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CONSTITUTIONAL AUTHORSHIP BY THE PEOPLE

*Frank I. Michelman**

*We, the People of the United States, . . . do ordain and establish this Constitution for the United States of America.*¹

*The Ratification of the Conventions of nine States shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.*²

*This Constitution, and the Laws . . . which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . .*³

*The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, . . . shall call a Convention for proposing Amendments, which, . . . shall be valid . . . as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof . . .*⁴

I. CONSTITUTION AS LEGISLATION

The Constitution of the United States is an enacted law, a piece of legislation, the intentional production of a political will. So, at any rate, it declares itself, and so we are pleased to regard it. To be sure, such an authorial view of constitutional origins is the sheerest banality, a view as simplistic as it is inevitable, a commonplace vernacular notion that cannot withstand critical examination. It is nevertheless a

* Robert Walmsley University Professor, Harvard University. This Essay is excerpted and adapted from my *Constitutional Authorship*, in *CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS* 64 (Larry Alexander ed., 1998) and is reprinted with the permission of the Cambridge University Press. Having been unexpectedly and unavoidably prevented from preparing, in time, a fresh submission to this collection in Kent Greenawalt's honor, but most urgently wishing not to be missing from the company, I am thankful for the editors' willingness to accept this offering taken from previously published work. I picked it because it was initially inspired by Professor Greenawalt's *The Rule of Recognition and the Constitution*, 85 MICH. L. REV. 621 (1987). That characteristically thoughtful essay was what started me puzzling over how to fit the Constitution and its role in American constitutional-legal argument together with my understanding of the deepest messages of contemporary legal positivism.

1 U.S. CONST. preamble.

2 *Id.* art. VII.

3 *Id.* art. VI, § 2.

4 *Id.* art. V.

fixture in the politics of our country. The Constitution's enactedness, as we see it, figures crucially in the country's acceptance of the Constitution as supreme law. I examine here the impossible, unrelinquishable idea of the intentional constitution, of constitution as legislation—or, as it has sometimes been put, as “writing” or as “written.”⁵

If someone says: “The United States has a strong constitution,” we hear metaphor. The speaker, we gather, is evoking the idea of the country's hardihood in its environment by likening American society, government, economy, culture—the country's endowment of organs and metabolisms, so to speak—to a thriving animal's physical makeup. By contrast, “The United States has an old constitution” most probably refers to the country's express political charter, or if not exactly to that, then to the country's somehow otherwise established set of governing norms for “constitutional essentials,” meaning (a) the plan of political government—offices, branches, levels, procedures, power-distributions, and competency ranges—and (b) the roster of personal rights and liberties, if any, that the constituted government is “bound to respect.”⁶ In what follows, we speak of constitutions in this political-regime or charter sense of the term.

Lacking special contextual cues to the contrary, “The United States has a good constitution” doubtless praises, as well-done, our regime or charter-sense constitution. Incurably, we think of good constitutional charters or regimes not as blessings that luckily befall a country as strength and health befall an animal, but as designed creations by responsible human authors: as laws that lawmakers *legislate*, and as laws, moreover, whose expressly legislated character is a part, at least, of what gives them their claim on our allegiance and support.

I mentioned just above a “we” who think in this authorial, authoritarian way of constitutions and their bindingness. I use the term to refer to whoever reading this will admit to thinking, sometimes, in the ways I am here beginning to map, my use of it thus representing my bet that you, Reader, are one of the party, some if not all of the time. For us (for you), I am saying, a political-institutional constitution has always—I do not mean constantly, but forever recurrently—the character of a law expressly and designedly laid down by politically circumstanced human agents, which gains its bindingness on us at least in

5 See WILLIAM F. HARRIS II, *THE INTERPRETABLE CONSTITUTION* (1993) (“writing”); Jed Rubenfeld, *Reading the Constitution as Spoken*, 104 YALE L.J. 1119 (1995) (“written”).

6 JOHN RAWLS, *POLITICAL LIBERALISM* 227 (1993).

part by force of its reputed intentionality as a product of their express political exertion.⁷

As distinguished from a product of what? There are two major alternative possibilities to keep in mind, which we may call the existential and the rational. *The existential possibility*: a constitution is binding as a matter of socio-cultural fact. Or rather, to speak more precisely: social fact (and nothing directive or evaluative or argumentative or otherwise rife with intention) is all that a constitution's bindingness consists in. *The rational possibility*: a constitution is binding (insofar as it is) as a matter—a dictate—of right reason (insofar as it is). This gives us, then, a triptych of possibilities: constitutional bindingness-as-law is (a) "existential," a matter of how things are (what I see that we in this country just happen to find ourselves doing);⁸ or (b) "rational," a matter of the right (what I see that reason requires that we do); or (c) "decisional," a matter of sovereignty (what I see that some agent whose entitlement to rule I recognize has, as it happens, decided we are to do).

Let us be clear that no one can hold strictly to all three possibilities at once, which is not to say that anyone can't or we all don't switch around among them all the time with the speed of light. When and inasmuch as I am feeling bound by some prescription for the reason that I perceive it to have been laid down as law at some time in the past by such and such persons having a title to do so, I cannot just then be feeling bound for the reason that (as I see or judge for my-

7 See, e.g., Richard S. Kay, *American Constitutionalism*, in CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS 16 (Larry Alexander ed., 1998) [hereafter CONSTITUTIONALISM]. For a recent, vivid expression of this view, see Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 907 (1995) (raising the question of "why the Constitution deserves our respect in the first place" and beginning the answer with a reference to "constitutional self-consciousness"); *id.* at 908 (continuing the answer with a reference to "citizens" engaged in "a principled overhaul of constitutional arrangements"); *id.* at 916 (referring to "America's overriding commitment to popular sovereignty"); *id.* at 924 (reserving valid constitutional lawmaking for "those rare moments in American history when the mass of Americans get into the act").

8 For discussions of good reasons that people might have for preferring not to monkey with an imperfect constitution currently in force—pertaining, for example, to the desirability of resolution and stability in the law—see Russell Hardin, *Why a Constitution?* in THE FEDERALIST PAPERS AND THE NEW INSTITUTIONALISM 100 (Bernard Grofman & Donald Wittman eds., 1989); Michael J. Perry, *What Is "the Constitution"?* (and Other Fundamental Questions), in CONSTITUTIONALISM, *supra* note 7, at 99; Joseph Raz, *On the Authority and Interpretation of Constitutions: Some Preliminaries*, in CONSTITUTIONALISM, *supra* note 7, at 152; cf. Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997) (advancing similar reasons for a practice of "judicial supremacy" in constitutional interpretation).

self) the prescription is right or is currently accepted as law in the territory where I am. The case, let us suppose, is that I am right now considering myself bound by something having the look of a law—say, the *Constitution of the United States*. If I am consciously doing so in virtue of the entitlement to rule of whoever laid it down, then, at the cost of my fealty to their sovereignty, it cannot matter to me whether I judge it to be right. If I am consciously doing so in virtue of the thing's being right in my judgment, then, at the cost of my fealty to the right, it cannot matter to me who laid it down. If I am consciously doing so for either of those reasons, then, at the cost of my fealty either to the right or to sovereign entitlement, it cannot matter to me who else feels bound. And if, on the other hand, I am just being swept along by a tide of general social acceptance of the thing as law, then it is not just then mattering to me how or by whom the thing got laid down or whether it is right in my judgment.

You might object that the following is possible: I see that what my country's people just happen to find themselves doing is ascribing constitutional bindingness to the intentional acts of certain agents under certain conditions, it being their belief (and this belief of theirs being a part of my description of what they are doing) both that these agents own a title to decide constitutional matters and that their acts under these conditions reveal or define what reason requires.⁹ Accordingly, I follow suit. You might say this is a case in which all three of our possible bases of constitutional bindingness are simultaneously in play. If it seems so, though, that is only because the ultimate motivation of my conduct has not sufficiently been specified. At the very instant of feeling bound by the contingency of intentional action ("in that they said so"), I cannot also be feeling bound by rational necessitation ("in that it is right regardless of what anyone may have said about it") or by intentionless accidents of history ("in that such-and-such complex legal-recognitional norm just happens to prevail in the

9 See David R. Dow, *The Plain Meaning of Article V*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 117 (Sanford Levinson ed., 1995) [hereinafter *RESPONDING TO IMPERFECTION*], discussed in Frank I. Michelman, *Thirteen Easy Pieces*, 93 MICH. L. REV. 1297, 1315–17 (1995); Lawrence G. Sager, *The Incurable Constitution*, 65 N.Y.U. L. REV. 893, 902 (1990) ("The claim of privilege [for popular will] . . . would have to be that popular will enjoyed a powerful advantage in accuracy or reliability [given a metric of what makes a political choice good] over other possible means of choosing among social options.").

territory where I am").¹⁰ And so on around the circle: contingency clashing with necessity, accident with design.

The focus of my exploration here is the moment in thought in which, by the internal act of premising allegiance to the Constitution on its having been authored by whom it was, we set aside, if only momentarily, whatever concerns we may also have with either the brute facticity or the rational necessity of society's recognition of it as the basic law of the country. The object of investigation is not, please note, the bare fact of our regarding the documentary Constitution as a historical product of known authorship. The obvious reason for *that* is that it is, and very interestingly. The issue here is the connection we draw between perceived historical facts of the documentary Constitution's authorship and the current normative authority for us, as law, of a body of practical political principles that we take its declarations to express or represent.

By the "normative authority" of a political directive I mean its serious impingement on our feelings and judgments about what is required and permitted in the conduct of political affairs. The connection we draw between the current normative authority of the Constitution and perceived historical facts of authorship ("we ought to now, because they said so then") I sometimes refer to below as the "authority-authorship syndrome." I do not mean by "syndrome" to call the connection pathological, which I do not consider it to be. I do mean that something strong must be motivating the connection because, as we shall soon begin to notice, the very thought that the Constitution's authority flows from its authorship is a sitting duck for critique.

As we shall see below, explanation for the syndrome does not obviously lie in the ideology of popular sovereignty. Neither does it obviously lie, as you may be thinking it does, in the idea of an expoundable or interpretable constitution. Perhaps it seems that the very possibility of the Constitution's force as law—the possibility of "applying" the Constitution to the run of cases supposed to be under its legal control—depends on attribution of it to a specified someone's authorship. Lacking such attribution, you might think, one would lack all basis for referring questions of the Constitution's meaning-in-application to the motive, vision, purpose, aim, or understanding, at any level of generality or abstraction, as of any moment past or present, of anyone in particular—any "framer" or all of them, any "rat-

10 For an idea of how complex this legal-recognitional norm is likely to be, see Kent Greenawalt, *The Rule of Recognition and the Constitution*, 85 MICH. L. REV. 621 (1987).

ifier" or all of them, any past or contemporary court or member thereof, any past or contemporary electorate or citizenry or "generation."¹¹ And wouldn't a so-called text cut off from all such reference to authorship be strictly meaningless? (How, in that case, could one even have a basis for construing those marks as tokens of the English language?)¹²

The answers are that it needn't be (and one could). Interpretability of a thing that has the look of being a text in English need not presuppose the interpreter's belief in its having been intentionally created by anyone. The thing, let us say, is found "written" in the sand at the seashore.¹³ It might just be a pattern cut by waves; no one is certain. Legibility does not depend on the answer. As long as it looks like English words and sentences, you can "read" it if you know English. Furthermore, as long as the words and sentences that it looks like come somewhere within shouting distance of making sense in your culture, you can "interpret" it, imbue it with meaning, even if the apparent meaning is quite unexpected. (It appears to say, "Everyone has the right to dishwasher.")

Now consider the following: In any country, at any time, a legal culture may sustain some distinct notion (by which I do not necessarily mean an uncontested notion) of the legal category "constitution" and its office in the ordering of social life.¹⁴ Now, suppose there comes within our field of vision an object that has the look of being a text in a language we know, and the text that the object looks like has the look of being a part of a constitution according to our culturally embedded notion of that category. The object, by appearance, roughly fits or calls to mind our constitutional notion. Even if it also contains variations and anomalies, that object, in our culture, will be interpretable as a constitution-part.

It may be—the point is a contested one—that application to particular cases of a legal text that is couched in generalities requires ascriptions of point or purpose. If so, it does not follow that an identified author must be made to appear. The question, say, is how or

11 See Bruce Ackerman, *A Generation of Betrayal?*, 65 *FORDHAM L. REV.* 1519 (1997).

12 See HILARY PUTNAM, *REASON, TRUTH, AND HISTORY* 4–5 (1981).

13 The example is adapted from Putnam. See *id.*

14 In recent American constitutional theory, the writings of Robert Nagel and Lawrence Sager are notable for having put to fruitful use—in very different ways—the idea of a culturally embedded notion of constitution. See, e.g., ROBERT F. NAGEL, *CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW* (1989); Lawrence G. Sager, *The Domain of Constitutional Justice*, in *CONSTITUTIONALISM*, *supra* note 7, at 235.

whether "everyone has the right to dishwasher" applies to governmental restrictions on the manufacture of soap. Given a known, historical author, we could have committed ourselves to answering by doing our best to seek out that author's intention, expectation, or disposition with respect to that question. But in the case I am posing, we know of no author whose disposition we might seek out. Structural relations among the focal clauses and other parts of the constitutional text (assuming we have the rest available) may doubtless help to frame the inquiry, but any further inputs of purpose or value will have to be supplied by the constitutional notion itself, the working theories of personality and society, and correlatively of government by or under law, that lead us to see the thing as a piece of a legal "constitution" in the first place.¹⁵ Instead of debating what the author meant or contemplated, a group of judges, more-or-less sharing a specific, if always contestable, political-cultural inheritance, would have to debate the constitutional notion embedded therein. From such a debate they would have to draw their claims about whether a true or proper constitution, speaking of a "right to dishwasher," would or would not most aptly have meant those terms to have any application to restrictions on soap manufacture. The task might prove impossible, of course, because the judges might not be able to see *anything* that a true and proper constitution could have meant by a dishwasher clause, given their culturally anchored notion of what constitutions are all about. In that event, it seems, the judges would have no choice but to decline to give the clause any constitutional-legal force or application. (Try substituting "to bear arms" for "dishwasher.")

The point is that all that I've just described can be done by interpreters while making no supposition whatever about the actual authorship of the constitution. I therefore conclude that the demands of interpretability cannot explain our urge to trace the bindingness of a constitution to attributions of its authorship.

II. CONSTITUTION AS PROPOSITION OF FACT: LEGAL NONVOLITIONISM

A norm for an agent is a directive that the agent does not feel rightly free to ignore. It is something saying efficaciously to the agent that not everything is rightly permitted, that within some range of action choices otherwise open to her, at least one ought to be done or not done. The authority-authorship syndrome is the connection we draw between two poles of our everyday knowledge of the Constitu-

15 Interestingly, the model I am sketching here seems to uphold the "textualist sensibility of American constitutional culture," of which Michael Perry neatly reminds us in Perry, *supra* note 8, at 112.

tion, one of which is our experience of it as a norm or container of norms. If the Constitution somehow came to figure for us as not a norm at all (a directive or "ought" statement that we don't feel rightly free to ignore) but rather only as a fact (a happening of history), then one of the syndrome's poles would be missing. It would seem, then, that you could deconstruct the syndrome by teaching people to see the Constitution as fact not norm. That might seem a tall order, at least when "norm" is defined broadly enough to include the possibility of agents gathering directives from what they perfectly well know to be intentionlessly grown facts of social practice.¹⁶ It could nevertheless be understood (or rather misunderstood) as the project of a certain branch of legal positivism.

In contemporary jurisprudential debates, use of the term "legal positivism" is notoriously vagrant.¹⁷ The term has been used to name the view that the status of a norm as part of a country's law depends on facts of social acceptance, either of that norm specifically or of the authority of certain officers or institutions in a country to pronounce what norms are and are not law there. Such a broad usage, however, unfortunately makes a legal positivist of anyone who insists on distinguishing the category of "law" or "the legal" from that of "morals" or "the moral" (or "reason" and "the reasonable"), if only for the purpose of raising and pursuing the question of the relations between law and morality. Once that categorial distinction is drawn, who can deny that to speak of a *legal* order actually subsisting in a country is always to speak of an ongoing social process in that country of recognition and acceptance of that order as the legal order of that country?¹⁸

A question that then divides legal positivists from other legal theorists is that of the relation, if any, between (a) the possibility of a norm's being made a valid legal one by social acceptance of it as such

16 Hans Kelsen for some reason defined "norms" more narrowly, as "the [objective] meaning of acts of will that are directed toward the conduct of others." HANS KELSEN, *The Function of a Constitution*, in *ESSAYS ON KELSEN* 109-11 (Richard Tur & William Twining eds., 1986). If, following Kelsen, you define "norm" to include only such directives as agents see issuing from some other agent's "act of will," then it becomes relatively easy to defeat any claim that the directive contents of regime-fixing constitutions are *eo ipso* "norms." All you then need do to defeat it is establish the possibility of agents taking direction from what they perfectly well know to be intentionlessly grown facts of social practice.

17 For searching analyses of variant usages, see Jules L. Coleman, *Negative and Positive Positivism*, 11 J. LEGAL STUD. 139 (1982); Frederick Schauer, *Constitutional Positivism*, 25 CONN. L. REV. 797 (1993); Anthony J. Sebok, *Is the Rule of Recognition a Rule?*, 72 NOTRE DAME L. REV. 1539 (1997); Anthony J. Sebok, *Misunderstanding Positivism*, 93 MICH. L. REV. 2054 (1995).

18 See Coleman, *supra* note 17, at 139.

and (b) the moral status of that norm whether in the eyes of an external observer of the social order in question or of an internal participant in it. Legal positivists deny that either the true moral status of a norm in the sight of an observer or its perceived moral status in the sight of participants has any necessary bearing on the possibility of the norm's being made a legal one by social acceptance of it as such.¹⁹ They assert the possibility of a legal system in which there is neither "external" nor "internal" connection between considerations of the transcendent morality of a norm and the efficacy of social acceptance to make the norm truly a legal one.²⁰

Within legal positivism thus defined, we can detect a smaller camp of what I will call "legal nonvolitionists." What distinguishes them is insistence that the foundations of legal orders are and can only be organically grown facts of social practice, as distinguished from acts or expressions of anyone's will.²¹ Straightforwardly, a going legal system is an effectively regulative social practice of reference to an identifiable collection or system of norms. Some of the norms are "primary," immediately regarding what is and is not to be done. Some are "secondary," regarding the modes and means by which primary norms are determined. Among the secondary norms are "rules of recognition," among which there logically must be an "ultimate" rule of recognition, controlling which purported determinations of primary normative contents, uttered by whom, in what forms and circumstances, are to be respected and given effect.²² Below, I shall sometimes refer to this ultimate rule of recognition as the country's basic law or law of lawmaking. Whatever you want to call it, legal nonvolitionists point out that it cannot itself consist in the command of any lawgiver because it supplies the standard by which claims to the status of lawgiver are verified (or not). Therefore, the legal nonvolitionist

19 What H.L.A. Hart calls "soft" positivism (in contradistinction to "plain-fact positivism") allows for the possibility of a legal practice, properly so called, in which people's judgments of justice or morality do in fact figure into the processes of social acceptance that constitute the practice as a legal one. See H.L.A. HART, *Postscript, in THE CONCEPT OF LAW* 247, 250-51 (2d ed. 1994). What unites all legal positivists, on the definition I am offering here, is insistence that it is nevertheless, in the last analysis, only a fact of acceptance, and not anyone's consideration or judgment of the moral justifiability of the acceptance, that can and does essentially constitute certain social practices as legal ones.

20 This is a somewhat elaborated version of the "separability thesis" in what Jules Coleman terms "negative positivism." See Coleman, *supra* note 17, at 140-43.

21 For example, this is how I understand Frederick Schauer, *Amending the Presuppositions of a Constitution*, in *RESPONDING TO IMPERFECTION*, *supra* note 9, at 148-52 (referring to works of Hans Kelsen and H.L.A. Hart).

22 H.L.A. HART, *THE CONCEPT OF LAW* 92, 96 (1961).

concludes, the normative system's ultimate ground can only, in the last analysis, be a social fact that is not itself a norm.

In a legal nonvolitionist account, the authority-as-law of the American Constitution (and of legislative and judicial law declarations made in pursuance thereof) flows in the last analysis from facts of social acceptance of *the Constitution*—of the collection of secondary norms in which it consists—as the society's ultimate rule of legal recognition. The point is, social acceptance of *the Constitution* as supreme law is a very different matter from acceptance of *someone's entitlement* to make the Constitution be supreme law by legislating it as such. The latter sort of acceptance still traces legal bindingness to facts about someone's exercise of a legislative will; the former does not.

It is always possible, of course, that some society's prevailing, ultimate legal-recognitional criterion would appear to take the form: such-and-such classes or descriptions of persons acting by such-and-such procedures have authority to legislate whatever they will as this country's ultimate recognition rule or law of lawmaking. That indeed appears to be true for the United States, where the strongly prevailing, although not uncontested view (among those who have a view) is that such authority was and is available to be claimed by or on behalf of any collection of actors who did in the past or may in the future successfully carry out the ratification and amendment processes laid out in Articles VII and V of the Constitution.²³ But you do not faze the legal nonvolitionist by posing this sort of case, of an apparently ultimate legal recognitional standard cast in terms of someone's authority to legislate the constitution. When you pose the case, she cheerfully rejoins that this recognitional standard is itself, then, to all intents and purposes the country's real law of lawmaking—its “small-c constitution” as I'll sometimes hereafter refer to it, as distinguished from the “big-C Constitution” whose recognition-as-law the “small-c constitution” underwrites—and that this standard is not itself conceived as a product of anyone's willful act.²⁴ If you object that, to the contrary, Articles VII and V gain *their* authority as (secondary, recognitional) law from a social perception of them as having been approved in certain procedures by certain descriptions of persons (“framers,” “ratifiers,” the confederation Congress), she just jacks her argument up a notch (or down, your choice): It is *that* procedure, then, that is really

23 See Kay, *supra* note 7. For the contestation, see generally RESPONDING TO IMPERFECTION, *supra* note 9. For Articles VII and V, see the epigraphs to this Article.

24 My usage of “small-c constitution” follows that of Frederick Schauer in Schauer, *supra* note 21.

the country's law of lawmaking, and the status-as-law of *that* procedure, she says, is just a social fact making no reference to anyone's exercise of will. You and she can replay your respective moves an indefinite number of times moving up (or down) an indefinite number of notches, but it seems that she must eventually prevail because you must sooner or later run out of historically plausible enactment claims. Her point—the legal nonvolitionist's point—is that references to authorship are in the last analysis inessential to the phenomenon of legality.

Here, then, is where we have come: everyone who conceptually distinguishes "law" from "morals" (or "reason") agrees that to speak of legal ordering in a country—to speak of the country's being in a legally ordered condition—is to speak of social convergence on some ultimate rule of legal recognition. Legal positivists, properly so-called, maintain that such a convergence is sufficient for legality regardless of anyone's view, or of the truth, about the moral status of the recognition rule or of any other norm in the system. Legal nonvolitionists insist further on the point that such an ultimately grounding so-called rule or norm is more accurately classed as a *fact*. It consists in a socially shared understanding of who, selected by what means and marks and acting by what forms and in what combinations, has final authority to say what is or will be valid law and to say further what this law concretely requires of inhabitants and officials in varying circumstances. True, this must be in a quite strong sense an intersubjectively shared understanding because a crucial part of what inhabitants (or maybe it is only "officials") must be sharing is awareness of each other sharing this awareness of a shared understanding.²⁵ Still, it remains in the end that the recognition "rule" is neither an intentional production nor a rational necessitation but just a matter of reflexive social practice being what it is. The "rule" consists in a pattern of interconnected responses on the part of a critical mass of a country's people (or officials) to certain classes of social events that they've culturally learned to construe as "Parliament" enacting a "statute," as the "decree" of a "court," as a "police car's" beacon, or what have you. In sum, according to the legal nonvolitionist view, a country's constitu-

25 See HART, *supra* note 19, at 267 ("[S]urely . . . an American judge's reason for treating the Constitution as a source of law having supremacy over other sources includes the fact that his judicial colleagues concur in this as their predecessors have done."). Hart takes the view that conscious acceptance of the recognitional rule or practice as such need occur only among legal officials, those whose work requires them to determine whether a given norm is or is not part of the law, and not necessarily among the population at large who need only "obey." See HART, *supra* note 22, at 110–13. The difference does not matter for any argument I make here.

tion—its really operative constitution—is not itself finally graspable as a prescriptive law or any other kind of norm but only as “a matter of social fact” to be discovered not by analysis of propositions but by “empirical investigation.”²⁶

You feel drawn to object. You want to say, by way of counterexample, that—obviously—the Constitution of the United States both gathers its effective legal force from public accreditation of it as an intentional act of legislation and is or provides the ultimate rule of legal recognition in American territory. The legal nonvolitionist then poses her challenge: You say the Constitution’s normative authority or “pull” flows from a perception of it as the product of someone’s act of laying it down as the country’s law of lawmaking. But that view apparently binds you to the further view that the said someone—the framers, the ratifiers—were themselves legally authorized to lay down basic law to the country in this way.²⁷ And what law, then, has conferred that authority on them? Your best rejoinder, I think, would be a law whose enactment was historically co-original and congruent with certain acts of constitutional lawmaking that it authorized. Why not? There seems to be no reason why a single transformative passage of national history cannot contain both and simultaneously (and even reciprocally) (a) a series of legislatively intended public actions and events that succeeds, in fact, in laying down law to the country and (b) the emergence in society—the coming-into-practice—of the precise “rule of recognition” that the legislative efficacy of this particular series of events implies. For illustration, it seems we need look no further back than the recent history of South Africa,²⁸ and no further abroad than the American constitutional founding, the course of events from the run-up to the Philadelphia convention of 1787 through the convention itself and the aftermath of the ratification.²⁹

26 Schauer, *supra* note 21, at 152.

27 Your view, generalized, is that the normative authority of law-like things flows from facts about who made them. But an authorization to certain agents to make laws is a law-like thing, *see, e.g.*, U.S. CONST. art. I. On your view, then, the normative authority of such authorizations flows from facts about who made them. You are headed for deep waters.

28 For a respected journalist’s account of the origins of the Constitution of South Africa, *see* ALLISTER SPARKS, *TOMORROW IS ANOTHER COUNTRY: THE INSIDE STORY OF SOUTH AFRICA’S ROAD TO CHANGE* (1995).

29 *See, e.g.*, BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS passim* (1998). Akhil Amar, to the contrary, argues vigorously (although not in these words) that the promulgation and ratification of the Constitution were in basic accord with a *pre-existing* rule of recognition. *See* Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457 (1994).

It's a nice thought, this idea of historical coincidence between the occurrence of a legislative endeavor conforming to a certain (broadly speaking) procedural specification and the coming-into-being of a social practice of attributing legislative efficacy to endeavors falling under that same procedural specification. But still this idea misses the point of the legal nonvolitionist's challenge to your attempt to ground the Constitution's *current* legal force in a *current* perception of it as a product of someone's *past* exercise of an entitlement to legislate. The legal nonvolitionist is making a charge of incoherence against all claims of this sort. She is saying that no one can *right now* be basing the Constitution's authority on its legislated character without, in that very thought, positing some preconstitutional ground of the authority-to-make-something-be-law-by-legislating-it of whoever is supposed to have made the Constitution be law by legislating *it*. The point, in other words, is that a law that we right now see as legally forceful by virtue of its having been duly legislated cannot itself right now also be or contain our legal order's ultimate rule of recognition.³⁰ So it cannot be, in that sense, what we also think a constitution is.³¹

It only remains to point out that if whatever it is—the real or meta or “small-c” constitution—that is supposed to drape the mantle of legislative authority on whoever is supposed to have legislated “the Constitution” is itself, in its turn, conceived as a legislated law, then the same argument recurses on it. The recursion recurs for as long as the successive mantles of authority are said to consist in legislated laws; we tumble in the void of infinite regress. Hans Kelsen saw this problem long ago.³² From it, he deduced what he called “the transcendental-logical condition” of any possible “grounding” of the valid-

30 See Alexander & Schauer, *supra* note 8, at 1370 (“[I]t is only the present [and not the past] that can constitute a legal order for a population, and the question of what [has and should have] the status of law . . . can only be decided non-historically.”).

31 For a recent vivid example of the view that a country's constitution *has to* contain the country's ultimate rule of recognition, see Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1246–47 (1995) (speaking of constitutional amendment):

[W]e must look to that Constitution to determine how [the institutions that it calls into being] are to operate and when their products are to be regarded as law. . . . We can know that something has the binding force of law only if it complies with the requirements that, as a matter of social fact, we have agreed must be met when a law is to be made. Pending some upheaval [of revolutionary magnitude], the only such requirements for our polity are those that are, for the time being at least, embodied in our Constitution's text (footnote omitted).

32 See Kelsen, *supra* note 16, at 111.

ity of a legal order. "Only a norm," offered Kelsen, can ground "the validity of another norm."³³ Therefore, when we regard a legal order as grounded we must—logically must—be positing a "historically first constitution," together with a socially prevailing "basic norm" conferring on that first constitution's promulgators the authority to make it the law by promulgating it and thereby to obligate the country's posterity (assuming the basic norm remains operative for them) to grant the force of law to everything that has issued from or pursuant to a chain of amending clauses depending on that first constitution.³⁴

Just as the "first constitution" and its promulgators are pure abstractions—"transcendental-logical" categories brought to mind by the prior determination of a thinker to regard his legal order as "grounded"—so then is the basic norm. Perhaps that is why contemporary legal nonvolitionism has turned away from Kelsen's dictum that only a norm can ground the validity of another norm, offering instead to block the regress by shifting attention from the space of norms to the space of facts and specifically to the convenient fact that a critical mass of the country's inhabitants (or officials) do, as it happens, intersubjectively concede a regulative force to an actually operative practice of government that they for some reason or other tend to identify with (or hypostatize as) a textoid that they call "the Constitution."³⁵

We should be clear, though, that the legal nonvolitionist argument, cogent as it is, leaves unscathed our knowledge that Americans do in fact recurrently *think of* the Constitution as containing the ultimate legal grounding, the law of laws, for the American legal order and, furthermore, as doing so by virtue of its legislated character. What the nonvolitionist argument aims to show is, first, that if you insist on finding the "ground" of a social practice of positive legal ordering, you will have to find it in something that is not itself a validated law in terms of the system's own ultimate standards of legal validation, and second, that the only alternative in sight is the sheer facticity of the social practice whose ground you are seeking—the

33 *Id.* at 115.

34 *See id.* at 114–16. On the reduction, for these purposes, of "small-c constitutions" to their amending clauses, see *id.*; PETER SUBER, *THE PARADOX OF SELF-AMENDMENT: A STUDY OF LOGIC, LAW, OMNIPOTENCE, AND CHANGE* (1990).

35 "Textoid," not "text" or "instrument," is used to make allowance both for textually nonreduced or noncodified (but still institutionally recognizable) constitutions like the British, as well as for lawyers' knowledge that the political-legal-institutional Constitution of the United States is not confined to the instrument thus captioned, but consists also of interpretive and other practices containing and surrounding the instrument.

practice, that is, of sooner or later referring all questions of legal validity to those particular standards. But full knowledge of a social practice includes knowledge of how participants in the practice experience it "from the inside," so to speak,³⁶ and the legal nonvolitionist argument neither says nor decides anything about the internal-experiential dimension of any given society's legal-recognition practice.³⁷ More precisely, the argument does not preclude that the practice might be one that has this as one of its features: that participants refer all questions about legal authority and validity to sets of standards to which, whenever they make such referrals, they attribute the character of having been intentionally legislated.

The legal nonvolitionist argument accordingly does not contradict the fact of American observance of the authority-authorship syndrome—of tracing the Constitution's bindingness on them at least partly to its reputation-as-legislated—it only makes it intriguing. In the face of a compelling refutation of the possibility of any essential tie between the legal force of a country's constitution and attributions of its authorship, we persist in tying our constitution's authority for us—"small-c" and "big-C"—to attributions of its authorship.

III. THE PEOPLE'S TITLE TO RULE: SOVEREIGNTY, DEMOCRACY, AND "POLITICAL IDENTITY"

In any search for what might be motivating a population's habit of tracing a constitution's normative bindingness to perceived facts of its authorship, a glaringly obvious possibility is the influence on that population of a theory of sovereignty. Moral bindingness can flow from legal validity. That is because it is possible for persons to experience or accept a moral obligation (perhaps only presumptive and defeasible) to abide by the law. For those who do, whatever is perceived to bind them legally also, in some measure, binds them morally. Now, it seems that to say, with any seriousness, that someone is sovereign in a country is to ascribe to that person a moral title to rule the country in whatever way she decides to do. As sovereign, she can promulgate whatever constitution she wishes, and what will make for her constitution's bindingness on me as an inhabitant, then, will be all and only

36 See ANTHONY T. KRONMAN, MAX Weber 11–14 (1983); PETER WINCH, *THE IDEA OF A SOCIAL SCIENCE AND ITS RELATION TO PHILOSOPHY* (Routledge & Kegan Paul eds., 1958).

37 See H.L.A. HART, *supra* note 22, at 238–44 ("[T]here is . . . nothing in the project of a descriptive jurisprudence . . . to preclude a non-participant external observer from describing the ways in which participants view the law from . . . an internal point of view.").

my recognition of her moral title to rule. My own judgments of the rightness of what she rules will be beside the point, as will be my observations regarding anyone else's acceptance of her rule. As long as I acknowledge her title of rulership, I am bound to follow her constitutional directives to the best of my ability to find out what those directives are and what she meant for them to have me do in one or another specific set of circumstances. An acknowledgment of sovereignty would thus supply a perfect explanation of the authority-authorship syndrome.

But of course the explanation, as applied to *us*, is only as good as its underlying supposition of *our* attachment to an idea of sovereignty. And there we run into a complication. For it seems safe to say that *we* do not, in fact, recognize the title of anyone in particular to rule a country *ad libitum*. Unless, that is, you count *the people* as someone in particular. If there is any sovereignty we accredit, it is popular sovereignty. And the case of popular sovereignty, I am now going to argue, is special in the very respect that it cannot tolerate a separation between judgments of the pretending sovereign's title to rule (or judgments of the pretender's actual identity as the entitled sovereign) and judgments of the rightness of the pretender's constitutional-legislative acts.

A. *Popular Sovereignty*

Constitutionally speaking, "democracy" in our times certainly signifies something beyond the rule of the many or the crowd as opposed to the few, the best, or "the one." The term names a standard by which a country is not a free one, its inhabitants not free men and women, unless political arrangements are such as to place inhabitants under their own political agency, their own "rule." No doubt the prevailing constitutional-democratic ideal does accept a large amount of rule *pro tanto* by legislative, administrative, and judicial officers, operating within schemes of representative government. What the ideal tests, in the end, are the constitutive or fundamental laws of a country—the laws, that is, that fix the country's constitutional essentials.³⁸ There is, however, an ambiguity in the ideal. Does it refer to authorship of a country's fundamental laws by its inhabitants collectively, as one agent ("the people"), or by them severally as contributing individuals? Here, I want to explore some implications of the collectivistic as opposed to individualistic conception of the ideal of democratic con-

38 On "constitutional essentials," see *supra* note 6 and accompanying text.

stitutional authorship³⁹—a “constitutional populist” conception, as we have been invited by a leading proponent to call it.⁴⁰

Constitutional populism begins with the proposition that, among requirements of moral rightness in political arrangements, none is more basic than the entitlement of the people of a country, somehow conceived as single situs of political agency or energy, to decide the country’s fundamental laws. It may seem directly clear, then, why for constitutional populists—those who start with the view that a constitution binds morally only insofar as the people are its authors—constitutional-legal authority depends on constitutional-legal authorship. In this matter, however, appearances are deceiving. For constitutional populists, as I now undertake to show, the deeper basis of constitutional-legal obligation must be rightness, not authorship. Authorship, at best, serves as a figure of thought for the supposition of rightness on which obligation depends.

To begin with, it is only when you attribute sovereignty to someone other than yourself that the authority-authorship syndrome clearly holds for you with respect to the bindingness on you of the sovereign’s lawmaking acts. If, instead, you attribute sovereignty to yourself, it seems the syndrome must break. If you, as sovereign, feel bound at all by what you ruled before, it won’t normally be for the reasons that it was ruled or was ruled by you. If you feel bound at all, it must be by rightness as you judge it now: what you ruled before still striking you, on current reconsideration, as the right thing to rule. If it does not, why shouldn’t you, being sovereign, feel utterly free to discard it? Why should you feel in the least bit bound by your own former judgment?

The only sort of reason that comes to mind is that you might be tired or on the blink right now. Here you are, absolute owner of the country and you in it, morally entitled as such to make laws *ad libitum* for it and you in it, quite irrespective of getting them “right,” whatever that might mean. (That is what it means to be sovereign.) Your only aim in this matter is for the country, and you in it, to be ruled *by you*. If you are out of sorts, not of a mind to rule right now, that aim could give you reason to abide by what you ruled before, just because it was you who ruled it, until such time as you might bestir yourself to rule again. The syndrome would hold.

39 For some probing of the individualist conception, see FRANK I. MICHELMAN, BRENNAN AND DEMOCRACY (forthcoming, 1999); Michelman, *supra* note *, at 82–91.

40 See RICHARD D. PARKER, “HERE, THE PEOPLE RULE”: A CONSTITUTIONAL POPULIST MANIFESTO (1994).

It would hold, that is, as long as we assume either that “you” are ascertainably still the same person as the one who ruled before, or else that what matters is not really being ruled by yourself but only being ruled by a pod with your name on it. So let us now suppose that neither of those conditions holds. “You” are *not* still ascertainably the same person as the one who ruled before, and genuine self-rule is indeed what matters. In that case, the syndrome breaks. Insistence on this point, I believe, confutes the radical separation of will from reason that the proposition of popular sovereignty is often taken to involve—the idea, that is, that a sovereign people is free to legislate to itself whatever damned law it pleases, just because that is what “sovereign” means.

B. *The “Generation” Problem*

Explanation begins with the opacity of the notion of the will “of the people” or a decision “by the people.” Few who consider the matter with much seriousness believe that this can plausibly be equated with a simple tally of votes taken under any conditions whatever, the vote of the majority then standing for the decision of the people.⁴¹

Among contemporary American constitutional theorists, Bruce Ackerman is the one who has grappled most seriously with the question of what counts as an expression of the legislative will of the people. Ackerman quite convincingly maintains that, on any plausible conception of a people’s constitutional will that is morally deserving of respect, that will (or that “people”) can never be corporately or instantaneously present, but can only be represented by time-extended courses of political events.⁴² Sometimes, Ackerman says, a course of events can disclose the existence of a “mobilized majority” in favor of major constitutional change—by which he means a clear, strong, sustained, and committed majority that arises, consolidates, and persists over a time during which the fundamental, constitutional matters in questions are publicly controverted at a high level of energy and concern.⁴³ Ackerman believes (and in this respect his view is non-controversial) that such episodes of constitutionally decisive and transformative popular mobilization have been relatively infrequent in American history.⁴⁴

41 See, e.g., Frank I. Michelman, “*Protecting the People From Themselves, or How Direct Can Democracy Be?*,” 45 UCLA L. REV. 1717, 1728–30 (1998).

42 See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 236, 260–62 (1991).

43 See *id.* at 274–75, 285–88.

44 See BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998).

At a recent conference on "Fidelity in Constitutional Law," announcing in effect what he finds in constitution-space that might be worthy of his faith, Ackerman pronounced "the generation" to be the basic unit in American constitutional theory: not "the clause" (for which read: some existentially self-warranting, autonomously speaking text) and not "the theory" (for which read: some rightness apple of the beholder's eye), but "the generation" (for which read: the historically-acting creator of constitutional law)—the creator, that is, on a full and true of view of who that is.⁴⁵ There are two distinct messages here. The first, and less interesting for our immediate purposes, is addressed to those who already agree with Ackerman that proper use of the Constitution today requires reference to past historical acts of constitutional creation. To them, Ackerman commends the need to reckon with a certain true fact about historical acts of creation of our Constitution, to wit: they were done by a succession of somewhat spiritually separated generations. The Constitution we have is a product of a chronologically ordered but nonlinear ("discontinuous") series of creative political events, each one of which rejected some but not all of its predecessors' basic normative premises. As such, then, must the Constitution be construed.⁴⁶

True enough. But when Ackerman posits *the generation* as the basic object of fidelity—not the clause, *not* the theory—he certainly intends a further message, the one that mainly concerns us here, addressed to those who do *not* already agree with him that proper use of the Constitution today requires reference to past historical acts and events. To them, Ackerman urges that indeed it does. He declares constitutional law to be constituted by a "conversation between generations."⁴⁷ Each generation of Americans is "obligat[ed] to honor" the creativities of every predecessor generation (saving certain barren ones such as, to date, our own).⁴⁸ Thus, *our* task today is to say what "*their* sound and fury" means.⁴⁹ The message seemingly could not be clearer: the most compelling what-there-is-to-be-faithful-to, constitutionally speaking, is human political action, the political works and acts of generations. Fidelity does not run to an impersonal prescriptive text that just happens, heaven only knows how, to be shining there before us *in loco constitutionis*. Whatever merits our acceptance—our "reception"⁵⁰—as constitutional law does so precisely by

45 See Ackerman, *supra* note 11, at 1519.

46 See *id.* at 1520.

47 *Id.* at 1524.

48 *Id.* at 1522.

49 *Id.* at 1523 (emphasis added).

50 *Id.* at 1524.

virtue of being the works and acts of the generations whose works and acts it is. Why so? Why not by virtue of being *right* (if it is), or by virtue of being *there*? Because, Ackerman says, of our commitment as Americans to be governed by ourselves as a people.

But here's the rub. That commitment leaves us with the problem of telling when we as a people have spoken law. It gives us need for a rule of recognition of the people legislating. In Ackerman's view, the root commitment that raises the need also points to the form of the only admissible answer to it, which is to draw the rule of recognition from the actual historical practice of the country. The country came to treat the semi-lawlessly enacted Constitution of the 1780s as its highest law, as it did with the semi-lawlessly enacted Reconstruction amendments, and as it now does (so Ackerman contends and many adamantly deny) with an undocumented constitutional-legal quasi-enactment of the New Deal era.⁵¹ The country thus shows to itself what it counts as a mobilized-majoritarian apparition of the legislating people. On this matter, as on others, our task is nothing more nor less than to listen to ourselves. What could be more in the spirit of democracy as popular self-rule?

The difficulty is the same as it has ever been (call it "counter-majoritarian,"⁵² call it "inter-temporal"⁵³). They—the generations of the Founding, Reconstruction, and the New Deal—are not in any obvious or self-proving way in unity or unison with us the living. But given that they are not, for us to submit in any degree to governance by their say so—including not least their say so regarding rules of recognition—is for us in that same degree to be not governing ourselves. What some prior generation *did* as distinguished from what we *might do* is extraneous, it would seem, to our self-government, as long as it remains agreed that they (then) are not us (now).

C. *All in the Family: "Political Identity" and Rightness*

Ackerman has a response: granted, predecessor generations are not us. Neither, on good authority, is Congress us, nor any other contemporary organ of representative government.⁵⁴ If what we mean by democracy is the rule of the people, we must also understand that this

51 See ACKERMAN, *supra* note 44, at 4–15.

52 ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16–23 (1962).

53 Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1046 (1984).

54 See Frank I. Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 75 (1986) ("The Air Force is not us. Congress is not us. The President is not us. 'We' are not 'in' those bodies. Their determinations are not our self-government. Judges

people appears in action only sporadically, in moments of exceptional political mobilization which it may not be granted to every generation to know. So in this world of generational finitude and change (not to add, of variable stature among the generations), to ask for perfect democracy is to ask for too much. The best that any on coming generation can do, if it means to be ruled by the people, is to receive as its law the most recent word from an adequately mobilized American citizenry, pending that on coming generation's own arousal (if ever) of the people slumbering within it.

With that in mind, suppose someone, an American, says that his sole objective in life is to live in compliance with a constitution that truly corresponds to the contemporary will of the contemporary American people. I emphasize *contemporary*. This person sees no moral or other value in being ruled from the grave by dead people. What moves him is the idea that the living should together rule their own lives in their own country. But he finds himself in a state of puzzlement about how he can possibly know what *is* the constitutional will of the *contemporary* American people, which is his sole object in life to abide by. So he takes a leaf from Bruce Ackerman's book. He allows himself to be persuaded by Ackerman that the best evidence he can hope to have of the will of the contemporary American people is the facts about where matters constitutional were last left (in the year 1937, let us say) by the series of constitutionally decisive, popular mobilizations that have previously occurred in American history.

Here you have a genuine case of the authority-authorship syndrome. Our hero is minded to abide by the Constitution "because they said so," no further questions asked. Given his objective—to live under laws corresponding to the (contemporary) people's will—his readiness to find dependable direction toward that objective in past historical acts and events not only relieves him but rationally bars him from any further direct inquiry of his own. In this matter, he does truly equate what he ought to do with whatever they said.⁵⁵ The authority-authorship syndrome holds for him. Of course, it does so only in a special way, by virtue of a special feature in *his* syndrome, its moral motivation. Submission to authority may not always be morally motivated, but in our hero's case it is. His attitude is certainly not one of moral detachment or indifference to the right. As a constitutional populist, he thinks it morally right to submit himself to the fundamen-

overriding those determinations do not, therefore, necessarily subtract anything from our freedom, although the judges also, obviously, are not us.").

55 For definitive discussion of the kind of heuristic or epistemic authority I am pointing at here, see JOSEPH RAZ, *MORALITY OF FREEDOM* 21–105 (1986).

tal-legal will of the contemporary people. He submits to the authority of past political events because, and only because, he aims to do what is right, having himself assumed responsibility for the judgment that what is right in these matters is submission to the contemporary people's will. But that, as we are about to see, is not the only or, perhaps, the most telling sense in which a rightness judgment undergirds his attitude of acceptance of what "they" said as normatively authoritative for him.

Our hero hazards a probability estimate that the constitutional doings of prior generations of Americans—dead Americans—point with acceptable accuracy toward the will of the contemporary people respecting matters constitutional. On what basis, however, can he count this estimate a rational one? The estimate depends on the supposition that each politically mobilized generation in the American series is an episode or representation of one and the same political family, so to speak, periodically exercising one and the same family-owned title to collective self-rule. But this succession of mobilizational episodes might also, after all, be construed as a temporal series of *different* collective agencies, strangers to each other, each possessed of its own discrete entitlement to rule over its own affairs.

The point is that, to think of a people living under a fundamental-legal regime that they themselves make or adopt, is already by the thought to confer upon "the people" an identity that is in some respect continuous across events of constitutional mobilization and constitutional change. The people need not be unchanging across the higher legislative divide: agents can change through their acts without loss of identity. (My biography is different after writing this than it was before.) But we do need to fix on *something* about this people that might warrant our calling them the same people after as they were before the event. Unable to affirm a relevant sameness between those who decide upon constitutional innovation and those who must live with the decision, we could not seriously speak of a people living under its own rule.

Popular sovereignty no doubt conceives of constitutional lawmaking events as deliberate acts of a "capital-P People" legislating. What is tricky is that these People legislate not only to the official agents—congresses, presidents, courts—whom they charter or "constitute" by their higher lawmaking acts, but to themselves as the self-same (self-governing) People as those who legislate. They do so at least inso-much as every constitution (worthy of the name) is a law containing a binding rule about how itself (including this rule of which we just now speak) may thenceforth be revised. In the Constitution of the United

States, this rule (most observers think) is Article V.⁵⁶ It looks like there is a dimension of political freedom that we both attribute to the chartering People (represented as the authors and ratifiers of Article V) and deny to the People as thus chartered, that is, the freedom to decide the terms and conditions of higher lawmaking. The charterers ("We the People of the United States") seem to stand, then, on a different plane of rulership from the chartered ("our posterity"), as creators to creatures. How is it possible to construe such an event as one of the People's self-government?

There are possibility conditions for this, but they are stringent. For a People to be self-governing means for them to legislate to themselves as the self-same (if also the ever-changing) People as those who legislate. This means that the lawmaking act emanates from a People whose collective character, or "political identity" (to use Bruce Ackerman's nice term),⁵⁷ not only continues through the process of enactment undissolved but also, by the same token, was already established when the process began. We need to say, then, what it is that we think confers political identities on empirical human aggregates, identities of a sort that allow us to check for the sameness of the People who lay down constitutional law with the People to whom it is laid down. What do we think this people-constituting, identity-fixing factor could possibly be? Must it not finally come down to an attitude of expectation or commitment shared by constituent members of the putative "capital-P People?" An attitude of expectation of the presence among them of some substantially contentful normative like-mindedness, or at the very least of commitment to searching out the possibility of this? An expectation of, or commitment to, some cultural or dispositional or experiential commonality from which they can together try to distill some substantially contentful idea of political reason or right? Something—could it be—along the lines of that constitutional-cultural "notion" to which I have previously made reference?⁵⁸

Think about how matters look from the standpoint of the People on the receiving side of a constitutionally decisive mobilization. As a

56 We noticed in *supra* note 23 that a minority of theorists hold to the view that Article V is not correctly construed as setting forth the exclusive procedural avenue to valid amendments of the Constitution. The minority theorists do not, however, all suggest that the Constitution, correctly construed, contains no binding amendment rule at all. Akhil Amar says the Constitution's rule is a deliberative majority vote. See Amar, *supra* note 29.

57 See ACKERMAN, *supra* note 42, at 204. Ackerman writes, it seems to me paradoxically, of "an entire People . . . break[ing] with its past and construct[ing] a new political identity for itself." *Id.*; see also Michelman, *supra* note 9, at 1325.

58 See *supra* note 14 and accompanying text.

supposedly self-governing people, they cannot accept law from anyone save themselves. But it seems they can know themselves as themselves—can know themselves as, so to speak, a collective political self—only by knowing themselves as a group of sharers, joint participants in some already present, contentful idea, or proto-idea, of political reason or right. This means they can know their lawgivers as legitimate, as the same People as they are, only through *the lawgivers'* perceived or supposed participation in some political-regulative idea that they right now hold about what constitutions are for and are supposed to do. What we're saying here, in effect, is that a population's conception of itself as self-governing, as legislating law *to itself*, depends on its sense of its members as, in their higher lawmaking acts, commonly and constantly inspired by and aspiring to some distinct regulative idea of political justice and right.

What it comes down to is this: for anyone committed to the pursuit of popular sovereignty for the sake of the value of political self-government—the value of a population's being under its own political rule (and why else be committed to the pursuit of popular sovereignty?)—acts of legitimate constitutional lawmaking can never within history be conceived as writing on a clean slate. Rather, such acts must always be conceived as outcomes of political interactions that were already framed, when they occurred, by some already present idea of constitutional reason, some constitutional-cultural “notion.” As devotees of self-rule by the people, we do not and cannot grant binding force to any predecessor constitutional lawgivers' say so just because it was theirs, without an identity check to make sure that they and we are relevantly the same people, and there appears to be no such relevant check apart from our current judgment of whether what they did was in accord, or at least tending toward accord, with constitutional reason as it may be given to us the living to know it. In other words, constitutional framers can be *our* framers—their history can be our history, their word can command observance from us now on popular-sovereignty grounds—only because and insofar as they, in our eyes now, were already on what we judge to be the track of true constitutional reason. (What if their words include, “Everyone has the right to dishwater”? “The right of the people to bear arms shall not be infringed”? “No State, without its consent, shall be deprived of its equal suffrage in the Senate”?)

We see a hermeneutical circle closing. I have been arguing that, in the production of present-day legal authority, constitutional framers have to be figures of rightness before they can be figures of history, *our* history. But if so, then present-day constitutional interpreters, dedicated to the support of the contemporary normative

authority of the Constitution, have no choice but to read the words of the framers with the interpretive charity of the living. In that respect, my argument here is incidentally intended to make trouble for those who assert that a strongly textualist mode of constitutional interpretation follows directly from the premise that "the Constitution . . . derives its power to restrain from assumptions about [a] historical act that created it."⁵⁹

But we shouldn't lose sight of our main question. If it is true that, in the production of present-day legal authority, the framers must in our eyes be figures of rightness before they can be figures of history—our history—why, then, is not their history superfluous to the ongoing enterprise of constitutional application? Why do we not dispense altogether with the framers—their authority, I mean, not their wisdom—and look to rightness directly? Beyond respect and gratitude for their wisdom, what is it that we owe to them?

59 See Kay, *supra* note 7, at 31.

