

BOSTON UNIVERSITY SCHOOL OF LAW

WORKING PAPER SERIES, PUBLIC LAW & LEGAL THEORY
WORKING PAPER NO. 01-19



CONSTITUTIONAL LEGITIMACY

RANDY E. BARNETT

This paper can be downloaded without charge at:

The Boston University School of Law Working Paper Series Index:

<http://www.bu.edu/law/faculty/papers>

The Social Science Research Network Electronic Paper Collection:

<http://papers.ssrn.com/abstract=?????>

ABSTRACT: The problem of constitutional legitimacy is to establish why anyone should obey the command of a constitutionally-valid law. Neither “consent of the governed” nor “benefits received” justifies obedience. Instead, the legitimacy of any constitution should be assessed as one component of a lawmaking system. A lawmaking system is legitimate if there is a prima facie duty to obey the laws it makes. A prima facie duty of obedience exists either if there is actual unanimous consent to the jurisdiction of the lawmaker or, in the absence of consent, if laws are made by procedures which assure that they are not unjust. To the extent a particular constitution establishes law-making procedures that adequately assure the justice of enacted laws, it is legitimate even if it has not been consented to by the people.

CONSTITUTIONAL LEGITIMACY

Randy E. Barnett*

Many constitutional scholars offer their opinions about what the Constitution means. Some also have theories about how it should be interpreted—or more commonly how it should *not* be interpreted. But few stop to consider whether the Constitution is legitimate. This is unfortunate because if the Constitution is not legitimate, then it is not clear why we should care what it means. And if it is legitimate, we need to know *why* before we can settle on how to interpret what it says.

The Constitution’s legitimacy cannot, then, simply be assumed. Unless we openly confront the question of its legitimacy, we will never know whether we should obey it, improve upon it, or ignore it altogether. It is therefore extremely odd that, for all the verbiage published annually about the Constitution of the United States, one almost never hears the issue of its legitimacy addressed systematically. Perhaps this is because, for many, the Constitution is sacred and any serious treatment of its legitimacy would have to admit the possibility that it does not pass muster. It is as though we are afraid to find that there is no man behind the curtain. But another possible explanation exists as well.

Despite their silence on the issue, and whatever may be in their hearts, many constitutional scholars write as though we are not bound by the actual words of the

*Austin B. Fletcher Professor, Boston University School of Law. I have benefitted greatly from comments by Einer Elhauge, Larry Solum and participants in the Boston University School of Law faculty workshop.

Constitution. One way to slip these bonds is to imply that the original Constitution is illegitimate by repeating the refrain that we cannot be bound by the “dead hand of past” or by constantly invoking the various sins of the framers. By delegitimizing the original Constitution, such rhetoric seeks to free us from its constraints. Yet it is both curious and significant that few come out and admit this. Why not?

Perhaps because they seek the obedience of the faithful and, were their delegitimation entirely successful, why on earth would anyone adhere to the commands of a law professor or philosopher or political scientist? For that matter, why adhere to the commands of the man or woman in a black robe, apart from the fact that disobedience is likely to land you behind bars in an extremely treacherous environment? By subtly undercutting the legitimacy of the Constitution while at the same time preserving its much-revered form, a constitutional scholar (or judge) can *become* the man behind the curtain, which perhaps is every scholar’s fondest wish. Pay no attention to that bookish professor; the great and powerful Constitution has spoken!

This is a fraud on the public. Imply but do not say aloud that the Constitution is illegitimate so we need not follow what it actually says. Remake it, or “interpret” it, as one wills and then, because it is The Constitution we are expounding, the masses will have to follow. This strategy also allows one to adopt a stance of moral superiority towards past generations without having to assume the responsibility of proclaiming forthrightly that the document they wrote and by which the government rules is of no authority.

In this essay, I will ask and answer the question that others seem to fear: Why should anyone obey the commands issued by persons who claim to be authorized by the Constitution? In Part I, I explain why the most commonly-held view of constitutional legitimacy—the “consent of the governed”—is wrong because it is a standard that no constitution can meet. Holding the Constitution to this unattainable ideal both undermines its legitimacy and allows others to substitute their own meaning for that of the text. This result is paradoxical since, notwithstanding the great expansion of suffrage since the founding, any new and improved “interpretation” of the Constitution will also fail to be legitimated by the “consent of the governed.” In Part II, I then examine and reject the principal alternative to arguments based on the “consent of the governed”: that the benefits citizens receive from a constitutional order obligate them, in return, to obey laws regardless of whether they consent to do so.

Despite the failure of the arguments from consent or benefits received, I maintain that laws passed pursuant to a legitimate constitutional authority can still bind us in conscience. Indeed, only by realizing that the “consent of the governed” is a fiction can one appreciate the imperative that lawmakers respect these

enumerated and unenumerated rights. In Part III, I begin by showing how, contrary to popular belief, *unanimous consent to governance is both possible and pervasive*, but also why constitutions like that of the United States could never receive the consent of “We the People.” To be binding without unanimous consent, a constitution must be legitimated in some other manner.

I then explain why legitimacy in the absence of unanimous consent requires putting enforceable limits on government powers—limits that would not be necessary where unanimous consent exists. To understand how any constitution could be legitimate, one must begin by acknowledging that ‘first comes rights, and then comes the Constitution.’ Rights that precede the formation of government are called “natural rights” or “human rights.” In the end, I will contend that, if a constitution contains adequate procedures to protect these preexisting rights, it can be legitimate even if it was not consented to by everyone; and a constitution that lacks adequate procedures to protect these rights is illegitimate even if it was consented to by a majority.

Though my thesis concerning legitimacy does depend on the claim that persons have rights independently of government, it does not depend on acceptance of the particular conception of background rights I defend elsewhere.¹ *Regardless of what conception of human rights one holds*, constitutional legitimacy can be seen as a product of procedural assurances that legal commands do not violate whatever rights humans have. The narrow thesis defended here concerns only the proper conception of constitutional legitimacy, not all the conditions that may lead to the conclusion that a particular constitutional regime is or is not legitimate. Still, to the extent that consistency with and the protection of background rights justify the imposition of legal commands on persons without their consent, the more ambitious a conception of rights one holds, the more nonconsensual impositions will be claimed to be warranted. For this reason, recognizing the absence of consent seems to argue for a less ambitious rather than a broader conception of background rights.

This procedural conception of constitutional legitimacy must be distinguished from the more familiar position commonly attributed to “natural law” theorists that an unjust law is not (in some sense) a law.² In what follows, I do not equate the

¹See Randy E. Barnett *The Structure of Liberty: Justice and the Rule of Law* (Oxford: Clarendon Press, 1998).

²The actual position of natural law theorists is that an unjust law—though a positive law—did not bind in conscience. Even Thomas Aquinas was quite capable of distinguishing as a conceptual matter between those human laws that were just and those that were unjust when he declared that “. . . Laws framed by man are either just or unjust.” Thomas Aquinas, *Summa Theologica*, trans. Fathers

legitimacy of a law with its propriety or “justice”—though these two concepts are closely related—or with the mere perception that a particular law is proper or just. I readily concede that a validly-enacted law may be unjust even within a legitimate legal system. Nor does “legitimacy,” as I am using the term, refer to whether a particular law is “valid” because it was enacted according to the accepted legal process. For example, the Constitution specifies that to be valid a law must be enacted by majorities of both houses of Congress and signed by the President.

Rather, the concept of legitimacy I will be advancing stands *between* the justice of laws and their validity. It refers to whether the process by which a law is determined to be valid is such as to warrant that the law is just. According to my usage, a valid law could be illegitimate and a legitimate law could be unjust. A law may be “valid” because produced in accordance with all procedures required by a particular lawmaking system, but be “illegitimate” because these procedures are inadequate to provide assurances that a law is just. Such a law would not be binding in conscience. A law might be “legitimate” because produced according to procedures that assure that it is just, and yet be “unjust” because in this case the procedures (which can never be perfect) have failed. Such a law would be binding in conscience unless its injustice is somehow established.

My discussion of legitimacy will be normative and therefore must also be distinguished from more sociological or descriptive uses of the term. Many discussions, perhaps even most, concern whether a constitution, law-making process or government is *perceived* to be legitimate. I am examining instead the conditions of legitimacy that need to exist for such a perception to be warranted.

One cannot appreciate the superiority of my approach, however, which raises questions of its own, without confronting squarely the severe and insurmountable problems with the conception of legitimacy based on the consent of the governed or “We the People.” So let us now pull back the curtain and see what we find.

of the English Dominican Province, *Great Books of the Western World*, vol. 20 (Chicago: Encyclopedia Britannica, 1952), p. 233. Rather, for Aquinas and other natural law thinkers, the issue of lawfulness is not conceptual as it is for modern positivists, but normative. Only just laws “have the power of binding in conscience. . . .” *Id.* It is this issue of “binding in conscience” that informs his endorsement of Augustine’s statement that “‘that which is not just seems to be no law at all;’ therefore the *force* of a law depends on the extent of its justice.” *Id.* 227 (emphasis added).

I. THE “FICTION OF WE THE PEOPLE”

The Constitution begins, “We the People of the United States . . . do ordain and establish this Constitution for the United States of America.” This was not idle rhetoric. These words were offered to claim legitimacy for the document that followed. The founders’ claim of legitimacy was based not on the divine right of kings, but on the right of “We the People” to govern themselves. They declared that “We the People” had exercised their rights and had manifested their consent to be ruled by the institutions “constituted” by this document. They made this declaration because they believed that the consent of “We the People” was necessary to establish a legitimate government and that, upon ratification, they would have gained this consent.

In this Part, I challenge the idea, sometimes referred to as “popular sovereignty” that the Constitution of the United States was or is legitimate because it was established by “We the People” or the “consent of the governed.” I deny that conditions needed to make this claim valid as to *this* Constitution existed at the time it was adopted or ever could exist. Though “the People” can surely be bound by their consent, this consent must be *real* not fictional, *unanimous* not majoritarian. Anything less than unanimous consent simply cannot bind nonconsenting persons. Moreover, the fiction of “We the People” can prove dangerous in practice and can nurture criticisms of the Constitution’s legitimacy that are unwarranted.

A. *Basing the Duty to Obey the Law on Consent*

Sometimes we speak as though the Constitution itself is or is not binding on the citizenry. Yet, with rare exception,³ the Constitution does not purport to bind citizens. Rather, it binds the government itself. As Rufus King, delegate from Massachusetts, stated to the Constitutional Convention: “In the establishment of Societies the Constitution was to the Legislature what the laws were to individuals.”⁴

³The Thirteenth Amendment prohibits private persons, not just government, from enslaving another or holding them in involuntary servitude. See *United States Constitution*, amend. XIII.

⁴James Madison, *Notes of Debates in the Federal Convention of 1787* (New York: W.W. Norton and Company, 1987), p. 231 (statement of R. King).

While the Constitution is law, it is law in a secondary, not a primary sense.⁵ It purports to bind government officials, not private individuals.

The real question, then, is not whether the Constitution is binding on citizens, but whether citizens are bound by the commands or laws issued by officials acting in its name. Does the fact that a “law” is validly-enacted according to the Constitution mean that it binds one in conscience? In other words, is one morally obligated to obey any law that is enacted according to constitutional procedures? Or is the only reason to obey a valid law the fear of punishment should one be caught for disobedience?

While some legal philosophers disagree,⁶ most citizens think that when a command is called a “law,” it carries with it a moral duty of obedience—though this duty might be rebutted in particular cases.⁷ Certainly most lawmakers and government officials assert that citizens have a moral duty to obey properly enacted laws. When this is the common perception of “the law,” and when the system that produces these legal commands lacks the requisite institutional quality—whatever it may be—to justify this favorable presumption, lawmakers in such a society will get a powerful benefit of the doubt or “halo-effect” to which they are not be entitled. Therefore, if the term “law” is to carry the implication that there is a moral duty to obey, then the requisite binding *quality must go in before the name “law” goes on.*

A law-making system is legitimate, then, if it creates commands that citizens have a duty to obey. A constitution is legitimate if it creates this type of legal system. What quality must a constitution have to make it legitimate in this sense? Why do citizens have a duty to obey the commands of those who are designated by a constitution as law makers and enforcers? Most constitutional scholars avoid explicitly addressing these questions.

If pressed for an answer, many people would likely rely, at least initially, on “the consent of the governed” or what is sometimes called “popular sovereignty.”

⁵See H. L. A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961), pp. 77-96 (distinguishing “primary rules” that direct individual from “secondary rules” that define how the primary rules are determined).

⁶See e.g. Joseph Raz, *Authority of Law* (Oxford: Oxford Univ. Press, 1979), p. 233 (“[T]here is no obligation to obey the law. . . . [T]here is not even a prima facie obligation to obey it. . . . [T]here is no obligation to obey the law even in a good society whose legal system is just.”). I respond to this position at greater length in Randy E. Barnett, *Getting Normative: The Role of Natural Rights in Constitutional Adjudication*, 12 *Constitutional Commentary* 93, 102-05 (1995).

⁷This is what philosophers like Raz call a “prima facie” obligation duty, meaning that one has a duty unless it can be shown that there is some reason why this duty does not adhere.

Characteristic is the following statement by Michael McConnell: “The people’s representatives have a right to govern, so long as they do not transgress limits on their authority that are fairly traceable to the constitutional precommitments of the people themselves. . . .”⁸ Or, as George Washington said in his farewell address: “The basis of our political systems is the right of the people to make and to alter their constitutions of government. . . . The very idea of the power and the right of the people to establish government presupposes the duty of every individual to obey the established government.”⁹

While Bruce Ackerman emphatically denies that legislators govern in the name of the People,¹⁰ throughout two massive works entitled “We the People,” he too apparently assumes that the People can bind themselves, though he never quite comes out and says this explicitly. Instead, he speaks repeatedly of “decisions by the People,”¹¹ “the constitutional judgement of We the People,”¹² the “will of We the People,”¹³ “revision by the People,”¹⁴ and the People’s “right to change their mind.”¹⁵ In sum, for liberals like Ackerman, no less than for conservatives like McConnell,

⁸Michael W. McConnell, “The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin’s ‘Moral Reading’ of the Constitution,” *Fordham Law Review*, vol. 65 (1997), p. 1291.

⁹“Washington’s Farewell Address” in Henry Steele Commager, *Documents of American History*, 6th ed. (New York: Appleton-Century-Crofts, 1958), p. 172. This passage of Washington’s speech was reputedly drafted by Alexander Hamilton. See Joseph Ellis, *Founding Brothers: The Revolutionary Generation* (New York: Alfred A. Knopf, 2001), p. 152.

¹⁰Bruce Ackerman, *We the People: Foundations* (Cambridge, Belknap Press, 1991), p. 184 (“No small group can ever be transubstantiated into the People by virtue of legal form.).

¹¹*Id.* at 6.

¹²*Id.* at 9.

¹³*Id.* at 10.

¹⁴*Id.* at 13.

¹⁵*Id.* at 14.

“the People” are an entity capable of making decisions, reaching judgments, having a will, and changing “their mind.”¹⁶

To the contrary, in the next section, I will show that “We the People” is a fiction. I will demonstrate that constitutional legitimacy has not been conferred by either the individual or collective consent of We the People. As we shall, the idea of the “consent of the governed” is not one but a series of different commonly-made arguments that must be distinguished and considered separately to see that none of them work. Though genuine consent, were it to exist, could give rise to a duty of obedience, the conditions necessary for We the People actually to consent to anything like the Constitution or amendments thereto have never existed and could never exist.¹⁷

B. *Why “We the People” is a Fiction*

Those who justify a duty to obey the law on the basis of the “consent of the governed” must explain exactly how and when “We the People”—you and me and everyone else—consented to obey the laws of the land. Some claim that by voting we consent to obey the resultant laws; others contend that residence or the failure to revolt or amend the Constitution implies consent. All of these theories collapse upon close examination. Let us consider each in turn.

¹⁶Id. The very phrase “their mind” signals that something is amiss beneath the surface. If “We the People” have a single mind, should Ackerman not speak of “*its* mind”? He would then have to tell us what exactly the “it” is—everyone? a majority?—and how a diverse multitude of millions of people can have a single mind. If, on the other hand, there is no single mind then should he not have said “their minds”? Yet this expression would weaken the desired imagery of a single deliberating, willing, and acting agent that—or is it “who”?—exercises judgment.

¹⁷While Ackerman’s preoccupation with the trope of “We the People” makes his work an obvious target of this critique, nowhere in his two path-breaking books does he, to my knowledge, systematically defend the normative assumption that the “will of We the People” is actually binding on any particular person, or that constitutionally-enacted laws are binding on the citizenry. Instead, he defends his “dualist” approach as the best description of the American constitutional tradition (about which he may well be correct). See e.g. *id.* at 13 (“My argument . . . focuses on the fact that our Constitution has never . . . explicitly entrenched existing higher law against subsequent revision by the People.”). I discuss Ackerman’s dualist theory of constitutionalism below.

1. *Does Voting Constitute Consent to Obey the Law?*

Because we do not live in a direct democracy in which every individual votes on every law, the most obvious answer is that we consent to obey the laws when we vote for the lawmakers who enact them. Just as a person empowers an agent to represent and bind him, when each of us votes for persons to represent us in the legislature, have we not consented to obey the laws that they, our designated agents, vote for? Perhaps. But suppose the candidate we voted for was defeated. In what way did we consent to be “represented” by his opponent, the very person we voted *against*? Or suppose the person we voted to be our representative votes against a particular law. In what way have we consented to be bound by a law to which we and our representative were opposed?

Well, consent doesn’t work that way comes the response. By *choosing to vote*, we have consented to the outcome of the election, whatever it may be. In a game, you consent to play by the rules even when you are losing. People often consent to a process of binding arbitration in which they know, when they consent, that they may win or they may lose. By the same token, when we participate in the electoral “game” or process have we not committed ourselves to respect the outcome when our candidate loses?

But if consent is a message we communicate to others—“I consent to be bound by the outcome”—it is not clear that voting conveys such a message. Suppose some people vote, not because they consent to the outcome of an election but ‘in self defense’—that is, they vote because they hope to influence, however marginally, the result so that it is not as unfavorable to them as it might otherwise be. For example, some people might vote for the candidate who promises to support a tax cut, not because they consent to whatever the candidate might do in office, but solely because they hope to make a tax cut more likely and a tax increase less likely. They just want to keep more of their earnings. The same holds true for persons who vote for candidates who support or oppose abortion rights. To infer from their having voted for such a candidate the message that these voters consent either to the outcome of the election or to the outcome of the law-making process, whatever it may be, is to misunderstand the meaning of their vote.

Yes, but by using a vote to try to influence the outcome, has not a person chosen to participate in the process and does not this choice necessarily entail a consent to abide by the outcome? After all, should their candidate prevail, voters would expect those who supported the losing candidate to go along with the winning side. Unless losing voters go along with the winners, the system would fail to accomplish anyone’s objectives. While this may be so, it does not follow from the fact that they hope or expect others to go along that individual voters, by voting,

have consented to be bound themselves. They could still be voting simply to minimize the threat to their interests posed by the law-making process. Voting for this motive in no way implies consent to any outcome that may result. Therefore, the simple act of voting does not tell us whether the voter consents to the outcome of the election (and all that follows from that) or whether he or she is voting for different motives entirely.

While I do not agree that consent to the outcome follows from a vote cast in self-defense, suppose for the sake of argument that it does. What then do we say about the consent of those who abstain from voting altogether? They have not expressed any consent to the outcome of an election, win or lose, or the decisions of “representatives” who they have neither voted for nor against. Surely, on the argument presented so far, they are not bound to obey the law by virtue of their consent.

“Not so fast,” comes the reply. Provided that they were given the *option* of voting, those who have chosen not to participate in the election cannot complain. Consider the right of a criminal defendant to be represented in court by a lawyer. Should he waive his right to counsel and represent himself, or even stand mute, he cannot object if he is convicted—provided he was given the right to be represented. By the same token, so long as we are free to vote, if we fail to do so we cannot complain *however* the election comes out. After all, we had the opportunity to influence the outcome and we freely chose not to employ it.

The analogy to the right to an attorney is inapt. We do not find the defendant guilty because he *consented* to be so found. We find him guilty because we conclude that he *is* guilty. There is no reason to expect or require a defendant to consent to his prosecution. Though some defendants probably do, most probably do not. We do not know and we do not care because their consent does not matter. In contrast, the argument that we are bound to obey the laws because we have been given a right to vote *is* based on consent—the consent of the governed. Is not clear why, by giving someone the opportunity to consent, say by voting, one may then infer consent from a refusal to vote.

This point becomes clearer when one realizes that, if consent is an expression of a willingness to go along with something, then this presupposes it is possible to express an *unwillingness* to go along. Just as I can say “I consent,” there must also be a way to say, “I do not consent.” I am not here talking about the likelihood of such a refusal or all the considerations that might leave one “little choice” but to consent. Rather, I am simply insisting that, just as the word “no” means the opposite of “yes,” for consent to have any meaning, it must be possible to say “I do not consent” instead of “I consent.” But notice where the argument has taken us when consent to obey the laws is based on voting:

If we vote *for* a candidate and he wins, we have consented to the laws he votes for, but we have also consented to the laws he has voted against.

If we vote *against* the candidate and he wins, we have consented to the laws he votes for or against.

And if we *don't vote at all*, we have consented to the outcome of the process, whatever it may be.

It is a queer sort of “consent” where there is no way to refuse one’s consent. “Heads I win, tails you lose,” is the way to describe a rigged contest. “Heads” you consent, “tails” you consent, “don’t flip the coin,” guess what? You consent as well. This is simply not consent.

2. Does Residency Imply Consent?

When confronted with this argument, many might say that I have attacked a straw man. No one argues that consent is to be inferred from voting, or from having a right to vote. (I dispute this, by the way. A lot of people do argue in this manner—or at least they believe it—until the difficulties of the argument are brought to their attention.¹⁸) Rather, the response continues, one consents to obey the laws of the land because one has chosen to live here. Just as you are bound to obey your employer (within limits) because you consented to work at your job, you are bound to obey your landlord (within limits) because you consented to rent your apartment, and you are bound to obey the referee (within limits) when you consented to play basketball in a league, you are bound to obey the commands of government. You can always leave your job, find another apartment, or quit the basketball team, but as long as you remain you have consented to live by the authority of others and are bound to do so. By the same token, while you can emigrate from the country if you want to, so long as you chose to remain, you have “tacitly” consented to obey the laws of the United States. Call this the “love it or leave it” version of consent.

While it is fair to say that one really does impliedly consent to obey one’s employer, a sports official, the usher in the movie theater, etc., it is not at all clear that one has consented to obey the laws of the United States simply by virtue of

¹⁸Citations cannot be provided, however, since these sorts of discussions rarely take place in print.

one's failure to emigrate. Certainly no one has ever asked me for my consent, nor you for yours. Unlike immigrants who become citizens by taking an explicit oath, those born within the boundaries of the United States are not asked or required to take an oath promising to obey the laws.

Consider for a moment the implication of such a demand. Suppose one refused to take the oath. Would one then *not* be bound to obey the laws of the United States? Or would one then be expelled from the country? The latter prospect presupposes that the person who is demanding we take an oath is an "authority" who has the right to expel us if we refuse, but it is his authority which is at issue in the first place and which supposedly depends on our consent. All this is quite circular.

It is always hard to explain why a circular argument is circular (without sounding circular yourself), so consider this: Suppose I come to you and demand that you sign an oath to respect my commands and you refuse. Upon your refusal I claim a right to your house and order you to leave the country. You rightly say that this is absurd. I have no authority to demand that you take an oath, so you are free to ignore me. Your refusal to take the oath in no way obligates you to leave the country. You would be right. Because you have not consented to my authority, I am in no position to demand that you either take an oath or leave the country.

Were the present government to demand we take an oath, it would be making exactly the same claim. If the reason for taking an oath is to give the law makers authority by our consent, then unless they first have authority, they cannot demand that we take an oath. But if they already have the authority to demand we take an oath, then the oath is unnecessary to establish that authority.

That which is true for oaths is just as true for mere residence. It is equally unwarranted to base the authority of lawmakers on the "tacit" consent of everyone who chooses to live here and does not leave the country. For remaining in this country only tacitly indicates consent if you assume that the lawmakers have the initial authority to demand your obedience or your exit in the first place. But it is their authority which is supposed to be justified on the basis of your and my tacit consent. So the problem with inferring consent from a refusal to leave the country is that it presupposes that those who demand you leave already have authority over you. Your decision to stay, therefore, cannot be the source of their authority. And their authority, if it exists, does not rest on your consent.

Leah Brilmeyer has dubbed this the "bootstrapping objection."¹⁹ Brilmeyer correctly identifies this as an objection to territorial jurisdictions that purport to be

¹⁹Lea Brilmeyer, "Consent, Contract, and Territory," *Minnesota Law Review*, vol. 74 (1989), at p. 10.

based on consent, not an objection to nonterritorial jurisdiction based on actual consent:

These bootstrapping objections to contractarian formation of a government do not necessarily arise when parties create governmental entities that lack territorial status. One might, for instance, agree with another individual that in the event of a dispute both will submit to binding arbitration. Although the arbitrator's authority is established by consent, its authority is not territorial. In such cases, only the actual participants are bound; the extent of authority is not defined territorially.²⁰

Thus, this objection will not apply to lawmaking jurisdictions based on actual unanimous consent described in Part III.

Besides its circularity, there is another reason to reject the “love it or leave it” conception of consent. As I have already noted, “I consent” is a message we communicate to others. Saying the words “I consent” is fairly unambiguous (so long as there is a way to express a refusal to consent). Depending on the context, there are few, if any, other meanings we can attach to these words. Simply remaining in the country, however, is highly ambiguous. It might mean you consent to be bound by the laws enacted by Congress; or it might mean you have a good job and could not find a better one in another country, or it might mean that you speak only English; or it might mean that you don't want to leave your loved ones behind. It is simply unwarranted to conclude from the mere act of remaining in the country that one has consented to all or any of the laws thereof.

Before the holocaust, many Jews remained in Germany when they had a chance to escape, but chose to stay for a variety of reasons. Whatever else we can say about their decision we cannot conclude that, *merely by their presence*, they tacitly assented to the Nuremberg laws. I do not mean to put too much stress on this argument. There were many characteristics of the Third Reich that undermined its authority and that made it substantially different in this regard from the United States. My point is merely that, simply by remaining in the country of their birth at a time they were free to leave, German Jews cannot be said to have consented to whatever laws were enacted in that country. Neither have we. And to return to the first argument, the Nazis had no authority based on the consent of German Jews to put them to this choice.

3. *Are We Bound by the Consent of the Founders?*

²⁰Id. at 16.

Those who wish to base the duty to obey the laws on popular sovereignty or the “consent of the governed” will not give up at this point. They will then point to the fact that the government of the United States predates the birth of everyone alive today. Because it was here first, it can demand that one consent to its authority or leave the country. Recall the quote from Michael McConnell with which we began: “The people’s representatives have a right to govern, so long as they do not transgress limits on their authority that are fairly traceable to the constitutional precommitments of the people themselves. . . .”²¹

The initial source of the authority of “the people’s representatives” was not your or my consent, goes the argument, but the consent of “We the People” at the time the government was founded. It is that consent that got the government up and running legitimately, and it is that consent that empowers it to demand that you “love it or leave it.” If you are born in and grow up in someone else’s house, for example, you must obey the rules of the owner or move out. Your continued presence constitutes consent to the authority of the home owner.

Moreover, a popular sovereignty theorist might also make the somewhat different argument that the issue of “consent of the governed” was never whether you or I consented to obey the laws by our vote or by remaining in the country. The real source of consent was the initial consent of the “We the People” to the formation of a government, and from then on, so long as the People do not successfully revolt against the government, they can be said to have tacitly consented to it. It is the failure to overthrow the government, not the refusal to leave the country, that constitutes our consent to obey its commands.

Both arguments invoke the legitimate origin of the Constitution and rest that legitimacy on the consent of “We the People” of 1789. It is this consent that gives the Constitution its initial legitimacy and which puts the onus on the citizenry afterwards either to obey, leave the country, or successfully revolt. This shift in argument from our consent to the consent of “We the People” at the time of the founding now requires us to ask who exactly it was that consented to the creation of this government and what it was that gave them the power to so bind themselves and their posterity. We shall immediately see the exact same problems here as we saw with voting, only once removed. Now we are talking about deficiencies in *other people’s* consent, not ours.

The Constitution was not approved by a unanimous vote, nor even by a majority of all persons in the country at the time. It was approved by a majority of delegates to conventions in each state. These delegates were elected by a majority

²¹McConnell, “Importance of Humility,” p. 1291.

of those who voted for them. Were the delegates who voted *against* the Constitution (and those who voted for these dissenting delegates) bound by their consent? And what about the *majority* of inhabitants who were not permitted to vote for any delegate. Though voting requirements varied with local jurisdictions, in no place could women, children, aliens, indentured servants, or slaves vote. Moreover, it was not uncommon to have a property requirement that limited the voting rights of white males and free black males. In what sense can a small minority of inhabitants presuming to call themselves “We the People” bind anyone but themselves? And assuming they could somehow bind everyone then alive, how could they bind, by *their* consent, their posterity?²²

One response to this, already suggested above, is that the refusal to revolt or overthrow the government is what constitutes an ongoing tacit consent to obey the lawful commands of the system the founders created. But this is asking much too much of those who would refuse their consent. Does one really manifest a consent to obey the commands of someone much more powerful simply because one does not physically resist the threat of violence for noncompliance? True, physical resistance is evidence of a lack of consent, but if the cost of physical resistance is high enough, we cannot conclude that a passive nonresistance equals consent.

The same is true to a lesser extent about a failure to emigrate. The cost of emigration, in terms of what one gives up by leaving, is simply too high to infer from the failure to emigrate a consent to obey the laws of the land. Moreover, the failure of *enough people* to band together to overthrow a government tells us nothing about the consent of *the individual* to be bound by the commands of the government and therefore it tells us nothing about why laws are binding on the individual. To argue otherwise is to assert that the majority, by *its* failure to revolt, can bind the minority to obey the laws.

To this the popular sovereignty theorist might respond that when the Constitution provides less costly mechanisms for change—such as an amendment process—it is the failure to amend the Constitution, rather than the failure to successfully revolt against the government, that manifests consent to obey all the laws. But this response is transparently inadequate. Whether a constitutional amendment requires a super-majority vote of both houses of Congress and approval by three quarters of state legislatures, or a simply majority of the electorate, the failure to obtain an amendment through this process hardly indicates consent by anyone to the existing regime. A refusal to approve a change in the Constitution

²²For what it is worth, in the Preamble to the Constitution, the framers do not purport to *bind* their prosperity but rather to secure for it “the Blessings of Liberty.”

implies neither that those who supported the defeated amendment nor those who opposed it consented to the existing regime. In the end, we are returned once more to the problem of inferring the consent of the minority or of the individual from the consent of the majority. Consent simply does not work that way.

We are now in a position to appreciate the fundamental reason why none of the foregoing arguments based on consent succeeds: *For consent to bind a person, there must be a way to say “no” as well as “yes” and that person himself or herself must have consented.* Unless we are speaking of children, incompetents, or principals who have actually consented to be represented by an agent, no person can literally consent for another. This fact poses an unsurmountable obstacle for all arguments that base the “consent of the governed” on anything less than unanimity. As Jeffrey Reiman has argued,

there is nothing inherently legitimating about the electoral process. If anything, the electoral process is the problem, not the solution. . . . [T]he policies that emerge from the electoral process will be imposed on the dissenting minority against its wishes. And then, rather than answering the question of legitimacy, this will raise the question with respect to those dissenters. Why are the exercises of power approved by the majority against the wishes of (and potentially prohibiting the desired actions of) the minority obligatory with respect to the minority? Why are such exercises of power not simply a matter of the majority tyrannizing the minority?²³

Arguments on behalf of constitutional legitimacy based on majoritarianism rather than unanimous consent attempt the moral equivalent of squaring a circle.

4. *Why Acquiescence Does Not Equal Consent*

The appeal of arguments based on tacit consent dies hard, however, and perhaps this is the reason: Can we not say that almost everyone in some sense

²³Jeffrey Reiman, “The Constitution, Rights, and the Conditions of Legitimacy,” in Alan S. Rosenbaum (ed.), *Constitutionalism: The Philosophical Dimension* (New York: Greenwood Press, 1988), p. 134. As he elaborates:

These questions not only point up the error of taking electoral accountability as an independent source of legitimacy, they also suggest that it is mistaken to think of electoral accountability and constitutional provisions as alternative sources of legitimacy. Rather, the Constitution *with its provisions limiting the majority's ability to exercise power* is the answer to the question of why decisions voted by a majority are binding on the minority who disagree.

Id. (emphasis in original).

“accepts” the current government of the United States as legitimate? Would not the number who reject its legitimacy be very small indeed? Were this not the case, would not the government be hopelessly unstable? If general acquiescence to the existing legal regime is an empirical fact, and one that is essential to its functioning existence, can the regime not also claim the tacit consent of the population and the legitimacy that flows from such consent?

Those who base tacit consent on general acquiescence have confused a “rule of recognition”—a concept made famous by H.L.A. Hart—with the conditions of constitutional legitimacy. A rule of recognition is the way the population can *identify* the existence of an operating legal regime.²⁴ But just as knowing that a particular command is “the law” does not tell us whether it is binding in conscience, knowing that a legal regime “exists” as a result of general acquiescence does not tell us whether there is a moral duty to obey its commands.

Of course, some form of general acquiescence is necessary for any constitution to be implemented and to maintain its continued existence as positive law. As Frederick Schauer has noted, this acquiescence distinguishes the Constitution of the United States from another document entitled, “The Constitution of the United States,” I might write and have my friends ratify.²⁵ Ratification by plebiscite or representative conventions can provide an effective rule of recognition to the population and can help to attain a general acquiescence to the constitutional regime, though these procedures are far from indispensable.

Mere acquiescence, however acquired—which *every* existing government and scheme of positive law can claim—and unanimous consent cannot be the same thing. For what is at issue here is not whether a legal system *exists*, but whether a particular existing constitutional regime is *legitimate*. Only if it is legitimate can an

²⁴See Hart, *Concept of Law*, pp. 92-3 (A rule of recognition is “a rule for conclusive identification of the primary rules of obligation.”). Notice Hart’s reference here to the “rules of obligation.” Hart also contended that, if the rule of recognition was satisfied, citizens would then not only be compelled or “obliged” to obey the law, they would also be under an “obligation” or moral duty to obey. This I reject for reasons I have given elsewhere. See Randy E. Barnett, *Structure of Liberty: Justice and the Rule of Law* (Oxford, Clarendon Press, 1998), pp. 17-23. And this is conceded by those modern positivists who deny that the mere legality of a command entails a duty of obedience.

²⁵Frederick Schauer, “Precedent and the Necessary Externality of Constitutional Norms,” *Harvard Journal of Law and Public Policy*, vol. 17 (1994), p. 52. (“[O]nly one of these “Constitutions” would be *the* Constitution of the United States, because only one of these documents would have been accepted, socially and politically, by the people of the United States as their Constitution.” (emphasis in original)).

existing legal system issue commands to the citizenry that bind individuals in conscience. If acquiescence, which every functioning regime can claim, equaled unanimous consent, even the most oppressive regime could claim to be entitled to a duty of obedience on the basis of such “consent” so long as it manages to exist. Clearly this proves too much.

While some degree of acquiescence may be necessary to establish a command as positive law, then, more than acquiescence is needed to create a moral duty to obey such a command. James Madison caught a glimpse of the moral problem when he observed in 1784 that the unratified Virginia state constitution “rests on acquiescence” only, which is a “dangerous basis.”²⁶ The consent of the individual, were it to exist, would do the trick—but one individual or generation cannot consent for another, and unanimous consent, all concede, cannot and has never existed.²⁷

There is considerable irony in the widespread claim that “tacit” consent is the source of the duty to obey the laws. Many who assert this would never accept so attenuated a notion of consent to justify, say, the lease of a television or the waiver of liability for harm. In these contexts, they demand a rarified version of “informed” consent that hardly if ever exists. They require “complete information” of everything one is consenting to (or giving up) and a diversity of sufficiently attractive alternative choices before concluding that someone has actually consented to an enforceable contract to buy a stereo. Unless these conditions are met they insist that such consent is “fictitious” or “coerced.”²⁸ Yet we are asked, often by the very same people, to accept the proposition that merely by virtue of living in the town in which we were born or by failing to leave the country, we have “consented” to obey nearly any command that is enacted by the reigning legal system. And the consent of *a*

²⁶Notes for a Speech [June 14 or 21, 1784], William T. Hutchinson, William M.E. Rachal, Robert Rutland, et al. eds., *The Papers of James Madison*, vol. 8 (Chicago: University of Chicago Press, 1962-91), pp. 77. Madison believed that if “ratified by” the people, the Virginia constitution would be “more stable and secured agst. the doubts & imputations under which it now labors.” *Ibid.*

²⁷Though unanimous consent to something like the Constitution is impossible to obtain, I explain later in this Essay why, contrary to popular assumption, unanimous consent to other governance structures is both quite possible and quite common.

²⁸Examples of this view are almost too numerous to require citation, but see e.g., Jean Braucher, “Contract versus Contractualism: The Regulatory Role of Contract Law,” *Washington and Lee Law Review*, vol. 47 (1990), pp. 697-739; Peter Linzer, “Is Consent the Essence of Contract?—Replying to Four Critics,” *Annual Survey of American Law* (1988), p. 213.

majority is supposed to bind not only themselves, but dissenters and future generations as well.

C. *The Dangerous Fiction of “We the People”*

Some fictions are harmless, some even beneficial. The fiction of popular sovereignty was beneficial insofar as it limited or “checked” the power of legislatures to do what they will and prevented them from violating the rights retained by the people. As Jack Rakove explains, at the founding it was thought that “[t]he majority deserved not so much to rule as to be protected from misrule, not so much to legislate in pursuit of its interests as to be secured against statutes that would reflect the ambitions of the privileged class.”²⁹ Rakove continues:

A full representation was necessary for two purposes: to prevent the adoption of measures, especially taxes, that would distribute the *burdens* of government unequally across society; and to instill in the people the confidence in government that would obviate the need to resort to coercion (that is, armed force) to enforce the laws.³⁰

After an initial, and to their mind disastrous, experimentation in “republican” or democratic rule,³¹ the founders devised a new scheme in which an electorate of “the people” by voting in elections would exercise, not a lawmaking power, but the power to “check” the lawmakers. “We the people” would not rule directly, but an electorate reflecting the rights and interests of the people would have effective power to check those who would issue commands to the people.³² By the same token, state governments would have the power to “check” federal legislation through Senators chosen by state legislatures. Their novel, and even ingenious, scheme of multiple

²⁹Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: Vintage 1997), p. 233.

³⁰*Id.*

³¹Rakove’s discussion of “the Mirror of Representation” makes clear that the framers of the Constitution were rejecting, or at least mitigating, the competing principle of republican or popular rule that had arisen in the states in the wake of the Revolution. See *ibid.*, pp. 203-243.

³²Notice that while it is a fiction to speak of *rule by* “the people” as a whole, it need not be at all fictitious to speak of imposing rules on the people (or of violating the rights retained by the people).

checks and balances was positioned somewhere between rule by a “democratic” majority and rule by an “aristocratic” minority.

In the intervening 200 years, we have moved away from the conception of “popular sovereignty” in which the people, through the electorate, effectively “check” the exercises of government power, and towards a fiction of “popular sovereignty” in which a “democratic” majority *rules*. Many no longer conceive of Congress as an institution charged with performing certain vital tasks, a group of select men and women who are the “servants” of and checked by the people. Instead they picture Congress as *We the People itself*. Under the prevailing theory of “popular sovereignty,” the legislature is thought of as the people personified, entitled to exercise all the powers of a sovereign people.

Some use such slogans as “We are the government” or “the government is us” (though I heard this more frequently in my youth before Viet Nam and Watergate). This view of government gives legislators an enormous power to do what they will, provided only that they muster the requisite number of votes. For if “we are the government” then anything the government does is consented to by “us” and “we” can consent to nearly anything.

The fiction of popular sovereignty, therefore, becomes dangerous when legislatures are conceived of as a literal surrogate for “We the People” themselves. Because “the people” can “consent” to alienate any particular liberty or right—though not their more abstract inalienable rights—legislatures, as the people’s surrogate, can restrict almost any liberty and justify it in the name of “popular consent.” The fiction of popular rule, as opposed to a popular check on rulers, allows a legislature to justifiably do almost anything it wills. And this, in turn, allows majority and minority factions of the electorate to gain control and wield the power of the legislative branch at the expense of the aggregate rights of their fellow citizens.

D. *Diminishing the Danger: Ackerman’s Dualist Democracy*

Bruce Ackerman refers to the view that legislatures function as the People themselves as “monistic democracy” in which “[d]emocracy requires the grant of plenary lawmaking authority to the winners of the last general election. . . . [and] all institutional checks upon the electoral victors are presumptively undemocratic.”³³ By contrast, Ackerman denies that “the winner of a fair and open election is entitled

³³Ackerman, *We the People: Foundations*, p. 8

to rule with the full authority of We the People.”³⁴ Instead, he distinguishes between “the will of We the People from the acts of We the Politicians.”³⁵ Ackerman posts a “dualist” constitution in which normal validly-enacted legislation is not confused with the “higher lawmaking” that “represents the constitutional judgment of We the People.”³⁶ That appellation is limited to lawmaking initiatives that follow an “arduous obstacle course”³⁷ designed to create a “deepening dialogue between leaders and masses within a democratic structure that finally succeeds in generating broad popular consent for a sharp break with the status quo.”³⁸

Ackerman’s dualism represents a refreshing and important improvement over the still-dominant conception of popular sovereignty. To the extent that legislative will is decoupled from We the People, the danger of that fiction is greatly reduced. No longer is the process of systematically checking legislative rule seen as running afoul of the so-called “countermajoritarian difficulty.”³⁹ Moreover, there is much to be said for “dualism” as a descriptive account of how constitutional doctrine actually changes over time.

Nevertheless, at one juncture Ackerman claims to have provided “a normative argument”⁴⁰ that rests on the imperative of gaining the “considered support” of We the People.⁴¹ This does not mean that he thinks he has provided a normative argument for why individuals are bound to obey constitutional laws. Such a question is neither raised nor addressed in his two works, but the arguments I have

³⁴Id. at 9.

³⁵Id at 10.

³⁶Id at 9.

³⁷Id at 10.

³⁸Id. at 19.

³⁹See Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (New York: Bobbs-Merrill, 1962), pp. 16-23. See also Barry Friedman, *The Road to Judicial Supremacy (The History of the Countermajoritarian Difficulty, Part I)*, 73 N.Y.U. L. Rev. 333 (1998).

⁴⁰Bruce Ackerman, *We the People: Transformations* (Cambridge: Belknap, 1998), p. 6.

⁴¹See id. (Dualism “prevents the political elite from undermining the hard-won achievements of the People and mobilize their considered support before foundational principles may be revised in a democratic way.”).

offered here suggest that Ackerman's dualist theory of constitutionalism provides no answer.

Though denying the authority of "the People" to ordinary legislation, ultimately Ackerman claims that the result of "higher lawmaking" is entitled to be called the "will of We the People." He speaks freely and unselfconsciously of "principles of higher law validated by the People during their relatively rare success in constitutional politics"⁴² and of "fundamental principles . . . affirmed by the People."⁴³ But all this too is a fiction and, therefore, could not justify a duty of obedience in the citizenry.

Though "the people" can be said to exist—pointing to the 250 million or so citizens of the United States each one of whom also has rights—the people as a whole never speak and never validate anything. Only some subset, whether a majority or minority of a whole, ever vote for or against anything and, even if those who support some constitutional change can somehow bind themselves (which I doubt), their votes cannot bind either dissenters or nonvoters. Consent, as we have seen, does not work that way. Perhaps because he defines his project as largely descriptive—the statement quoted above notwithstanding—Ackerman does not confront the fictional nature of *rule by We the People*. This leaves the normative question of constitutional legitimacy—how individuals come to be bound to obey lawful commands—unaddressed by his constitutional dualism.

Recalling Ackerman's vivid account of the transformative effect of "higher lawmaking" leads me to close this Part with an important caveat. I have argued to this point only that a duty to obey the law cannot be grounded on the consent of the governed when there has been anything less than unanimous consent and that, quite obviously, no government legal system can claim this degree of consent. *I am not claiming that adoption of constitutions (or laws) by popular vote or conventions is a bad idea.* It may well be that such ratification processes are a very good idea because they enhance the likelihood that whatever *does* legitimate a constitution actually exists. Moreover, such adoption procedures may effectively secure a general acquiescence which is a requirement of any functioning legal order, whether or not it is legitimate.

I am only challenging the widely-held assumption that, because of popular sovereignty or the consent of the governed, "We the People" are bound in conscience to obey any law that is enacted by constitutional means. Further, since unanimous consent is never required, in practice the "consent of the governed" is reduced to the

⁴²Ackerman, *We the People: Foundations*, p. 21.

⁴³*Id.*

consent of a majority of legislators who are elected by a majority of those who vote in an election. “We the People” is, in short, a fiction that by falsely assuming the presence of consent whenever legislatures enact statutes—Bruce Ackerman excepted—has dangerously eroded the rights and liberties of each and every one of The People.

II. PROBLEMATIC ALTERNATIVES TO “WE THE PEOPLE”

In the final analysis, the only way that a duty to obey the law can be based on consent is when consent is given. Anything less than unanimous consent cannot bind those who dissent. Those who acknowledge this take one of two positions. As we saw earlier, some maintain that there is no *prima facie* or presumptive duty to obey the law just because it is the law. Though conceptually defensible, this position is unacceptable in regimes where law-makers are given the benefit of the doubt and it is widely thought that there exists a duty to obey enacted laws. Others abandon popular sovereignty by contending that law-making authority is *not* based on the “consent of the governed” after all, but on something else. (It is remarkable how fast people drop the argument based on consent when confronted with its difficulties.) What is this “something else”?

A. *Does the Receipt of Benefits Obligate Us to Obey?*

According to one such argument, laws are binding, not because of the consent of “We the People,” but because people who receive the benefits of the legal system are bound to obey its demands. It is not consent, they say, but *receipt of benefits* that binds one. There has been much discussion of this theory among philosophers and I shall not try to summarize the nuances of the debate.⁴⁴ The most influential criticism of this position is that it too is ultimately based on some notion of consent. If out of the blue I send you a valuable item, are you obliged to pay for it in the absence of consent? Are you even obliged to return it to me? Most answer no. Likewise, we are not obligated to pay for benefits that are thrust upon us by others.

Some may say that if you choose to *use* the item, then you have obligated yourself to pay for it. There may be some merit to this suggestion; using an item that you know has been sent to you with the expectation of repayment may indicate a

⁴⁴For a good cross-section of scholarly opinion, see Williamson A. Edmunson, ed., *The Duty to Obey the Law: Selected Philosophical Readings* (Maryland: Rowman & Littlefield Pub. 1999).

consent to pay. (Even this does not mean, however, that you are obligated to return the item rather than discarding it.) It is still not clear, however, that one is obligated to pay for all unsolicited benefits one receives from others. We may get great pleasure from wonderful architecture, or from seeing an attractive person walk by, without conceding for a moment that we could be charged for the genuine enjoyment we experience.

But I shall not pursue the matter further here, because the kinds of benefits supposedly received from a legal system—the benefit of social cooperation, for example—are benefits that one cannot refuse no matter how hard one tries. Unless one *can* somehow refuse a benefit that is thrust upon him or her, it is not at all clear that one is obligated to pay for it either in money or in obedience. For the same reason, it is not at all clear why the “benefit” one receives from living in the particular legal system we have—benefits we cannot decline to “enjoy” even if we want to—obligates one to obey the commands of this system.

When we move beyond the benefits of a “scheme of cooperation” supposedly provided by the legal system to *tangible* benefits—like roads, parks, schools, etc.—we find that most are paid for by taxation; payments that certainly are not consented to in any meaningful way. Must everyone whose income is confiscated to pay for roads, parks and schools (to some unknowable extent) decline to make use of these resources lest they be accused of voluntarily benefitting from them and, therefore, of *owing* not only a duty to obey the laws, but a moral duty to pay for them as well? For all of these reasons the argument for a duty to obey the laws based on “benefits received” has fared little better than the argument based on the tacit consent of the governed. But there is more.

Some who make the argument based on benefits received would say that the above responses miss the basic point: benefits received provide an entirely *nonconsent*-based argument for obedience and for this reason, it is inadequate to respond that tacit consent to obey or pay is lacking. So let us take this argument at face value and assume that one really does owe a duty of obedience to anyone who takes it upon himself *and without the consent of the recipient* to provide another with (vital?) benefits.

Could this not be offered as a justification for the legitimacy of chattel slavery? Could not a slave holder claim, and often accurately, that he was indeed providing his charges with vital benefits: food, clothing, shelter, medical attention when needed, protection from predation by outsiders, etc? Of course, one might quarrel with the accuracy of this claim, but on what grounds? That food, shelter and the rest are not “benefits.” Hardly. That these benefits are not adequate? According to what scale of adequacy? Do citizens of severely impoverished countries have no duty to obey the law because the benefits provided by those law-making systems are

too niggardly? At what point do the benefits become great enough to generate a duty of obedience in the absence of consent? Is the moral problem with chattel slavery that masters do not pay the minimum wage?

To better appreciate why the nonconsensual receipt of benefits cannot be the source of a duty of obedience, imagine a very generous master who provides all essentials and even a degree of choice or freedom to his vassals—or house slaves—which they are nevertheless unable to refuse. Are the slaves of sufficiently bounteous (defined however you wish) masters morally obligated to obey them? What is the problem with this entire line of argument? The obvious answer is that what is lacking is the consent of the slave. Were there consent to the relationship, then we would not (or should not) describe it as slavery at all—provided that the servant was free to exit the relationship.⁴⁵ But if consent is required to convert a morally impermissible slavery into a duty of obedience, then such consent cannot be fictitious. It must be real, and we have already seen how there is and can be no real consent to the sort of legal system established by the Constitution.⁴⁶

Does all this entail a conclusion that, in the absence of actual consent, the fact an enacted law is constitutional never gives rise to a duty of obedience? I think not. In Part III, I shall offer an alternative source of the duty to obey laws in the absence of consent, but at this juncture what is most important is seeing (a) that consent to the sort of lawmaking process established by the Constitution is nonexistent and impossible and (b) the dispensation of benefits by lawmakers does not generate a duty to obey their commands in the absence of consent. If such a duty exists, it must

⁴⁵Indentured servitude co-existed with chattel slavery throughout its history in America. Such arrangements were voluntary, but still objectionable in my view because the servant was bound to service for a period of years and could not exit. For reasons why this too violates the inalienable rights of persons, see Barnett, *The Structure of Liberty*, pp. 77-82. Other classical liberals have defended such “voluntary slavery” arrangements as morally permissible. See e.g. Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), p. 331.

⁴⁶John Rawls’ early theory of legal obligation based on the “duty of fair play,” while superficially resembling a benefits received argument, actually depends “upon our having accepted and our intention to continue accepting the benefits of a *just* scheme of cooperation that the constitution defines.” John Rawls, “Legal Obligation and the Duty of Fair Play,” in Sydney Hook, ed. *Law and Philosophy* (New York: N.Y.U. Press 1964), p. 10 (emphasis added). This therefore is not a pure benefits received argument. “[A]n essential condition of the obligation is the justice of the constitution and the general system of law being roughly in accordance with it. Thus the duty to obey . . . an unjust law depends on there being a just constitution.” *Id.* This makes the structure of Rawls’ old theory very similar to that presented in Part III, though it *adds* a requirement of voluntary acceptance of benefits that I think is unnecessary to justify a *prima facie* duty to obey laws that are produced by procedures that assure their justice.

be grounded in some other manner and, unless some alternative justification exists, there is no duty to obey the commands of these law makers.

Though it is not hard to see why consent is needed to convert a slavery relationship to one that is morally permissible, it is sometimes overlooked that this strongly implies the existence of preexisting human rights. For only if persons have a right to refuse their consent can we ever say they have consented. Such a right of refusal must, therefore, precede the creation of a duty of obedience. If consent is the source of a duty to obey the law, then first comes rights and only then comes law. As we shall soon see in Part III, in the absence of consent, the preexistence of these rights has important implications for any legal system that claims a duty of obedience.

B. Hypothetical Consent and the Importance of Rights

Some political theorists rely upon a notion of “hypothetical consent” or that to which a rational person *would* consent.⁴⁷ To evaluate claims based on “We the People,” we need not get enmeshed in the intricacies of such “rational choice” theories. It is sufficient to note that hypothetical consent is not actual consent. Indeed, actual consent plays no role in such approaches. Rather, it is a normative approach that is based on a thought experiment of that to which people under certain conditions *ought* to consent regardless of whether they do consent or not.

In other words, while an argument based on “hypothetical consent” may well provide an argument in favor of certain moral or political principles, such an argument is not based on the real world consent of anyone to anything. This means, however, that hypothetical consent provides no consent-based reason to *ignore or evade* the background rights of the people—if, that is (as I have argued at length elsewhere), people do have rights prior to the formation of a legal system.⁴⁸ Properly understood, arguments based upon hypothetical consent actually help us understand why lawmakers must respect the rights of the people they purport to bind.

⁴⁷See e.g. John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard Univ. Press, 1971), p. 12 (“The choice which rational men would make in this hypothetical situation of equal liberty . . . determines the principles of justice.”).

⁴⁸This is the principal thesis of Barnett, *The Structure of Liberty*. There I argue that certain fundamental rights—as well as the rule of law—are essential to solve the pervasive social problems of knowledge, interest, and power. Though these rights precede the formation of a legal system and are therefore “prepolitical,” because they only arise in a social context, they should not be considered “presocial.”

Lysander Spooner was perhaps the earliest American constitutional theorist to recognize that an argument based on hypothetical consent “exist[ing] only in theory”⁴⁹ is *required* to respect the rights of the individual because everyone cannot be presumed—in the absence of express or actual consent—to have given up their rights. “Justice is evidently the only principle that *everybody* can be presumed to agree to, in the formation of government.”⁵⁰ In the absence of actual consent, a government that protects the rights of all “is the *only* government which it is practicable to establish by the [theoretical] consent of all the governed; for an unjust government must have victims, and the victims cannot be supposed to give their consent.”⁵¹

In sum, an argument based on “theoretical” or hypothetical consent is inadequate to justify *overriding* background rights. To the contrary, for a constitution to be legitimate on the basis of hypothetical (as opposed to actual) consent, it must be shown that such a constitution is *consistent* with the rights of the individual. In the next Part, I shall consider an alternative conception of constitutional legitimacy that explains both how laws can bind the citizenry in conscience in the absence of consent and why, *because consent is lacking*, the lawmaking power of government must be limited. Indeed, I argue that, in the absence of unanimous consent, there is a duty to obey the law *only when* the legislature’s powers are limited.

III. CONSTITUTIONAL LEGITIMACY WITHOUT CONSENT

In light of the problems with basing the legitimacy of the Constitution on the actual consent of the governed, what led the founders and so many later commentators up to today to claim that “We the People” established the Constitution? What led them to accept the obviously flawed argument that the

⁴⁹Lysander Spooner, “The Unconstitutionality of Slavery” (rev. ed. 1860), reprinted in vol. 4 of *The Collected Works of Lysander Spooner*, ed. Charles Shively (Massachusetts: M & S Press, 1971), p. 153. (“Our constitutions purport to be established by ‘the people,’ and, *in theory*, ‘all the people’ *consent* to such government as the constitutions authorize. But this consent of ‘the people’ exists only in theory. It has no existence in fact.”) (emphasis in original). See also *ibid.* 225 (“The whole matter of the adoption of the constitution is mainly a matter of assumption and theory, rather than of actual fact.”).

⁵⁰*Ibid.* 143.

⁵¹*Ibid.*

consent of a majority of representatives of only a portion of the population was sufficient to establish the consent of the governed? Primarily it was necessity: the same necessity that moves people today to accept majoritarian consent in place of actual consent.

Since consent was widely acknowledged to be both necessary and sufficient to legitimate governance, and unanimous consent is admitted to be nonexistent and impossible, then the explicit consent of some who supposedly represent a majority, followed by widespread acquiescence, is simply the closest we can come to the ideal, making the Constitution as legitimate as any constitution can be. Now as then, when it comes to majoritarian consent, its necessity makes it proper.

But this argument is flawed in two respects, both of which I shall examine in this Part. First, this argument assumes that unanimous consent is impossible, an assumption that is simply wrong as a factual matter. As I explain in Section A, because unanimous consent to governance *is* possible (though not to the form of governance provided by this Constitution), majoritarian consent cannot be justified on grounds of necessity. Second, as will be discussed in Section B, the argument contending that majoritarian consent is sufficient as “second best” ignores the constraint that must be imposed on any institution that is legitimated by this type of fictitious consent: *the rights of nonconsenting persons must be protected*.

A. *More Consent, Less Freedom: Forgoing Rights*

Advocates of popular sovereignty ultimately concede the absence of real consent to obey the laws made pursuant to the Constitution, but argue that because majoritarian consent is the closest we can come to real consent, it is sufficient to legitimate governance. If, however, it can be shown that unanimous consent is possible, then necessity could no longer be used to justify majoritarian consent. With unanimous consent no longer a hopeless ideal, it also becomes easier to see why, in the absence of unanimous consent, legitimacy requires that limits or constraints be imposed on a majoritarian governance system.

The argument in Part I made it clear that a duty of obedience *could* be grounded on consent if *everyone* consents to be so bound. One reason this condition fails to be met under our constitutional system is that the polity is simply too big ever to unanimously consent to anything.⁵² But suppose that the relevant law-making unit was much much smaller than the United States, indeed smaller than any state and

⁵²As will be seen shortly, the size of the polity makes unanimous consent impossible only when law-making jurisdiction is defined geographically.

even most cities. Would unanimous consent be possible then? I think it would. Let me now briefly sketch how unanimous consent is practical.

My parents live in a large private residential community known as Leisure World. When they bought their home, they also expressly agreed to a governance structure that is highly democratic. Leisure World is typical in this regard, though governance arrangements do vary among different residential communities. As with most other communities, the structure of Leisure World empowers the governing boards to authorize numerous restrictions on behavior within the community. Houses cannot be expanded without a permit, nor can they be rented for long periods of time. Indeed, no one under fifty-five years of age is allowed to purchase a home in this community.

I could go on and on listing the freedom-constraining regulations that exist in Leisure World. Have my parents consented to obey these rules? Yes, but not in the sense that they have consented to each and every rule as it is enacted. Rather, they expressly consented to the existing rules of Leisure World when they purchased their home and they also expressly agreed to the governance structure by which the rules would be administered and changed. They committed to be bound by the outcome of this structure every bit as much as contracting parties expressly agree to be bound by the outcome of private arbitration when such a clause is in their contract.

In Leisure World, then, there is actual unanimous consent to be bound by the rule-making process. Why cannot we say the same thing about other law-making authorities? One obvious reason is that our consent is never solicited. Would such a solicitation now be appropriate? Could the town I live in have required my consent to the outcome of our municipal law-making process before it allowed me to reside there? Could the state I live in have required such consent before I moved there? Not without encountering the vicious circle of authority described in Part I. Unlike the town and state I live in, that Leisure World originally purchased and owned all the land on which it is built and sold parcels on condition that the purchaser accept its governance structure. Because of its original ownership, it could rightfully condition sale on obedience to the governance structure of Leisure World.⁵³

⁵³I am not unaware of the serious philosophical issues raised by this paragraph. While not strictly beyond the scope of this essay, it would be unduly distracting to parse and pursue them at this point. However they are resolved, the difference remains: justifying the control over property exercised by persons who obtain title by the consent of previous rightful owners, or by first possession, is a substantially different matter than justifying the claims of some to rule territory belonging to others. This is simply another variant of the “first comes rights, then comes law making” proposition discussed above.

But initial ownership and initial consent is not the only morally relevant difference between communities like Leisure World and polities governed by federal, state and municipal law makers. Leisure World and thousands of communities just like it are also distinguished by the cost of exit that makes that initial consent meaningful. Though Leisure World is fairly large—larger than many small towns—it is a relatively small part of a larger metropolitan area. If you do not like the rule-making system of Leisure World, you can buy a house across the street where the rules and rule-making procedures may be very different and more to your liking. The cost of exit is quite low.

By “cost of exit” I refer not merely to the financial costs of moving to location A or B, but to the other sacrifices you make by that choice.⁵⁴ If you want to live and enjoy a particular area, if you do not want to abandon your friends, your job, social network, or local customs and cuisine, but you dislike the rules or rule-making process in Leisure World, you can buy a home across the street, or up the road a bit. This applies when you make your initial decision of where to live as well as when you continue to remain within the jurisdiction. And it applies to legal jurisdictions as well.

As I have described elsewhere at greater length,⁵⁵ the jurisdiction of lawmakers over individuals need not be allocated geographically. We can join and consent to the jurisdiction of myriad organizations, each with its own rules and regulations, that stretch around the world and comprise millions of persons. From employers, to professional associations, to health care organizations, to book clubs, to churches, mosques and synagogues, to file-sharing networks on the internet—the list is endless—each group enjoys the unanimous consent of its members to obey its rules. The cost of exit is low with nongeographically-based jurisdictions precisely because members do not have to leave home to join or to resign their membership. Members can and do actually consent to all sorts of limitations on their freedom. In this way, the exact composition of each person’s duty to adhere to the law making power of others is likely to be as unique as the individual.

It was Lon Fuller who most famously contended that these sorts of rule-making activities are as entitled ” as geographically-based legal systems to be called “law making:

⁵⁴See Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 U. Va. L. Rev. 821, 902-05 (1992) (defending the claim that consent even to immutable can be actual when the cost of exit is sufficiently low).

⁵⁵See Barnett, *Structure of Liberty*, chapters 12-14 (describing a “polycentric” constitutional order).

If law is considered as “the enterprise of subjecting human conduct to the governance of rules,” then this enterprise is being conducted, not on two or three fronts, but on thousands. Engaged in this enterprise are those who draft and administer rules governing the internal affairs of clubs, churches, schools, labor unions, trade associations, agricultural fairs, and a hundred and one other forms of human association. . . . [T]here are in this country alone “systems of law” numbering in the hundreds of thousands.⁵⁶

What Fuller does not mention is that these myriad legal systems have the moral imprimatur of unanimous consent that large geographically-based legal systems necessarily lack. For when geography defines jurisdiction, size matters.

The larger the land area, the higher the cost of exit and thus the less meaningful is “tacit” consent to the jurisdiction of the law-making process. Most modern cities are probably too large, but even if they are small enough, states are certainly too large to command meaningful unanimous consent. If these law-making authorities are to command a duty of obedience it must be on some grounds other than the consent of the governed. Of course, when geographically-based law-making authorities first purchase the land over which they claim jurisdiction, we can say that consent by subsequent purchasers or lessors to the jurisdiction of the original owner is both consensual and unanimous. The need to raise the funds to make such purchases will, however, limit the size of such jurisdictional claims.

Thus, contrary to conventional wisdom, unanimous express consent to obey the law is quite possible, but only if the cost of exit is sufficiently small, either because jurisdiction is not geographically based or because the geographical territory is not too large. Where such unanimous consent exists, legal regulations can cover virtually any subject provided they do not infringe upon inalienable rights or upon the rights of third parties. This is true because persons may consent to alienate or waive many of their rights. The difference between a prize fight and a battery, between making love and rape is consent.

Under the conditions of unanimous consent, then, *liberty is not inconsistent with both heavy regulation and even the prohibition of otherwise rightful conduct*. Ironically, with a governance structure based on unanimous consent, there may be far *less* freedom of action than in its absence. To the extent that such communitarian constraints on freedom are desirable, this is the context in which they are permissible.

⁵⁶ See Lon L. Fuller, *The Morality of Law*, rev. ed. (New Haven: Yale Univ. Press, 1969), p. 124-25.

B. Less Consent, More Freedom: Protecting Rights

Only when law-making authority is imposed over a relatively large geographical area does unanimous consent become impractical. Can such jurisdiction ever be legitimate in the absence of consent and, if so, under what conditions? The answer begins with understanding why consent legitimates law making when it does exist. As was suggested earlier, consent only legitimates law making on the assumption that “[i]ndividuals have rights and there are things no person or group can do to them (without violating their rights).”⁵⁷ Nor is this merely an assumption. Elsewhere I have explained at great length why the existence of individual rights is an appropriate conclusion from the nature of human beings and the world in which we live.⁵⁸ Moreover, this conclusion was accepted by the framers of the United States Constitution as well as by those who wrote the Fourteenth Amendment.⁵⁹

One need not accept this particular formulation of background rights, however, to accept the conception of constitutional legitimacy advanced here. For present purposes, it is only necessary to note that for consent to legitimize a law-making process, we must presuppose that consent matters—that people have a right to consent and, by necessary implication, they also have a right to withhold their consent. Otherwise consent would not be required and could not impart legitimacy upon that to which one has consented. In sum, for consent to matter in the first instance, we must assume (and there is also good reason to conclude) that “first come rights, and then comes law” or “first come rights, then comes government.” Historically, the rights that people have independently of government were called “inherent” or “natural rights.” Today, they are often referred to as “human rights.”

The assumption that “first come rights, then comes government” helps explain how law making can be legitimate in the absence of consent. For a law would be *just*, and therefore binding in conscience, if its restrictions are (1) *necessary* to protect the rights of others and are (2) *proper* insofar as they do not violate the preexisting rights of the persons on whom they are imposed. After all, if a law has not violated a person’s rights, then that person’s consent is simply not required. And

⁵⁷Nozick, *Anarchy, State, and Utopia*, p. ix.

⁵⁸See Barnett, *The Structure of Liberty*. I do not claim that the argument presented there is the *only* valid justification for individual rights.

⁵⁹I will justify this historical claim in a forthcoming book, *The Presumption of Liberty: Natural Rights and the Constitution*.

if that law is necessary to protect the rights of others, then it is as obligatory for the person on whom it is imposed as that person's rights are obligatory on the legal system itself.

While the protection of rights is not the only function performed by a government, it is the only function that justifies *restricting personal freedom* in the absence of the actual consent of the individual. To be proper, other functions must be performed in other ways. I know of course that others will claim that a person's freedom may be restricted for ends other than the protection of the rights of others. The burden is on them to justify this further extension of power. We have seen the weaknesses of arguments based on consent or benefits received.⁶⁰

Those readers who want more than this from law making might want to consider the protection of rights a baseline by which to assess legitimacy. That is, a legitimate legal system is one that provides assurances that its liberty-restricting commands are necessary to protect the rights of others and do not improperly violate the rights of those on whom they are imposed. Whether a legal system that does more (or less) than this is also legitimate is an open question that requires additional analysis and justification.

The theory of constitutional legitimacy advanced here does not rule out more ambitious impositions of duties on persons. Bear in mind that there are, not one, but two sources of binding laws: laws that are produced by unanimous consent regimes, and laws that are produced by regimes that provide assurances that they have protected the rights of the nonconsenting persons on whom they are imposed. Whatever additional types of laws and regulations beyond the protection of rights are thought desirable can usually be obtained within unanimous consent communities that, as we have seen, are both possible and pervasive.

Like Leisure World, academic and religious communities, for example, impose a wide variety of additional duties on their members. Those who insist that geographical nonconsent-based lawmaking is necessary because unanimous consent to lawmaking is *impossible* are simply in error. That which already exists is clearly possible. And those who contend that these unanimous consent communities are somehow *inadequate* must justify, not merely assert, their claim. In so doing, they must be careful show why the same deficiencies do not apply as well to nonconsensual territorially-based legal systems—especially in a world in which a diversity of such systems compete with one another and no one legal system can ensure the “right outcome” in all the others.

⁶⁰See also Barnett, *The Structure of Liberty*, pp. 308-321 (discussing weaknesses in claims for distributive and retributive justice).

I have borrowed the standard of “necessary and proper” from the Constitution itself. Article I grants Congress the power to “make all laws which shall be necessary and proper for carrying into execution” the other powers that are vested by the Constitution in the national government. To be clear, I am not claiming that the original meaning of this clause is identical to the meaning I contend is the prerequisite of constitutional legitimacy.⁶¹ Two differences are immediately apparent.

The Necessary and Proper Clause requires that laws be necessary to the execution of *any* power delegated to the national government by the Constitution, not just the power to protect the rights of others. In this respect, the clause is broader or more permissive. Part of the reason for this is that the government is authorized by the Constitution to pursue additional objects or ends that do not require the restriction of personal freedom. On the other hand, as has been shown by Gary Lawson and Patricia Granger, “propriety” includes not only the protection of the natural rights retained by the people, but also an adherence to principles of federalism, separation of powers, and any positive rights created by the Constitution itself.⁶² In this respect, the clause is narrower or less permissive. A law that violates principles of federalism, for example, may be improper even though it does not infringe upon the retained rights of individuals.

In the absence of actual consent, then, every freedom-restricting law must be scrutinized to see if is necessary to protect the rights of others without improperly violating the rights of those whose freedom is being restricted. In the absence of consent, a *legitimate* law making process is one that provides adequate assurances

⁶¹I discuss the original meaning of this clause at length in Randy E. Barnett, *Necessary and Proper*, 44 U.C.L.A. L. Rev. 745 (1997) (distinguishing between Madisonian and Marshallian conceptions of “necessity”). In *The Presumption of Liberty*, I will be qualifying somewhat the historical claim by showing how Madison’s (and others) conception of “necessity” was closer—though by no means identical—to that of Hamilton (and Marshall) than is commonly believed. For now, see David P. Currie, *The Constitution in the Supreme Court: State and Congressional Powers, 1801-1835*, 49 U. Chi. L. Rev. ___, 932 (1982) (discussing John Marshall’s opinion in *McCulloch v. Maryland* and concluding that “[i]n light of earlier statements in his opinion, the implication seems unmistakable: incidental authority must not be so broadly construed as to subvert the basic principle that Congress has limited powers.”).

⁶²Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 Duke L. J. 288, 297 (1993) (To be proper, “executory laws must be consistent with principles of separation of powers, principles of federalism, and individual rights.”). See e.g. *Printz v. U.S.*, 117 S.Ct. 2365 (1997), at 2379 (“When a ‘La[w] . . . for carrying into Execution’ the Commerce Clause violates the principle of state sovereignty . . . it is not a ‘La[w] proper for carrying into Execution the Commerce Clause’ . . .”).

that the laws it validates are *just* in this respect. If a law-making process provides these assurances, then it is “legitimate” and the commands it issues are entitled to a benefit of the doubt. They are binding in conscience unless shown to be unjust.

We have then reached an ironic conclusion: With unanimous consent, there can be many more legitimate restrictions on freedom than when consent is absent. Because people may consent to just about anything, they have the liberty to consent to laws that greatly restrict their freedom. In the absence of actual consent, however, their rights remain intact and must not be infringed. In sum, while actual consent can justify restrictions on freedom, without actual consent, liberty must be strictly protected. Therefore, when we move outside a community constituted by unanimous consent, laws must be scrutinized to ensure both that they are necessary and that they do not infringe upon the rights retained by the people.

CONCLUSION

The problem of constitutional legitimacy is to establish why, in the absence of actual consent to be bound, anyone should care what a constitutionally-valid law may command. I am not asking why people *perceive* a constitution to be legitimate and constitutional laws binding on conscience but instead I am asking what qualities a constitution should have to justify this perception. My answer is that we may owe a *prima facie* duty to obey a constitutionally-valid law, only if the constitutional processes used to enact laws provide good reasons to think that a law restricting freedom is both necessary to protect the rights of others without improperly infringing the rights of those whose liberty is being restricted.

As we have already seen, this quality depends upon the presence or absence of consent. When consent is present a lawful command can restrict almost any freedom except an inalienable right or the freedom to respect the rights of others. However, when consent is lacking, as it is with respect to the Constitution of the United States, to bind in conscience, a law must be both necessary to the protection of the rights of others and proper insofar as it does not violate the rights of those upon whom it is imposed. A constitutionally legitimate law-making process provides an assurance that both these requirements have been met.

What exactly are these rights that a legitimate law-making process must assure us have not been violated? I maintain that the natural rights people have before they form a legal system and which they retain unless they consent to their alienation are *liberty rights*.⁶³ I further maintain that the rights “retained by the

⁶³This normative claim is the principal thesis of *The Structure of Liberty*.

people” in the Ninth Amendment affords protection to these liberty rights from the national government while the “privileges or immunities” referred to in the Fourteenth Amendment protects the same liberty rights (and others) from violation by states.⁶⁴

You do not, however, have to agree with the framers’ or my account of justice or natural rights to accept the theory of constitutional legitimacy advanced in this Essay. We can be in full agreement that, when consent is lacking, a constitution is legitimate only when it provides sufficient procedures to assure that the laws enacted pursuant to its procedures are just.⁶⁵ While, at the same time, we can disagree about what it is that makes a law just and, for that matter, what procedures are sufficient for assuring that laws are likely to be just in the relevant sense. This is no different than theorists who agree that the “consent of the governed” legitimates a constitution while disagreeing about what constitutes such consent and whether it exists in a particular case.

My claim here is only that (a) anything short of actual consent cannot bind a nonconsenting party, (b) the U.S. Constitution is legitimated neither by actual consent of the governed nor by receipt of benefits, and (c) in the absence of actual unanimous consent, to be legitimate a constitution must provide sufficient procedural assurances that, *whatever makes a law just and therefore binding in conscience*, this quality has gone in before the name law goes on a particular command.⁶⁶

For better or worse, this makes legitimacy a matter of degree rather than an all-or-nothing-at-all characteristic. Above a certain threshold where a law is more likely than not to be just, the more effectively procedures ensure that valid laws are

⁶⁴This descriptive historical claim will be defended at length in *The Presumption of Liberty: Natural Rights and the Constitution*.

⁶⁵Compare Rawls, *A Theory of Justice*, p 353 (“[I]n the constitutional convention the aim of the parties is to find among the just constitutions . . . the one most likely to lead to just and effective legislation in view of the general facts about the society in question. The constitution is regarded as a just but imperfect procedure framed as far as circumstances permit to insure a just outcome.”).

⁶⁶Elsewhere, I make the further claim that, if a particular legal system includes the adoption of a written constitution to “lock in” the other procedural features that help ensure laws are just, then *within such a system* judges, when interpreting the text, must adhere to the original meaning of the written constitution to the extent that this meaning can be ascertained. See Randy E. Barnett, “An Originalism for Nonoriginalists,” 45 *Loyola L. Rev.* 611 (1999). Where that meaning is vague or incomplete, however, supplementation or “construction” is permissible—indeed inevitable—and constitutional constructions that do not contradict original meaning should be adopted that enhance whatever it is that makes laws legitimate. See *id.* at 645-47. I will greatly expand upon this discussion in *The Presumption of Liberty*.

just, the greater the presumption to be accorded those laws that are enacted. The more confidence we have in enacted laws, the more skeptical we can be about a claim that a particular law is unjust. In this essay it is not possible for me to describe all the characteristics that contribute to legitimate law making. Familiar features of our legal system—widespread suffrage, separation of powers, federalism and a written constitution which “locks in” these practices as well as lists of both enumerated powers and enumerated rights—each play a role if properly respected. So too does judicial review to ensure that these legitimacy-enhancing features are indeed respected. So too would adoption of a “presumption of liberty” which would place the burden on the government to justify to a court that its freedom-restricting commands are both necessary and proper.⁶⁷

By acknowledging that, above a threshold, constitutional legitimacy is a matter of degree, the theory I am proposing does not always provide a clean answer to the question of whether a particular law-making process, taken as a whole, is sufficient to provide enacted legislation with the benefit of the doubt. But it does confront the question that others neglect and answers it by positing something real, not fictitious, we should be looking for: procedures that assure that enacted legislation does not violate the rights retained by the people. And it also allows us to conclude that some constitutions are more legitimate than others.

It is an open question whether the U.S. Constitution—either as written or as actually applied—is in fact legitimate. Intellectual honesty requires us to acknowledge the possibility that no constitution lacking unanimous consent is capable of producing laws that bind in conscience. Therefore, though the conception of legitimacy offered here may not always be easy to apply, and though it invites debate and controversy about the nature of justice and rights, readers should think long and hard before rejecting it. For the alternative may be to admit that there is no one behind the curtain.

⁶⁷I offer a preliminary defense of the “presumption of liberty” in Barnett, *Getting Normative*, pp. 113-121.