

THE LOGIC OF LEGITIMACY: *Bootstrapping Paradoxes of Constitutional Democracy**

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Many have claimed that legitimate constitutional democracy is either conceptually or practically impossible, given infinite regress paradoxes deriving from the requirement of simultaneously democratic and constitutional origins for legitimate government. This paper first critically investigates prominent conceptual and practical bootstrapping objections advanced by Barnett and Michelman. It then argues that the real conceptual root of such bootstrapping objections is not any specific substantive account of legitimacy makers, such as consent or democratic endorsement, but a particular conception of the logic of normative standards—the determinate threshold conception—that the critic attributes to the putatively undermined account of legitimacy. The paper further claims that when we abandon threshold conceptions of the logic of legitimacy in favor of regulative-ideal conceptions, then the objections, from bootstrapping paradoxes to the very idea of constitutional democracy, disappear. It concludes with considerations in favor of adopting a more demanding conception of the regulative ideal of constitutional democracy, advanced by Habermas, focusing on potentials for developmental learning.

Suppose—as many including myself do—that to be legitimate, political systems must be both democratic and constitutional.¹ Yet this supposition runs into a potentially devastating counterargument, namely, that such a package view of legitimacy—requiring both constitutionalism and democracy—is

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1. I use “legitimate” and its cognates in their normative, moral senses and not in either their legal senses or their empirical, descriptive, or sociological senses. Thus I am not considering here questions about the de facto support that a population has for the extant political regime or constitutional system, nor about the relation between (normative) legitimacy and (empirical) stability. For more on this distinction, see CHRISTOPHER F. ZURN, *DELIBERATIVE DEMOCRACY AND THE INSTITUTIONS OF JUDICIAL REVIEW* (2007), at 76–77. That book also contains my considerations in support of the normative proposition—simply presupposed here—that constitutionalism and democracy are both required for political legitimacy.

inevitably subject to foundational paradoxes. One version of the counterargument is conceptual: according to the package view, a legitimate constitution could be adopted only through democratic endorsement, yet that democratic endorsement would need to be structured by preconstitutional procedures, even while those preconstitutional procedures would themselves require democratic endorsement, and so on into a paradoxical infinite regress. Another version notes that empirically, actual constitutional democracies have suffered from related origins paradoxes: for instance, the U.S. Constitution was adopted through constitutionally illegal means (given the procedures then in force that were established by the Articles of Confederation) and it was democratically ratified thanks only to a constitutive antidemocratic commitment to the exclusion of slaves from the demos. Consider, as another example, the current Iraqi constitution: it was imposed by patently undemocratic means even as it attempted to inaugurate practices of legitimate constitutional democracy.

This paper argues that the troubling nature of such conceptual and empirical paradoxes results not, as many argue, from supposed irreconcilable tensions between the substantive principles of democracy and of constitutionalism. Nor does it arise only for specific substantive conceptions of democracy, of constitutionalism, and of constitutional democracy. The trouble is generic and arises, as I hope to show, from the underlying conception of the logic of legitimacy assumed by the respective accounts of constitutional democracy.² The paper contends that an inappropriate “threshold” conception of legitimacy’s *logic*—inherited from legal discourse and modeled most clearly in legal positivism—is the root of the paradoxical troubles canvased. Whatever one’s preferred substantive conception of constitutional democracy, the paper urges the adoption of a “regulative ideal” conception of the logic of legitimacy to assuage the paradoxical worries and argues that a “developmentalist” version of such a regulativist conception is the most promising.

The first section reconstructs various considerations that are taken to support the proposition that constitutional democracy is inevitably subject to debilitating legitimacy paradoxes: conceptual arguments advanced by Randy Barnett and Frank Michelman and empirical worries motivated by the tainted origins of actual constitutional democracies. The second section outlines two different ways of conceiving of the logic of legitimacy. Section III then turns to a critical examination of the role of the two distinct conceptions of the logic of legitimacy in Barnett’s and Michelman’s theories in order to show the attractiveness of the regulative-ideal conception. That section also enlists arguments from Jeremy Waldron to suggest that the paradoxical regresses identified cannot be stopped through recourse to

2. Because the trouble is generic, I do not intend the positive arguments of this paper to rely upon any particular substantive conception of the legitimacy of constitutional democracy. Of course, the trouble would not arise if constitutional democracy were not required for political legitimacy.

objectively conceived substantive political ideals. Section IV then turns to Jürgen Habermas's proposal of a more determinate form of regulativism—developmentalism—and suggests that while his account of the logic of legitimacy is in broad strokes a persuasive and powerful form of regulativism, it merits some important modifications.

I. BOOTSTRAPPING PARADOXES

A. Conceptual Problems of Infinite Regress

Consider first two recent conceptual arguments to the effect that legitimate constitutional democracy is inherently paradoxical: Barnett's paradox of authority³ and Michelman's paradox of democratic procedures.⁴ Although each is advanced only on the way to the positive presentation of each author's preferred account of what makes constitutional democracy legitimate, I am deferring treatment of their positive accounts until Section II, focusing here only on the claim that the very idea of constitutional democracy is subject to paradoxical infinite regresses.

Barnett makes original use of suggestions made in an article by Lea Brilmayer to argue that any and all contractualist accounts of political legitimacy are subject to endemic bootstrapping paradoxes.⁵ Barnett begins by asking what legitimates state coercion of subjects. The answer contract theories present is that it is the *consent* of individual subjects to the laws, or the state, or the constitution that does the normative work of making state coercion morally acceptable. But note, argues Barnett, that if there is an already existing regime, one must render one's explicit consent to an authority of the state or, on some weaker accounts, one tacitly consents to remain under the jurisdiction of the state's laws and its authorities. Yet on either the explicit- or the tacit-consent accounts, the existing state, its laws, and its minions are

3. RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004).

4. FRANK I. MICHELMAN, BRENNAN AND DEMOCRACY (1999); Michelman, *Constitutional Authorship*, in CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS (64–98) (Larry Alexander ed., 1998); Michelman, *How Can the People Ever Make the Laws? A Critique of Deliberative Democracy*, in DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS (145–171) (James Bohman & William Rehg eds., 1997); Michelman, *Jürgen Habermas's Between Facts and Norms*, 93 J. PHIL. (307–315) (1996) (book review). I think Michelman's clearest formulation of the paradox is to be found in *Constitutional Authorship*, though only in BRENNAN AND DEMOCRACY does he suggest determinate ways to come to terms with the paradox in practice.

5. See BARNETT, *supra* note 3, at 11–31, referring to Lea Brilmayer, *Consent, Contract, and Territory*, 74 MINN. L. REV. (1–35) (1989). Specifically, his argument is directed against contractualist political theories in a broad sense but is not directed to contractarian or contractualist moral theories. I ignore here Barnett's (unacknowledged) replay of Hume's arguments against consent, to the effect that various empirical circumstances that individual subjects find themselves within under already constituted states render their putatively free consent questionable and therefore unreliable as a basis for claiming legitimacy. These familiar arguments—e.g., that acquiescence to the law might reflect the extremely high cost of exit rather than tacit consent to the law—are not *conceptual* barriers to a contractualist account of legitimacy, no matter how weighty they may be under actual empirical conditions.

already in existence *and* are assumed to have the legitimate authority to demand one's consent. But it is the act of individual consent that is supposed to be doing the normative work of legitimating the state, its laws, and minions in the first place. Hence we seem to be caught in an infinite regress of legitimization between individual consent and legal authority.

We can extend Barnett's paradox of authorization from his application of it to what I call the problem of "existing legitimation" to the problem of "originating legitimation" if it, too, is conceived in contractualist terms. For if individual consent, in a democratic act of collectively establishing an original social contract, legitimates the adoption of a specific constitution, then that consent must be rendered to a group of persons (perhaps to the entire *demos*) that is already authorized to demand either consent to or emigration away from the future political community. But no group of persons could be authorized to make such demands in the absence of a legitimate authority-conferring legal instrument, that is to say, a legitimate constitution. However, there can be no legitimate constitution in the absence of consent, and no authorized consent in the absence of a legitimate constitution, and so on, into a paradox of infinite regress. If we stylize unanimous individual consent in an originating convention as democracy and stylize rule according to preestablished, legitimate law as constitutionalism, then their combination in constitutional democracy appears to lead inherently to skepticism. Barnett's paradox of authority thus threatens the very possibility of conceiving of a contractualist foundation for a constitutional democracy.

If one's normative tendencies are more attuned to popular sovereignty and less sympathetic to the individualist orientations of contractualism, one might think that such bootstrapping paradoxes could be avoided by turning away from the focus on individual, aggregated acts of consent and focusing rather on a democratically founded constitution. Considering an originating constitutional convention, one might then emphasize collective, democratic self-legislation as the properly legitimate foundation of constitutional democracies. Here, however, one would be faced by Michelman's version of the bootstrapping objection, his paradox of democratic procedures. For not just any self-proclaimed act of "democratic self-legislation" can confer legitimacy on a constitutional democracy. The processes engaged in during that original self-legislating activity—the constitutional convention processes, let us say—must themselves be subject to procedural conditions of at least minimal fairness and openness. There would have to be, for instance, antecedent rules for membership in order to foreclose possibilities of unjustified exclusions of some of the population and agenda-setting and voting rules to allocate political power equally to all. In a nutshell, democratic self-legislation could not be legitimacy-conferring without antecedently established, legitimate procedures.

But then a natural question arises: How is the *demos* to establish that the particular convention procedures employed are the correct procedures—or at least good enough—to confer legitimacy on the resulting settlement?

The consistent democratic theorist will then answer: We would need democratic endorsement of the rules proposed for the convention. But for that democratic endorsement of the convention rules to be legitimate, it would have to be procedurally structured itself, and those antecedent procedures could be legitimated only through an antecedent democratic endorsement, and so on into an infinite regress. If we stylize the collective endorsement as democracy and the requisite procedures as constitutionalism, then democracy and constitutionalism reciprocally presuppose one another for their legitimacy-conferring power, and the combination expressed in “constitutional democracy” comes to seem inherently paradoxical.

B. Practical Problems of Tainted Origins

The bootstrapping paradoxes pointed out by Barnett and Michelman are not just abstract puzzles fit only for the theory of constitutional democracy but are reflected as well in the puzzles thrown up in the actual practice of constitutional democracy. Let me briefly canvas three such puzzles of tainted origins concerning foundational compromises, procedural illegality, and nondemocratic origins, using examples familiar from U.S. experience. As is widely acknowledged, the original constitutional settlement ensuing from the U.S. Constitutional Convention in the summer of 1787 and ratified the next summer could not have been possible without endorsing and facilitating the continuance of the Slave Power.⁶ Although the Constitution of the United States (hereafter the USC) nowhere uses the word “slavery” or its cognates, the Constitution and the political procedures it established were thoroughly shot through with this foundational compromise.⁷ Perhaps most interestingly from the point of view of constitutionalism, the USC includes only three hard entrenchments—that is, provisions that are theoretically or practically incapable of change through amendment—and all three are centrally concerned with the maintenance of the Slave Power.⁸ It is, then,

6. For a powerful institutional analysis, see MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* ch. 5 (2006).

7. While slaves were legally cognized as chattel and were legally barred from enjoying any of the privileges and immunities of citizenship, they were notoriously counted (at a 40 percent “discount”) toward the population of their respective states, thereby giving a very important numerical boost to the Slave Power states with respect to their proportional representation both in the House of Representatives (U.S. CONST. art. I, § 2, cl. 3) and in the selection of the President through the Electoral College (U.S. CONST. art. II, § 1, cls. 2–3; and amends. XII and XXIII). For more on the expected and actual historical interaction between federal representation and the counting of slaves, see GRABER, *supra* note 6, pt. 2. The USC itself also gave a twenty-year safe harbor to the international slave trade by barring in art. I, § 9, cl. 1 any federal laws that might outlaw the importation of slaves and it included a fugitive-slave provision in art. IV, § 2, cl. 3, requiring nonslave states to return any escaped slaves to their owners.

8. See the way in which the amendment procedures specified in U.S. CONST. art. V ensure the effective unamendability of USC provisions concerned with the allocation of Senate seats (since every state must consent to any re-allocation); and ensure the actual unamendability of

no understatement to say that the *prima facie* legitimacy of the original USC was foundationally compromised by the immoral bargain thought to be required to bring it into existence.

We can see how such actual foundational exclusions are related to the conceptual bootstrapping paradoxes canvassed above by asking whether the original U.S. constitutional settlement was legitimate according to the consent and self-legislation standards. If one takes consent as the legitimating factor, it is clear that neither explicit nor tacit consent was available to slaves, given their legal status as both nonpersons, who were granted no legal capacities for autonomous expressions of will, and as chattel property, with no legal rights to emigration away from a regime that they (in all probability) would not have freely consented to.⁹ Hence, from the contractualist point of view, the original USC was illegitimate. But that means that it could not legitimately grant authority to any future officials who might demand legitimating consent from individuals under an already extant constitution. In addition, a constitutional democracy instituted under the conditions of an exclusionary foundational compromise could never gain legitimacy later on through the free consent of all, since it would have no legitimate authority in the first place.

We can run the problem through the lens of democracy as well, resulting in a similar predicament to that outlined in the paradox of democratic procedures. Noting that the original ratifying conditions for the USC in 1788 were obviously illegitimate—given the persistence of slavery and other forms of exclusionary oppression, proper members of the demos were constitutively excluded from the opportunity for democratic participation—any further democratic decisions made under the procedures established by the USC would not be legitimate. Even amendments that sought to correct for the foundational compromises and exclusions would themselves be illegitimate, for they could be adopted only through the USC's own already tainted procedures.

Perhaps one is willing to dismiss, excuse, or overlook the foundational exclusions of the USC as the products of the prejudices of a benighted but thankfully bygone era. Yet even apart from such moral compromises clearly visible as such in retrospect, the founders themselves knew that they engaged in a procedurally illegal constitutional founding. For there was in 1787 and 1788 a legally binding constitution already in effect—the Articles of Confederation—which contained specific procedures for its modification. Yet those procedures were simply ignored by the conventioners, and

the twenty-year guarantees of both the slave trade (U.S. CONST. art. I, § 9, cl. 1) and counting slaves as three-fifths of a person when calculating a capitation tax (U.S. CONST. art. I, § 9, cl. 4).

9. Other groups of persons who were also constitutively left out of the U.S. constitutional settlement present more complex examples of delegitimizing exclusion: adult females, free men without significant personal property, and Native Americans. Yet I think it safe to say that in different ways they were constitutively barred from the possibility of consenting to or withholding consent from the colonists and their new governments, not to mention constitutively excluded from collective political democracy.

the newly proposed USC substituted its own self-ratification procedures.¹⁰ Eighty years later, the most dramatic and far-reaching changes in the USC—the Thirteenth and Fourteenth Amendments—were achieved through political processes that were themselves arguably formally illegal.¹¹

Because these procedural irregularities during the founding and Reconstruction eras occurred while settling the fundamental laws of political procedure—while settling the constitutional structure of democracy itself—the bootstrapping paradoxes become particularly poignant in their reflexivity. The constitutional structure of all future democratic decision-making for the nation has been decided on under distinctly unconstitutional and undemocratic conditions. But if the legal framework that is to confer legitimacy on future political actions is itself illegitimate due to its procedurally illegal and antidemocratic origins, then it is hard to understand how any future political actions within that framework could be legitimate.

Practical bootstrapping problems, finally, also arise in those situations in which a constitutional democracy is externally imposed on a population. Even if the procedures, institutions, and laws instituted by that new regime are sterling—even if they contain all of the “right stuff” that a political system should have while containing nothing dubious, as determined by the best theory and experience—there is a real question of whether such an imposed system can be legitimate. Consider, as examples, the Allies’ virtual imposition of the German Basic Law and the Japanese Constitution after the end of World War II.¹² Arguably both constitutions have both the requisite conceptual content to count as legitimate constitutional democracies and the historical record of having sustained constitutionally successful and democratically decent political practices and institutions for some sixty years. Might even such successful constitutional democracies be illegitimate in light of their nondemocratic origins?

10. For discussions of the ways in which art. XIII of the Articles of Confederation were ignored in designing the USC’s ratification procedures, see David Kay, *The Illegality of the Constitution*, 4 CONST. COMMENT. (57–80) (1987); and Bruce Ackerman & Neal Kumar Katyal, *Our Unconventional Founding*, 62 U. CHI. L. REV. (475–573) (1995). THE FEDERALIST NOS. 40, 43 (James Madison) explicitly recognize that the ratification procedures depart from those specified in the Articles, but Madison dismisses the significance of this objection on the grounds that the Articles’ unanimous-state-consent provision would give too much veto power to a single intransigent state and that the antifederalist opponents of the USC had not really pressed the objection. Note that neither of Madison’s arguments is responsive to the problem of procedural illegality.

11. See the documentation of the claim that amends. XIII and XIV were strictly illegal constitutional amendments in BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998), at 99–252. The claim is contested in AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* (2005), at 364–380.

12. The stories are importantly different. The German Basic Law was written largely by delegates appointed by the heads of the German states in 1948, approved by the state parliaments, and promulgated in 1949. Nevertheless, the Occupying Powers retained effective veto power over the proposal should it have not met with their approval. The Japanese constitution was mostly written by two U.S. military lawyers in 1946 after the Occupying Powers disapproved of an earlier indigenous proposal, and was ratified in national legislatures that same year.

Alternatively, consider a much less clear example: the current Iraqi constitutional system, effectively the result of a series of transitions from external military rule to what looks like constitutional self-government, undertaken in the wake of the U.S. military conquest of the country in 2003. While one surely cannot yet say that it will be a successful constitutional democracy in practice at this point, the formal political procedures, institutions, and laws established by that constitution appear at least well within the mainstream, acceptable range of decent constitutional democracies. The Iraqi constitution even has the democratic advantage over the German and Japanese ones of having been formally ratified through a direct democratic vote of the people in October 2005. Yet here again, we come up against bootstrapping problems in action. For the democratic ratification of the constitution occurred according to rules established before the constitution became binding. But what of the pedigree of those preconstitutional ratification rules? They certainly were not subject to democratic ratification but rather were imposed by the occupying force in the guise of the Coalition Provisional Authority.¹³ It is unclear how legitimate constitutional democracy could arise from such apparently illegitimate origins.

II. THE LOGIC OF LEGITIMACY

Whether we focus on the conceptual bootstrapping paradoxes highlighted by Barnett and Michelman, which stretch out in an infinite regress into the past, or the empirical bootstrapping problems of tainted origins, which seem to saddle the future with permanently illegitimate regimes, it appears that the combination we require of political systems for their legitimacy—constitutionalism and democracy—is inherently unstable and suspect. In the remainder of this paper, I aim to argue against these skeptical appearances and in favor of two main theses.

First, I intend to show that the bootstrapping arguments against the very possibility of constitutional democracy have force only on the supposition of a specific conception of the logic of legitimacy, labeled here the “threshold” conception. This means that the bootstrapping objections do not rely on any specific conceptions of political legitimacy—such as contractualism, popular sovereignty, or other specific political conceptions—and so cannot be assuaged by moving to a different conception of the specific sources of legitimacy. Second, given the paradoxes caused by the adoption of a

13. The story is considerably more complex than this—involving the United States’ direct rule through the Coalition Provisional Authority from April 2003 to June 2004, then the rule of the Iraqi Interim Government under the aegis of the Transitional Administrative Law from June 2004 until the election of the Iraqi Transitional Government in January 2005, and finally the October 2005 ratification and adoption of the Iraqi Constitution—but I think the formula in the text adequately foreshortens the story from normative a point of view. For an insightful and thought-provoking account of the Iraqi situation written in February 2004, see Andrew Arato, *Sistani v. Bush: Constitutional Politics in Iraq*, 11 *CONSTELLATIONS* (174–192) (2004).

threshold conception of the logic of legitimacy, I propose that we ought to adopt a “regulative ideal” conception of such logic, which should be able to avoid the skepticism engendered by the paradoxes. I argue for a specific version of regulativism I label “developmentalism,” which arises out of a few modifications to Habermas’s conception of the logic of legitimacy. However, the more important move is, as I hope to show, the adoption of a regulative-ideal conception in some form or other.

Before turning to the different logics, I need to specify what exactly the proper object of legitimacy judgments is. What kinds of claims or assessments have the skeptical bootstrapping considerations rendered potentially paradoxical? Consider examples of one distinctive kind of claim often put forth in the political arena explicitly relying on the language of legitimacy: “Iraq has an illegitimate government since it was imposed by force”; “the U.S. Constitution is illegitimate since it was founded in and protected slavery”; “the European Union is illegitimate because its real policy-makers are democratically unaccountable”; “Zimbabwe’s government is illegitimate since it does not function according to the rules of electoral democracy specified in its constitution”; “Pakistan’s government is illegitimate insofar as it subverts the rule of law by hiring and firing judges according to the political saliency of their legal rulings”; and so on. These kinds of challenges to the worth or bona fides of a government system are distinctly normative claims—they frame a moral-political judgment—rather than empirical or sociological claims—they are not about gauging the sentiments of citizens, nor about the degree of stability of a regime, nor about claims that could be adjudicated through public opinion polls.

Legitimacy challenges of this type are not, however, typically directed at specific laws, policies, or governmental actions.¹⁴ While we often normatively assess such individual activities as unwise, imprudent, immoral, and so on, it is unlikely that such disapproval is coupled to the thought that the entire system of government—the manner of choosing particular governing persons and parties, the system of policy choice and administration, the legal system the state employs, and the formal constitution and the constitutional understandings and practices that support it—is illegitimate because of the disapproval of individual governmental policies or activities. Of course, on some very serious moral matters, some persons do say that one distinctly immoral governmental policy is sufficient to delegitimize the entire system of government, but then we have moved precisely to the terrain of discussion I am focusing on here.

14. There are surely other common usages of the language of legitimacy that are directed at more individual governmental actions; e.g., at the processes and outcomes of trials, the decisions of appellate courts, the procedures and outcomes of legislative or administrative decisions, and so on. Rather than a survey of linguistic usage in this area, then, I am simply trying to delineate and focus upon one type of usage of “legitimacy” and its cognates when addressed to the most general assessment of the worth of a governmental system.

One complication here is that people *do* often speak of particular ruling regimes—those persons and parties with current control of the levers of power—as illegitimate: that they, for instance, came to political power or continue to wield it through undemocratic or unconstitutional means. However, such usages of “illegitimate” as directed at specific ruling regimes are double-sided; they are usually negative assessments of those currently ruling even as they tacitly suppose the positive legitimacy of the underlying political system that the current regime is taken to have subverted or undermined. In this paper, I focus on the latter, more capacious notion of political structure as the proper object of a legitimacy assessment: the broad and fundamental political system of rule, policy, and law that perdures through changing individual rulers, regimes, policies, and laws.

To begin to get a grasp of the two different logics, it helps first to consider the typical picture of legal validity presented in formalist and positivist accounts of law. According to such a conception, for any particular putative legal provision, one can determine if it is a legally valid provision of a given legal system by investigating whether it meets with the necessary and sufficient criteria for legality that are employed within that system. Of course, different philosophies of law will present different accounts of where to look for such legality criteria—formalists will look to “deductive” inferences from established doctrinal principles, nineteenth-century legal positivists such as Jeremy Bentham and John Austin will look to the coercive orders of an uncommanded sovereign, twentieth-century positivists will look to foundational, quasi-legal norms such as Hans Kelsen’s *Grundnorm* or H.L.A. Hart’s rule of recognition—but all agree that a given legal system must have definite standards for the identification of which putative norms are part of that system and which are not. Legal validity is, in short, a determinate matter of criterial fulfillment of the necessary and sufficient conditions specified—a norm meeting the relevant baseline or threshold is legally valid.

Hence legal validity is not only, first, a determinate (and ideally fully determinable) matter of meeting the threshold but it is, second, an all-or-nothing affair. A provision either meets the sufficiency threshold or it does not; legal validity is logically binary. Third, legal validity requires gaining the definitive authority-indicating properties specified by the legal system. As Dworkin puts it, this is a matter of having the right “pedigree”: having been produced or modified in the correct way according to the legally specified procedures.¹⁵ Hence legal validity accrues to a provision at a distinct point in time where it switches from being a proposed legal norm to being an actual legal norm in that system because of having been processed in the right way. It should, then, be a straightforward inquiry to determine the validity of any putative legal provision: look back into its history and determine whether that provision, as a matter of fact, gained the authority-conferring properties that constitute the correct pedigree for legal validity in that legal system. Finally, fourth, this means that legal validity has the logic of a goal:

15. Ronald Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. (14–46) (1967).

in principle, validity is a fully achievable state in the same way that a goal can be scored in field hockey.

Compare this “threshold” logic with the different way in which regulative ideals operate on these four registers.¹⁶ Take first, for an example, a broadly Kantian notion of individual moral autonomy as the capacity to determine one’s will and act in accordance with the dictates of practical reason. Being moral in this sense is not a matter of criterial fulfillment of some specifiable necessary and sufficient conditions but is rather a matter of degree to be assessed by nondispositive judgments; assessing moral autonomy involves complex judgments about the specific dictates of practical reason in different situations and about the degree to which one’s will and actions have been closer to or farther away from those dictates.

Second, as achieving an ideal is not a matter of meeting some threshold requirement but of approximating it to a greater or lesser degree, the logic of a regulative ideal is scalar: greater or lesser approximation, not binary fulfillment or nonfulfillment. Regulative ideals like moral autonomy are then achievement concepts, where the approximation to the ideal has to arise out of various substantive competences possessed by the achiever and due to the achiever’s determinate character, nature, or constitution. Whereas threshold goals may accrue to a possessor by accident, as it were—consider legally valid but unintended provisions due to scrivener’s error—for regulative ideals there can be no lucky guesses or fortunate accidents responsible for their achievement.

Third, regulative ideals are processual; they are approximated over time. We are willing to say that an individual is autonomous only when she has exhibited an ever closer approximation to the ideal over time and under varied conditions. In contrast to the logic of threshold goals, the attribution of the achievement of a regulative ideal cannot be made for single acts, nor is it achieved all at once or at one single point in time. Finally, a regulative ideal such as moral autonomy is an ideal, not a goal; in principle it can never fully be realized. It functions as an asymptote that is approachable but never perfectly achievable rather than as a determinate goal state that can be fulfilled.¹⁷

16. Although Kant is the obvious inspiration for my conception of the logic of regulative ideals, and I believe that this account is consistent with Kant’s usage of the notion, I do not here make any claims to present accurately Kant’s view of regulative ideals. The same is true for my example of a “broadly Kantian” notion of moral autonomy: I do not aim to reproduce his views exactly. One particular difference deserves note, however: for Kant, regulative principles or ideals are to be strictly distinguished from constitutive ones, in that the former are standards guiding reason, whereas the latter are standards imminent in objects; see, e.g., IMMANUEL KANT, *CRITIQUE OF PURE REASON* (Norman Kemp Smith trans., St. Martin’s Press 1965) (1781), at 449–451, 514–518. I make no use of this contrast in my account of the logic of regulative ideals, even though the contrast is fundamental to Kant’s use of the term “regulative.” For an insightful discussion of how regulative ideals function, see Thomas McCarthy, *The Philosophy of the Limit and Its Other*, 2 *CONSTELLATIONS* (175–188) (1995).

17. A clear illustration of these features of the logic of regulative ideas in Kant’s work is the discussion of the practical idea of a “holy will” and its relation to human morality in IMMANUEL KANT, “*Remark to the Corollary of 7. Fundamental Law of Practical Reason*,” in *CRITIQUE OF PRACTICAL REASON* (Lewis White Beck trans., Macmillan 1956) (1788).

In the remainder of this paper I hope to show how the bootstrapping paradoxes rely on supposing that legitimacy follows a threshold logic and how such skeptical paradoxes concerning constitutional democracy can be avoided by adopting a conception of legitimacy that accords with the logic of regulative ideals. Section III turns to unsatisfying solutions to the bootstrapping paradoxes. It treats Barnett's and Michelman's complementary turns to substantialist criteria of legitimacy in order to try to stop the infinite regresses they identify and argues that each escapes the skeptical implications of the regresses only by adopting its own versions of regulativism. Section IV explicates Habermas's developmentalist version of regulativism as a more promising route and suggests some modifications to his particular formulations of that version. The concluding Section V then takes up a number of issues raised by my reformulated version of developmentalism.

III. SUBSTANTIALISM

One might think that the real source of the bootstrapping paradoxes is the adoption of proceduralist conceptions of democracy and constitutionalism, such that they could be solved by moving to substantialist accounts of political legitimacy. To understand the difference between "proceduralist" and "substantialist" conceptions of legitimacy, consider that when we ask of any particular outcome of a political process whether it is legitimate, there are at least two distinct ways of answering. On the one hand, we might point to the fact that the correct procedures had been followed in producing the decision, resting the legitimacy on the character of the procedures themselves. On the other hand, we might point to the fact that the substance of the outcome accords with some determinate ideal or standard, such as justice or goodness or efficiency, where that ideal or standard is logically independent of the procedures used to arrive at the decision.¹⁸

Taking one's bearings from a similar infinite regress of justified beliefs often detected in epistemology, one might approach the bootstrapping regresses in a structurally analogous way. Recall the epistemological regress: if belief C is justified in the light of belief B, then B must be justified in the light of some other belief A, which must be justified . . . ad infinitum. The epistemological skeptic concludes that the regress of inferential dependencies is infinite, such that no belief could ever be justified, much in the same way that the political skeptic concludes that the joint requirement of constitutionalism and democracy leads to an uncompletable regress that calls into question the very idea of the modern conception of political legitimacy. The epistemological foundationalist responds to the skeptic by attempting to find bottom: by proposing a single or single set of justified beliefs that

18. The distinction between proceduralism and substantialism is defined more precisely at ZURN, *supra* note 1, at 76–80. It plays a large role throughout the book as well.

is nevertheless not inferentially justified and can function to put a stop to the regress of inferences. The foundationalist move is analogous to a move to a substantialist account of legitimacy in practical philosophy, where the theory posits some single or set of determinate ideals that can be used as a process-independent test for legitimacy.

Turning to the theoretical bootstrapping problems, it looks at first glance as though the root of the difficulty is the strict proceduralist accounts of constitutionalism and of democracy, such that the regress ensues from an infinite spiral of two types of procedures (constitutional and democratic) reciprocally requiring one another for the outcome of the process to be legitimate. Individual consent and legal authorization (à la Barnett) as well as democratic endorsement and established procedures for democracy (à la Michelman) are all procedural tests for legitimacy. And we might be tempted to step out of the regresses by referring to a nonprocedural legitimacy-maker, in the same way that the foundationalist attempts to step out of the regress of inferential justification by referring to a noninferential justification-maker. Familiar candidates for such legitimacy-makers include a determinate catalog of natural rights and substantive conceptions of distributive or commutative justice. They might function to put a stop to the procedural questions of how to establish the legitimacy of particular decisions by using a procedure-independent check on the worthiness of the substantive content of the decision. Thus we could know that a procedurally correct decision would nevertheless be illegitimate if it were to violate, say, some determinate natural right or substantive component of justice.

In fact, Barnett and Michelman both employ just this strategy of moving to (different) substantialist standards of legitimacy, apparently with the aim of escaping the bootstrapping paradoxes they have diagnosed with other accounts of the legitimacy of constitutional democracy. In the remainder of this section I aim to show how the move to substantialism does not in fact resolve the paradoxes, first by showing how Barnett's and Michelman's preferred substantialist accounts of legitimacy are themselves subject to bootstrapping problems and then by advancing a broader argument to suggest that substantialist strategies in general will not work. This suggests that the heart of the problem with bootstrapping does not lie in the adoption of proceduralist accounts of constitutional democracy.

A. Barnett's Petard

Let me begin first with Barnett's libertarian conception of political legitimacy, grounded in natural rights. It is a straightforward substantialist test for legitimacy, modeled on Locke's notion of prepolitical fundamental rights accruing to individuals. Persons have certain natural negative liberty rights that function as limits on legitimate governmental action, and when governments act to enforce those rights through coercive laws, those laws are

legitimated by the substance of the rights they uphold.¹⁹ As Barnett puts it, adopting the “necessary and proper” language from Article I of the USC concerning the powers of the national legislature:

For consent to matter in the first place, we must assume (and there is good reason to conclude) that “first come rights, and then comes law” or “first come rights, then comes government.” And this proposition, once accepted, helps explain how lawmaking can be legitimate in the absence of consent. For a law is *just*, and therefore binding in conscience, if its restrictions are (1) *necessary* to protect the rights of others and (2) *proper* insofar as they do not violate the preexisting rights of the persons on whom they are imposed.²⁰

Thus, on this theory, individual consent—which was the starting point for Barnett’s paradox of authority—is wholly unnecessary for the enactment of just laws. In fact, the natural-rights test is entirely substantialist since it dispenses with any concern about the procedures of lawmaking in the first place. All that matters at this level is that the black boxes of law creation and application actually produce substantively just outcomes.

If we next ask whether a particular political system is legitimate, Barnett answers that it is when we can reasonably suppose that it will tend to produce and enforce just laws. Of course no political process, no set of constitutional procedures, can ensure that only just laws will always ensue, but a constitutional system is legitimate when its structure and operation sufficiently warrant the expectation of fundamental rights protection.²¹ Notably, as Barnett himself indicates, this means that legitimacy follows the approximative logic of regulative ideals rather than the binary logic of threshold conceptions and thus that judgments concerning the legitimacy of a given constitutional system are not always straightforwardly determinate:

This makes legitimacy a matter of degree rather than an all-or-nothing-at-all characteristic. . . . The theory I am proposing does not always provide a clean

19. Barnett, taking his cue from Locke as filtered through Robert Nozick, refers to natural rights as inalienable and repeatedly catalogs them “as the rights of several property, freedom of contract, self-defense, first possession, and restitution”; BARNETT, *supra* note 3, at 73. Barnett’s argument for natural rights appears to be functional: if we want to live happy, prosperous lives in functioning and perduring societies, then the catalog of rights must be respected—*see id.* at 78–86. Barnett’s particular functionalist justification of natural-rights substantialism is not of interest here, though one cannot help wondering both how rights justified merely hypothetically are supposed to gain the categorical force usually accorded to natural, inalienable rights and how all kinds of societies apparently keep functioning perfectly well even with massive violations of these same rights.

20. *Id.* at 44.

21. Barnett thus conceives of the justice of a constitutional system to be an instance of *imperfect procedural justice*, to use Rawls’s nomenclature, where there is a procedure-independent test for justice (here, the catalog of natural rights), but there is no feasible way of structuring decision-making rules (here, the constitutional system of lawmaking and applying) that will ensure, in all cases, that a just outcome is achieved; *see* JOHN RAWLS, *A THEORY OF JUSTICE* (1999), at 74–75.

answer to the question of whether a particular lawmaking process, taken as a whole, is sufficient to provide enacted legislation with the benefit of the doubt.²²

But it is precisely this move to the logic of regulative ideals that makes it possible to escape the bootstrapping paradox, since legitimacy is here conceived of as properly attributable only to a legal system as a whole, is achieved over time, and that achievement is a matter of approximating an in-principle unrealizable ideal such that no minor infraction or singular imperfection of the legal system necessarily delegitimizes that system.

To make it clear that it is the regulativism of Barnett's legitimacy conception—and not its substantialist test for rightness—that saves it from debilitating paradox, consider first how his natural-rights conception would fare on a threshold logic. If the legitimacy of an entire constitutional system of lawmaking and law application is a determinate, all-or-nothing affair, then the test according to Barnett's standards would have to be that the system always guarantees the protection of individual's natural, inalienable rights—by only and always passing “necessary and proper” laws and by only and always applying them justly. Yet it seems that any feasible system of government would fail such a test of legitimacy. For any just system of individual liberty protection requires criminal trials that convict all and only guilty persons. But we have no feasible way of guaranteeing this outcome.²³

Thus any political system dedicated to achieving Barnett's conception of justice will fail if conceived in terms of a threshold logic.²⁴ And it likely will fail not just once but potentially in perpetuity as new criminal trials are conducted. The political system is thus rendered permanently illegitimate and so is owed no allegiance in conscience on Barnett's account.²⁵ We could, of course, lower the threshold of just trials required to some determinate number or percentage, say to a level allowing no more than three or no more

22. BARNETT, *supra* note 3, at 51.

23. The choice of criminal trials is not accidental; it is Rawls's example of imperfect procedural justice, where we have a substantive test for just outcomes but no feasible procedures for guaranteeing such outcomes. Using Barnett's natural-rights theory in concert with the threshold conception of legitimacy yields, in Rawls's terms, a unrealizable demand for perfect procedural justice.

24. One might object that perhaps Barnett could suitably weaken his legitimacy test so that only very extreme rights deprivations would count as delegitimizing. Aside from the fact that this threatens to render almost all political systems legitimate despite the intentions of his rather stringent brand of libertarianism, it seems incompatible with the catalog of rights that Barnett considers natural and inalienable and with the fulsome content he often interprets them as having.

25. Consider, in addition, Barnett's endorsement of the USC as a basically legitimate lawmaking system. He bases this judgment largely on the existence of the Ninth Amendment (concerning constitutionally unenumerated rights retained by the people), which he interprets as guaranteeing the protection of natural rights. But the Ninth Amendment was ratified some three years after the USC itself. That means that the original, unamended Constitution was, strictly speaking, illegitimate by Barnett's account and so could not have furnished the just authority for the amendment procedure itself—at least if we accept a threshold conception of legitimacy.

than 5 percent of unjust convictions per year. But the problem simply raises its head again: a fully legitimate constitutional democracy is suddenly rendered entirely illegitimate—on a threshold conception—at the moment the next yearly unjust conviction exceeds the lowered threshold. One simple exonerating DNA test of a convicted felon, and all of a sudden no citizen owes any obligation of obedience to a system that was fully obligating yesterday.

If Barnett's substantive standard is saved from paradox by regulativism, it turns out that the proceduralist consent standard can be saved in a similar way. Consider first the potential new member asked to give her consent to an existing political system. Surely the constitution is not fully legitimate when its representative asks for the consent of a new member, but there is an important sense in which the consent of those who are already members of the consociation does give the set of rules a great degree of *prima facie* legitimacy. And if the newcomer gives her consent, the constitution becomes that much more legitimate.

Consider second the situation of original contractors considering consenting to a new political system. It is true that each of the original contractors must treat their co-contractors as merely provisionally authorized to demand the consent of each in the absence of an authority-conferring legal instrument. But if the standards are democracy (in the sense of the freely given consent of each) and constitutionalism (in the sense of authority exercised only according to established legal rules), then these standards are ever more approximated as the contractors move through the various stages of constituting a political system through consent: establishing a horizontal political community of free and equal consociates by unanimous consent, then establishing decision rules for the horizontal political community, then establishing vertical relations of political authority according to those new horizontal decision rules, then laying out constitutional structures for that political authority, and so on.²⁶ At each stage, the original contractors are reciprocally ensuring the requisite level of consent and creating legal structures that shape the authority that is to establish the consent at the next stage.

Hence the legitimacy of constitutional democracy is indeed tied up with a particular *reflexivity* between constitutionalism and democracy as highlighted in the paradox of authority (and in Michelman's paradox of democratic procedures). But this reflexivity, at least in principle, can be virtuous when it asymptotically approaches a regulative ideal, as opposed to vicious when it regresses into an infinity of unmet, determinate threshold criteria.²⁷

26. The stages indicated here are used merely as examples; different variations have been proposed in different social contract theories.

27. My thinking about reflexivity is deeply indebted to the important use of the concept made in conceptualizing the threat of persistent social inequality to legitimate deliberative democracy by Kevin Olson. See, e.g., KEVIN OLSON, *REFLEXIVE DEMOCRACY: POLITICAL EQUALITY AND THE WELFARE STATE* (2006).

B. Michelman's Petard

Regulativist accounts of legitimacy—at least in terms of consent or natural rights—are not, then, subject to wholesale indictment on account of imperfect achievements of threshold sufficiency criteria. Thus it is not the difference between proceduralism and substantialism, at least in Barnett's case, that makes the difference with respect to the skeptical implications of the bootstrapping paradoxes. I would now like to show how similar results arise for Michelman's response to the paradox he detects.

Recall that Michelman's paradox of democratic procedures arises from an infinite regress of needing democratic endorsement of a constitutional settlement, legal rules for that democratic endorsement, democratic endorsement of those legal rules, and so on. Michelman also makes original use of Rawls's notion of "the fact of reasonable pluralism" to complicate this paradox further,²⁸ since one would then have to expect reasonable but irreconcilable dissensus concerning both the legitimizing democratic endorsement and the legitimacy conferring political decision rules.²⁹

Michelman's response, as I understand it, is basically to split the legitimacy question into two, offering a substantialist account of legitimacy at the level of originating legitimation and a proceduralist account at the level of existing legitimation.³⁰ Let me begin with the problem of originating legitimation achieved through an agreement between free and equal consociates. Because of the threat of infinite regress posed by the paradox of democratic procedures and because Michelman seeks to endorse the ideals of constitutional democracy rather than their skeptical rejection, he embraces substantialism in order to stop the regress. Taking a page from civic republicanism, he claims that there must be some sufficiently thick, pre-constitutional ethical consensus among the consociates in order for legitimate constitutional democracy to be able to get off the ground:

It is now looking very much as though there cannot possibly be, in any country, both constitutional government and self-government for everyone, except in the special circumstance of wholehearted acceptance by virtually all the country's people of a critical mass of substantive first principles of right government. These principles . . . are what we may call cultural commitments of constitutional democracy, ideas that in the last analysis everyone is just going to have to grow to accept, perhaps over generations, if freedom through law is going to be possible for everyone.³¹

28. JOHN RAWLS, *POLITICAL LIBERALISM* (1996), at xxiii–xxx, 36–38, 54–58.

29. See Michelman, *Constitutional Authorship*, *supra* note 4.

30. My reconstruction of Michelman's positive response differs substantially from that given in Ciaran Cronin, *On the Possibility of a Democratic Constitutional Founding: Habermas and Michelman in Dialogue*, 19 *RATIO JURIS* (343–369) (2006).

31. MICHELMAN, *BRENNAN AND DEMOCRACY*, *supra* note 4, at 50–51.

Hence on this register he proposes that only a kind of substantialist consensus of some kind can stop the regress of democratic procedures.³² We should note, however, that already, with this answer, Michelman's strategy turns to elements of regulativism. For the quote suggests that constitutional democracies are actually not originally founded with such an ethical consensus in place; socialization produces such only over time and perhaps only over generations.³³ Of course, as Michelman recognizes, this could work only if we assume that legitimacy has the approximative and processual logic of regulative ideals rather than the threshold logic of legality.³⁴

If Michelman employs substantialism of this sort at the level of originating legitimation, why not also at the level of existing legitimation, that is, for questions of the ongoing legitimacy of a presumptively decent constitutional democracy? Here he brings to bear his distinctive jurisprudential viewpoint, one oriented to, as it were, the business end of constitutional law, that is, the law-applying rather than the lawmaking end. When we think about the controversial character of constitutional interpretations, it becomes evident that even if we are fortunate enough to have a solid, substantive consensus on rather abstract fundamental constitutional principles, the fact of reasonable pluralism also impacts the concrete application of those principles. For instance, the fact that we might agree on a basic commitment to rights of freedom of speech in no way eliminates reasonable but foreseeably irreconcilable disagreement over whether such rights allow or bar restrictions on, say, hate speech or political advertising expenditures. Calling such disagreement concerning the application of constitutional provisions the "fact of reasonable interpretive pluralism," Michelman notes that hopes for a developing substantialist consensus are unlikely to be realized here, in the light of the apparently endless good-faith disagreements about what constitutions really mean in practice.

At this point, Michelman goes proceduralist, suggesting that as long as the basic political arrangements responsible for the interpretation and application of constitutional generalities can be seen to be open "to the full blast of sundry opinions and interest-articulations in society, including on a

32. A later paper loosens the thickness of the required consensus, demanding not that all citizens agree on the same fundamental principles but only that there is an overlapping consensus of individual citizens' positive assessments of the legitimacy of the given system of government and law. See Frank I. Michelman, *Ida's Way: Constructing the Respect-Worthy Governmental System*, 72 *FORDHAM L. REV.* (345–365) (2003).

33. This strategy is structurally the same as Rawls's argument that an "overlapping consensus" on political fundamentals among irreconcilable comprehensive doctrines is possible and could develop over time out of mere political compromise through the workings of public reason in the context of free institutions: RAWLS, *POLITICAL LIBERALISM*, *supra* note 28, at 158–168.

34. In another context, Michelman explicitly endorses regulativism with respect to the possibility of giving a democratic legitimation for human rights: "No logic excludes the possibility of there being something that is morally necessary to do, which we cannot ever finally know or show that we have done. We call such thing a regulative ideal." Frank I. Michelman, *Human Rights and the Limits of Constitutional Theory*, 13 *RATIO JURIS* 76 (63–76) (2000).

fair basis everyone's opinions and articulations of interests,"³⁵ then citizens could understand themselves as simultaneously self-governing and living under law, even if they did not agree with every particular governmental decision concerning the specific application of constitutional principles. In other words, in the light of substantive interpretive disagreement, Michelman proposes a proceduralist test for the legitimacy of the outputs of those political institutions responsible for applying constitutional law. Thus, as I understand this two-level proposal, only a thick ethical consensus can solve the problem of originating legitimation for a constitutional democracy, while the residual interpretive pluralism that threatens existing legitimation is to be managed through democratically open political processes of legal application.

I indicate above that the substantialist part of Michelman's solution depends on assuming a regulative logic. If we were instead to apply a threshold logic there, then the only apparent hope for legitimate constitutional democracy would be the fortunate existence of an immediate and wide-ranging ethical consensus, and that hope unrealistically takes neither the burdens of judgment nor the fact of modern pluralism very seriously. But there is yet a deeper problem with this two-level solution, one that Michelman's own work points to and which threatens both the substantialist and the proceduralist prongs of his account of legitimacy. The problem is found in the relation of abstract constitutional provisions and principles to concrete applications of those provisions and principles through the incidence of law. For Michelman argues that reasonable interpretive pluralism, which led him to a procedural standard of legitimacy for the law-applying institutions, reacts back up the ladder of abstraction, as it were, threatening even our supposed consensus at the level of originating ethical consensus. According to his pragmatist account of the meaning of abstract concepts—where the meaning of those concepts is reciprocally related to the concrete uses we put the concepts to in practice—"it's not clear how a social norm can be known, identified, or discriminated, completely prior to and independent of its applications."³⁶

For instance, if we cannot really agree on what a right to free speech means as a concrete legal requirement and as a justiciable bit of constitutional law, then it is not at all clear that we really agree on the basic right to free speech in the abstract. And the same goes for almost every other fundamental legal

35. MICHELMAN, BRENNAN AND DEMOCRACY, *supra* note 4, at 60. The argument is tailored to promoting a particular understanding of the function of constitutional review and its institutionalization in an electorally unaccountable judiciary. I critically evaluate Michelman's theory of judicial review but endorse his notion of openness as criterial for the requisite sensitivity of institutions of constitutional review in ZURN, *supra* note 1, at 163–220 and 271–272. Here I am not concerned with which actual institutional arrangements actually carry the function of applying constitutional law to concrete controversies.

36. Frank I. Michelman, *The Problem of Constitutional Interpretive Disagreement: Can "Discourses of Application" Help?*, in HABERMAS AND PRAGMATISM 114 (Mitchell Aboulafla, Myra Bookman & Catherine Kemp eds., 2002).

provision of a democratic constitutional order: the ethical consensus that endorses the content in the abstract (and substantively underwrites originating legitimation) is nothing more than an apparent agreement, one papering over real, irreconcilable disagreements concerning what that content means in actual practice. But those very real disagreements vitiate the very notion of a consensus at the abstract level, at least on “the pragmatist claim of a constructive reciprocity between a normative principle’s identity and its applications.”³⁷ Thus the substantialist ethical consensus which was to stop the regress is itself undermined by reasonable interpretive pluralism, a pluralism that practically shows itself only in the institutions of legal application that were supposed to gain their own proceduralist legitimacy through their democratic openness to disagreements over the correct interpretation of the (only apparently) shared constitutional provisions.

In short, both the substantialist and proceduralist solutions to the paradox of democratic procedures are threatened by Michelman’s claim of a semantic reflexivity between abstract and concrete contents of a given practical concept. If we adopt a threshold conception of legitimacy, then we have no sufficiently determinate substantive consensus to stop the regress, nor can we allow a proceduralist test for legitimacy in the more contested areas of our collective life without having already met the specific necessary and sufficient criteria for the general legitimacy of the constitutional system.

Both solutions, however, look much more promising on the logic of regulative ideals. On the substantialist level of originating consensus, we already know that Michelman believes this consensus is feasible only as an achievement of a culture over time, as more and more citizens become socialized into the institutions and practices carried out in the light of those ideals of constitutional democracy originally shared by only a portion of the population. Perhaps a hope for a similar asymptotic approach toward consensus is not unreasonable with respect to the applications of certain abstract constitutional provisions and principles. For instance, over time, as U.S. citizens have been socialized into a postsegregationist culture, the originally controversial application of the Fourteenth Amendment to racially segregated public schools half a century ago is now almost universally taken as a correct application of the principle of equal protection under law.³⁸ Surely such convergence does not end reasonable interpretive pluralism—the next question of whether equal protection requires race-sensitive or race-insensitive policy regimes in public schools is still a live controversy³⁹—yet the degree of legitimacy achieved by the system over time is not simply

37. *Id.*

38. *Brown v. Board of Education*, 347 U.S. 483 (1954). *Brown* now functions as what I call elsewhere a “firmament” case, acknowledged in the legal community as unimpeachably correct (ZURN, *supra* note 1, at 11) even though it was not always treated so; see, e.g., the attack on it in Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. (1–35) (1959).

39. *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S. Ct. 2738 (2007).

flipped from all to nothing on account of some specific points of dissensus undermining the fulfillment of a determinate threshold goal.

On one reading, Michelman is not offering “solutions to” or “ways out of” the bootstrapping paradoxes but rather highlighting the ineliminable paradoxical condition we find ourselves in when we dedicate ourselves to self-government through the medium of constitutional law:

Any society’s goals respecting democracy, self-government, and a rule of law or of reason must be one’s of approximation, of choosing among necessarily compromised offerings of necessarily damaged goods. . . . Teaching ourselves to see our country’s constitutional democratic practices as, at their best, sisyphian attempts to approximate unsatisfiable ideals of democracy and self-government under law—not just technically, but logically and conceptually unsatisfiable—may help us steer clear of foolish acts and proposals in the name of ideals that we nevertheless have reason to continue to hold.⁴⁰

There is a sense in which his council here is to face bravely our fallen condition and stop trying to wish away paradoxes. But an alternative reading of this passage attuned to the logic of regulative ideals reveals a somewhat different moral: constitutional democracy is not to be abandoned simply because we cannot easily supply necessary and sufficient criteria for dispositively determining whether a governmental system has or has not met those criteria. Constitutional democracy is, rather, a complex set of regulative ideals that we hope our political practices, institutions, and laws will ever more closely approximate over time, even as we can never expect that set of ideals to be fully realized. Much like the coherentist response to the epistemological problem of inferential regress, to return to the earlier analogy, the regulativist both denies that there is any way to step out of the reciprocal relation between constitutionalism and democracy and denies that this impossibility leads to skepticism.

In summary, Michelman explicitly relies throughout on a regulative-ideal conception of legitimacy rather than a threshold conception to avoid skepticism. Furthermore, his alternative moves to substantialist and proceduralist accounts of legitimacy turn out to be immaterial with respect to the bite of the paradoxes: that depended rather on the logic of legitimacy assumed.

C. A General Argument against Substantialism

So far, the arguments against substantialist solutions to bootstrapping paradoxes are limited to specific versions; Barnett’s and Michelman’s turns to substantialism fail to resolve or mitigate the paradoxes. I would like now to pursue a broader argument to the effect that such substantialist solutions in

40. MICHELMAN, BRENNAN AND DEMOCRACY, *supra* note 4, at 8.

general cannot work, an argument inspired by Jeremy Waldron's argument concerning the political irrelevance of moral objectivity.

Waldron's argument starts from what he calls "the circumstances of politics." On the one hand, political consociation presents a coordination problem whereby each recognizes that certain goals and goods can only be realized by deciding upon and adapting a common framework for action. On the other hand, precisely such a decision on a common framework seems threatened by the fact of reasonable pluralism.⁴¹ In short, we must make political decisions even as normative disagreement persists. Some metaethical positions suggest, however, that we might be able to step out of the circumstances of disagreement if we have reference to certain foundational moral certainties or truths. The idea, simply, is that these objective moral certainties about what is really right and really wrong can settle certain issues. Waldron claims, by contrast, that such moral objectivity is *politically* irrelevant, that is, it is distinctly unhelpful in the situation of a need for political decision:

As long as objective values fail to disclose themselves to us, in our consciences or from the skies, in ways that leave no room for further disagreement about their character, all we have on earth are *opinions* or *beliefs* about objective value. The friends of truth will insist stubbornly that there really is, still, a fact of the matter out there. Really. And maybe they are right. But it is surprising how little help this purely existential confidence is in dealing with our decision-problems in politics.⁴²

Note that this argument is agnostic with respect to the metaethical controversy concerning the objectivity of moral values; it does not depend on any assumptions about the ultimate status of moral validity or truth claims. It is rather an argument about our epistemic limits when we are collectively considering political options.⁴³ For even granting that there are some objective truths about particular moral values—say self-evident truths about natural rights—we humans-all-too-humans have access to those truths only through our limited epistemic tools, and the evidence from our use of those tools is that we continue to have persistent disagreement about the content and entailments of those moral truths and that such disagreement is the

41. See JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999), at 11–12, 55, 73–75, 101–103, 112–113.

42. *Id.* at 111 n.62. The argument is fully laid out in ch. 8 at 164–187.

43. Michelman likewise claims, when reflecting on reasonable interpretive pluralism, that he is not denying that there is moral truth about correct applications of legal principles, only insisting that such truths are "*politically* unavailable" to us under modern pluralism; Michelman, *Human Rights*, *supra* note 34, at 71. Habermas points out that this puts Waldron and Michelman in the same boat: they neither endorse moral skepticism nor reject moral cognitivism. The problem is essentially about our epistemic limits concerning moral content in collective action situations, not a problem of the basic metaethical status of that content. Jürgen Habermas, *On Law and Disagreement: Some Comments on "Interpretive Pluralism,"* 16 *RATIO JURIS* (187–194) (2003).

predictable and reasonable outcome of the limits of practical reason in the face of moral complexity.⁴⁴

How does all this relate to the substantialist strategy for ending the bootstrapping regresses of constitutional democracy? Recall that that strategy aims to end the regresses by reference to foundational substantive values that can be used as an external check for legitimacy on the outcomes of any given (constitutional or democratic) political procedures. But whence the warrant for the claim that those substantive values are the correct ones—and with the correct fulsome conceptions including their concrete entailments—once those values are challenged? If the substantialist claims that, for instance, it is objectively correct that all legal property rights flow from originating rights of first possession and that it is objectively false that all legal property rights flow from originating acts of political consociation, it is hard to see exactly what is added by the phrases “objectively true” and “objectively false.” For in the circumstances of politics, these claims have no more force than “I believe that it is objectively true,” and so on, and add nothing to the clash of good-faith claims about the normative character of legal property rights. But if that is the case, then it seems that there are no alternatives to engaging in procedures of practical reasoning together, directly about the claims and their supporting arguments, with the aim of making binding legal decisions. However, in aiming at binding legal decisions for pressing coordination problems, we should reasonably expect continuing dissensus on those claims due to reasonable pluralism.

Thus there seem to be no (nonviolent) alternatives to adopting some kinds of closure mechanisms in the predictable absence of full substantive consensus, that is, no alternatives to adopting some decision procedures. And these procedures—the procedures of constitutional democracy—are the ultimate test for the political legitimacy of the outcomes rather than any particular disputed set of substantive values. Of course, in those fortunate circumstances where there is full consensus on some substantive political value *and* its practical entailments, we can provisionally take it off the menu of political debate and decision. But since even these provisional agreements can be reopened and reinterrogated when subject to reasonable challenge, in the end we have recourse only to procedural tests for the legitimacy of political decisions. Appeals to substantialist founding truths cannot get us out of the bootstrapping paradoxes as long as we honestly acknowledge persistent reasonable pluralism and the need for decision mechanisms putting a temporary end to debate. Notably, proceduralist approaches cannot get us out either, since we can always subject our currently accepted decision procedures to challenge and investigation for their constitutional and democratic worth. In the practical circumstances of politics that we find ourselves in, then, bootstrapping paradoxes threaten constitutional democracy whether we adopt proceduralist or substantialist accounts of legitimacy.

44. This is, of course, another way of stating Rawls’s point about the “burdens of judgment.”

IV. DEVELOPMENTALISM

In distinction from a strategy of trying to stop the bootstrapping regresses by stepping outside the reflexive relation of mutual presuppositionality between constitutionalism and democracy, Jürgen Habermas attempts to address bootstrapping objections by adopting a developmentalist account of the legitimacy constitutional democracy, specifically in response to Michelman's arguments.⁴⁵ While I find that his attempt includes most of the elements of a promising approach to the bootstrapping problems in terms of regulative ideals, I also raise some questions about specific elements of Habermas's approach, especially where I detect that it contains lingering traces of a "threshold" logic of legitimacy. This leads to a reformulated version of developmentalism that can be productively applied not only to the theoretical bootstrapping puzzles but also to the empirical cases indicated above.

A. Habermas's Developmentalism

As Habermas presents it, constitutional democracy should be characterized as a tradition-building collective project that institutionalizes a reflexive, self-correcting learning process. At its starting point during the founding, such a project is legitimate exactly when it attempts to establish political processes, institutions, and laws that will approximate the ideals of constitutional democracy and when those processes, institutions, and laws will also set in motion a set of reflexive learning mechanisms that will enable the institutions ever more fully to realize those ideals over time.⁴⁶

Turning from considerations of originating to existing legitimation, Habermas claims that we current citizens living under an extant political system can understand it as a legitimate constitutional democracy to the extent to which we can understand ourselves as engaged in the same project as the founding generation: instantiating the ideals of constitutional democracy in political processes, institutions, and laws. The bootstrapping paradoxes are thus addressed not by looking for a stop to the regress between constitutionalism and democracy but rather by putting the relation between the two into time and suggesting that the reflexive back-and-forth

45. This strategy is most clearly articulated in response to Michelman's challenge in JÜRGEN HABERMAS, *Constitutional Democracy—a Paradoxical Union of Contradictory Principles?*, in *TIME OF TRANSITIONS* (113–128) (Ciaran Cronin & Max Pensky eds., 2006) (originally published 2001 in *POLITICAL THEORY*); and to the challenge of legal disagreement posed by Michelman and Waldron in Habermas, *On Law and Disagreement*, *supra* note 43. Cronin, *On the Possibility*, *supra* note 30, provides an insightful reconstruction of the debate between Michelman and Habermas.

46. I am not directly interested here in Habermas's specific conception of the legitimacy requirements for constitutional democracy nor in the general outlines of his account of the processes, institutions, and laws appropriate to its instantiation. For fuller treatments of these topics, see ZURN, *supra* note 1, at 227–243.

between constitutionalism and democracy is productive, at least when it shows signs of being directed toward ever better realizations of the ideals implicit in practices of constitutional democracy and of being so directed on account of its reflective capacities for learning from the mistakes and missteps of past realizations:

In my view, a constitution that is democratic . . . is a tradition-building project with a clearly marked beginning in time. All the later generations have the task of actualizing the still-untapped normative substance of the system of rights laid down in the original constitution. . . . To be sure, this fallible continuation of the founding event can break out of the circle of a polity's groundless discursive self-constitution [i.e., out of the circle indicated by Michelman] only if this process—which is not immune to contingent interruptions and historical regressions—can be understood in the long run as a self-correcting learning process.⁴⁷

Three features of this proposal deserve further comment before engaging in a critical evaluation of some of its minor weaknesses as I see them. First, Habermas endorses a strong version of the thesis that both constitutionalism and democracy are required for legitimate political systems, namely, the thesis that they mutually presuppose one another; constitutionalism presupposes democracy, and democracy presupposes constitutionalism. Calling this the intuition of the “co-originality” of constitutionalism and democracy, Habermas repeatedly stresses throughout his writings that this entails a relation of reflexivity between the two. For instance: “The idea of the rule of law [i.e., constitutionalism] sets in motion a spiraling self-application of law, which is supposed to bring the internally unavoidable supposition of political autonomy [i.e., democracy] to bear.” “The democratic principle states that only those statutes may claim legitimacy that can meet with the assent of all citizens in a discursive process of legislation that in turn has been legally constituted [i.e., constitutionalized].”⁴⁸ Constitutionalism and democracy not only presuppose one another, then, but work in reciprocal relations of mutual transformation over time.

Second, the temporal dimension of this proposal has a more specific sense than Michelman's idea of the gradual diffusion of core ideals so that they are shared by virtually all of the population. In contrast, for Habermas the historical process must be both directional—in the sense of tending, all things considered, in one way—and developmental—in the sense of becoming ever more capable of fulfilling its ideals over time on account of specific competences gained in learning processes. Directional development in the case of constitutional democracies is evinced, then, not just in changes but in changes that can be seen as simultaneously progressive and self-consciously

47. HABERMAS, *Constitutional Democracy*, *supra* note 45, at 122.

48. JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* (William Rehg trans., 1996), at 39, 110.

responsive to prior inadequacies.⁴⁹ Of course, actual learning almost never follows a smooth, parabolic, unidirectional line but occurs rather in fits and starts, often with setbacks and partial regressions. While such contingencies surely undermine a simple picture of uninterrupted progress, that is not a realistic view of the complex developmental paths of actual constitutional democracies. More important, it is not required for legitimacy assessments that can differentiate between general trajectories of development, of stasis, or of regression even as they must struggle to make such assessments in the light of historical records that are less than crystal clear. I assume throughout the more realistic and discontinuous view without repeating these qualifications.

Finally, it should be clear that this picture of legitimacy is fully in accord with the logic of regulative ideals. First, legitimacy assessments are approximative, not binary: specific political systems may be more or less legitimate to the degree that they more or less approximate the ideals of constitutional democracy, and assessing such is a complex matter of judgment. Second, as an achievement concept, legitimacy accrues to those systems we call constitutional democracies only on account of specific constitutive features they possess. A governmental system is legitimate, on this account, to the degree to which its political processes, institutions, and laws provide good evidence that it has instantiated and will continue to instantiate the project of constitutional democracy in a dynamic, self-correcting, and thus progressive manner. Third and obviously, legitimacy is processual, a matter of achievement over time; it is not something that accrues to a system in virtue of any specific collective action or at any determinate point in time. Finally, on this Habermasian conception, legitimacy is not an achievable goal state but an ideal: an asymptote approachable but never perfectly realizable. In part, the unrealizability of a project of constitutional democracy can be read directly off the constitutive openness it must show to learning, for unless the political system is fallibilistically open to revisiting its basic political processes, institutions, and laws in the light of new information and new insights, it will not be able to correct heretofore unnoticed problems and defects and thereby better realize the ideals of constitutional democracy.⁵⁰

49. Habermas's conception of progressive learning arises from a combination of the Hegelian idea of dialectical progression and the specific stage-sequential logic of learning evident in developmentalist psychology as in Piaget and Kohlberg. A clear exposition and defense of this conception of learning as Habermas applies it to underwrite some of his most ambitious claims concerning social evolution can be found in DAVID S. OWEN, *BETWEEN REASON AND HISTORY: HABERMAS AND THE IDEA OF PROGRESS* (2002).

50. Thus worries expressed by "agonistic" theorists that Habermas's political theory prematurely forecloses the "democratic openness" that agonists take to be constitutive of healthy politics seem to me to be misplaced. For two different versions of the complaint that Habermas proposes a static, fully reconciled, and prematurely "closed" theory of constitutional democracy, see Bonnie Honig, *Between Decision and Deliberation: Political Paradox in Democratic Theory*, 101 AM. POL. SCI. REV. (1–17) (2007); and CHANTAL MOUFFE, *THE DEMOCRATIC PARADOX* (2000). Cronin, *On the Possibility*, *supra* note 30, at 367–368, makes a similar point in defending Habermas.

In the above discussion of substantialist legitimacy tests, I argue that each of the proposed tests—Barnet’s natural-rights libertarianism, the individual consent versions he rejected, and Michelman’s ethical-consensus civic republicanism—fall to debilitating bootstrapping paradoxes when they employ the threshold logic inherited from the common notion of legality and that they are salvageable once legitimacy is understood to operate on the logic of regulative ideals inherited from Kantian practical philosophy. It seems to me that the same follows for Habermas’s proceduralist test of legitimacy in terms of deliberative democratic constitutionalism. When we combine the thesis of the mutuality or “co-originality” of constitutionalism and democracy with a threshold logic of legitimacy, the reflexivity between the two ensues in an inescapable infinite regress such that no political processes could be rightly characterized as legitimate, as Michelman’s paradox of democratic procedures makes clear. Yet regulativism allows us to understand that reflexivity as not necessarily fatal to the very conceptual possibility of conceiving of a legitimate constitutional democracy.

If the regulativist interpretations of all the conceptions of legitimacy face symmetrical problems, why should one prefer Habermas’s thicker version of developmental regulativism? It seems to me that the benefits come from the way in which developmentalism provides us quite useful additional criteria for evaluating and adjudicating claims concerning the legitimacy of actual governmental systems. In a sense, by softening the hard edges of legitimacy criteria, regulativism always opens the theoretical door to one who wants to attribute constitutional democracy to any less-than-ideal political system; on bare regulativism it is always possible in principle for the defender of, say, a despotic government to claim that the current arrangements are approximations of the ideals of constitutional democracy—just like most other political systems but at a different place on the scale of achievement.

Developmentalism, however, adds further conditions that must be met in an assessment of legitimacy in addition to the assessment of absolute level of achievement in light of the legitimacy ideals it shares with simple regulativism: the political system must evince historical evidence of specific learning in the direction of the legitimacy ideals due to particular characteristics of the political system and it must currently evince political processes, institutions, and laws that warrant the expectation that such learning will continue into the future.⁵¹ Hence legitimacy assessments have a complex, tritemporal character: historical and contemporary evidence

51. Although some formulations in Michelman indicate that historical trends are important to legitimacy judgments, in general he tends to emphasize their presentist character to underline the idea that contemporary citizens must judge their current governmental system as worthy of respect: *see* especially his summary of his views in Frank I. Michelman, *Reply to Ming-Sung Kuo*, 7 INT’L J. CONST. L. (715–730) (2009), at 723–730. Thus, while Michelman’s view is clearly a form of regulativism, I do not think it counts as developmentalist.

about the structural reasons for the actual performance of a system are essential for assessments of its expected future trajectory.⁵²

Notably, these richer developmentalist criteria concerning the learning potential of a given political system are formal criteria, applicable to multifarious governmental forms, and, importantly, independent of the specific content of the legitimacy test proposed. Thus any theory of legitimacy from libertarian substantialism to deliberative democratic proceduralism can employ them; political systems can learn in the light of natural rights or of discursive openness. Whatever one's preferred theory of legitimacy, developmentalism asks one to attend to specific features of an extant governmental system—constitutional provisions, political processes, laws, cultural conditions, social arrangements, educational institutions, material conditions, and so on—that might underwrite or undermine assessments that the system has sufficiently approximated and is likely to continue ever more closely approximating the regulative ideals specified by one's theory. And the same is true for assessments of particular features of political systems that require evaluation: Do particular features—civilian control of the military, proportional representation, privately financed mass media, easy constitutional amendment procedures, widening wealth inequality—contribute to or detract from the specific system's learning potentials with respect to the realization of the relevant regulative ideals, or do they have no appreciable effect?

Finally, as these examples indicate, we can use different ideals and combinations of ideals in such judgments: from putatively universal high ideals (of, say, democratic self-legislation) to culturally specific ideals (of, say, American liberty or Norwegian social security). These seem to me to be signal attractions of developmentalism if we are to employ our theories insightfully to understand the actual political systems we find in the world.

B. Problems with Habermas

Identity over Time

Notwithstanding my enthusiasm for the developmentalist version of regulativism, I would like to suggest that two aspects of it ought to be given more abstract renditions. Let us begin with Habermas's claim that there

52. I believe this goes a long way to assuaging Olson's and Honig's worries about the epistemic viability of predictions of progress, since on my account such predictions are not purely future-oriented. Cf. Kevin Olson, *Paradoxes of Constitutional Democracy*, 51 AM. J. POL. SCI. (330–343) (2007), at 333–334; and Bonnie Honig, *Dead Rights, Live Futures: A Reply to Habermas's "Constitutional Democracy,"* 29 POL. THEORY (792–805) (2001). Olson's introduction of the notion of path-dependent constitutional development as an important component of the logic of legitimacy plays the same role in his theory, if I am not mistaken, as does my insistence that legitimacy assessments attend carefully to the past and present as well as the future.

must be some fundamentally identical features between the projects of the founders' generation and that of the current generation. He claims that:

the interpretation of constitutional history as a learning process is predicated on the non-trivial assumption that later generations will start with the *same standards* as did the founders. Whoever bases her judgment today on the normative expectation of complete inclusion and mutual recognition, as well as on the expectation of equal opportunities for utilizing equal rights, must assume that she can find these standards by reasonably appropriating the constitution and its history of interpretation. The descendants can learn from past mistakes only if they are "*in the same boat*" as their forebears. They must impute to all the previous generations the *same intentions* of creating and expanding the bases for a voluntary association of citizens who make their own laws. All participants must be able to recognize *the project as the same* throughout history and to judge it from the *same perspective*.⁵³

The idea here, I take it, is that there must be some basic continuity between what the founders and their forebears are doing—or intending or creating or operating on or acting within—in order for us to be able to attribute progressive learning to that which is the same and which is somehow causally responsible for that learning potential.⁵⁴

One problem with this idea is already emphasized in the quotation: What exactly is it that is supposed to remain the same? Habermas himself here suggests a number of alternate possibilities: the particular standards of the system of rights employed by the founders, or the "same boat" of actually founding a specific form of political practice, or the same intentions of establishing ever more inclusive structures of democratic self-legislation, or the general project shared across all constitutional democracies, or the historical continuity of that project as specific to one nation-state, or the same evaluative perspective concerning the developmental legitimacy of a system. Is it, say, important that the specific structuration of political power and the system of abstract rights enshrined in the Constitution stay the same, or are only the principles and ideals underlying these necessarily continuous over time? Perhaps only the words of a written constitution need remain constant, or perhaps this is immaterial as long as participants in both founders' and forebears' generations understand themselves as trying to do the same thing? I could go on, but at the least, this supposition is quite ambiguous as phrased.

53. HABERMAS, *Constitutional Democracy*, *supra* note 45, at 123 (almost all emphases added).

54. My reflections here are indebted to Alessandro Ferrara, *Of Boats and Principles: Reflections on Habermas's "Constitutional Democracy,"* 29 POL. THEORY (782–791) (2001); and Honig, *Dead Rights*, *supra* note 52, even as I approach the problems differently. I am not frontally concerned here with a question that Habermas briefly considers in *Constitutional Democracy*, *supra* note 45, and that preoccupies both Ferrara and Honig: namely, how can it be legitimate for past generations' agreements to bind the present demos?

But these ambiguities are not mere idle curiosities, for depending on the answers, we will get very different conceptions of the logic of developmentalist legitimacy claims, and these different logics ensue in quite different practical recommendations when we are attempting to continue the project of a given constitutional democracy. What are we to say, for instance, when someone claims that we ought not amend a constitution since that would violate the founders' intentions or would fundamentally change the project they had been engaged in? Those who are disposed to venerating constitutional originators for their unimpeachable sagacity would be bolstered by the historical continuity required by this supposition, but, to say the least, this conservative ancestor worship is in some real tension with the notion that a political system must be able to change itself through reflective learning processes.

Further, what are we to make of those fundamental changes that do in fact occur in actual constitutional democracies? Are they disqualified by the identity supposition, or should we retreat to a very abstract level of what must remain the same? Consider the introduction of real, effective political parties in the "revolutionary" election of Thomas Jefferson as President of the United States in 1800, which overcame the deliberately adopted but insufficient constitutional impediments to party-based national politics. If we are to judge such changes from the point of view of a given developmentalist conception of legitimacy, should we attend to facts of violated original intentions and structural discontinuity or to the effects of the change from the point of view of the conception of legitimacy? And even if we retreat to the abstract supposition of sharing with national founders the general project of realizing constitutional democracy in nation-state-specific terms, it is not clear that acceptable legitimacy judgments must always be traceable to some continuity with founding generations.⁵⁵ For as a U.S. citizen, I might plausibly *deny* that I share the same project with a founding generation that constitutively excluded so many from political citizenship and might insist instead that it was only much later that the American realization of constitutional democracy began to have sufficient inclusiveness guarantees to

55. Throughout his political theory and political writings, Habermas insists on a distinction between, on the one hand, the universal project of constitutional democracy, with its abstract system of rights categories and functionally based separation of powers, and, on the other, the acceptably different realizations of constitutional democracy under given contingent cultural, social, and material conditions in distinct nation-states. For instance, with regard to rights, he claims "we can understand the catalogs of human and civil rights found in our historic constitutions as context-dependent readings of the *same* system of rights"; HABERMAS, BETWEEN FACTS, *supra* note 48, at 128. The same goes for the ideals of the separation of powers, the rule of law, rational adjudication, a free and open public sphere, and so on; in each case, the same abstract ideals are realized in the specific traditions of a given polity, where the bone and marrow of such traditions consists in conflicts concerning the proper interpretation and implementation of those very ideals.

warrant the expectation of legitimate outcomes from ordinary democratic processes.⁵⁶

Lingering in the background of these concerns are a host of theoretically difficult and controversial puzzles about how precisely to identify and individualize constitutional democracies. However, we can, I hope, largely sidestep not only the specific Habermasian problems but also these larger issues by adopting the most general reading of what must be supposed to be the same: simply, the project of establishing a governmental system likely to institute sufficient achievement of and ongoing self-improvement in the fulfillment of the ideals of constitutional democracy. Accordingly, when approaching the problem of originating legitimation, we ask whether proposed structures are likely sufficiently to realize constitutional democratic ideals in a reflexively learning structure (however those ideals may be spelled out), given the specific consociation situation we find ourselves within. And when we consider the problem of existing legitimation, we ask about the degree to which the history of our political system, its current configuration, and its likely future prospects together warrant the judgment that it is sufficiently and ever more closely approximating the relevant regulative ideals. In neither case do we ask, in a suitably thick sense: Are *we* carrying on *our* traditions?⁵⁷ We ask rather: Are *our* political arrangements carrying on *the* project of constitutional democracy?⁵⁸

Admittedly this generalized reading of what remains the same loses certain nationalistic implications that Habermas might want to retain from the way such questions are often posed in everyday political controversies: for instance, that German forebears ought ask about what they share with their German forebears, or that Canadian citizens ought ask what the distinctively Canadian project of constitutional democracy is, and so on.⁵⁹ But this, as

56. One might cite here the eventual inclusion of slaves through U.S. CONST. amends. XIII, XIV, XV (1865–1870), women through amend. XIX (1920), and nonpropertied males through amend. XXIV (1964).

57. Or if we do ask this, it is only in the deflated sense that Michelman specifies: “constitutional framers can be *our* framers—their history can be our history . . . —only because and insofar as they, in our eyes now, were already on what we judge to be the track of true constitutional reason.” Michelman, *Constitutional Authorship*, *supra* note 4, at 81.

58. At various points, though inconsistently, Habermas seems to endorse this more general conception of what remains the same across the generations of citizens in a particular political system: “What binds them together is the performative meaning of the very practice of constitution making. The ‘purpose’ of this practice is supposed to be understood in the same way as the founding, development, and preservation of a voluntary association of free and equal citizens governing themselves by means of modern, i.e. positive and legitimate, law.” Jürgen Habermas, *Postscript: Some Concluding Remarks*, in HABERMAS AND PRAGMATISM (223–233) (Mitchell Aboulafia, Myra Bookman & Catherine Kemp eds., 2002), at 225.

59. Cronin, *On the Possibility*, *supra* note 30, explicitly endorses the opposite of what I am recommending: a contextualized and historicized version of the identity between founders and successors that is inherently particularistic and finds expression in a determinate collective political identity that is constructed through imaginative, retrospective projection. While Cronin argues on the basis of salutary sociological effects in fostering shared identity among citizens, this is a different question from whether a political system is normatively legitimate.

I see it, is a feature of my view, not a bug. To the extent to which citizens in one polity are open to analogous discoveries of problems or promising solutions from other constitutional democracies, they should be able to introduce such information as argumentative support for their own proposals for reform or transformation of their own polity. The normatively relevant question of such proposals, after all, is not whether or not they are foreign but how and the degree to which they would materially affect the indigenous political system's approximation of the relevant regulative ideals. Assessing this, furthermore, is not an abstract exercise of political theory disconnected from the context-specific details of a given governmental system, its supporting conditions, and its history; quite to the contrary. For apart from knowing, for instance, the relevant specifics of the Iraqi situation, there is no way to determine whether a federalist devolution of power might help or hinder the prospects for Iraqi constitutional democracy.

Retrospective Origins Worship

By adopting this much more general and abstract conception of what must be identically attributed to previous and contemporary generations than Habermas himself usually does, we can also expunge lingering but detectable traces of origins worship. For on this modified picture, we need no longer understand legitimacy assessments as necessarily involving retrospective conferrals of wisdom and political rectitude upon founding generations, as are required on Habermas's usual view.⁶⁰ Whereas on my picture we need to be able to judge whether the history of our polity is that of a sufficient and self-improving realization of the project of constitutional democracy, we need not accept any of our forebears' beliefs about the material entailments of that project. They might have gotten some elements right and others not, but all elements are to be evaluated in the light of the ideals of constitutional democracy, not because we share a contingent historical heritage that allows us to connect those elements back to their founding acts. The founding generation must be treated as just as likely to have been wrong as we are today, rather than building a presumption in their favor into the very logic of legitimacy. This approach also makes better sense of postfounding discoveries—for instance that real equal opportunities for political involvement require more than election procedures that are merely formally open to all on an equal basis—and it makes better sense of changes in the political system that are responsive to sociocultural changes.

60. Recall that according to Habermas's more concretistic conception, "All the later generations have the task of actualizing the still-untapped normative substance of the system of rights laid down in the original document of the constitution." HABERMAS, *Constitutional Democracy*, *supra* note 45, at 122. But to put it bluntly, what if "we" happen to have an unlucky heritage; what if that original document simply does not contain all that constitutional democracy requires, even *in nuce*? If we cannot plausibly trace a constitutional innovation back to the normative content of the original document, is it then to be abandoned even if it is a demonstrable improvement from the general point of view of the project of realizing the ideals of constitutional democracy?

Returning to the hereditary defects considered at the beginning of the paper concerning foundational exclusions (such as the USC and the Slave Power), procedural illegality (such as the relation of the USC to the Articles of Confederation), and external impositions of new governments (such as Iraq after its military conquest by the United States), in each case, on my picture, we can avoid distracting focus on the intentions and designs of those who have set the historical sequences into motion and focus rather on the historical sequences themselves as indicators of future potentialities. Hereditary defects matter exactly as far as and no farther than they actually impact the historical, present, and likely future performance of the political system vis-à-vis the regulative ideals of constitutional democracy. Consider the fact that the original U.S. constitutional settlement was achieved only by constitutively excluding slaves from not only political participation but also even legal personhood and that the resulting governmental system seemed even constitutionally bound to the continuation and expansion of the Slave Power. Yet in the long run, the Slave Power was defeated, and at least the constitutive exclusions of chattel slavery were overcome through political processes that can straightforwardly be described as self-correcting, reflexive learning. Obviously the mere fact that a legitimacy claim concerning the USC made in 2010 is not defeated by the USC's hereditary defects of slavery in no way exculpates the nation from the evils of chattel slavery. Nor do I mean to suggest that this particular example of developmental progressivism thereby renders the entire current U.S. constitutional structure legitimate. We should also note that legitimacy judgments have an inextinguishable temporal index: one would have had a much more pessimistic assessment of the polity's learning capacities in 1792, when the USC went into effect with its particularly strong constitutional protections for the Slave Power, and perhaps an even gloomier judgment sixty-five years later after the Supreme Court's disastrous decision in the *Dred Scott* case.⁶¹ The assessment, then, turns not on the founders and what they intended but on the actual political structures and processes set in motion and their course of change over time.

It may even be the case that a government's forbears distinctly did *not* intend to institutionalize a project of constitutional democracy but that a legitimate one ensued given later developments. We need not attribute to the British colonial rulers of India any intentions to or actions toward establishing the project of constitutional democracy in order to comprehend how colonial and postcolonial developments in India can nevertheless be interpreted as progressive realizations of the project of constitutional democracy. And the same goes for the transition from apartheid to postapartheid South Africa, which can be characterized as peaceful and legal transformation of a nondemocratic system into a constitutional democracy, one that shows many remarkable indications that it is on a developmentally propitious path. A

61. *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

like independence of founders' intentions and actual developments is relevant to assessing the current Iraqi political system: even if the regime was imposed with the most nefarious of intentions, the question of its legitimacy hangs on assessing its likely prospects for progressively realizing the ideals of constitutional democracy through self-reflective learning in the light of its current and historical approximations of those ideals.

On Habermas's picture, by contrast, such severely tainted origins in colonial rule, violent racial apartheid, or military conquest could never, in principle, give rise to legitimate constitutional democracies, insofar as no members of later generations could ever look back to such origins and attribute to the founders the supposition that they were engaged in the good-faith effort to institute a form of democratic rule through law. But it seems to me that such tainted origins have in fact sometimes given rise to admirable and *legitimate* practices of constitutional democracy. Do not misunderstand this position as a naïve Pollyannaish boosterism that sees all political history as progressive. For a developmentalist logic is just as capable of making negative judgments about legitimacy. One might point to the short history of post-Soviet Russia as an example of the failure of a regime to institutionalize self-correcting learning processes tending toward the realization of constitutional democracy. For whatever one's preferred conception of the ideals of constitutional democracy, one might well assess the recent tendencies toward ever greater authoritarianism there as good evidence that the governmental system has not sufficiently achieved those ideals nor successfully institutionalized self-correcting learning processes tending toward those regulative ideals.⁶²

In summary, the key questions for determining legitimacy concern the actual procedures, institutions, and laws that currently structure a particular political system, the historical evidence that those current arrangements have arisen out of developmental processes within which we can discern a directionality ever more closely approaching the ideals of constitutional democratic practice and where evidence from both historical and contemporaneous conditions makes it appear likely that such a specific asymptotic

62. Could a judgment of legitimacy at one point in time be warranted by the evidence available at that time—perhaps after the 1996 Russian presidential election one might be warranted in thinking the developmental path towards increasing democratization propitious and likely irreversible—and later be shown to have been wrong by subsequent developments—perhaps after the 2007 legislative and 2008 presidential elections showed distinct signs of democratization regress? Yes, I think it makes sense to assert that a legitimacy judgment could have been warranted at time 1 given the evidence available at time 1, and at the same time to assert that, given the evidence available at time 2, it is clear in retrospect that the judgment of time 1 was not correct. Thus legitimacy judgments are fallibilistic in a similar way that scientific propositions are: Priestly may have been both warranted *and* incorrect in his assertions about the existence of phlogiston in 1774, as shown by Lavoisier's results publicized in 1775. This also connects with my point above about the irrelevance of the beliefs of the founders about legitimacy: their assessments at time 1 of legitimacy may have been warranted, but they are not dispositive. In the end, only the evidence—about the actual past, present, and likely future performance of the political system in terms of the stipulated ideals of constitutional democracy—is dispositive.

approach to the regulative ideals is likely to continue into the future. In short, we should purge from Habermas's developmentalist account the lingering elements of a threshold logic of legitimacy that still traces some aspects of legitimacy judgments to determinate points in time—the founding moment—and to specific intentions and actions of a determinate group of people—the founders. A legitimacy judgment is a complex, tritemporal inference referring to the real features of a given political system, but it can do without worrying specifically about what we and our forebears share, and it can even do without worrying about what our forebears intended. Judgments of legitimacy are thereby constitutively severed from the *who* and the *how* of a polity's founding—what matters is *what* was thereby put into motion.⁶³

V. CONCLUSION

I argue in this paper that Barnett's paradox of authority and Michelman's paradox of democratic procedures both pose troubling challenges to conceptual consideration of the very idea of constitutional democracy, at least where one assumes a threshold logic of legitimacy modeled on the idea of legal validity. I also argue that their own preferred substantialist theories of legitimacy, as well as Habermas's competing proceduralist theory, all fall prey to the bootstrapping paradoxes exactly when they employ a threshold conception of legitimacy. Noting that each of the theories can be saved by employing a conception of legitimacy modeled on the logic of regulative ideals, I conclude that we ought to embrace regulativism when considering the logic of legitimacy claims. I also provide a number of reasons for preferring a specific version of regulativism, namely, the Habermasian idea of a developmental project, even as I seek to modify his specific formulation of developmentalism to save it from lingering traces of the threshold conception. I conclude by addressing two objections to the developmentalist view presented here.

The first objection is that the origins of a political system *do* matter deeply to its legitimacy. On the regulativist and specifically developmentalist views of the logic of legitimacy the origins of a polity are irrelevant in a significant sense: legitimacy is not a matter that can be settled by looking at the pedigree of a political system. Hence many of the leading theories of legitimacy are simply looking for the wrong thing: some set of features of social reality at the moment of a purported constitutional democracy's founding that originally created a legitimate and therefore binding political system, features in virtue of which all citizens continue to be legitimately bound to that system,

63. Here I am in full agreement with Michelman, much of whose "writing denies the cogency—once examined—of authorship as a ground of constitutional legitimacy," Michelman, *Reply to Ming-Sung Kuo*, *supra* note 51, at 719.

at least in the absence of explicit acts of repeal of the original settlement.⁶⁴ In contrast, on the view pressed here, *who* authored the constitutional settlement and *how* it was authored matter only to the extent to which the *who* and the *how* affect the *content* of the constitutional settlement, considered from the vantage point of how likely its political processes, institutions, and laws are to lead to achieving and reflexively developing the project of the realization of constitutional democratic ideals.

Yet I would not like to be misunderstood; origins are not entirely irrelevant to assessments of legitimacy. For in a very significant sense, origins are crucial: they inaugurate distinctly path-dependent vectors that will be essential to later assessments of the legitimacy of the political system. We could not hope to inaugurate a reflexive learning process from any possible starting point or any arbitrary political system. *Which* legal and political structures are formally announced in a written constitution or collection of legally binding quasi-constitutional arrangements matters to the future prospects of the polity. *Whether* there are in fact already in place various requisite preconditions of constitutional democracy—for example, practices of the rule of law; mechanisms mitigating governmental corruption; a vibrant public sphere—also matters materially to a polity's future prospects and hence to its legitimacy. Origins matter to such legitimacy assessments because of what was originated, not on account of how or by whom it was originated.

At this point, one might put a serious objection to my claim that the character of a polity's origins do not matter. Is there not, for instance, something fundamentally wrong when a particular set of political structures is imposed on a population against their will, no matter what the attractive features of the imposed system are?⁶⁵ And should we not, for instance, identify the wrongness of, say, the imposition of a constitutional democracy through military conquest as precisely that which is *illegitimate* in an exemplary manner? I think that there is something intuitively correct about the claim that an imposed constitutional democracy is illegitimate, but I want to suggest that it is not so on account of the imposition itself. What makes such an imposed political system illegitimate, typically, is that the system itself is not actually a vehicle for the conquered people to assume the collective powers of self-government through law but is rather something else: say, for instance, a legalistic framework for the continuing oppression of the citizenry

64. I have in mind here both commitment-focused theories (e.g., Jon Elster's and Steven Holmes's accounts of constitutional precommitment or Jed Rubenfeld's commitmentarian account of constitutional binding across generations) and ratification-focused theories (such as Alexander Hamilton's theory of the constitution as the ratified will of the people or Bruce Ackerman's more complex theory of constitutional change through sustained popular deliberation and endorsement). It is, however, well beyond the scope of this paper to make good on such claims.

65. One obvious candidate wrong is the impropriety of paternalism, now writ large into international military relations; see, e.g., the lengths gone to in order to show that such paternalistic interventions admit of at least a possibility in principle of normative acceptability in Arthur Isak Applbaum, *Forcing a People to Be Free*, 35 PHIL. & PUB. AFF. (359–400) (2007).

by a few to the benefit of those few, whether that be an indigenous elite, a foreign elite, or a sectional social power. In other words, the problem is not the *origins* of the political system via imposition but the actual *features* of the system that make it inappropriate to attribute legitimacy in the sense of establishing and fostering an ongoing project of realizing constitutional democracy.

Of course, the fact that, on my view, it is conceivable in principle to create a legitimate constitutional democracy through fundamentally undemocratic and/or anticonstitutional means in no way licenses such actions. There are other important normative considerations concerning the (un)acceptability of such impositions in the first place, and I do not mean to prejudge in any way the upshot of those considerations. I do, however, deny that such considerations include the notions that imposed democracies or procedurally illegal constitutional settlements are thereby necessarily illegitimate.

The second objection is that regulativist and developmentalist approaches to assessing legitimacy do not in any way “solve” or “resolve” the bootstrapping paradoxes this paper begins with. While the original barb of the paradoxes as presented by Barnett and Michelman might have been reduced, it is true that they still perdure in the very reflexivity at the heart of the thesis of the mutuality of constitutionalism and democracy. One might better say, then, that the arguments of this paper, if successful, dispel the skeptical force of the paradoxical objections to the very idea of constitutional democracy precisely by showing the productive possibilities of reflexivity. I have tried to show that we should reorient the logic of legitimacy judgments away from the past and the threat of degenerative infinite regress and toward the future and spirals of progressive reflexivity, which at least opens the potential for asymptotic progressions to regulative ideals. The paradoxes are not so much solved, then, as rendered benign by employing a more satisfying account of the logic of legitimacy.

If we want simultaneously to hold on to ideals of both constitutionalism and democracy, we ought to require that our conceptions of legitimacy be modeled on the logic of regulative ideals, not on the threshold logic of legal validity. And the most promising way of doing this is to adopt the specific developmentalist conception of regulativism articulated here.