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DONI GEWIRTZMAN

The Seussian Dead Hand: Concluding
Remarks to *Exploring Civil Society Through
the Writings of Dr. Seuss*

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THE SEUSSIAN DEAD HAND

In concluding this symposium, I would like to look at the relationship between Dr. Seuss and civil society through the lens of my own discipline, constitutional law. There are two ways to look at this relationship: one that tells a sad story about civil society's potential, and another that presents a much happier view.

Let's start sad. On this level, Seuss offers a very bleak view of civil society. Re-reading the books this week, I was struck by just how *uncivil* Seuss's world actually is. Seuss offers us a particularly uncivil social vision in two distinct ways. First, the characters in Seuss's books are incredibly uncivil toward one another. As Jorge Contreras reminded us, they are angry, they are rude, they are selfish, they are brazen, they are lawless, and they are mean.¹ And why shouldn't they be? After all, they reflect the divided and boundaried world that Dennis Parker,² Peter Nicolas,³ Lani Guinier,⁴ and Elena Baylis⁵ presented us with. It is, to use Miguel Padró's term, a very Milton Friedman-y state of nature,⁶ in which no one seems to care a whole lot about how their actions affect anybody else.

On a second level, Seuss's world is not only filled with characters being uncivil toward one another, it is also missing many of the forces that help society maintain a core level of civility. No one is trying to keep the peace. There is no law. There is no God. There is no philosopher-king who is trying to step in and manage the situation.

In particular, there are very few mediating institutions to help manage the many group conflicts that arise in Seuss's world. There is no bowling league for star-bellied and plain-bellied Sneetches to get to know one another and build trust.⁷ There is no Greenpeace or Sierra Club to help the Lorax exert more power or recruit other people to his cause.⁸ There is no Elks Lodge to build a sense of community in the Jungle of Nool that might allow the animals to just chill out for a second and hear Horton

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1. See Jorge Contreras, Assoc. Professor of Law, Am. Univ. Wash. Coll. of Law, Remarks at the New York Law School Law Review Symposium: Exploring Civil Society Through the Writings of Dr. Seuss (Mar. 1, 2013), available at <http://youtu.be/BHnQS7ysIcE?t=13m26s>.
 2. Dennis Parker, Dir., Racial Justice Program, Am. Civil Liberties Union, Remarks at the New York Law School Law Review Symposium: Exploring Civil Society Through the Writings of Dr. Seuss (Mar. 1, 2013) (video recording on file with the *New York Law School Law Review*).
 3. Peter Nicolas, Professor of Law, Univ. of Wash., Remarks at the New York Law School Law Review Symposium: Exploring Civil Society Through the Writings of Dr. Seuss (Mar. 1, 2013) (video recording on file with the *New York Law School Law Review*).
 4. Lani Guinier, Professor of Law, Harvard Law Sch., Remarks at the New York Law School Law Review Symposium: Exploring Civil Society Through the Writings of Dr. Seuss (Mar. 1, 2013) (video recording on file with the *New York Law School Law Review*).
 5. Elena A. Baylis, Assoc. Professor of Law, Univ. of Pittsburgh Sch. of Law, Remarks at the New York Law School Law Review Symposium: Exploring Civil Society Through the Writings of Dr. Seuss (Mar. 1, 2013), available at <http://youtu.be/-TbbgLRWWoM?t=4m38s>.
 6. Miguel Padró, Project Manager, Aspen Inst. Bus. & Soc'y Project, Remarks at the New York Law School Law Review Symposium: Exploring Civil Society Through the Writings of Dr. Seuss (Mar. 1, 2013), available at <http://youtu.be/0m8JpnMrhqc?t=7m36s>.
 7. See generally DR. SEUSS, *The Sneetches*, in THE SNEETCHES AND OTHER STORIES (1961).
 8. See generally DR. SEUSS, THE LORAX (1971).

speak his truth.⁹ There is no team of Roger Clarks trying to impose international law on the Butter Battle.¹⁰ And, quite frankly, I share John Hursh's partial skepticism that any of these groups would actually do any good.¹¹

So that's the very sad, very uncivil world that Seuss confronts us with.

Let's now move to a happier way of thinking about Seuss and civil society, a world where constitutional law helps us correct this sad, uncivil state of affairs. Constitutions are many, many things. But first and foremost, they are a method of making large-scale social commitments that preserve civil society commitments over time and across generations.¹² Many of our civil society commitments—the institutions and ideals that enable us, as a people, to recognize our common humanity and fix the uncivil world Seuss presents us with—are embedded in the choices made by the U.S. Constitution. Though we often vehemently disagree about what those commitments are and whether we actually live up to them, the Constitution helps us, as Alice Korngold put it, fulfill our collective “duty of imagination” by committing to a world that's more civil than our baser instincts will allow.¹³

But there's a core theoretical problem with this commitment-making device that is designed to help us avoid the uncivil Seussian nightmare. Our constitutional commitments, whatever they might be, were made by people who died a long time ago. This is the heart of what constitutional theorists call the “dead hand” problem.¹⁴ The dilemma, in short, is this: Why should we, in the present day, adhere to these civil society commitments when we were never asked whether we agree with them? Why do we have to listen to dead people? It's like having to comply with a contract that was signed by your great-great-grandfather two hundred years ago.

Most of us are never asked to read the words of the Constitution aloud, or to state our agreement with its principles, even though we know that making a commitment orally or in writing is the best way to legitimize that commitment and get a group of

9. See generally DR. SEUSS, *HORTON HEARS A WHO!* (1954).

10. See Roger Clark, Bd. of Governors Professor of Law, Rutgers Sch. of Law-Camden, Remarks at the New York Law School Law Review Symposium: Exploring Civil Society Through the Writings of Dr. Seuss (Mar. 1, 2013), available at <http://youtu.be/-TbbgLRWWoM?t=39m21s> (discussing DR. SEUSS, *THE BUTTER BATTLE BOOK* (1984) in the context of international law); see also Roger S. Clark, *Is The Butter Battle Book's Bitsy Big-Boy Boomeroo Banned? What Has International Law to Say About Weapons of Mass Destruction?*, 58 N.Y.L. SCH. L. REV. 655 (2013–2014).

11. John Hursh, O'Brien Fellow, McGill Univ. Ctr. for Human Rights & Legal Pluralism, Remarks at the New York Law School Law Review Symposium: Exploring Civil Society Through the Writings of Dr. Seuss (Mar. 1, 2013), available at <http://youtu.be/-TbbgLRWWoM?t=42m>.

12. See JED RUBENFELD, *FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT* 92–93 (2001).

13. Alice Korngold, President & CEO, Korngold Consulting, Remarks at the New York Law School Law Review Symposium: Exploring Civil Society Through the Writings of Dr. Seuss (Mar. 1, 2013), available at <http://youtu.be/0m8JpnMrhqc?t=28m36s>.

14. See Richard A. Primus, *When Should Original Meanings Matter?*, 107 MICH. L. REV. 165, 192 (2008).

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individuals to adhere to it.¹⁵ We never really get the chance to decide whether we want to sign on the dotted line.

Given the dead hand problem, how does the Constitution's vision of a civil society—assuming we can agree on exactly what that is—gain legitimacy as law?¹⁶

In thinking about constitutional commitment and the dead hand problem, I am drawn back to a personal image. It's 1975 and I'm on the couch in the living room of my parents' apartment on the Upper West Side in Manhattan. I'm five years old. I'm small for my age. I'm lying across the couch with my head resting on my mother's lap. She's reading *Horton Hears a Who!* to me, and I'm reading along as she speaks the words aloud.¹⁷ The magic of the moment for me, at least, is not in the story or the drawings. It's in her cadence and her tone, which I can re-create even now: "A person's a person no matter how small."¹⁸

As Naomi Mezey made so very clear, these books were meant to be read aloud, from parents to children, and from those children to grandchildren, like any story that really matters.¹⁹ The rhymes, the rhythm, the tone, the rap—they only really work when the words are actually spoken.²⁰ It's a performative act.

So what's the connection between the spoken word and the legitimacy of constitutional commitments? This is where Seuss enters the picture, offering us a way out of the dead hand problem.

Our common humanity and our vision of civil society are embedded in our core narratives. These texts, read aloud by us or to us so many years ago, form some key part of who we are—a connective tissue that exists apart from any tribal affiliation, market economy, or monarch. These books are a critical part of our oral tradition that, as Donald Pease suggested, help define the core principles we choose to live by and trigger, in his words, "deep structures of belief."²¹

As individuals, we make our present-day commitment to civil society—as abstract as that commitment might be—not through signing the Constitution itself,²² but through the stories we choose to tell²³—or, as Anne McGillivray put it, the

15. ROBERT B. CIALDINI, *INFLUENCE: SCIENCE AND PRACTICE* 54 (5th ed. 2008).

16. See generally Richard A. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787 (2005).

17. HORTON HEARS A WHO!, *supra* note 9.

18. *Id.*

19. Naomi Mezey, Professor of Law, Georgetown Univ. Law Ctr., Remarks at the New York Law School Law Review Symposium: Exploring Civil Society Through the Writings of Dr. Seuss (Mar. 1, 2013), available at <http://youtu.be/BHnQS7ysIcE?t=46m>.

20. *Id.*

21. Donald E. Pease, Ted & Helen Geisel Third Century Professor in the Humanities, Dartmouth Coll., Remarks at the New York Law School Law Review Symposium: Exploring Civil Society Through the Writings of Dr. Seuss (Mar. 1, 2013), available at <http://youtu.be/LA0ujAxHulU?t=10m>; see also Donald E. Pease, *Dr. Seuss's (Un)Civil Imaginaries*, 58 N.Y.L. SCH. L. REV. 509 (2013–2014).

22. See Doni Gewirtzman, *Our Founding Feelings: Emotion, Commitment, and Imagination in Constitutional Culture*, 43 U. RICH. L. REV. 623, 650 (2009).

23. See generally ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* (2000).

myths we decide to transmit.²⁴ And through Seuss, we solve the dead hand problem and affirm our shared commitment to equality every time we tell the tale of the star-bellied Sneetch.²⁵ We confirm our dedication to limited government every time we speak the words of *Yertle the Turtle*.²⁶ We pledge our allegiance to principles of due process when we share Horton's legacy with another generation.²⁷ It is an act—intimate and small—like so many of the protagonists in these books, like the seed of a Truffula tree or a turtle named Mack, that revitalizes our shared commitment to civil society.²⁸

And for so many of us, that act of commitment-making takes place not at a secret conclave in Philadelphia in 1787, or in a crowd of one million people on a Washington, D.C. lawn in 1963. It happens in places like a small living room on the Upper West Side in the mid-1970s, where I first heard my mother say aloud—using words not written by James Madison, but by the child of a brewer born in Springfield, Massachusetts in 1904—that she agrees to live her life within the terms of a more perfect union.

24. See Anne McGillivray, Professor of Law, Univ. of Man., Remarks at the New York Law School Law Review Symposium: Exploring Civil Society Through the Writings of Dr. Seuss (Mar. 1, 2013), available at <http://youtu.be/BHnQS7ysIcE?t=22m59s>; see also Anne McGillivray, *Horton Hears a Twerp: Myth, Law and Children's Rights in Horton Hears a Who!*, 58 N.Y.L. SCH. L. REV. 569 (2013–2014).

25. *The Sneetches*, *supra* note 7.

26. See generally DR. SEUSS, *YERTLE THE TURTLE AND OTHER STORIES* (1958).

27. *HORTON HEARS A WHO!*, *supra* note 9.

28. See generally *THE LORAX*, *supra* note 8; *YERTLE THE TURTLE*, *supra* note 26.