into law a bill abolishing slavery in the territories, and in issuing the Emancipation Proclamation. Eventually, the Reconstruction generation "overruled" *Dred Scott* in a rare maneuver not attempted since 1795, by inscribing its views directly into "the legal firmament" with the creation of a new set of constitutional texts: the Thirteenth, Fourteenth, and Fifteenth Amendments. Magliocca shows how this reversal revived Marshall's landmark decisions and then enshrined them in constitutional history as authoritative precedents. Salmon Chase, nominated as chief justice by Lincoln upon the death of Taney in 1864, declared that Marshall's interpretation of the Constitution in *M'Culloch* had always been sound, and had "finally settled, so far as judicial decisions can settle anything," the constitutionality of implied federal powers (123–25). The major rulings of Taney were relegated to exile and infamy.

Andrew Jackson and the Constitution raises important questions about the metamorphosis of our constitutional history. The grand narrative of constitutional generations, political escalation, and preemptive strikes is particularly engaging, in part because it reveals an inherent tension between the "separate but equal" powers established by the Constitution. However, the full implications of its thesis and approach for the study of American constitutionalism and statesmanship should not be ignored. With each rhetorical "turn" of "the constitutional cycle," Magliocca's analysis assumes the mantle of inevitability and the governing metaphor shifts from economics to mechanics, rendering political deliberation and prudence subordinate to process. Republican government is no longer conceived as a blessing preserved by a frequent recurrence to fundamental principles, and it goes without saying that "the important question" as to whether human beings are, indeed, capable of "establishing good government from reflection and choice" (*Federalist Papers*, no. 1) is all but silenced.

–Dustin A. Gish

THE TRAVAILS OF LIBERAL CONSTITUTIONALISM

Howard Schweber: *The Language of Liberal Constitutionalism* (Cambridge, UK: Cambridge University Press, 2007. Pp. v, 386. $96.00.)

doi:10.1017/S0034670508000648

The Language of Liberal Constitutionalism is an extraordinarily ambitious work that covers a vast range of material from Bodin to contemporary material, from epistemology and semantics to constitutional theory. Howard Schweber has incorporated nearly every work of relevance available into his deeply informed discussion. Consequently, there is much to be learned from serious study of this work as well as with critical engagement with it. Because of the constraints of space, my focus will be on the latter.

In this provocative work, Schweber seeks to answer two questions: "First, under what conditions is the creation of a legitimate constitutional regime possible? Second, what must be true about a constitution if the regime that it grounds is to retain its claim to legitimacy?" (1). In response to the first question, Schweber maintains that "the creation of a legitimate constitutional regime depends on a prior commitment to employ constitutional language, and that such a commitment is both the necessary and sufficient condition for constitution making" (7). In response to the second, he argues that "a specific set of characteristics described in terms of exclusivity, completeness, and substance are the analytically necessary answers" (8).

Each of Schweber's answers requires some unpacking. First, however, the reader is compelled to note an important caveat as to the sort of answer Schweber thinks acceptable:

> [T]he inquiry that is undertaken here is not a search for the conditions of any conceivable constitution, but rather takes place within the tradition of liberal constitutionalism, a tradition that assumes the inescapability of value pluralism and accepts fundamental importance of basic democratic principles. The challenge for liberal constitutionalism, then, is that we cannot answer the questions that this book asks by referring to a necessary set of universally shared moral values or belief in a higher law external to the constitution itself, nor may we accept an explanation that depends on the coercion of the population by force. (2)

While Schweber's assertion here is in no way atypical of conventional liberal political theory, the train of thought does involve a rather obvious non sequitur: the "fact" of value pluralism (a dubious "fact" at best) in no way negates or contradicts the claim that some constitution x is legitimate only if it is adequately grounded in a higher law external to the constitution. In fact, the move from the assertion of value pluralism to the claim that constitutions cannot be grounded on some standard transcendent of any given constitution holds *only if* moral relativism obtains. But there is nothing by way of a philosophically valid argument for moral relativism, and there is at least one powerful argument for its self-referential incoherency. Even worse, it is logically fallacious to infer moral relativism from variations in moral beliefs and opinions across cultures. Of course, it is more in vogue to speak of value pluralism instead of moral relativism. But value pluralism is an exceedingly ambiguous phrase premised on the conflation of that which is valued with that which is valuable. The fallacy of equivocation also shows up in Schweber's conflation of universally accepted or shared moral norms with universally binding ones. But whether some set of norms is universally binding is analytically distinct from whether that particular set is universally accepted and, therefore, universally shared. Problematically, much of Schweber's argument seems to turn on these equivocations. These problems notwithstanding, Schweber's caveat reveals why he answers the first question as he does. The conjunction of Schweber's assertion of value pluralism and his

commitment to democratic principles leads him to believe that only universal consent (whether hypothetical or real) is capable of grounding a constitutional order.

As accepting the alleged "fact" of value pluralism precludes agreement on a shared set of moral norms, Schweber is forced to look elsewhere. Schweber suggests that universal consent to employ constitutional language is possible. He also suggests that people behave "as if" they have given this consent when they employ constitutional language and that this sort of "as if" consent is sufficient to ground a legitimate constitutional regime. Schweber rightly recognizes that if the argument stops just here, then a significant objection emerges. In this connection, he takes up Robert Alexy's criticism of legal positivism to the effect that legal positivism "does not provide a basis for declaring a Nazi regime illegitimate because it does not contain a reference to grounding normative commitments external to law" (268). The idea is that if constitutional regimes can fail to embody substantive normative commitments and remain legitimate, then we must concede that the most oppressive of regimes (e.g., the Nazi regime) can, in fact, be legitimate. This conclusion is unacceptable. But Schweber's caveat cited above means that he cannot allow these normative commitments to be external to constitutional language.

Rather, for Schweber, the employment of constitutional language necessarily carries some substantively normative requirements along with it. Schweber tells us a few things about these norms. First, these norms must be thin rather than thick—they must be sufficiently thin to command universal assent (the thicker the norm, the more people there are who will disagree with it). Second, it seems they must be political rather than moral norms, as moral norms are precisely the sort that he thinks fail to command universal assent. Third, Ronald Dworkin's idea of "integrity" is one of the norms he has in mind. Though, one might note that Dworkin's norm of integrity, inasmuch as it is simply treated as a requirement that law be internally consistent or coherent (see 287), does not seem sufficient by itself to compel the conclusion that a Nazi-like regime is illegitimate.

Schweber also tells us something about the sort of substantively normative commitments that he thinks unacceptable when it comes to grounding a legitimate, liberal constitutional order. He is critical of Robert George's claim that "Even a law enacted by impeccably democratic procedures can be unjust, and insofar as it is unjust it can fail to create an obligation to obey" (263). While Schweber wants to avoid the odious consequences of a legal positivism detached from substantive normative commitments, he rejects the idea that commitment to a constitutional language that legitimizes a liberal constitutional order can somehow be conditioned upon "a higher level commitment to moral principles" because, that being the case, sovereignty would "no longer reside in [a] self-authored 'People' but in some other, external authority" (266). In short, Schweber's aim is, on the one hand, to reject the idea that for a constitution to be legitimate then that constitution must comport with transcendent moral norms and, on the other hand, to argue

that a constitution must be committed to thin, substantial political norms (or norms implicit in constitutional language) in order to preclude the possibility that Nazi-like regimes are legitimate.

But surely it is strange to call norms that would preclude the legitimacy of the Nazi regime "constitutional" or "political" rather than "moral." Surely no one opposes the actions of the Nazi regime on the ground that Nazi atrocities violated norms implicit in constitutional language. We oppose Nazis precisely because their actions are immoral or evil in the deepest senses of those words. We view them as illegitimate because they are unjust, whether or not they conform to political and constitutional norms. One is inclined to think that the way in which Schweber distinguishes moral from political norms is, therefore, simply confused. There is a larger logical flaw in the Schweber's argument. Consent is clearly *insufficient* to establish the legitimacy of any political regime; consent is nothing other than an act of will. And, as I have argued elsewhere, it is logically impossible to distinguish among acts of will on the basis of will alone. It follows that we cannot distinguish between obligatory and non-obligatory acts of will on the basis of will alone (put another way, if obligation is a property that is external to sheer will and force, then it is equally external to consent). One cannot be bound by as if or actual consent unless there is a norm such that people ought to keep their commitments—and such a norm is clearly a moral norm rather than a political one. Moreover, natural law or moral obligation forms a necessary condition of legal obligation, otherwise "law" is nothing other than an act of force (even if the force in question is nothing other than the conventions of the community) and, hence, not binding at all. As we all know, even if force can oblige, it cannot obligate. Locke understood the point. In *Questions Concerning the Law of Nature* (Cornell University Press, 1990), he says this: "If the law of nature is not binding on men, neither can any human positive law bind them, since the laws of the civil magistrate derive all their force from the binding power of this law. . . . [I]f you would abolish the law of nature, you overturn at one blow all government among men, [all] authority, rank and society. . . . [T]he obligation of the civil law depends on the law of nature."

–Paul R. DeHart

CONTESTING JUDICIAL AUTHORITY

Keith E. Whittington: *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History* (Princeton and Oxford: Princeton University Press, 2007. Pp. xii, 303. $35.00.)

doi:10.1017/S0034670508000685

Judicial supremacy in American history is the subject of Keith E. Whittington's fine book *Political Foundations of Judicial Supremacy: The*