1-1-2003

They the People: A Third-Party Beneficiary Approach to Constitutional Interpretation

Eric Parnes

Follow this and additional works at: http://digitalcommons.law.scu.edu/lawreview

Part of the Law Commons

Recommended Citation

Available at: http://digitalcommons.law.scu.edu/lawreview/vol43/iss2/3

This Article is brought to you for free and open access by the Journals at Santa Clara Law Digital Commons. It has been accepted for inclusion in Santa Clara Law Review by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact sculawlibrarian@gmail.com.
THEY THE PEOPLE: A THIRD-PARTY BENEFICIARY APPROACH TO CONSTITUTIONAL INTERPRETATION

Eric Parnes*

I. INTRODUCTION

To lay claim to the legitimacy of its product, any approach to constitutional interpretation must satisfy two related conditions. First, the method of interpretation must begin with, derive from, and remain true to some source of the Constitution's legitimacy. Second, to share in the legitimacy of the Constitution, the approach to constitutional interpretation must offer some narrative\(^1\) that establishes that legitimacy. Neither traditional approaches nor novel recent proposals\(^2\) succeed in satisfying these two conditions.

Despite the close relationship between the two conditions, each plays a distinct role in the elucidation of a third-party beneficiary approach to constitutional interpretation. A discussion of the first condition suggests two points. First, current approaches fail to connect to any source of the Constitution's legitimacy. Second, contract law offers a paradigm of how one's method of interpreting a document might preserve that document's normative authority.

In the presentation of the second condition necessary for an

---

* Associate, Hughes, Hubbard & Reed LLP, Washington, D.C. J.D., Georgetown University Law Center; B.A., University of Maryland. The author would like to thank Professor Mark Tushnet, Ryan Lehning, Illomai Kurrick, Mathew Kaiser, Carl Edman, Nilam Sanghvi, and Ann Parnes for their helpful comments and suggestions on this article.

1. Some account beyond a mere assertion of legitimacy is required. A narrative account represents the ideal: by beginning from some independent source of legitimacy and describing the relationship between that source and the Constitution.

approach to constitutional interpretation to yield legitimate results, three issues arise. First, when using a traditional mode of constitutional interpretation to establish a basis for the Constitution's legitimacy, one will encounter an initial hurdle in what has been called the precommitment problem. Several solutions to the basic precommitment problem present themselves and may prove satisfying. The second issue that arises involves a more daunting formulation of the precommitment problem for which the standard solutions fail to account. This problem, called the intertemporal precommitment problem, may appear as an insurmountable barrier to the satisfaction of the second condition to a legitimate approach to constitutional interpretation. However, the intertemporal precommitment problem may rest on presumptions of questionable validity.

In Part III, a close analysis of the presumptions underlying the intertemporal precommitment problem demonstrates that, indeed, it is an illusory problem. By questioning some of our most cherished convictions concerning the nature of liberal democracy and the United States Constitution, this article dispels the myths of popular sovereignty that lie at the heart of the intertemporal precommitment problem. With the shaky foundation of the problem razed, Part IV begins to erect a more stable base on which to rest the enterprise of constitutional interpretation.


4. The problem arises when we ask why, given the fact that we did not write or ratify the Constitution, we should be bound by its terms. Although I suggest a new name, the problem itself is far from novel. Bruce Ackerman identifies an almost identical problem, which he refers to as the "intertemporal difficulty." See Bruce A. Ackerman, The Storrs Lectures: Discovering the Constitution, 93 YALE L.J. 1013, 1045-46 (1984) [hereinafter Ackerman, Discovering the Constitution]. Frank Michelman calls a more basic version of the problem the "paradox of constitutional democracy." FRANK I. MICHELMAN, BRENNAN AND DEMOCRACY 5 (1999). Michael Klarman describes a similar difficulty as applied to legislation generally as the "cross-temporal majorities problem." Michael J. Klarman, Majoritarian Judicial Review: The Entrenchment Problem, 85 GEO. L.J. 491, 504 (1997). What I call the intertemporal precommitment problem might be suitably described as an intergenerational problem, but that moniker has already been used in the context of environmental regulation. I have thus chosen to use a new, but appropriately descriptive, term to refer to the problem.

5. The presumptions are that the written Constitution expresses the will of the people at the time of the enactment and that our system of government represents a real commitment to popular sovereignty.

6. See infra Part III.

7. See infra Part IV.
for the benefit of third parties, the article seeks to restore honesty and legitimacy to constitutional interpretation. "We the People" neither wrote the Constitution nor are bound by its terms. Instead, the framers drafted the Constitution to benefit us, and interpreting it accordingly is the only way to maintain its normative force.

II. THE PROBLEM OF INTERPRETIVE LEGITIMACY IN A CROSS-TEMPORAL WORLD

A. Connecting with a Source of Legitimacy

To lay claim to legitimacy, any approach to constitutional interpretation must begin with, derive from, and remain true to some source of the Constitution's legitimacy. If we are to honor a particular interpretation of the Constitution as legitimate, it must be because the Constitution itself is legitimate and because the interpretation shares in that legitimacy. So too, if we are to accept as legitimate the constitutional interpretations produced by a particular method of interpretation, we must accept that the interpretive method proceeds from and sustains constitutional legitimacy.

8. See infra Part IV.C.1.

9. This tenet applies to a method of interpretation's claim to legitimacy as a method of constitutional interpretation. In common parlance, we might describe an interpretation as legitimate if it conforms to our substantive preferences, or if it satisfies our ethical or moral philosophy. While this may be one type of legitimacy, it is of only tangential relevance to an inquiry into methods of constitutional interpretation. The assertion that some interpretation of the Constitution maximizes happiness (utilitarian justice), see, e.g., John Stuart Mill, Utilitarianism (Samuel Gorovitz ed., 1971), or would be consistent with a system of justice favored by a rational person behind a veil of ignorance (Rawlsian justice), see, e.g., John Rawls, A Theory of Justice (1971), does not, by itself, speak to whether the result constitutes a legitimate constitutional interpretation. The assertion would more closely address that question if it included a claim that the Constitution dictates that we maximize happiness or satisfy Rawlsian justice. The claim would satisfy the condition if maximizing happiness or satisfying Rawlsian justice also gave legitimacy to the Constitution—not a great leap. Traditional approaches, however, fail to offer persuasive explanations of the source of the Constitution's legitimacy, as I will suggest in Section B.

10. If connecting to the legitimacy of the Constitution is not a central purpose of the interpretive enterprise, then that enterprise is at best disingenuous and at worst empty. The enterprise is disingenuous if it seeks wise or substantively desirable policy and then asserts ad hoc that the interpreted document dictates that policy. Critics of this sort of approach to interpretation often label the practice "judicial activism." See, e.g., Edwin Meese III, Interpreting the Constitution, in Interpreting the Constitution: The Debate over Original Intent 13 (Jack N. Rakove ed.,
Developments in contract law during the twentieth century illustrate the need for a connection between the legitimacy of interpretation and the legitimacy of that which one seeks to interpret. Over the past hundred years, Anglo-American contract law has been defined by a conflict between classical and modern doctrine. Debates between proponents of the two basic approaches to contract interpretation may be reduced to disagreement over the source of contract authority.

Although the classical and modern approaches to contract interpretation differ in many respects, perhaps the most obvious distinction arises in their treatments of the intent of contracting parties. In broad terms, classical contract law approached interpretation seeking objective manifestation of the intent of the parties. Modern contract law emphasizes the subjective intent

1990). Meese noted that the problem with interpretations grounded "in appeals to social theories, to moral philosophies or personal notions of human dignity... is not that it is bad constitutional law, but that it is not constitutional law in any meaningful sense at all." Id. at 18.

11. See P.S. Atiyah, An Introduction to the Law of Contract 7-8 (5th ed. 1995); Melvin Aron Eisenberg, Expression Rules in Contract Law and Problems of Offer and Acceptance, 82 Cal. L. Rev. 1127, 1130 (1994). Suggesting a rigid dichotomy between classical and modern approaches belies the complexity of the many issues that have arisen in contract law. Other taxonomies may better express the different directions taken by twentieth-century scholars. See, e.g., Ian R. Macneil, Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law, 72 Northwestern U. L. Rev. 854 (1978). For the purposes of this illustration, however, broad and oversimplified distinctions between the classical and modern approaches will suffice.

12. As used here in its imprecise sense, the term "interpretation" subsumes two related, but distinct enterprises: interpretation and construction. Corbin observes: Although these two words are most often used synonymously, a distinction between them does exist. Through 'interpretation' of a contract, a court determines what meanings the parties, when contracting, gave to the language used. Through 'construction' of a contract, a court determines the legal operation of the contract – its effect upon the rights and duties of the parties.


For purposes of this discussion, the distinction between construction and interpretation will blur in usage, but ought to persist in mind. To the extent that one approach might emphasize construction more than interpretation, the distinction remains significant. Nonetheless, "the interchangeable use of the terms" is widespread, id. at 11, and alternative language adequately describes the differences in approach. See, e.g., Eisenberg, supra note 11, at 1128-29 (contrasting the functions of default rules and expression rules and of objective and standardized interpretations).


14. See Eisenberg, supra note 11, at 1130-35. An opinion by Learned Hand represents the classical approach:
of the contracting parties.15

In evaluating these competing approaches, we have two primary options. We might ask whether one or the other approach can succeed on its own terms. Thus, we might argue that the modern approach fails because one can never know the subjective intent of contracting parties. At a more fundamental level, we might ask whether either approach yields interpretations that legitimately bind parties. To answer this question, we must ask why society cares about interpreting contracts, why it chooses to enforce contracts at all, and why it considers them legitimate.

In the abstract, both classical and modern approaches "begin with the proposition that a contract is normative—a guide to conduct for the parties in relation to each other and for a judge asked to adjudicate their rights and duties."16 This assumption of normativity may rest on any number of theoretical grounds, "including theories of promise, autonomy, consent, rule utility, [and] fairness."17 A belief that any one of these theories explains why society chooses to enforce contracts may determine which approach to contract interpretation ought to prevail.

An answer to the question of why a contract should be enforced goes a long way toward resolving how a contract should be enforced. If we believe that contracts may be legitimately enforced insofar as they express the will of the parties, we should favor an interpretive approach that seeks to determine that in-

---

A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake, or something of the sort.

*Hotchkiss v. National City Bank, 200 F. 287, 293-94 (S.D.N.Y. 1911).*

15. *See Eisenberg, supra* note 11, at 1130-35. The Restatement (Second) of Contracts adopts the modern approach: “Where the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning.” RESTATEMENT (SECOND) OF CONTRACTS § 201(1) (1981) [hereinafter RESTATEMENT SECOND]. The objective/subjective dichotomy does not hold under all circumstances, as demonstrated by the equivocation at the end of Judge Learned Hand’s statement in *Hotchkiss*. *See Hotchkiss, 200 F.* at 293-94. For this illustration, however, we can stipulate that classical means objective and modern means subjective.


17. *Id.* at 118.
tent. This starting point will likely lead to adoption of the modern approach, which concerns itself with the subjective intent of the contracting parties.\textsuperscript{18}

\textbf{B. Establishing a Source of Legitimacy}

In constitutional interpretation, the underlying basis for legitimacy—the reason for honoring the Constitution such that we care whether a particular interpretation is correct—is largely dismissed, avoided, or ignored.\textsuperscript{19} Jed Rubenfeld has insisted that originalists have never provided an account “explaining why the will of the dead should govern.”\textsuperscript{20} The failure to ground interpretation in the legitimacy of the Constitution is a deficiency not limited to original intent approaches.\textsuperscript{21} Put simply, in championing one or another approach to constitutional interpretation, commentators seldom address the basic question: so what? Why should it matter that an interpretation derives from the Constitution’s text or remains true to the founders’ intent? These questions suggest the second, and central, defect that plagues approaches to constitutional interpretation. Approaches to constitutional interpretation are unable to share in the legitimacy of the Constitution because they are unable to establish that legitimacy. This inability derives from the intertemporal precommitment problem.

The intertemporal precommitment problem is a more challenging version of the basic precommitment problem in constitutional theory.\textsuperscript{22} The trouble in its basic form arises when we

\textsuperscript{18} See supra note 15 and accompanying text.

\textsuperscript{19} The idea of an interpretive approach maintaining constitutional legitimacy has been addressed. See, e.g., PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 9 (1991) (“Judicial review is...a practice by which constitutional legitimacy is assured, not endowed.”); see also PHILIP BOBBITT, CONSTITUTIONAL FATE (1982) (proposing six modalities of constitutional argument as the basis of legitimacy for judicial review). The problem with Professor Bobbitt’s modalities-of-constitutional-argument approach is that it purports to maintain legitimacy only upon the assumption that the Constitution has an independent source of legitimacy.


\textsuperscript{21} Professor Rubenfeld overstates the extent of the deficiency with regard to originalist approaches. See id. While he may be right, and I certainly agree, that originalism cannot ground its interpretive approach in an acceptable account of constitutional legitimacy, the suggestion that originalists cannot offer any account is inaccurate.

\textsuperscript{22} The precommitment problem as it arises in constitutional theory resembles, but is not equivalent to, the precommitment problem that philosophers illustrate with the tale of Ulysses and the Sirens. See, e.g., Gerald Dworkin, Paternalism, in
consider "two clashing commitments: one to the ideal of government constrained by law ('constitutionalism'), the other to the ideal of government by act of the people ('democracy')." When these commitments clash in the present tense, potential solutions present themselves. For instance, one might argue that commitment to the ideal of government by act of the people requires a commitment to government constrained by laws that protect the processes necessary for government by the people. Or, one might insist that the people make law in two different ways, one everyday and one constitutional, and that the government ought to honor the commitments that the people make when they act in their more public-regarding constitutional lawmaking capacity.

Any number of reasons, of various adequacies, might be offered to explain why we as democratic actors ought to honor the constitutional commitments that we have made. These reasons, however, generally fail to explain why commitments made by other people more than 200 years ago should limit present-day popular sovereignty. This is the intertemporal precommitment problem. Put simply, we did not write or ratify the Constitution, so why should it constrain our self-government?

PHILOSOPHY OF LAW 215 (Joel Feinburg & Hyman Gross eds., 3d ed. 1986). Whereas the Ulysses and the Sirens issue concerns the binding force of individual commitments, the basic constitutional precommitment problem involves commitments made at the level of the polity. See id.

23. MICHELMAN, supra note 4, at 4; see also Walter F. Murphy, Constitutions, Constitutionalism, and Democracy, in CONSTITUTIONALISM AND DEMOCRACY 3 (Douglas Greenberg et al. eds., 1993) (noting conflict between constitutional and democratic theory in constitutional democracies). The precommitment problem, in both its basic and intertemporal form, should be distinguished from the closely related "counter-majoritarian difficulty." ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (1962). The counter-majoritarian difficulty focuses on institutional roles, particularly the vesting of judicial review with the Supreme Court. See generally id. For two reasons, the counter-majoritarian difficulty will not trouble a third-party beneficiary approach. First, though the third-party beneficiary approach implies judicial interpretation of the Constitution, it need not rule out the involvement of other institutions. Second, to prove coherent, the third-party beneficiary approach requires a denial that the Constitution represents the sort of commitment to popular sovereignty that leads to the counter-majoritarian difficulty. See infra Part II.B.

24. This is a very rough account of legal process theory's approach to the problem. See generally JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).

25. This is a rough account of Professor Ackerman's "dualist democracy." See BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 6-7 (1991) [hereinafter ACKERMAN, FOUNDATIONS].

26. For example, that by playing the game and participating in the democratic process, one implicitly consents to respect its outcomes.

27. The force of this problem is captured in the observation that we have more
A demonstration that most major approaches to constitutional law fail to resolve (or dissolve) the intertemporal precommitment problem would exceed the scope of this paper. Most approaches tend either to follow Locke and Madison in asserting that later generations consent tacitly, or to develop some mechanism by which each generation can be said to commit. By attempting to dissolve the problem, this article shows that the theoretical acrobatics in which many commentators engage are unnecessary. Nonetheless, to demonstrate the reach of the intertemporal precommitment problem, this article briefly suggests how one of the more promising maneuvers at the difficulty comes up short.

Professor Ackerman's "dualist democracy" approach fails because it does not account for the possibility that our democratic activity might be constrained by higher-lawmaking choices made by past generations. This constraint appears operative today--much of the population has not lived through a "constitutional moment." Put simply, Ackerman cannot adequately explain why we should be bound by choices that may have been made by past generations. To say that we can nullify or amend these choices through constitutional moments does not advance the discussion beyond the point where we acknowledge that we can nullify or amend choices through Article V amendment. An easier amendment process does not solve the intertemporal precommitment problem. Even if today's population could change the commitments of past generations by a vote of a majority plus

in common with the people of present-day Canada than we do with the framers, yet we would never accept as legitimate the application of Canadian law within our borders.


30. See supra text accompanying note 25. Professor Ackerman offers this description of the dualist view: "our Constitution is one great effort to distinguish between those rare acts of representative government backed by the considered judgments of the mass of mobilized citizens and the countless actions based on something less than this." Ackerman, Discovering the Constitution, supra note 4, at 1046.
one, one still has reason to ask why the choices of past generations should constrain popular sovereignty even to that limited extent.

III. DISSOLVING THE INTERTEMPORAL PRECOMMITMENT PROBLEM (OR STRIVING TO BECOME COMPLETELY ADULT JURISTS)

The intertemporal precommitment problem appears to present an obstacle to legitimacy in constitutional interpretation. To frame an approach to constitutional interpretation that both maintains the legitimacy of the constitution and establishes a basis for that legitimacy, one must somehow overcome the intertemporal precommitment problem. On its own, the third-party beneficiary approach cannot succeed at this task. Instead, the approach will emerge as a legitimate and legitimizing instrument following the reader’s recognition that the intertemporal precommitment problem does not, in fact, exist.

The problem arises only upon acceptance of two faulty presumptions. To have meaning, the intertemporal precommitment problem requires first, that the written Constitution express the will of the people at the time of enactment, and second, that we believe in popular sovereignty. If neither of these presumptions holds, we have no reason to ask why the people of today are

31. The “plus one” may be important to the intertemporal precommitment problem in the constitutional context. If a simple majority could reverse commitments made in the past, these “commitments” would not bind in the way that constitutional commitments bind. Cf. Brett W. King, Wild Political Dreaming: Historical Context, Popular Sovereignty, and Supermajority Rules, 2 U. PA. J. CONST. L. 609, 611 (2000) (“Once simple majority is departed from, there is no logical stopping point between a fifty-one percent rule and autocracy.”).

32. A stronger version of this point asks why decisions made in the past ought to be treated as baselines, alteration of which requires some affirmative activity by today’s political community. See CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 41-67 (1993).


abandoned, once and for all, the phantasy [sic] of a perfect, consistent, legal uniformity, and has never tried to perpetuate the pretense that there is or can be one. He has put away childish longings for a father-controlled world .... As a consequence, whatever clear vision of legal realities we have attained in this country in the past twenty-five years is in large measure due to him.

Id. This part strives to dispel some of the fantasies and myths that pervade discussions of government and law in the United States. In so doing, it aspires to live up to Frank’s idealized view of Justice Holmes by leading toward “sane and honest recognition of how the law works.” Id.
bound by the will of the people from a past generation. The intertemporal precommitment problem dissolves with the realization that the Constitution is not the product of popular sovereignty and does not bind The People of today by limiting its popular sovereignty.34

A. The Founding Myth: The Will of the American People

"The fabric of American empire ought to rest on the solid basis of THE CONSENT OF THE PEOPLE. The streams of national power ought to flow immediately from that pure, original fountain of all legitimate authority." Hamilton's words have great rhetorical force, but the framing and ratification of the Constitution deviated from this democratic sentiment. The state-based mechanism by which the Constitution was ratified supports the conclusion that, even if citizens had genuine input in the ratification decision,36 they acted as state citizens, not as The American People.37

Despite the problems of representation and deliberation raised below, even if the people of every state participated in ratifying the Constitution, they did not do so as The People of the United States. Instead, the ratification mechanism, as the Constitution provides in Article VII, specifies that the decision

34. Refutation of only the second of these presumptions, that of popular sovereignty, is both a necessary and sufficient condition for truly dissolving the intertemporal precommitment problem. Even if we demonstrate that the Constitution does not express the will of The People at the time of the framing and ratification, the problem may persist in a slightly altered form. If, however, we show that the Constitution fails to bind present-day Americans, the intertemporal precommitment problem dissolves. Nonetheless, invalidating the first presumption will further the discussion in two ways. First, the argument will raise questions about the relationship between representation and consent that will help drive the refutation of the popular-sovereignty presumption. Second, the argument will provide a foundation for the discussion in Part IV.C. of the identity of the parties to the Constitution-as-contract.


36. This section discusses the extent to which the People of the States qua state citizens might have participated as parties to the ratification. See infra Part IV.C.1.

37. One argument that I will not raise is the "Dead White Men" line. See, e.g., Akhil Reed Amar, The Supreme Court 1999 Term Forward: The Document and the Doctrine, 114 HARV. L. REV. 26, 36 (2000). Recognizing that the exclusion of large segments of the population from participation in government presents serious problems for any claims about consent of "The People," I prefer to deal with the founding generation on its own terms. Even if we can coherently equate white, male landowners with The People, that group did not ratify the Constitution. See text accompanying notes 36-39.
rests with “the Conventions of [the] States.”\(^{38}\) This specification proves important for two reasons. First, it demonstrates that, insofar as “The People” played a role in ratification, they did so as citizens of their respective states rather than as part of some monolithic entity. Second, the ratification mechanism, considered in light of the contemporary population distribution, demonstrates that the consent of The American People, insofar as such a group could be said to exist, had no relevance to the legal fate of the Constitution.\(^{39}\)

Article VII of the new Constitution provides the manner of ratification.\(^{40}\) In so doing, it fails to mention "The People" or "citizens" as participants in the process. Instead, the Constitution designates state “Conventions” as the relevant actors in the ratification process.\(^{41}\) Some commentators have emphasized that the specification of state Conventions as the ratifying entities in preference to state legislatures signifies the Constitution’s connection to “The People.”\(^{42}\) This view, however, implausibly stresses the importance of Article VII’s “Conventions” in such a way that it fails to recognize the greater significance of the “States.”\(^{43}\)

To understand the ratification mechanism, the first question should not concern the distinction between legislature and Convention. Instead, one ought to ask what political entity the Constitution specified as responsible for ratification. Two reasonable answers present themselves, and neither is “The People of the United States.” Article VII recognizes the authority of either

---

38. See U.S. Const. art. VII.
39. I say “legal” fate to distinguish the conditions for success set by the Constitution from more practical conditions for success. The Constitution could not have prevailed in the face of mass adamant opposition. Its success in the ratification process, however, ought not to imply the converse practical condition, that the Constitution enjoyed mass popular support. See infra text accompanying notes 55-60.
40. See U.S. Const. art. VII.
41. See id.
42. See, e.g., Ackerman, Foundations, supra note 25, at 168 (The framing Convention “refused to permit existing state governments to veto its authority to speak for the People”); see also U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) (“In my view, however, it is well settled that the whole people of the United States asserted their political identity and unity of purpose when they created the federal system.”).
43. See U.S. Term Limits, 514 U.S. at 846 (Thomas, J., dissenting) (“The ultimate source of the Constitution’s authority is the consent of the people of each individual State, not the consent of the undifferentiated people of the Nation as a whole.”).
each state or each state’s citizens to ratify the Constitution.\textsuperscript{44} The correct answer, I believe, is that Article VII accepts the authority of each state, as a sovereign political entity, to ratify the Constitution.\textsuperscript{45} Nonetheless, even if we accept that the citizens of each state ratified the Constitution, we cannot conclude that they did so as anything but citizens of their respective states. That the ratification decision occurred at the level of the state rather than at the level of a national polity is further demonstrated by the demographic context in which Article VII operated.\textsuperscript{46}

While the Articles of Confederation required unanimous consent of the States to dissolve or amend its terms,\textsuperscript{47} the newly framed Constitution provided that “[t]he Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.”\textsuperscript{48} Given the emphasis on states as the political entities relevant to ratification and considering the population distribution in the late 1780s, Article VII rendered irrelevant the will of The American People. This conclusion holds even if we assume, in spite of the problems presented by non-proxy representation,\textsuperscript{49} that the votes at state conventions accurately reflect the

\textsuperscript{44} See U.S. CONST. art. VII.

\textsuperscript{45} The belief that the specification of Conventions as the mechanism for ratification recognizes the people of each state as sovereign has a tenuous foundation. First, Article VII fails to provide guidance to the States on how they should compose their Conventions. That the word “Convention” did not automatically suggest popularly elected delegates is demonstrated by the fact that the framers, who were appointed by their state legislatures, called their assembly a Convention. See Jack N. Rakove, The Beginnings of National Politics: An Interpretive History of the Continental Congress 376-77 (rev. ed. 1982). Second, if the direct consent of state citizens was a priority to the framers, they presumably would have specified a referendum-type ratification mechanism.

\textsuperscript{46} See infra text accompanying notes 47-56.

\textsuperscript{47} Article XIII provided:

[T]he Articles of this confederation shall be inviolably observed by every state and the union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a congress of the united states, and be afterwards confirmed by the legislatures of every state.

\textsuperscript{48} U.S. CONST. art. VII.

\textsuperscript{49} The problem of non-proxy representation is suggested in the difference between delegates and trustees. While a delegate essentially delivers a proxy for his constituents’ vote, a trustee is empowered to exercise judgment and deliberate, so long as he seeks to promote the interests of his beneficiaries. See Don Herzog, Happy Slaves: A Critique of Consent Theory 210 (1989) (suggesting a distinction between the nature of authority wielded by delegates and trustees). I take up this
distribution of consent among the state population.

In 1790, the thirteen states had a combined population close to four million. Of this population, over 2.1 million, or 56% of the total, lived in Pennsylvania, Massachusetts, North Carolina, or Virginia, the four most heavily populated states. Given these numbers, we can imagine scenarios in which the Constitution might have been ratified despite the opposition of a majority of the nation's population. The possibility of this result under the ratification mechanism makes it difficult to characterize constitutional ratification as an enterprise based on the consent of The People.

The simple, but unlikely, version of this type of scenario involves 100% of the citizens of the four largest states opposing ratification with 51% of each of the remaining nine states favoring ratification. In this scenario, which illustrates the lowest level of (hypothetical) popular support that could satisfy Article VII, the Constitution would be ratified by approximately 22% of the American people.

In a more plausible scenario, and one which, in fact, obtained for four days in 1788, the Constitution could be officially ratified, even though a sizable majority of the American people had not consented. On June 21, 1788, the third Constitutional Convention convened in New Hampshire in under a year finally

---

50. While the ratification debates occurred between 1787 and 1790, the first reliable population statistics do not appear to have been collected until the last of these years. See U.S. CONSTITUTION COUNCIL OF THE THIRTEEN ORIGINAL STATES & THE CENTER FOR THE STUDY OF THE AMERICAN CONSTITUTION, THE CONSTITUTION AND THE STATES: THE ROLE OF THE ORIGINAL THIRTEEN IN THE FRAMING AND ADOPTION OF THE FEDERAL CONSTITUTION, Chronology (Patrick T. Conley & John P. Kaminski eds., 1988) [hereinafter THE CONSTITUTION AND THE STATES]. Nonetheless, there is no evidence of a substantial population change during the period of ratification.

51. The number was 3,843,789. Population figures are based on calculations using data in THE CONSTITUTION AND THE STATES, supra note 50.

52. The number is 2,160,429. See id. The populations of the four largest states were: Virginia (821,287), Massachusetts (475,327), Pennsylvania (434,373), and North Carolina (429,442). See id.

53. While there was nothing magical about majoritarianism as a means of determining consent of a population, it seems that one cannot viably claim that a group in which a majority disapproves of a measure consents to that measure.

54. Fifty-one percent of the population of the nine smallest states is 858,513. See THE CONSTITUTION AND THE STATES, supra note 50.

voted for ratification, and New Hampshire became the ninth state to ratify the Constitution.56 At that point, under Article VII’s terms, the Constitution had been established.57 If we assume that the votes of the delegates in each of the states ratifying conventions proportionately represented the will of the population of their states, we discover that the Constitution was, in fact, ratified with the consent of a minority of the population.58

At the point of the Constitution’s official establishment through ratification by nine states, only 34% of the country’s population had approved of the Constitution, if we accept that their delegates proportionately represented their rates of approval or disapproval.59 The possibility of ratification in the absence of popu-

56. See id.
57. Had the final four states not followed suit, the fate of the Constitution, Article VII notwithstanding, would have been in grave doubt. See id.
58. The assumption of proportional representation proceeds as though, in any given state, each delegate’s vote expresses the will of an equal number of state citizens. Thus, in a hypothetical state convention where a population of 100,000 elected 100 delegates, a convention vote of sixty in favor and forty opposed to ratification would, under the assumption of perfect representation, signify that 60,000 of that state’s citizens favored ratification while 40,000 opposed ratification. Perfect proportional representation is, of course, a fiction. However, in this context, the calculations that such an assumption yields probably bias towards larger populations favoring ratification than was actually the case. For, while the conventions of three states, Delaware, New Jersey, and Georgia, voted unanimously in favor of ratification, no conventions voted unanimously against ratification. See THE CONSTITUTION AND THE STATES, supra note 50. Given the debates held in each of these states, it is highly unlikely that their populations supported ratification with substantial unanimity. See id. In Georgia, for example, twenty-nine delegates participated in the State Convention, but only twenty-six voted. See Albert B. Saye, Georgia: Security through Union, in THE CONSTITUTION AND THE STATES, supra note 50, at 77, 88-89.

The defects in proportional representation might have weighed even more heavily in favor of ratification than the implausibility of three states giving unanimous consent suggests. See Charles W. Roll, Jr., We, Some of the People: Apportionment in the Thirteen State Conventions Ratifying the Constitution, 56 J. AM. HIST. 21 (1969-70) (identifying manipulative apportionment of voting districts by pro-ratification state legislators).

For a good summary of enfranchisement and voter turnout during the ratifying conventions, see Bruce Ackerman & Neal Katyal, Our Unconventional Founding, 62 U. CHI. L. REV. 475, 563 nn.255-57 (1995). Professors Ackerman and Katyal criticize the assumption of proportional representation in developing “vote counts.” See id. at 566 n.259. While I agree that these numbers do not represent historical fact, they do illustrate plausible scenarios that suggest something less than a theoretical or practical commitment to a Constitution approved by The People of the United States.

59. See THE CONSTITUTION AND THE STATES, supra note 50. One might object, at this point, that the relevant population at the point of ratification by nine states ought to include only the populations of those states. Article VII provides that ratification by nine States is “sufficient for the Establishment of this Constitution be-
lar consent proved more than hypothetical, at least for several days, and suggests that the consent of The People qua The People of the United States had no relevance to the establishment of the Constitution.

B. Denying Democracy: Why We Don't Rule

At first blush, denying popular sovereignty in America

tween the States so ratifying the Same." U.S. CONST. art. VII (emphasis added). Because, the objection would run, ratification established the Constitution only as to the ratifying states, the will of populations in other states was irrelevant.

This objection fails for two reasons. First, it concedes the disunity between the people, acting as citizens of their respective states, and The People of America—the very point at issue. Second, it ignores the fact that the establishment of the Constitution essentially nullified the Articles of Confederation, and thus affected the populations of all thirteen states, regardless of their decision on ratification. See Ackerman & Katyal, supra note 58, at 479-80.

60. Virginia voted to ratify on June 25, 1788. See THE CONSTITUTION AND THE STATES, supra note 50. The last state to do so, Rhode Island, ratified the Constitution on May 29, 1790. See id. One might also note that there is good reason to question whether the decisions of the hold-out states, Rhode Island in particular, could be described as consensual under any meaningful definition of the term. See Patrick T. Conley, First in War, Last in Peace, Rhode Island and the Constitution, 1786-1790, in THE CONSTITUTION AND THE STATES, supra note 50, at 269, 287 ("The principal proximate cause for Rhode Island ratification was the economic coercion exerted upon the state by the new federal government.").

61. I wish to avoid using the term "popular sovereignty" in its rhetorical sense, to mean, as James Wilson argued during the ratification debates, that "in our government, the supreme, absolute, and uncontrollable power remains in the people." 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 432 (Jonathan Elliot ed., 1996). Used in this way, the idea of popular sovereignty is essentially a truism. In the rhetorical sense, the masses, such that they are the masses, may always be said to retain popular sovereignty, in that they may always topple the government by force or force of will, rather than by law. This "Right of Revolution," however, probably does not accord with what most people mean when they talk of democracy or popular sovereignty. See Donald L. Doernberg, "We the People": John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action, 73 CAL. L. REV. 52, 63 (1985) (discussing the centrality of a right to revolt in Locke's conception of the social contract). Few would likely accept that a democratic government is any that popular revolution can practically (rather than legally) topple. The idea is particularly unappealing if one considers its absurd implication that popular sovereignty can be said to have existed in any government, no matter how despotic, that is toppled by a people's revolution. The assertion that all government flows from the people expresses a view about humanity's original condition that tells us nothing about the nature of a particular government.

might appear heretical, or at least implausible. On closer examination, however, it will become apparent that most people do not genuinely believe that The People rule and that the idea that they do has little basis in reality. The idea of popular sovereignty is a valuable and durable myth, promoting loyalty and patriotism. "From the creation of the Constitution, . . . democracy in America was no longer something to be discussed skeptically and challenged but a faith to which all Americans and all American institutions must unquestioningly adhere." That we perpetuate the myth in our schools and our public discourse should come as no surprise. That members of the legal academy devoted to the understanding of our system of government should operate under the haze of this democratic mythology, however, is simply fantastic.

The intertemporal precommitment problem presumes a baseline identity between government and The People, and demands that we account for any limitations on the sovereignty of that entity. Once we deny that identity, the problem dissolves, even if we acknowledge that the Constitution provides for citizen input in government. If we are not the government, we are not bound by limitations on government action. Two points, one practical and the other theoretical, suggest the disunity of government and The People. On a practical level, citizens do not function as government during "normal lawmaking," and they

---

62. Popular sovereignty promotes loyalty because the artisans of the law ought to respect their craft.

63. It promotes patriotism because our country stands alone among nations as one governed by its citizens.


65. Remember that the Federalist papers and the Declaration of Independence, the origin of many myths about popular sovereignty, were propaganda devices. See id. at 15.

66. See generally Ackerman, Discovering the Constitution, supra note 4.

67. The Constitution might also bind us by regulating our non-lawmaking conduct. I suggest that the Constitution does not bind our ordinary conduct save for two anomalous instances. Where the Constitution does bind ordinary conduct, it functions not as a constitution, but as a body of conventional law that is difficult to alter. Regardless, invoking these two anomalies (the Thirteenth and the Twenty-first Amendments) does nothing to revive the intertemporal precommitment problem. See infra Part IV.E.

68. Professor Ackerman distinguishes between normal and higher lawmaking. See ACKERMAN, FOUNDATIONS, supra note 25, at 7. He acknowledges that during times of normal lawmaking, The People do not speak. See id.
believe, and behave as though, the government were "other." On a theoretical level, "representative democracy," though perhaps the best a large nation can do, cannot unify citizens and government.69

1. Power vs. Patronage in Modern Government

As a practical matter, citizens do not function as government or as political artisans of the law in the day-to-day governance of the country.70 Leaving aside, for now, the theoretical questions raised by representative democracy, a look at how government operates and how people interact with and conceive of the government suggests the practical implausibility of popular sovereignty.

We might begin by noting the implications of the fact that citizens "interact" with the government. Citizens reluctantly follow laws with which they do not agree, they complain about taxes and other government actions and demands, and they speak of the government in the third person. In virtually every sphere of our lives we behave as though the government were other. That we interact with, rather than identify with, government may be no more than semantics—a part can interact with the whole. However, the rejection of the myth of popular sover-

69. Cf. JOHN DUNN, WESTERN POLITICAL THEORY IN THE FACE OF THE FUTURE 28 (2d ed. 1993) ("Today, in politics, democracy is the name of what we cannot have—yet cannot cease to want."); Winston Churchill, Address to the House of Commons (Nov. 11, 1947), in THE INTERNATIONAL THESAURUS OF QUOTATIONS 231 (Rhonda Thomas Tripp ed., 1970) (declaring that "[d]emocracy is the worst form of government except all those other forms that have been tried from time to time").

70. See, e.g., BENJAMIN R. BARBER, STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE 145 (1984) ("representation is incompatible with freedom because it delegates and thus alienates political will at the cost of genuine self-government and autonomy.").

71. Because higher lawmaking, in Professor Ackerman's scheme of dualist democracy, results in constitutional law, see ACKERMAN, FOUNDATIONS, supra note 25, at 6-7, it has no real relevance to the question of whether the Constitution binds citizens-as-lawmakers. The idea of constitutional amendment by The People during periods of higher lawmaking provides a potential justification for constraining the lawmaking power of citizens. If Professor Ackerman succeeds in dissolving the intertemporal precommitment problem, it is because he accepts the disunity of government and The People during periods of normal lawmaking, not because he professes the idea of The People speaking during periods of higher lawmaking. While I disagree with Professor Ackerman's characterization of constitutional moments, the possibility of such moments is not inconsistent with a third party beneficiary approach. As I suggest, profound shifts in popular interpretation of constitutional guarantees may function as amendments under the theory of third-party reliance. See infra Part IV.F.
eighty finds clear support in what people say and do.  

2. Modern Representative Democracy as Oxymoron

Representative democracy as it exists today bears little resemblance to the ideal of democracy as government by the people. This is not to say that the ideal of democracy should be our ideal form of government. As the framers recognized, deliberation is important to good government, and meaningful deliberation among the whole of the people is implausible in anything but the smallest polities. If our concern is consent to the acts of government, modern representative democracy may not pose problems. If, however, we care about popular sovereignty, representative democracy simply fails to fulfill our ideals.

The crucial problem arises when we consider the difference between representation as conduit for our decisions and repre-

72. The clearest evidence comes from two sources: public opinion polls and the documented rise in direct voter ballot initiatives. See, e.g., CBS News/NY Times Poll, Accession Number 0243422, Question 1, Aug. 1995, available at LEXIS, Public Opinion Online (finding, in survey of 1,478 adults nationwide that only 13% believed interpreted the phrase “the government” to mean “representative democracy (government by and for the people)” or “The people/Society as a whole,” compared to 16% who responded “Those who control our destiny/The powerful/Pow Power/Big shots”); CBS News Poll, Accession Number 0368697, Question 3, Feb. 2000, available at LEXIS, Public Opinion Online (finding, in survey of 1,499 adults nationwide that 39% of respondents feel that their views are represented in the national government); Becky Kruse, Comment, The Truth in Masquerade: Regulating False Ballot Proposition Ads Through State Anti-False Speech Statutes, 89 CAL. L. REV. 129, 137 (2001) (“By 1998, the 1990s had already surpassed every other decade of the century in the initiative activity.”).

73. See, e.g., ROBERT PAUL WOLFF, IN DEFENSE OF ANARCHISM (2d ed. 1976) (arguing that only unanimous direct democracy creates full compatibility between the autonomy of the individual and the authority of the state). As for the Constitution, “[i]t is simply a reality that the Constitution was far from a majoritarian document—the Constitution itself does not contemplate any form of direct, unmediated lawmaking by the people—and its status as perhaps the most democratic document of its time cannot hide this fact.” Henry Paul Monaghan, We The People[s], Original Understanding, and Constitutional Amendment, 96 COLUM. L. REV. 121, 130 (1996) (criticizing proposals for non-Article V amendment of the Constitution).

74. “[T]he concept of self-government that we have derived from democracy is no more desirable as a norm than it is accurate as a description.” Edward L. Rubin, Getting Past Democracy, 149 U. PA. L. REV. 711, 731-32 (2001).

75. See ROSEN, supra note 28, at 114-19. See also THE FEDERALIST NO. 10, at 82 (James Madison) (Clinton Rossiter ed., 1961) (“the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose”). The Constitutional Convention rejected proposals that would have yielded either something akin to direct democracy or a right of voters to instruct representatives. See Marci A. Hamilton, The People: The Least Accountable Branch, 4 U. CHI. L. SCH. ROUNDTABLE 1, 8 (1996-97).
sentation as delegation of decision-making authority. To illustrate the difference, consider investments made in a mutual fund.

I may have consented to trades made by the manager of my mutual fund. I chose him and I could take my money elsewhere, but I would be lying if I said that I managed my money. This is the case even if I made occasional suggestions on investments or selected the fund because I approved of the manager's trading style and agreed with the majority of his choices. He retains the ultimate decision-making power (except as to whether he continues to manage my money). When things go well, I could take pride in my choice of an able manager, but I could not demand credit for his decisions.

In the same way, we may be said to consent to the decisions made by "our" government (even though our alternatives are not so strong as in the selection of a mutual fund manager). We might be said (this is, of course, a fiction) to select the decision-makers in government. Even if we assume popular consent, however, we cannot assume popular sovereignty. No matter what degree of choice we have as to who makes the decisions, the person we select, and not us, makes the decision. Our range of choices does not reach policy. Our options do not extend beyond participation in the selection of decision-makers and some limited input in the decision-making process. If we do not actually make the decisions on policy and execution, do we govern in any meaningful sense of the term?

Now, to the point as it pertains to the intertemporal precommitment problem. If the SEC limits the types of trades that my mutual fund manager can make, have my options been limited? While certainly I might feel the impact of the regulations, and I might complain that my mutual fund made more money before their implementation, my range of choices has not changed, because the same regulations apply to any mutual fund manager whom I might choose. The same applies to government. The Constitution may limit the choices that the gov-

76. A stronger version of the claim against popular sovereignty would go further by pointing out that we have not, in fact, even delegated our decision-making authority to representatives in government. For, the argument would go, we never possessed such decision-making authority, even in our collective capacity as The People. In the absence of some system extrinsic to The People themselves through which we could determine what decision The People had made, there is no popular decision-making authority.
ernment can make, but those limitations do not alter our range of choices. Because the decisions are not ours to make, restrictions on decisional autonomy are not limitations on our autonomy. If the Constitution limits only government choice and action, it cannot bind the people.

Note that at this point, this article has dispensed with the need for any sort of consent theory or other social-contract like approach to account for the authority of the Constitution. This analysis has not yet accounted for that authority, but we know that it does not limit popular sovereignty and thus requires no justification relative to the people. In the absence of popular sovereignty, the intertemporal precommitment problem as it applies to the Constitution simply dissolves. If the Constitution does not further limit our choices, what effect does it have, and on what basis can we call certain interpretations legitimate? It is here that the third party beneficiary approach proves helpful.

IV. A THIRD-PARTY BENEFICIARY APPROACH TO CONSTITUTIONAL INTERPRETATION

A. Why a Third-party Beneficiary Approach?

Establishing a distinction between the entities “the government” and “the people” may throw a wrench into the logical workings of the intertemporal precommitment problem, but many questions remain. Even if the Constitution does not bind us, it does seem to do something. At the very least, it appears to make demands that affect our lives. Constitutional commitments, although not commitments made by or operative upon citizens, are nonetheless very real and very important. Looking at the Constitution from the perspective of contract law allows us to understand whom, how, and why these commitments bind. Further, by treating the Constitution as an agreement made for the benefit of a third-party—a proposition that will prove extremely plausible given the rules of contract law pertaining to third-party beneficiaries—we can produce interpretations that establish, derive from, and share in the legitimacy of the Constitution.

Development of the third-party beneficiary approach proceeds here in six measured steps. Part B provides a brief account of contract law as it governs third-party beneficiaries. The next parts address several questions in an attempt to fit the Constitution into the framework of contract law. Part C raises and at-
tempts to answer the question, "if we conceive of the Constitution as analogous to a contract, who are the parties to that contract?" The answer to this question builds on Part III by further demonstrating that The People are not parties to the Constitution-as-contract. Part D asks how the Constitution can be read as an agreement undertaken for the benefit of a third party, and how we can identify the beneficiaries. Part E then asks what effect the Constitution-as-contract has on contemporary Americans. Finally, Part F explores the contours of the approach and describes how it can establish and maintain constitutional legitimacy.

A brief caveat is in order before beginning to explore the third-party approach to constitutional interpretation. In developing the approach, this section presents both a descriptive and a normative account of its interpretive technique. In so doing, I attempt to focus first and foremost on normativity. Most interpretive methods are presented first as descriptive and then as normative. This, I believe, leads to a realist trap. The trap creates the appearance that any claims regarding an interpretive approach's normative value are merely ad hoc rationalizations of judicial behavior, whether "activist" or "conservative."

By suggesting an interpretive method based on its normative force rather than its descriptive accuracy, this section aims to articulate a means by which constitutional interpretation might at least appear more legitimate. The idea is that an ideal approach to constitutional interpretation will cloak its products in the same shroud of legitimacy that surrounds the Constitution itself. However, this section likely will not yield a determinate solution to every difficult problem of constitutional law. Instead, the approach may provide a basis for attaching the same sort of legitimacy to any solution to these problems as attaches to the Constitution itself.

B. Third-party Beneficiaries in Contract Law: A Brief Primer

Treatment of third-party beneficiaries of contracts, as with most issues in contract law, has been a matter of some conten-
tion over the past 200 years. Most of the debate has focused on three relevant issues. First, commentators and courts have disagreed as to whether individuals not party to a contract (and thus not bound by its terms), but who would benefit from its performance could enforce the contract in court. Second, even if the law acknowledged the enforceability of contracts by appropriate third-party beneficiaries, different approaches to identifying appropriate third-party beneficiaries competed for acceptance. Third, with consensus as to enforceability by and identification of third-party beneficiaries, the question remained: how to interpret contracts that third-parties seek to enforce. The debate over these three issues does not serve as the primary focus or concern of this section. Instead, discussion of these issues provides a basis for understanding how contract law has sought a legitimate approach to enforcing agreements that provide for benefits to individuals other than those who consented to the agreement or are bound by its terms.

1. Enforcement of Contracts by Non-parties

The first concern that arises with regard to a third-party

---

79. "Historically, the rights of contract beneficiaries have been the subject of doctrinal difficulties in both England and the United States." RESTATEMENT SECOND, supra note 15, at ch. 14, Introductory Note. The extent of the doctrinal difficulties surrounding the third-party beneficiary rule is suggested by the fact that modern recent commentaries dispute even whether the rule was indeed in dispute (as well as whether to hyphenate "third-party"). Compare Abstract, Anthony Jon Waters, The Property in the Promise: A Study of the Third Party Beneficiary Rule, 98 HARV. L. REV. 1109, 1110 (1985) ("In the seminal case of Lawrence v. Fox, the New York Court of Appeals defied the prevailing rules of contractual liability by holding that a third party—someone who was not a party to the contract... could, nevertheless, enforce it.")., with Melvin Aron Eisenberg, Third-party Beneficiaries, 92 COLUM. L. REV. 1358, 1363 (1992) ("Although Lawrence v. Fox is often celebrated today as a landmark case that established the power of a third-party beneficiary to bring suit, in reality the case was not very remarkable for its time.") (citation omitted). Although these two articles disagree on certain elements of the birth narrative of third-party beneficiary rules, their accounts of current law prove consistent and helpful. Notably, both authors agree that, during the second half of the eighteenth century— which happens to coincide with the ratification of the Constitution— "English law did permit some suits by beneficially interested third parties." Waters, supra, at 1113 n.6; see Eisenberg, supra, at 1361. Professor Eisenberg also insists that early American courts followed the British lead. Eisenberg, supra, at 1361-62.

80. See infra Part IV.B.1.
81. See infra Part IV.B.2.
82. See infra Part IV.B.3. I do not mean to imply that these three issues were resolved in this chronological order. Instead, I present the issues in this order because I believe that it reflects their relative logical priority in establishing a complete doctrine of third-party beneficiaries.
beneficiary rule raises a threshold question. Specifically, should the law ever permit someone other than a party to a contract to enforce the contract’s terms? The question is essentially one of standing in that it is “the very first question that is sometimes rudely asked when one person complains of another’s actions: ‘What’s it to you?’” During the latter half of the nineteenth century, many courts doubted whether a third party attempting to enforce a contract could ever provide an adequate answer to that question.

The primary objections to third-party enforcement of contractual obligations appeal to the formal doctrines of privity and consideration. Both of these technical objections, however, suffer from fatal defects. The objection from lack of privity insists that, to enforce its terms, a “plaintiff must have some legal interest in the contract’s undertaking.” This, however, proves circular, “because the very question was whether a third-party beneficiary had a legal interest in the undertaking.” The objection from lack of consideration insists that valuable consideration must flow from the plaintiff. This objection fails because consideration is relevant only to determining whether a promise is legally enforceable. Consideration has no relevance to deciding who may enforce an enforceable promise.

With the formal objections to third-party enforcement of contracts refuted, the possibility of recognizing such actions becomes real. While technical arguments against claims by third-party beneficiaries may fail, that fact does not necessarily give reason for a permissive enforcement rule. Today, American law accepts that at least some third-party beneficiaries can demand

83. See Eisenberg, supra note 79, at 1359-60.
85. As mentioned, commentators disagree on the extent to which pre-twentieth century courts allowed actions by third parties. See supra note 79. Without doubt, however, the case of Lawrence v. Fox has long been considered one of the most significant recognitions of a third-party beneficiary’s right to demand performance of a contract. See, e.g., LAWRENCE M. FRIEDMAN, HISTORY OF AMERICAN LAW 534-35 (2d ed. 1985). Professor Eisenberg argues that after Lawrence, some American courts began to disapprove of third-party actions. See Eisenberg, supra note 79, at 1367-68.
86. See Eisenberg, supra note 79, at 1370.
87. Id.
88. Id.
89. See id.
90. See id. at 1370-71.
performance of certain contracts. For whom and under what circumstances the law will consider enforcement legitimate is the next question that helps define the contours of the third-party beneficiary rule.

2. Identifying Third-party Beneficiaries

With little, if any, dispute over whether a third party may ever enforce a contract, most of the debate over the last one hundred years has centered around what sort of claims by third parties the courts should recognize. Courts and commentators have, at various times, adopted any of three approaches to identifying third-party beneficiaries. Each approach can be traced to one of several bases for the legitimacy of contract enforcement.

The first Restatement of Contracts recognized third-party beneficiaries only if they could be classified as “creditor” or “donee” beneficiaries. Those falling outside of these categories, and thus lacking the ability to enforce were called “incidental beneficiaries.” A creditor beneficiary was one for whom performance of the contract by the promisor would provide a benefit that the promisee already had a duty to provide to the

91. See Waters, supra note 79, at 1111-12; see also RESTATEMENT SECOND, supra note 15, § 304 (“A promise in a contract creates a duty in the promisor to any intended beneficiary to perform the promise, and the intended beneficiary may enforce the duty.”).

92. From this point, I use the term “third-party beneficiaries” to refer to that class of individuals who the law permits to enforce contracts to which they were not privy. While there may be many third parties who stand to benefit from the performance of contracts to which they were not privy, the law recognizes claims by only certain third parties. Courts often refer to both parties as third-party beneficiaries, see Eisenberg, supra note 79, at 1360 n.4, but for economy, I will use the term to mean only legally recognized third-party beneficiaries.

93. This basic taxonomy comes from Eisenberg, supra note 79, at 1376-84. Professor Eisenberg finds defects in each of the approaches, and proposes a fourth alternative, which he calls “the third-party-beneficiary principle.” Id. at 1384-89. Though the third-party-principle does solve some of the difficulties of the other approaches, it has been endorsed by only one court, in a decision later reversed. See Leyba v. Whitley, 882 P.2d 26, 35-36 (N.M. Ct. App. 1994), rev’d, 907 P.2d 172 (N.M. 1995). Because this fourth approach does not describe current law or a stage in its evolution, and because the problems that it addresses do not arise in the context of a third-party approach to constitutional interpretation, I will not consider Professor Eisenberg’s third-party beneficiary principle.

94. See RESTATEMENT OF CONTRACTS §§ 133, 135-136 (1932) [hereinafter RESTATEMENT FIRST].

95. Id. § 133(1)(c).
beneficiary.\textsuperscript{96} Suppose that A owes P $100. D wants A to paint his house, and is willing to pay $100 for the service. D and A enter into a contract whereby A paints the house and D pays A's debt to P. Under this arrangement, P qualifies as a creditor beneficiary of the contract between D and A, and can enforce the contract if D fails to perform. If neither party to a contract owes a prior duty to a third party, but the "purpose of the promisee in obtaining the promise of all or part of the performance thereof is" to provide a gift or benefit to the third party, that third party was a donee beneficiary under Restatement First.\textsuperscript{97} In both cases, the rationale for permitting the third party to enforce a contract to which he was not privy, concerns protection for the contracting parties.

The Restatement First approach derived from the belief that contracts should be enforced "to facilitate the power of self-governing parties to further their own interests by contracting."\textsuperscript{98} While a broad recognition of third-party rights to enforce contracts would conflict with this principle, limiting the class of third-party beneficiaries to donee and creditor beneficiaries ostensibly furthers this principle. In this way, the Restatement First approach grounds third-party beneficiary enforcement in the legitimacy of contract enforcement generally.

Courts seeking to apply the Restatement First test encountered difficulty in fitting many cases into the approach's taxonomy.\textsuperscript{99} For simplicity of analysis, most courts adopted an "intent-to-benefit test."\textsuperscript{100} Under this test, the court recognizes a third-party beneficiary if the promisee or the parties to the contract intended to benefit that individual.\textsuperscript{101} Although courts have displayed some inconsistency in applying the intent-to-benefit test, the general trend has been to look for clear evidence of the subjective intent of the parties.\textsuperscript{102} As with the Restatement First test, the intent-to-benefit test grounds the legitimacy of third-party beneficiary enforcement of contracts in the principle

\textsuperscript{96} See id.
\textsuperscript{97} See Id. § 133(1)(a).
\textsuperscript{98} Eisenberg, supra note 79, at 1374.
\textsuperscript{99} See id. at 1377-78.
\textsuperscript{100} Id.
\textsuperscript{101} Although there has been some dispute as to whether both parties, or only the promisee, must intend to benefit a third-party beneficiary, this issue does not arise in the context of constitutional interpretation. See id.
\textsuperscript{102} See supra note 14 and accompanying text.
that the law ought to effectuate the will of contracting parties.\textsuperscript{103}

The Restatement Second, on its face, combines elements of the Restatement First and intent-to-benefit tests.\textsuperscript{104} In its black-letter text, the Restatement Second therefore simplifies the nomenclature, but fails to provide a new approach. In a comment, however, the Restatement Second suggests a break from the party-centered approach and endorsements a focus on the perspective of the beneficiary.\textsuperscript{105} Comment D suggests that a third-party beneficiary may enforce an agreement when there is a "manifestation of intention by the promisee and promisor sufficient, in a contractual setting, to make reliance by the beneficiary both reasonable and probable."\textsuperscript{106}

Focusing only on this comment, the Restatement Second appears to adopt a reasonability-of-reliance test. By looking to whether a third party might reasonably rely upon an agreement to which he is not privy, this test seeks objective manifestations of an intent to benefit and embraces a new basis for legitimacy.\textsuperscript{107} A reasonability-of-reliance test derives its legitimacy from the principle that contracts perform social functions beyond the sphere occupied by their parties. If we enforce agreements to the extent that they tend to induce others to act in reliance, whether the parties intended to induce reliance matters less than whether reliance was reasonable.

Of these three approaches to identifying third-party beneficiaries, none has achieved clear dominance. Instead, courts tend to combine elements of all three.\textsuperscript{108} In most clear cases, of which I believe the Constitution is one, the choice of approach will not affect the determination of third-party beneficiary status.

3. \textit{Interpreting Contracts Benefiting Third Parties}

Once a court has decided to recognize a third-party beneficiary, by whatever approach it may use, it must ask the distinct question of how the contract ought to be interpreted. The court might use whatever contract principles it would otherwise employ in interpretation. Upon recognition that the third-party

\textsuperscript{103} See supra note 14 and accompanying text.
\textsuperscript{104} See RESTATEMENT SECOND, supra note 15, § 302; see also Eisenberg, supra note 69, at 1383.
\textsuperscript{105} See RESTATEMENT SECOND, supra note 15, § 302 cmt. d.
\textsuperscript{106} Id.
\textsuperscript{107} See RESTATEMENT SECOND, supra note 15, § 302.
\textsuperscript{108} See Eisenberg, supra note 79, at 1382-83.
beneficiary may legitimately enforce the contract, the interpretive problem changes. While a court might otherwise be free to choose from a wide spectrum of objective and subjective approaches to interpretation, the presence of a third-party beneficiary introduces another set of subjective expectations.

One response to the expectations of the third-party beneficiaries would be to deem them irrelevant, which would be consistent with classical contract law. Ignoring reasonable interpretations of terms upon which a third-party beneficiary has relied in deference to subjective, but unexpressed, intentions of the parties, however, leads to problematic results. At the same time, giving primacy to the subjective expectations of the third-party beneficiary, one who has no obligation under the contract, would seem to derogate from basic principles of contract legitimacy.

As a solution, "the intentionalism of contemporary contract interpretation is relaxed a bit when it comes to third-party beneficiary contracts." When a third-party beneficiary seeks to enforce a contract, courts place greater emphasis on objective manifestation of the contracting parties' intent. This approach permits the third-party beneficiary to rely on reasonable interpretations of the contract's terms, without subjugating the objectives of the parties to the satisfaction of third-party reliance that the parties could not have foreseen.

C. Who Are the Parties to the Constitution-as-Contract?

1. Neither We the People nor They the People Were Parties to the Constitution

One might claim that one or both of two entities called "The People" ought to be treated as party to the Constitution-as-contract. As the intertemporal precommitment problem seems to presume, one might believe that the People at the time of ratification, "They the People," were party to the Constitution. One might also believe that "We the People"—meaning the citizens of the United States since the founding—are party to the Constitution. Neither of these claims finds support in the terms or cir-

109. See id. at 1376-84.
111. See id. at 1175.
cumstances of the document. Looking at the Constitution-as-contract, we have no reason to believe that either We the People or They the People should be treated as party to the agreement that it embodies.

This article has shown that the circumstances under which the Constitution was ratified belie any assertion of direct involvement by The People of the United States at that time as such. Nonetheless, the opening words of the Constitution, declaring its source to be “We the People of the United States,” carry such rhetorical force that the issue requires further treatment. From the basic view of contract formation, if the People are to be treated as parties to the Constitution-as-contract, it must be because they either made or accepted an offer with intent to be bound.

Considering first the question of whether The People accepted the offer embodied by the Constitution, the circumstances and text of the document, in light of the basic law of contract formation, provide clear guidance. As already discussed, the circumstances surrounding the ratification demonstrate that the People of the United States as such, did not ratify the Constitution. Not only did they, acting in their capacity as the People of the United States, fail to accept the Constitution, they lacked the power of acceptance under the terms of the offer. The Restatement Second provides that the “manifested intention of the offeror determines the person or persons in whom is created a power of acceptance.”

Article VII provides a clear manifestation of to whom the offeror intended to extend the power of acceptance. Acceptance of the Constitution could come from only the State Conventions. By its terms, the Constitution would not have been established even if a popular vote by They the People produced unanimous support.

A slightly more plausible account of They the People as parties to the Constitution-as-contract stresses the opening language of the document in suggesting that the offer emanated from the People. Although appealing in view of the populist tone of the

---

112. See supra Part III.A.
113. “The manifestation of mutual assent to an exchange ordinarily takes the form of an offer or proposal by one party followed by an acceptance by the other party or parties.” RESTATEMENT SECOND, supra note 15, § 22.
114. See supra Part III.A.
115. RESTATEMENT SECOND, supra note 15, § 29. Similarly, “[a]n offer can be accepted only by a person whom it invites to furnish the consideration.” Id. § 52.
Constitution's first words, this position suffers from two related flaws. First, the fact that a document invokes a particular authority or purports to originate from a certain source does not, alone, support those claims.\textsuperscript{116} It is clear that They the People did not write the Constitution, and that the offer did not issue directly from that entity. For one to believe that The People authorized the offer would require more than the fact that the offer invokes that name.

Second, we do have a good idea of who wrote the Constitution and upon whose authority,\textsuperscript{117} and we know that They the People were not involved. In the most basic sense, the delegates who took part in the Philadelphia Convention wrote the Constitution. As their titles suggest, however, the delegates did not craft the document on their own behalf. If we conceive of the Convention's result as a contractual offer, the delegates as individuals were not the offerors. They acted on behalf of some other entity, for whom they had the authority to speak. For now, we need not describe that entity. It is enough to observe that the delegates clearly did not meet in Philadelphia as representatives of They the People nor did they speak with the authority of the national population as such.

Each delegate who attended the Philadelphia Convention did so on the authority of two political entities. First, Congress, composed primarily of delegates appointed by state legislatures, passed a resolution calling for each of the states to appoint delegates to attend the Convention in Philadelphia.\textsuperscript{118} Second, the

\textsuperscript{116} I cannot make Bill Gates a party to a contract to pay me one billion dollars by simply writing a contract that says "I Bill Gates agree to pay one billion dollars to Eric Parnes." At root, the question is one of authority. I simply lack the authority to speak for Bill Gates just as, I suggest, the framers lacked the authority to speak for They the People.

\textsuperscript{117} I discuss the relevance of the composition and origin of the Philadelphia Convention in subsections 2 and 3 of this section. \textit{See infra} Part IV.C.2-3.

\textsuperscript{118} The resolution read:

Resolved that in the opinion of Congress it is expedient that on the second Monday in May next a convention of delegates who shall have been appointed by the several states be held at Philadelphia for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions therein as shall when agreed to in Congress and confirmed by the states render the federal constitution adequate to the exigencies of government and the preservation of the Union.

state legislatures appointed delegates to the Convention.\textsuperscript{119} Neither of these political entities tenably equates to They the People.\textsuperscript{120}

Once we have demonstrated that They the People is not a party to the Constitution-as-contract, denial of party status to We the People—all Americans—follows without difficulty. We need not address theories\textsuperscript{121} postulating mechanisms by which each generation commits to the Constitution. Even if these mechanisms operate, and every American has committed to the Constitution, such a commitment does not make We the People party to the agreement. Commitment to the terms of a contract by a non-party has no effect on the contract or its parties. For example, I might fully and vocally express my agreement to a contract between my neighbor and the person buying his house, but my assent does not make me a party to their agreement.

2. \textit{The Promisees: The Several States}

Looking at the terms of the Constitution-as-contract, and building on the discussion of the mechanism of acceptance/ratification,\textsuperscript{122} the identity of the promisee to whom the offer extended the power of acceptance may appear obvious. Indeed, the language of the document and the circumstances surrounding its establishment clearly point to the states as one set of parties to the Constitution-as-contract. Accepting these indicators, some doubt may remain on the nature of the states as parties. One can speak of the states, in their ratifying capacities, as parties in two different, but overlapping, senses. The states mean either the government of each state or the people of each state qua state citizens, and each meaning could differently affect our understanding of the Constitution-as-contract.

The Constitution-as-contract contains a seemingly straightforward specification of the parties to whom it extends its offer and the method by which they might accept.\textsuperscript{123} Article VII pro-

\textsuperscript{119} See \textit{The Constitution and the States}, supra note 50. Notably, one state, Rhode Island, did not send delegates. See Patrick T. Conley, supra note 60, at 273. Rhode Island's Governor wrote to the President of the Continental Congress explaining that the state legislature could not appoint national delegates because Rhode Island law empowered the citizens of the state to elect delegates to Congress. See Ackerman & Katyal, supra note 58, at 505.

\textsuperscript{120} See infra Part IV.C.2.

\textsuperscript{121} See, e.g., ACKERMAN, FOUNDATIONS, supra note 25.

\textsuperscript{122} See supra Part III.A.

\textsuperscript{123} See U.S. CONST. art. VII; see also supra Part III.A.
vides that "The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so Ratifying the Same."\(^1\)\(^2\)\(^4\) Ambiguities arise, however, largely because the document appears to use the same sentence to both identify the offerees and prescribe the mechanism of acceptance. This economy of words complicates our task of identifying the set of parties to which Article VII refers.

Beginning within the four corners of the document, two interpretations appear equally plausible, but permit us to refine our terms. First, one might read the first phrase, "the Conventions of nine States," as a specification of the mechanism of acceptance, and read the phrase "the States so Ratifying" to designate the class of parties empowered to accept. Second, one might read the first phrase to identify the offerees without requiring a precise form of acceptance. On the first reading, the offerees—the states—may accept the Constitution-as-contract only by the mechanism of "Conventions." On the second reading, the offerees—the state Conventions—have the option of accepting in any reasonable manner that they might choose.\(^1\)^\(^2\)\(^5\)

While these two readings may appear at odds, it is important to note that both can ascribe essentially equivalent meanings to each of the two central terms: States and Conventions. This is not to say that they necessarily define these terms in the same way. Instead, by assuming the same meanings for the terms, the two readings do not compromise their distinctiveness. What then, are these meanings, and what is the root distinction between the two readings?

Defining "States" as used in Article VII is fairly straightforward, at least for these purposes. A State is simply a geographically defined political entity. What then, would it mean for a State to accept the offer embodied by the Constitution-as-contract? Answering this question proves complicated. Fortunately, however, the two readings allow one to dodge the question without compromising the inquiry, for neither reading requires a definition of States that specifies general criteria for ascribing behaviors to such entities. On the first reading, all that we need to know about States we learn from the fact that "Rati-

---

\(^1\) U.S. CONST. art. VII. The last phrase may raise issues regarding the identity of the other party, as I will consider in the next subsection. See infra Part IV.C.3.

\(^2\) "Unless otherwise indicated by the language or the circumstances, an offer invites acceptance in any manner and by any medium reasonable in the circumstances." \textsc{Restatement Second, supra} note 15, § 30.
fication of the Conventions" of each State constitutes formal acceptance of the Constitution-as-contract. Presumably, this means that a State could prevent this situation. On the second reading, one need not be concerned with how a State might accept the offer, because the offer was not for the States to accept. Instead, the second reading appears to recognize the Conventions of the States as the party empowered to pass on the Constitution-as-contract's offer.

To evaluate the two possibilities, one must define "Convention" with somewhat more precision than that necessary for the first pass at defining States. One must also look beyond the document itself for guidance. Fortunately, one need not look far, as the Constitution arrived at the legislatures of each State accompanied by instructions on the formation of Conventions. The instructions clearly define the composition of a State Convention as delegates chosen by the people of that State. The actual compositions of the Conventions complied with these instructions.

---

126. It would be absurd to ascribe intention to an entity's behavior if the entity cannot prevent that behavior. On a similar note, "to say one has consented requires that there have been some way of withholding consent." HERZOG, supra note 49, at 225.

127. On Friday, September 28, 1787:
Congress having received the report of the Convention lately assembled in Philadelphia Resolved Unanimously that the said Report with the resolutions and letter accompanying the same be transmitted to the several legislatures in Order to be submitted to a convention of Delegates chosen in each state by the people thereof in conformity to the resolves of the Convention made and provided in that case.

RESOLUTION OF CONGRESS SUBMITTING THE CONSTITUTION TO THE SEVERAL STATES, reprinted in 2 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES 22 (1894) [hereinafter RESOLUTION OF CONGRESS].

In accordance with this resolution, the state legislatures received the resolution of the Constitutional Convention providing that the Constitution should "be submitted to a Convention of Delegates, chosen in each State by the People thereof, under the Recommendation of its Legislature, for their Assent and Ratification."


128. The next clause would seem to complicate matters, in that it appears to contemplate some role for state legislatures. The awkward grammar of the sentence, however, makes difficult a determination of the precise meaning of this clause. Because reservation of any type of role for the state legislatures would tend to support my conclusions, we need not dissect the Resolution's language.

129. See THE CONSTITUTION AND THE STATES, supra note 50 (describing the election of ratification-Convention delegates in each state).
With this definition of Conventions and the instructions upon which it is based, one can begin to merge both readings into a coherent vision of the class of parties that may have accepted the Constitution-as-contract. Both readings answer two important questions in the same way. First, if one asks to whose decision we should look to determine whether the Constitution has been accepted, the readings must provide a common answer. Second, if one asks for whom the decision-maker was authorized to speak, the two readings will arrive at, though via different routes, the same response.

The answer to the first question proves fairly straightforward given the workings of the Conventions and the role that the Conventions play on both readings. On the first reading, the Conventions act as the mechanism for acceptance. If one wants to know whether the Constitution-as-contract has been accepted, one asks if the mechanism has produced the appropriate output. The question then becomes who determined what output the mechanism would produce. The second reading might seem to supply an answer, but it is important that the response not differ from that which the first reading would provide. Whether one conceives of the Convention as the mechanism by which some party accepts or the actual party that does the accepting, the basic operation of the Convention remains constant. The Convention,130 although composed of delegates elected by the people, made the decision.

The State Conventions decided whether to accept the Constitution-as-contract. Although this runs counter to the implications of the first reading, which implies that the states decided, and of the second reading, which implies that the people of each state decided, the function of the Conventions renders this conclusion irresistible. Everything about the Conventions suggests that they contemplated delegates who would deliberate and debate rather than serve as mere conduits.131 The delegates to each

130. Ascribing the decision-making function to an institution may seem awkward. The alternative formulation, asserting that the delegates decided, would not really alter the point in this context. Nonetheless, because the delegates as individuals did not produce the relevant decisions, and because the delegates in their collective capacities were called Conventions, I believe it most accurate to identify the institutions as decision-makers.

131. This role might not be clear from the language of the Constitution or the Resolutions. Nonetheless, at least three considerations support the claim that the Conventions were conceived of as deliberative bodies. First, given that the framers meeting in Philadelphia had used the word “Convention” to describe their patently
Convention did not deliver their constituents' proxies to be tallied. In other words, they were not delegates at all. The State Conventions did not simply communicate the will of another entity. The Conventions decided, regardless of whether we believe them to have been the parties or the mechanism.

Realizing that the Conventions decided whether to accept might lead to the conclusion, suggested by the second reading, that they were the parties to whom the offer of the Constitution-as-contract was extended. To do so, however, would ignore the function of the Conventions' decisions—their consequences such that we care what the Conventions decided—as well as the important issue of authority.

One might ask what consequences flowed from the decisions of the Conventions. The obvious answer is ratification and the establishment of the Constitution. What, however, could this mean? The important question seems to be: who did the decisions of the Conventions bind to the terms of the Constitution-as-contract? As a preliminary matter, an answer will dispel any notion that the Conventions acted on their own behalves in ratifying the Constitution as parties. The Constitution does not bind the Conventions as such, because their existence terminates upon issuance of a decision. It would be meaningless for the

deliberative assembly, we may safely assume that they had this usage in mind when they used the word "Conventions" in their Resolution to Congress. For an indication of the extent of deliberation at the Philadelphia Convention, see generally 1-5 JONATHAN ELLIOT, ELLIOT'S DEBATES (2d ed. 1907). Second, had the framers sought to base ratification on the will of the People of the several states, they could have specified direct referenda as the mechanisms for acceptance. Third, and perhaps most telling, the delegates to the Conventions of every state did, in fact, deliberate in some way. See THE CONSTITUTION AND THE STATES, supra note 50 (providing accounts of the deliberations in all thirteen of the State Conventions).

132. See HERZOG, supra note 49, at 210. I deny that they functioned in this way in the sense that a delegate is one to whom another delegates his vote. This meaning makes sense if we consider that we have another term available to describe a person whom another entrusts with his decision-making authority: a trustee. It is important to note, however, that the Convention delegates functioned no more as trustees than they did as delegates. A trustee is one who has been authorized by another person to make decisions that that person would otherwise have the power to make. In order to authorize a trustee to make particular decisions on your behalf, those decisions must otherwise be within your competence to make. Whether to accept the Constitution was a decision outside of the competence of the people as such. See supra Part III.

In some instances, voters attempted to elect delegates who would act like delegates in the proxy-voting sense. Because the Convention design presumed deliberation, however, delegates were not bound by any such commitments. In New Hampshire, for example, three delegates elected with instructions to vote against ratification chose not to vote at all. See Daniell, supra note 55, at 196-98.
Conventions to accept the offer if they did not do so for some other parties.

Who, then, were the parties? Here, it is not enough to look to the document because, as I have suggested, a contract's specification of the parties cannot alone serve to create obligations in those parties. Thus, we must decide upon whose authority did the Conventions make their decisions. Instinctively, we might look to the people of each state who elected the delegates to the Convention, and by thus authorizing the Conventions to exercise decision-making power, the people of each state are parties to the Constitution-as-contract. This intuition—inspite of its initial appeal—proves inconsistent with the circumstances in a subtle but important way.

If we focus on who elected the delegates to the Conventions, the people of each state may appear the logical holders of party status. If, however, we ask the more fundamental question of how the delegates were elected, another set of parties, the states as representative democracies, becomes central. The people of each state elected the delegates to the Conventions, but they did so in a framework fixed by another entity. The legislatures of the states called the elections, defined voting districts, apportioned representation, and established suffrage requirements. The people of each state, as such, lacked the authority to make a decision and thus could not have authorized the Conventions to do so in their steads. They could do so only within a framework supplied by the Constitution, the Resolution stating the mechanism for acceptance, and the state legislatures.

These observations do not, however, support the conclusion that the state legislatures were party to the Constitution. They also lacked the authority to do so on their own. It would not constitute an acceptance if each of the state legislatures passed a resolution accepting the terms of the Constitution. The legislatures simply lacked the authority to accept, and thus could not have been parties to the Constitution-as-contract.

Who then? The simple answer is that the states are parties to the Constitution-as-contract. Without further explanation, however, this answer would be empty—it could mean the states as geographical regions or as collections of citizens or as political

133. See supra text accompanying note 116.
134. Several states altered their ordinary suffrage requirements for the Convention elections. See Roll, supra note 58.
entities. It is, in fact, this last meaning that proves accurate. The only parties capable of authorizing the Conventions to decide whether to accept the Constitution-as-contract were the states as political entities, but only as political entities of a very particular sort. A state ruled by monarchy could not have accepted the Constitution-as-contract, even if it had called a Convention. Instead, the only parties from whom the offer invited acceptance were states with legislatures that called elections of their citizens to select delegates to the Conventions.\footnote{135. See supra text accompanying notes 116-119.}

This may seem like a trivial point, but it speaks to the nature of the parties that accepted the offer embodied in the Constitution-as-contract. Not just any state could accept and enter into the agreement. Only states with sufficiently representative systems of government were invited to become party to the Constitution-as-contract.\footnote{136. This prerequisite to party status may be read alongside of, but ought not be confused with, the Constitution’s Guarantee Clause, which provides that “The United States shall guarantee to every State in this Union a Republican Form of Government.” U.S. CONST. art. IV, § 4. The Guarantee Clause, rather than specifying the nature of the states-as-parties, extends the protection of the National government to states that have already become parties. The clause therefore is just one of many examples of valuable consideration extended to states-as-parties. That such a guarantee indeed constituted valuable consideration speaks to the nature of the promises. After all, the guarantee of a republican form of government would probably not be considered valuable consideration to a monarchy or despotism. For an interesting discussion of the Guarantee Clause, as it arose in an action for trespass, see Note, Political Rights as Political Questions: The Paradox of Luther v. Borden, 100 HARV. L. REV. 1125, 1127-28 (1987).}

The mechanism of ratification proved the parties’ fitness to uphold the terms of the agreement. Thus, the states as very particular types of political entities were party to the Constitution-as-contract.

3. The Promisor: The Federal Government

If the states, as particular sorts of political entities, stood as promisees of the Constitution-as-contract, there must have been some entity that extended the offer, a promisor. In spite of the populist rhetoric of its first words, the offer embodied in the Constitution could not have emanated from They the People.\footnote{137. See supra Part IV.C.1.} Instead, the offer appears to have issued from the Constitutional Convention in Philadelphia. Through analysis similar to that applied to the roles of the state ratifying conventions, however, it will become clear that neither the Philadelphia Convention nor
the delegates of which it was composed could have made the offer. Instead, the offer issued on behalf of some other entity that would become party to the Constitution-as-contract upon acceptance by the states. A look at the circumstances of the framing and an analysis of the authority—or lack thereof—under which the offer embodied in the Constitution was made will lead to the conclusion that the Federal Government is the promisor party to the Constitution-as-contract.

From the basic story of the Constitution’s framing and its issuance to the states, two clear candidates emerge as possible promisors. As an initial matter, one might plausibly claim that either the Philadelphia Convention, which framed the document, or the Confederation Congress, which sent it to the states, made the offer embodied in the Constitution-as-contract. Such assertions, however, cannot withstand scrutiny.

The delegates to the Philadelphia Convention drafted the Constitution, and thus might be candidates for party status. Of course, something more than physical authorship is needed to find that the Convention, or the delegates of which it was composed actually made the offer. After all, law firms routinely draft contracts to which they are not party. If the delegates or the Convention are to be considered party to the Constitution-as-contract, they must have made the offer on their own behalf. As with the ratifying conventions’ decisions, the practical effect of the Philadelphia Convention’s product makes clear that it could not have made an offer on its own behalf. “An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.” Nothing in the text of the Constitution or any other communications from the Convention manifests the willingness of the Convention or its delegates to enter into a bargain with the states. The fact that the Philadelphia Convention ceased to exist after it had drafted the Constitution renders highly dubious the possibility that it had the capacity to enter into a bargain.

138. For an extremely basic account of the framing, see supra Part IV.C.1. For more detailed accounts of the Philadelphia Convention’s operation, see generally ACKERMAN, FOUNDATIONS, supra note 25; Ackerman & Katyal, supra note 58; Akhil R. Amar, The Consent of the Governed: Constitutional Amendment Outside Article V, 94 COLUM. L. REV. 457 (1994).
139. See supra Part IV.C.2.
140. RESTATEMENT SECOND, supra note 15, § 24.
If the Philadelphia Convention did not make the offer on its own behalf, perhaps it extended the offer on behalf of some other entity. As mentioned earlier, the delegates convened in Philadelphia on the authority of two political entities. First, the Confederation Congress, a body composed primarily of delegates appointed by state legislatures, passed a resolution calling for each state to appoint delegates to attend the Philadelphia Convention. Second, most of the state legislatures appointed delegates to the Convention. Perhaps the Convention extended the offer on behalf of one of these entities—the Confederation Congress or the state legislatures?

If the Philadelphia Convention extended the offer embodied in the Constitution-as-contract on behalf of either Congress or the state legislatures such that that entity became bound upon the promisees' acceptance, it could only have done so upon proper authority. Neither Congress nor the state legislatures, however, granted the Convention the authority to extend this offer on their behalf. In its resolution calling upon delegates to meet in Philadelphia, the Confederation Congress expressly defined the limited scope of the Convention's task, specifying that a convention was to "be held at Philadelphia for the sole and express purpose of revising the Articles of Confederation." Extending an offer in the form of a new Constitution—one providing for a ratification/acceptance mechanism in clear violation of the Articles of Confederation—fell far beyond the scope of authority conveyed to the Convention to act on Congress's behalf.

The same problem of authority confronts any claim that the Convention acted on behalf of state legislatures. Even if the state legislatures had authorized their delegates to take action beyond recommending revisions to the Articles of Confederation (clearly counterfactual), the Convention would nonetheless have lacked authority to make an offer on behalf of the

141. See supra Part IV.C.1.
143. See HISTORY OF THE RATIFICATION, supra note 118, at 187.
144. See supra note 119.
146. Id. (emphasis added).
147. See Ackerman & Katyal, supra note 58, at 506 ("Illegality was a leitmotif at the convention from its first days to its last.").
148. In fact, several of the delegates were appointed with commissions strictly limiting the scope of their authority to speak for their states. See id. at 481-83.
states. This is because Congress, and not the states, called the Convention and defined its terms. The Convention was not a creature of the state legislatures, but one hatched by the Confederation Congress, which specified its nature as one limited to revising the Articles of Confederation. The state legislatures could not have authorized the Convention to extend an offer on their behalves, because the authority of the state legislatures relative to the Convention was limited by Congress.

Although these circumstances make clear that the Convention did not extend the offer of Constitution-as-contract on behalf of the Confederation Congress, the possibility remains that Congress directly extended the offer after having received the document drafted by the Convention. This account has a strong appeal in light of the events that followed the Convention's conclusion. Support comes, in particular, from the following resolution:

Congress having received the report of the Convention lately assembled in Philadelphia Resolved Unanimously that the said Report with the resolutions and letter accompanying the same be transmitted to the several legislatures in Order to be submitted to a convention of Delegates chosen in each state by the people thereof in conformity to the resolves of the Convention made and provided in that case.

Congress, it might appear, approved of the Constitution-as-contract and decided to extend its offer to the states. Under this account, the Confederation Congress was party to the Constitution-as-contract.

The problem with this account, once again, arises when considering the issue of authority. The Confederation Congress was not an independent political entity bound only by the limits of its discretion. Instead, the Articles of Confederation defined and limited the Confederation Congress' power. Contracting with the states to create a new Constitution was simply beyond the authority of the Confederation Congress.

Difficulties identifying an existing political entity with the capacity and authority to make the offer embodied in the Constitution-as-contract lead to the conclusion that the offer did not extend from an existing political entity. Instead, the promisor was
the entity that derived its existence from the ratification of the Constitution—the federal government. For its part, the federal government offered, among other things, to protect the states and provide benefits to their citizens. In return, the federal government received certain powers previously held by the states and, more essentially, came into being.

D. Who Are the Third-party Beneficiaries of the Constitution-as-Contract?

An attempt to locate instances in which the text of the Constitution names its intended beneficiaries yields several promising candidates, but none so clear as to preclude objection. Fortunately, the third-party beneficiary rules that have evolved in contract law acknowledge that an agreement may create obligations to third-parties even if it does not name the beneficiaries. Where confusion exists as to the identity of any potential third-party beneficiary, one looks for both subjective and objective manifestations of the intent of the parties to provide a benefit to a third party.

If one begins this analysis with the Bill of Rights, the text of the Constitution can lead to no conclusion other than that the parties intended to provide benefits to third parties. None of the first nine Amendments, after all, pertains directly to the relationship between the contracting parties, the States and the Federal Government. Instead, these Amendments obligate the promisor, the Federal Government, to limit its activities as they might affect individuals not party to the Constitution-as-contract. By re-

153. See, e.g., U.S. CONST. arts. I-IV.
154. The idea of an offer emanating from an entity whose existence depends on the offer's acceptance may seem unusual. Analogous accounts, however, help to explain the existence of many legal creatures of contract. The most common illustration of this sort of contract-derived existence is the idea of a corporation as an entity born of a contract between itself, the state, and its shareholders. See Frank H. Easterbrook & Daniel R. Fischel, Contractual Freedom in Corporate Law, 89 COLUM. L. REV. 1416, 1426-27 (1989) (describing the idea of a corporation as a nexus of contracts).
155. In its preamble, for example, the Constitution declares as one of its objectives, to "secure the Blessings of Liberty to ourselves and our Posterity." U.S. CONST. PMBL. We, as the founding generation's "Posterity" might point to this text in support of an action for specific performance of the Federal Government's contractual duty to secure for us the blessings of liberty.
156. "It is not essential to the creation of a right in an intended beneficiary that he be identified when a contract containing the promise is made." RESTATEMENT SECOND, supra note 15, § 308.
157. See supra Part IV.B.2.
quiring the forbearance of one of the parties for the benefit of third parties, the Bill of Rights presents the paradigm of a third-party beneficiary contract. The identity of the third-party beneficiary will vary with the nature of the benefit and its specification.

E. Contemporary Americans and the Constitution-as-Contract

Much of the Constitution does not apply in any way, either by providing an obligation or by guaranteeing a benefit, to the citizens of the United States. Generally, when the Constitution applies to Americans in legally significant ways, it does so by obligating the government to forebear in its activities so as to provide us with certain benefits. This situation characterizes the vast majority of constitutional claims in which a citizen might be involved.

As a whole, the Constitution simply does not impose obligations on citizens—it makes demands of government, often for the benefit of citizens. There are, however, two notable exceptions to this characterization of the Constitution. As Professor Tribe has noted,

there are two ways, and two ways only, in which an ordinary private citizen . . . can violate the United States Constitution. One is to enslave somebody [a violation of the Thirteenth Amendment]. The other is to bring a bottle of beer, wine, or bourbon into a state in violation of its beverage control laws [in violation of the Twenty-first Amendment].

158. Here, I should note that the third-party beneficiary approach, combined with the principles of objectively reasonable reliance, can act as a ratchet in favor of rights. Each time one of the parties (or the Judiciary, the entity established to provide interpretations of the Constitution-as-contract that would bind the parties) interprets a constitutional provision to provide a benefit to a third party in the form of a rights protection, the class of third-parties to whom that benefit applies have a reasonable basis for relying on the obligation of one or both of the parties to continue providing that benefit/right.

159. For instance, one can make a credible argument that the Sixth Amendment was enacted for the benefit of only those accused of crimes. Or, one could reasonably conclude that soldiers seeking shelter at time of peace are not beneficiaries of the Third Amendment.

160. Of course the Constitution applies to us in many ways if, by applying we mean that it affects our lives. But such a definition proves vacuous, almost any event has the potential to affect our lives. In this respect, I could argue that an agreement between my neighbor and the child of another neighbor for lawn-mowing services applies to me, because the child might not be able to take on another job pruning my trees.

161. Laurence H. Tribe, How to Violate the Constitution Without Really Trying, in
These two provisions represent anomalies of the Constitution. They are useful, however, to demonstrate why the intertemporal precommitment problem does not apply even where provisions of the Constitution limit our behavior.

F. Interpreting the Constitution-as-Contract: A Third-party Beneficiary Approach

Looking at the Constitution as a contract between the federal government and the states (as inclusive political entities) for the benefit of third-parties entails a new approach to constitutional interpretation. The approach begins with and maintains the legitimacy of whatever constitutional authority is at issue. In this way, interpreting the Constitution-as-contract differs from other interpretive enterprises. Nonetheless, the contours of the third-party beneficiary approach should feel familiar. In essence, the approach simply requires application of principles of contract interpretation to the task of constitutional interpretation. Of course, just as commentators disagree on the precise doctrines that should guide contract interpretation, so too is there ample room for debate on how best to interpret the Constitution-as-contract. The debates should, in fact, be identical. Thus, the third-party beneficiary approach consolidates discussions of constitutional interpretation and contract interpretation.

Just as one can take many different principled positions on contract legitimacy and interpretation, so can one defend a variety of approaches to describing and interpreting the Constitution-as-contract; both sides can engage in principled debate within a coherent framework.

V. CONCLUSION

Conventional approaches to constitutional interpretation, insofar as they fail to establish and preserve the legitimacy of the

CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES 98, 100 (William N. Eskridge, Jr. & Sanford Levinson eds., 1998).

162. Aside from the basic legitimizing function achieved by an identity of approaches, discussing constitutional interpretation in the same terms with which we discuss contract interpretation may promote more refined and well-reasoned principles of interpretation. For, given the extent to which contracts are used to define countless relationships and activities, perverse or incoherent doctrines of contract interpretation are likely to be exposed more quickly than are incoherent doctrines of an interpretive enterprise that is conceived of as sui generis.
Constitution cannot make valid claims to the legitimacy of their products. The misguided nature of most accounts of the Constitution and its meaning is apparent in their persistent struggle to overcome the intertemporal precommitment problem—a dilemma that persists only so long as one blindly accepts a mythical narrative of constitution formation and popular sovereignty lacking any basis in fact or logic.

With the fictions of popular sovereignty and popular ratification of the Constitution exposed, the intertemporal precommitment problem dissolves. Once we have charged through this false obstacle to constitutional legitimacy, the prospect of describing an approach to constitutional interpretation that is both legitimate and legitimating becomes real. Contract law—as an enterprise fundamentally concerned with interpreting documents so as to establish and maintain their source of authority—provides an ideal model for this approach to constitutional interpretation.

The text of the Constitution and the circumstances surrounding its framing and ratification provide strong support for a Constitution-as-contract approach to interpretation. Crucial to articulating a coherent account of the Constitution-as-contract is the refutation of the mythical role of They the People—the undifferentiated people of the United States at the time of the framing—in ratifying the Constitution. They the People did not ratify the Constitution-as-contract, and were not party to the agreement embodied in the document. Instead, They the People, as well as We the People—present-day Americans—are the intended beneficiaries of an agreement between the federal government and the individual states.

Conceiving of the Constitution as a contract between the states and the federal government that obliges the government to provide benefits to third parties permits the application of contract principles to questions of constitutional interpretation. While the precise nature of these principles may be a valid subject of debate, the importance of providing some account of a contract’s legitimacy remains central. Thus, the third-party beneficiary approach to interpreting the Constitution-as-contract will not dictate an indisputable solution to every problem of constitutional interpretation. Instead, the approach provides a framework within which one or another conception of the source of contractual legitimacy will lead to an interpretation of the Constitution that provides a basis for establishing and main-
taining the legitimacy of that document. In this way, the third-party beneficiary approach brings coherence, if not determinacy, to constitutional interpretation.