Introduction

This book is devoted to an exploration of two closely interrelated questions. First, under what conditions is the creation of a legitimate constitutional regime possible? Second, what must be true about a constitution if the regime that it grounds is to retain its claim to legitimacy?

The focus on legitimacy derives from the fact that a constitution is fundamentally an instrument of legitimation for a set of juridical practices. By the term "juridical" I mean the combination of legal, political, and administrative actions that are undertaken in terms of laws or law-like rules as elements of formal institutions of governance. A constitutional regime is one in which the claim to legitimacy of these juridical practices rests, at least in part, on a prior claim of legitimacy on behalf of a constitution. This is not to say that the constitutional and legal claims of authority are coextensional; the relationship between a constitution and ordinary law will be the subject of a great deal of discussion in later chapters. But describing a system as a "constitutional regime" implies that the system of institutional organization and a set of basic guiding norms are authoritatively contained in the constitutional "text," however conceived. As a result, I will conceive of a constitutional system as one that has two critical elements: institutionalized mechanisms for collective action, and a set of law-like rules supreme within their domain. For a constitutional regime to be legitimate, each of these elements requires an adequate justification.

The scope of this discussion is therefore narrowed to a particular kind of political system that confronts particular kinds of challenges in asserting a claim to legitimacy. In addition, the inquiry that is undertaken here is not a search for the conditions of possibility of any conceivable constitution, but rather takes place within the tradition of liberal constitutionalism, a tradition that assumes the inescapability of value pluralism and accepts the fundamental importance of basic democratic principles. The challenge for liberal constitutionalism, then, is that we cannot answer the questions that this book asks by referring to a necessary set of universally shared moral values or belief in a higher law external to the constitution itself, nor may we accept an explanation that depends on the coercion of the population by force. If liberal constitutionalism is to be made legitimate, the answers to the two questions that motivate this study have to be couched in terms that are consistent with value pluralism and democracy.

The first traditional step in trying to answering these questions derives from the nature of liberal constitutionalism itself. Liberal constitutionalism assumes the acceptance of basic democratic norms in addition to the social fact of value pluralism. Respect for fundamental democratic commitments to self-rule, in turn, implies that legitimation depends on some version of consent of the governed. In the context of a theory of liberal constitutionalism, the question "under what conditions is the creation of a legitimate constitutional regime possible?" becomes shortened to "Consent How?" And the question "what must be true about a constitution if the regime that it grounds is to retain its claim to legitimacy?" becomes, in its shortened version, "Consent to What?"

The argument of this book is extensive and in places complex, but the answers that I propose can be stated simply. Broadly stated, the argument of this book is that the necessary conditions of possibility for legitimate constitutional rule ultimately involve the creation and maintenance of a language of liberal constitutionalism. What is required for the creation of a legitimate constitutional regime is an initial shared commitment to the creation of a system of constitutional language in a manner consistent with the principle of justification by consent. And for a constitutional regime to retain its claim to legitimacy, the integrity of the system of constitutional

language must be preserved, again in a manner consistent with justification by consent. In their third and final iteration, then, the questions to be answered will become "How is consent to a system of constitutional language possible?" and "What must be true about that system of constitutional language in order that consent to its creation and maintenance is sufficient to ground a liberal constitutional regime?"

Each of the formulations just mentioned raises further questions. It is all very well to say that the creation of a constitutional regime requires an initial commitment to language, but how can such a commitment be shown to exist? Thereafter, how can an initial commitment to language be legitimately understood to bind subsequent generations? The idea of a constitutional language system similarly raises further questions. What is the relationship between constitutional language and systems of language employed in legal and moral discourse? And what qualities of form and content is a system of constitutional language required to have if it is to do the work that is being asked of it here?

There are a number of ways to approach these inquiries: One might ask about the sociological conditions that enable a population to engage in a certain kind of collective action; one might investigate the conditions of historical and cultural development that are required to make the phrase "constitutional order" meaningful; or one might ask what juridical traditions and institutions are needed for a project of constitutional construction have a high likelihood of success. My goal in this book, however, is to gain some purchase on the two original questions from a theoretical perspective. That is, I am not attempting to identify a set of historical circumstances under which constitutional democracy is likely to arise, but rather to derive a persuasive argument about legitimacy. My approach in developing the argument is minimalist, in the sense that I am only trying to determine the conditions of possibility for legitimate constitutionalism, not the ideal conditions for the best form of constitutional rule. The further questions of what conditions are sufficient to *ensure* a *desirable* constitutional regime – which are arguably both more difficult and more important than the questions I ask here – are left for another day.

There is also a non-trivial argument that while a constitutional order legitimates juridical practices, that order either cannot or

need not be legitimated itself. Such an argument might take the form of the proposition that the project of legitimating a constitutional order is a waste of time. The creation of a constitutional system, it may be said, is a brute historical fact that defines the scope of "legitimacy" for a particular system, and there is no external basis for challenging or affirming the legitimacy of the constitutional order itself. Moreover, one can imagine a society in which the vast majority of persons are perfectly willing to abide by a system of laws without any commitment to principles that recognize those laws as "legitimate" by virtue of the operation of any specifiable principle. Persons might be said to accept a particular set of such rules without any particular view about their legitimacy because they believe that there is a chance that at some point in the future their side will win. Alternatively, the argument might be that persons might simply feel that they are materially better off under the present set of rules than under available alternatives. All of these are arguments for the position that the search for grounding principles of legitimation is both futile and unnecessary.

On closer inspection, however, these turn out to be arguments about the grounds of legitimacy rather than the relevance of the concept. Even in the most interest-driven and instrumental description of a person's reasons for accepting a juridical order, there are implicit appeals to meta-rules, or rule-like norms; an adequate likelihood of ultimate success under existing rules; the equal or characterizable "fair" application of the rules to different parties; and some notion of sufficient reciprocal commitment to the rules on the part of other players and authorized enforcers. The reference to "authorized enforcers," in turn, names another layer of the lurking set of meta-rules that are always involved in any formalized situation of strategic competition.

It is also not the case that appeals to interests and strategic advantage are ever completely absent from a theory of juridical legitimacy. It is, frankly, difficult to imagine an argument for legitimacy that does not coincide with at least one of these instrumental justifications. But these are not persuasive arguments against the necessity for legitimacy. They are arguments about the terms of that discussion. The possibility that today's losers may be tomorrow's winners, the promise of better conditions, or an appeal to

rules for the game that are sufficiently rule-like are all ways of invoking legitimating principles quite familiar in constitutional and philosophical debates. In the same way that the most altruistic act can be described as self-interested ("I have an interest in thinking of myself as a moral person"), the most self-interested motivation becomes the basis for a legitimating principle when it is translated into juridical institutions. This observation provides the basis for one of the fundamental tenets of liberalism, that meaningful arguments for the legitimacy of a political system may emerge even in the face of a genuine pluralism of interests and values.

Furthermore, legitimation is an essential condition of possibility for sustained collective action. The term "collective action" refers to a classic problem in political science: How do groups coordinate themselves to act in ways that individual members accept as binding despite disagreements about the desirability of the group decision? An institutionalized system of collective action is one in which it is possible to know when a decision has been reached, the decision-making process is understood to involve direct or indirect participation by the relevant community, and the decision that is reached is understood to apply to community members. In other words, a system of politics.

A system of politics is a necessary implication of any constitutional system. By contrast, imagine a situation of truly absolute monarchial rule. In such a situation, it would be both possible and plausible that a single ruler would issue contradictory mandates to two subordinates, then leave it to them to fight it out. It would also be possible for such a monarch to change his or her mind without notice, or to dictate actions that are entirely destructive of the welfare of those subject to their edicts. Such a system of decision making yields neither collective action nor institutionalization. Decisions by such a governing authority cannot be described as meaningfully "collective" insofar as they rest entirely within the unfettered discretion of an individual actor, and any "action" is obtained through the direct coercion of individuals (excepting members of the coercing organizations, such as an army personally loyal to its commander). And there are none of the elements of predictability, transparency, and rationalization that are required for institutionalization. Multiplying the number of rulers into an

oligarchy obviously does nothing to change this equation from a perspective external to the ruling group.

Systems of government that do not satisfy the criteria for institutionalized collective action are neither impossible nor necessarily unstable, but they are not "constitutional" in any meaningful sense. Rather than being maintained by politics, such regimes can be maintained only by the exercise of force, leading inevitably to the question that has bedeviled every dictatorship in history, "Do we hold the army?" If the assumption of the discussion is that we are concerned with regimes that can be sensibly characterized as "constitutional," the necessity that constitutional systems be legitimated is a matter of definition.

The necessity of legitimation is also evident as a matter of sociolegal practice, a conclusion that can be demonstrated by consideration of the prosaic example of the adjudication of private disputes. If participants in a system of dispute resolution cease to accept the outcomes as legitimate, there is a danger that they will either ignore the system or ignore the outcome of its proceedings. At a certain point, in turn, the willingness or ability of the state to mobilize coercive authority to compel respect for the judicial process will be exhausted. At that point, the absence of legitimacy in the system of laws results in a failure of that system as an institution of collective action at all. The statement "there is no right without a remedy" recognizes the meaninglessness of a legitimating standard in the absence of effective institutions of collective action to enforce it; conversely, those institutions cannot be effective for long – or even, in the sense described earlier, remain "institutions" – unless they are themselves viewed as legitimate. To the extent that "constitutional system" is understood to mean "constitutional system stable over time," the need for legitimating arguments is inescapable. By the same token, any description of the conditions of constitutional adequacy is also simultaneously a description of the possibility of constitutional failure.

Recognizing that the question of legitimacy is inescapable has important consequences for the understanding of the term "constitution" even before any particular argument is considered. A "constitution" is often described as a charter for government that performs the dual functions of organizing and defining the limits of

the exercise of power. But it will not do to define any system that includes a written charter that fits that description as "constitutional," nor to exclude systems that have no formal charter from the discussion. The former category, after all, would include such regimes as the Soviet Union, while the latter limitation would arguably exclude constitutional systems such as Great Britain, not to mention less clear cases such as Israel. What is missing is the recognition of the special role that a constitution plays in articulating the legitimating principles for the political regime. This is not an observation that depends on the adoption of some particular theory of constitutionalism. Whether one conceives of a constitution as an aspirational statement of highest political goals, or purely as a compact between autonomous entities, consistency with that conception becomes the litmus test for the legitimacy of subsequent juridical acts. Any theory of constitutional rule requires justification by an appeal to a legitimating principle.

As I noted earlier, throughout the discussion that follows I have employed a minimalist approach. That is, I have not attempted to describe the circumstances under which a constitutional order will be the "best" – most just, most moral, most egalitarian, or most free – only the circumstances under which we can speak of a legitimate constitutional order at all. Similarly, I have not attempted to derive everything that might or should follow from the fact of a constitutional system – the most developed possible set of rights, the most effective system of democratic participation, or the most virtuous juridical order – only those consequences that are *necessarily* required for a constitutional system to be able to assert a claim to legitimacy. Nonetheless, I will argue that there are substantial conclusions to be reached with regard to both questions.

With respect to the first motivating question of this book, "Under what conditions is the creation of a legitimate constitutional regime possible?" as I have already indicated, I intend to argue that the creation of a legitimate constitutional regime depends on a prior commitment to employ constitutional language, and that such a commitment is both the necessary and the sufficient condition for constitution making. I will also argue that this initial observation requires us to reconsider the nature and operation of popular sovereignty and the basis for the authority of juridical officials. In

response to the second question, "What must be true about a constitution if the regime that it grounds is to retain its claim to legitimacy?" having refocused the inquiry toward the language of constitutional discourse I will argue that a specific set of characteristics described in terms of exclusivity, completeness, and substance, are the analytically necessary answers.

Throughout the discussion, I will argue that the unequal political burdens that these answers impose on democratic action are not only justified, but are actually the inevitable results of the commitment to constitutional self-government. Finally, I will argue that serious errors of modern constitutional practice appear in the failure to preserve the boundaries of constitutional language against a variety of competing forms of discourse, including the languages of religious morality and ordinary law. I will also argue that the analysis requires us to reject claims of emergencies that cannot be expressed in terms recognizable in constitutional discourse. To explain the path of the argument, however, a somewhat more detailed description of its elements is required.

Chapter 1 begins with an exploration of some of the early roots of liberal constitutionalism. In the earliest Western political writings, the solution to the problem of collective action and the need for legitimating principles led to the focus on law as both a legitimating and a legitimate set of organizing principles. Those principles, in turn, derived their legitimacy from some version of natural law principles. That is, laws, and political regimes generally, were legitimate (or "just," or "desirable," or "moral") insofar as they accorded with the natural order of things (as in Aristotle and Cicero), or with divine revelation (as in the Hebrew Bible and Augustine). There were also hints in early writings on the subject of a specific focus on universal human nature – characteristics unique to humans and unconnected to the ontology of the rest of the universe – as the test for legitimacy, leading Justinian to distinguish *jus naturae* (universal laws of nature), *jus gentium* (laws universal to human societies) and *jus civile* (laws specific to particular societies). The natural law tradition is far from absent in modern constitutionalism, where it takes the form of an appeal to substantive moral norms. It should be noted that, in terms of the form of the argument, it makes no difference whether these moral norms are

asserted to be uniquely suited to a community, universal to humans, or grounded in metaphysical authority. The argument remains that law is legitimate insofar and to the degree that its content is morally sound.

In the Early Modern period of European history, a different approach to the legitimation of juridical regimes appeared in the form of the theory of sovereignty developed by, among others, Jean Bodin, Thomas Hobbes, and John Locke. The text that is thought of as the beginning of this theory of legitimate government is Bodin's *The Six Books of the Republic*. Bodin was motivated, in large part, by a desire to establish a basis for secular authority capable of withstanding the divisive forces of religious conflict. His solution was to turn away from the content of laws as the basis of their legitimacy, and to focus instead on the identity of the human lawmaker. Contrary to the tradition of medieval constitutionalism, in which a monarch's rule was understood to be constrained by customary norms, the scope of authority in Bodin's version of sovereignty was bounded only by the conditions of its creation. So long as laws emanated from a sovereign and did not contradict the basic nature of its rule, Bodin argued, their legitimacy did not depend on their agreement with other, established normative principles.

Hobbes, and then Locke, developed the idea of sovereignty further, pointing to the centrality of authority over language as an element of lawmaking authority. In the process, the meaning of sovereignty underwent a transformation. For both Bodin and Hobbes, sovereignty was a fundamentally other-directed phenomenon, in which the sovereign exercised authority over others. With Locke, sovereignty comes to be understood as a collective form of self-rule, a formulation that leads to the conclusion that legitimate rule requires consent. In the process, Locke makes the definition of a legitimate governing sovereign the basic test for legitimacy in liberal constitutionalism, characterized by the assertion of collective self-sovereignty, legitimation by consent, and the exercise of authority over language. At the end of Chapter 1, after reviewing these three writers' arguments, I propose that some version of Lockean constitutionalism remains the strongest analytical approach to the problem of defining the conditions of constitutional legitimacy.

Chapters 2 and 3 look beyond Locke's prescriptions to an understanding of the problem in its modern form. These chapters are devoted to exploring the question that was earlier phrased as "Consent How?" Modern challenges to the possibility of legitimate constitutional rule focus on the problems of defining conditions of genuine "consent," describing an understanding of collective action appropriate to the process of constitutional creation, and justifying the possibility of precommitment. Responding to these challenges requires a reconceptualization of popular self-sovereignty as the first necessary step in describing a legitimate constitutional regime. Older models such as those of Bodin and Hobbes depended on a characterization of collective self-rule in terms of an anthropomorphic metaphor of the state as an "artificial person." This metaphorical understanding of collective action, however, is inadequate to provide satisfactory justifications for liberal constitutionalism. Locke's description of a commonwealth began the process of moving away from an anthropomorphic metaphor to something more descriptive of a modern state. To develop a Lockean theory of modern constitutionalism, we must look more deeply into the idea of an initial commitment to linguistic practice that provides the basis for subsequent acts of political consent.

The simple observation that there can be no social contract without a common language in which to express that agreement is the first step toward a theory of constitutional language. Locke's recognition that the creation of language precedes moments of political consent resolves many of the difficulties in establishing conditions of legitimacy at the moment of constitutional creation. At the same time, recognition of the critical fact that constitutional authority operates in the first instance as authority over the creation of new forms of juridical language requires the possibility of forward-looking "consent" of a different kind. Here, the content of constitutional language comes into play. Grounding the legitimacy of a constitutional text in the creation by consent of language-generating authority parallels the approach to grounding the legitimacy of a legal system in facts of sociolegal practice, thus cementing the connection between legitimate and effective constitutional rule in the very terms of its possibility. To apply an argument of this kind to the question of constitutional legitimacy,