integrity, making the law the best it can be,[17] is immensely capacious — capable of harboring virtually any jurisprudence. Rawls's two principles of justice are notoriously flexible.[18] As for Hart's ultimate rule of recognition, it verges on the mystical. It is not at all clear what it is, what content it may have, or how it may be identified.[19]

RECONSTRUCTING THE FOUNDATIONS

In liberal justification the paramount norm, typically, is temporarily liberated from any historically situated event. In Rawls, this is accomplished by bringing the universalizing, abstracting, ahistorical frame of Anglo-American moral philosophy into play. In a real sense, the foundational moment in Rawls, "the original position," is supposed to be a (virtually) timeless thought experiment — or, as he calls it, a "device of representation."[20] This founding moment, in turn, is achieved as the reader is invited and induced to abstract from his or her historical, sociological, and psychological circumstances. This emancipation of the paramount norm from any historically or temporally situated event serves to avoid the arbitrariness of localizing the founding movement of a particular point in historical time. Instead, the paramount norm assumes a universal appearance, transcending the confines of historical epochs, or the parochial self-interests of any specific generation.

Bruce Ackerman's work presents an especially interesting twist on this emancipation of the paramount norm from history.[21] Through his articulation of the notion of "transformative politics,"

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17. *See* DWORKIN, *supra* note 2, at 411.

18. Inasmuch as the Rawlsian scheme does not — and indeed does not set out to — resolve empirical questions about the relative performance of various economic systems or social arrangements, the Rawlsian principles leave a great deal of room for argument over which kind of system or arrangement is best: socialism, welfare capitalism, economic libertarianism, and so on.

19. *See* HART, *supra* note 16, at 106.

20. RAWLS, POLITICAL LIBERALISM, *supra* note 2, at 25-27.

21. *See* ACKERMAN, *supra* note 2.

Ackerman maintains the possibility that each generation can contribute to the establishment of a paramount norm through an effort at "higher lawmaking," that meets certain requirements of constitution making.[22] In a sense, like the Rawlsian strategy, this approach overcomes the arbitrariness of privileging a particular generation and a particular epoch in establishing the paramount norm. But, in another sense, because of its exigent requirements — quite reminiscent of the Constitution's Article V amendment procedures — this dispersal of the founding moment nonetheless remains tied to the parochial interests of some particular generations and some particular epochs. Ackerman's peculiar contribution is to spread (and possibly diffuse) the arbitrariness by dispersing it across multiple generations.

REFASHIONING THE MYTHIC SUBJECT

The practice of liberal justification also attempts to rework the subject who consents to the paramount norm. Recall that the paramount norm in liberal justification is not self-validating. The paramount norm has to be accepted or ratified by its subjects. These subjects are hardly a monolithic crew. Their dispositions, orientations, identities, interests, and preferences are far from homogeneous. The likelihood that any paramount norm would be satisfactory to all of them is extremely small. Moreover, they are not always receptive to reasoned argument. If these subjects are to accept a paramount norm, they will have to be disciplined. Their identities will have to be recast in such a way as to make them more manageable, more docile, and more compliant.

And so they are. At the level of the individual the subject is recast as coherent, unified, autonomous, self-directing — in short, as abstracted individual subjects. In turn, these subjects are summoned, invited, and induced to identify with grand supra-individual subjects: "We the People" (Ackerman), "The Interpretive Community" (Fiss), "Persons in the Original Position" (Rawls), or "Hercules" (Dworkin).[23] Assuming these new identities, the liberal subjects become capable of accepting the paramount norm.

One problem with this mythical fashioning of supra-individual subject identities is that in order for the logic of consent to work, the individual liberal subjects must *in fact identify* with the mythic

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22. *See id.* at 266-94.

23. *See* ACKERMAN, *supra* note 2, at 6-7; DWORKIN, *supra* note 2, at 238-40; RAWLS, A THEORY OF JUSTICE, *supra* note 2, at 11; Owen Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 745 (1982).

supra-individual subject identities. If the individual liberal subjects do not identify with these mythic identities, then, of course, whatever these mythic identities accept, ratify, or consent to will remain beside the point. Liberal thinkers use a variety of rhetorical techniques to prompt identification with the mythic self-representation. Most of these techniques involve the use of moral flattery, the promise of communal belonging, the incentive of self-interest, and a certain amount of rhetorical bullying.

Among the liberal thinkers, Rawls is particularly interesting because he is the most explicit and self-reflective in his construction of a mythic process that will yield consent to a paramount norm. Hence, Rawls constructs as a thought experiment an "original position" in which artificial persons are to choose behind "a veil of ignorance" the principles that are to regulate "the basic structure" of society.[24] Rawls makes a point of telling his readers that "the original position" is a representational device designed specifically to yield a choice for his paramount norm — what he calls "justice as fairness."[25]

Readers are invited to identify with the person in the original position through moral flattery and an appeal to self-interest. The person in the original position is, in his abstraction, universality and openness — a moralistic self-image to which readers will feel they ought to aspire. At the same time, the person in the original position is asked to evaluate various forms of political organization that will advance his self-interest. The person in the original position is thus a hybrid — conjoined in the observance of morality and the pursuit of self-interest.

What makes the Rawlsian argument remarkable is precisely this conjunction of moral attitude and instrumental self-interest as supportive of a choice for his paramount norm. The problem with the Rawlsian strategy, as we shall see, is that the person in the original position ultimately fails to adequately represent the moral concern and the instrumental self-interest of the reader.

If Rawls is the most interesting in his refashioning of the subject, Dworkin is no doubt the most extravagant. If Rawls's subject is stripped of flourish and ready for normative submission, Dworkin's mythic subject is dressed to kill. Dworkin invites his readers to become "Hercules" — a formidable legal giant gifted with profound moral insight and unbounded legal intelligence. Dworkin's scheme

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24. *See* RAWLS, A THEORY OF JUSTICE, *supra* note 2, § 3.

25. *See* RAWLS, POLITICAL LIBERALISM, *supra* note 2, at 28.

is clearly one of flattery. It is an elaborate self-aggrandizement fantasy that allows each of his readers to become an exalted and grandiose self. The problem with this account is that the mythic self-representation known as Hercules seems to be as much a candidate for psychoanalytic intervention as an agency for a legitimate law. Indeed, Hercules, while truly grand, turns out to be a fairly vacuous fellow ruling over a jurisprudential empire that is very nearly a perfect mirror image of his own truly grand though nearly vacuous self.[26]

Ackerman's work is interesting in that, more than other liberal thinkers, he attempts to rework and refashion the mythic subject of "The People" in a way that can claim some fidelity to the popular constitutional mythology.[27] Of the key ontological identities in the popular constitutional mythology, it is perhaps "The People" that has remained the most abstract and the most elusive. For one thing, it has been a long time since "The People" have been seen to act.[28] There is no obvious concrete referent for "The People." When do the People act? In constitutional conventions? In popular initiatives? In massive street protests?[29]

Nor has the category of "The People" been used much in recent American history to describe political or legal events. It remains a largely empty abstraction. Few (if any) political or legal actions are attributed to the People. The point becomes manifest if one compares the status of the People to the status of The Constitution. In contrast with the People, the Constitution is a key ontological identity that is almost daily infused with meaning and significance. It is incessantly invoked, evoked, celebrated, berated, and abused. The Constitution is a daily site for contestation, conflict, and thus social and political definition. The Constitution is on CNN; the People are not.

Moreover, American culture makes it difficult, both intellectually and politically, to sustain supra-individual subjects such as the People.[30] For one thing, if such supra-individual subjects are accorded sufficient depth and significance, they could displace or disturb the centerpiece of American liberalism — namely, the liberal individual subject. Accordingly, to the extent that supra-individual

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26. *See* Schlag, *"Le Hors de Texte," supra* note 3, at 1662-67.

27. *See generally* ACKERMAN, *supra* note 2, at 6-7.

28. *See id.* at 6.

29. For Ackerman's attempt to work out some of these difficulties, see *id.* at 272-90.

30. For one interesting effort to elaborate such a constitutional subject, see Jed Rubenfeld, *Reading the Constitution as Spoken,* 104 YALE L.J. 1119 (1995).

subjects are allowed on the intellectual or political scene, they are weak, ephemeral, schematic. As if in confirmation of the point, the obvious supra-individual subject in American life — namely, the "community" — is most often cast as a derivative construction, the aggregation of individuals and individual action.[31] Indeed, in the rhetoric of American politics, an appeal to "community" is almost always a sure loser — destined to be trumped by appeals to individual liberty and individual freedom. In short, the Hegelian-Marxist tradition that places great importance on collective or supra-individual subjects such as "nation" or "class" remains *largely* foreign and antithetical to American intellectual and political life, as do fascistic subjects steeped in notions of "the soil," "the nation," and "the blood."[32]

Ackerman's recent works nonetheless attempt to introduce a diluted Hegelianism into the American constitutional mythology by introducing — or from his perspective, reviving — the mythic subject "The People." Ackerman's argument strives to prompt a recognition of the crucial role played by the People in American constitutional history. According to Ackerman, it is this mythic agency of the People that periodically engages in "higher lawmaking" and thereby yields the paramount norm that is supposed to regulate constitutional meaning. Ackerman's argument thus can be charitably understood as a kind of sustained reflection on American constitutional history, one that allows readers to reach for a self-conscious recognition of what they already are — namely, potential instantiations of "We the People." As Ackerman himself says, "[W]e too may find it within ourselves to speak with the voice of We the People — so long as we keep the language alive."[33] His enterprise, as he describes it, is not "to glimpse the shape of Utopia," but to "capture the spirit of the existing historical enterprise — to persuade you that this spirit is better captured by the dualist emphasis on rule by the People than any competing theory of American government."[34] Why should Americans accept this mythic self-representation? The answers are classic. First, because

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31. *See* Roberto Mangabeira Unger, Knowledge and Politics 76-81, 128, 211 (1975).

32. Even American racism seems organized more around schemes of exclusion, denigration, and hatred rather than on the celebration or worship of "blood" or "the nation." For further exploration, see Richard Delgado & Jean Stefancic, Critical White Studies: Looking Behind the Mirror (1997).

33. Ackerman, *supra* note 2, at 302.

34. *Id.* at 321.

Americans already do.[35] Second, because it is morally appealing.[36]
And third, because it is in their interest.[37]

<div align="center">REPRODUCING CONSENT</div>

Yet another point at which the liberal justification is subject to
rhetorical pressure is in the conceptualization of what it means to
accept, ratify, or consent to the paramount norm. Insofar as an ap-
peal to an actual historical act of acceptance, ratification, or consent
by all individual subjects is beyond possibility, the crucial rhetorical
action of acceptance, ratification, or consent must be redefined and
refashioned. The problem then becomes to articulate defensible
criteria for what counts as acceptance, ratification, or consent by
the mythic subject.

For Rawls, the requisite consent is generated by the pre-given
interests of the person in the original position. For Ackerman, the
problem of consent is trans-substantiated into what counts as a le-
gitimate act of higher lawmaking by his mythic subject, "We the
People." As Ackerman puts it:

> What fundamental criteria should be used to judge a movement's
> claim to speak for "the People"? How *should* a higher lawmaking
> system be designed that can reliably distinguish between the rare oc-
> casions upon which a mobilized majority of American citizens ham-
> mer out a considered judgment on a fundamental matter of principle,
> and the countless decisions of normal politics?[38]

For Owen Fiss, the problem of specifying what would count as ac-
ceptance, ratification, or consent never seems to arise at all.[39] It is
outside the realm of his inquiry and is simply presumed. The entire
question of how the interpretive community comes to recognize
its legitimate "disciplining rules" is not a question for Fiss; it just
does — end of story. For Fiss, the relation of the mythic self-
representation to the paramount norm — specifically, the interpre-
tive community to the disciplining rules — is one of reciprocal con-
stitution.[40] No more, no less. Thus, one can see a certain common

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35. *See, e.g., id.* at 5.

36. *See, e.g., id.* at 316. Note that while Ackerman insists repeatedly that his is not a
utopian project, nonetheless, participation in his vision is rewarded by the promise of a gran-
diose and morally self-flattering role.

37. As Ackerman puts it, "Are you quite sure that it is in your self-interest to scoff at the
very idea of citizenship, when you may later want to protect your own hide by appealing to
others to take a broad view of the public good?" *Id.* at 313.

38. ACKERMAN, *supra* note 2, at 55.

39. *See* Fiss, *supra* note 23.

40. *See id.*

aesthetic that shapes, more or less loosely, the work of liberal thinkers:

Popular Constitutional Mythology	The Constitution	The Founding	The Framers	Ratification
Political Philosophy (John Rawls[41])	Principles of Justice (for the basic structure)	Original Position	Persons in the Original Position	Consent
Legal Philosophy (H.L.A. Hart[42])	The Master Rule of Recognition		Persons taking the internal perspective	Acceptance as binding
Constitutional Philosophy (Bruce Ackerman[43])	Higher Lawmaking	Transformative Moments (1787, 1865, 1935, etc.)	"We, the People"	Popular Acceptance, with adequate breadth, depth, and decisiveness
Constitutional Theory (Frank Michelman[44])			The Court as modeled on the principle of dialogic self-government	Dialogue and reason-giving
Theory of Adjudication (Ronald Dworkin[45])	The authoritative materials made the best they can be		Hercules, the interpretive attitude of the internal perspective	Integrity and fit
Theory of Interpretation (Owen Fiss[46])	Disciplining Rules		The Interpretive Community	Binding

The work of liberal justification is accomplished through the refashioning of mythic identities and the relations of the four critical terms — the paramount norm, the founding moment, the subject, and its consent — in ways that make the myth seem intellectually more convincing.

Of course, not all liberal thinkers rework all of the fundamental ontological identities. Some thinkers strive to perform the reconstruction by locating the crucial problems and the reconstructive

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41. *See* RAWLS, A THEORY OF JUSTICE, *supra* note 2.

42. *See* Hart, *supra* note 16.

43. *See* ACKERMAN, *supra* note 2.

44. *See* Michelman, *supra* note 2.

45. Ronald Dworkin is not a contractarian philosopher. Nonetheless, his fundamental ontology remains consonant with the contractarian narrative. *See* DWORKIN, *supra* note 2.

46. *See* Fiss, *supra* note 23.

work in a few of the fundamental ontological identities. What is crucial is that the reworking of some fundamental ontological identities effectively reconstructs the popular constitutional mythology in a way that produces a more convincing narrative reconciliation of authority, reason, and freedom.

THE ROLE OF MYTH IN LIBERAL JUSTIFICATION

In one sense, it is striking just how large a role myth seems to play in liberal justification. Indeed, the reliance of liberal justification on mythic devices of presentation and argument seems discordant with its self-advertisements as a carefully reasoned enterprise.

In another sense, of course, there is nothing odd about the use of myth in liberal justification. To the extent that liberal law and politics are socially constructed — as opposed to, say, divinely produced, intellectually derived, or a metaphysically given — myth is an extremely effective vehicle for the creation and sedimentation of liberal belief and liberal practice. Myth serves as a rhetorical device for entrenching shared understandings of the political and legal world. In this sense, myth operates not simply as a rhetorical lure that captivates its audience, but also as one that effectively establishes and entrenches the identities, relations, and levers that comprise the liberal legal and political world. To put it simply: The social existence of a shared legal and political world is, in part, a creation of myth. To put it perhaps too strongly: If we are going to have a legal and political world at all — liberal or not — it will be, at least in part, a construction of myth. In a sense, then, it would be bizarre, even perverse, to begrudge a legal and political system *simply* for its use of myth.

What is neither perverse nor bizarre is to examine particular legal and political myths. It is at this level that the mythic aspect of liberal justification becomes interesting. It becomes interesting precisely because the practice of liberal justification continuously seeks to ground liberalism in an *authoritative, reasoned, free choice*. The use of myth may be compatible with authority, but it is in uneasy tension with reason and free choice. Indeed, if the myth of reason and free choice is to do its work, then it must deny the mythic character of reason and free choice. This is precisely the role that liberal justification attempts to play: it is the kind of mythic construction that depends upon the continuous denial of its own mythic character. Liberalism is the myth that dares not speak its name. It is, in short, the kind of intellectual enterprise that must

continuously deny both what it is and what it does.[47] Consider, then, the mythic aspects of the four fundamental ontological identities.

The various versions of the paramount norm listed are all cast in the language of myth:

The Principles of Justice
The Ultimate Rule of Recognition
Higher Lawmaking
The Authoritative Materials
The Disciplining Rules

These are imaginary constructions endowed with considerable magical powers. Indeed, consider that these mythic creations might function well in a Star Wars movie: "May the Authoritative Materials be with you," or "May you always follow the Master Rule of Recognition."

Of course, there is something facile, even tendentious, in such juxtapositions. But there is also a serious point. The narrative structure of Star Wars, however impoverished it may be, works precisely because it mimics *in a new vocabulary* certain basic myths of Western culture: the originary power of the force, the hero who becomes at one with the force, the fallen one who rebels against the force, the archetypal struggle of good and evil, and so on. The same is true of the paramount norms: they draw their persuasive power by mimicking, in a new, elusive vocabulary, certain embedded myths of western civilization: the origin, the power of the word, the ultimate authority.

The elusiveness of these paramount norms contributes greatly to their mythic character. For one thing, the norms are hard to pin down and can thus more easily be cast as all-inclusive or ultimate. Moreover, their elusiveness serves to elide the question of their provenance. To be sure, these paramount norms are binding, regulative, or authoritative because they are accepted by a mythic subject. But that still leaves open the questions: Where do these mythic paramount norms come from? Just how do they come to be included on the menu? Or more accurately: How do they become *the* menu?

The various paramount norms are in turn accepted by a *mythic subject* — a constructed, artificial, schematic subject endowed with mythic powers of creation and authority:

Persons in the Original Position

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47. *See* Stanley Fish, *Liberalism Doesn't Exist,* 1987 DUKE L.J. 997.

      Persons taking the internal perspective
      We the People
      The Court
      Hercules
      The Interpretive Community

Here too the agencies are endowed with elusive and mysterious qualities. Some of these are endowed with an oracular function: "The Court" as described by Frank Michelman serves as an agency that models dialogic self-government.[48]

The Court becomes the oracle that mediates between the spirit of a republican ideal of government and the masses who must accept its rule. In more pedestrian versions, The Court is *the* oracle authorized to receive and communicate the meanings of the Constitution for the masses. Other agencies, such as "We the People," "Persons in the original position," "The interpretive community," or tellingly, "Hercules," are not so much oracular as endowed with the power to create originary meaning. As befits such agents and their Herculean tasks, the methods of creation remain shrouded in mystery.

In turn, consent to the paramount norms itself has mythic proportions. The acceptance is a constructed symbolic event that occurs in highly specified circumstance. Thus in Rawls's work, acceptance occurs through the hypothetical and nonhistorical "device of representation" known as the "original position."[49] The acceptance is deliberately induced through a rhetorical construction of the choice and the situation that will prompt such an acceptance. In Ackerman's work, acceptance occurs through "transformative moments": descriptions of the breadth, depth, and decisiveness of popular mobilization required for instances of higher lawmaking.[50] In turn, the acceptance is accorded a transcendent character — one that is supposed to cut through time, history, and context to govern sundry unanticipated situations.

It is a measure of the power of such mythic versions of acceptance that few respond by saying "So what?" Indeed, amidst all the

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48. I am indebted to Rebecca French for this insight.

49. Rawls acknowledges — indeed insists — that "the original position is to be seen as a device of representation and hence any agreement reached by the parties must be regarded as both hypothetical and nonhistorical." RAWLS, POLITICAL LIBERALISM, *supra* note 2, at 24.

50. As for Ackerman, he seems to treat his own instances of "higher lawmaking" — his "transformative moments" — as significant only to the extent that they are historically real. Thus he worries at great (and rhetorically counterproductive) length about what might constitute sufficient political mobilization to count as "higher lawmaking." *See* ACKERMAN, *supra* note 2, at 272-80.

attacks on Ackerman's work, few bother to argue: "So what if 'the People' engage in higher lawmaking?" "Why should this matter to us?" And again, few attack Ackerman's work by asking, "What do you mean *higher* lawmaking?" "In what sense is it *higher,* as opposed to, say, exalted? transported? visionary? delusional? nuts?" The very fact that these questions often do not arise — even for the most stalwart critics — bespeaks the mythic power accorded to the notions of acceptance and consent in liberal justification.

In temporal terms, the acceptance functions as an origin, cutting off the authority of anterior claims and traversing across future time to regulate contexts and circumstances that have not yet arisen. The acceptance totalizes political and legal time, subordinating this time to the power of a determinate action — acceptance at the founding moment.

In turn, the founding moment is itself cast in mythic language:
The Founding
The Original Position
The Transformative Moments
The founding moment serves to locate the point in time at which the mythic subject consents to the paramount norm. In a sense, the foundational moment serves as *the* vehicle to identify the convergence of the other three fundamental ontological identities: a *paramount norm* that is *accepted* by the *mythical subject.*

The moment of founding, in its singularity and in its distinctiveness, is what accords authority and legitimacy to the entire scheme. It is the moment of foundation — and its attendant specification — that enables a sense of one paramount norm that, however abstract, is nonetheless singular and unitary.[51] The founding moment serves as the aesthetic vehicle for the specification of the *singular authoritative moment* for the constitution of the liberal state. It endows the particular creation of the paramount norm with political-legal privilege extending indefinitely into the future, transcending context and circumstance.

Even for Ackerman, who insists on pluralizing the foundational moment into several — so far three and a half[52] — that extend indefinitely into the future, such moments are nonetheless *singular* in

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51. Even Ackerman's dualist democracy — his distinction between normal and higher lawmaking — is ensconced in the security of an overarching monism. This is the monism of Ackerman's own perspective: his singular and at times rather detailed elaboration of dualist democracy. In short, Ackerman is in favor of dualist democracy within his own monistic understanding of its content and its significance.

52. *See generally* ACKERMAN, *supra* note 2; Bruce Ackerman & David Golove, *Is NAFTA Constitutional?,* 108 HARV. L. REV. 799, 802-03 (1995).

character. To be sure, Ackerman would protest that his particular account is designed precisely to avoid such monistic tendencies.[53] In one sense — a limited sense — he is right. In another sense, however, even though Ackerman recognizes and anticipates a plurality of founding moments, all of these emerge from the same singular source, are recognized by the same singular set of criteria, and have the same singular status. This is no accident; Ackerman's "reconstructive" history is history with an attitude. It is a history designed for use and implementation by *The* Court (or the courts), and as such it is driven — like all attempts to produce or reform American law — toward the production of a single, conclusive, unitary, monistic norm.[54]

This drive to recognize a singular moment or moments necessarily seeks to freeze the frame — a *unitary* paramount norm accepted by a *single* subject in *one* particular context — in a way that extends that frame through political and legal time. It is the mysticism of the moment of foundation that negotiates the temporal dilemmas of liberal justification. For it is through the moment of foundation that the expanse of constitutional and legal time is referred back to a single unifying moment. Thus, a single moment can span and regulate an expanse of time extending indefinitely into the future.

THE RHETORIC OF LIBERAL JUSTIFICATION

It is in these ways that liberal justification refashions the identities and relations of the critical terms of the popular constitutional myth. Through an equilibrating action, each of the terms is rendered consonant with the others. Whether called "reflective equilibrium" (as in Rawls), the "internal perspective" (as in Dworkin), or "reciprocal constitution" (as in Fiss), the regulative image produced by proponents of liberal justification is that of the circle.[55]

Each crucial term in this circle must be adjusted, refined, and elaborated so that it is consonant with each of the other terms. The circle of justification must be constructed so that the circular motion operates smoothly — so that the mythic subject does indeed consent to the paramount norm, so that the paramount norm be-

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53. *See* ACKERMAN, *supra* note 2, at 6-16.

54. Ironically, it is precisely Ackerman's need to produce *legally* cognizable criteria for identifying founding moments that propels him to ensconce his otherwise interesting historical narratives within the pedestrian prescriptive (and absolutely unbelievable) strictures of a normative legalism. For a genealogical sketch of the legalistic drive to monism, see Pierre Schlag, *Clerks in the Maze,* 91 MICH. L. REV. 2053 (1993).

55. For another exploration of the circular organization of American law, see Pierre Schlag, *Law and Phrenology,* 110 HARV. L. REV. 877, 914-18 (1997).

comes authoritative in a founding moment, so that the political and legal entailments of that paramount norm sustain the mythic subject.

Not only must the circle of justification operate smoothly, but at some point — and perhaps at several — it must induce the consumer of liberal justification to jump in. That is, the consumer must be induced to enter the circle in order to complete, if only symbolically, its crucial circular operations. Through whatever entry point, the consumer must identify with the mythic subject, subordinate himself to the founding moment, and choose the paramount norm. The circular motion of liberal justification must become the consumer's own. As Frank Michelman puts it, "The argument, then, is that the philosophical project of political liberalism is possible for us (if it is) because, as it happens, a certain conception of the person appeals to us as an account of a truth of our being."[56] How, then, does liberal justification induce the entry of the consumer into the circle? What is important here is not only that the consumer enter the circle of justification, but that he do so *in a liberal fashion.* He must *choose* liberal constitutionalism as *authoritative,* and he must do so on the basis of *reason.*[57]

In asking how the consumer is induced to enter the circle of liberal justification, I have deliberately represented the consumer as being *outside* the circle of liberal justification. This location of the consumer outside the circle is in important ways wrong, as discussed later, but it is (1) consistent with the self-representations of liberal justification, and (2) helpful to elucidate the rhetorical techniques through which liberal thinkers persuade their consumers to enter the circle.

Consonant with this representation of the consumer as outside the machinations of the myth, liberal justification confronts the consumer with a momentous decision — a decision either for or against liberalism. Liberal justification almost invariably confronts its consumer with an *either/or* choice: choose the myth or face perdition. Within the circle there is something good, appealing, admirable, necessary, sensible, reasonable (this is liberalism), while on the outside there is something bad, unappealing, contemptible, avoidable, senseless, and unreasonable (this is the antithesis of liberalism

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56. Frank I. Michelman, *The Subject of Liberalism,* 46 STAN. L. REV. 1807, 1831 (1994) (book review).

57. *See, e.g.,* GAUS, *supra* note 9, at 129, 292 ("Liberal politics requires, first that citizens recognize their moral commitment to justify their demands on each other . . . .").

and goes by names such as chaos, tyranny, totalitarianism, and so on).

   This specific use of the either/or structure is not merely an incidental or hyperbolic rhetorical gesture. On the contrary, it is an essential aspect of liberal justification. It is essential because liberal justification requires that the consumer make *a choice for an entire system of political governance*. That is precisely the logic of justification instantiated by the idea of a paramount norm: for liberal thinkers, the point is precisely to get the consumer to consent to the paramount norm. Once that is achieved, the hierarchical superiority and overarching character of the paramount norm guarantee as a matter of course that the rest of the liberal vision, in all its concrete detail, is "on the whole" justified. To put it another way, within the liberal vision, consent to the paramount norm directly and necessarily entails consent to a whole series of institutions and practices that are authorized by the paramount norm. Once the paramount norm is accepted, it is as if the entire liberal pinball machine lights up.[58]

   How is this consent elicited from the consumer? How is the consumer induced to enter the circle of justification and perform its actions as her own? At stake here are rhetorical negotiations between the *mythic* representations of liberal justification and the *social* conditions of the consumer.

FEAR, SHAME, SEDUCTION, AND ROMANCE

   Part of the answer is emotion. It is through the medium of emotion — through fear, shame, seduction, and romance — that the consumer of liberal justification is induced to enter the circle of justification. The irony of this answer, given the insistence of liberal justification on choice and rationality, is worthy of some consideration. But for now, let us consider the role of emotion in liberal justification.

   The consumer of liberal justification must come to view the mythic subject as a fitting representation of herself and thus come to view the paramount norm as something to which she chooses to submit. There are two important and often intertwined moments here.

   One moment entails the reconstruction of the consumer's self-identity so that she chooses submission to the paramount norm. This reconstruction typically entails inducing the consumer to un-

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58. *See infra* text accompanying notes 81-83.

derstand herself as an abstracted individual — an autonomous, self-directing, coherent self — ready to choose submission to the paramount norm. This is quite a feat, for the consumer must be induced to understand this abstract liberal subject — what Merleau-Ponty called the empty subject[59] — as a fitting re-presentation and representative of herself, her condition, needs, wants, orientations, tastes, and so on. The consumer must come to believe that this abstracted subject, this universal subject, somehow accurately represents her core, inner self, in its essence, at its best, at its truest. Liberal rhetoric will by turns frighten, shame, seduce, and even romance the consumer into taking on the identity and the perspective of the liberal subject.

The second important moment is the prompting of an actual choice. True, much of the groundwork for this "choosing" has already been accomplished in the refashioning of the consumer's identity as an abstracted individual subject. But more is required. The consumer must actually choose submission to this particular paramount norm. The consumer's motivations must be elicited and evoked so that she is prompted to choose. Once again the consumer is, by turns, frightened into submission, shamed into acquiescence, seduced into consent, or ultimately romanced into identification with the paramount norm.

Hobbes's defense of Leviathan as protection against a life that would otherwise be nasty, brutish, and short is perhaps the most famous example of the liberal — or rather proto-liberal — use of fear to induce submission.[60] The success of the Hobbesian gesture depends upon the credibility of a rhetoric of static opposition: on this side, liberal belief; on that side, terror, tyranny, and totalitarianism. The rhetorical premise is that liberal belief has a robust ontological identity — an essence that renders liberal belief (and its political institutions) at once distinct from and impervious to terror and tyranny. Implicit in this rhetoric is the supposition that something about liberal belief — never specified and always presumed — prevents liberal belief — and its political institutions — from evolving or collapsing into totalitarianism, terror, and tyranny.

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59. "There are at bottom only two ideas of subjectivity — that of empty, unfettered, and universal subjectivity, and that of full subjectivity sucked down into the world — and it is the same idea . . . ." MAURICE MERLEAU-PONTY, *Everywhere and Nowhere, in* SIGNS 126, 154 (John Wild ed. & Richard C. McCleary trans., Northwestern Univ. Press 1964) (1960).

60. Hobbes frames the appeal of "Leviathan" (the state) on the basis of an either/or: *Either* Leviathan *or* the "war . . . of every man, against every man." THOMAS HOBBES, LEVIATHAN 84 (J.C.A. Gaskin ed., Oxford Univ. Press 1996) (1651).

This is reminiscent of the rhetoric now so common in contemporary fear-advertising: "Afraid of cancer? Eat *this* everyday." "Afraid of totalitarian regimes or chaos? Choose liberal belief." In both cases, of course, there is plenty to fear. But in both cases — liberalism or cereal — it is doubtful that the precautions are fully efficacious.

The either/or gesture has been repeated many times, as liberals have sought to represent liberal belief and its political institutions as a bulwark against totalitarianism, terror, and tyranny. The gesture implies that only a choice for liberalism — often, the author's version of liberalism — will forestall the advent of inhuman conditions. Bruce Ackerman, a leading liberal thinker, recently upped the emotional ante by personalizing the gesture. As he put it, "Are you quite sure that it is in your self-interest to scoff at the very idea of citizenship, when *you may later want to protect your own hide* by appealing to others to take a broad view of the public good?"[61] In a sense, this gesture resembles emotional blackmail: accept the liberal justification or you may find yourself unable to protect your interests, perhaps even yourself.

Interestingly, this gesture seems to work (at least some of the time) even though it is a non sequitur. Indeed, given that whether or not the consumer (you) chooses to be for or against liberalism is of no moment whatsoever for the survival or continuation of the liberal state, why should anyone be persuaded by this gesture to choose liberalism?

One answer is fear. Fear, after all, does not have to be rational. But there is more to it than that. The Hobbesian gesture is perhaps aimed not so much at inducing a choice for liberalism as it is aimed at raising the stakes for the consumer. The momentous character of the choice — liberalism or tyranny — sets the scene for the introduction of other motivating forces — namely, shaming and seduction. The following passage, drawn from Bruce Ackerman's recent work, presents an excellent example of the interplay of seduction and shame. As Ackerman intimates, *either* you follow him on the pathways of dignity and nobility *or* you are a grunting animal:

> You are not alone on Earth; you share your time and space with others, lots of others, who differ with you about lots of things. How to come to terms with this basic fact? You may simply seek to oppress others through force and fraud. Or you may try to come to terms with them about the best way to associate together. Isn't there a certain dignity in the second course? Isn't there something noble in call-

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61. ACKERMAN, *supra* note 2, at 313 (emphasis added).

ing upon yourself, by calling upon others, to put some intelligible
form upon your social life together? If we are not to live as mere
brutes, grunting past one another in the night, surely we owe at least
this much to each other?[62]

Seduction is also an important part of the liberal rhetoric, which
typically goes to great lengths to praise the consumer who accepts
the liberal justification. Such a consumer is praised for her moral
concern, her moral acumen, and her regard for others. Frank
Michelman, referring to a constitutional liberal, puts it this way:
"Who can do better than to live the best she can according to the
sort of being she finds herself believing herself to be . . . ?"[63] In
addition, the consumer who acquiesces in the liberal justification is
praised not only for her moral qualities, but also for her reason and
reasonableness.

On the other side of seduction is shame. The consumer who
does not accede to the liberal justification is threatened with shame
and possibly moral or intellectual exile. In Ackerman's work, the
nonconforming consumers are degraded to the status of animal life
— brutes "grunting past one another in the night." In Michelman's
work, the failure to accede to the Rawlsian political vision has per-
sonal implications for whether the consumer is truly a human being
or not. Indeed, rejection of the Rawlsian vision calls into question
"whether (for this purpose) *your* kind is anything less than the
human kind."[64]

The intensity of these shaming devices serves not only to induce
a choice for liberalism but also to induce consumers to participate
in the practice of liberal justification itself — to continue the con-
versation within the terms established by liberal justification. Here
too, the either/or rhetorical structure performs quite efficaciously.
Either one engages in the practice of liberal justification *or* one is
reduced to the unenviable status of the grunting brute, the
inhuman.

These examples are but some of the more flamboyant instances
of shaming rhetoric in the literature of liberal justification. They
are extreme manifestations of a more muted, but prevalent, ethos
of shame. Liberal shaming portrays the mature, responsible, rea-
sonable, coherent, integrated self as one that will choose liberalism.
Meanwhile, the rejection of liberalism is depicted as the product of
character flaws — childish romanticism and frivolity (often ascribed

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62. *Id.* at 313-14.

63. Michelman, *supra* note 56, at 1832.

64. *Id.* at 1833.

to the extreme left), or crude egoism and cruelty (often ascribed to the extreme right).

Beyond fear, shame, and seduction, liberal justification also employs romance. This is where the liberal plot picks up. Liberal romance, like many other forms of political romance, enacts a narrative of reconciliation. Indeed, liberal justification promises to dissolve a series of troublesome binary oppositions that have marked not only philosophy, but also ethics, personality, and life itself. It is in the promise to dissolve the active manifestations of these oppositions that liberal justification achieves its appeal and its greatness. For instance, liberal justification promises to reconcile the individual with the community,[65] the concrete with the universal,[66] reason with authority,[67] ethic with interest,[68] and is with ought.[69]

Moreover, liberal justification promises such reconciliations not just conceptually, but politically in our institutions, socially in our culture, and emotionally in our personal lives. Liberal justification promises, in short, to reunite liberal citizens with each other, with themselves, and with their fate.

Consider, as an example, the promise to reconcile the individual with the community — private cost with social cost, private interest with public interest, and so on. Liberal justification promises to reconcile these oppositions through the rhetorical trope of self-rule, of self-government, of self-legislation, or, as many in America call it, "popular sovereignty." In the liberal justification, the paramount norm is ruling. It rules us. But, it has been chosen by us. In a fundamental sense the paramount norm is us. We are, in short, ruled by ourselves.

Liberal justification thus promises communal redemption: We shall be as one again. We are invited to come home and to belong once more. The seductive appeal of this romance of reconciliation is not to be denied. And it is indeed regularly invoked by liberal thinkers. For example, Bruce Ackerman writes:

> Behold, then . . . an America in which a rediscovered Constitution is the subject of an ongoing dialogue amongst scholars, professionals, and the people at large; an America in which this dialogue between theory and practice allows the citizenry, and its political representa-

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65. *See generally* ACKERMAN, *supra* note 2; RAWLS, A THEORY OF JUSTICE, *supra* note 2.

66. *See generally* RAWLS, A THEORY OF JUSTICE, *supra* note 2.

67. *See generally* Fiss, *supra* note 46.

68. *See generally* RAWLS, A THEORY OF JUSTICE, *supra* note 2.

69. *See generally* DWORKIN, *supra* note 2.

tives, a deepening sense of its historical identity as it faces the trans-
forming challenges of the future.[70]

This is moving stuff. The question is, what does it move? One an-
swer is that it is supposed to move the readers. It is supposed to
move them to a singular, unifying, and "deepening sense of [their]
historical identity."[71]

The use of such emotional devices in liberal justification is
rather ironic. Liberal justification, true to its form, insists that its
consumers make a *reasoned choice* for liberal constitutionalism. In-
deed, this reasoned choice is an essential aspect of liberal belief.
The choice for the liberal state must appear the reasoned choice of
a coherent, self-directing, autonomous individual subject. Unlike
the circles of belief exemplified in theocratic, fascistic, or commu-
nist ideologies, liberalism depends upon a demonstration that it can
be the outcome of reasoned choice by those who are ruled. It is
thus ironic that the addressee of liberal justification is systemati-
cally frightened, shamed, seduced, and romanced into acquiescence.

Perhaps the use of such emotional devices can be reconciled
with the liberal insistence on reasoned choice. Still, it is no easy
task, for in liberal justification fear, shame, seduction, and romance
are used not merely to influence choice, but, more problematically,
to compensate for a lack of knowledge and for the inadequacy of
reason in making such a choice. Thus, the Hobbesian gesture
evokes fear to represent the alternative to liberalism as essentially
bleak and undesirable, while it deploys romance to eclipse an un-
known political future with enticing images of communal reconcilia-
tion and noble deeds. Hence, when knowledge and reason fall
short of liberal ambitions, it is emotion that takes up the slack.

More problematic still for liberal justification, the use of these
emotional devices constructs a coercive frame within which the ad-
dressee *must* exercise his reasoned choice. The either/or structure
of the Hobbesian choice is both elicited and reinforced through
fear, shame, and seduction. The coercion here may be difficult to
appreciate, for it is coercion aimed at producing a choice — and
within liberal thought, choice and coercion are offered as mutually
exclusive.[72] Yet, the coercion of liberal justification lies precisely in

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70. ACKERMAN, *supra* note 2, at 5.

71. *Id.*

72. On this point, consider the amusing interchange between Richard Epstein and Gary
Peller in a 1988 *Cornell Law Review* symposium. *See* Richard A. Epstein, *The Classical
Legal Tradition*, 73 CORNELL L. REV. 292 (1988); Gary Peller, *The Classical Theory of Law*,
73 CORNELL L. REV. 300 (1988); *Discussion: The Classical Theory of Law*, 73 CORNELL L.
REV. 310 (1988).

forcing its consumer to choose for or against liberalism. And not only is the consumer forced to choose, he is forced to believe that this choice matters greatly. Indeed, one could hardly imagine a person placed in Rawls's original position saying back to his author:

> Look here dear author, the sort of predicament that you have put me in is really quite preposterous. Human beings, as you know, are not "persons in the original position." Human life is not lived well abstractly. And politics do not generally run from the top down. What is more, reason would require that I know a great deal more about my situation before I seal my fate. I refuse to play, I refuse to decide. The choices you are giving me have been forced upon me and as a human being — or at least human-being-in-waiting — I believe that it is simply not rational to participate in this exercise.

Why is it that a person in the original position would not say this? The short answer is that he has been constructed not to say this. What about the "real" consumer of liberal justification? Is this someone equipped to resist the rhetoric of liberal justification?

No.

The "real" consumer of liberal justification is already deeply ensconced in the circles of liberal justification, for he is himself already a mythified construction. As intimated earlier, the image of the consumer as someone induced from the *outside* to enter the circle of liberal justification is wrong. In many important senses, the consumer *is already within the circles of liberal justification.*

It is time to take stock of the circles.

The Rhetoric of the Circle

The Circle of Politics

The first circle of liberal justification is perhaps the most easily recognizable. This is a circle that entails a sovereign people (a mythic subject) choosing a constitution (a paramount norm) that sustains and protects the sovereign people (the mythic subject). Liberal justification demands an equilibration between the paramount norm and its subjects. This circularity is explicit in the various attempts at liberal justification.

Myth on Myth

More problematic still for liberal justification is the myth on myth circularity. Liberal justification as myth does not operate upon some unprocessed, unmediated political reality. Rather, it operates upon artifacts and relations constructed through the popular constitutional mythology. In other words, liberal justification is —

like all successful myth — a meta-myth. As myth, liberal justification enables the interpretation — and validation — of a prior, more vulgar, but also more pervasive version of itself. All the referents of liberal justification — the state, rights, liberty, freedom, the constitution, the self, and so on — are all already artifactual references encoded with the myth of liberal constitutionalism.

Liberal justification, in short, intervenes at a point where mythical representation has already done much of its work. This point can be corroborated by an examination of the leading works of liberal justification. In such works, there is virtually never any critical inquiry into the ontological status and the political efficacy of referents such as rights, liberty, norms, values, the state, reason, autonomy, the self, and the like. Liberal justification may well place the substantive *meanings* of these terms in question — and indeed often does — but their referentiality to something real, stable, and socially and politically efficacious is never seriously in doubt.[73] Indeed, the sometimes heated internecine squabbles among liberals as to the precise meaning or significance of these terms ironically reinforces their apparent reality. The liberal thinker approaches a category such as "rights" with the same degree of credulity that a medieval scholar approaches the category of "angels," or a communist apparatchik the category of "bourgeoisie."

This myth-on-myth circularity helps explain a certain shallowness to the enterprise of liberal justification. In part, this shallowness is quite understandable. The mythology of liberalism is *an already actualized mythology:* many of the categories of lived social and political existence are liberal categories. The dominant image of human beings as liberal individual subjects thus is not just an intellectual construction of liberal thinkers; it is also the prevailing self-image throughout American society. Similarly, the term "rights" is not just some bit of liberal political utopianism. It is a recurrent and, in important ways, consequential utterance routinely invoked by lawyers, judges, political groups, ethnic groups, citizens, children, and so on. Given the apparent social and political actualization of liberal categories, it is understandable that liberal thinkers would presume that liberal categories such as rights, liberty, norms, values, the state, reason, autonomy, and the self are ontologically referential and politically efficacious.

But this presumption is nonetheless a kind of ontological category mistake. The prevalence of liberal categories in American so-

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73. *See* Pierre Schlag, *Hiding the Ball,* 71 N.Y.U. L. Rev. 1681 (1996).

ciety does not establish their ontological identity; it does not establish whether liberal categories such as "individual rights" are on the order of rocks, trees, dollar bills, rubles, words, advertising images, or angels. Similarly, the prevalence of popular belief in liberal categories such as individual rights in no way establishes the social and political roles and efficacy of such referents.

This myth-on-myth circularity is precisely what enables liberal justification to eschew inquiry into the ontological identity and the social and political roles of the key liberal referents — rights, liberty, norms, values, the state, reason, autonomy, the self, and so on. Hence, *what liberalism sets out to justify is its own description of the world.* This would not be a useless task if liberal justification were a bit more critical of its own description of the world. But this is something it does not do and indeed cannot do without transforming itself into a significantly different intellectual enterprise.

The myth-on-myth circularity belies the critical pretensions of liberal justification. Indeed, practitioners of liberal justification often represent that the theoretical articulation of a liberal ideal serves as a basis for criticism of liberal practice, a benchmark by which to measure the successes and failures of concrete practice. This claim — one that is generally unsupported — loses much of its plausibility and appeal once one recognizes that it is not liberal practice per se that will be called to account in the court of liberal theory. Rather, what will be called to account is an already mythologized representation of practice — a representation of practice already inscribed in terms of the liberal mythology.

What is promised is an examination of the gap between the ideal and the reality. What is delivered is an examination of the gap between a higher order ideal (liberal justification) and a lower order ideal (popular liberal mythology). Ironically, while the higher order ideal is often represented as controlling the lower order ideal, it is often little more than an idealized abstraction of the lower order ideal.

The Circle of the Mythified Subject

Liberal justification, as suggested, does its work not only by fashioning an image of the liberal state that conforms to its subjects, but by shaping its subjects — its consumers — to conform to the idea of the liberal state. The very configuration of the liberal subject is a mimesis of the liberal state.

In one sense, this is quite unremarkable. It cannot be of surprise — given the political and social actualization of liberalism —

that the consumer of liberal justification is someone whose political world is *already* mapped out in liberal categories. Moreover, in light of the social and political inscription of categories such as rights, reason, norms, choice, deliberation, and so on, it comes as no surprise that the consumer of liberal justification *already* understands his world as operationally organized in terms of these kinds of artifacts and relations. Indeed, the consumer of liberal justification is himself already constructed as a mimesis of the liberal state. The liberal individual subject is a representation of the self that is circulated throughout the culture of liberal society — its literature, advertisements, schooling, morality, religion, and so on. What liberal justification does (more myth-on-myth) is refine, elaborate, and reinforce this particular self-representation.

The point is perhaps most clearly demonstrated in John Rawls's elaboration of the character of persons in the original position. According to Rawls, the original position is an artificial construction designed "to model both freedom and equality and restrictions on reasons in such a way that it becomes perfectly evident which agreement would be made by the parties [the persons in the original position] as citizens' representatives."[74] The consumer, of course, is invited to consider what would be a fair characteristic to attribute to such mythical persons.

It turns out that the person in the original position has certain character traits and confronts political questions that are themselves already instantiations of the liberal mythology. This is a person who is stripped of all information about his actual status in society, his particular predilections and tastes. He is told that he may want to pursue any number of life plans and that he values certain basic goods generally thought necessary to the pursuit of those life plans: liberties, wealth, income, and the bases of self-respect. He is self-interested, rational, and not given to envy.[75]

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74. RAWLS, POLITICAL LIBERALISM, *supra* note 2, at 26.

75. Hence persons in the original positions are:

(1) deprived of knowledge of their actual social or economic positions, and their particular conceptions of the good life, their actual talents, or their psychological propensities;

(2) limited in their choices to "a short list of alternatives given by the tradition of moral and political philosophy";

(3) limited to choosing principles that apply to the basic structure of the society;

(4) limited to choosing certain instrumentally necessary primary goods defined as basic liberties, powers, and prerogatives of office, income, wealth, and the social bases of self-respect;

(5) endowed with means/ends rationality; and

(6) endowed with rational autonomy.

See RAWLS, A THEORY OF JUSTICE, *supra* note 2, at 118-50.

In short, persons in the original position are constructed as ahistorical, abstracted, depersonalized, autonomous, self-directing, integrated, unified, but virtually empty subjects.[76] They are sketches, schemas, formal outlines of a human being. They are, as Rawls himself repeatedly insists, "representations."[77] Their mission in life is to represent the interests of fully fleshed human beings who are rich in experiences, hopes, tastes, and so on.[78]

Persons in the original position know that they are mere representations and that the subjects they represent will have specific tastes, preferences, ambitions, hopes, and fears. The represented will be fully fleshed-out human beings.

What we have in the Rawlsian framework is the familiar drama of liberal representation — one in which empty subjects (that is, persons in the original position) represent full subjects (that is, live human beings) and lay down the ruling norms for the latter. The Rawlsian scheme is thus but one instance of a classic liberal separation between the empty subject and the full subject. This separation usually tacks the following associations:

The Empty Subject Is:	The Full Subject Is:
Universal	Particular
Abstract	Concrete
Transcendental	Contingent
Depersonalized	Personal
Ahistorical	Historical
Public	Private
Reason	Desire
Objective	Subjective

Once the full and the empty subjects are separated in this way, liberal justification typically establishes certain relations between the empty subject and the full subject. The empty subject must be authorized to represent and to legislate for the full subject.

In Rawls's work, as in liberal justification generally, it is crucial that the empty subject be considered a *legitimate representation* of

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76. For a criticism of Rawls's theory of justice in terms of the abstract character of his persons in the original position, see MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982).

77. *See* RAWLS, POLITICAL LIBERALISM, *supra* note 2, at 24, 27, 35.

78. Hence, they are close approximations of what Merleau-Ponty once called "the empty subject." The empty subject is one version, or rather one mode, of the liberal individual subject. The empty subject is pictured as autonomous, coherent, self-directing, and unified. It is abstract, depersonalized, ahistorical, and seemingly universal. This is the kind of subject that is typically addressed and called forth in philosophy seminars and law school classes — this is the individual subject as greatest common denominator, the subject who can rise above his or her own particular circumstances. The emptiness of this subject stems precisely from the fact that, in order to represent everyone, this subject must be stripped of all particular content. *See* MERLEAU-PONTY, *supra* note 59, at 154.

the full subject. The empty subject must perform as a fitting symbolic, psychological, and political representation of the full subject. The reason is obvious: the consumer of liberal justification — who is both an empty and a full subject — must acquiesce to his representation by the empty subject. He must accept the notion that it is reasonable to allow empty subjects to choose norms for full subjects. He is asked to accede to the logic of legitimate representation; that as a full subject, his interests will be protected because the only legitimate role of the empty subject is to represent those interests — not to substitute better ones, not to legislate morality.

The representation of the empty subject entitles the empty subject to *legislate* for the full subject — to choose the norms by which the full subject will live. This is, of course, precisely what is asked of persons in the original position and of all other consumers of liberal justification. They are asked as empty subjects to decide upon ultimate norms to govern the conduct of full subjects.[79]

The authorization of the empty subject to represent and legislate for the full subject is not only played out in liberal justification, but will indeed be inscribed repeatedly in the very laws of the liberal state. Hence, the image of the subject — the person protected by the rights contained in the Constitution — is abstract, universal, and essentially formal. Similarly, the dominant image of the judge who applies the law of the liberal state is that of a subject who is neutral, detached, dispassionate, and above the fray. Indeed, a judge can lay claim to the authority of the community, and to the authority to represent its interests, to the extent that he can represent himself as an empty subject — abstract, universal, depersonalized.

How exactly does liberal justification induce the consumer to allow the empty subject to *represent* and *legislate for* the full subject? The short answer is that liberal justification invites the consumer to identify with the empty subject. Significantly, the consumer consulted here is the consumer as both empty and as full subject. In fact, Rawls's original position might be seen as a kind of pedagogical device designed to train the full subject to frame and refashion his arguments in terms of public reason — that is, in terms that are worthy of consideration by an empty subject.

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79. The pedigree for this move is considerable. It is implicit, for instance, in Kant's categorical imperative which summons an empty subject to lay down the rule for the full subject. *See* IMMANUEL KANT, FUNDAMENTAL PRINCIPLES OF THE METAPHYSIC OF MORALS 38-46, 54-56 (Thomas K. Abbott trans., Bobbs-Merrill Co. 1949).

The action of liberal justification occurs both on the level of the individual and on the level of the collective. On the level of the individual, liberal justification, while recognizing both the importance of the empty as well as the full subject, strives to produce an integration of the full subject by the empty subject. The image of the self championed by liberal ethics is of a self that is integrated, coherent, consistent, centered — an image not unlike a circle. The empty subject envelops the richness and variety of the full subject and disciplines this full subject to the formal laws of the empty subject: autonomy, coherence, consistency, unity. All aspects of personality are linked in a continuous integrated whole — in short, the image of a bounded, gapless, figure — not unlike that of a circle.

Notice that in this construction of the self, the full subject is neither ignored nor jettisoned. The full subject is merely subordinated to the formal laws of the empty subject. Thus emerges a hierarchy, one in which the empty subject is authorized to rule. This subordination of the full subject to the law of the empty subject is effectuated by addressing the consumer both as empty and full subject. By addressing the consumer as an empty subject, liberal justification seduces or shames her into assuming this more noble and more ethically appealing version of herself, further causing her to put aside her own particular tastes, preferences, idiosyncrasies, and other concrete aspects. By addressing the consumer as a full subject, liberal justification uses greed and fear to convince the consumer that it is in her own interest — within her own particular tastes, preferences, and idiosyncrasies as a full subject — to acquiesce in the rules laid down by the empty subject.

Once the full subject has acceded to the rule of the empty subject, the same formal hierarchy is then reproduced on the political level. Once having taken on this particular psychological configuration, the consumer will easily — indeed, naturally — accede to its political equivalent. From a psychological representation of the self — as a full subject ruled psychologically by an empty subject — we move to a political representation of the self — as a full subject ruled politically by an empty subject. The movement can be schematized as follows[80]:

Full Psychological Subject	*enveloped and ruled by*	Empty Psychological Subject	Liberal Image = of Full Political Subject

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80. The schematization here tracks Roland Barthes's representation of language and myth as two "staggered" semiological systems. *See* BARTHES, *supra* note 1, at 115.

Liberal Image	*enveloped*	Liberal Image	Liberal
of Full Political	*and*	of Empty Political =	Image
Subject	*ruled by*	Subject	of Politics

It is crucial to liberal justification to establish (1) *the separation* between the empty and the full subject, as well as the authority of the empty subject to (2) *represent* and (3) *legislate for* the full subject. More is accomplished in these three moves than might at first appear. Each of these three moves yields a crucial implication.

The separation of the full and the empty subject enables liberal justification to train its consumer to effectuate this separation as a matter of her own psychological structure. In effect, liberal justification trains its consumer to assume the identity of the empty subject — to abstract herself from her peculiar circumstances, her particular engagements, her specific tastes and preferences. Once the psychological separation between the full and the empty subject is in place in the consumer, she will, of course, choose a political form that corresponds to her dual essence — as both an empty and a full subject. The psychological separation of the empty subject from the full subject corresponds to a political separation between the liberal state and civil society, between the public realm and the private sector.[81]

This correspondence between the psychological and the political in liberal justification is also reflected in the relation known as *representation* for the full subject. Just as the consumer of liberal justification understands the relation of empty and full subject to be one of representation, so too will she understand the relation between state and civil society, public realm and private realm, to be a relation of representation. This means that the state cannot legitimately represent interests beyond those shared within civil society. Its powers, like those of the empty subject, are limited. The limited representation of the full subject by the empty subject is thus reproduced at the political level. The limited character of state power, in turn, evokes the characteristic anxiety of the liberal thinker over what social, institutional, and discursive mechanisms can best maintain the limits on state power: the problematics of judicial review, the countermajoritarian difficulty, the intertemporal difficulty, separation of powers, and so on.

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81. Karl Marx's essay *On the Jewish Question* remains perhaps the best demonstration of how this distinction is crucial to — indeed constitutive of — the liberal democratic state. *See* KARL MARX, *On the Jewish Question* (1843), *reprinted in* EARLY WRITINGS 211 (Rodney Livingstone & Gregor Benton trans., Vintage Books 1975).

Legislation is yet another crucial point of correspondence between the psychology and the politics of liberal justification. The notion that the empty subject can legislate for the full subject implies that the former is authorized to govern the actions of the latter — and that the full subject will conduct its affairs within the norms established by the empty subject. This relation of legislation is reproduced at the political level. The consumer of liberal justification, in identifying with the empty subject, authorizes the latter to lay down the law. Inasmuch as the empty subject is identified with the public sector and the full subject with the private realm, the relation is transposed from one set to the other: just as the empty subject is authorized to lay down the law for the full subject, the state is authorized to lay down the law for civil society.

In the end, perhaps liberal justification seems so persuasive to the consumer *precisely because the liberal state is already in the consumer's head*. There is an isomorphic resemblance between the psychological configurations of the liberal subject and the crucial political configurations of the liberal state.

And if, in some moments, liberal justification seems shallow, it is precisely because while claiming to be argument — a progression of reasoning — it is instead a circular activity. Indeed, liberal justification is often little more than a game of mirrors in which a particular aesthetic configuration is reflected from the plane of psychology to the plane of politics (and vice versa). The political configuration of liberal justification is already implanted in the psychology of the consumer. The consumer is then invited to choose a form of political organization appropriate to that psychology.[82] And so on.

What then sustains this liberal psychology? Part of an answer appears if we trace the path of the circle of the mythified subject: Liberal psychology renders liberal justification possible, and liberal justification establishes the liberal subject by repeatedly positing that subject and rehearsing its aesthetic.[83] If liberal justification can ever begin to do its work, it is in virtue of an articulated premise: "Assume you are an individual liberal subject. O.K. now, let's talk." There is little difference here, in terms of argumentative aes-

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82. This, of course, is somewhat circular. This circularity, in and of itself, is not necessarily a problem. It does, however, become a problem once *the shallowness* of the circle becomes apparent. At that point, the circularity has already ceased to do its job. Similarly, the circularity becomes a problem once it is recognized that the circularity was supposed to resurrect the *foundations* and has instead turned out to be a circle resting, as it were, on its nonexistent bottom. Again, at this point, the circularity has ceased to do its job.

83. *See* Schlag, *The Problem of the Subject, supra* note 3.

thetics, from those who would say, "Assume you are one of God's creatures. O.K. now, let's talk." Or yet again: "Assume you are the universal class. O.K. now, let's talk." The trick is to presume into existence precisely the sort of psychological ontology that conduces the desired politics — and what is more, to do so without being seen.[84]

It is a good trick, possibly an unavoidable trick. But that does not guarantee its success. It can fail. The reason is simple: while all politics must serve to establish and maintain the kind of subject necessary for its continued existence, politics presumes (quite impossibly) that it controls the historical, psychological, and cultural conditions that render it possible. In virtue of this blind moment of presumption, politics must fail. In the case of liberal justification, the fission of the individual subject into a full subject regulated by an empty subject can seem as natural as existence itself. Then, in the next moment, it can seem ludicrous.[85]

In sum, the circle of the mythified subject identifies a circle between liberal psychology and liberal politics. The circle entails producing in the consumer a particular aesthetic configuration — an empty subject ruling a full subject — that is then transposed to the political plane. The same relations of *separation, representation,* and *legislation* are then enacted on the plane of politics. This brings us to yet another circle.

The Circle of Justification

In liberal justification, the circle of the mythified subject is encompassed by another circle. This is the circle of justification. This circle can be described in terms of a relation between form and meaning.

In any myth, as Roland Barthes suggests, there is a kind of structural ubiquity between its *meaning* and its *form;* a structural ubiquity between the "language object" and the "meta-language."[86] This point is easily illustrated in the context of liberal constitutionalism. The liberal constitutional mythology posits a sovereign people who, through their representatives, establish at a particular point in time a constitution that sets forth the powers and the limits of legitimate government. This myth is given a naturalized and concretized expression through "meaning." As an illustration of such a

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84. *See id.* at 1630-31.

85. *See* Schlag, *"Le Hors de Texte," supra* note 3, at 1670-71.

86. BARTHES, *supra* note 1, at 123.

naturalized and concretized expression, one might say that the substantive meaning of the liberal constitutional myth is that, in 1787, certain political leaders convened in Philadelphia where they drafted the Constitution — a document that sets forth in various articles the powers of the various agencies of government. But the myth also has the crucial dimension of "form." As form, one might say that the liberal constitutional myth establishes that political governance is justified when a mythic subject in the exercise of deliberative self-rule chooses a paramount norm to regulate all subordinate political activity.

As Barthes notes, "[T]he signification of the myth is constituted by a sort of constantly moving turnstile which presents alternately the meaning of the signifier and its form, a language-object and a metalanguage . . . ."[87] For example, if one had to identify the meaning and form of the liberal constitutional mythology, one might do so as follows:

Meaning (Language-object)	Form (Metalanguage)
1787	Founding Moment
The Framers (Madison, Hamilton, etc.)	The Mythic Subject
The Constitution of 1787	The Paramount Norm
Ratification	Consent/Self-Rule

While this rendition of the meaning and form of the liberal constitutional mythology may be illustrative, a note of caution is necessary. This rendition leads to the supposition that myth lends itself to a noncontroversial distinction and identification of its meaning and its form, of its language-objects and its metalanguage. But the power of myth lies precisely in the fact that what comprises its form and what comprises its meaning is undecidable. Meaning and form, language-object and metalanguage, are best conceptualized not as determinate entities, but as relations — ultimately unspecifiable relations.

The point can be seen within the context of liberal justification. In liberal justification there is a structural undecidability as to whether its principal orientation is focused on *meaning, the language-objects* of the constitutional myth, or instead on the *form,* the *metalanguage* of the constitutional myth.

One could say that some constitutional thinkers understand the tasks of liberal justification as focused on the language-objects of

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87. *Id.*

the constitutional myth. Here one would include the views of so-called literalists, strict constructionists, originalists, intentionalists, and textualists.[88] Their understanding of the constitutional myth is very much defined by what they take to be its specific meaning, its particular language-objects.[89]

In contrast to those who understand the constitutional myth in terms of its meaning or its language-objects, some constitutional thinkers could be described as committed to the myth in terms of its form or its metalanguage. This would include "theorists," "noninterpretivists," "loose constructionists," and "moral philosophers."[90] Their views on the enterprise of constitutional thought could be understood as an attempt to practice the metalanguage of the constitutional myth — an attempt to reveal its essential animating spirit. Their focus is on the form of the constitutional myth.[91]

Yet, this bipolar classification overstates the differing tendencies between these two kinds of constitutional thinkers. As participants in the myth, the orientations of both groups necessarily partake in some observance of both the *language-objects* and the *metalanguage* of the constitutional myth. Indeed, for those who participate in this kind of myth-making or myth-rehearsing activity, there is a kind of reciprocal relation — a circular movement between the metalanguage and the language-objects of the constitutional myth. It is, after all, the language-objects — 1787, the Constitution, ratification, amendment, and so on — that map out the form, the metalanguage. At the same time, of course, it is the form — a sovereign people choosing to establish . . . and so on — that accords the relevant language-objects their identity. As Barthes puts it,

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88. *See* RAOUL BERGER, CONGRESS v. THE SUPREME COURT (1969); Robert H. Bork, *The Constitution, Original Intent, and Economic Rights,* 23 SAN DIEGO L. REV. 823 (1986); Robert H. Bork, *Styles in Constitutional Theory,* 26 S. TEX. L.J. 383 (1985); William Van Alstyne, *Interpreting This Constitution: The Unhelpful Contributions of Special Theories of Judicial Review,* 35 U. FLA. L. REV. 209 (1983).

89. The point is perhaps most evident in William Van Alstyne's attempt to suggest that the problem of constitutional interpretation is properly focused on what he calls (with emphasis) "*This* Constitution." *See* Van Alstyne, *supra* note 88.

90. *See* RAWLS, A THEORY OF JUSTICE, *supra* note 2; Thomas C. Grey, *The Constitution as Scripture,* 37 STAN. L. REV. 1 (1984); Michelman, *supra* note 2; Michael J. Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation,"* 58 S. CAL. L. REV. 551 (1985).

91. Michelman seems to elaborate the preconditions and the implications of dialogical self-rule at a certain remove from the *specific* substantive content of the American constitutional order. *See* Michelman, *supra* note 2. The argument seems to strive for great fidelity to the metalanguage of the constitutional myth, while paying little attention to its language-objects.

"[t]he meaning is always there to *present* the form; the form is always there to *outdistance* the meaning."[92]

Barthes's point is reflected in the leading works of liberal justification. For example, the point is elegantly, even if unwittingly, exemplified in the work of Ronald Dworkin, who recognizes a reciprocal — that is to say, circular — relation between legal interpretation and its objects. Dworkin recognizes that the objects of legal interpretation — what he calls "the institutional materials"[93] — do not exist prior to interpretation. At the same time, Dworkin also recognizes that legal interpretation does not exist independently of the materials in which it is instantiated. In Dworkin's work, the "institutional materials" thus play the role of the language-object, while his "best interpretation" plays the role of the metalanguage. The relation of the two is one of circularity, of reciprocal constitution. We can see that a good number of liberal thinkers reproduce this pattern in their theories:

Barthes	Language objects	Metalanguage	Myth
Dworkin	Institutional Materials	Best Interpretation	Law as integrity
Rawls	Considered Intuitions	Theory	Reflective Equilibrium
Fiss	Disciplining Rules (as meaning)	Disciplining Rules (as form)	Objectivity in Law

It is characteristic of the liberal thinkers to promise an ultimate reconciliation, a stabilization of the language-object and metalanguage. The Rawlsian reflective equilibrium that insists that our considered convictions be matched up against our theory (and vice versa) thus promises an ever-increasing convergence of the two.[94] Rawls promises convictions that are ever more in tune with theory and a theory that is ever more in tune with convictions. Similarly, in Dworkin's work, the constant attempt of judges to make law the best it can be, to formulate the best interpretation that best explains the institutional materials, ultimately leads to a view of law as integrity.[95] The promise is that, over time, the institutional

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92. BARTHES, *supra* note 1, at 123.

93. *See* DWORKIN, *supra* note 2, at 255, 405-06.

94. *See* RAWLS, POLITICAL LIBERALISM, *supra* note 2, at 8.

95. *See* DWORKIN, *supra* note 2, at 255, 405-06.

materials and the theory that best explains them will converge until, in the end, "law works itself pure."[96]

Liberal thinkers thus exploit the possibilities of the constitutional myth by recasting the language-objects of the myth in terms of its metalanguage and vice versa. Indeed, much of the current intellectual focus of liberal justification is on producing new accounts that will bring about an "appropriate" relation of the language-objects and the metalanguage of the constitutional myth.

Liberal thinkers thus strive to produce a new stabilized account of the myth. Inasmuch as they are purveyors of the myth, they always strive to provide some stabilized synthesis — some final account that must be accepted as true.

To put it too bluntly, a great deal of "jurisprudential" theorizing about the meaning of the United States Constitution reduces to three stereotypical stances:

> (1) There are those who insist upon redefining the language-objects of the myth in terms of the metalanguage of the myth. Here the paramount example might be the work of Bruce Ackerman, who uses the metalanguage of the constitutional myth to create new constitutional language-objects — to wit, higher lawmaking, foundational moments, a new mythic subject, amendment outside Article V, and so on.[97]
>
> (2) There are those who insist upon maintaining the language-objects of the myth while largely disregarding its metalanguage. Here we would include the textualists and originalists, including William Van Alstyne, Robert Bork, and others.[98]
>
> (3) Finally, there are those who show *some* awareness of the reciprocal relation of the two aspects of the myth. Their understanding ranges from the highly sophisticated, as exemplified by the work of Ronald Dworkin, to the more rudimentary, as manifested in the work of Owen Fiss.[99]

But regardless of which of the three stances the liberal thinker assumes, he or she always strives to achieve some pleasing, stabilized synthesis. Rather vexingly, that is precisely what cannot be had, because, as Barthes admonished, "[t]he meaning is always there to

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96. Ronald Dworkin, *The 1984 McCorkle Lecture: Law's Ambition for Itself*, 71 VA. L. REV. 173, 173 (1984).

97. *See* ACKERMAN, *supra* note 2, at 266-69.

98. *See* Bork, *The Constitution, Original Intent, and Economic Rights, supra* note 88, at 826; Van Alstyne, *supra* note 88, at 225-26, 233-35.

99. *Compare* DWORKIN, *supra* note 2, *with* Fiss, *supra* note 46.

present the form; the form is always there to *outdistance* the meaning."[100] The question of whether it is form or meaning, metalanguage or language-object, that should predominate remains necessarily unresolvable within the terms of the myth. The myth cannot resolve this undecidability precisely because the myth *is* this undecidability.

To illustrate this point, recall the following scheme outlining the distinction between meaning and form:

Meaning (Language-object)	Form (Metalanguage)
1787	Founding Moment
The Framers	The Mythic Subject
The Constitution of 1787	The Paramount Norm
Ratification	Consent/Self-Rule

It was previously suggested that such a determinate rendition was in some sense wrong. Now we shall see why: The undecidability of meaning and form in myth allows for a different allocation between the two. What was previously taken to be the metalanguage thus could very well become the language-objects of some higher order metalanguage, and so on. The identification of meaning and form within the constitutional myth might then be redescribed in the following terms:

Meaning (Language-object)	Form (Metalanguage)
Founding Moment	Ground
The Mythic Subject	Motivating Source
The Paramount Norm	Ultimate Authority
Consent/Self-Rule	Justification Principle

The possibility of this redescription instantiates Barthes's observation that in myth, "the form always *outdistances* the meaning."[101]

. Of significance here is that *the very form* of liberal justification already instantiates the liberal myth. The metalanguage — denoted as ground, motivating source, ultimate authority, and legitimation — is the form in which liberal justification operates. Liberal justification, in the form of its inquiries, asks political theories to furnish some sort of normative justification for the political order. The form of liberal justification itself demands a *grounds* for the political order — some action, event, happening, or occurrence. The

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100. BARTHES, *supra* note 1, at 123.
101. *Id.*

form demands a *motivating source* — some notion of who or what creates this political order. It demands the establishment of some *ultimate authority* that is at once identifiable and determinable. It also demands that there be some *justification principle* — some reason to believe that the ultimate motivating source is justified in recognizing the ultimate authority.

Liberal justification thus institutes a form that anticipates liberal meaning. This is the form of normative justification. The very form of normative justification presupposes that reasoned argument can be used to persuade sovereign autonomous individuals that some norms can be justified and that the norms in turn justify their respective political practices. It presupposes a scene (the human constitution of the state), an action (deliberative argument), agents (sovereign and autonomous individual subjects), and instrumentalities (reason) that are the essential components of the liberal world view. Hence, *in its very formulation of the task to be performed, of the agents to be addressed, and of the manner of performance, the question of normative justification already posits and presupposes into existence an essentially liberal ontology, a liberal psychology, and a liberal narrative.*

To ask the question of normative justification is to already situate oneself within the metalanguage of the liberal myth, within the circles of liberal justification. It is to apprehend and experience the world within the mythic narratives and ontologies of liberalism. It is to predispose thought to reach liberal conclusions.

CONCLUSION

What remains perhaps most interesting about liberal justification is that it still evokes significant interest. How is this to be explained? Indeed, absent a proclivity for going around the same circles, what is it about liberal justification that remains appealing to so many thinkers? The short answer is that for those who are within the circles of liberal justification, the enterprise seems neither circular nor empty. They believe. Until one day, they don't.