

Who Authorizes the Authorizers: The Problem with Professor Markovits's Jurisprudence

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Can a constitution born in exclusion claim the authority to bind a people? This Note challenges the democratic legitimacy of the United States Constitution, engaging with the argument of Professor Richard Markovits that the Constitution obligates the polity to instantiate a “liberal conception of justice.” His claim presupposes that Ratification was more than political maneuvering—that it was a morally binding act capable of committing future generations. I argue instead that without democratic consent at its founding or viable channels for ongoing constituent participation, the Constitution lacks normative authority. Drawing on the theory of constituent power, I borrow criteria for democratic legitimacy and show that both the founding process and the Article V amendment mechanism fall short of democratic legitimacy. Philosophical and sociological defenses fail to cure this deficit. Ultimately, I contend that legitimacy requires more than lofty ideals or habitual obedience—it demands pathways for “We the People” to speak with sovereign force.

* J.D. Candidate, 2026, The University of Texas School of Law. I am deeply grateful to Professors Sanford Levinson, Joel Colón-Ríos, and Richard Markovits for their teaching and guidance on constituent power, democratic legitimacy, and jurisprudence. All errors, of course, remain my own. I also thank Jordan Lamb and Chris Brady for many illuminating conversations about constitutional legitimacy and for their thoughtful comments on earlier drafts of this Note.

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Introduction

I strongly believe that the Constitution is basically indefensible with regard to what have become widely accepted twenty-first century criteria for identifying a political system as 'democratic.'

—Sanford Levinson¹

Do the cords of antiquity bind us to a constitution—and a conception of justice—imposed by the past? Or do “We the People” stand *over* the Constitution, sovereign not only to *contemplate* its forms but to *reconstitute* them, to reconsider its ideals, and to *demand* a juridical system that reflects our present commitments? This Note confronts this tension by interrogating the provocative claim by Richard Markovits that the Constitution's

1. Sanford Levinson, *Who, If Anyone, Really Trusts “We the People”?*, 37 OHIO N.U. L. REV. 311, 317 (2011).

Ratification committed our polity to a “liberal conception of justice.”² His argument raises a deeper question: *Who authorizes the authorizers?*³

To answer this, this Note examines three theories of legitimacy.⁴ First, democratic legitimacy: Were the people sovereign at Ratification, and does the Constitution still enable constituent power? Second, philosophical legitimacy: Can the Constitution claim authority by virtue of being just?⁵ Third, sociological legitimacy: Does acceptance alone confer legitimacy?⁶

This inquiry is theoretical, empirical, and normative. We scrutinize the Ratification debates to test whether Ratification reflected popular sovereignty—or excluded it. We dissect whether the Constitution’s amendment procedures enable democratic re-constitution or entrench a dead hand of the past. And we confront the unsettling possibility that a document ratified by a narrow, unrepresentative elite might lack legitimacy altogether. The stakes are nothing less than democracy’s promise: a people free to govern themselves, not governed by ghosts.⁷

2. Richard S. Markovits, *Why the U.S., the E.U., Germany, and France Are Constitutionally Committed to Instantiating the Liberal Conception of Justice and the Implications of This Conclusion for Valid Legal Argument, the Existence of Uniquely-Correct Answers to Legal-Rights Questions, and the Attainability of the Rule of Law in Those Political Entities 18–19* (Dec. 10, 2024) [hereinafter Markovits, *Why the U.S.*] (unpublished manuscript) (on file with author).

3. The basic claim of this Note is straightforward: If a group lacks legitimacy to create or impose a constitution, then the ideals embedded in that constitution cannot, by themselves, generate binding commitments. Only if “the people are the only legitimate fountain of power” can the Founders be said to possess constitutional authority. THE FEDERALIST NO. 49, at 313–14 (James Madison) (Clinton Rossiter ed., 1961). Compliance is a separate matter; obedience may arise from prudence or necessity, but it does not confer legitimacy. One’s compliance with the laws of Iran, for example, does not imply acceptance of its regime. This is the central concern behind the title *Who Authorizes the Authorizers?* The Founders did not possess inherent authority to bind future generations.

4. As David Beetham notes, the definition of legitimacy often depends on the discipline: Lawyers emphasize legal validity, social scientists focus on obedience, and philosophers stress justice. DAVID BEETHAM, *THE LEGITIMATION OF POWER 4–6* (Peter Jones & Albert Weale eds., 1991). This Note adopts none of these accounts. Instead, it treats democratic legitimacy as procedural, grounded in the people’s ability to exercise constituent power independent of established legal authority. See JOEL I. COLÓN-RÍOS, *WEAK CONSTITUTIONALISM: DEMOCRATIC LEGITIMACY AND THE QUESTION OF CONSTITUENT POWER 104–107* (2012) [hereinafter COLÓN-RÍOS, *WEAK CONSTITUTIONALISM*] (describing Colón-Ríos’s definition of legitimacy as one viewed through the historical relationship between a constitution and its citizens and the legitimacy of the procedures creating the constitution).

5. What is legitimate to the defender of philosophical legitimacy “is what is morally justifiable or rightful; legitimacy entails the *moral justifiability* of power relations.” BEETHAM, *supra* note 4, at 5.

6. Sociological legitimacy is descriptive, not normative. A government action is sociologically legitimate if it is widely accepted by the population as morally binding in some sense. See David A. Strauss, *Reply: Legitimacy and Obedience*, 118 HARV. L. REV. 1854, 1854, 1856, 1866 (2005) (praising Richard Fallon’s precise definition of legitimacy that emphasizes that legitimacy centrally concerns whether laws or regimes merit obedience).

7. “I set out on this ground, which I suppose to be self evident, ‘that the earth belongs in usufruct to the living’: that the dead have neither powers nor rights over it.” Letter from Thomas Jefferson to James Madison (Sep. 6, 1789), in 15 THE PAPERS OF THOMAS JEFFERSON 392 (Julian P. Boyd ed., 1958) (footnote omitted).

With that in mind, this Note will begin in Part I with an introduction to Markovits's jurisprudence. This analysis draws from personal conversations with Markovits and engagement with his scholarship. Following this, the Note proceeds in four substantive parts.

Part II examines the theory of constituent power and democratic legitimacy. Part II turns to historical evidence concerning the Ratification of the United States Constitution, contending that the process was democratically illegitimate. In combination with Part III, it argues that Markovits's approach falls short when assessed against democratic legitimacy. Part IV builds on this critique by examining the United States Constitution's structural flaws—particularly Article V's restrictive amendment process. This Part rejects the notion that the Constitution's legitimacy can be justified merely by its philosophical virtues. Part V turns to sociological legitimacy, questioning whether passive public acceptance can truly ground a constitution's authority. This Part argues that this view is both inadequate and at odds with democratic principles. This Note concludes by reflecting on the implications of our constitutional illegitimacy and outlines the democratic ideals we should strive toward.

I. Markovits's Jurisprudential Framework

This Part does not attempt a complete articulation of Richard Markovits's "anthropological, secular version of natural-law jurisprudence."⁸ This Note only summarizes the claims necessary to show that Ratification of the 1787 Constitution committed our polity to instantiating a "liberal conception of justice."⁹ At the heart of Markovits's theory is the claim that our society is a moral-rights-based polity, one that engages in prescriptive moral discourse about justice and that gives lexical priority to such discourse over competing considerations of the moral good.¹⁰ For Markovits, lexical priority means society's moral commitments "take precedence over" individual values.¹¹ Moral rights, in this framework, belong to all beings with the capacity to contemplate moral oughts¹² and construct value systems.¹³ These rights impose both positive and negative duties,

8. RICHARD S. MARKOVITS, *MATTERS OF PRINCIPLE: LEGITIMATE LEGAL ARGUMENT AND CONSTITUTIONAL INTERPRETATION 1* (1998) [hereinafter *MARKOVITS, MATTERS OF PRINCIPLE*].

9. Markovits, *Why the U.S.*, *supra* note 2, at 18.

10. *See* *MARKOVITS, MATTERS OF PRINCIPLE*, *supra* note 8, at 1 (discussing the tendency of our society to have discourse on what morally ought to be done and what one is morally obligated to do).

11. *Id.* at 14–15.

12. This underlies the justification for a right to abortion: At certain stages of development, the unborn lack the neurological prerequisites necessary to take their lives morally seriously and do not qualify as moral-rights holders to whom the state owes obligations. *Id.* at 350.

13. *See id.* at 22 (declaring moral integrity involves balancing personal values and moral obligations). By "non-experience-generated neurological prerequisites," Professor Markovits appears to mean the mental capacity to contemplate moral oughts and to construct a system of

especially on the State.¹⁴ Positive obligations require affirmative state action (e.g., education, minimum income); negative obligations bar unjustified harm or rights infringements.¹⁵

Markovits identifies the “abstract . . . ‘moral principle’” that all creatures with the neurological capacity for moral integrity deserve equal respect and concern as the “liberal conception of justice” from which all moral rights are derived.¹⁶ He argues that this principle both grounds legitimate legal argument and yields internally correct answers to nearly all rights questions.¹⁷ As Markovits explains, by “internally right,” he means that “the answers in question are required by the principles our society is morally committed to using in the relevant context.”¹⁸

This framework gives rise to state obligations: to provide moral-rights bearers with education, income, privacy, and the conditions for moral integrity; to ensure democratic participation; to protect rights through fair procedures; and to remedy violations.¹⁹ A liberal state must also recognize both heterosexual and homosexual relationships, a woman’s right to abortion, diverse forms of parenting, and the right to die.²⁰

Markovits justifies his claim about constitutional commitment by citing (1) the natural-rights rhetoric of the Declaration of Independence, (2) the Enlightenment commitments of the Founding generation, (3) the Preamble’s references to “justice” and “liberty,” and (4) textual provisions like the Guarantee Clause and the Privileges and Immunities Clause.²¹ He concedes slavery, women’s exclusion, and Native mistreatment as “dismal realities,” but treats them as regrettable exceptions that do not negate the Constitution’s supposed commitment to the liberal conception of justice.²²

This Note’s basic critique of Markovits’s claim is not that his jurisprudential system is philosophically unsound or normatively undesirable. Rather, the problem lies in its foundation: If the Founders lacked legitimacy to create the 1787 United States Constitution, then the normative

personal ultimate values—capacities that, in his view, are essential to “taking [one’s] life morally seriously.” Richard S. Markovits, *Welfare Economics and Antitrust Policy: A Selective Summary*, 68 ANTITRUST BULL. 551, 557 n.5 (2023).

14. MARKOVITS, MATTERS OF PRINCIPLE, *supra* note 8, at 4–5.

15. *Id.* at 4.

16. *Id.* at 2–3 (explaining that the third proposition of Markovits’s jurisprudential position is that society’s “basic moral principle” is the described “abstract liberal ‘moral principle’”); Markovits, *Why the U.S.*, *supra* note 2, at 7 (calling his view the “liberal conception of justice”).

17. MARKOVITS, MATTERS OF PRINCIPLE, *supra* note 8, at 2–3 (arguing that “in our culture there are internally-right answers to all or virtually all moral-rights questions and to all legal-rights questions”).

18. *Id.* at 2.

19. *Id.* at 4–5.

20. *Id.* at 5.

21. Markovits, *Why the U.S.*, *supra* note 2, at 2–3.

22. *Id.* at 2, 24, 60–61.

ideals purportedly embedded within—like the “liberal conception of justice”—cannot, by themselves, generate binding obligations on the polity. In other words, if the Founders lacked legitimate authority to bind future generations, then no matter how attractive the values they sought to enshrine, those values cannot claim obligatory force. There must be a normative theory of legitimacy to explain how their actions—or the Constitution itself—acquire binding force. The theory advanced here is one of democratic legitimacy: a fundamentally procedural conception grounded in the principle that sovereignty resides in the people, and that any legitimate constitution must preserve a meaningful avenue for the exercise of constituent power.²³

II. Founding Without Consent: Legitimacy and Constituent Power

[T]he democratic legitimacy of a constitutional regime depends on its susceptibility to democratic *re*-constitution. In other words, . . . a constitution must provide an opening, a means of egress for constituent power to manifest from time to time.

—Joel Colón-Ríos²⁴

A. *Varieties of Legitimacy: Sociological, Philosophical, and Democratic*

Constitutional foundations presume that constitutional authority is distinct from and transformative of political power.²⁵ Markovits tacitly accepts this, arguing that the Constitution’s Ratification imposed a *liberal conception of justice*.²⁶ His argument is built upon the distinction between constitutional authority and political power for three reasons. First, he treats constitutional ratification categorically different from ordinary legislation.²⁷ Second, his framework insists citizens must make arguments of moral principles that lead to “internally correct answers”—something that would only be possible if ratification had normative authority.²⁸ Third, he derives

23. See Martin Loughlin, *The Concept of Constituent Power*, 13 EUR. J. POL. THEORY 218, 219 (2014) (maintaining that a constitution’s authority rests on constituent power, understood as the people’s capacity to establish and re-make their governing arrangements).

24. Joel Colón-Ríos, *The Legitimacy of the Juridical: Constituent Power, Democracy, and the Limits of Constitutional Reform*, 48 OSGOOD HALL L.J. 199, 199 (2010) [hereinafter Colón-Ríos, *The Legitimacy*].

25. STEPHEN TIERNEY, *THE FEDERAL CONTRACT: A CONSTITUTIONAL THEORY OF FEDERALISM* 59 (2022).

26. See Markovits, *Why the U.S.*, *supra* note 2, at 58–59 (extrapolating from Markovits’s recognition that liberalism underlies the Constitution’s structural features of federalism and separation of powers to argue that Ratification itself instantiated a liberal conception of justice).

27. See *id.* at 37–38 (observing that “post-original-U.S.-Constitution-ratification U.S. realities manifest the fact that the U.S. is Constitutionally committed to instantiating the liberal conception of justice”).

28. See MARKOVITS, *MATTERS OF PRINCIPLE*, *supra* note 8, at 3 (arguing that the “abstract liberal moral principle . . . provide[s] the basis of the type of legitimate legal argument—arguments

substantive implications that would lack justification if ratification were mere political power.²⁹

Given that Markovits accepts the distinction between constitutional authority and political power, the subject of constitutional foundations presents a challenge for him. Specifically, it requires him to confront the question of whether the United States Constitution is legitimate and to identify the source of legitimacy. If the Constitution was illegitimate, then we must ask on what authority could the Founders bind future generations. This raises the question: What conditions must a constitutional regime meet to be considered legitimate?³⁰

The answer depends on what we mean by legitimacy and what a constitution must do to count as legitimate. Scholars typically distinguish three forms of legitimacy: sociological, philosophical, and democratic.³¹

Sociological legitimacy concerns public belief in a constitution's authority: "[W]hether people (and, if so, how many of them) believe that . . . the constitution deserves to be respected or obeyed for reasons that go beyond fear of adverse consequences."³² As Richard Fallon puts it, "what ultimately matters today . . . is that nearly everyone continues to accept the Constitution . . . as valid, binding law."³³ Philosophical legitimacy, in contrast, evaluates whether a constitution can be justified by its normative ideals. According to John Rawls's defense of philosophical legitimacy,

[O]ur exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason. This is the liberal principle of legitimacy.³⁴

Subpart II(B) that follows, however, centers on democratic legitimacy,³⁵ which is procedural and grounded in constituent power—the principle that

of moral principle—that we are committed to making dominant in our legal culture," to contend that this commitment entails substantive obligations on citizens) (footnotes omitted).

29. *See id.* at 4–5 (outlining the specific rights implicated by moral justifications for the Constitution).

30. To the best of my knowledge, Markovits has not directly addressed the question of constitutional legitimacy.

31. *See, e.g.,* Colón-Ríos, *The Legitimacy*, *supra* note 24, at 201 (introducing the three different types of legitimacy); *cf.* Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1790 (2005) [hereinafter Fallon, Jr., *Legitimacy*] (delineating three different types of legitimacy: legal legitimacy, sociological legitimacy, and moral legitimacy).

32. RICHARD H. FALLON, JR., *LAW AND LEGITIMACY IN THE SUPREME COURT* 22 (2018).

33. *Id.* at 85.

34. Colón-Ríos, *The Legitimacy*, *supra* note 24, at 215 (quoting JOHN RAWLS, *POLITICAL LIBERALISM* 136–37 (expanded ed. 2005)).

35. Arguably, Markovits relies on a theory of sociological legitimacy. One of his stated reasons for rejecting the civic republican conception of constitutional authority is "the more relevant point

ultimate political authority derives from “the people.”³⁶ A constitution is democratically legitimate only if it is the product of popular authorship and remains subject to popular revision. Democratic legitimacy requires more than elections or representation; it demands structures enabling citizens to initiate, deliberate, and enact constitutional change.³⁷

Thus, a democratically legitimate constitutional order must satisfy one of two conditions: either (1) it must be democratically constituted *ab initio*³⁸ and retain accessible channels through which constituent power can be exercised over time; or (2) if not originally founded democratically, it must at minimum enable present-day exercises of constituent power.³⁹ Without such pathways, the “silent sovereign” remains mute.

By this standard, the United States Constitution and Ratification exhibit significant deficits. This will be examined in Part II.⁴⁰ Moreover, Article V’s structure precludes meaningful expressions of popular sovereignty.⁴¹ This issue will be examined in Part III.

B. *Constituent Power and the Rise of Popular Sovereignty*

Constituent power refers to the inherent authority of a people to create and reconstitute the constitutional framework that governs their collective

... that, by the last quarter of the 18th century, the percentage of Americans and a fortiori the percentage of politically-influential Americans who believed these claims and subscribed to this civic-republican government-organization position had dropped precipitously.” Markovits, *Why the U.S.*, *supra* note 2, at 26. The very fact that Markovits treats the loss of civic-republican consensus as a reason for its normative inadequacy suggests he is appealing, at least in part, to the people’s acceptance of constitutional ideals as a source of legitimacy.

36. See Loughlin, *supra* note 23, at 219 (arguing that constituent power “emerges from the secularizing and rationalizing movement of 18th century European thought known as the Enlightenment and rests on . . . recognition that the ultimate source of political authority derives from an entity known as ‘the people’”).

37. Colón-Ríos, *The Legitimacy*, *supra* note 24, at 201.

38. *Ab initio* is Latin for “from the first act or meaning from the start.” *Ab Initio*, THE L. DICTIONARY, <https://thelawdictionary.org/ab-initio/> [<https://perma.cc/JS7L-6U4F>].

39. Colón-Ríos, *The Legitimacy*, *supra* note 24, at 200–01.

40. One limitation of this Note is that it does not fully address Markovits’s argument that, even if the original Constitution did not commit the United States to a liberal conception of justice, the Reconstruction amendments did. See Richard S. Markovits, Professor of Law, Univ. of Tex. Sch. of L., Lecture in Constitutional Law II: Jurisprudence and Constitutional Law (Nov. 18, 2024) [hereinafter Markovits, Lecture] (notes on file with author) (arguing that if one does not accept Markovits’s argument on the “liberal conception of justice” being instantiated at Ratification, the “liberal conception of justice” was at least instantiated at Reconstruction); *cf.*, Sanford Levinson, Professor of Law, Univ. of Tex. Sch. of L., Lecture in Political Sovereignty Seminar (Mar. 6, 2025) (arguing that the Reconstruction amendments were less transformative than often portrayed because the Thirteenth Amendment was “not jurisgenerative,” the Fourteenth remains vague and contested, and the Fifteenth was opposed by many women for excluding them from its protections).

41. See Colón-Ríos, *The Legitimacy*, *supra* note 24, at 212 (“The amendment procedures of most modern constitutions, like the American [one] . . . purposively make change difficult and unlikely . . .”).

existence.⁴² That is why Antonio Negri asserts that “[t]o speak of constituent power is to speak of democracy.”⁴³ Like democracy⁴⁴ itself, constituent power presupposes a self-determining demos, a populace capable of asserting its will to shape the juridical⁴⁵ structures of its political community.⁴⁶ Recognizing the people as bearers of constituent power affirms their sovereignty: the ultimate authority to define political association without external constraint.⁴⁷

Although the people hold the power to define the terms of their political association, the people cannot deliberate or act as a unified agent. They are people that are sovereign who cannot exercise their sovereignty. Therein lies the paradox. Constituent power faces the same fundamental challenges as democracy: Who belongs to “We the People,” and how can this power be meaningfully exercised?

This Note contends that constituent power manifests in two distinct forms.⁴⁸ Original constituent power operates in foundational constitutional moments, those decisive instances when a people first create a constitution.⁴⁹

42. JOEL COLÓN-RÍOS, *CONSTITUENT POWER AND THE LAW* 6, 223, 259 (2020) [hereinafter COLÓN-RÍOS, *CONSTITUENT POWER*].

43. ANTONIO NEGRI, *INSURGENCIES: CONSTITUENT POWER AND THE MODERN STATE* 1 (Maurizia Boscagli trans., Univ. of Minn. Press 1999) (1992).

44. Madison defined “pure democracy” as a small society where citizens govern directly, contrasting it with a “republic,” where power is delegated to elected representatives. THE FEDERALIST NO. 10, at 81–82 (James Madison) (Clinton Rossiter ed., 1961). The Founders typically used “democracy” in the classical sense and viewed it with suspicion. Yet they faced a core tension: grounding legitimacy in popular sovereignty while distrusting the people’s direct exercise of power. See Robert A. Dahl, *James Madison: Republican or Democrat?*, 3 PERSPS. ON POL. 439, 441 (2005) (noting that eighteenth-century Americans often used “democracy” and “republic” interchangeably, with “democracy” favored by those supportive of popular rule and “republic” by those more skeptical).

45. Juridical means, “Of, relating to, or involving law; legal.” *Juridical*, BLACK’S LAW DICTIONARY (12th ed. 2024).

46. See Loughlin, *supra* note 23, at 219 (“[Constituent power] comes into its own only when the constitution is understood as a juridical instrument deriving its authority from a principle of self-determination . . .”).

47. Colón-Ríos, *The Legitimacy*, *supra* note 24, at 209.

48. Scholars have mainly conceptualized constituent power in two ways: first, as an *extra-legal* and *uncontrollable* force, which remains the prevailing view; second, as a *constitutionalized* power, exercised through prescribed procedures for altering or replacing a constitution. See COLÓN-RÍOS, *CONSTITUENT POWER*, *supra* note 42, at 4–8 (discussing the two main ways scholars have conceptualized constituent power but focusing on *constitutionalized* power).

49. See *id.* at 13, 220 (describing the relationship between original constituent power and derived constituent power).

Derived constituent power,⁵⁰ by contrast, functions through established procedures for constitutional amendment within an existing legal order.⁵¹

Although the idea of constituent power has older roots, its modern form emerged most fully in the theory of Emmanuel-Joseph Sieyès.⁵² Sieyès argued that the nation, as the bearer of constituent power, stands above the constitutional order it creates.⁵³ In *What Is the Third Estate?*, Sieyès insisted that the people could never surrender sovereignty.⁵⁴ Constituent power is perpetual and inalienable: The people retain the right to remake their political framework whenever justice or necessity so requires.⁵⁵

This marked a decisive break from earlier thinkers like John Locke and George Lawson, who viewed constitution revision as appropriate only in exceptional cases like tyranny.⁵⁶ Sieyès, by contrast, treated the people's constituent authority as foundational, locating the power to create and remake government in the national will.⁵⁷

Concerningly, the people's constituent authority includes the power to elect despots or disenfranchise themselves,⁵⁸ but this risk is mitigated by an inherent procedural limit: a regime grounded in constituent authority must include those subject to the new regime.⁵⁹ Direct citizen involvement in every law is neither feasible nor desirable.⁶⁰ But in moments of constitutional transformation, democracy demands institutional channels for heightened popular participation, ensuring the "democratic ideal" becomes tangible.⁶¹

Yet, democratic legitimacy extends beyond the singular act of constitution-making. A genuinely legitimate constituent process requires *inclusive* participation, a *deliberative* structure, and *ongoing* avenues for

50. See Joel I. Colón-Ríos, *Introduction: Seven Theses on the Constituent Power*, 48 J. LEGAL PHIL. 38, 39–40 (2023) ("Positive law can regulate the activity of constitution-making, but in such cases it would only be providing a legal means for the exercise of constituent power, not conferring it."); Loughlin, *supra* note 23, at 236 n.46 (discussing the standard juristic distinction between "original constituent power" and "derived constituent power").

51. Some scholars use *constituent power* and *constituted power*, but I consciously avoid these terms due to their visual similarity. See *id.* at 220 (using the terms "constituent power" and "constituted power").

52. Colón-Ríos, *The Legitimacy*, *supra* note 24, at 205.

53. *Id.* at 206.

54. *Id.* at 206–07.

55. *Id.*

56. *Id.* at 206.

57. *Id.*

58. See *id.* at 218 ("Like democracy, constituent power negates itself when it violates the conditions that make it possible . . .").

59. Constituent power entails procedural limits, for as an expression of popular sovereignty it must include all bound by the constitutional order to reflect the people's sovereign will.

60. See Colón-Ríos, *The Legitimacy*, *supra* note 24, at 211 (emphasizing that democracy cannot literally mean citizens voting directly on every law, as such a system is neither feasible nor functional).

61. See *id.* (explaining that during moments of constitutional change, democracy calls for channels of heightened citizen involvement to realize its ideal).

popular reassertion. The next subpart explores two models for meeting these minimal conditions, which Part II then applies to the 1787 Ratification and Article V amendment processes.

C. *Minimal Criteria for Democratic Legitimacy*

Two principal models emerge as legitimate mechanisms for constitutional transformation: first, the legislative-convened constituent assembly, initiated by established government institutions; and second, the citizen-initiated constituent assembly (from below), activated through direct popular action.⁶²

The first mechanism involves a constituent assembly convened by ordinary government institutions, typically the legislature.⁶³ In other words, it involves “a constituent assembly composed of delegates elected for the sole purpose” of re-constituting the juridical order.⁶⁴ By vesting the power to initiate change solely in established institutions, it creates two fundamental problems: First, it enables legislatures to pursue self-interested amendments without genuine popular support; second, it allows political elites to block popular demands for reform even during periods of widespread mobilization.⁶⁵ These deficiencies can be partially mitigated by requiring a ratification referendum with high participation thresholds (e.g., 75% of prior election turnout), but the mechanism remains inherently constrained by its dependence on constituent powers.⁶⁶

A more democratically robust alternative is the citizen-initiated constituent assembly.⁶⁷ This model, exemplified by the constitutions of Bolivia, Ecuador, and Venezuela, allows citizens to trigger the process through petitions (typically requiring fifteen to twenty percent of the electorate) followed by an approval referendum.⁶⁸ The resulting assembly is sovereign, independent of existing institutions, and its proposals require final

62. By “from below,” this Note means directly from the People themselves.

63. Colón-Ríos, *The Legitimacy*, *supra* note 24, at 237–38.

64. *Id.* at 237.

65. *Id.* at 238.

66. *Id.* at 238–39; see *Initiative and Referendum Processes*, NAT’L CONF. OF STATE LEGISLATURES (July 9, 2025), <https://www.ncsl.org/elections-and-campaigns/initiative-and-referendum-processes> [<https://perma.cc/CU2A-7BJT>] (discussing mechanisms by which citizens in various states, including California, can directly propose and vote on statutory and constitutional changes, exemplifying California’s system that allows for direct democracy through initiatives and referenda).

67. This mechanism is “superior . . . from the perspective of democratic legitimacy. It attributes to the people . . . the faculty of re-activating its constituent power and becoming the author of a radically transformed constitutional regime.” Colón-Ríos, *The Legitimacy*, *supra* note 24, at 240 (footnote omitted).

68. *Id.* at 240–41. The goal is to avoid setting the threshold for triggering a constituent assembly so high as to make reform impossible, or so low that a well-funded minority lacking broad public support can initiate constitutional change.

ratification by the people.⁶⁹ This approach more authentically embodies constituent power by placing initiation and approval directly in the hands of the citizenry.⁷⁰ While not without risks, it provides an institutional pathway for popular sovereignty to manifest.⁷¹

It is important to clarify the purpose of this subpart. It does not aim to offer a precise or exhaustive definition of the conditions sufficient to render a constitutional founding democratically legitimate. Rather, it introduces two illustrative mechanisms, a legislature-initiated constituent assembly and a citizen-initiated assembly, that exemplify how a constitutional order might instantiate core principles of democratic legitimacy: *inclusivity*, *deliberative participation*, and the preservation of a *window* for constituent power. These models are not presented as exclusive or universally applicable, but as normative benchmarks against which constitutional frameworks could be assessed. Viewed against this normative benchmark, the United States Constitution falls short. It provides no means for citizens to initiate or directly approve constitutional change. This deficiency is not merely theoretical; at the time of the founding, no such mechanisms existed, notwithstanding the Framers' frequent rhetorical appeals to "We the People" as the ultimate source of authority.⁷² This absence underscores the gap between democratic principles professed and the structure created.

III. Founding in Democratic Deficit: The Ratification of the 1787 Constitution

With regard to the national constitution, it is difficult, perhaps even impossible, to define the United States as a country that believes in a very robust notion of democracy

—Sanford Levinson⁷³

69. *Id.* at 241.

70. *Id.* at 241–42.

71. George Mason, a key dissenter at the 1787 Convention, favored direct election of the lower house and warned that senators were "not the representatives of the people or amenable to them." PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788, at 42, 46, 49 (2010). His stance reflects an early commitment to citizen-driven constituent authority.

72. See, e.g., THE FEDERALIST NO. 39, at 241 (James Madison) (Clinton Rossiter ed., 1961) ("[W]e may define a republic to be . . . a government which derives all its powers directly or indirectly from the great body of the people"); THE FEDERALIST NO. 2, at 37 (John Jay) (Clinton Rossiter ed., 1961) ("When the people of America reflect that they are now called upon to decide a question"); THE FEDERALIST NO. 14, at 103 (James Madison) (Clinton Rossiter ed., 1961) ("I submit to you, my fellow-citizens"). As Madison later wrote, "[the Constitution] was nothing more than the draught of a plan, nothing but a dead letter, until life and validity were breathed into it, by the voice of the people." James Madison, Jay's Treaty (Apr. 6, 1796), in 16 THE PAPERS OF JAMES MADISON 290, 296 (J.C.A. Stagg, Thomas A. Mason & Jeanne K. Sisson eds., 1989). These quotations reflect the Founders' own understanding that authority rests with the people. If Markovits claims that the act of Ratification created moral obligations, he should also accept the grounding of legitimacy in popular sovereignty.

73. Levinson, *supra* note 1, at 326.

A. *The Political Strategy of the Federal Convention*

This subpart brackets the drama of Ratification and defers to Pauline Maier’s *Ratification* for the full story. It focuses instead on the procedural choices that undermined democratic legitimacy.

The story begins on February 21, 1787, when Congress endorsed Rufus King’s resolution calling for a convention in Philadelphia “for the sole and express purpose of revising the Articles of Confederation,” with the aim of “render[ing] the federal constitution adequate to the exigencies of government and the preservation of the Union.”⁷⁴ The Convention was scheduled to convene on May 14, but took a week before a quorum of seven state delegations arrived.⁷⁵ Once assembled on May 25, the delegates adopted a rule of secrecy forbidding members from “print[ing], publish[ing], or . . . communicat[ing]” anything said during the debates “without leave.”⁷⁶ The Convention unanimously elected Washington as its president as Henry Knox and David Humphreys had predicted, and Washington wrote to Knox on May 31 confirming that ten states were present, with Maryland en route.⁷⁷ Eventually, all states except Rhode Island were represented.⁷⁸

What followed was not a revision of the Articles, but the creation of a new constitutional order, signed by thirty-eight of the forty-one delegates on September 17, 1787.⁷⁹ The result would surprise those who expected only amendments to the existing charter.⁸⁰ As the Convention explained in its transmittal letter to Congress, placing all effective powers in a single body—as the Articles had done—was inadvisable.⁸¹ A new institutional framework was required.⁸² Most significantly, the proposed Constitution did not follow the amendment procedures of the Articles, which required unanimous state approval.⁸³ Instead, it declared: “We the people of the United States . . . do ordain and establish this Constitution.”⁸⁴

A separate resolution recommended that the Constitution “be laid before the United States in Congress assembled,” and “be submitted to a Convention of Delegates, chosen in each State by the People thereof . . . for their Assent

74. MAIER, *supra* note 71, at 21.

75. *Id.* at 27.

76. *Id.* at 28. The rule of secrecy has both positive and negative implications for democratic legitimacy. It can encourage open and honest deliberation among delegates, yet it also limits transparency and public input, creating the danger of unaccountable decision-making.

77. *Id.*

78. *Id.*

79. *Id.* at 29; Scott Bomboy, *On This Day, the Constitution Was Signed in Philadelphia*, NAT’L CONST. CTR. (Sep. 17, 2024), <https://constitutioncenter.org/blog/today-the-constitution-was-signed-in-philadelphia> [<https://perma.cc/9S2D-T996>].

80. MAIER, *supra* note 71, at 29.

81. *Id.*

82. *Id.*

83. *Id.* at 30.

84. *Id.*

and Ratification.”⁸⁵ Upon ratification by nine states, Congress was to implement the new government.⁸⁶ New Hampshire became the ninth state to ratify on June 21, 1788, making the Constitution operative.⁸⁷

Importantly, the Constitution included several provisions with far-reaching legal and moral implications. It mandated the extradition of individuals charged with crimes who fled from one state to another⁸⁸ and, more troublingly, required the return of persons “held to Service or Labour in one State . . . escaping into another,” a reference to fugitive slaves.⁸⁹ In addition, Article I, Section 9 prohibited Congress from banning the foreign slave trade before 1808, placing the institution of slavery beyond amendment.⁹⁰

Equally significant was Article V, which introduced a new amendment process. Unlike the Articles of Confederation, which required unanimous consent of the state legislatures and congressional approval, amendments under the new Constitution could be proposed either by a two-thirds vote in both houses of Congress or by a convention called at the request of two-thirds of the state legislatures.⁹¹ Ratification would occur upon approval by three-fourths of the state legislatures or by conventions in three-fourths of the states, with Congress authorized to choose the method.⁹²

The Convention was far from unanimous. Thirteen delegates left before its conclusion—some for personal reasons, others, like Robert Yates, John Lansing Jr., and Luther Martin, in open protest.⁹³ As George Washington recorded, three additional delegates remained until the end but refused to sign the final document.⁹⁴ In total, sixteen of the fifty-five delegates who had attended at some point declined to endorse the Constitution.⁹⁵ As Pauline Maier observed, the Convention⁹⁶ “acted without authority,” having been

85. *Id.*

86. *Id.*

87. *Id.* at 361.

88. U.S. CONST. art. IV, § 2, cl. 2.

89. U.S. CONST. art. IV, § 2, cl. 3, *superseded by*, U.S. CONST. amend. XIII. Markovits concedes that slavery was the Constitution’s central illiberal feature and seeks to mitigate it by noting the Framers’ moral unease, the Constitution’s rhetorical distancing, and the incoherence of pro-slavery justifications. But this neglects how slavery’s status as a “non-fit” undermines not only his view but also democratic legitimacy: Treating Black Americans as property, excluding them from the franchise, and reducing them to fractional persons under the Three-Fifths Clause stripped the Founders of the moral authority to bind “the People.” Markovits, *Why the U.S.*, *supra* note 2, at 22–24.

90. MAIER, *supra* note 71, at 191.

91. *Id.* at 34.

92. *Id.* at 35.

93. *Id.*

94. *Id.*

95. *Id.*

96. Markovits concedes that excluding women from the Convention and political life undermines his claim but argues this reflected eighteenth-century assumptions—that God ordained

appointed only to revise the Articles, “not to design a new government.”⁹⁷ Two dissenters at the time, George Mason and Edmund Randolph, reflect this Note’s core criticism of the founding’s undemocratic shortcomings. They believed state conventions should deliberate on proposed changes, with a national convention later adopting, modifying, or rejecting the changes.⁹⁸ This approach embodies two essential components of democratic legitimacy: open deliberation and the preservation of a window for constituent power.⁹⁹ Although such a process would still have failed the principle of inclusivity, it would have at least created a participatory framework. Mason and Randolph rightly insisted that the people and their chosen representatives should have been able to shape the Constitution *before* it took effect.¹⁰⁰ They challenged the Convention’s authority to present the proposed Constitution to the people on a take-it-or-leave-it basis, a move that foreclosed constituent engagement at the most critical stage.¹⁰¹

B. The Problem of Exclusion: Who Was Absent from the Founding?

To summarize, the Constitution’s Ratification process was exclusionary in several respects. First, it was premised on *broken promises*.¹⁰² Convened to revise the Articles of Confederation, the Convention instead produced a constitutional overhaul that betrayed the public’s expectations.¹⁰³ Second, the process lacked *genuine deliberation*.¹⁰⁴ A fundamental component of constituent power is the people’s ability to deliberate, amend, and, if

domestic roles, women were biologically distinct and undereducated, and that gender hierarchies were mutually beneficial rather than demeaning. Markovits, *Why the U.S.*, *supra* note 2, at 24.

97. MAIER, *supra* note 71, at ix.

98. *Id.* at 48.

99. Colón-Ríos, *The Legitimacy*, *supra* note 24, at 201.

100. MAIER, *supra* note 71, at 48.

101. *See id.* (“What right did the convention have to tell the sovereign people to ‘take this or nothing?’”).

102. In response to charges that the Convention exceeded its mandate, Madison reframed the issue: “The prudent inquiry . . . ought surely to be not so much *from whom* the advice comes, as whether the advice be *good*.” THE FEDERALIST NO. 40, at 254 (James Madison) (Clinton Rossiter ed., 1961). He conceded that even if the delegates had violated their instructions, the proposal “ought nevertheless to be embraced, if it be calculated to accomplish the views and happiness of the people of America.” *Id.* at 254–55. In doing so, Madison shifted the conversation from procedure to normativity.

103. *See* MAIER, *supra* note 71, at 65 (“The federal Convention . . . violated the instructions to its members, which empowered them only to propose amendments to the existing Confederation, not to devise an entirely new form of government.”).

104. Consider Richard Henry Lee’s observation in a letter to George Mason, where he criticized the Ratification campaign’s lack of openness: The Constitution, he wrote, was presented as a “this or nothing” proposition, “and this urged with a most extreme intemperance.” Letter from Richard Henry Lee to George Mason (Oct. 1, 1787), in 1 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 345 (Merrill Jensen ed., 1976).

necessary, refound their constitutional order.¹⁰⁵ Yet dissenting voices, like Richard Henry Lee, Edmund Randolph, and others, were sidelined.¹⁰⁶ In fact, proponents of the new Constitution pressured Congress not to engage in paragraph-by-paragraph consideration, urging it instead to transmit the document to the states “without ‘any examination of it by paragraphs in the usual mode of doing business.’”¹⁰⁷ This maneuver denied the people any real opportunity to revise or meaningfully deliberate on the proposed charter.¹⁰⁸

Third, the Ratification process *excluded* enslaved persons, women, and Native Americans, yet the Constitution, according to Markovits, imposed binding normative commitments on them.¹⁰⁹ Fourth, the *rush to ratify* further exacerbated these deficiencies. As Lee warned, the “violence . . . practised [sic] by the Agitators of this new System in Philadelphia to drive on its immediate adoption” revealed that the Constitution’s approval had become a “business of passion, instead of cool, sober, and intense consideration.”¹¹⁰ The Convention pushed for Ratification “with great dispatch,” before the public could engage in “reflection and due examination.”¹¹¹ Finally, *Article V’s restrictive amendment procedures* sealed off any future window for constituent power to reemerge.¹¹² Even if one were to excuse the founding’s initial democratic failings, the Constitution could have redeemed itself by preserving an institutional path for popular sovereignty to assert itself over time. That it failed to do so is decisive.

105. In Connecticut, for example, the ratification debates lasted only six days. *Connecticut Ratifies the Constitution*, EBSCO (2022), <https://www.ebsco.com/research-starters/history/connecticut-ratifies-constitution> [<https://perma.cc/DMK5-37CK>]. While that brevity alone may not prove a failure of open deliberation, it adds weight to the broader concern. See RICHARD BEEMAN, PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION 384–85 (2009) (describing the ratification process in the Connecticut as rushed and dominated by Federalist messaging and pressure to approve without amendment).

106. See MAIER, *supra* note 71, at 58, 66–67 (discussing that Washington had thought George Mason had caused the opposition in both Congress and the Pennsylvania assembly and the official records did not include the amendments Lee proposed).

107. *Id.* at 52–53.

108. The Ratification process itself undercut open, popular deliberation. Rather than submitting the Constitution directly to the people, delegates were chosen through special elections to attend state conventions. By contrast, Massachusetts had submitted its 1780 Constitution to the towns for direct approval. As Michael Klarman notes, this approach “depart[ed] from existing norms—especially in New England—of how important governance decisions were to be made.” MICHAEL J. KLARMAN, *THE FRAMERS’ COUP: THE MAKING OF THE UNITED STATES CONSTITUTION* 618 (2016).

109. See Markovits, *Why the U.S.*, *supra* note 2, at 18, 23–24 (arguing that the Constitution committed the United States polity to liberal justice despite its exclusion of enslaved persons and women).

110. Letter from Richard Henry Lee to Samuel Adams (Oct. 5, 1787), in 8 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 36, 38 (John P. Kaminski & Gaspare J. Saladino eds., 1988).

111. Letter from Richard Henry Lee to George Mason (Oct. 1, 1787), in 2 *THE LETTERS OF RICHARD HENRY LEE* 438, 439 (James Curtis Ballagh ed., 1914).

112. See *infra* notes 143–147 and accompanying text.

C. *The Convention's Overreach*

Markovits might¹¹³ defend the Ratification process on two grounds: First, that the Constitutional Convention reflected a broad reform effort; and second, that the Articles of Confederation were so structurally flawed that wholesale replacement was necessary.¹¹⁴ But neither addresses the fundamental question: Was the process of Ratification legitimately inclusive of “We the People?”¹¹⁵ Markovits might plausibly contend that he addresses the core question of democratic legitimacy through his first point that the Constitutional Convention constituted a broadly accepted reform effort, suggesting that “We the People” effectively ratified the outcome. Yet this misunderstands this Note’s view. In this Note’s view, democratic legitimacy is a procedural concept; it depends not on whether an outcome proves popular, but whether the process was inclusive, deliberative, and meaningfully authorized.¹¹⁶ Markovits might respond that the Articles were so structurally deficient, lacking, for instance, centralized taxing authority or a unified executive, that wholesale replacement was required. But that argument invokes philosophical, not democratic legitimacy. It suggests that the Constitution’s substantive merits justify its procedural irregularities.

Ultimately, Markovits’s claim that the Constitution was a “widely accepted reform effort” is an empirical assertion disguised as a normative one. It is *empirical* in that it posits a sociological fact—that the Philadelphia Convention was broadly accepted—but *normative* in that it seeks to justify procedural defects based on that acceptance. Even taken on its own terms, Markovits’s assertion demands empirical substantiation, which appears difficult to provide. He does not address the necessary threshold question: *Accepted by whom?* Are we to believe that women, the poor, Native Americans, and the enslaved—none of whom could vote or participate in ratifying conventions—were part of this “broad” consensus?¹¹⁷ The claim

113. I use “might” because Markovits has not directly addressed the question of whether the 1787 constitutional Ratification was a “coup.” Thus, this is speculative and not attributed.

114. See *Articles of Confederation*, HISTORY (Sep. 2, 2025), <https://www.history.com/articles/articles-of-confederation> [<https://perma.cc/8938-HT7D>] (describing the weaknesses of the Articles of Confederation, including the lack of federal power to enforce laws or raise taxes, and the absence of executive and judicial branches).

115. See Colón-Ríos, *The Legitimacy*, *supra* note 24, at 201 (“The conception of democracy on which this account of legitimacy rests requires that citizens be allowed to become authors of their constitution . . .”).

116. See *id.* at 201 (explaining that democratic legitimacy is highly procedural and that to achieve it, a constitution should have a mechanism to allow citizens to deliberate on changes to and have the chance to become authors of their constitution); Andreas Kalyvas, *Popular Sovereignty, Democracy, and the Constituent Power*, 12 CONSTELLATIONS 223, 237 (2005) (“In a democratic regime, the legitimacy of the fundamental norms and institutions depends on how inclusive the participation of the citizens is during the extraordinary and exceptional moment of constitution making.”).

117. See *Presidential Elections and Voting in U.S. History: Voters and Voting Rights*, LIBR. OF CONG., <https://www.loc.gov/classroom-materials/elections/voters/> [<https://perma.cc/46F2-LGQP>]

that ratification was “widely accepted” cannot substitute for democratic legitimacy (procedural) unless it accounts for the exclusion and marginalization in the process. Even accepting Markovits’s claim at face value, one must ask: If the Convention truly reflected a broadly accepted reform effort, why the rush to ratify, the suppression of dissenting voices in both the press and the conventions, and the insistence on an all-or-nothing vote with no opportunity for amendment?

These theoretical concerns become especially apparent when one examines how ratification actually unfolded. Consider Pennsylvania: Immediately after the Constitutional Convention adjourned on the afternoon of September 17, 1787, Pennsylvania’s congressional delegation requested an audience before the General Assembly.¹¹⁸ At eleven a.m. the very next morning on September 18, they formally presented the proposed Constitution.¹¹⁹ The timing was no accident: The Assembly was scheduled to adjourn on Saturday, September 29 and would not meet again until after statewide elections on October 9.¹²⁰ This meant the Federalist-controlled legislature had a narrow window to push for a ratifying convention.¹²¹ Importantly, this push began *before* Congress had officially transmitted the Constitution to the states.¹²² Federalist leaders coordinated a wave of petitions from towns like Germantown urging the General Assembly to adopt the Constitution “as speedily as possible . . . in the manner recommended by the resolution of the late Honorable Convention.”¹²³ Yet at that point, most Pennsylvanians had not seen the document. Representative Robert Whitehill estimated that “not one Pennsylvanian out of twenty” had read it.¹²⁴ He later protested the pace of the process: “I don’t know any reason there can be for driving [the Constitution] down our throats, without an hour’s preparation,” unless it be “a plan not fit for discussion.”¹²⁵

Meanwhile, Anti-Federalist legislators attempted to block the convention call by denying the Assembly a quorum, and on September 29, two of them, James M’Calmont and Jacob Miley, were forcibly seized by a city constable and dragged into the chamber to establish quorum.¹²⁶ This

(describing how youth, Native Americans, African Americans, and women gradually secured the right to vote); Paul Finkelman, *The Nefarious Intentions of the Framers?*, 84 U. CHI. L. REV. 2139, 2147–48 (2017) (reviewing KLARMAN, *supra* note 108) (outlining that those sent by the state legislatures to the Constitutional Convention were prominent men).

118. MAIER, *supra* note 71, at 59.

119. *Id.*

120. *Id.* at 59–60.

121. *See id.* (noting that the majority of legislators were “inclined to favor a national government like the one proposed by the Convention”).

122. *Id.* at 60.

123. *Id.*

124. *Id.*

125. *Id.* at 61 (alteration in original).

126. *Id.* at 63–64.

“peaceful” quorum enabled the legislature to proceed with calling the convention, which was scheduled for elections on November 6, less than six weeks later.¹²⁷ The ratifying convention opened on November 21 and ratified the Constitution on December 12 by a vote of forty-six to twenty-three.¹²⁸ During that time, Anti-Federalist voices were systematically marginalized. For instance, politicians opted not to circulate publications and pamphlets that discussed objections to the Constitution even when those writings were overall pro-Constitution.¹²⁹ Suppression extended even to the official record, as *The Debates of the Convention of the State of Pennsylvania* omitted speeches critical of the Constitution.¹³⁰ Fortunately, Alexander J. Dallas, editor of the *Pennsylvania Herald*, printed a full version of the debates.¹³¹ One delegate, Ebenezer Bowman, later admitted that he had “carefully avoided” letting local residents know “that any objections were made to the Constitution,” fearing they were “so prone to opposition that they would readily join in any [effort] to prevent that excellent plan from taking place.”¹³²

Indeed, the insistence on *wholesale ratification* was a recurring feature of Federalist strategy. As Daniel Clymer, a Federalist, urged at the Pennsylvania convention, delegates “must adopt *in toto* or refuse altogether.”¹³³ Richard Henry Lee complained how “the states must agree in the whole, or else . . . reject it.”¹³⁴ Federalists feared that introducing amendments would fracture support and delay or derail Ratification.¹³⁵ And this is only Pennsylvania, which the Federalists dominated.¹³⁶ In Connecticut, the debates only lasted six days.¹³⁷

Pennsylvania underscores a deeper truth: Legitimacy is not secured by popular assent to a foregone conclusion. When elites dictate terms and the people merely ratify, the result may be orderly but not authentically

127. *Id.* at 64, 100.

128. *Remembering the Day Pennsylvania Ratified the Constitution*, NAT’L CONST. CTR (Dec. 12, 2017), <https://constitutioncenter.org/blog/remembering-the-day-pennsylvania-ratified-the-constitution> [https://perma.cc/SN46-NM4G].

129. *E.g.*, MAIER, *supra* note 71, at 100.

130. *Id.* at 100–01.

131. *Id.* at 101.

132. *Id.* at 100 (alteration in original).

133. *Id.* at 61 (quoting Daniel Clymer, Speech at the Pennsylvania Assembly (Sep. 28, 1787), in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 65, 76 (Merrill Jensen ed., 1976)).

134. *Id.* at 59 (quoting Melancton Smith, Notes on Proceedings of Congress on the Constitution (Sep. 27, 1787), in 1 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 335, 337 (Merrill Jensen ed., 1976)).

135. *See id.* at 55, 67–68 (discussing the possibility that the introduction of amendments would risk the creation of multiple constitutions or would open a “Pandora’s box” that would have no obvious end).

136. *See id.* at 59 (“[Pennsylvania] also had a majority of members inclined to favor a national government like the one proposed by the Convention.”).

137. Finkelman, *supra* note 117, at 2153.

democratic. Legitimacy for the few cannot replace legitimacy by and for the many.

IV. The Structural Entrenchment of the Past: Article V and the Closure of Constituent Pathways

Article V constitutes what may be the most important bars of our constitutional iron cage precisely because it works to make practically impossible needed changes in our polity.

—Sanford Levinson¹³⁸

A. *The Design and Effects of Article V*

This account does not attempt to catalog every structural flaw in the Constitution. For that, Sanford Levinson's *Our Undemocratic Constitution* offers fuller treatment.¹³⁹ Instead, this subpart focuses on a specific subset of structural shortcomings: those that impair democratic legitimacy, particularly the Constitution's failure to provide a meaningful avenue for the people to reconstitute their governing framework.

Article V is not formally immutable, but it is functionally static.¹⁴⁰ Its supermajority thresholds empower political minorities to block amendment, even in times of broad consensus.¹⁴¹ The Fourteenth Amendment was ratified under coercive Reconstruction conditions; the Seventeenth Amendment took decades of effort and required near-crisis conditions to succeed.¹⁴² These exceptions confirm the rule: Our Constitution lacks a regularized pathway for the people to reassert constituent authority.¹⁴³ Article V establishes two formal mechanisms for constitutional amendment:

138. SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* 160 (2006) [hereinafter LEVINSON, *OUR UNDEMOCRATIC*].

139. *See id.* at 11–12 (introducing Levinson's argument that "the Constitution we currently live under is grievously flawed" and constitutes a danger "to achieving the laudable and inspiring goals to which this country professes to be committed, including republican self-government").

140. *See id.* at 160 (noting that, though Article V "allows for the possibility of amendment," it is "next to impossible" to amend the Constitution).

141. *See, e.g., id.* at 162 (explaining that Article V's requirement of two-thirds majority enabled "the minority of senators from the minority of states" to block the ratification of the Seventeenth Amendment for more than a decade).

142. *See id.* at 160–62 (highlighting that the Fourteenth Amendment "was added only at the point of a gun," for Congress would not grant the former Confederate states representation in the federal government until each respective state ratified the Fourteenth Amendment and that the Seventeenth Amendment was only ratified out of fear that the state legislatures would petition Congress to call a constitutional convention).

143. *See* Colón-Ríos, *The Legitimacy*, *supra* note 24, at 210, 212–13 (explaining that "constituent power mandates that those living under a set of fundamental laws participate in the creation and recreation of those laws").

1. *Congressional Initiative*: An amendment may be proposed by a two-thirds vote in both the House and Senate and then must be ratified by three-fourths of the states.¹⁴⁴

2. *Convention of the States*: Alternatively, if two-thirds of the state legislatures apply, Congress must call a constitutional convention to propose amendments, which must also be ratified by three-fourths of the states.¹⁴⁵

In theory, Article V allows revision; in practice, supermajorities give minorities vetoes at every stage.¹⁴⁶ No Article V convention has ever been successfully called, and Congress-initiated amendments are rare and typically minor.¹⁴⁷

One might object: Doesn't the existence of the Fourteenth and Seventeenth Amendments prove Article V's adequacy? The record says otherwise. The Fourteenth, the most transformative amendment, was ratified under the force of sword.¹⁴⁸ Congress made clear that Southern states would not have elected representatives seated unless they ratified the amendment.¹⁴⁹

Additionally, the Fourteenth Amendment was followed by decades of constitutional stagnation.¹⁵⁰ The Fifteenth Amendment was ratified in 1870, and for the next forty years, no significant structural amendment followed.¹⁵¹ Even the Seventeenth Amendment—the shift to direct election of senators—offers little comfort.¹⁵² Though reformers had advocated for the change since the Jacksonian era, it took until 1913 to be enacted.¹⁵³ By 1911, at least nineteen state legislatures had called for an Article V convention on the issue, and it was only this looming threat that pressured Congress to act.¹⁵⁴ The Senate's decision to pass the amendment was not a reflection of evolving

144. U.S. CONST. art. V.

145. *Id.*

146. See LEVINSON, OUR UNDEMOCRATIC, *supra* note 138, at 160, 162 (pointing out that the requirement of two-thirds consensus presents a serious obstacle to ratification of an amendment).

147. See JOHN G. MALCOLM, HERITAGE FOUND., RECONSIDERING THE WISDOM OF AN ARTICLE V CONVENTION OF THE STATES 2 (2023), <https://www.heritage.org/the-constitution/report/reconsidering-the-wisdom-article-v-convention-the-states> [<https://perma.cc/KB37-T5ZT>] (noting that no Article V convention has ever been successfully called).

148. LEVINSON, OUR UNDEMOCRATIC, *supra* note 138, at 160.

149. *Id.*

150. See *id.* at 161 (explaining that the Fourteenth Amendment was ratified in the immediate aftermath of the Civil War, before the Fifteenth Amendment was passed in 1870, after which no amendment was passed for forty years).

151. *Id.*

152. See *id.* at 161–62 (expressing concern about the fact that, despite widespread support for the popular election of senators, ratification of the Seventeenth Amendment took many years).

153. *Id.*

154. *Id.* at 162.

democratic theory, but of institutional self-preservation.¹⁵⁵ The Seventeenth Amendment shows reform occurs only when all political stars align, not when urgently needed.¹⁵⁶

Some argue that constitutional interpretation compensates for the rigidity of Article V.¹⁵⁷ But interpretive innovation cannot substitute for democratic authorship. No branch of government, however creative, can cure the structural silence imposed on the people since 1787.¹⁵⁸ Article V offers no citizen-accessible method for revision, neither legislature-initiated assemblies with ratification nor citizen-initiated conventions. Instead, it entrenches the choices of the founding generation, shielding them from meaningful popular revision by future ones. Without institutional pathways for “We the People” to reassert constituent authority, the sovereign remains silent. And where the sovereign is silent, democratic legitimacy fails.

B. *The Democratic Deficit in Everyday Governance*

Robert Dahl once posed the question, “*How democratic is the American Constitution?*”¹⁵⁹ His answer was unambiguous: not enough.¹⁶⁰ This subpart turns from the Constitution’s Article V barrier to reconstitution to its failings in ordinary democratic governance. Democratic legitimacy demands not only constitutional mechanisms for a window for constituent power but also a political structure that reflects the principles of inclusivity and the fostering of deliberative participation in everyday lawmaking.¹⁶¹ Yet the Constitution entrenches systemic inequalities in political voice—especially through Senate malapportionment, the Electoral College, bicameralism, and the presidential veto—that frustrate both deliberation and inclusivity.

Begin with the Senate. Its structure frustrates the people’s voice by giving disproportionate power to smaller states by giving each state two senators, regardless of population.¹⁶² A Wyoming resident holds sixty-eight

155. *See id.* (noting that the ratification of the Seventeenth Amendment was the result of intense political pressure on the Senate and that the Amendment did little to diminish the senators’ power).

156. *Id.*

157. *Id.* at 163–64.

158. *See id.* at 164 (“[T]here are limits to what even the most imaginative Congress, president, or Supreme Court can do to alleviate the deficiencies of the Constitution composed in 1787 and only infrequently formally amended thereafter.”).

159. This is the title of one of Dahl’s books. ROBERT A. DAHL, *HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION?* (2001).

160. LEVINSON, *OUR DEMOCRATIC*, *supra* note 138, at 51–52.

161. *See* Colón-Ríos, *The Legitimacy*, *supra* note 24, at 212 (“Democratic self-government . . . requires the participation of the citizenry in the production of the laws . . .”).

162. In holding that state senate districts must have roughly equal populations, the Supreme Court argued:

[I]f a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted.

times more Senate voting power than a Californian, despite California's population exceeding Wyoming's by more than 38 million people.¹⁶³ Six states (Alaska, Delaware, North Dakota, South Dakota, Vermont, and Wyoming) each have fewer than one million residents and yet control twelve Senate seats collectively.¹⁶⁴ The combined population of the seven smallest states—Vermont, North Dakota, Montana, Delaware, Alaska, Wyoming, and South Dakota—is 5,693,253.¹⁶⁵ Minnesota alone has a population of 5,706,494.¹⁶⁶ Yet those seven states collectively send fourteen senators to the United States Senate, while Minnesota sends only two.

The Electoral College magnifies this inequity by allocating electors through congressional representation.¹⁶⁷ Because every state receives two electors tied to its Senate seats, small states enjoy inflated influence. But the deeper problem lies in the winner-take-all allocation used in all but two states (Maine and Nebraska), which reduces presidential contests to a handful of battlegrounds.¹⁶⁸ States like California, New York, and Illinois, representing tens of millions of people, are effectively ignored, while “swing states” dominate national attention.¹⁶⁹ In fact, presidents spend a disproportionate amount of time in swing states. During his first three years in office, fifty percent of President George W. Bush's trips to his ten most frequently visited states and forty-five percent of his trips to his twenty most frequently visited states were swing states, including twenty-seven visits to Pennsylvania,

Reynolds v. Sims, 377 U.S. 533, 562 (1964).

163. This figure was calculated by dividing California's population (39,538,223) by Wyoming's (576,851), yielding a ratio of approximately 68:1. *2020 Census Apportionment Results: Table 2. Resident Population for the 50 States, the District of Columbia, and Puerto Rico: 2020 Census*, U.S. CENSUS BUREAU (Apr. 2020), <https://www2.census.gov/programs-surveys/decennial/2020/data/apportionment/apportionment-2020-table02.pdf> [<https://perma.cc/K2W5-NLP5>].

164. *Id.*

165. *Id.* Only Montana (1,084,225) exceeds one million residents; the others—Delaware (989,948), Vermont (643,077), North Dakota (779,094), Alaska (733,391), South Dakota (886,667), and Wyoming (576,851)—all fall below that threshold.

166. *Id.*

167. See *Distribution of Electoral Votes*, NAT'L ARCHIVES, <https://www.archives.gov/electoral-college/allocation> [<https://perma.cc/7AU9-WPD5>] (“Every State is allocated a number of votes equal to the number of Senators and Representatives in its U.S. Congressional delegation—two votes for its Senators . . . plus a number of votes equal to the number of its Congressional districts.”).

168. See *id.* (describing the winner-take-all system); LEVINSON, *OUR UNDEMOCRATIC*, *supra* note 138, at 87–88 (explaining how the winner-take-all system creates the phenomenon of battleground states, which become the focus of presidential campaigns while other states become “utterly irrelevant”).

169. See, e.g., KATHRYN DUNN TENPAS, *PRESIDENTIAL TRAVEL AND THE PERMANENT CAMPAIGN* (2004), <https://www.brookings.edu/wp-content/uploads/2012/04/20040329tenpas.pdf> [<https://perma.cc/85P7-E7GX>] (evaluating campaign travel by Presidents Bush and Clinton to demonstrate that campaign travel is disproportionately focused on battleground states rather than on states with the largest populations).

twenty-four to Florida, and eighteen to Missouri.¹⁷⁰ This concentration of attention reflects the outsized influence swing states exert on presidential agendas, effectively privileging their regional interests in national policymaking.

Compounding the democratic deficit is the problem of bicameralism. Unlike most parliaments, the United States Senate and House share equal authority.¹⁷¹ This is exceptional. Among eight European democracies with bicameral systems, six have only “weak” bicameralism, where one chamber (typically the lower, more representative house) can override the other.¹⁷² In France, the National Assembly has the final word in legislative conflicts.¹⁷³ Only two, Germany and Switzerland, are “strong” bicameral systems, and even Germany allows the popularly elected Bundestag to break deadlocks.¹⁷⁴ The United Kingdom’s House of Lords, meanwhile, has not had parity with the House of Commons since 1911.¹⁷⁵ In the United States, however, the Senate and House share equal legislative authority, notwithstanding the Senate’s unique powers over treaties and federal appointments.¹⁷⁶

The Senate’s origins as a compromise do not mitigate the fact that it functions as a minoritarian veto point, capable of blocking legislation supported by national majorities. Proponents defend the Senate as a federalism safeguard, claiming it prevents populous states from dominating policy.¹⁷⁷ But this rationale conflates the protection of state interests with democratic representation, treating equal voting power for states as though it reflects popular will.¹⁷⁸ As Lynn Baker and Samuel Dinkin note, the Senate not only redistributes power from large states to small, but it also distorts racial and economic representation and incentivizes narrow, parochial politics.¹⁷⁹ Senators from small states can focus on a few dominant interests—e.g., Iowa corn subsidies—while senators from large, diverse states must balance a myriad of often conflicting demands.¹⁸⁰ A senator from New York may have to navigate the interests of upstate farmers, Orthodox

170. *Id.*

171. LEVINSON, OUR UNDEMOCRATIC, *supra* note 138, at 30.

172. *See, e.g., id.* (providing examples of European countries where the popularly elected lower house holds superior legislative power).

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* at 31.

177. *See id.* at 32 (describing a “broader consensus” as a primary justification for bicameralism).

178. *See id.* at 34 (using the unconstitutionality of state legislative systems that emulated the Senate’s structure to illustrate the conflict between protecting political subdivisions and ensuring democratic representation based on population).

179. *Id.* at 54.

180. *See id.* at 55 (explaining that senators from large states must accommodate heterogeneous constituencies, while senators from smaller states can prioritize narrower economic base).

Jewish schools, and urban housing policy—all within a single vote—whereas a senator from Vermont or Wyoming can prioritize a single economic base.

Moreover, executive veto power in the United States deepens the crisis. Article I, Section 7 empowers the President to veto legislation unless repassed by two-thirds of both chambers.¹⁸¹ While intended as a safeguard, this power now functions as a supermajoritarian requirement.¹⁸² Historically, more than 95% of presidential vetoes have been sustained.¹⁸³ Other democracies recognize the dangers of this concentration of power: Switzerland grants its president no veto at all, and South Africa limits presidential vetoes to requiring legislative reconsideration.¹⁸⁴ In the United States, however, a single president can override the legislative will of both chambers.

In sum, the Constitution's design for ordinary lawmaking—far from enabling inclusive and deliberative self-rule—excludes most of the population from meaningful representation, empowers political minorities to block national majorities, and frustrates collective deliberation through procedural roadblocks.¹⁸⁵ Any account of legitimacy that ignores them—particularly one that seeks to ground legitimacy in “philosophical” ideals—must grapple with the fact that the constitutional structure denies the very people it claims to represent a voice in their governance.

C. *Three Problems with Philosophical Legitimacy*

Philosophical legitimacy evaluates constitutions by their normative content: whether free and equal citizens could reasonably endorse their principles under fair deliberative conditions.¹⁸⁶ Likewise, Randy Barnett argues that legitimacy turns on whether constitutional procedures reliably prevent injustice.¹⁸⁷ Building on this, Markovits might¹⁸⁸ argue that legitimacy derives from a constitution's actual embodiment of moral principles that all persons—viewed as free and equal moral agents—have good reason to affirm, regardless of whether they have historically had the chance to formally consent.

181. *Id.* at 39.

182. *Id.*

183. *Id.* at 40.

184. *Id.*

185. *See id.* at 50–52 (arguing that the Senate's constitutional structure and internal rules transfer power from citizens of populous states to those in less populous states, grants representatives of less populous states outsized influence over legislation, and enables minority opponents of legislation to play spoiler against a majority).

186. Colón-Ríos, *The Legitimacy*, *supra* note 24, at 214–15.

187. Randy E. Barnett, Essay, *Constitutional Legitimacy*, 103 COLUM. L. REV. 111, 114 (2003).

188. I use “might” because Markovits has not directly addressed the question of constitutional legitimacy in his published work, and therefore the position reconstructed here is speculative rather than attributed.

From this perspective, the Constitution gains normative authority because it instantiates, however imperfectly, a set of moral commitments—rooted in what Markovits terms the “liberal conception of justice.”¹⁸⁹ Markovits might contend that these rights supply objective normative reasons for obedience, even absent democratic authorship. He could further argue that this Note places excessive weight on procedure at the expense of substance. A democratic constitution that enabled, for example, slavery—even if ratified with universal participation—would not be legitimate.¹⁹⁰ What matters is whether the system justifies its coercive authority by reference to defensible moral reasons.

Finally, Markovits might turn this Note’s critique back on itself: If democratic authorship is lacking, are we trapped in permanent delegitimation? He could argue that legitimacy today depends not on origins, but on the legal system’s continuing moral evolution.¹⁹¹ While Markovits’s potential account may offer a principled and morally rich defense of constitutional authority, it ultimately shifts the locus of legitimacy from the people to an abstract standard of justice, thereby raising deep concerns about authority, democratic agency, and the dangers of elite substitution for popular will. Markovits’s defense of philosophical legitimacy¹⁹² ultimately begs the very question it seeks to answer: Who decides what counts as just, and on what authority is such a regime imposed?¹⁹³

First, his account introduces the fundamental problem of external moral authority.¹⁹⁴ To say that citizens “have good reason” to endorse the

189. Markovits, *Why the U.S.*, *supra* note 2, at 4–6.

190. Markovits is correct that a constitution permitting slavery would not be legitimized solely by democratic ratification. But this objection presumes a moral standard, external from the people. Democratic legitimacy, by contrast, vests authority in “the people” themselves. Nor is the risk of injustice unique to democracy; it exists in any system, including one grounded in moral principle.

191. This critique does not imply permanent illegitimacy. Legitimacy remains possible, but only if institutional mechanisms exist for the people to reassert constituent authority. Without such avenues, constitutional legitimacy is not lost entirely but remains out of reach.

192. I struggled with this subpart because I believe Markovits and I are speaking past one another. He argues that the Constitution is legitimate because it embodies morally attractive principles; I contend that it is illegitimate because it neither represents the people nor empowers them meaningfully. At bottom, we prioritize different values. Still, Markovits faces an unresolved burden: He must explain how the Constitution’s structural design can be normatively justified. Inspiring ideals alone cannot confer legitimacy unless institutions can actually achieve them.

193. Markovits’s potential appeal to philosophical legitimacy ultimately depends on the viability of an external moral standard, an account of justice capable of evaluating a regime’s procedural legitimacy from outside its own terms. Yet Markovits expressly does not provide this. *See* Markovits, *Why the U.S.*, *supra* note 2, at 63, n.18 (“This Article does not proceed on the assumption that the conception of liberalism it articulates is an objectively-true concept of justice . . . I am not capable of generating a Foundationalist (conceptual) argument for such a conclusion . . .”).

194. Like sociological legitimacy, philosophical legitimacy must confront a core difficulty: A philosophically sound constitution could still be imposed by an external ruler through force. The mere presence of normative merit does not justify the act of imposition.

Constitution's values is not to show that those values were rightfully imposed—especially if the people had no voice in their adoption and possess no meaningful mechanism for revision.

Second, while Markovits rightly warns against hollow proceduralism, this objection is not responsive to the core of the democratic critique. The claim is not that all democratic outcomes are just. Rather, the claim is that authority over fundamental law must begin with the people. Normative ideals gain force not when imposed by philosopher kings but when grounded in participatory authorship.¹⁹⁵ A system that insulates itself from constituent power cannot claim to represent the governed, no matter how lofty its principles.

Finally, and most critically, an appeal to philosophical legitimacy risks freezing the constitutional order by treating moral endorsement as a substitute for democratic renewal. If the Constitution is legitimate because it expresses correct moral values, then what need is there for change, especially when those in power can claim fidelity to those same values? This logic shields the regime from critique even as it fails to offer meaningful channels for participation.

V. The Normative Limits of Sociological Legitimacy

We stand in judgement over the Constitution, rather than accept as “justice” whatever the Constitution is thought to require, permit, or prohibit.

—Sanford Levinson¹⁹⁶

A. Markovits's Hybrid Legitimacy Theory

Richard Fallon defines sociological legitimacy as a descriptive¹⁹⁷ and not a normative notion: “[A] government action enjoys sociological legitimacy if it is generally accepted by the population as morally binding in some way.”¹⁹⁸ Building on this, Markovits might respond to this Note's critiques of the Ratification and the Constitution by arguing that although the Ratification process was exclusionary and undemocratic, the Constitution nonetheless binds the polity because the people have come to accept the

195. See PLATO, REPUBLIC 148–56 (G.M.A. Grube trans., C.D.C. Reeve revisor, Hackett Publ'g Co. 2d ed. 1992) (c. 380 B.C.) (discussing the idea of philosopher kings).

196. Sanford Levinson, *Divided Loyalties: The Problem of “Dual Sovereignty” and Constitutional Faith*, 29 TOURO L. REV. 241, 250 (2013).

197. Richard H. Fallon, Jr., *Author's Response: Further Reflections on Law and Legitimacy in the Supreme Court*, 18 GEO. J.L. & PUB. POL'Y 383, 387 (2020) (“[S]ociological legitimacy is an empirical rather than a normative concept.”).

198. Strauss, *supra* note 6, at 1855 (citing Fallon, Jr., *Legitimacy*, *supra* note 31, at 1795).

ideals embedded within.¹⁹⁹ This acceptance, he might argue, coupled with the normative weight of the “liberal conception of justice,” confers legitimating force.

Markovits might develop this position along several lines. First, he could argue that legitimacy does not depend solely on procedure but instead arises from a combination of two elements: the substantive moral commitments expressed in the constitutional text (a form of philosophical legitimacy),²⁰⁰ and the population’s widespread acceptance of those commitments as binding (sociological legitimacy).²⁰¹ On this, if the “liberal conception of justice” is both morally sound and widely embraced, the Constitution’s authority derives from the convergence rather than from its original method of adoption. Legitimacy, in this view, is conferred by the moral merit of the new system and the people’s recognition of it rather than by the process through which it came into being.

Second, he might contend that even if the 1787 Constitution did not commit the polity to the liberal conception of justice, the Reconstruction Amendments did.²⁰² These post-Civil War reforms may represent a

199. Markovits might argue that Americans have embraced not only the Constitution’s ideals but also the broader “liberal conception of justice.” A 2024 survey found that 63% of United States adults support legal abortion in all or most cases. PEW RSCH. CTR., BROAD PUBLIC SUPPORT FOR LEGAL ABORTION PERSISTS 2 YEARS AFTER DOBBS 3 (2024), <https://www.pewresearch.org/politics/2024/05/13/broad-public-support-for-legal-abortion-persists-2-years-after-dobbs/> [<https://perma.cc/TNG7-LRFS>]. In 2022, 61% viewed same-sex marriage legalization positively. Gabriel Borelli, *About Six-in-Ten Americans Say Legalization of Same-Sex Marriage Is Good for Society*, PEW RSCH. CTR. (Nov. 15, 2022), <https://www.pewresearch.org/short-reads/2022/11/15/about-six-in-ten-americans-say-legalization-of-same-sex-marriage-is-good-for-society/> [<https://perma.cc/APU3-6FE8>]. A 2020 survey reported that 67% of adults under thirty favored a \$1,000 monthly universal basic income. Hannah Gilberstadt, *More Americans Oppose Than Favor the Government Providing a Universal Basic Income for All Adult Citizens*, PEW RSCH. CTR. (Aug. 19, 2020), <https://www.pewresearch.org/short-reads/2020/08/19/more-americans-oppose-than-favor-the-government-providing-a-universal-basic-income-for-all-adult-citizens/> [<https://perma.cc/ZVA8-H3PE>].

200. This is a form of philosophical legitimacy, claiming that the Constitution’s normative ideals remain morally sound despite its structural flaws. Yet this argument faces several problems. First, if the Constitution’s design cannot realize these ideals, they risk becoming empty principles rather than actual commitments. Second, the argument assumes that these ideals are themselves morally desirable, but Markovits expressly refuses to defend that claim. *See* Markovits, *Why the U.S.*, *supra* note 2, at 66 n.18 (conceding that he is “not capable of generating a Foundationalist (conceptual) argument for such a conclusion”). If the Constitution’s legitimacy depends on the soundness of the substantive ideals, declining to justify them makes the argument circular: the Constitution is legitimate because it instantiates liberal justice, and liberal justice is legitimate because it is embodied in the Constitution. Third, ideals such as equality or liberty are so abstract that asserting we are bound by them carries little practical or normative meaning.

201. Markovits might contend like Scott Soames that sociological legitimacy stems from the Constitution, which has served as a normative anchor since the founding and was reaffirmed through the Civil War. Scott Soames, *Originalism and Legitimacy*, 18 *GEO. J.L. & PUB. POL’Y* 241, 255 (2020).

202. Markovits, *Lecture*, *supra* note 40 (“If the original Constitution did not commit the United States to a liberal conception of justice, the Reconstruction Amendments surely did.”).

democratic and moral recommitment to the “liberal conception of justice.” From this perspective, the people’s continued engagement with the Constitution retroactively legitimizes the regime. What matters is not mere acquiescence, but ongoing endorsement of the Constitution’s normative framework.

Third, Markovits might reject a strict binary between descriptive and normative legitimacy. He could argue that sociological legitimacy possesses normative weight precisely because it reflects the people’s collective moral judgment. If the public treats the Constitution as morally binding, that practice itself may generate obligations. Drawing on H.L.A. Hart’s concept of the “rule of recognition,”²⁰³ Markovits might claim that legitimacy arises when legal norms are treated as binding by participants in the system, and that such acceptance can create a form of normative force independent of democratic origins.

On this hybrid account, legitimacy emerges from the interaction between substantive moral ideals and public recognition. The Constitution’s initial moral failures do not, in this view, undermine its long-term legitimacy. Rather, the Constitution’s aspirational principles—justice, liberty, and equality—establish a framework for moral development. According to this argument, that development is exemplified by decisions like *Brown v. Board of Education*,²⁰⁴ which helped realize the Fourteenth Amendment’s moral promise and, in doing so, lent retrospective legitimacy to a constitutional system that began in democratic deficit.²⁰⁵

B. *Six Problems with Sociological Legitimacy*

While Markovits’s hybrid account offers a nuanced defense of legitimacy, it fails to address several foundational concerns. Namely, sociological legitimacy may explain why governments endure but it does not tell why they are legitimate. What follows are six conceptual problems that reveal the limits of sociological legitimacy as a normative justification. First, can we even call it *legitimacy* if it is purely descriptive? Legitimacy, as traditionally understood, is a normative concept—it concerns whether an institution *ought* to be obeyed, not simply whether it *is* obeyed.²⁰⁶ A

203. Stephen V. Carey, *What Is the Rule of Recognition in the United States?*, 157 U. PA. L. REV. 1161, 1163 (2009) (“[H.L.A. Hart’s] rule of recognition is . . . complex . . . but it may be described most simply as the rule that is used to identify those other rules that are valid as law in a given legal system.”).

204. 347 U.S. 483 (1954).

205. *See id.* at 495 (“We conclude that in the field of public education the doctrine of ‘separate but equal’ has no place.”).

206. The term “legitimacy” encompasses a range of meanings that go beyond mere compliance. Merriam-Webster defines “legitimate” as “genuinely good,” “accordant with law or with established legal forms and requirements,” and “conforming to recognized principles or accepted rules and standards.” *Legitimate*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam->

descriptive account does not answer the question of legitimacy; it evades it. To appeal to sociological legitimacy, then, is to answer the question of legitimacy by redefining it out of existence.

Second, even if later generations accept the Constitution, this does not resolve the original sin of exclusionary Ratification. Sociological legitimacy ignores this. Democratic legitimacy requires that the *initial* act of constitution-making be authorized by the people or at least preserve an avenue for amendment.

Third, this view appears to justify even authoritarian or externally imposed regimes, so long as they are passively accepted. Does sociological legitimacy mean a regime remains legitimate even if it engages in violence or oppression, so long as the population acquiesces?²⁰⁷

Fourth, sociological legitimacy suffers from a boundary condition problem: what level or form of resistance is necessary to render a regime *illegitimate*? Must people stage a violent overthrow?²⁰⁸ Is sustained protest sufficient? What about widespread, written opposition?²⁰⁹ Even if sociological legitimacy relies on moral acceptance, how much dissent undermines it? If 30% of the population rejects the Constitution's moral framework (e.g., libertarians, communists), is it still legitimate?

Fifth, sociological legitimacy seems to rely implicitly on the premise that "the people" are sovereign. Otherwise, why should the acceptance of the population have any moral significance? If the people's opinions carry no normative weight, then their acceptance or acquiescence is irrelevant to the legitimacy of a regime. In other words, if legitimacy is defined purely by acceptance, it becomes tautological (i.e., it's legitimate because people accept it). Markovits must explain *why* acceptance matters normatively: Is it because democracy is inherently valuable? If so, then procedural legitimacy is doing the work, not sociological legitimacy.

Sixth, sociological legitimacy offers no principled limit on constitutional revision. If legitimacy is based purely on popular acceptance of moral ideals, what prevents a future population from repudiating the

webster.com/dictionary/legitimate [https://perma.cc/BW5L-7CEX]; cf., Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2240 (2019) (reviewing FALLON, JR., *supra* note 32) ("Legitimacy is a complex and puzzling concept. But in legal discourse, we have an intuitive sense that *illegitimate* means something more than erroneous or incorrect.").

207. I would ask Markovits whether "acceptance" includes coerced acquiescence. If not, how do we distinguish genuine acceptance?

208. Finkelman suggests as much, remarking that "[s]urely such a revolution or coup should have required troops in the street and cannons aimed at statehouses." Finkelman, *supra* note 117, at 2149.

209. Approximately eighty-five Anti-Federalist papers were published across diverse regions of the country, articulating deep and principled objections to the Constitution. *The Anti-Federalist Papers*, HIST. SOC'Y OF THE N.Y. CTS., https://history.nycourts.gov/about_period/antifederalist-papers/ [https://perma.cc/U5CB-A8RT].

“liberal conception of justice” in favor of illiberal or authoritarian values? If acceptance alone determines legitimacy, then even morally regressive shifts could be legitimate, undermining Markovits’s reliance on enduring liberal norms as a foundation for authority.²¹⁰

Though thoughtful, Markovits’s potential hybrid model of legitimacy fails to resolve the core problem of democratic authorization. Sociological acceptance and moral ideals may reinforce a constitution’s stability or normative appeal, but they cannot retroactively cure a legitimacy deficit rooted in an exclusionary and unauthorized founding. Without original consent or mechanisms for the “sleeping sovereign”²¹¹ to speak, the Constitution’s authority remains contestable—however noble its aspirations or broad its acceptance.

Conclusion

This Note began with a question—who authorizes the authorizers?—and ends with a sobering answer: not “We the People.” The 1787 Constitution, far from being the expression of a sovereign populace, was the product of exclusionary procedures, elite compromises, and structural barriers to participation. Article V’s rigidity, Senate malapportionment, the Electoral College, and the presidential veto all reinforce a system that entrenches the dead hand of the past while foreclosing meaningful popular reconstitution.

Yet recognizing the Constitution’s illegitimacy leaves an urgent question unanswered: what does that mean for us? What this does not mean is that we should disregard or disobey the Constitution.²¹² Founding illegitimacy does not erase authority; rule of law and stability still give us reasons to work within the system we have.

What it does mean is that we must take constitutional illegitimacy seriously and confront its implications. I suggest that this finding leads to

210. When asked whether someone could use political power to undermine the liberal conception of justice, Markovits responded that they could not. Telephone Interview with Richard S. Markovits, Professor of Law, Univ. of Tex. Sch. of Law (Jan. 21, 2025) (notes on file with author).

211. I use the term “sleeping sovereign” as a nod to Richard Tuck’s evocative title. RICHARD TUCK, *THE SLEEPING SOVEREIGN: THE INVENTION OF MODERN DEMOCRACY* (2016). As this Note argues, I favor mechanisms that keep the sovereign continuously awake. For many political theorists, “the people” are the sovereign, ultimately holding the reins of power but remaining largely inactive: a silent sovereign. As this Note argues, mechanisms should exist to keep the sovereign continuously awake, ensuring that the people can always express their voice by exercising their constituent power to reconstitute the political order rather than remaining silent.

212. See COLÓN-RÍOS, *WEAK CONSTITUTIONALISM*, *supra* note 4, at 106 (arguing that authority and legitimacy are distinct concepts as authority pertains to the state’s claim to obedience, while legitimacy concerns the procedures by which the Constitution is established and revised, and as such, a constitution may lack democratic legitimacy yet still warrant obedience on independent grounds).

three practical consequences. First, constitutional illegitimacy has interpretive consequences: It challenges how we read and apply the Constitution. Second, illegitimacy justifies structural critique. Third, it should shift how Americans talk about and relate to the Constitution.

First, the Constitution's illegitimacy carries significant interpretive consequences—undermining original-intent originalism while offering greater support for original-public-meaning originalism. Original intent grounds constitutional meaning in the intentions of the Founders.²¹³ But if the Founders lacked democratic authority to bind the polity, then their intentions carry less force. This critique also extends to original-application originalism, which attempts to determine how the Framers would have applied constitutional provisions to modern circumstances.²¹⁴ Original public meaning, by contrast, asks how the Constitution's text would have been understood by the public at the time of Ratification.²¹⁵ This approach places interpretive weight on public understanding.²¹⁶ In that way, original public meaning is more democratically defensible: It seeks legitimacy not from the will of the few but from the understanding of the many.²¹⁷

Beyond original public meaning, the argument advanced in this Note also lends support to living constitutionalism.²¹⁸ If the Constitution lacks original legitimacy, then the Constitution arguably warrants interpretive evolution that prioritizes current democratic values. In this light, living constitutionalism can partially repair our Constitution's illegitimacy by interpreting the Constitution to support the people's voice.²¹⁹

Second, constitutional illegitimacy strengthens the case for structural reform. It forces us to ask: If the Constitution lacks democratic origins, how might we reclaim legitimacy today? This question invites renewed attention to proposals that expand democratic participation and constituent power like the citizen-initiated constitutional conventions, legislatively convened

213. John O. McGinnis & Michael B. Rappaport, *Unifying Original Intent and Original Public Meaning*, 113 NW. U. L. REV. 1371, 1373 (2019).

214. Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 28 (2009) (“Application originalism is a bad view, but one to which not even originalists subscribe.”).

215. McGinnis & Rappaport, *supra* note 215, at 1373.

216. *Id.*

217. Critics may argue that original public meaning originalism lacks democratic legitimacy because it entrenches the “dead hand” of the past by tying interpretation to how the public understood constitutional provisions at the time of ratification. However, this concern can be mitigated because originalism primarily concerns judicial interpretation. Its function is to constrain judges, not the sovereign people. By limiting judicial discretion, originalism shifts policy-making authority to the legislative branch—the branch most directly accountable to the public.

218. See Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243, 1244 (2019) (“Living constitutionalists contend that constitutional law can and should evolve in response to changing circumstances and values.”).

219. Living constitutionalism faces a core flaw: Interpretation cannot cure an undemocratic founding, especially when Article V blocks meaningful reconstitution.

assemblies, national referenda, term limits, and other institutional reforms aimed at making our constitutional order more inclusive and deliberative.

Third, constitutional illegitimacy should shift how Americans talk about and relate to the Constitution. It invites us to replace reverence with reflection and to move from passive veneration to critical engagement. This means taking an honest look at the Constitution's exclusions and structural flaws and asking not how best to preserve it, but how to make it better. A critical attitude does not mean discarding the Constitution; it means reclaiming it.

Returning to the core question: If Markovits ignores democratic legitimacy, how can the order he defends be legitimate? Defenders of the Constitution's legitimacy offer three primary justifications: that the people accept it (sociological legitimacy), that it is substantively just (philosophical legitimacy), and that it was democratically authorized. This Note has shown that the Constitution fails each test. It was not born of inclusive consent, does not enable the ongoing exercise of constituent power, and cannot derive legitimacy merely from moral aspiration or passive obedience.

This directly implicates Markovits: His claim that the Constitution commits the polity to liberal justice presupposes that it had legitimate authority to bind the people. But an illegitimate constitution cannot impose moral commitments on a sovereign it never consulted. Without democratic authorization, no normative conception, no matter how attractive, can supply binding force. To accept his conclusion is to concede the very authority the Constitution lacks.

Ultimately, legitimacy is not a function of endurance or idealism. It is the rightful expression of a people's power to constitute, critique, and revise the framework that governs them. If "We the People" are to be sovereign, then we must possess the means to speak—not merely in preambles, but in practice.