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MICHELMAN ON CONSTITUTIONAL DEMOCRACY

C. Edwin Baker*

INTRODUCTION

In a recent and continuing series of essays and a short book, Frank Michelman has approached multiple facets of a single basic problem: "to ascertain the conditions of the possibility of political legitimacy in modern, plural societies."[1] Or the roughly equivalent question is: how "there [could] exist over time a stable and just society of free and equal citizens profoundly divided by reasonable though incompatible religious, philosophical, and moral doctrines."[2]

In this inquiry, the question of legitimacy is, of course, an ethical or moral normative question,[3] and the answer that a person finds acceptable will depend on her ethical or moral perspective. A religious person might conclude that coercive law is legitimate if and *only if* in accord with God's will. The perspective that Michelman—and, he suggests, the theorists he examines—assumes might be described as "liberal normative individualism," which in particular emphasizes the

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1. Frank I. Michelman, *Rawls on Constitutionalism and Constitutional Law*, in *The Cambridge Companion to Rawls* 394, 395 (Samuel Freeman ed., Cambridge U. Press 2003).

2. *Id.* (quoting John Rawls, *Political Liberalism* xx (Colum. U. Press 1996)) (internal quotations omitted). For the moment I disregard a point that becomes important later—that the questions diverge slightly if "legitimacy" turns out to be a less demanding requirement than having a "just society." *See* Frank I. Michelman, *Human Rights and the Limits of Constitutional Theory*, 13 Ratio Juris 63, 70-74 (2000) [hereinafter Michelman, *Human Rights*]. Michelman distinguishes a valid law (in a positivist sense), a legitimate law, and "rightness on the merits." *See* Frank I. Michelman, *Is the Constitution a Contract for Legitimacy?*, 8 Rev. Constl. Stud. 101, 115 (2003) [hereinafter Michelman, *Contract for Legitimacy*]. Thus, though slave codes are no doubt unjust, Michelman appears to leave open the possibility that they may have been legitimate in 1858—seeing that as a question that each must answer for herself, *id.* at 117—but emphasizing that the search for legitimacy relates to a desire and need to find justification for collaborating in the enforcement of laws that are "witless, vicious, and unjust." *Id.* at 103.

3. There is also a sociological tradition associated, for example, with Max Weber, which inquires into conditions under which people will *believe* in the legitimacy of law. Throughout these essays, however, Michelman is clearly interested in the normative, not Weber's descriptive, issue of legitimacy. *See e.g.* Michelman, *Contract for Legitimacy*, *supra* n. 2, at 105 n. 19. Still, I will note later that in taking various implications of what, following Rawls, he calls "Hobbes' thesis," Frank I. Michelman, *Ida's Way: Constructing the Respect-Worthy Governmental System*, 72 Fordham L. Rev. 345, 346 (2003) (quoting John Rawls, *A Theory of Justice* 240 (Harv. U. Press 1971)) (internal quotations omitted), his analysis at times may also rely on a (quite questionable) position respecting sociological legitimacy.

moral importance of viewing the person ideally as "free and equal." In this formulation, "free" apparently requires that the individual be self-governing, that she give law to herself. From this perspective, Michelman restates his question. Now it is whether the rule of law or, more specifically, the democratic principle—which inevitably includes people on the losing side of any choice of ruling law—can be consistent with *individual* self-government.[4] This consistency is apparently morally necessary. In the end, Michelman seeks to chasten our hopes. Neither the ideal of democracy (or the rule of law) nor individual self-government should be abandoned, but the reality of our condition is that they will remain in tension, with neither capable of full realization.[5] The best we can do is some pragmatically defended and, hopefully, acceptable and accepted compromise.

With some emphasis on his book, *Brennan and Democracy*, this essay first describes the structure of Michelman's approach to the question of whether constitutional democracy can provide a solution to the aim of having a just society of free and equal citizens. Part II highlights and comments on some features of this approach. Finally, Part III considers whether shifts in the understanding of the moral theory underlying his inquiry, shifts that may already be developing within his investigations, would helpfully advance his—and modern political philosophy's—major project.

I. THE ARGUMENT

A. *Constitutional Democracy: An Attempted Solution*

Anyone embedded in the last generation's ubiquitous (and often boring) constitutional debates might expect that in his book, *Brennan and Democracy*, Michelman would pose the now traditional question: is constitutionalism consistent with democracy—a question often described as the counter-majoritarian difficulty.[6] This characterization, however, both misunderstands and trivializes his recharacterization of the issue. It quickly becomes evident that Michelman's inquiry more deeply raises the question of whether any government, any legal order, even a democratic government (*whatever* that turns out to mean), is consistent with self-government of persons.

Michelman emphatically begins with the supposition that the liberal moral ideal of a person as a free and equal moral being requires that the individual person be individually self-governing. Following Rousseau (and presumably Kant), the moral idea is that "each individual human being remains or becomes

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4. Michelman emphasizes that the need is for each individual to be self-governing, that is, for everyone to be able to count themselves authors of the laws. *See* Frank I. Michelman, *Brennan and Democracy* 10-12, 49 (Princeton U. Press 1999). I will discuss later the difference between this and an alternative formulation that he also uses—each being able to endorse, agree, or accept the laws, a list of verbs that may involve a progressive weakening of what is required.

5. *See id.* at 8.

6. *See id.* at 4-6; Don Herzog, *Up from Individualism*, 86 Cal. L. Rev. 459, 459 (1998) (reading Michelman's concern as being with an asserted counter-majoritarian difficulty).

his or her own governor."[7] Then the dilemma becomes whether any political or legal order, which necessarily threatens and potentially uses coercive force to enforce its mandates and does so even (or especially) on those who dissent from those mandates, is consistent with the liberal normative idea of the person as a moral being, giving the law to herself. The book examines how constitutionalism can be understood as a valiant attempt, but inevitably (as a matter of fact and logic[8]) not a completely successful attempt, to provide a solution.[9] That is, he explores constitutionalism not (only) as in conflict with democracy but, more importantly, as possibly essential for democracy to realize its normative ideal of being government "by the people," meaning by *each* individual person.

The transition from constitutionalism as a problem to the more interesting view of it as a possible solution follows if, to be morally satisfactory, democracy crucially involves, or at least must be consistent with, *self*-government. On this construal, the normative point of democracy or its variant, constitutional democracy, is to make the rule of law consistent with a person being self-governing in a moral sense. (Michelman repeatedly insists that it is only the individual person's self-government for which we have any moral reason to care.[10]) In brief, the argument observes that although a person inevitably will find herself in disagreement with particular laws, she could still see herself as in some sense the author of such laws if she chose, or maybe if she approved or endorsed and hence treated as her own, the method by which it became a law. That is, *if* there were consensus on the law of lawmaking (roughly on the constitution or on constitutional essentials), then everyone could see the resulting laws as of her own making even if she did not approve of a particular law. It is like saying, "I got myself into this fix with my eyes wide open," maybe even adding, "and I would not change it even now."

Of course, those who understand democracy to require that people decide for themselves all important politically decidable matters routinely view constitutionalism as problematic.[11] Democracy must mean at least that nothing

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7. Michelman, *supra* n. 4, at 10. Rousseau, whom Michelman invokes, famously posed this issue in the context of political association, but I assume the issue can more generally be seen at the basis of Kantian moral theory. Michelman is insistent on this theme of each individual's self-government, which is crucial to the dilemma as he construes it. *See e.g. id.* at 12-14.

8. *See id.* at 8.

9. In other essays, Michelman considers whether other strategies, either as supplements or alternatives to the Constitution, can provide an adequate solution. Thus, he investigates public reason, *see e.g.* Frank I. Michelman, *The Problem of Constitutional Interpretative Disagreement: Can "Discourses of Application" Help?*, in *Habermas and Pragmatism* 113, 121-23 (Mitchell Aboulafia et al. eds., Routledge 2002) [hereinafter Michelman, *Interpretative Disagreement*]; Frank I. Michelman, *Postmodernism, Proceduralism, and Constitutional Justice: A Comment on van der Walt and Botha*, 9 Constellations 246, 258-59 (2002) [hereinafter Michelman, *van der Walt and Botha*], division of principle and application, *see e.g.* Frank I. Michelman, *Morality, Identity and Constitutional Patriotism*, 76 Denv. U. L. Rev. 1009, 1023-26 (1999) [hereinafter Michelman, *Constitutional Patriotism*], a fighting faith liberal conception of the good, *see e.g.* Frank I. Michelman, Modus Vivendi Postmodernus*? On* Just Interpretations *and the Thinning of Justice*, 21 Cardozo L. Rev. 1945, 1963-64 (2000), and individual (and thus non-duplicative) interpretative reconstruction, *see e.g.* Michelman, *supra* n. 3, as possible strategies.

10. Michelman, *supra* n. 4, at 6.

11. *See id.* at 5-6.

like constitutional norms be set beyond people's (routine?) activity of deciding, but that seems the very point of the norm being constitutional. While Michelman does not reject this point—he in fact emphasizes it—he also shows that this characterization of a contradiction between these two ideals—constitutionalism and democracy—is too glib. After invoking Dworkin and Post as construing democracy as a matter either of people having certain rights (Dworkin) or of having certain lawmaking procedures (Post), Michelman suggests constitutionalism seems to have a foothold in redeeming the aim of serving self-government.[12] Dworkin and Post can be read to say that constitutionalism does this by promising a legal order that a person could herself subscribe to precisely because of its content or procedure. Nevertheless, these arguments inevitably falter. At best, Dworkin gives reasons "to respect and accept laws made by some agency other than yourself, which is not at all the same thing as . . . [seeing] yourself as lawmaker to yourself."[13] Post's attempt to do without substantive foundations and thus leave people democratically free fails, in the end, to do without substantive foundations. Such foundations are inevitably necessary to justify a favored procedure. The hope that *all* could view the results as their own because they would legislate or, equivalently, because they would agree to, either Dworkin's substance or Post's procedure also necessarily fails. In a world like ours of deep but reasonable pluralism, such agreement on procedure or rights cannot be reasonably expected (or found).[14] Even if they intended to empower (procedurally or substantively) the individual involved in self-government, Dworkin and Post—and Brennan—fail in providing for *self-government.*

Eventually, however, Michelman salvages some defense of an imaginable constitutional democracy.[15] He suggests that you can still consider yourself a self-governing person if a variety of conditions are met. Initially, assume that you believe there are foundational conditions of right government but that, though these conditions are subject to reasoned argument, they are not publicly ascertainable. That is, certainty about their content is impossible, for example, because of deep cultural pluralism, the burden of judgment, and limited real time for discussion. Assume also that because of the value of freedom, you believe it is morally important that people be able to abide by law out of respect for the lawmaking system and that this is only possible because (and if) the foundational principles of rightness for the lawmaking system are ones that everyone "has controlling reason of his or her own to agree."[16] As a *reasonable* person, you also could recognize that people need to proceed with at least temporary settlements, despite these inevitable disagreements, especially if these settlements follow from an institutional arrangement that a person can recognize is *more likely* to get at right conclusions about foundational rights and institutionalized lawmaking

12. *See id.* at 16.
13. Michelman, *supra* n. 4, at 32.
14. *See id.* at 46-49.
15. *See id.* at 55-57.
16. *Id.* at 55.

procedures than would any individual on her own. Constitutional democracy with judicial review, if it meets some further conditions that improve, for example, judicial review's epistemic capacity, might be such an arrangement. Then, because of its epistemic capacity for getting at right answers, you "might be able to abide, . . . out of respect for the arrangements."[17]

There is, however, slippage here. Normative individualism requires each person to be self-governing. At one point Michelman wonders if it is enough to "be in a state of self-government"[18] if "you willingly abide by the system."[19] The answer seems to be that if you abide because you "approve [the system] as right, you would seem to be in as full a state of self-government as politics can afford."[20] On the one hand he seemingly rhetorically asks, could not you abide by the day-to-day results of these basic arrangements "out of respect for the arrangements"?[21] (I take it that respect relates to the arrangements being the best we can do at getting it right, not that a person actually believes that they are right.) On the other hand, he adds not so rhetorically, "Would you not then freely be governing yourself . . . ?"[22] Michelman offers doubt. He asserts that "[t]o find the laws deserving of your respect is not yet to decide the laws."[23] Still, he asks, again not rhetorically, "And what of it?"[24] I take his implied answer to be that this may be the best we can do. He asserts both that the demand for *self*-government and the need for *collective* government (that is, democracy as a basis of the rule of law) are normatively compelling but that, at least given the limits of human understanding and deep ethical pluralism, they will necessarily be in tension. The best possible solution will be some sort of pragmatically defended and, hopefully, acceptable and accepted resolution—will be "choosing among necessarily compromised offerings of necessarily damaged goods."[25]

B. *Discursive Structure*

The discussion of constitutional democracy in his book on Brennan illustrates a more general discursive structure found in much of Michelman's recent work. Here, I offer a stylized summary of typical moves in the argument, moves that vary somewhat with the particular proposed solution being evaluated.

(1) First, Michelman repeatedly identifies how a specific theoretical problem or theorist directly or indirectly raises the more basic issue of the *possibility of legitimate law* or of legitimate politics under conditions of reasonable pluralism, the actual context in which we find ourselves. (2) He then suggests that he and

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17. *Id.* at 60.
18. Michelman, *supra* n. 4, at 52.
19. *Id.*
20. *Id.*
21. *Id.* at 60.
22. *Id.*
23. Michelman, *supra* n. 4, at 62.
24. *Id.*
25. *Id.* at 8; *cf.* Michelman, *van der Walt and Botha*, *supra* n. 9, at 260-61 ("[R]efrain[ing] from political acts that one cannot sincerely explain as fully considerate of each and all . . . *is* justice.").

any theorist he examines assume that the answer, if there is to be one, must accord with people being "*free and equal*" and also must justify use of *coercive* legal power over these people, including, inevitably, people who were on the losing side of some real world political decisions. That is, the solution must show how a state's willingness to use coercion to enforce political decisions is consistent with the freedom of political losers.

(3) From the view of people as free and equal, he quickly moves to the proposition that any free and equal person could only find laws to be legitimate if she, *individually*, could view them as *self-authored* or, at least, as acceptable. If she does not view laws as self-authored, how is she *free*? Moreover, if she does not view the laws as self-authored, how is she *equal* to those who are, or would willingly be, the authors of such laws. More equivocal, however, is the question of what self-authorship requires. Does it require control over or choice of the law actually enacted, or something apparently less stringent? Possibly self-authorship—or the crucial notion of freedom—requires only that: (i) the law is one that she would have chosen or, more modestly, that (ii) she now willing endorses or, (iii) as a reasonable and rational person, that she knows she should willingly endorse or ratify or, perhaps to a lesser extent, that (iv) she cannot *reasonably* reject? (Michelman quarrels with Post over whether each person needs to be able to exercise some influence or control over lawmaking, as Post suggests, or only that the system get as close as possible to process-independent right content for the basic laws of lawmaking.[26] Although Post's emphasis might seem closer to active self-authorship, *some* influence is overtly inadequate to provide for any full sense of self-authorship. In contrast, some sense of self-authorship *might* exist without control if you live only by basic laws that you would have adopted if, for instance, you knew what was right to adopt.)

(4) For each person to be able to view herself as governed by self-authored law seems to require at least *unanimous* acceptance of, if not each individual's control over, the content of the legal order. "Unanimity" *also* can be given different interpretations. One interpretation might be empirical (which is unlikely to occur). The content of such empirical acceptance is quite likely to vary from society to society. Possibly better is an interpretation that emphasizes *universalism*. The claim that legitimacy is a moral, not merely ethical, matter asserts that the right answer is right for all people; they all ought, whether or not they will (or historically, even could) accept this answer.[27] In this view, the claim is that the conditions of legitimacy should, at least theoretically, be capable of being accepted by all. Still, even if all people *could* accept it, have the demands of liberal moral theory been met? This seems unclear. Acceptability seems less than self-authorship (or even actual acceptance). Arguably, self-authorship asserts that

26. *See* Michelman, *supra* n. 4, at 52-54.

27. *See* Michelman, *Interpretative Disagreement*, *supra* n. 9, at 117, 132-33; Michelman, *Constitutional Patriotism*, *supra* n. 9, at 1018-19 (noting this emphasis in Habermas). This usage treats "morality" as making purportedly universal claims of rightness and "ethics" as making claims only of what is right for "us" or for "me."

each person—and therefore all people—is able to view the content of the legal order as in some sense law that she does give to herself. Unanimous self-authorship is somewhat more specific and more demanding than mere acceptability.

(5) The argument proceeds by recognizing the empirical implausibility that each person could in any meaningful way view herself as the author, or could even support as desirable, all laws that even the best modern state will produce. Thus, presumably the acceptability, if there is to be such, of laws must be *displaced* (either totally or partially) onto the lawmaking process.[28] Maybe a person can accept even a law that she considers undesirable if (i) she recognizes the real need for legal ordering and (ii) she accepts as desirable (and fair?) the lawmaking process that produced the law. Thus, the argument for legitimacy hinges, in Habermas's terms, on the possibility of a persuasive procedural theory or, in Rawls's analysis, on laws being produced under a constitution—a law about law making—the essentials of which are appropriately (apparently universally, fairly, and rationally) acceptable to the people governed by it. That is, legitimacy requires a *constitutional contractualist* interpretation. Then a person can accept even (subjectively) bad laws because she and all others can or do accept the essentials of the legal order that produces the law.

(6) Still, even with this displacement of the burden of acceptability onto the process, it is still implausible to think that every person in our actual world does (or would) actually find the same lawmaking process or purportedly ideal constitution acceptable. Thus, Michelman and the theorists he examines all recognize that the agreement or the universal acceptability of the process or the constitutional essentials must in some way be *hypothetical or counterfactual*, although precisely the way it is so differs somewhat among theorists. For example, maybe the hypothetical aspect only results from the need to find agreement in real time and space. Maybe it results because acceptability would be possible only under stringent counterfactual conditions. In particular, maybe it would only be possible if people were of a certain sort—rational and reasonable. These differences can be very important.

(7) At this point, the argument becomes quite complex. Michelman repeatedly raises the telling claim that the theoretical efforts to find possible bases of legitimacy may never be fully successful. Still, the *great practical benefits* of a legal order that are only available with sufficient empirical acceptance of its legitimacy may motivate continued efforts at justification.

(8) Michelman frequently suggests that for it to be plausible that a person could even hypothetically find a constitutional contract or any lawmaking process acceptable, a number of stringent requirements must be met. At first, it would seem that a key requirement is for a person to be able to know the content of the process (or of the substantive rules). The *content must be fixed* in order for a

28. *Cf.* Michelman, *Interpretative Disagreement*, *supra* n. 9, at 132 (interpreting Habermas to require that each can "with good reason regard [herself] as author[] of at least the regime's most basic, framing constitutional principles . . .").

person to know whether (hypothetically or actually) to accept it. How can a person be comforted by—much less agree to—a process that is undefined or constitutional essentials whose content is unknown? (9) Michelman, however, invokes the pragmatist insight, which tracks the critical legal studies's so-called *indeterminacy thesis*,[29] that interpretations can always be controversial and that no "rule can 'regulate its own application.'"[30] This fact undermines the possibility of fulfilling the requirement of describing determinant content, either of the process or of the substantive rules, to which people might agree.

Finding among the theorists he examines an initial apparent need for determinant content, Michelman examines how each does or could respond. Various moves are offered—e.g., distinguishing acceptable principles from contested applications, relying on public reason for removing indeterminacies, or invoking the motivational force of a rational constitutional patriotism. Each move purports to overcome the problem of indeterminacy through acceptance of the legitimating role of the "idea" of a constitutional solution, though, of course, each move will itself also be indeterminate.

(10) For example, an option, drawn from Rawls's later work to which Michelman is particularly attracted, relies on some conception of *public reason.* People having followed his argument to this point, not being stupid, might (hypothetically?) conclude (agree?) that indeterminacy is acceptable as long as people responsible for the legal order respond to the indeterminacy in a particular way, namely with the use of public reason. They are even more likely to conclude so if they have, as they do, good reason for a *constitutional patriotism.* Specifically, maybe people could find indeterminacy acceptable if they could see disagreements about indeterminate matters as, first, never anything other than temporarily settled and settled only out of necessity and, second, settled only by authoritative discourse procedures (either legislative or, if epistemologically preferable, judicial) that consider and do not exclude any publicly appropriate reasons.[31]

(11) Still, related to (as a partial cause) but normatively independent of the problem of indeterminacy is the deep social or ethical *pluralism* of different, even if reasonable, comprehensive doctrines or ethical identities. These differences make any hypothetical, much less actual, agreement among even reasonable or rational people unlikely. Not only is the same truly public reason not always identifiable from different pluralistic standpoints, but also neither public reason nor constitutional patriotism are likely to be acceptable to all as sufficient to arrive at a constitutional settlement, that is, a constitutional contract. This is the point where Michelman can conclude our condition is such that we cannot fully have both self-government and legitimate democratic government, but that we should

29. *See* Frank I. Michelman, *Justification (and Justifiability) of Law in a Contradictory World*, in *NOMOS XXVIII: Justification* 71, 78 (J. Roland Pennock & John W. Chapman eds., N.Y.U. Press 1986).

30. Michelman, *Interpretative Disagreement*, *supra* n. 9, at 125 (citing Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. Rev. 781, 801 (1989)).

31. *See* Frank I. Michelman, *Living with Judicial Supremacy*, 38 Wake Forest L. Rev. 579, 604 (2003).

not give up on either ideal—we must accept damaged goods as we try to do the best we can. Doing the best we can in this enterprise may lead to a less oppressive, more desirable world than would the victory of any other approach.

II. COMMENTARY

Michelman's inquiry is very systematic and at each point generally persuasive. Still, eventually I will ask whether a slight change in the ambition and basis of the normative argument allows for different conclusions. Before considering that change, however, several points about the argument merit comment.

First, consider the central issue: the conditions of possible political legitimacy. Any examination of a theoretical analysis should be sensitive to the possibility of unconscious ideological distortion. As probably the central issue of political theory, surely, taking up this issue cannot be faulted. Still, it is always worth taking a step back and asking two questions: To whom is the inquiry and any answer directed, and for what purpose might the inquiry be informative? In the real world, to vastly oversimplify, at any moment there are those who are in power and those who are not—or those who approve of a particular regime (or of major and sufficient aspects of it) and those who do not.[32] And among possible aims of the inquiry are to determine: (1) whether enforcement of existing law is justified; (2) whether compliance and daily complicity with a legal order that the inquirer thinks is in some respects deeply wrong, wicked, or unjust can be justified; (3) how the existing order needs reform; and (4) whether illegal resistance is justified.

Each question is proper. Still, sometimes academic theorists seem to serve as apologists for the existing order, possibly engaged in an often unconscious effort to give "yes" answers to the first and second questions above, a "no" answer to the fourth, and a lack of real concern with the third. Such efforts could bolster the sense of legitimacy of those in power, rationalizing, at least to themselves, their power and their role. Or they could be seen as seeking to convince those out of power of the acceptability (or necessity) of their subordinate status or otherwise losing position. Something might be learned from critics or interpretations that lay such a charge of unconscious ideological rationalization against a theorist.[33] Of course, neither Michelman, Rawls, Habermas, nor any other theorist examined by Michelman sees his or her work in that light. Rather, among other goals, their investigations into legitimacy are typically intended to perform a critical task of

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32. Obviously, this is only one way to divide up the possible audience for the question. My motivated choice can be distinguished from an infinite variety of other possible divisions—for example, between political theorists on the one hand and a broader category of everyone else, from most brain surgeons to steel workers to the employed, on the other.

33. For example, consider the claim that Habermas's recent investigations of the problems discussed here uneasily straddle a critical commitment to radical democracy, for which he is indebted to Nancy Fraser, and an accommodation to a more apologetic democratic theory of Bernhard Peters. *See* William E. Scheuerman, *Between Radicalism and Resignation: Democratic Theory in Habermas's* Between Facts and Norms, in *Discourse and Democracy: Essays on Habermas's* Between Facts and Norms 61 (Rene von Schomberg & Kenneth Baynes eds., S.U.N.Y. Press 2002).

providing standards to guide reform or against which to hold up an actual regime for criticism. Legitimacy should be a public goal. If, as will be likely, the existing regime does not meet this goal, theorists should identify both the fact of failure and the direction of needed change. For this task, seemingly both those in and those out of power are relevant audiences. Both need to be convinced—those in power so they will willingly reform, those out of power so they will know the merits of their dissent, although appropriate means of dissent or resistance require separate consideration. Thus, given the obviously proper potential uses of the results of the inquiry into the conditions of legitimacy, my question may seem impertinent. Still, the danger of unconsciously becoming an ideological rationalization rather than an emancipatory guide counsels care. When choices in argumentative development occur, it may be desirable to consider whether the theoretical move is more explicable from the perspective of the interests of the powerful or of those out of power.[34] This awareness could provide, for example, a way to explain, defend, or criticize moves within Michelman's explication of his inquiry.

Second, consider the assumption that the people to whom the justification must be provided are conceived of as being free and equal. This formulation is shared ground among modern liberal theorists. I will put aside that many people over much of history rejected the assumption.[35] Since I am among those for whom it is shared ground, I rather observe that its precise meaning is hardly clear. Given the existence of alternative interpretations or elaborations, there is a distinct possibility that the choice among them could make a difference for conditions seen necessary for the legitimacy of coercive law. For example, why does "free" require that a person only be subject to coercive law that she gives to herself, as opposed to . . . what? Maybe, as opposed to having a right (and a capacity?) to participate in a collective process in which a majority chooses the law.[36] Does "equality" require that law be *neutral* between (not *disfavor* some) acceptable conceptions of the good or, alternatively, only that law not exhibit *disrespect* for anyone or anyone's non-justice-violating conception of the good? Does equality entail other standards for evaluating the legal order? Answers to such questions would have obvious implications for the necessity of a unanimity requirement, either actual or hypothetical, for acceptance of the lawmaking framework. Understanding the basis of this conception of people and the context(s) in which it

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34. My sense is that some people whom I greatly respect reject the type of theoretical enterprise in which both Michelman and this paper engages on the ground that what needs to be done is sufficiently obvious that theory at best almost *always* works as a counterproductive diversion. That view might be right, but obviously even as I note it, I reject it.

35. *See generally* Jeremy Waldron, *Two Essays on Basic Equality* 21-22, 39 (unpublished manuscript 1999) (available at <http://www.law.nyu.edu/clppt/orginalpapers/waldron.doc>).

36. *See* Martha C. Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge U. Press 2000); *cf.* Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 Wash. U. L.Q. 659, 670-72.

is applicable or appropriate[37] could clarify the nature of, or fulfillment-conditions for, a legitimate legal order.

Third, one strong conception—possibly following both Kant and Rousseau—of "free and equal" suggests that each individual should equally be able to view herself as the author of the laws to which she submits; otherwise in what way is she free or autonomous? At many places, self-authorship seems to be replaced with a notion that each individual should be freely able—presumably independent of any threat of coercion and, maybe, independent of the fear of a Hobbesian world as the only alternative—to view the laws as *acceptable*, that is, should be able to agree to laws actually authored by someone else. An agreeable constitutional *contract* seems to be a substitute for authorship in some relevant sense. Sometimes the statement, with occasional references to Thomas Scanlon, is more a matter of whether the relevant aspects of the legal order are ones that "no one could reasonably reject."[38] Each alternative apparently implies involvement of a non-coerced agent. Still, in everyday parlance, authorship or choice, agreement, and ratification or acceptability seem somewhat different criteria. Usually authorship intuitively suggests an *individual* activity, while agreement suggests a necessarily *intersubjective activity*, as does rejectability—namely, the capacity in discourse to say "yes" or "no" to someone else's choice. The question is whether any arguable slippage (or difference) is relevant for the issue of legitimacy.

Fourth, and related to the notions of "free" and "self-authorship," *each* person being able to view a law as a matter of individual self-authorship or acceptability appears to require some sense of unanimous approval or acceptance of the laws. Michelman treats this implication of *self*-government as almost definitional of a liberal theory of legitimacy. This demand might be contrasted with an alternative view of legitimacy. Maybe laws should be good for the community or the people as a whole, in which case the needs of the community, possibly as identified by a majority, would suffice to show the law's legitimacy. Or, for a slightly different conception that might still claim to be liberal in Michelman's sense, maybe the idea of freedom in respect to those matters or activities like law that are properly and essentially "social to the core"[39] should not be self-authorship, or even approval, but something else—maybe an appropriate form of participatory involvement. This possibility I explore more in Part III.

Fifth, consider how curiously far removed the emphasis on agreement, acceptance, and especially unanimity is from the real world of political struggle and political conflict. On its face, the search for legitimacy conditions that would enable each person to view herself as author of the law seems synonymous with an

37. *See* Rainer Forst, *Contexts of Justice: Political Philosophy beyond Liberalism and Communitarianism* (John M. M. Farrell trans., U. Cal. Press 2002).

38. T. M. Scanlon, *What We Owe to Each Other* 153 (Harv. U. Press 1998) [hereinafter Scanlon, *What We Owe*]; T. M. Scanlon, *Contractualism and Utilitarianism*, in *Utilitarianism and Beyond* 103, 110 (Amartya Sen & Bernard Williams eds., Cambridge U. Press 1982).

39. Michelman, *supra* n. 4, at 15.

attempt to eliminate—I must emphasize, eliminate, not suppress—conflict. Though surely an honorable ambition, this still is an arguably peculiar scholarly aim for political theory. Maybe conflict is intrinsic to the human condition. If so, should political theory be about the conditions where conflict is abolished, or about proper approaches to responding to, and proper determination of the side to align oneself in, our inevitable conflicts?[40] Marxist social theory is not unique in seeing actual society riveted by fundamental conflict. Why this aim of abolishing conflict? It seems implausible if differing groups are identified as oppressors and oppressed. But, maybe because subconsciously less overtly so identifiable, this aim is more plausible when differing groups are identified as culturally or ethically pluralistic than when conceived of as capitalists and workers or those with and without great wealth. If people are taken as they are, as opposed to taken as rational and reasonable, the theoretical aim might instead be more to understand and guide justifiable struggle rather than to reach hypothetical agreement. The moral as well as political issue is often conceived, to paraphrase President Bush's foreign policy, to determine on whose side one should be. (Of course, one might reject Bush's instinctive answer that one should side with the rich and powerful who, for example, proudly possess and willingly threaten use of weapons of mass destruction.)

The quick response is that making conflict the premise confuses the level of inquiry. Michelman and the theorists he examines are responding precisely to unavoidable pluralism, that is, to the real fact of value or ethical conflict. Many of the issues he examines would not exist in a world of ethical solidarity or consensus. His inquiry concerning conditions of legitimacy is, in part, directed at this critical question of whose side to join or what response to make in real world struggles—of what reforms are necessary on behalf of those who object to being subject to coercive force. Different theoretical investigations have different objectives. The pragmatic question of how to respond to political, cultural, or class conflict is simply a different issue from, and is arguably secondary to, the matter of coming up with conceptions of the criteria of legitimacy.

Still, it is worth considering why the inquiry takes identifying the conditions or content required for (hypothetical) consensus as its organizing theme. An alternative could have been to identify the criteria with which to know who or what content should prevail in the face of ever-continuing conflicts. Or, as a related but somewhat different matter, one could ask whether the theoretical aim should be—rather than understanding the conditions for universal consensus on the legitimacy of law—understanding how or when or the extent to which conflict, including one group prevailing over another, is proper and legitimate.[41]

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40. *Cf.* Ralf Dahrendorf, *Class and Class Conflict in Industrial Society* (Stan. U. Press 1959).

41. *Cf.* William Rehg & James Bohman, *Discourse and Democracy: The Formal and Informal Bases of Legitimacy in* Between Facts and Norms, in *Discourse and Democracy: Essays on Habermas's* Between Facts and Norms 31 (Rene von Schomberg & Kenneth Baynes eds., S.U.N.Y. Press 2002). They see the existence of ineliminable conflict—and presumably this conflict can apply also to the choice of what process is acceptable. If so, maybe theory should explore when having one side prevail is proper, legitimate, or otherwise appropriate. On one account, this is precisely what process theory is

Sixth, Michelman repeatedly makes the point that a person cannot sensibly consider a legal order—or the law of lawmaking or its constitutional essentials—legitimate or legitimacy-producing without knowing the content of what she is accepting. There is a serious difficulty, he suggests, in the notion of rationally agreeing to something the content of which a person does not know. But he shows that this necessary determinacy in the content of the agreement is necessarily—given indeterminacy of language, but even more so, given value pluralism—unavailable. He evaluates the possibility that an indeterminate agreement could be acceptable if a person knew the legal order would respond to the indeterminacy in a specific and appropriate way, such as by using "public reason." The obvious problem, which he identifies, is that this response mechanism will itself be indeterminate. Or maybe the hope can be that if this way of responding were combined with people having a certain spirit or attitude—call it constitutional patriotism, an affirmative evaluation of the *idea* of a constitution—they could abide by the indeterminacy. Much of Michelman's careful discussion in these essays follows from these points, but I will put that aside here. Rather, here I want to consider whether there is any other way to view the quest for legitimacy than as a search for a *determinant* legal or constitutional order, a requirement seemingly implicit in the aim of having it unanimously accepted.

Consider the possibility that legitimacy is not founded on a purportedly future-controlling agreement with particular terms implicitly (hypothetically) made prior to the time of the current inquiry into legitimacy. Maybe legitimacy should be based neither on universal agreement with the content of laws nor on consistency with determinate terms of a universally acceptable constitutional contract. Instead, consider the possibility that legitimacy involves a constantly raisable discourse of legitimacy. For help in finding answers, such a discourse would likely look both backward to an actual history and forward toward predictable consequences of the current regime. So far Michelman might be on board. In his terms, this might make the regime "respect worthy."[42] Note, however, that a *discourse* does not imply that the discourse will conclude in agreement. People will predictably disagree both about the merits of present law and the proper interpretation or appropriation of past events. But they can continue to ask: given this history, given predictable consequences, is this present law or application of constitutional principle legitimate? Engagement in this *practice* does not assume agreement on an answer. Moreover, it certainly does not require that the answer turn on following any pre-existing (actual or assumed) contract. Finally, contrary to Michelman, it does not posit that the legitimacy of a legal order depends on each person being able to view herself as the author of her constraints.

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supposed to allow—supposedly legitimate prevalence to the extent produced by a *proper* process. Rehg and Bohman proposed something like this, namely, proper prevalence of one over another if three demanding but process-like conditions were met. *Id.* at 46-52.

42. Michelman, *Human Rights*, *supra* n. 2, at 73-76.

I will explore further whether such an alternative transforms and, maybe, helps resolve many of the issues Michelman raises. However, he may have anticipated this. At the 2003 Prague Conference on Philosophy and Social Science, he purported to reject "constitutional contractualist" approaches to legitimacy as doomed and misguided. If I understood him correctly, he offered as a replacement a hope for unanimous acceptance of a *practice*. People who could not reasonably expect to agree on the right interpretation of a constitutional contract might be able to accept an actual ongoing practice, maybe even if they did not all have the same understanding of the practice they were accepting. Using the analogy of two people looking at an ink-spot, with one seeing a duck and the other seeing a rabbit (or in America, I suppose one would see an elephant while the other sees a donkey), if they were also both motivated not by paranoia but by a spirit of seeking ongoing cooperation, unanimous acceptance of such an ink-spot—or constitutional practice—might be plausible.[43]

Given an understanding of legitimacy as a constantly raisable issue, an issue not looking for or purportedly solved by the existence of a contract with uncontroversially right content, the problem of determinacy takes on a different hue. Lack of determinacy of rules, even constitutional rules, would not play the same crucial role of undermining legitimacy as it did in the interpretation of constitutional contractualism elaborated by Michelman. Indeterminacy in principles or prior commitments that have not yet been redeemed or applied to particular issues would not undermine legitimacy *if* legitimacy concerns the justifiability of what is currently done. And even if in conflict, different views about "what should currently be done" are presumably relatively determinate—can be argued over—in contrast to the inherent indeterminacy of what some past linguistic act says about a then unenvisioned future.[44] Thus, in this alternative approach to legitimacy, indeterminacy about past meanings or future applications does not crucially need to be resolved at the point of the current discourse on legitimacy. Another way to put this is that maybe legitimacy should not depend

43. I have no transcript but only memory of the talk, and I may have dramatically misunderstood or misremembered it as a duck talk (which I like) while really it was about rabbits. *See* Michelman, *supra* n. 3. Still, I am inclined to object to one aspect, specifically Michelman's purported rejection of the contractualist metaphor. In my view, the main accomplishment of contractualist thought is to emphasize that legitimacy involves obligations that grow out of people's "connections," their social or plural practice as opposed to matters involving pure self-reflection or nature or rationality. Contractualism emphasizes plurality, intersubjectivity, or a communicative ethics, not natural or "real" rights that are independent of relationship and practice. *See* C. Edwin Baker, *Foundations of the Possibility of Legitimate Law* (unpublished manuscript 2003) (copy on file with *Tulsa Law Review*). Of course, it may be that I like the "social" aspect of "social contract," while Michelman objects to the "contract" aspect, thinking of contract in strictly legal terms of a past meeting of the minds—the control of the future on the basis of a determinate agreement. Still, that may have never been the best way to view contracts subject to continuing modification, which normally involve something much more relational and open-ended. *See* Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 Am. Sociological Rev. 55, 56-57, 61-62, 64 (1963).

44. *See* H.L.A. Hart, *The Concept of Law* 121-32 (Oxford U. Press 1961) (emphasizing the desirability as well as the necessity of the open texture of law).

on a traditional conception of the rule of law or on the existence of a "hypothetical-contractual *body* of constitutional *law*."[45]

Envisioning legitimacy this way changes other analyses, too. This approach emphasizes that legitimacy is never settled (or settleable) by the existence of a comprehensive set of particular legal constitutional rules (or by a fully elaborated procedure or process). Rather, the inquiry is always open and is always related to an interpretation of what is done now. Possibly more important, given the constant real world need to make legally authoritative decisions, there should be an expectation that those in power who make these decisions should be able to give a defense of the legitimacy of their decisions. However, there is no reason to presume that the defense they consider convincing will receive ratification by those addressed. That is, the possibility of conflict—that is, lack of unanimity or of agreement—would be built more fundamentally into the practice. If so, the inquiry should turn more to the implications of failures of agreement for people engaged in a communicative process that is aimed, not always successfully, at reaching agreement. The implications could be different for those who agree with the current acts or interpretations (i.e., those who prevail politically or are in power) and those who say "no."

Seventh, and finally, unanimous agreement even on constitutional essentials has never taken place. Given people as they are—in numbers, in psychology, and, in the real world, in positions where both their material and ethical interests apparently conflict—actual agreement seems fanciful. But no problem! Michelman and the theorists he examines treat the agreement on or acceptance of a constitutional contract as hypothetical or counterfactual. Whatever the moral significance of actual contracts,[46] that of hypothetical agreements is much more obviously in need of explanation. What counterfactual conditions must be hypothesized to make hypothetical unanimity plausible? How is the choice of those conditions rather than other conditions justified? And, relatedly, what makes the hypothesized agreement normatively significant or, more specifically, normatively significant for what purposes?

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45. Frank I. Michelman, *Relative Constraint and Public Reason: What Is "The Work We Expect of Law"?*, 67 Brook. L. Rev. 963, 985 (2002). Michelman observes how Steve Winter's assertions of lack of determinant legal *control* by legal materials can be shown to be consistent with law performing various important pragmatic functions relating to stability and settlement of disputes but, Michelman argues, not so obviously with law's liberal legitimizing role. *Id.*

46. Interestingly, the moral relevance—the obligatory force—of actual agreements or promises is not so obvious as some take it to be. Clearly, some actual agreements do not create either legal or moral obligations—for example, they might not do so because of the conditions of knowledge or unequal power under which they were made or, maybe, because of their content (e.g., to kill the guy!). When they do or do not probably varies in part with the background practices and ethical ideals of particular groups or communities in which the actual agreement or promise occurs. Thus, the obligatory quality of a contract apparently depends on "non-contractual" norms, often embodied in social practices or (contestable) ethical ideals—that is, depends on practices and premises to which people might be thought, hypothetically, to accept or agree. Maybe the (variable) obligatory force of actual agreements depends on background hypothetical agreements. Still, we are quite familiar with thinking about normative implications (and necessary conditions for the bindingness) of actual, but not of hypothetical, agreements.

Given that the relevant parties to any constitutional contract include at least all people for whom the law is intended to be legitimate, any agreement must be hypothetical. These parties never do and never could actually come together. If the agreement is imagined to apply over generations, the impossibility is even more obvious. Moreover, even if unanimous agreement among some large existing group would be possible given unlimited time for discussion and adequate rationality, surely there will never be sufficient time (nor adequate rationality) for real people to agree on the contents of a comprehensive constitutional solution. So maybe the agreement is counterfactual only because an actual agreement would require unlimited time, rationality, and physical presence. The theorist might assert that actual people *as they are* would agree given the idealized conditions of an opportunity to get together with unlimited time to discuss and given sufficient reasoning ability. This explanation resembles a common justification for limited forms of paternalism. The aim is to duplicate outcomes that the person (assertedly) would want if only she were in a favorable position to decide for herself.[47] Of course, dangers of abuse are obvious. Still, given contexts where actual informed expressions of agreement or acceptance are impossible, the counterfactual enterprise seems a plausible substitute for obtaining whatever normative force would come from actual expressions of agreement.

Some theorists may have such a logistically required counterfactual agreement in mind. But not Michelman. For him, the hypothetical agreement is an aspect of substantive moral/ethical reasoning. Moreover, like most modern theorists, he believes that even if adequately informed but otherwise *real* people could be hypothesized to be able, with adequate time, to agree to terms of a constitutional contract, their hypothesized agreement would not thereby have normative or legitimizing relevance. Certainly, an agreement that an actual rich CEO and a desperate janitor, or an actual powerful white racist and a marginalized black nationalist, could be hypothetically expected to be able to reach—presumably in a bargain that game theory predicts would contain some of what each wants—does not thereby have normative significance. Though often not stated in this way, modern moral or political theorists' enterprise seems more about trying to identify that to which actual people *should* agree, or maybe what they have *good* reasons to agree to or, somewhat differently, what an appropriately reasonable person would have no good reason to reject. If this is what is going on with hypothetical agreements, two important inquiries need to be addressed. First, explaining and describing the conditions that make the hypothesized agreement a relevant one—why it is an agreement that real people *ought* to accept—remains to be accomplished, and this will require hard justificatory work. Second, the theorist should consider the significance of this type of argument for other issues. For example, reasons that might require that this hypothesized agreement have determinant (specifically, "right") content

47. For example, this form of paternalism might represent what the Court should do in response to contexts where the political process can be assumed to break down. *See* John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harv. U. Press 1980).

would not imply anything about whether actual law or actual constitutional provisions need be determinant. That is, there is no reason to assume that the uses—or problems raised—by this type of hypothetical agreement will be the same as for actual agreements.

Although the discussion here will be woefully incomplete, I want to comment on the hypothetical reasoning that might support a constitutional contract. Consider three versions.

(1) In the everyday practice of entering into a discussion with another regarding any consensual coordination of action, the parties necessarily assume the aim and possibility, but by no means the certainty, of reaching an agreement. Speech aimed at agreement, rather than at strategic exercise power, always raises various potentially contestable validity claims. In this effort to reach agreement, both parties implicitly but *counterfactually assume* an ideal speech situation.[48] That is, this activity assumes agency and equality (for example, in the equal and autonomous ability to say "yes" or "no," or something in between) on the part of the other. The parties implicitly assume that the outcome should be determined only by the quality of the reasons offered, not by, for example, the one or the other's power (unless they can show why this is a proper reason). Analogously, a hypothetical agreement that provides for legitimacy of a resulting coercive legal order might be the agreement people would reach under those ideal conditions.[49] Thus, presupposed and normatively required as an empirical matter would be, first, the realization of these legitimacy conditions and, second, acceptance of the possibility that agreement (on the constitutional contract) would not be reached.

(2) Alternatively, maybe the agreement is the one people would reach *if* they adopted the "moral point of view," which in typical liberal Kantian constructions is a view that sees all properly as free and equal persons. Maybe moral theorists could model such a commitment to help disclose relevant content of a hypothesized agreement whose realized content would provide for legitimacy.[50]

(3) Or maybe the legitimizing agreement should be one that "rational and reasonable" persons could reach in inclusive discourses if motivated by a desire to reach agreement about fair terms for their cooperation or interaction.[51] In this formulation, "rational" is a rather straightforward capacity to engage in instrumentally intelligent calculations about advancing whatever conception of the good the person has. "Reasonable," however, is much more complex. It is likely to bear the weight of various moral requirements, such as a requirement that the

48. *See generally* Jürgen Habermas, *Moral Consciousness and Communicative Action* (Christian Lenhardt & Shierry Weber Nicholsen trans., MIT Press 1990).

49. Note that this is not Habermas's proposal. Most commonly, his use of ideal speech situation refers to the counterfactual ideal elements of actual discussions. However, any actual order or actual agreement would be subject to critique on the basis that it occurred under conditions that deviated from those necessarily presupposed in reaching it. Although in his emphasis that his is a purely procedural theory sometimes Habermas seems to suggest otherwise and although his approach does not lead to content of a hypothetical agreement, arguably his notion of communicative action provides—as critical presuppositions—a basis for seeing necessary content of a legitimate social order.

50. *See* John Rawls, *A Theory of Justice* (Harv. U. Press 1971).

51. *See* John Rawls, *Political Liberalism* (Colum. U. Press 1995).

person respond to the other as a free and equal person who merits fair consideration; that is, it will likely at least include some notion of reciprocity.

These formulations all impose stringent conditions in an effort to construct a possible conclusion. None purports to describe actual agreements or even to provide actual arguments for agreeing to any content, *unless* the constructor can convince actual parties of the propriety of the method of construction. At first the analysis may seem to have left the idea of agreement far behind and turned fully toward merely substantive moral investigation, whatever that is. This conclusion is too quick. These approaches have in common the implicit view that the issue of legitimacy is a social or relational matter that, I take it, is the key rationale for describing this as a contractual argument. They all also assume this relation should respect an equal autonomy or agency of those related. Each approach to hypothetical agreement sees that content that people could, and assertedly should, accept freely and equally is central to the hypothesized agreement. If the three approaches differ, I suppose, the main difference is that the first purports to find both presuppositions, or grounding, and motivation for normative conclusions in actual practices, while the last two leave the inquiry comparatively unmotivated. Still, for anyone willing to adopt the "moral point of view" or to seek fair terms of cooperation, the second or third may be adequate and may overlap with the first.

The above points are, I believe, largely common ground among Michelman and most theorists whom he discusses. However, worth consideration are the implications of this way of looking at the *hypothetical* agreement and the uses that can sensibly be made of it. First, unlike an actual agreement, the hypothesized agreement will most obviously be part of some *present argument*, never a past verbal act designed to control the future. The agreement will be hypothesized in order to assess the legitimacy of a present order, to determine whether currently asserted legal obligations are legitimate, to guide reform or construction of an existing constitution, or as part of an enterprise about how now to best interpret past legal acts, including an existing constitution. Certainly, the inherently indeterminate terms of a past legal event will properly only have the relevance that current argument attributes to them. Among the uses of the present argument is to evaluate a current situation or to determine what should now be done. Thus, there is no unambiguous need to attribute to people a capacity, which they may not have, to use language to identify or ratify determinant rules that can control the future.

Second, a hypothetical agreement properly gives *guidance only as far as its reach goes*. Nothing in the attempt to specify a hypothetical agreement is necessarily inconsistent with the pragmatist point that principles or rules do not control their own application and that concrete applications will always be potentially contestable. Although rule-of-law type control of the future might require some form of determinacy, present argument only requires satisfaction with claims presently made. Still, hypothesized content of a hypothetical

agreement potentially could rule out some legal content or practices as improper.[52] The argument supporting the hypothetical agreement may also provide (some) guidance as to *the spirit* in which the agreement should be applied.

Third, *consensus and conflict* have different relations to actual agreements than to hypothetical or counterfactual ones. In actual agreements, unanimity is definitionally necessary. Its absence causes the effort to fail—but that conclusion has no straightforward application to a hypothetical agreement. Also, those reaching an actual agreement presumably assume that they are in agreement on the terms, that they have a consensus, at least under the actual conditions in which, and at the time and to the extent, they reach agreement. Contract case law reports that this assumption that minds have met is often misguided—and this fact is one obvious implication of indeterminacy critiques. In contrast, the enterprise of trying to construct hypothetical agreements operates on very different assumptions. It assumes the propriety of counterfactual conditions underlying the construction—specifically, the potentially counterfactual nature or circumstances of the hypothesized parties (e.g., they are behind the veil or they are rational and reasonable). This enterprise also does not need to assume that the counterfactual agreement represents real world consensus or will prevent real world conflict. Nor need the enterprise even assume that *actual* people would agree about the persuasiveness of the present argument asserting the propriety of universal support for the counterfactual agreement.

Fourth, as implied by the earlier points, the hypothetical agreement and the argument for it can provide guidance to those exercising power about what they need to be able to offer in the way of justification before proceeding with their inevitable exercise of power. Similarly, it can provide guidance to those subject to the law about whether they should view obedience as obligated. However, these two uses do not imply that these two groups will converge in their understanding (or identification) of the hypothesized counterfactual agreement. There is no reason to expect—or to assume the primary justification of—this enterprise is to eliminate actual or even morally motivated conflict in the real world.

Though the suggestion needs further elaboration, these differences point to a potential danger that Michelman may not have always avoided. Clearly, Michelman recognizes—emphasizes—that the hypothetical contractarian analysis is an aspect of substantive moral reasoning,[53] not a pale substitute for empirical agreements. Nevertheless, he also emphasizes needs for some determinacy and unanimity that, although necessary for real contracts, would not necessarily follow from substantive moral reasoning. Likewise, his view that the inquiry should be whether to comply with the regime as a whole, including laws that are vicious and unjust, could be motivated by an attempt to imagine an actual binding contract, but it seems under-motivated by the enterprise of substantive moral reasoning. Thus, it is worth considering the extent to which his argument, although explicitly

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52. *See* C. Edwin Baker, *Injustice and the Normative Nature of Meaning*, 60 Md. L. Rev. 578 (2001).
53. Michelman, *Human Rights*, *supra* n. 2.

emphasizing the hypothetical nature of the constitutional contractual agreement, at times evaluated this constitutional contract under standards or criteria relevant for an actual but not a hypothetical contract—constructs which serve different purposes and require different discursive achievements.

III. ALTERNATIVE INTERPRETATION OF NORMATIVE INDIVIDUALISM

The theme of "liberal" or "normative individualism"[54]—"the view that the lives of individuals are the ultimate moral concern for political arrangements"[55]—is, as Michelman recognizes, an insistent though partisan ideal, a "fighting faith." I join Michelman in accepting this ideal. Still, the proper meaning of this individualism in particular contexts—specifically, here the context is "democratic government"—requires careful consideration.

Michelman notes that a theorist might view self-government as government by some collective self, some conceptual whole—e.g., the "People" might be the relevant agent.[56] But he bets that not only Brennan, Dworkin, and Post but also his readers will find that implausible. Rejection of this construal of self-government, he suggests, follows from "our"—or at least purportedly from his quite appealing cast of characters'—inability to credit the meaningfulness of self-government by something, a collectivity or political community, that "we cannot see as having a consciousness and a will of its own."[57] Instead, he predicts this audience will understand *self*-government as self-government of individual persons,[58] meaning self-government "of and by each person."[59] Apparently, normative individualism's mandate for democracy is a demand that it achieve a situation in which, as Rousseau wished, each person can accept the law as in some sense an assertion of her own will,[60] although, as noted in Part I, procedural displacements and notions of consistency with her own will—that is, acceptability or endorsement rather than active authorship—may suffice. Still, self-government by the individual is the ultimate moral concern. This is his claim. Is he right?

At least for one with a penchant for severe dialectical tension, an inclination which certainly fits Michelman's dialectic writing style and possibly his intellectual character, this view of self-government is a plausible interpretation of the moral ambition of democracy. However, I want to examine this move. Does normative individualism really require this ambition? Is there any appealing, alternative, normative but still liberal and still *individualist* interpretation of democracy that would avoid or reduce the conflict between these moral ideals of *self*-government and the rule of law? If there is, the nature of dilemmas that Michelman sees for

54. Michelman, *supra* n. 4, at 66-67, 123.
55. *Id.* at 67.
56. *Id.* at 13.
57. *Id.* at 14.
58. *Id.* at 12-14.
59. Michelman, *supra* n. 4, at 14; *see* Michelman, *Constitutional Patriotism*, *supra* n. 9, at 1015.
60. Michelman, *supra* n. 4, at 10.

the normative individualist's acceptance of constitutional (or majoritarian) democracy may change.[61]

A. An Alternative Based on Communicative Action

What could be an alternative interpretation? First, accept Michelman's beginning point: the lives of individuals (and their agency) "are the ultimate *moral concern* for political arrangements."[62] Of course, other views exist. Someone may believe that only service of God ultimately matters, maybe even if that service does not involve exercises of an individual's agency. I will put such possibilities aside. It is certainly a worthy project to understand the implications of the commitment to liberal individualism that I share with Michelman. And note that, in good liberal fashion, this individualism leaves a person free to live her own life in accordance with the above suggested religious ethical belief. Still, note the word "moral" in Michelman's beginning point. The implications of this concern could diverge depending on the basis of morality. In fact, below, I will suggest that two different understandings of the basis of morality point to alternative understandings of the ideals of self-government and democracy.

Second, accept Michelman's emphasis on the factually irreducible plurality of conceptions of the good. Given deep social or ethical pluralism in modern liberal democracies, Hobbesian fears, but predictably not normative consensus, might motivate agreement on concrete terms of cooperation. Moreover, this ethical pluralism inevitably exacerbates the interpretative indeterminacy of any constitutional contract or any terms of cooperation. Failure to obtain agreement can be expected theoretically as a possible good faith outcome, *maybe* even if "burdens of judgment" and the limitation implicit in the need for decisions in real time did not exist. I should note, however, only "maybe." The pretensions of the moral is that its claims have universal validity or, in some specifications, involve assertions that no one could "reasonably" reject.[63] Morality's purported universalism arguably implies the belief that agreement is theoretically possible among moral agents, among rational and reasonable people, at least as to morality's claims of "right." Moreover, recognizing claims of right, including claims of freedom, is presumably necessary and may be sufficient to justify the application of coercive force on a "free" person. For the moment, however, put aside this potential agreement. Certainly reasonable but different conceptions of

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61. In seeking an alternative, I waffle between challenging the view, in the context of the need for rules applicable to a collective group, that *self*-government is the right ideal, and challenging this construal of self-*government* as requiring individual authorship or acceptability. I doubt that much turns on which characterization is favored.

62. Michelman, *supra* n. 4, at 67 (emphasis added). Michelman consistently develops this point, which he often observes in Justice Brennan's writing and reasoning. *See id.* at 94 ("'The State,' Brennan wrote, 'has no legitimate interest in someone's life, completely abstracted from the interest of the person living that life, that could outweigh the person's choice . . . .'" (quoting *Cruzan v. Dir., Mo. Dept. of Health*, 497 U.S. 261, 313 (1990) (Brennan, Marshall & Blackmun, JJ., dissenting))); *id.* at 71 ("[T]he Constitution, morally read, commands unwavering respect for every individual's capacity for transcending biography.").

63. *See generally* Scanlon, *What We Owe*, *supra* n. 38.

the "good"—or, more specifically, of the "ethical," understood as referring to what is good for me or for us, as specifications of my or our identity—need make no claim of universality but do make conflicting calls for legal embodiment. Still, these competing conceptions, which law will inevitably further or impede, merely need be consistent with the right (the moral). Maybe, agreement on the right is still theoretically possible.

Given these two beginning points, how ought a speaker (or, here, the democratic majority) and a listener (or, here, the democratic loser) respond to the persistence of disagreement? Remember all the mostly procedural methods of displacing the burden of the need for agreement, that is, the suggestion that a person could accept as "hers" the laws if they come about through a process (the law of lawmaking) that she accepts, especially if indeterminacies are resolved with public reason elaborated in a spirit that she accepts. Still, disagreement is very likely to persist. What if people do disagree about fundamentals, about the law of lawmaking, about the majority's (read: the powerful's[64]) practice of secular public reason, and about the spirit of approaching unresolved issues? Moreover, what if they disagree about the significance of disagreement on these matters? Without (theoretical) agreement, is coercive force unjustified? Or, alternatively, are the losers simply losers? Does fundamental disagreement mean the essential moral failure of democracy or, more plausibly, at least the loss of moral autonomy of the political losers? That is, does legal dominance of one set of views—presumably the majority's—that are rejected by others mean the failure of a politically desirable and morally required conception of *self*-government? Kantian instincts might suggest the answer is, regrettably but inevitably, "yes." No longer can each person see herself as governed by self-given laws.

Here, I think, is where alternative conceptions of grounding of morality could lead to different conclusions. In the first conception, which might be called a "philosophy of consciousness,"[65] morality is rooted in the single individual. A person is free only when autonomously giving the law to herself.[66] Thus, in the context of government, as Michelman has told us, what finally matters morally is the self-government, the freedom, of and by each individual person.[67] This is a basic, "non-paltry" human good.[68] For this reason, each single person's agreement to the laws is central—even if derivative in the sense of accepting any law as long as it is made in certain ways or as long as certain conditions are met. Lack of agreement or at least lack of free acceptance indicates moral failure. Since in the end this cannot be achieved but can at most be an ideal that can guide our efforts,

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64. *See generally* Kenneth L. Karst, *Boundaries and Reasons: Freedom of Expression and the Subordination of Groups*, 1990 U. Ill. L. Rev. 95.

65. I take the term and distinction from Habermas. *See* Jürgen Habermas, *An Alternative Way out of the Philosophy of the Subject: Communicative versus Subject-Centered Reason*, in *The Philosophical Discourse of Modernity: Twelve Lectures* 294, 295 (Frederick Lawrence trans., 1st paperback ed., MIT Press 1990).

66. *See* Christine M. Korsgaard, *The Sources of Normativity* (Onora O'Neill ed., Cambridge U. Press 1996).

67. *See* Michelman, *supra* n. 4, at 13-14.

68. *See id.* at 13.

the rule of law, democracy, and self-government are, in Michelman's evocative phrase, at best "damaged goods."[69]

The alternative account sees morality (or at least a large portion of its domain) as irreducibly "relational"—relational between people who are necessarily themselves agents, maybe equal agents—but it sees morality arising only in, and only because of, relationship.[70] Of course, morality, to use a popular formulation, is about what we owe to each other. It is about others' claims on us within our interactions, and to this extent is almost definitionally relational. The argument, however, is not only that morality is externally about relationships, that is, about relationships as its content or subject. Rather, the claim is internal. Morality's source, grounding, justification, and motivation comes from relational practices that we cannot give up and still be the type of beings that we are and to which we are committed. More specifically, though other derivations may lead to the same conclusions, the normative relational presuppositions of, or commitments implicit in, communicative action are foundational for morality. The claim relies on the supposition that communicative action, which itself is centrally involved in our normative efforts, and the commitments which it entails are sufficiently basic to our identity that we could not give it up and still be the type beings we are and want to be.

The intrinsic *aim* of communicative action (and maybe, at least in some aspects, of democratic debate) is uncoerced agreement. The speaker aims to obtain the listener's assent, purportedly on the basis of good reasons or good arguments, while the listener's agency means that she always can make either a "yes" or "no" response to the speaker's claims.[71] And, of course, the listener also plays the role of speaker and vice versa in normal discourses. Communicative action involves an implicit normative commitment with which any participant in the discourse necessarily regards the others. Real participation requires each to entertain with open mind any claims that the other makes, requires each to stand ready to provide for her views (that is, her validity claims) reasons that she believes the other should accept, and requires that she recognize that the other may say "no." This orientation amounts to a certain apparently equal and reciprocal respect with which each must regard the other as an agent capable of agreeing (or not) and whose agreement is sought.

The respect of the other's agency implicit in communicative action does not imply, however, any assumption that the parties will achieve agreement. Especially, this respect does not assume agreement about matters for which

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69. *Id.* at 8.

70. I develop this largely Habermasian alternative in Baker, *supra* note 43.

71. This emphasis on communicative action in no way denies huge numbers of other uses of speech. People use speech, for example, in creative acts, in problem solving, in legal formalities, in play, in manipulating others (e.g., by lying or suppressing facts), and in the exercise of power (e.g., giving orders or directives). Still, the claim is that use of speech in communicative action is fundamental to social life, is something to which people are committed, is a practice on which other uses are usually parasitic, and is more ubiquitous than it might appear at first—but these are topics to be discussed elsewhere.

universal truth is not hypothesized. Where universal truth is hypothesized, the *possibility* of reaching agreement might be assumed. Still, this counterfactual or *hypothetical agreement*, as opposed to actually seeking agreement, *has little relevance* to—it is certainly not required by—the relationship or respect. That is, though communicative action involves a normative relationship whose presuppositions may serve as the grounding of morality, it assumes neither reaching actual agreement nor the relevance of a (potentially monological) hypothetical agreement.

Once respect is given—once a person entertains the other's claims and offers her own claims about moral matters that she thinks the other should accept—the participant in communicative action should finally act, I suggest, in line with what *she* thinks is proper whether or not agreement has been reached.[72] This conclusion is implicit in the underlying notion of equal agent autonomy that the context of communicative action assumes. Although it would be appealing if disagreement did not result in conflicting actions, the possibility of real, potentially coercive, conflict based on real pluralism about ethical life can hardly be assumed away. The moral stance of liberalism in valuing ultimately the autonomy of each individual, *as exhibited in communicative action*, means that an individual acts properly when she acts in accord with her beliefs about proper action even if her beliefs and the resulting acts conflict with the beliefs and acts of others.

If this follows for the individual in communicative action, maybe the same conclusion should apply to coercive actions of a political majority after it gives reasons it finds persuasive and entertains with openness all dissenting views. In this view, the majority acts properly even in applying coercive power to ethically dissenting people when the majority acts in accord with results of a collectively fair (open, respectful, reason giving) process, a process, for example, that involves majority—or sometimes judicial—determination of issues.

To put this alternative interpretation of normative individualism schematically, it allows for, maybe requires, a democratic law-making that (1) proceeds by an appropriate process, which means at least that it is truly open to the discursive participation of all, and (2) has no content inconsistent with what individuals can properly claim as a matter of right, independent of contested collective decisions. Moreover, the process (3) should *aim* at agreement—that is, should rely on reasons that the presenter believes others could and should accept (but she need not believe that they necessarily will accept) as rational, moral (reasonable) beings. However, the moral content of normative individualism (4) would not require, even in principle as a prerequisite for the majority to coercively enforce laws, that the laws receive agreement by all or even be adopted by a

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72. This evaluative action response can reasonably apply law by law rather than in the form of acceptance or rejection of the legal order as a whole, contrary to a suggestion by Michelman. *See* Michelman, *Contract for Legitimacy*, *supra* n. 2, at 105-06. Though more consideration of Michelman's claim is needed, it sounds suspiciously like "exalt[ing] order at the cost of liberty." *Whitney v. Cal.*, 274 U.S. 357, 377 (1927) (Brandeis & Holmes, JJ., concurring); *cf.* Steven H. Shiffrin, *Dissent, Injustice, and the Meanings of America* (Princeton U. Press 1999).

process accepted by all.[73] At least, this last point applies as to matters, such as most coercively enforced laws, that are necessarily or appropriately collective or social. The "People," not self-authorship, is the proper basis of most laws among free and equal persons. That is, having losers or dissenters in relation to appropriately collective decisions is consistent with normative individualism. Exercising coercive force against these dissenters is not inconsistent with their moral status, assuming the majority properly respected the dissenters in this inherently collective process of law making.

And who is to judge whether these conditions—an appropriate process and respect for process-independent rights—have been meet? Of course, the person engaged in the substantive normative investigation. Moreover, nothing about the argument justifying collective decision-making requires that this judgmental authority be denied either to individual dissenters, to the majority, or to the governing institutions charged with enforcing its understanding of the law. Of course, Michelman provides an argument that democratic legitimization could, because of its potential epistemic capacities, provide a respect-worthy reason to require and maybe to accept democratic (that is, majoritarian or, maybe, judicial) determinations.[74] But in the alternative offered here, though his epistemic point merits consideration by those who disagree, having losers in respect to ethical choices is considered theoretically unobjectionable while actual (predictable) conflict about the proper interpretation of moral requirements is not such a grim conclusion.[75] Thus, this alternative understanding of normative individualism requires and justifies the existence of democratic law-making but should expect actual conflict. Moreover, neither this conflict nor the ability of each dissenting individual to claim, in this sense, to be self-governing implies either moral failure or the illegitimacy of legal enforcement.

B. *Evaluation of Alternatives*

So the question is: how to choose between these accounts? How should a commitment to normative or liberal individualism conceive of and reconcile the presumed ideals of individual self-government on the one hand, with the ideals of democratic government and the rule of law on the other? The argument for the first view—a view that, as a matter of social fact and logic,[76] implies irreconcilable conflicts between the ideals of self-government under law and democracy—is well stated by Michelman. Self-government is insistently "the state of living a life of one's own under one's own direction":[77] self-government is simply not something

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73. I have not tried in this essay to respond to Michelman, *A Reply to Baker and Balkin*, 39 Tulsa L. Rev. 649 (2004). However, I do agree that in this sentence, which implicitly describes the Kantian/Rawlsian interpretation of normative individualism as the position that is being distinguished from the communicative action based morality, should have been "acceptable," not accepted.

74. Michelman, *Human Rights*, *supra* n. 2, at 74-76.

75. *Id.* at 72.

76. *See* Michelman, *supra* n. 4, at 8.

77. *Id.* at 13.

that "a group or community can have,"[78] such that "self-government of 'everyone[]' mean[s] of and by each person."[79] Thus, here, I need to describe an argument for the alternative view, which has the possibly pleasing quality of allowing for the consistency of ideals. Then I will explore implications of this argument for the normatively proper responses by individuals who are in dissent. Before proceeding, however, I need to note two distinctions.

First is a distinction between things that are and are not inherently social. Some things—poems, hikes, naps, fences, prayers—surely might be created or done by an individual acting by herself. Even if building or relying on the past achievements of others (compare culture and language as relied upon by the poet or the trail used by the hiker), a single individual could decide on and proceed to create or do each of these. Whether or not taking account of the interests of others, an individual normally decides on her own acts. Likewise, many things done with others—picnics or voluntary sex or political demonstrations—can occur with merely the willing solidaristic associational participation of another. Some individual activities make use of materials that are "social to the core"—individuals' discussion, for example, relies on language. Similarly, agreements or contracts may involve voluntary individual behavior. However, prior social or legal rules, which do not require unanimity to be created, determine what individual behavior amounts to an agreement or contract. Thus, there is a second category of things, as Michelman emphasizes, that include institutions, officials, and customs—and hence laws—that are "social to the core." H.L.A. Hart observed that even a king's orders could not by themselves create an obligatory law. Law, Hart shows, requires at least a social custom or practice that identifies the king, recognizes his authority, and distinguishes those of his acts that create obligations from those that do not.[80]

Social creations or activities that are "social to the core," however, do not necessarily require unanimity or consensus. Culture, language, custom, and communicative action (i.e., the attempt to reach agreement) do not. My view that "red" should not refer to a color has little importance (except to me). A morality that concedes or even demands the rightness of individual choice over many (if not all) non-social matters, even over matters that dramatically, possibly harmfully, affect others, is plausible.[81] However, a parallel claim over matters inherently social seems odd. Even if conceptually possible, a claimed natural individual right to legislate would involve power over others. The propriety of such a claim should be doubtful, especially doubtful for those that see themselves as liberal individualists (as opposed, I suppose, to royalists). Whatever the scope of self-governance for matters subject to individual determination, participatory

78. *Id.*

79. *Id.* at 14.

80. *See* H.L.A. Hart, *The Concept of Law* (Oxford U. Press 1961). And the identification of someone as king requires reliance on *social* rules or practices, a point recognized by both Michelman and Hart.

81. *See* C. Edwin Baker, *Harm, Liberty, and Free Speech*, 70 S. Cal. L. Rev. 979, 1003 (1997).

rights may be the most—and the least—that can reasonably be recognized as to social matters.

Second is a distinction between morality and ethics. In this usage, claims of morality assert a universal validity. Distinguished from morals is ethics—what either is normatively right or is good from the perspective of a person's actual situated identity. In the ethical realm, variation is common and presumptively appropriate, at least if it remains within moral bounds. Of course, the existence of this distinction is controversial. Many deny the existence of an independent moral or universal dimension, but Michelman does not appear to be among them.[82] Given the distinction, the relation between ethics and morals can be disputed. One possibility (to which I subscribe) claims that the moral provides universal requirements without exhausting the normative realm. The normative also includes the ethical realm, which should be subordinate to, in the sense of consistent with, the moral but otherwise independent of the moral universals.

A law that *each and every* person would legislate, that is, would author herself, implicitly claims universality. Except when mistakes are made (and given the burdens of judgment, mistakes are inevitable), collective choice (democracy) and giving law to oneself should converge. This possibility apparently would describe the situation of law if law were restricted to the moral, leaving the ethical to be played out in people's choices and associations made under law. The liberal fascination with neutrality[83] may represent an attempt to achieve this result—representing the view that everyone, at least under appropriate counterfactual or hypothetical conditions, could agree to a legal order that is neutral between their varying conceptions of the good or other ethical standards. Thus, maybe moral principles require that the legal be restricted to the moral, or that in some other way the law remain ethically neutral. Although Michelman rejects this conclusion,[84] for a theorist—anyone who accepts that laws should only be those that each person, being who she is, could give to herself—the necessity of limiting law to the moral not only should make sense, but might seem required.

Nevertheless, there remains the question of whether morality really requires neutrality and requires law to be limited to the moral. It might—if morality requires *self*-authorship of law but not if morality allows for political losers and

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82. For this usage and Michelman's employment of it, see *supra* note 27.

83. Of course, the meaning of neutrality is notoriously difficult to pin down. *See* Forst, *supra* n. 37, at 45-48. Charlotte Gross tells me that the "neutrals" inhabit the "fore-hell." *See* Dante Alighieri, *The Inferno*, at Canto III (Ciaran Carson trans., Granta Bks. 2002). That seems about right. Even if not affirmatively evil, the neutrals merit disfavor for the way they obfuscate clear thinking and avoid needed action.

84. Michelman's emphasis that the ethical as well as the universal are inseparably part of law from the beginning suggests that he might distance himself from the affirmation of neutrality common among theorists such as Ackerman, Dworkin, and Rawls. Of course, each of these theorists recognize that their emphasis on neutrality is itself an important, disputed value but treat it as the core of liberalism. Moreover, each presumably excludes unreasonable (unjust) conceptions of the good from those that the theory or law must be neutral between. Still, Michelman's position concerning the necessary inseparability of the ethical and moral could be part of why he will also always find tension between individual legal authorship and democracy. *See* Michelman, *Constitutional Patriotism*, *supra* n. 9, at 1013-14, 1026-28; Frank I. Michelman, *Family Quarrel*, 17 Cardozo L. Rev. 1163, 1174-77 (1996).

permits the use of force to enforce the law against them. The immediate problem with the first view is twofold: appeal and coherence. Maybe law should not, or cannot not, be restricted to the moral. Maybe the legal order should and must take sides on ethical issues. This would mean, at least in a pluralistic society, that there will be losers—people who do not get to be the author of at least some laws under which they live.

As for appeal, limiting law to the universals or neutrality would be strongly disabling to human enterprise and the realization of human projects. It would stringently and unnecessarily limit people's pursuit of the good, the ethical in various contexts where effective pursuit of values requires enforceable collective action. If this is right, a powerful and persuasive argument would be needed for such a disabling requirement. A moral argument for the right of one person, a lone dissenter and would be political loser, to be able to exercise this type of power over other people should seem perverse. As for coherence, law often necessarily takes non-neutral ethical positions, positions that are presumably not morally required—a point even more obvious once inaction, that is, no law, is seen as taking a position. Though the extent to which laws *inevitably* favor particular ethical values, rather than merely devote resources to various aims by equally weighting all people's preferences (and, assertedly thereby being neutral), may be complicated, quite clearly some laws will do so without thereby being unjustified. Or, at least, I so maintain but will not try to demonstrate here.

So where do these distinctions leave us? Ultimately, the choice between these different visions of the proper content of democracy and of law may depend on which view of the basis of morality is most appealing and on the persuasiveness of their respective elaborations. Both understandings of morality offer themselves as an understanding of the ultimate worth of the individual and the mandate that she be respected as free and equal. One finds a (necessarily compromised, Michelman says) moral mandate that the individual be the author of the law under which she lives. The other—based on grounding morality in the commitments implicit in communicative action—does not, but instead asserts, among other requirements, the requirement that she have a right to participate in the process of choice of the ethical content of law. The comparative persuasiveness of these alternative moral approaches—or even my view that they differ—can hardly be demonstrated here. But more pragmatically, in the spirit of reflective equilibrium, it can be helpful to see how each casts light on practices to which we are generally committed.

Things "social to the core" include both law and, more generally, social creations such as culture and language. Culture and language, however, differ from law in that they typically embody or are created by some form of non-institutionalized addition of individual behavioral choices of people within a community rather than any institutionalized decision. Similarly, legal enforcement of the content or "rules" of culture and language is generally considered unjustly oppressive rather than routine and purportedly justifiable. In addition to being social to the core and coercively enforced, I have argued that law

properly includes purportedly both universal and ethical content. And note that although calling some elements "universal" is a way of claiming that all people should agree on this content, any hope for actual agreement, if for no other reason than the burdens of judgment, is unwarranted. Still, these universal elements, I suggest, have limited scope but should prevail when they apply. Ethical elements are those about which agreement should be sought but, even theoretically, should not be expected. A legal modeling of this vision is, I think, quite familiar. It would attempt to remove the universal elements from politics—though in practice, since their content is uncertain, some form of institutionalized discourse will necessarily surround their recognition. The removal could be signaled by treatment of these elements as constitutional. (There may be other pragmatic arguments to also include more ethical matters within a constitution, such as the obviously ethically based grant of two senators to each state.) In contrast, the ethical elements of law should be the ordinary content of democratic politics. There we should logically expect losers and, individually, sometimes accept being a loser. In other words, we have a relatively straightforward vision of constitutional democracy. The most obvious remaining problem, which I will address in a moment, is that not only will there be appropriate disagreement about ethical visions, there will also be disagreement about appropriately universal content and disagreement about whether a particular issue raises a moral or an ethical issue, that is, a constitutional or political issue.

To return to the earlier discussion, this model can be analogized to communicative action. People commonly engage in communication to coordinate and align actions or expectations. The ambition is agreement. However, given ethical pluralism or simply variety in individual preferences and understandings, and because of other practical problems, the ambition often fails. This failure of communicative action to reach agreement does not mean moral failure *unless* it reflects either the exclusion of some people or proposals from the discussion or unless it represents the consequence of immoral demands or proposals on the part of some of the participants (and, then, this criticism applies only to those pushing these immoral claims). Moreover, this failure of agreement does not deny that moral individuals should then proceed to act; at least, it does not *unless* their acts would embody immoral content.

Translating this analogy to the political/legal realm would treat majorities and losers as participants in communicative action. If proper participatory and moral rights are included within the constitutional framework and the majority abides by this framework, that majority would act properly in embodying their decisions in enforceable law despite the presence of political losers. The individual engaged in communicative action does not disrespect the moral status of the other, in respect to matters that are not social to the core, if she acts on her own views when they cannot successfully reach agreement about coordinating action. The analogous response applies to majorities in respect to matters that are social to the core. If the matter is one where an authoritative collective conclusion is required (and, of course, not passing and enforcing a law is a conclusion)—that

is, where the judgment is about a matter that is inherently social (like language and culture) *and* also requires an authoritative collective resolution (like the proper domain of law)—the majority shows no disrespect for the moral status of the loser at the point of enactment and coercive enforcement of collective (democratic) decisions, even though it refuses to follow the loser's ethical vision. Surely, the loser does not exhibit *self*-government in Michelman's sense; she does not give the law to herself. My claim is that, at least put that way, *self*-government as to society's laws is the wrong moral ambition even for one committed to liberal individualism. Rather, the aim of liberal individualism should be a constitutional democracy—that is, "constitutional" in guaranteeing at least properly universal claims, "democracy" in guaranteeing full participatory rights and collective legal authority.

This would all be quite straightforward if constitutional interpretation presented no problems—that is, if the properly universal procedural and substantive elements were within a constitution whose content was clear. But as Michelman has insistently shown, this is not and will not be our situation in a world of limited insight and significant pluralism. Passionate good faith disagreement is rampant in political, legal, and constitutional arenas. Specifically, in the framework described above, three types of disagreement can be expected: about the content of universal principles or rights, about the best ethical conclusions, and about whether a particular issue presents an ethical or moral issue. As to the first, Michelman presents repeated examples of decent, intelligent people taking opposite sides on matters that both believe are essential to the justifiability of the constitutional legal order. Normal politics may be seen to represent the second type of disagreement. Finally, political winners will often not claim their conclusions are morally required, but will still think their conclusions are about how to best create our society or about ethical or instrumental vision, while the losers will often think moral issues were at stake. For example, to the extent the law denies conscientious objector status to people who refuse to fight in wars they consider unjust, the majority is likely to claim the military obligation reflects an ethical decision, while the objector is likely to view it as violating a moral right.

In the view of constitutional democracy described here, the majority should always act in accord with universal moral demands, demands possibly included in a constitution and possibly identified by courts, although the choice of these implementation features raise separate pragmatic and epistemological matters. And the majority also properly reaches and enforces decisions in respect to ethical issues—again, assuming that the first set of requirements, including an inclusive discourse, is met. Of course, given the burdens of judgment and inevitable plurality, the majority should recognize both the possibility of misguided judgments on its part and the importance of respect for the efforts of those with whom it disagrees also to reach proper and wise conclusions. Efforts aimed at accommodation and charity in enforcement of judgments is often appropriate.

Still, moral theory, the theory of legitimate government, points to the propriety of the majority reaching and enforcing decisions despite disagreement.

Still, another question awaits. How should the losers respond to laws to which they object? The option of each party in communicative action aimed at agreement to say "no" generally suggests that if the losers disagree, they act properly by not accepting the majority decision. They may be obliged (by force) but have no obligation to accept the legal order with which they disagree. But this answer is too quick. Reconsider the three types of disagreement described above.

The interpretation of liberal individualism offered here asserts that the obligation of losers in *ethical* legal disagreements—issues concerning what is best for us, "us" being the group covered by the law—is to obey even as they continue to seek legal change. For example, a person may have an autonomy (and ethical) right to focus her own historical studies on Japan and to speak Japanese. And, in the context of our empirical historical situation, she may even have a moral right (a doubtful proposition[85]) to make this choice for her child if she has adequate resources to pursue the choice (and, although this is a separate question, having those resources itself may also be a matter of moral right). Still, the curriculum and allocation of resources to and within public education are primarily ethical issues concerning people's conception of their good or their identity. Moreover, some collective choices about curriculum and about resource allocation must be made. (Allocation of resources either to different individuals or to collective projects is inherently a collective matter.) The claim advanced here is that, absent the choice being made in a way (either procedurally or substantively) that violates a person's moral rights, these ethical choices are properly a matter of collective decision.[86] Given a collective choice not to focus the public school curriculum on Japanese and Japanese history, she has no right to engage in action in violation of this decision. Liberal individualism should not regret that the result is not a matter of *self*-government in Michelman's sense. Of course, moral values relating to democracy do not require abandonment of her views or her advocacy of different collective decisions or her abandonment of individual and associational efforts to further study Japanese history. Still, assuming this is an ethical matter, moral values do require acceptance of majority choice about curriculum and allocations.

On the other hand, losers' moral obligation to accept collective decisions applies only in the context of ethical disagreement. The situation differs when the disputed issue is, as both the losers and the majority agree, a matter of moral principle or, more likely, where the losers believe the issue raises a matter of

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85. *See* Seana Valentine Shiffrin, *What Is Really Wrong with Compelled Association* (unpublished draft Feb. 9, 2004) (copy on file with *Tulsa Law Review*); Steven H. Shiffrin, *The First Amendment and the Socialization of Children: Compulsory Public Education and Vouchers*, 11 Cornell J.L. & Pub. Policy 503 (2002); *but see Pierce v. Socy. of Sisters*, 268 U.S. 510 (1925).

86. Though this requires much more discussion, my view is that religious free exercise is a moral right requiring interpretation, but which many forms of establishment would not violate. Establishment issues involve ethical choices, although there are good reasons as a matter of collective choice and self-definition for us to adopt a strong anti-establishment principle.

universalistic moral principle while the majority believes it only involves an ethical concern. This might be the case in curricular choices and resource allocations described above. More likely, collective decisions concerning affirmative action or abortion or public secularism could, however characterized by the majority and depending on the specifics of the judgments involved, be situations where the loser believes moral principles are violated. The version of liberal or normative individualism proposed here, which still emphatically requires recognition of each person's agency, implies that each (the losers and the prevailing majority) acts properly when she proceeds on the basis of her own view of universal or moral principles. That is, given human epistemological fallibility, the interpretation of moral theory offered here leaves conflict and potential lawlessness as intrinsic aspects of the legal or normative order.

How despairing is this conclusion, not only for those who seek to avoid a life that is nasty, brutish, and short, but also for those who want a pragmatically appealing social order? Maybe not so great. First, the claim that a loser does not act improperly by rejecting the assertion of obligation does not mean that she must be civilly disobedient. Pragmatic reasons for deference to majorities should and likely will be entertained. For reasons related to the burden of judgment, she should recognize that she may be wrong. Her inability so far to convince the majority may properly raise self-doubt about her moral views, giving a reason, of variable strength given her own certainty and the nature of the issue, to defer. In addition, even if she feels certain, she may conclude the wisest option is to continue to advocate her view in the not necessarily unreasonable hope that it will eventually prevail. Finally, though the morally right legal answer is important, legal peace also has real ethical appeal. A person may conclude that the costs to her and others' ethical and moral interests justify behavioral conformance to a morally wrong but prevailing legal view. In each situation, the pragmatic argument for conformity will vary depending on the circumstances and the moral matter at stake.

Second, the benefits of the legal order may depend much less on regular conformity to and acceptance of the legitimacy of the law than often suggested.[87] People would be in a woeful condition without most behavior conforming to many norms, norms often embodied in law. There is, however, little reason to think adequate degrees of conformity have much or maybe anything to do with widespread empirical acceptance of the legal order's legitimacy. Moreover, though circumstances are tremendously variable as are forms of non-acceptance or non-compliance, in agreeing with Brandeis that "the greatest menace to freedom is an inert people,"[88] a reasonable argument could be advanced that the well-being of society is much more threatened by too much conformity to or

87. *See* Alan Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 Wis. L. Rev. 379 (arguing that belief in legitimacy of law has little to do either with our actual condition or with the legal order's relative effectiveness).

88. *Whitney*, 274 U.S. at 375 (Brandeis & Holmes, JJ., concurring); *cf.* Shiffrin, *supra* n. 72.

acceptance of practices by people who consider the practice unjust than by instability due to principled, even if illegal, resistance.

My recommendation has been to emphasize a different conception of the moral basis and hence the moral demands placed on a legitimate legal order. Even if this were accepted, much would remain contested about the content of a legitimate legal order. Interestingly, although developed in the context of the problem of trying to reconcile the rule of law and democracy with individual *self*-government, most of Michelman's sensitive discussion of the potential role of public reason, constitutional patriotism, and potential epistemological uses of judicial review remain important in responding to the fact of democratic disagreements under conditions of deep social pluralism. Nevertheless, the approach I have recommended would involve abandoning Michelman's—along with Rousseau's and maybe Kant's and maybe Rawls's—view that a legitimate legal order requires that a person be able to view herself as the author of the laws under which she lives.

Still, this alternative understanding of the basis of morality as grounded in the presuppositions of communicative action and this alternative's implications for the moral understanding of democracy has a number of appealing elements. It is more immediately congruent with the moral acceptability, not merely the practical necessity due to the necessity of decision and to move on, of majoritarian resolution of many issues. In this respect, this moral view is probably in accord with much popular belief that democratic resolution of (many) disputes is not merely epistemologically likely to lead to right conclusions, but is also (often) fair to all people within a political community. This moral view also dispenses with the conceptually complex and finally inadequate (e.g., as indicated by the conclusion that we must accept "damaged goods") procedural displacement argument for the constitution—that is, an argument that our need for a constitution follows from the need to transform laws into ones that a person can accept as her own even when she disagrees with their content. This moral conception replaces Michelman's complex argument for a constitutional "lawmaking" with a more direct one: the constitution should embody universalistic moral content, including its democratic qualities, that a person has a right to demand of any legal order that claims to obligate her, that claims to be legitimate. Finally, despite the aim of agreement, this approach sees conflict as normal.

CONCLUSION

In reading Michelman's essays, despite clarity along the way, I have often found it surprisingly difficult to discern the bottom line. Often he sets up a perplexingly difficult problem, carefully disposing of appealing but too simplistic resolutions, and just when the time comes for him to pull the rabbit (or duck) out of the hat, he tells you, "no, the problem is real." My confusion or dissatisfaction surely is my own problem—and I recognize that lack of solution and the complexity of the human situation are likely themselves part of Michelman's

pragmatic point. Nevertheless, in reading his dialectical writing, I find he constantly anticipates my every objection and proposal. Maybe he has done it again. Specifically, the alternative approach I propose here at times seems to be where his argument is heading or, alternatively, it may be there is little difference between our positions—and, if so, maybe I should withdraw any criticisms.

Michelman claims to be powerfully pulled by the idea of constitutional contractualism. Still, at least in the way he initially described it, he seems increasingly to be giving it up.[89] There can be, he shows, no agreement on the necessary contractual terms. Overlapping consensus is unlikely to be sufficiently deep, as he shows in countless examples—maybe most clearly as to the issue of abortion. Public reason helps reduce the problems of disagreement and indeterminacy, but neither its borders and content are not clear; its results are likely insufficient. Even if one believes in a universalism of moral content that could redeem constitutional contractualism, this content is not likely to be sufficiently epistemically available to us from our own inevitably ethically circumscribed home—available within a society divided by deep pluralism. Given, Michelman says, the great, possibly indispensable, good potentially offered by government and given our moral need to be able to justify our use of coercion over others, what is to be done?

The hope seems to lie, maybe as it should for a liberal, with individual motivational and interpretive efforts directed at the practice of trying to be morally legitimate in obtaining those goods potentially offered by a legal order. Rejection of judicial infallibility is a rejection of the Supreme Court getting to be the sole author of constitutional law as opposed to the judiciary's more proper role of responding to the necessity of temporary settlements by settling cases put before it.[90] "Ida's Way"—with each individual Ida giving allegiance to her own, different interpretation of purportedly universalistic norms—superficially resembles Rawls's overlapping consensus.[91] However, Rawls's overlap was supposed to reach defensible (and hence presumably identifiable and acceptable) content—i.e., constitutional essentials. The *many* Idas produce many different reconstructions, none of which are "the" law (and, to the extent Ida is private, as opposed to a Herculean judge, none need even be temporary law) but do represent good faith conclusions for which each Ida can and should struggle. Thus, again, we live without a contract (as Michelman imagines a contract), but with relations within a political/legal community. Constitutional patriotism is seen as motivated by the ideal of a constitution, not a constitution itself. It encourages civility and struggle within pluralism. Thus, increasingly, Michelman's response to the need to justify law seems to be a call to intellectual struggle directed at justification and political struggle and at realizing the justification that you find, but that you know others will not find, persuasive. This response does not really diverge from the alternative I proposed. Scooped yet again!

89. See, for example, his 2003 Prague lecture referred to *supra* note 43 and accompanying text.

90. *See* Michelman, *supra* n. 31.

91. *See* Michelman, *supra* n. 3.

Still, I want to persist in suggesting that even if there is little bottom line difference between Michelman's developing position and the alternative sketchedly outlined here, there are differences worth noting. First, the alternative suggests dropping the interpretation of normative individualism (and the interpretation of the arguably Kantian moral theory that leads to it) that requires self-authorship of law. Once dropped, the alternative theory of normative individualism arguably provides a cleaner justification for a democratic constitutional order rather than, as does Michelman's account, an analysis that finds presumptive failure, ideals as damaged goods and an analysis that defends the constitutional democracy as merely the best we can do given the fate of living in a world like ours. Second, though nothing here has demonstrated his claim, my hope would be that the moral premises on which the alternative lies are sounder—thus, a more intellectually and morally appealing approach. Third, the alternative may offer the better account of when conflict is, in a sense, proper and offer a better account of its different forms—ranging from political dispute settled democratically to moral disagreement potentially justifying non-compliance or other forms of resistance. Fourth, though again the demonstration must await further papers, the alternative may provide better, stronger, more precise, as well as different guidance to the substantive content necessary to justify a coercive legal order—that is, a stronger and better defense of (contested) universal rights. In other words, there may be real differences even if it is just a "family quarrel."[92]

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In closing, I wish to note that the honor of being able to participate in this event is huge. Frank Michelman is the premier constitutional theorist of our generation. In addition to his abundant intelligence and inquiring mind, displayed in his characteristically dialectic style of writing, to me his greatness reflects two qualities that too often are missing in scholarly writing but which Frank exhibits to the highest degree: an uncompromising and relentless honesty and a passionate and unerring moral compass. Outward evidence of his preeminent status abounds—*Harvard Law Review* editors twice choosing Frank to write their "Foreword," or a study finding him to have written three of the fifty most cited legal articles of the twentieth century.[93] Beyond these, I find many of his "smaller" articles, often published in obscure places, to be the best available on their subject. This is why, for instance, in choosing about fourteen articles to assign in a constitutional jurisprudence seminar I included both his articles on due process[94] and on basic aspects of critical legal studies.[95]

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92. *Cf.* Michelman, *supra* n. 84. For an initial defense of some of the claims made in this paragraph, see Baker, *supra* n. 43.

93. *See* Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 Chi.-Kent L. Rev. 751 (1996).

94. *See e.g.* Frank I. Michelman, *Formal and Associational Aims in Procedural Due Process*, in *NOMOS XVIII: Due Process* 126 (J. Roland Pennock & John W. Chapman eds., N.Y.U. Press 1977).

95. *See e.g.* Michelman, *supra* n. 29.

Nevertheless, for me, Frank's importance is more personal. Since reading his foreword, "On Protecting the Poor through the Fourteenth Amendment,"[96] as a first semester law student, I have constantly been learning from, relying upon, and assigning his writing. At various important points in my academic career, both substantive conversation with and sometimes at least implicit personal professional advice from Frank have been extraordinarily important. In one instance, at a very early, crucial stage in my academic career, I was particularly despondent. Three months after *Stanford Law Review* had accepted one of my first articles (and, of course, after I had withdrawn it elsewhere), one of their editors called to tell me that they could not publish it and that the acceptance was withdrawn because they had "discovered," with the concurrence of their faculty advisor, that the article was simply "wrong." After reading it, Michelman suggested that I send it, with his recommendation, to *Philosophy & Public Affairs*, where it became one of my most known and influential publications.[97]

But even more than his help, since being a fellow at Harvard almost thirty years ago and having Frank as one of the fellows' seminar teachers, and continuing in the context of his participation within critical legal studies in the 1980s and now in his role as a participant in (as well as one of the directors) of the Seminar on Philosophy and Social Science meetings in Prague, I have treasured Frank as a friend.

96. Frank I. Michelman, *Foreword: On Protecting the Poor through the Fourteenth Amendment*, 83 Harv. L. Rev. 7 (1969).

97. *See* C. Edwin Baker, *The Ideology of the Economic Analysis of Law*, 5 Phil. & Pub. Affairs 3 (1975) (portions reprinted in [C. Edwin] Baker, *The Ideology of the Economic Analysis of Law*, in *Cohen and Cohen's Readings in Jurisprudence and Legal Philosophy* 870 (Philip Shuchman ed., 2d ed., Little, Brown & Co. 1979) and in Anthony T. Kronman & Richard A. Posner, *The Economics of Contract Law* 266 (Little, Brown & Co. 1979)). Although portions of this article have become part of the received wisdom, I believe that other parts remain to be assimilated by many law and economics scholars.