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A REPLY TO BAKER AND BALKIN

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In no way does my selection of two of the Symposium contributions to which to make some reply here reflect on my regard for the other contributions. I could not, just now, pay to all of the contributions the attention they deserve, and so I had to make some choice about which to take up here. To all who contributed, I am grateful beyond words.

I take up the essays of Professors Baker and Balkin because they deal directly and in detail with a particular, current project in which I expect to be engaged for some time yet to come. Both essays offer tellingly perceptive commentaries about my work on that project to date, along with proposals of high import regarding its further development. With limited time and space, I cannot do justice to the richness of these commentaries or even make a bow to every nugget of insight and wisdom they contain. Both essays have challenged me to clarify the state of my thinking about the project in certain important respects, on which I concentrate in what follows.

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How can liberals committed to normative individualism[1] justify conduct in support of the coercive operations of constitutional-democratic government? Edwin Baker and I share the view that this is possible only when some relevant set of motivational, social-environmental, and institutional conditions is satisfied. It might, for example, be a set of conditions roughly like this: (1) a lawmaking process "truly open" to the discursive participation of all;[2] (2) entrenchment of certain rights of persons regardless of what political majorities may say to the contrary;[3] and (3) on the part of each participant, a refusal to justify any exercise

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1. *See* C. Edwin Baker, *Michelman on Constitutional Democracy*, 39 Tulsa L. Rev. 511, 511-12 (2004) (describing "liberal normative individualism" as a position that "in particular emphasizes the moral importance of viewing the person ideally as 'free and equal'"); *id.* at 520 (endorsing the liberal assumption that "the people to whom the justification must be provided are conceived of as being free and equal" and examining this view's possible alternative implications regarding the necessary conditions of political and legal legitimacy); *id.* at 521 (suggesting an intersubjective understanding of liberal "freedom in respect to . . . law" that can be satisfied by providing each individual with "an appropriate form of participatory involvement"); *id.* at 534 (calling the recommended "appropriate process" norm an "alternative interpretation of normative individualism").

2. *Id.*

3. *See* Baker, *supra* n. 1, at 534.

of coercive political power by appeal to considerations, as reasons, that the participant does not sincerely believe all the others "could and should accept"[4]—a practical attitude we might call by the name of *reciprocity*.[5]

Can one posit a plausibly realizable set of such conditions, satisfaction of which renders morally justifiable, on liberal terms of reciprocity, one's supportive participation in constitutional democracy? If one cannot, it seems one then, in all honesty, must choose between one's attachment to liberal reciprocity and one's attachment to constitutional democracy. Reciprocity-minded, liberal constitutional democrats, therefore, have reason to proceed at least initially on the assumption that at least one set of such redemptive conditions exists. The leading question then becomes: What are the conditions in the set? For workers in the vineyards of constitutional theory, that question leads to the following two: What, if anything, can the idea of a good or ideal constitution contribute to a defensible solution? What, accordingly, is the prescriptive content of a good or ideal constitution?

My series of forays into these questions[6] has so far centered mostly on proposed responses sharing an approach that I am going to call "constitution-as-contract."[7] I do not mean thereby to imply that, in these responses, a constitution is regarded as an actual contract. Obviously, no real-world constitution is or can be that, given the lack of signification of assent from everyone treated as bound. But a constitution nevertheless may be regarded as *acting like* a contract in the following way: The constitution in force serves as a rule for the conduct of lawmaking and other governmental operations, conformity to which *may* be sufficient to endow the resultant stream of legislative and other governmental product with a strongly presumptive, moral claim to public support. Whether conformity to the constitution in force *will* be sufficient to that end will depend on the aptness and adequacy to this task of the prescriptive content of that particular

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4. *Id.*

5. *See* John Rawls, *Political Liberalism* xlvi (paper ed., Colum. U. Press 1996) (defining the "criterion of reciprocity: our exercise of political power is proper only when we sincerely believe that the reasons we offer for our political action may reasonably be accepted by other citizens as a justification of those actions" and treating reciprocity as a key to legitimacy).

6. *See* Jack M. Balkin, *Respect-Worthy: Frank Michelman and the Legitimate Constitution*, 39 Tulsa L. Rev. 485, 485 n. 2 (2004) (collecting authorities); Frank I. Michelman, *Relative Constraint and Public Reason: What Is "The Work We Expect of Law"?*, 67 Brook. L. Rev. 963, 974 (2002) [hereinafter Michelman, *Relative Constraint and Public Reason*]; Frank I. Michelman, *Morality, Identity and "Constitutional Patriotism,"* 76 Denv. U. L. Rev. 1009, 1018-19 (1999) [hereinafter Michelman, *Constitutional Patriotism*].

7. I choose this term in preference to "constitutional contractualist." *Cf.* Baker, *supra* n. 1, at 517. In contemporary political philosophy, the term "contractualist" carries a connotation of a certain conception of morality, as rooted in a "desire to be able to justify one's actions to others on grounds they could not reasonably reject," given a desire on their part to find principles that others similarly motivated could not reasonably reject. T.M. Scanlon, *Contractualism and Utilitarianism*, in *Utilitarianism and Beyond* 103, 116 (Amartya Sen & Bernard Williams eds., Cambridge U. Press 1982); *see* Rawls, *supra* n. 5, at 50 ("Reasonable persons . . . desire for its own sake a social world in which they, as free and equal, can cooperate with others on terms all can accept. They insist that reciprocity should hold . . . ."). I mean to keep my inquiries anchored at all times to a morality that is contractualist in that sense, but I also mean to treat constitution-as-contract approaches, as defined in the text immediately following this note, as very much open to question. I am asking whether constitution-as-contract follows from contractualism, or even is compatible with contractualism.

constitution. If the constitutional contract in force is thus satisfactory in substance, public support of all the legislative results achieved in conformity to it is morally warranted, regardless of how repellent some of the results may be to some of the parties. That is the nub of the constitution-as-contract idea.

Constitution-as-contract can play a pivotal part in attempts to define a set of conditions for the liberal legitimacy of constitutional democracy. For me, the emblematic case has been John Rawls's proposed "liberal principle of legitimacy":

> [O]ur exercise of [coercive] political power is proper and hence justifiable only when it is exercised in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational. This is the liberal principle of legitimacy.[8]

Scanning my investigations to date of constitution-as-contract approaches to liberal political justification, Professor Baker finds it difficult to make out a bottom line. I do not blame him. Constitution-as-contract ideas hold strong attractions for me, and the explorations Baker reviews started out, just as he detects, with the idea of possibly redeeming such ideas from objections of the kinds he identifies in his masterful review. As Baker also perceptively observes, though, my stance has been shifting as the explorations have proceeded—to a point, now, where constitution-as-contract and I stand at arms' length.[9]

Rather, therefore, than look backward at the work of mine that Baker has inspected so incisively, I would like to keep the conversation a forward-looking one. As one significant consequence, you will find below no mention of the notion of every affected individual's being able to see himself or herself as author of the laws of the country. I am persuaded by Baker's very forceful arguments that such a formulation sets an unnecessarily strong condition for liberal justification of political coercion. With that move to common ground as a start, I want to offer some preliminary thoughts in response to Baker's constructive proposals for political justification without constitution-as-contract.

I begin with a brief discussion of Baker's proposed communicative-ethical alternative to what he calls a Kantian take on normative individualism,[10] and of the respective implications of the two views for a possible liberal justification of constitutional democracy. That discussion leads to a question about whether Baker's communicative-ethical alternative eases in any way the "damaged goods" claim I have made[11] and to which I am inclined to adhere.

Next, I consider Baker's proposal that we take, as the sole gauge of normative political legitimacy in the here and now, the moral adequacy of actual, concrete, current governmental practice—never mind trying to judge the

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8. Rawls, *supra* n. 5, at 217.

9. *See* Frank I. Michelman, *Ida's Way: Constructing the Respect-Worthy Governmental System*, 72 Fordham L. Rev. 345, 358-65 (2003) [hereinafter Michelman, *Ida's Way*]; Frank I. Michelman, *Living with Judicial Supremacy*, 38 Wake Forest L. Rev. 579, 609-11 (2003).

10. *See* Baker, *supra* n. 1, at 532, 545.

11. *See id.* at 515.

conformity of this practice to some separately posited set of constitutional requirements.[12] Baker's suggestion is that we should dispense with trying to make the constitution act in that way as, or like, a contract.[13] With regard to this suggestion—with which I am inclined to agree—I shall ask, first, whether the suggested move makes the practice of constitutionalism irrelevant to liberal assessments of normative political legitimacy (in other words, whether it renders irrelevant to such judgments the constitutionalist dimension of constitutional democracy); second, whether the move involves any less of a "displacement"[14] of substance by (or onto) procedure than the constitution-as-contract view that the move is meant to obviate; and, third, whether this move opens the way to a possible claim of undamaged goods.

In a Kantian understanding of normative individualism, Baker writes, "[a] person is free only when autonomously giving the law to herself."[15] In an alternative, relational, or communicative-ethical account, each individual person adequately recognizes the freedom and equality of others by support of collective action, as long as the collective action is conducted in a manner that meets the "presuppositions of, or commitments implicit in, communicative action."[16] An advantage of the communicative-ethical view, Baker suggests, as compared with the Kantian, is that the former does away with the worry that the persistence of dissent to a collective decision—let us even stipulate reasonable dissent—necessarily makes coercive enforcement of that decision an affront to normative individualism.[17] The communicative-ethical view, unlike the Kantian, does 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 process accepted by all."[18]

It is not clear to me how this move gains us anything by comparison with the contractualist-liberal,[19] constitution-as-contract views my work has been examining. On my understanding of such views, the word "accepted" in Baker's "by a process accepted by all," should be regarded as a slip. The word ought to be "acceptable"[20] (compare "could not reasonably reject"[21]). Once that substitution is made, the Rawlsian-Kantian view and the communicative-ethical view start to converge. They converge, moreover, not only toward the (possible) compatibility of coercion of political losers with normative individualism, but also toward the inevitability of "damaged goods."

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12. *See id.* at 523.
13. *See supra* text following n. 7.
14. Baker, *supra* n. 1, at 517, 543.
15. *Id.* at 532.
16. *Id.* at 533.
17. *Id.* at 534.
18. *Id.* at 534-35.
19. On my usage of "contractualist," see *supra* note 7.
20. *See e.g.* Michelman, *Relative Constraint and Public Reason*, *supra* n. 6, at 974; Michelman, *Constitutional Patriotism*, *supra* n. 6, at 1018-19.
21. Scanlon, *supra* n. 7, at 116-17; *see* Rawls, *supra* n. 5, at 49-50 n. 2, 124 (endorsing Scanlon).

Baker asks, rhetorically: "Does fundamental disagreement mean the essential moral failure of democracy or, more plausibly, at least the loss of moral autonomy of the political losers?"[22] Rawlsian-Kantian liberalism answers: Of course fundamental disagreement does not mean the moral failure of democracy, if by "mean" you mean "equate to." A main point of Rawlsian, political-liberal theorizing, after all, is to vindicate the idea that there does exist a set of institutional and motivational conditions under which public support of morally controversial, coercive laws is consistent with respect for everyone's autonomy.[23] Even if, as may happen, the losers believe those conditions are not fulfilled in the present instance, Rawlsian political liberals are prepared to maintain, on moral grounds, that the losers sometimes will be mistaken about that and that in such cases coercion is justified morally.[24]

What is more, the sorts of constitutional-legal conditions that Rawlsian liberals would regard as conducive to that justificatory end could easily be—it seems entirely likely that they are—quite similar to the ones communicative ethics would pick out as necessary to constitute the "collectively fair (open, respectful, reason giving) process"[25] that would, in a communicative-ethical view, render coercion of dissenters by majorities morally appropriate. They would be, just as Baker says, conditions pertaining to the fairness and openness of the lawmaking process, to the safeguarding of fundamental rights, and to the dominance in the process of public reason ("reasons that the presenter believes others could and should accept"[26]).

Baker's own writing points clearly to the kinship. At one point, Baker sums up: "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."[27] The hand is the hand of Baker, but the voice is the voice of constitution-as-contract.[28]

Like all variations on constitution-as-contract, Baker's proposal—were we to take it strictly on those terms—would raise immediately the spectre of reasonable disagreement, not only over whether the "proper" rights are contained in the constitution but, more insidiously, over whether the majority is "abid[ing]

22. Baker, *supra* n. 1, at 532.

23. The focus here presumably would be on the "ascriptive" sense of autonomy, distinguished by Richard Fallon from a "descriptive" sense. *See generally* Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 Stan. L. Rev. 875 (1994).

24. *See e.g.* Rawls, *supra* n. 5, at 137-39 ("[T]he political values expressed by [the] principles and ideals [of a reasonably well-ordered constitutional regime] normally have sufficient weight to override all other values that may come in conflict with them.... The ... values of the political are very great values and hence [are] not easily overridden ...."); *id.* at 157 ("[V]alues that conflict with the political conception of justice and its sustaining virtues may be normally outweighed because they come into conflict with the very conditions that make fair social cooperation possible on a footing of mutual respect.").

25. Baker, *supra* n. 1, at 534.

26. *Id.*

27. *Id.* at 539.

28. *See supra* text following n. 7; *supra* text accompanying n. 8.

by" the proper rights or, in other words, over whether a concededly proper set of abstract constitutional rights ("the freedom of speech" or "equal protection of the laws," for examples) have been given a correct, concrete application (say, in this most recent interpretation of the constitution's requirements and prohibitions respecting laws regulating political campaign finance). Baker says that if those who collectively hold effective power sincerely and considerately judge the answers to be yes, they are morally justified in coercing the dissident.[29] Rawlsians and other Kantians would agree wholeheartedly.[30]

A question that remains is whether there may be cases in which, so judging, both Habermasians and Rawlsians also would judge the dissenting views to be ones that could be held, competently and sincerely, by persons trying just as hard as they are to frame constitutional interpretations and applications in terms that are (let us say, adopting the Habermasian formulation) acceptable to all from the standpoint of each.[31] If so—and Baker does not appear to be denying this possibility[32]—then it seems to me that the goods, inescapably, are damaged; I shall say a bit more about this below.

But let me be clear about what point I think I have made so far. It is not that Baker, finally, adheres to a constitution-as-contract view. In fact, as we are about to document, he outspokenly does not. My point so far is merely that a decidedly communicative-ethical take on normative individualism is no less susceptible than is a Rawlsian-Kantian take to the blandishments of constitution-as-contract (however else we may think the two takes differ, a matter as to which I confess deep confusion and uncertainty). Regarding the choice between constitution-as-contract and whatever alternative to that approach may arguably be preferable from the standpoint of normative individualism, communicative ethics and Rawlsian-Kantian contractualism stand on the same footing. That is the burden of my argument so far.

Baker urges the rejection, or at least the skeptical reconsideration, of constitution-as-contract. Maybe, he suggests, legitimacy is not necessarily, or even appropriately, tied to judgments of the consistency of ordinary-level lawmaking with "determinate terms of a universally acceptable constitutional contract."[33] Perhaps, instead, "legitimacy involves a constantly raisable discourse of legitimacy."[34] This could be a discourse that looks both backward in time to

29. *See e.g.* Baker, *supra* n. 1, at 535 ("[N]othing... 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.").

30. *See* Rawls, *supra* n. 5, at 247 ("[W]e can maintain that the political conception is a reasonable expression of the political values of public reason and justice between citizens seen as free and equal. As such the political conception makes a claim on comprehensive doctrines in the name of those fundamental values, so that those who reject it run the risk of being unjust, politically speaking.... If we do so insist, others in self-defense can oppose us as using upon them unreasonable force.").

31. *See* Jürgen Habermas, *A Genealogical Analysis of the Cognitive Content of Morality*, in *The Inclusion of the Other: Studies in Political Theory* 3, 31 (Ciaran Cronin & Pablo De Greiff eds., MIT Press 1998).

32. *See* Baker, *supra* n. 1, at 531.

33. *Id.* at 523.

34. *Id.*

achieved results and forward to expected further consequences.[35] In any case, the discourse would not pin legitimacy judgments tightly to judgments of compliance with "any pre-existing (actual or assumed) contract."[36] The question of legitimacy would never be resolvable simply by application of any "set of particular legal constitutional rules []or by a fully elaborated procedure or process[]."[37] "Rather, the inquiry is always open[, as well as] always related to . . . what is done now."[38]

An advantage claimed by Baker for this contract-independent, presentist approach (as we may call it) is that it sidelines the worry about reasonable indeterminacy in the application of abstractly formulated, constitutional-legal requirements.

> Given an understanding of legitimacy as . . . 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 [what I have chosen here to call "constitution-as-contract"] elaborated by Michelman. . . . [E]ven 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.[39]

My own thoughts currently run in a like direction.[40] What remain to mention are a couple of quibbles. The first quibble pertains to what I take to be a further point of agreement between Baker and myself.

Baker and I agree that the suggestion to dispense with constitution-as-contract does not amount to a suggestion that *constitutionalism* is irrelevant to legitimacy—meaning by "constitutionalism" the practice of writing certain constraints on the content of democratic lawmaking into a body of supreme law, which an independent judiciary (perhaps) is expected then to apply decisively to controverted cases, sometimes against the duly expressed will and judgment of popularly elected branches of government. Why does it not? I have explained as follows:

> You could start with the . . . idea that the "system" or "practice" of government whose respect-worthiness you want to gauge consists of the entire aggregate of concrete political and legal institutions, practices, laws, and legal interpretations

35. Results and consequences of *what*, exactly? *See infra* text accompanying and following n. 49.

36. Baker, *supra* n. 1, at 523.

37. *Id.* at 525.

38. *Id.*

39. *Id.* at 524.

40. See my writings cited *supra* note 9, especially Michelman, *Ida's Way*, *supra* n. 9, at 347-48 ("Looking out at [the] governmental totality, one might ask oneself how various classes or groups of persons are faring, and maybe how they would perceive matters from their own situations and standpoints. One would apply whatever standards of freedom, justice, prosperity, distribution, participation, and systemic openness to change one considers to be applicable. Finally, one would judge whether the total performance is good enough, on the whole, to be accepted considering the practical, imaginable alternatives.").

> currently in force or occurrent in the country. Call this "the governmental totality." It would be, in effect, the currently surviving deposit of the country's entire history to date of institutional and legal creation and revision. Notice that, if your country happens to be one that relies substantially on judicial rulings to steer or constrain decisions on matters of substance[,] . . . the current governmental totality will be composed, in significant part, of major, extant judicial rulings on such matters.
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> . . .
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> Suppose a country [does have] in place a "supreme law"-type of written constitution containing entrenched recitals of rights against the government. We might ask what, if anything, that fact about the country has to do with constructing the "governmental system in place," whose respect-worthiness might supply the major premise for a legitimation project. . . . [T]he answer would be "probably something but by no means everything." . . . If such a thing does happen in fact to be there, as a part of a given country's governmental totality, [appraisals] of the respect-worthiness of that totality probably will take its presence into account.[41] It also will take into account any judicial rulings issued in its name that currently, as matter of fact, form a part of the country's governmental system. But if it happens that no such thing is there, the absence of it neither defeats appraisal nor points [necessarily] toward a negative appraisal.[42]

Constitutionalism, in short, is relevant to the presentist style of legitimacy appraisal. The presence of constitutionalism in a political practice (or its absence therefrom) might contribute a positive or a negative vector to overall appraisal of the "respect-worthiness"[43] of the practice. Baker's comparable endorsement of the continuing relevance of constitutionalism to legitimacy judgments is more succinct but fully clear: "In the view of constitutional democracy [that Baker proposes], 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."[44]

Baker clearly is allowing, as I do, for the possibility that the presence of constitutionalism within a given, present political practice can be a positive factor, from which it would follow that it can be a factor that makes the difference between that practice's passing or not passing legitimacy muster.

We come, now, to my second quibble. As one advantage of the presentist approach to legitimacy-testing, by comparison with constitution-as-contract, Baker claims that it

> dispenses with the . . . 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

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41. *See* Sanford Levinson, *Constitutional Faith* 180 (Princeton U. Press 1988). Levinson refers to the Constitution as a "presence" that may or may not be deemed "encouraging" to "the establishment of a more perfect Union." *Id.* [Footnote in original.]

42. Michelman, *Ida's Way*, *supra* n. 9, at 347, 360-61.

43. *Id.* at 346-48.

44. Baker, *supra* n. 1, at 540.

> need to transform laws into ones that a person can accept as her own even when she disagrees with their content.[45]

I believe this claim may overreach. It can stand unscathed only if Baker rejects totally the idea that the moral supportability of government is a virtue that we locate (when we judge it to be present) in "regimes"[46] or "practices"[47] of government conceived as more inclusive than—as transcending in some way—any single one of the sundry, individuated laws and other governmental acts issuing from the regime or practice, among which at any given time are bound to be some that some among us will judge, not unreasonably, to deviate grievously from what justice truly requires.

It seems to me that Baker does not reject this idea.[48] The key passage, I believe, occurs at page 523:

> [C]onsider 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.... 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?[49]

Given this history *of what*? Given these predictable consequences *of what*? Of one or another particular, individuated "present law or application of constitutional principle"? No. Rather, "of the current regime" of which this or that particular item is a component, aspect, or manifestation.

Like me and countless other liberals, it appears, Baker regards the question of a particular law's *legitimacy* (its assertion upon us of a claim to support based in political morality), as distinct from the question of its true and direct conformity to the demands of justice. In good, political-liberal fashion, Baker ties the legitimacy of the particular law to an approving judgment passed upon the past, the present, and the expected future of a more encompassing complex from which that law issues or in which it is embedded. Call that complex a practice, call it a regime, call it a system. Whichever you call it, I do not see how Baker can maintain that the presentist approach to legitimacy assessment affords an escape from the "procedural displacement" that he links directly to the damaged-goods claim that I have advanced.[50]

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45. *Id.* at 543.

46. *Id.* at 523.

47. *Id.*

48. At one point, Baker questions how tightly the benefits of legal ordering are tied to people's actual acceptance of the legitimacy of the law. *See id.* at 542-43. However, that question is directed to legitimacy in its empirical sense, whereas my inquiries have been directed, as Baker elsewhere points out, *see* Baker, *supra* n. 1, at 511, 515-16, to a *normative* question of legitimacy, which Baker apparently agrees has independent significance. *See id.* at 529 (observing approvingly that "hypothetical contractarian analysis is an aspect of substantive moral reasoning, not a pale substitute for empirical agreements" (footnote omitted)).

49. *Id.* at 523.

50. *See supra* text accompanying n. 45.

Procedural displacement is an accompaniment of liberal legitimacy discourse in general, not exclusively of the constitution-as-contract sub-version of the discourse. In order to explain, I must first say a bit about how the expression "procedural" is to be understood in the present context. We can stick with John Rawls as our example. Recall that Rawls's liberal principle of legitimacy requires that coercive political power be exercised subject to the constraint of a set of constitutional essentials adequately reflecting political principles and ideals that everyone as reasonable and rational can accept.[51] Needless to point out, Rawls maintains that a set of constitutional essentials meeting that standard necessarily includes guarantees regarding the content of laws, not just the institutional and procedural protocols for lawmaking.[52] In what sense, then, might I or Baker say (as both of us do) that Rawlsians propose a procedural test for political justification? The answer is that "procedural," in this context, does not mean a test concerned only with matters of lawmaking protocol as distinguished from the content of the lawmaking product. It rather means a test that is abstracted or deflected from the most immediate and concrete issues of morality and public policy that are obdurately and divisively controversial in society.

In sum: As Rawls sees matters, a constitution, including its guarantees of substantive constraint on lawmaking, defines an institutional framework[53] for use in settling sundry, concrete controversies in the field of public policy that practically require political resolution one way or the other. The constitution thus provides the *procedure* correlative to which the controversies it is used to settle compose the *substance*. The proceduralist impulse is the impulse to deflect—in Baker's language, to "displace"—legitimacy testing away from the individuated, ground-level, politically decidable questions that compose the agendas of ordinary politics, so as to focus it instead on a framework or practice for deciding such questions.

By now, it should be clear that, while constitution-as-contract is one kind or instance of procedural displacement, it does not exhaust the category. Any deflection of legitimacy assessment upward or outward—from a given, individuated resolution of a current political controversy to the horizon of framework or practice—is an instance of the category. The category thus includes the kind of contract-independent, holistic-presentist assessment of the practice (as respect-worthy or not) that Baker and I are both inclined to favor over constitution-as-contract.

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51. *See supra* text accompanying n. 8.

52. *See* Rawls, *supra* n. 5, at 227 (including among "constitutional essentials" the "equal basic rights and liberties of citizenship that legislative majorities are to respect: such as the right to vote and to participate in politics, liberty of conscience, freedom of thought and of association, as well as the protections of the rule of law").

53. *See e.g.* John Rawls, *A Theory of Justice* 28 (rev. ed., Harv. U. Press 1999) ("A just social system defines the scope within which individuals must develop their aims, and it provides a framework of rights and opportunities and the means of satisfaction within and by the use of which these ends may be equitably pursued."); Rawls, *supra* n. 5, at 325 ("[T]he basic liberties . . . specified by institutional rights and duties . . . are a framework of legally protected paths and opportunities.").

In a remark I quoted above,[54] Baker has pointed out the sting that lurks in this conclusion. It means that "damaged goods" describes the plight of all of us liberals committed to reciprocity,[55] insofar as we admit that some important laws currently in force are reasonably regarded as unjust by persons judging competently from the standpoint of communicative ethics or liberal public reason, and despite any refuge we may seek from such admissions in a transcendent notion of system, framework, or practice. Baker and I agree that non-refutable, communicative-ethically defensible perceptions of injustice do not and cannot be expected to stop at the system's edge.[56] That proposition holds whether we conceive of the system as an as-it-were constitutional contract or, alternatively, we conceive of it as a purely free-standing practice, having its own, immanent past, present, and future, to be appraised by direct application of constitutionally unmediated, liberal political morality.[57]

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"[W]hat makes the Constitution legitimate"—Professor Balkin writes by way of summing up my view—"is that everyone in the political community can, at least in theory, reasonably give their respect to the governmental system in place as they understand it and interpret it."[58] Well, yes, if you read the sentence in a certain way, with certain interpolations, in a certain context. The sentence makes me nervous, though, for two reasons.

First, Balkin's sentence risks conflating empirical with normative legitimacy. By failing to distinguish expressly between (1) factual judgments regarding the expected stability of a political regime and (2) normative judgments regarding the moral justifiability of the regime's claim to public support (which of those two does Balkin's "legitimate" refer to?), Balkin's sentence may obscure an important question: How, if at all, do normative judgments regarding legitimacy and respect-worthiness depend on empirical judgments regarding stability? Second, Balkin's sentence may understate the depth of the protestantism[59] I am trying to bring myself to contemplate.

Consider Balkin's restatement of the same proposition a few sentences later: "[W]hat produces the legitimacy of the Constitution and [other existing governmental] practices is the fact that people can all agree to disagree about what the Constitution and those practices mean."[60] That looks to me like a causal proposition: *X* produces *Y*. Now, where the cause is a *fact*, so must be the effect. If—the proposition runs—it really is a fact that people can all agree to disagree amicably about constitutional meanings, then stability may ensue as a

54. *See supra* text accompanying n. 45.
55. *See supra* text accompanying nn. 4-5.
56. *See* Baker, *supra* n. 1, at 531.
57. *See* Michelman, *Ida's Way*, *supra* n. 9, at 363.
58. Balkin, *supra* n. 6, at 492.
59. *See id.* at 492-93.
60. *Id.* at 493.

consequence of that fact (among other facts, of course). In other words, the political order of which the constitution is a part may be stable in fact, and one contributing, productive reason for that stability may be the social or behavioral fact that the preponderant fraction of the people retain loyalty to the order despite their awareness of serious disagreements among them about the order's meaning.

I have no quarrel at all with such a proposition or with an attribution of it to things I have said in print.[61] Yet, as Balkin very nicely conveys, an empirical expectation of stability is not the only—or the primary—sort of "legitimacy" with which I have been concerned.[62] Rather, my primary concern has been the question with which I opened this reply: How can liberals committed to normative individualism justify conduct in support of the coercive operations of constitutional-democratic government?

Used in a normative sense, "legitimate" is a response to a question about moral justification for one's conduct of a certain sort, as in: "I, a person of liberal, reciprocity-bound, political-moral conviction,[63] am justified in supporting the coercive application of laws insofar as they may be legitimate; and laws are legitimate when they spring from a respect-worthy governmental order or practice." Now, "respect-worthy," in a sense that will fit my argument, is not a fact, it is a judgment. The difference is this: We locate facts in the world, "third person." We locate judgments in consciousness, "first person." Every judgment, but not any fact, carries a trailing "I" (which is not to say that it may not also carry a trailing "we"; the subjective does not exclude the intersubjective).

Much aided by my encounters with Baker's and Balkin's commentaries, I now would write Balkin's sentence differently: *What can make it morally justifiable for* me, *a reciprocity-committed political liberal, to support the coercive operations of constitutional democracy in my country, can only be* my *judgment that every reciprocity-minded (a/k/a "reasonable") person within range has reason to accept the governmental system in place as* I *construe that system, although reasonable disagreements persist about whether the system in place is in all respects what justice requires in a reciprocity-minded, political-liberal view.* Thus, what gives me my justification is not any *fact* about the universal reasonable acceptability of the system in place,[64] it is *my judgment* regarding that question, made on the basis of *my understanding* of what the system in place *is*.

That way of putting the matter would, I believe, be satisfying to Baker.[65] It also accords with what I would understand to be a "protestant" stance toward the normative question of governmental legitimacy. Notice, though, that putting the matter that way does not render the possibly conflicting judgments of others *irrelevant* to my judgment regarding systemic respect-worthiness. If others

61. *See* Michelman, *Ida's Way*, *supra* n. 9, at 362-65.
62. *See* Balkin, *supra* n. 6, at 485-86.
63. *See supra* text accompanying n. 5.
64. I am not denying that there may be such a fact.
65. *See supra* n. 29 and accompanying text.

construe the system differently from how I do and judge it less favorably, I have reason to pay attention. I may do so in the hope or expectation of learning from them. More radically, I may do so because factual expectations regarding stability, and regarding the breadth and depth of the coercion that a stable system on my terms would impose on not-unreasonable others, are factors bearing directly on *my* judgment (reciprocity-bound as it is) regarding systemic respect-worthiness.[66] Nevertheless, the judgment, finally, must be mine to make about whether public support of the system is or is not morally warranted. This is not the sort of question that a vote, for example, could possibly settle for me—relevantly informative though votes sometimes may be.

Accordingly, I balk at Balkin's attribution to me of an ideal-observer sort of theory of legitimacy:[67] "If Ida [the hypothetical ideal observer] would give assent, based on the content that she reasonably imagines the system to have, then the system is legitimate, even if not everyone in the system actually does give assent."[68] In my view, that formulation risks making too little allowance for reasonable, competent, reciprocity-minded disagreement about both the most accurate construction of the system and its deservingness of respect as thus construed. Legitimacy, I want to argue, is, from the standpoint of a reciprocity-minded liberal, an insuperably and irreducibly decentralized, personal judgment. It is, to be sure, a judgment concerned, in part, both with how others have reason to judge and how others may be expected to judge. It is nevertheless *my* judgment. Unlike individual preferences regarded from the standpoint of a utilitarian morality, legitimacy judgments in reciprocity-minded liberalism are not publicly liquidatable in the hypothetical judgment of an ideal observer.

So is legitimacy *not*, then, in my view, "a matter of acts of individual conscience collectively considered"?[69] That would be an overstatement. A judgment regarding legitimacy refers, in part, to a judgment regarding stability; and a judgment regarding stability is, in significant part, a matter of the conscientious attitudes of individuals, collectively considered. To that far from trivial extent, a legitimacy judgment is, indeed, a matter of individual stances collectively considered; only not considered from any ideal-observer or third-person standpoint, but rather from the first-person standpoint of anyone making the judgment.

With that clarification on the table, I will have to consider, and I hope Balkin will consider, whether facts of constitutional change "put[] Frank's conception of legitimacy at risk"[70] in quite the way Balkin suggests.[71] Balkin offers important and bracing discussions of the constructed character of political reason,[72] and also

66. *See* Rawls, *supra* n. 5, at 141 ("Unless [a political conception for the basic structure of society is sufficiently stable], it is not a [morally] satisfactory political conception . . . .").

67. *See* Balkin, *supra* n. 6, at 494.

68. *Id.*

69. *Id.* at 503.

70. *Id.* at 504.

71. *See id.* at 503-10.

72. *See* Balkin, *supra* n. 6, at 506-08.

of the crucial role played by constitutional protestantism—understood as a process "by which and through which individual and dissenting constitutional interpretations become widely accepted and promulgated"[73]—in recouping the possibility of affirmative, reciprocity-minded, liberal judgments of legitimacy from the constructed character of political reason. To refer legitimacy judgments to an ideal observer, Balkin observes, would be to "gloss over" crucial questions about whether and how the construction of public reason occurs[74] and about "asymmetr[ies] in social position and political power"[75] of various would-be contributors to the social processes of construction.

So it would. So, too, I have not given those questions the attention that Balkin shows so clearly they deserve. However, it is not an ideal-observer view that has kept me from them, and I won't need to scrap such a view in order to get moving. Ed Baker and Jack Balkin, I expect, will be around to help keep my nose to the grindstone.

73. *Id.* at 510.
74. *Id.* at 507.
75. *Id.* at 504.