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REPLY

LEGITIMACY AND OBEDIENCE

*David A. Strauss**

Perhaps we should just stop talking about legitimacy altogether. Why do we even need to use the word, at least in discussions of constitutional law? That is one of the questions raised by Richard Fallon's thoughtful and exceptionally illuminating article.¹ Why not just talk about moral right and wrong, or about legal right and wrong, or about whether a particular law or legal system is generally accepted by a population? Using the term "legitimacy" only adds the potential for confusion; why not dispense with it?

The answer is that discussions of "legitimacy" do add one element to debates over constitutional issues. To condemn something as illegitimate — a statute, a Supreme Court decision, a President's claim to have won an election, or something else — is, I think, implicitly to threaten defiance. It is to suggest that the government should, in some respect, not be obeyed. There are mistaken decisions, lawless decisions, morally wrong decisions. Those are all familiar forms of criticism. Calling a decision "illegitimate" adds the suggestion that the decision is mistaken, or lawless, or immoral, in a way or to a degree that raises a question about whether it should be obeyed. For me, this is one of the principal lessons of Professor Fallon's article.

Disobedience and defiance, in this respect, are matters of degree in the same way that, as Professor Fallon notes, the acceptance of government authority is a matter of degree.² To say that a President was not legitimately elected is not necessarily to assert the right to disregard a bill that that President has signed into law or a lawful military order that the President has issued as Commander-in-Chief. Rather, the claim of illegitimacy asserts that in some respect the President should not be accorded the deference he would otherwise receive: his proposed appointees will be scrutinized more closely; his legislative initiatives will encounter more hostility; he will not be viewed as having a mandate to carry out an extensive program of policy initiatives. The same is true for the assertion that a Supreme Court decision is illegiti-

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¹ Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787 (2005).

² See *id.* at pp. 1805–06; see also *id.* at p. 1831 ("Clearly the authoritative legitimacy of judicial decisions can be relative, rather than absolute. Regional variations also can occur.")

mate. It does not necessarily amount to an assertion that the parties to the case can ignore the Court's ruling. But it does mean that such a decision — unlike, for example, a decision that is simply legally wrong, even clearly legally wrong — should have less weight as a precedent in court and should have a diminished role in shaping the judgments that other branches of government make about the lawfulness of their actions.³

Professor Fallon's account is descriptive rather than prescriptive; he is concerned with how the term "legitimacy" is actually used, rather than with how the term should be used.⁴ For that reason, his article, as I understand it, does not take a position on whether the term "legitimacy" is best confined to the uses I have suggested. But his precise and accurate typology helps demonstrate why the term should be used only in more limited ways. Often, in the instances Professor Fallon describes, the use of the term obscures the claim that is being made. In addition, it is not clear why the same term should be used for three different kinds of claims. And Professor Fallon points out that the various uses of "legitimacy" share a "concern[] with the necessary, sufficient, or morally justifiable conditions for the exercise of governmental authority."⁵ My suggestion is that this last insight can be the basis for a specific, prescriptive definition: the term "illegitimacy" should be reserved for that subset of wrong actions to which defiance, of some form, is a proper response.

I. THREE KINDS OF LEGITIMACY?

Professor Fallon identifies three basic kinds of legitimacy: moral, legal, and sociological. To oversimplify his careful account, a government action — a Supreme Court decision, for example — is morally illegitimate if it is morally wrong; more precisely, a claim that a decision is morally illegitimate is a claim that it is outside the bounds of reasonable moral disagreement.⁶ Similarly, a decision is legally illegitimate if it is clearly wrong as a matter of law.⁷ Sociological legitimacy, in contrast with the other two forms, is a descriptive and not a normative notion: a government action enjoys sociological legitimacy if it is generally accepted by the population as morally binding in some way.⁸ Acceptance in this sense is different from merely yielding to the threat of force, although, as Professor Fallon explains, it is difficult to

³ See *id.* at pp. 1831–32.

⁴ See *id.* at pp. 1790–91.

⁵ *Id.* at p. 1791.

⁶ See *id.* at p. 1834.

⁷ See *id.* at pp. 1817–18.

⁸ See *id.* at p. 1795.

specify precisely what kind of acceptance is needed to confer sociological legitimacy.⁹

Professor Fallon is surely right that the term “legitimacy” is sometimes used in the ways he describes. But particularly in the case of “moral” and “legal” legitimacy, the claim of illegitimacy, in Professor Fallon’s typology, seems to be just another way of saying something for which we already have an adequate vocabulary. Why speak of legitimacy at all, instead of just saying that an act was clearly morally wrong or clearly legally wrong?

Beyond that, as Professor Fallon notes, none of these three notions of legitimacy seems quite right in isolation. None seems to capture what people are trying to say when they denounce something, such as a Supreme Court decision, as illegitimate.¹⁰ Consider, first, moral legitimacy. Not all morally wrong government actions are illegitimate. A tax cut that gives money to the wealthy and deprives poorer people of public services might be plainly unjust — that is, morally wrong, perhaps egregiously morally wrong. But critics who are willing to denounce such a policy as morally wrong would not automatically, or even usually, add that it was illegitimate. Similarly, it would be odd to say that all judicial decisions that are clearly legally wrong are illegitimate. A court might make a plainly erroneous decision on a matter of, say, bankruptcy law or civil procedure, but we would not ordinarily call such a decision illegitimate. As Professor Fallon’s discussion shows, the claim of illegitimacy seems to be reserved for decisions like *Roe v. Wade*,¹¹ *Bush v. Gore*,¹² or *Miranda v. Arizona*.¹³

Sociological legitimacy, in Professor Fallon’s sense, certainly does seem to capture some important uses of the term “legitimacy.” Someone might say, for example, that a certain regime is entitled to diplomatic recognition because it is the legitimate government of a foreign country. That is the descriptive, sociological use of the term “legitimate”; a regime can be legitimate in this sense even though it governs in ways that are not morally justified — by not allowing free elections, for example. We do not seem to have another simple way to express this notion of legitimacy, and Professor Fallon’s analysis of “sociological” legitimacy is right on target. But this is not how the term “legitimacy” is most commonly used in discussions of constitutional law. In most of the examples Professor Fallon discusses, “legitimacy” (or, more commonly, “illegitimacy”) is used normatively, as a term of praise or condemnation, rather than descriptively. At least for purposes of con-

⁹ See *id.* at pp. 1795–96.

¹⁰ See *id.* at p. 1791.

¹¹ 410 U.S. 113 (1973).

¹² 531 U.S. 98 (2000).

¹³ 384 U.S. 436 (1966).

stitutional debates, then, none of the three senses of legitimacy that Professor Fallon identifies seems to reflect the most common uses of the term. And to the extent they do, we do not need the term, and we could alleviate confusion by speaking directly of clear moral or legal wrongness.

II. THE COMPLEX RELATIONSHIP BETWEEN LEGAL AND MORAL LEGITIMACY

Why do people continue to use the word, then? What are people claiming when they unreflectively assert the illegitimacy of, say, a judicial decision? Professor Fallon's typology might be read to suggest that they are saying either that the decision is morally illegitimate or that it is legally illegitimate, and that we can gain analytical clarity by specifying which of those claims is being made. But I am not sure that is right. A claim that a court decision is illegitimate often seems to be simultaneously, and inseparably, both a legal and a moral claim. Moreover, it is not simply a claim of clear legal error; nor is it simply a claim of clear moral error. Rather, it is a particular kind of moral claim, one that is often (though not always) related to a claim of legal error. To be more precise: a claim that a decision is illegitimate is a claim that the decision is, as a moral matter, not entitled to a full measure of obedience; and legal wrongness may be, but need not be, part of the reason for reaching that conclusion.

Professor Fallon's examples help illustrate this point. He notes that *Korematsu v. United States*¹⁴ might properly be regarded as "constitutionally illegitimate,"¹⁵ which, in Professor Fallon's terms, is a form of legal illegitimacy.¹⁶ *Korematsu* upheld the exclusion order that forced Japanese Americans from their homes on the West Coast of the United States during World War II. *Korematsu* certainly might have been, as Professor Fallon suggests, clearly wrong as a legal matter, but the critics of *Korematsu* are saying more than that. An important part of their objection is that the decision upheld an action — the exclusion of the Japanese Americans — that was a serious moral wrong.

Bush v. Gore has also been widely attacked as illegitimate.¹⁷ Part of the basis of the attack is again that the decision was clearly wrong as a legal matter.¹⁸ Beyond that, many critics say that the Court did

¹⁴ 323 U.S. 214 (1944).

¹⁵ Fallon, *supra* note 1, at p. 1848.

¹⁶ See *id.* at pp. 1848–49 (linking "[l]egal" and "constitutional" legitimacy).

¹⁷ See generally *BUSH V. GORE: THE QUESTION OF LEGITIMACY* (Bruce Ackerman ed., 2002).

¹⁸ See, e.g., Bruce Ackerman, *Off Balance*, in *BUSH V. GORE: THE QUESTION OF LEGITIMACY*, *supra* note 17, at 192, 196 ("[T]he Court gave no legally valid reason for this act of usurpation.").

not simply make a mistake but in some sense acted in bad faith. That claim of bad faith also seems to be part of what underlies the assertion that the decision is not just wrong but illegitimate.¹⁹ But the criticism of *Bush v. Gore* is different from the criticism of *Korematsu*. It is no part of the *Bush v. Gore* critics' case to say that the result brought about by the Supreme Court's decision — George W. Bush's becoming President — was itself morally wrong in the way that the Japanese American exclusion was morally wrong.²⁰ Unlike in *Korematsu*, the objection is not to the outcome but solely to the fact that it was the Supreme Court that brought about that outcome.

Sometimes claims that a judicial decision is illegitimate resemble the attacks on *Korematsu*; sometimes they resemble the attacks on *Bush v. Gore*. The critics who say that *Miranda v. Arizona* is an illegitimate decision do not always say, and need not say, that the police practices mandated by that decision are bad practices in any sense. Their claim is just that the Supreme Court should not have been the institution that required those practices. Some critics of *Roe v. Wade* do assert, as critics of *Korematsu* do, that the decision, by allowing abortions, brings about morally bad results. But not all critics of *Roe v. Wade* say this. Some of the most severe critics of *Roe v. Wade* believe that, as a moral matter, women have the right to have an abortion; their criticism is that the legislature, not the courts, should secure that right.²¹ To give a more extreme example, it would surely be illegitimate for the Supreme Court to order the President to invade a foreign country — even if the invasion was morally justified and the President's refusal to order the invasion was morally wrong.

Does this mean, in Professor Fallon's typology, that the critics of *Korematsu* are asserting that that decision is both morally and legally illegitimate, while the critics of *Bush v. Gore* are asserting only legal illegitimacy? That does not seem right. The critics of *Bush v. Gore* are not just asserting that the Court is clearly legally wrong. They are also making a moral claim. As Professor Fallon explains, judges, like other officials, have a moral obligation to conform to their proper institutional roles. When they overstep the boundaries established by those

¹⁹ See, e.g., Margaret Jane Radin, *Can the Rule of Law Survive Bush v. Gore?*, in *BUSH V. GORE: THE QUESTION OF LEGITIMACY*, *supra* note 17, at 110, 114 (“[F]ive Republican members of the Court decided the case in a way that is recognizably nothing more than a naked expression of these justices’ preference for the Republican Party.”).

²⁰ See, e.g., Guido Calabresi, *In Partial but Not Partisan Praise of Principle*, in *BUSH V. GORE: THE QUESTION OF LEGITIMACY*, *supra* note 17, at 67, 81 (“[T]his was an election between two relatively ordinary and not especially interesting, let alone frightening, politicians.”).

²¹ See, e.g., John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 *YALE L.J.* 920, 923–26 (1973).

roles, they do something that is morally wrong, at least in certain circumstances.²²

The implication of this point is that what Professor Fallon would call claims of legal illegitimacy are not always distinct from claims of moral illegitimacy. Rather, a claim that a decision is clearly legally wrong can be a component of a certain kind of moral argument — an argument that the decision is not entitled to a full measure of obedience. Moreover, as I noted earlier, people do not condemn decisions as illegitimate just because they are legally wrong, even clearly legally wrong. If the Supreme Court simply made a mistake on a relatively technical legal subject, no one would call its decision illegitimate; that would be rhetorical overkill, even if the mistake were clear.

The assertion that a decision is illegitimate also does not amount simply to an assertion that the decision produces a morally wrong outcome. There are many such decisions that would not be condemned as illegitimate. A person who thinks that capital punishment is immoral will not necessarily, or even ordinarily, say that a decision upholding a death sentence is illegitimate, given the current state of American law. Similarly, someone might think a criminal sentence, authorized by law, was so severe as to be clearly morally wrong, but again one would not ordinarily condemn a decision as illegitimate because it upheld such a sentence.

Finally, a claim of illegitimacy does not always depend on an assertion that a decision is legally wrong. Another of Professor Fallon's well-chosen examples — the fugitive slave laws — makes this point.²³ It would have been possible (indeed, I think it would have been correct) to have asserted that a decision returning a fugitive slave was illegitimate — and should have been evaded, undermined, or even flatly defied — even if the decision was legally correct. The crucial element of each of these claims of illegitimacy is the assertion that it is morally proper to withhold full obedience. The reason may be the clear illegality of the action (as in *Bush v. Gore*, according to some critics of that decision); a combination of the illegality of the action and the immorality of the outcome (as in *Korematsu*); or simply the extreme immorality of an admittedly legal outcome (as in the fugitive slave example).

A claim that a judicial decision is illegitimate is, therefore, neither simply a claim that it is legally wrong nor a claim that it produces morally wrong results. Neither legal wrongness nor moral wrongness (in the sense that the decision produces morally objectionable results) is a sufficient condition of claiming illegitimacy. Nor is either of those a necessary condition (although generally, it seems, one of them will be

²² Fallon, *supra* note 1, at pp. 1834–39.

²³ *Id.* at p. 1801.

present). A claim of illegitimacy is a specific kind of moral claim about obedience, sometimes but not always based on a claim of illegality.

III. THE NATURE OF ILLEGITIMACY

My suggestion is that when people say that a judicial decision is illegitimate, they are saying that it should not receive the deference to which it would otherwise be entitled. In an extreme case, an assertion that a decision is illegitimate might amount to saying that the decision should simply be ignored. But the claim of illegitimacy need not go so far; there are less extreme ways of denying a decision its usual force.

If a decision is illegitimate, for example, the Court should have no hesitation in overruling it. Similarly, if a decision is illegitimate, lower courts should feel free to read it very narrowly, and the other branches of government may do likewise. More generally, a claim of illegitimacy may be a way of asserting that the Court is properly subject to more far-reaching attacks, such as legislation that deliberately challenges the Court's rulings or other measures that seek to undermine the Court's power. Those kinds of actions are not proper responses to a decision that is simply mistaken; they are the steps one takes in response to an illegitimate decision.²⁴

The most extreme case of an illegitimate decision is a corrupt decision, that is, one in which the judges ignored their duty and simply advanced their personal interests. In such a case, one might say, they have not acted as judges at all. If the judges are not acting like judges, arguably their decision need not be treated as the decision of a court. This is why the assertion of bad faith in *Bush v. Gore* seems so closely connected to the claim of illegitimacy. If the Justices stepped outside their assigned role — and asserted, for example, a legally untethered power to bring order to the electoral process (or, in a more extreme version that I do not endorse, if they simply became partisan actors) — then there is a good argument that they acted morally wrongly in a way that forfeited their claim to obedience. This is one way that a claim of illegitimacy might differ from a claim of simple,

²⁴ I leave aside here the “departmentalist” view of constitutional interpretation, examined with great insight in LARRY D. KRAMER, *THE PEOPLE THEMSELVES* (2004). According to that view, the other branches of the federal government are free to advance their own interpretations of the Constitution and need not defer to the Supreme Court's. *See id.* at 106–07. If a departmentalist view is correct, then legislation that deliberately challenges the Court's rulings on a constitutional question need not be seen as an attack on the Court's legitimacy; the rough analogy might be to a court of appeals that differs with the decisions of another court of appeals. The point of a claim of illegitimacy is that a decision is entitled to less deference than it would ordinarily receive; the departmentalist position is that the courts are — ordinarily — entitled to less deference than people today commonly think.

even if clear, error. More generally, a claim of illegitimacy asserts that the Justices have, to a degree — through some combination of legal and moral error — forfeited their right to rule.

Other governmental actions, such as legislation or an executive decision, might also be illegitimate. In each case the nature of the claim is the same: this government action is not entitled to a full measure of obedience. People who believe that a law is illegitimate might evade it by technically complying while seeking to defeat its purpose; they might litigate over its enforcement in instances in which litigation would ordinarily be unwarranted; they might disobey and accept punishment; or they might disobey and try to avoid punishment. Similarly, people who think a President's election was not legitimate might deny the President the full range of deference a President would normally get, without engaging in outright defiance. In each of these instances, the characteristic feature of a claim of illegitimacy is the assertion that, as a moral matter, full obedience is not required.

This account of illegitimacy may also explain why the term "legitimacy" is used for both normative and descriptive claims. The assertion that a government action is illegitimate, in the sense I am proposing, is unmistakably normative. But it also suggests that the government action does not *deserve* sociological legitimacy — it does not deserve to be accepted. That is, perhaps, why we use the same term in both contexts.

To summarize: my proposal is that the term "legitimacy" is not best understood as a tripartite notion. Rather, in constitutional debates, an assertion of legitimacy is generally used, and should only be used, to make a certain kind of moral claim: that a government action is not entitled to a full measure of obedience. Ordinarily, when the action is a judicial decision, the claim of illegitimacy will be based on an assertion that the decision is seriously flawed as a legal matter. But such an assertion is not a necessary component of a claim of illegitimacy. And even when the claim of illegitimacy is based on a legal premise in that respect, it is a moral claim, and a moral claim of a specific kind, one having to do with obedience.

IV. THE LEGITIMACY OF THE CONSTITUTION

Much of Professor Fallon's article is devoted to questions concerning the legitimacy of the United States Constitution. In the most important respects, his account seems to me entirely correct. In particular, he is surely right in saying, à la H.L.A. Hart, that the Constitution owes its legitimacy to the fact of general popular acceptance (of some, hard-to-specify kind) rather than to its adoption by a form of popular

vote hundreds of years ago.²⁵ But in two respects, the account of legitimacy I suggest may lead to somewhat different answers to the questions that Professor Fallon poses about the Constitution's legitimacy.

First, Professor Fallon suggests that the Constitution should be regarded as only "minimally legitimate" rather than ideally legitimate.²⁶ His point is that the Constitution is not morally ideal; it contains some provisions that are unjust and does not address some fundamental matters that, arguably, a morally ideal constitution would resolve.²⁷ Of course, it is a very difficult question how much a morally ideal constitution should resolve and how much it should leave to the ordinary legislative process; a constitution can fall short of the moral ideal in either direction. But one can certainly accept Professor Fallon's premise that the Constitution does not achieve the moral ideal in some significant respects.

The Constitution is nonetheless minimally legitimate, Professor Fallon says, because it is reasonably just and it is widely accepted. I agree with Professor Fallon that, ordinarily, it is a sufficient condition of legitimacy that a legal regime is reasonably just and widely accepted. This use of the term "legitimacy" is the one I suggest: it means that the regime is entitled to obedience. In any event, Professor Fallon seems clearly right when he says that a regime need not be perfectly just in order to deserve obedience.

I would not draw a distinction, however, between minimal and ideal legitimacy, at least not for the reason Professor Fallon does. He draws this distinction in order to make the point that certain aspects of our constitutional regime are morally defective. But that point can be made, and usually should be made, without invoking the notion of legitimacy. The provision in the Constitution that disqualifies naturalized citizens from becoming President²⁸ seems to me clearly morally wrong. But it would be odd to say that that morally wrong provision draws the Constitution's legitimacy into question; it is better seen as simply a moral shortcoming in the Constitution. The same is true of the argument that there are some matters that our Constitution leaves to the legislature but that an ideal constitution would resolve: that point is probably better made in just those terms, rather than by saying that it lessens the legitimacy of the Constitution. If the important

²⁵ See Fallon, *supra* note 1, at pp. 1804–06.

²⁶ *Id.* at p. 1813.

²⁷ See *id.* at p. 1807; *id.* at p. 1809 (citing Frank I. Michelman, *Ida's Way: Constructing the Respect-Worthy Governmental System*, 72 *FORDHAM L. REV.* 345, 362 (2003)) (“[S]ome reasonable parties might decline to consent to a constitutional compact that gave no definitive assurance concerning how matters of moral urgency would be resolved . . .”).

²⁸ U.S. CONST. art. II, § 1, cl. 5.

issues left unresolved by the Constitution are handled in a satisfactory way by the legislature, then there does not seem to be any reason to question the *legitimacy* of the Constitution. We would simply say that, in an ideal regime, those matters would not have been left to the legislature at all.

Legitimacy can be a matter of degree, as Professor Fallon is right to emphasize. But the degree to which a regime enjoys legitimacy depends on both its moral soundness and the extent to which the regime is accepted; so it seems not quite right to say (as I take Professor Fallon to be saying) that a constitution falls from being ideally legitimate to being minimally legitimate just because of moral deficiencies. Even if the Articles of Confederation were not seriously morally defective, their legitimacy declined over time and was finally extinguished when the Constitution was accepted. On the other hand, as Professor Fallon says elsewhere in his article, a regime with serious moral weaknesses might enjoy a high degree of legitimacy if there is no other game in town, that is, if the only alternative to that regime is anarchy. In such a situation, even a regime with significant moral failings might still merit obedience — that is, it might still be legitimate.

Judged in that way, the United States Constitution is fully, not minimally, legitimate, even though it is not a moral ideal. There is no question, for most of us, that the Constitution is sufficiently just, and sufficiently widely accepted, so that its claim to obedience — its legitimacy — is beyond question. It would be possible, in principle, for there to be a regime that was morally superior to the Constitution but *less* fully legitimate because it did not enjoy as high a degree of acceptance as the Constitution. For these reasons, I would not say that the Constitution's moral shortcomings make it less than fully legitimate.

My second (and again relatively minor) disagreement with Professor Fallon concerns his proposal that we can pass judgment on the legitimacy of the Constitution, taken in isolation from the rest of the system of laws that governs the United States. The reason to do this, he says, is that we want to be able to make moral criticisms of particular parts of the law.²⁹ A constitutional regime with a Fugitive Slave Clause³⁰ could be legitimate, if the regime as a whole were widely accepted and, despite that Clause, not intolerably unjust (if, for example, the Clause was seldom invoked). But, Professor Fallon suggests — very plausibly — we would still want to denounce that Clause as illegitimate, and if we are limited to holistic judgments about the legitimacy of an entire system, we cannot do that.

²⁹ See Fallon, *supra* note 1, at pp. 1811–12; *id.* at p. 1812 (stating that one should “[r]esist[] the conclusion that the moral legitimacy of parts of the law can never be appraised independently of the whole”).

³⁰ U.S. CONST. art. IV, § 2, cl. 3.

I agree with Professor Fallon that we should make judgments about the legitimacy of particular components of our legal system; we should not be in the position of having to make an all-or-nothing judgment of the entire system. Nonetheless, I have two concerns. The first is, again, that it is better not to conflate claims about legitimacy with claims about morality. The Fugitive Slave Clause was surely immoral. Was it also illegitimate? That is a different question; it is the question whether that clause should be obeyed. I would give the same answer to both questions: the Fugitive Slave Clause was not entitled to a full measure of obedience, to say the least. Many inhabitants of free states held that view; they systematically sought to undercut enforcement of the Fugitive Slave Clause and in some instances defied it outright. But still, the question of legitimacy is different from the question of moral wrongness, and it would be possible to say that the Clause was morally wrong but not illegitimate — as many other people, including judges, did at the time. They believed that, although the requirement that fugitive slaves be returned was immoral, it should be obeyed. The disqualification of naturalized citizens from the Presidency makes the same point — morality and legitimacy are different things — in a less important context.

My second concern is that Professor Fallon seems to suggest that one can evaluate, in isolation, the legitimacy of the Constitution, by which he appears to mean the document with its amendments.³¹ As I said, I agree with Professor Fallon that we can evaluate the legitimacy of components of the legal system and need not make an all-or-nothing judgment. But I do not think that the document called the Constitution, with its amendments, is the kind of component that can be evaluated. There is a complex network of understandings that guides the interpretation of the document, and those understandings determine what the document actually requires and permits.³² The legitimacy of the document cannot be evaluated without taking those understandings into account.

³¹ See Fallon, *supra* note 1, at p. 1812 (“[I]t should suffice to say that the Constitution is the document and set of amendments thereto that are broadly accepted as the written expression of the foundational commitments of the United States as a political community and that therefore structure debate about how those commitments ought to be understood, both inside and outside the courts.”).

³² Of course, the document itself, taken totally in isolation, does nothing. The only reason it has any legal force is that it is widely accepted as legally binding. And its words cannot be given any meaning at all unless some background understandings are accepted — such as understandings that it is obligatory and not hortatory, and that words are to be given their normal meaning (or some version of it) and not taken ironically. Professor Fallon of course understands these points; in fact, he makes them as well as anyone. See, e.g., *id.* at pp. 1809–11. The question is whether the document, interpreted according to such widely shared and uncontroversial understandings, can be said to be legitimate or not.

For example, some provisions of the Constitution, such as the Takings Clause or the Due Process Clauses, might be interpreted to forbid many regulatory and redistributive laws³³ — occupational safety laws, for example, or progressive taxation. If those Clauses were so interpreted, many people would regard the Constitution as more questionable morally; some might even doubt its legitimacy. But the document itself does not preclude such interpretations. Only a complex set of legal arguments, resting on precedent and other sources of law not found in the text itself, precludes such interpretations and saves the document from questionable legitimacy.

Consequently, it does not seem to make sense to talk about the legitimacy of the document alone. It does not seem right to question the legitimacy of the document just because it is possible to interpret some of its provisions in ways that would undermine its legitimacy. Probably no constitution could ever be drafted in a way that would, as a linguistic matter, preclude every interpretation that might render it immoral or illegitimate. On the other hand, it does not seem right to affirm the legitimacy of the document, taken in isolation, without knowing how its provisions are interpreted. The only solution is to recognize that the legitimacy of the document (or any provision of it) must be assessed in connection with understandings about how it is to be interpreted — understandings not found in the document itself.

Similarly, even if the document itself permits certain practices that are morally wrong and illegitimate, that should not count against the legitimacy or morality of the Constitution if, given our political culture, those practices are virtually certain not to occur. For example, the text of the Constitution quite clearly permits the President to be elected through undemocratic means. Article II provides that the President is to be chosen by electors who are appointed “in such Manner as the Legislature [of each State] may direct,”³⁴ and nothing in the Constitution says that that “Manner” must be, in any sense, democratic. Does this count against the legitimacy of the Constitution? Surely the answer depends at least in part on the likelihood that some state would actually do such a thing. That likelihood cannot be discovered from the document. For these reasons, while it makes sense to consider the legitimacy of particular provisions of the Constitution in isolation from the entire system of laws, those provisions must be considered in context — a context of precedents and general understandings that determine what effects the provisions will have.

³³ See, e.g., *Lochner v. New York*, 198 U.S. 45, 53–65 (1905). See generally RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).

³⁴ U.S. CONST. art. II, § 1, cl. 2.

V. CONCLUSION

Professor Fallon is right in saying that the term “legitimacy” is widely used in discussions about constitutional law, and he is also right in his tactful suggestions that the term is often used haphazardly, with no clear sense of what is meant. Professor Fallon’s terrific article goes a long way toward providing a clear sense of the term, and discussions of legitimacy and the Constitution would be immeasurably improved if those involved paid close attention to his analysis. For me, though, the crucial aspect of Professor Fallon’s account is the connection he suggests between legitimacy and obedience. To question the legitimacy of something — a constitution, a statute, a legal regime — is to question whether it is entitled to obedience. That is the central contribution of the notion of legitimacy.