

# The William B. Lockhart Lecture\*

## Consent, Contract, and Territory

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### INTRODUCTION

There is an obvious natural affinity between the theory of contract law and the political theory based on social contract or consent. Both reflect liberal premises; both treat voluntary assumption of responsibility as the central foundation of obligation. Both are theories of *exchange*; exchange of private property in the one context, and exchange of political rights and obligations in the other. Although one deals with political relationships and the other with legal ones, both are based on the obligated individual's promise. While the consent theory of political obligation is not founded literally upon any strictly legal obligation, it gathered strength historically in a society increasingly oriented towards the market transactions that made such legal obligations important.<sup>1</sup> Contract law and contractarian political theory came of age together.

Today, readers of legal and political theory face a veritable blizzard of writing linking various aspects of market and polit-

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\* This lecture was delivered on March 30, 1989 at the University of Minnesota Law School. The Lockhart Lecture Series honors former University of Minnesota Law School Dean William B. Lockhart.

\*\* Nathan Baker Professor, Yale Law School. The author wishes to thank a number of generous colleagues who read a draft of the manuscript: Akhil Amar, Jules Coleman, Bob Ellickson, Tony Kronman, Carol Rovane, Andy Rutten, and Peter Schuck. Rogers Smith's thoughtful written comments were especially appreciated, although they went far beyond anything that could adequately be accommodated in this article. In addition, thanks are owing to the faculty of the University of Minnesota Law School for their invitation to deliver the Lockhart Lecture, and to everyone who made my visit so enjoyable.

1. See generally M. LESSNOFF, SOCIAL CONTRACT chs. 2-5, 7 (1986) (discussing the history and context of the development of social contract theory); C. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM ch. 2 (1962) (same); Hopfl and Thompson, *The History of Contract as a Motif in Political Thought*, 84 AM. HIST. REV. 919, 919-31 (1979) (same).

ical theory. Some authors seek to explain political institutions in terms of consent or by analogy to market agreement.<sup>2</sup> Others use consent theory to explain how moral principles might be chosen.<sup>3</sup> John Rawls has almost singlehandedly inspired a cottage industry devoted to arguments about hypothetical contracts formed in a position of ignorance about one's own eventual position in society.<sup>4</sup> Perhaps because our society is so overwhelmingly liberal — when “liberal” is understood in the old-fashioned<sup>5</sup> sense of “voluntaristic” — our journals are dominated by articles exploring this or that aspect of consent or contract theory.

Much of this discussion seems to assume that as a private matter enforcement of contracts is relatively unproblematic. The assumption seems to be that if state power could be reduced to contract, it would be philosophically justifiable. The question then is simply whether this supposedly “unproblematic” contract theory explains the pattern of political obligations that the author in question wishes to generate. Lawyers and legal academics, however, should be more dubious. Contract theory is not unproblematic. There is extensive recent literature criticizing the normative assumptions underlying legal enforcement of market transactions.<sup>6</sup> Not surprisingly, this literature contains some arguments relevant to political theory relying on the contract paradigm.

One such argument, in particular, casts a rather long shadow over political theories based on contract or consent. “Contract” analysis assumes that there is already a prior assignment of entitlements so that the parties to the contract have something to exchange. An individual with no assets cannot acquire any through the process of contracting, because he or she

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2. See, e.g., J. BUCHANAN & G. TULLOCK, *THE CALCULUS OF CONSENT* ch. 3 (1962) (seeking to explain political institutions by analogy to market agreements); R. NOZICK, *ANARCHY, STATE, AND UTOPIA* ch. 7 (1974) (attempting to derive a political state from a social contract). For a collection of essays dealing with the interrelated issues of law, political theory, and contract reasoning, see J. COLEMAN, *MARKETS, MORALS, AND THE LAW* (1988).

3. D. GAUTHIER, *MORALS BY AGREEMENT* chs. 5-7 (1986).

4. The literature on this subject is enormous. See, e.g., C. BEITZ, *POLITICAL THEORY AND INTERNATIONAL RELATIONS* pt. 3 (1979) (applying Rawls's argument to the field of international law); Harsanyi, *Can the Maximin Principle Serve as a Basis of Morality? A Critique of John Rawls's Theory*, 69 *AM. POL. SCI. REV.* 594, 594-604 (1975) (criticizing Rawls's argument).

5. By “old-fashioned,” the author simply means to include free market theory as a liberal theory. Today, of course, many find market-based analysis to be “conservative.”

6. See, e.g., J. COLEMAN, *supra* note 2, pt. 2.

has nothing to bring to the bargaining table. This is a basic feature of the contractual process, and it is as applicable to the process of political exchange as it is to the exchange of private goods. The state must enter the bargaining process with assets that it did not acquire through exchange, assets obtained through some other means. Consent, therefore, cannot be used to justify state power as an initial matter.

To put this point another way, one consents to a transition from one state of affairs to another, rather than to a particular state of affairs as an absolute matter. Consent establishes only that an individual prefers the latter outcome to the earlier one, not that it is fair to hold the individual to either one. Consent is about making choices; the fairness of holding an individual to a choice made, however, depends on the legitimacy of limiting him or her to a particular set of choices. For a state to present a limited set of choices to an individual, such as choosing between assuming political responsibilities while remaining in the state and leaving the state, the state already must possess a certain amount of sovereign power over that individual. Otherwise an individual can choose to stay in the state without assuming political responsibilities.

Although one might attempt to demonstrate this point directly, there is an indirect approach that has the advantage of more clearly illustrating some concrete implications. Consent as a political theory and consent as a legal theory come together in one particular doctrinal context: jurisdiction. They intersect in the jurisdictional context because, while consent theory is used to justify the exercise of state coercive power — a classic issue of political theory — determining the outer reach of state authority is necessary to resolve a legal issue — the legitimacy of a state's acts that extend beyond its borders.<sup>7</sup> Focusing on particular issues of state or national jurisdiction poses questions of political theory in a concrete context. Certain of our intuitions, moreover, are more clearly developed in the setting of multistate affairs. Indeed, some conclusions from the literature criticizing free market exchange theory have already been noticed in the jurisdictional context.<sup>8</sup>

We will examine, then, three related areas in which consent plays a prominent role. Our focus will be on certain jurisdictional questions from conflict of laws, certain contractarian

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7. See generally L. BRILMAYER, JUSTIFYING INTERNATIONAL ACTS 13-27 (1989) (discussing political legitimacy and jurisdictional boundaries).

8. See text accompanying *infra* notes 21-22.

arguments from political theory, and certain theoretical observations about contract law. Drawing these three areas together demonstrates that consent cannot play the foundational role commonly assigned to it. This is true as a theoretical matter, and not just because it is implausible to believe that agreements sufficient to establish political obligations were actually made.<sup>9</sup> Consent is a seductive notion because it seems to rely on nothing but the parties' voluntary choice. In reality, however, it relies on much more. Consent relies on a prior assignment of entitlements or, in other words, on a prior identification of the available range of choices.

This reliance on initial entitlements is well known in the literature concerning market transactions.<sup>10</sup> It also is recognized in judicial opinions about consent as a basis for state court jurisdiction.<sup>11</sup> Yet, the point has apparently not been noticed in discussions of consent in political theory, where it is, nonetheless, of potentially great importance. The problem in that context is that both social contract and consent theory depend on a prior assignment of territorial sovereignty that cannot itself be justified in terms of consent. Furthermore, once such an assumption of territorial sovereignty is made, consent-based arguments become fairly superfluous. The role that voluntarism plays in consent theory is a thin one indeed.

The first part of this Article examines the three related areas of conflicts, political theory, and contracts, to highlight different aspects of consent theory. After outlining the general thesis about why consent cannot bear the theoretical weight assigned to it, this Article investigates consent-based arguments as applied to two specific problems. One of these applications is a strictly legal matter, namely, state court jurisdiction based upon consent. The other is primarily theoretical, although it also has legal ramifications; that problem arises in immigration law and concerns the status of the children of persons illegally

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9. It has been common since Hume to deny that individual consent could be inferred from the act of merely remaining in a state. *See, e.g.*, D. HUME, *THEORY OF POLITICS* 196-99, 203 (F. Watkins ed. 1951); Pitkin, *Obligation and Consent I*, 59 *AM. POL. SCI. REV.* 990, 994 (1965).

10. *See, e.g.*, J. COLEMAN, *supra* note 2, at 109 (stating that "[t]he system of wealth maximization . . . cannot provide a basis for an initial assignment of entitlements"); Kronman, *Wealth Maximization as a Normative Principle*, 9 *J. LEGAL STUD.* 227, 240 (1980) (stating that wealth maximization principles favor those who already have money); *see also* Goldberg, *On Positive Theories of Redistribution*, 11 *J. ECON. ISSUES* 119, 121 (1977) (arguing that one cannot talk about redistribution without a theory of initial entitlements).

11. *See, e.g.*, Sternberg v. O'Neil, 550 A.2d 1105, 1111 (Del. 1988).

present in the United States. These applications reveal the foundational problems with consent theory and show how consent-based arguments rely in fact on other hidden assumptions.

## I. ASPECTS OF CONSENT THEORY

### A. CONFLICT OF LAWS

Conflict of laws is a good place to start, because as a general matter, consent plays an important role in conflicts theory. Consent is important when the state attempts to assert personal jurisdiction; in such cases, consent may either be embodied in a private contract<sup>12</sup> or inferred from the defendant's behavior that subjects the defendant to state authority.<sup>13</sup> Consent arguments also arise in the enforcement of forum selection clauses<sup>14</sup> and in choice of law clauses in private contracts.<sup>15</sup> In addition, consent to a particular forum may play an important role in determining proper venue or deciding a *forum non conveniens* motion.<sup>16</sup>

Conflicts reasoning illustrates the potential practical applicability of consent theory. Take a relatively straightforward problem: a state ("the forum") attempts to exercise jurisdiction over an individual ("the defendant") by claiming that the defendant consented to its jurisdiction by entering the forum and committing a tort. This is an example of both contract reasoning — the defendant *agreed* to be subject to suit in the state — and a political theory of legitimate government — the state's power is legitimate because the defendant has consented. Consent is implicit: the defendant's entrance into the state amounts to a tacit voluntary subjection to state authority.

The theory of tacit consent, of course, is controversial. Ever since John Locke asserted that entering a state or remaining or residing within a state constituted tacit consent, political philosophers have attacked the plausibility of this inference.<sup>17</sup> State reliance on consent inferred from someone merely remaining in the state is particularly unrealistic. An individual's unwillingness to incur the extraordinary costs of leaving his or her birthplace should not be treated as a consensual undertaking to obey state authority. The implausibility of Locke's infer-

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12. *National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 313 (1964).

13. *Hess v. Pawloski*, 274 U.S. 352, 356-57 (1927).

14. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 17-18 (1972).

15. *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 187 (1969).

16. *Stewart Org., Inc. v. Ricoh Corp.*, 108 S. Ct. 2239, 2245 (1988).

17. See M. LESSNOFF, *supra* note 1, at 83-90.

ence of "tacit" consent, however, does not present the only basis for doubt.

When the state defends its exercise of jurisdiction in terms of the defendant's consent, its argument implicitly rests on an assumption that the state may legitimately demand consent to its authority as a condition of the defendant's entrance into the state. This implicit assumption amounts to a prior assumption of state territorial sovereignty. Only a state that has territorial sovereignty may condition entrance upon consent to obey the law. If the state already possesses territorial sovereignty, however, reliance on the defendant's consent, whether explicit or implicit, is unnecessary. Consent is largely superfluous; indeed, it only serves to mask the fact that territorial sovereignty provides the real basis for the exercise of personal jurisdiction. A variation of our initial simple hypothetical about personal jurisdiction illustrates this point.

Assume that the forum attempts to deduce consent from the defendant's entrance into a neighboring state and commission of a tort while present there. For example, the defendant enters into Wisconsin and Minnesota attempts to infer the defendant's consent to Minnesota authority from this act. Although Minnesota may infer the defendant's consent from entry into Minnesota, Minnesota cannot use entrance into Wisconsin to infer consent to Minnesota authority. There are limits on Minnesota's ability to infer consent.

Presumably, Minnesota cannot attach conditions to the defendant's entry into Wisconsin because entry into Wisconsin is none of Minnesota's business; conduct within Wisconsin is not within the scope of Minnesota's legitimate concern. In contrast, Wisconsin's use of entrance into its territory to infer consent to Wisconsin authority is unobjectionable. If a state's assertion of authority, however, is actually premised on the possession of territorial sovereignty over its land, justifying the state's authority in terms of consent is unnecessary. Instead the state simply could rely on territorial sovereignty directly. Consent is superfluous.

Civil procedure teachers will undoubtedly find this reasoning familiar. State court authority once was explained entirely in terms of territorial sovereignty; this was the reign of *Pennoyer v. Neff*.<sup>18</sup> As states sought to expand their authority to encompass individuals who could not be served within the

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18. 95 U.S. 714, 722-23 (1877).

state, they came to include among the bases for jurisdiction the individual defendant's consent.<sup>19</sup> Although consent sometimes was explicit, often the state simply inferred consent from the defendant's commission of a tort within the state. Nonresident motorist statutes, for example, declared that by driving into the state, a defendant consented to service of process on the local secretary of state.<sup>20</sup>

The United States Supreme Court rejected this legal fiction in *International Shoe Co. v. Washington*.<sup>21</sup> In *International Shoe*, the Court declined to frame the question of personal jurisdiction in terms of whether the defendant corporation had consented.<sup>22</sup> If the state did not have any legitimate power over the defendant's activities, it could not compel the defendant to consent to jurisdiction. If, on the other hand, the assertion of jurisdiction already was legitimate because it comported with standards of "fair play and substantial justice," the state's reliance on the fiction of consent was unnecessary.<sup>23</sup>

Ironically, since *International Shoe* the Supreme Court has had a difficult time defining when an assertion of jurisdiction is consistent with "fair play and substantial justice." The Court's initial efforts to define this standard involved inquiries into foreseeability and purposefulness,<sup>24</sup> but in the end, its analysis has returned to notions of territorial sovereignty.<sup>25</sup> The reason is clear. Even when it is completely foreseeable that a state will attempt to assert jurisdiction if one behaves in a particular manner, this does not by itself make assertion of jurisdiction fair. For instance, suppose Minnesota, in our earlier hypothetical, publicly declared it would assert jurisdiction over anyone who entered Wisconsin. Although Minnesota's assertion of jurisdiction would clearly be foreseeable, this would not make jurisdiction legitimate. Territoriality cannot be escaped by framing the issue in terms of foreseeability, purposefulness, or consent.<sup>26</sup>

Whether to infer consent is more complicated than first ap-

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19. See, e.g., *Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93, 94-96 (1917) (upholding nonresident corporation statutes).

20. See, e.g., *Hess v. Pawloski*, 274 U.S. 352, 354 (1927).

21. 326 U.S. 310 (1945).

22. *Id.* at 318.

23. *Id.* at 316.

24. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295-98 (1980).

25. *Id.*

26. See generally L. BRILMAYER, *supra* note 7, at 60-68 (arguing that theories akin to foreseeability, purposefulness, and consent presuppose sovereign boundaries).

pears. An inference of consent typically involves the application of a legal rule establishing that certain conduct constitutes consent. The application of such a legal rule is itself an exercise of political sovereignty. A closer look at some consent decisions illustrates how consent theory requires application of a state's legal rules to determine whether an inference of consent is permissible. In *National Equipment Rental, Ltd., v. Szukhent*<sup>27</sup> the Supreme Court upheld an assertion of New York jurisdiction premised on a contractual provision stipulating that the wife of one of the plaintiff's employees would serve as the defendant's agent for service of process in New York.<sup>28</sup> "Agency," however, is a legal, not a factual, conclusion. In his dissent Justice Black challenged this supposed agency relation, arguing that this appointment did not constitute a valid agency under either the agency law of New York or the Federal Rules of Civil Procedure.<sup>29</sup> The majority's inference of agency was not simply a value-free acknowledgment of an obvious fact. Rather, deriving the defendant's consent to jurisdiction from the contractual stipulation required application of some rule of law.

Similarly, in *The Bremen v. Zapata Off-Shore Co.*,<sup>30</sup> the Court upheld a contractual forum selection clause even though it acknowledged that such clauses might be invalid when part of an adhesion contract.<sup>31</sup> The determination that some instance of consent is legally adequate necessarily requires application of subsidiary contract principles to ascertain whether the written agreement effectively expressed such consent. In *Phillips Petroleum Co. v. Shutts*,<sup>32</sup> the Court upheld jurisdiction premised on a Kansas class action rule that required plaintiffs to opt out if they did not wish to be part of a nationwide class action.<sup>33</sup> Again, this conclusion does not result from a neutral determination of the parties' actual wishes. The Court's inference is a legal one, and not a factual one. Indeed, the Court's determination conflicts with the usual rules about how consent is to be expressed, for as a matter of contract law, silence usually does not constitute consent.<sup>34</sup>

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27. 375 U.S. 311 (1964).

28. *Id.* at 313.

29. *Id.* at 321-29 (Black, J., dissenting).

30. 407 U.S. 1 (1972).

31. *Id.* at 17.

32. 472 U.S. 797 (1985).

33. *Id.* at 806-14.

34. See 1 A. CORBIN, CONTRACTS § 72, at 304, § 73, at 310 (1963).

By the same token, theories of "waiver" of objections to state jurisdiction depend on legal conclusions; they are not simply value-free factual inferences. An inference of waiver typically involves the application of a procedural default rule. Perhaps most intriguing is the Supreme Court's decision in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*.<sup>35</sup> In this case, the defendant challenged the court's personal jurisdiction and the plaintiff sought discovery on this issue. When the defendant refused to respond to discovery, the trial court sanctioned the defendant by imposing an adverse finding on the factual issues for which the defendant did not provide information.<sup>36</sup> The court thus effectively subjected the defendant to its adjudicative jurisdiction for failing to provide discovery. On appeal, the defendant argued it should not be sanctioned for failing to obey the court's orders because it was not properly subject to the court's authority.<sup>37</sup> The Supreme Court, however, was not persuaded that there was a problem with the way the forum "bootstrapped" itself into authority.<sup>38</sup>

Such bootstrapping is nearly unavoidable where jurisdiction is premised on consent or waiver. The application of a legal rule is necessary to find an effective expression of consent or a valid waiver. There must be a good basis, therefore, for holding the defendant to the particular rule inferring such waiver or consent. If the forum merely applies its own waiver or consent rules, and then uses the waiver or consent to justify its adjudication of the case, its reasoning is circular. It uses its authority to infer consent, and thus to rationalize its own exercise of authority.

The same circularity is involved in inferring consent from the defendant's entrance into the forum and commission of a tort. Inferring consent from the defendant's activities involves attaching conditions to the activities that he or she engages in. Attaching such conditions involves the exercise of sovereign authority. The forum does not simply make a factual inference about what the defendant intended; indeed, the defendant may have given ample objective evidence of his or her intent not to be bound.<sup>39</sup> In the case of deducing consent from entrance into

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35. 456 U.S. 694 (1982).

36. *Id.* at 699.

37. *Id.* at 706.

38. *Id.* at 694.

39. This is certainly true in the *Insurance Corp. of Ireland* case, where the defendant was in fact litigating the issue of personal jurisdiction at the time that the inference was made. *Id.*

the state, a specific sort of inference is involved. Rather than inferring consent from contract stipulation, failure to respond to discovery request, or silence in the face of an "opt-out" notice, the state infers consent from the defendant's coming within its geographical boundaries. Although consent arguments always require some legal norm to support the inference, the territorial nature of the inference is clearest when consent relies on entrance into the state. Entrance signifies consent only because it is generally understood that states possess sovereignty over their geographical territory.

Of course, in the conflicts context, the state's sovereign authority is relatively unproblematic: jurisdictional due process is analyzed against a constitutional backdrop that clearly recognizes the territorial legitimacy of both the separate states and of our nation-state as a whole. The problem remains that when the state already possesses authority over the individual, it is unclear why a consent argument is necessary or illuminating. The state instead can base its exercise of authority directly on the individual's presence within the scope of its legitimate power. This foundation, however, is apparently lacking when one moves from the legal context, where the states' territorial legitimacy is taken for granted, into the context of political theory. A primary function of political theory is to explain how and why states come to have sovereign powers in the first place.

## B. POLITICAL THEORY

Although we initially phrased these arguments in jurisdictional terms — in the context, that is, of interstate relations — they are equally applicable to consent-based explanations of the state's purely domestic coercive power. As our reference to John Locke illustrates, consent has been thought by many political philosophers to be an important element of the state's legitimate power over its own people within its own territory. The Western liberal democratic tradition, in particular, regards the voluntary assumption of citizenship responsibilities as the best explanation of the state's right to rule.<sup>40</sup> Since Locke, many theorists have attempted to explain government authority in terms of such consent, whether express or tacit.<sup>41</sup> Some-

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40. See, e.g., Pitkin, *supra* note 9, at 990 (arguing that consent is the most commonly offered answer to the question of political obligation).

41. Thomas Hobbes was one of the first proponents of a contract approach to political obligation; Jean Jacques Rousseau and Immanuel Kant also made

times the state's power is explained simply by the individual's consent to an existing state's authority; in the alternative, such power can be explained as a social contract to form a state in the first instance. For purposes of terminological clarity, we will call the former *consent* theory and the latter *social contract* theory. Both are contractarian, but in the former, the contract is with an existing state, while with the latter, the contract is with a group of other people prior to state formation.

Once the difficulties with establishing consent-based arguments in the multi-jurisdictional context are recognized, the difficulties in using such an argument domestically also become apparent. We can start with the notion of consent to an existing state, and take up social contract explanations later. Consent, whether express or tacit, apparently turns on prior assumptions about territorial sovereignty. To use John Locke's example, if England did not have territorial sovereignty, it could not infer the obligations of English subjects from their residence or entrance upon the land.<sup>42</sup> First consider express consent. Even if persons expressly promised the King of France that as a condition of entering or remaining in England they would abide by French law, this does not create an obligation to obey.

The same is true when consent is tacit or hypothetical. When consent is tacit, France simply cannot infer from entry into or residence in England that persons are obliged to support the French government. Proving hypothetical consent without a prior assignment of territorial sovereignty is even more difficult than showing express consent. Rawls, for example, asks what would constitute a fair political society that persons would agree to be part of under appropriate circumstances for reflection.<sup>43</sup> A sufficiently fair society is one that would command hypothetical consent. This hypothetical consent, however, requires a prior division into territorially sovereign states; in a world divided into a number of equally fair governments, the mere substantive fairness of a state provides no way of knowing which state the individual is obligated to obey.<sup>44</sup> There is no obligation to obey all sufficiently just governments simply because each is fair enough that a person would have agreed to

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important contributions, as have Robert Nozick and John Rawls in recent times. See M. LESSNOFF, *supra* note 1, chs. 5, 7.

42. See L. BRILMAYER, *supra* note 7, at 60-62 (discussing Locke's theory).

43. J. RAWLS, A THEORY OF JUSTICE ch. 1 (1971).

44. See A. SIMMONS, MORAL PRINCIPLES AND POLITICAL OBLIGATIONS 31-35 (1979) (discussing "particularized" obligations).

obey it behind a veil of ignorance. Under such a theory, an individual would be obliged to obey all just governments equally.<sup>45</sup>

Our conflict of laws analysis reveals that consent arguments depend on some prior assignment of territorial sovereignty. The same is true when the state's underlying legitimacy is examined. In this context, however, the problem is far more serious because here the very question is the legitimacy of the state's authority in the first instance. For jurisdictional purposes we simply assumed that the state's territorial authority was legitimate; now we must ask about the legitimacy even at the territorial core. Multistate authority in the conflicts context is derived from the state's sovereignty over its land. In the political theory context, however, it begs the question to derive the state's initial claim to assert authority from the state's territorial sovereignty.

In other words, in the absence of any prior assumption of the state's legitimate power, the state cannot rely on territorial sovereignty to justify its power over people. Some prior assignment of territorial power is necessary to establish power over people under a consent theory, but how can this initial assignment itself be justified? We will refer to this problem as "the bootstrapping objection" because most consent arguments presume the very state power that they attempt to justify. The state merely bootstraps itself into authority by inferring consent from the individual's entering or remaining within the state's legitimate sphere of territorial authority. The consent argument ultimately turns on the state's power to regulate — the power to exclude or to attach conditions to entrance. This, however, poses a seemingly insoluble problem. How can the state ever come into being through consent when it must already possess power before consent can be established?

Certainly some authors do attempt to describe how a state can be formed from scratch, without any prior assumption of authority.<sup>46</sup> To better understand such efforts we must turn to the second sort of contractarian argument, namely, the social contract between a group of private individuals. Up until now, we proceeded as though the individual had a direct agreement with the state, a public contract between the individual citizen

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45. Rawls would require only that one support all just institutions "that apply to us." J. RAWLS, *supra* note 43, at 334. His lack of clarity on this point is discussed in A. SIMMONS, *supra* note 44, at 147-52.

46. See *infra* notes 47-55 and accompanying text.

and the state. In this form, the consent argument is most vulnerable to the "bootstrapping objection." There is, however, another explanation why consent provides a basis for sovereign authority. The consensual agreement need not exist between the individual and the state, but rather among all involved individuals. Instead of a public contract with the government, one privately agrees with other individuals to form the state. This distinction between consent and social contract is analogous to the distinction between different types of consensual arguments for jurisdiction in the legal context. The jurisdictional argument that the individual submits to the state by entering onto its territory corresponds to consent theory. The argument that the individual consents to the state by contractual provisions in a private agreement with another individual, however, corresponds to social contract theory.

One of the best known recent attempts to derive the political state from social contract is Robert Nozick's argument in *Anarchy, State, and Utopia*.<sup>47</sup> Nozick explains how a group of individuals living in a state of nature might join together and establish a government by agreement.<sup>48</sup> His account is reminiscent of Hobbes.<sup>49</sup> In a similar vein, David Gauthier has sought to derive familiar moral principles from hypothetical consensus in a state of nature.<sup>50</sup> Arguments based on social contract theory seem better situated to avoid the bootstrapping objection than consent-based arguments. Rather than relying on an agreement between an individual and a theoretical entity whose legitimate existence has not yet been justified, social contract theory hypothesizes an agreement between two or more equal individuals. One individual agrees to respect the state that is about to be created as long as the others do. Because no one has a prior obligation to obey the state, each individual can assume a new obligation in exchange for the others doing so.

The social contract theorist might respond to the bootstrapping objection in the following way. "Yes," she might admit, "the consent theorist presumes the existence of a legitimate state that can bargain with an individual and obtain his or her consent. The consent theorist takes this important fact for

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47. R. NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974).

48. *Id.* ch. 2.

49. See T. HOBBS, *LEVIATHAN* ch. 17 (1651). For a recent effort to develop Hobbes's thinking through the use of game-theory techniques, see J. HAMPTON, *HOBBS AND THE SOCIAL CONTRACT TRADITION* ch. 6 (1986).

50. D. GAUTHIER, *supra* note 3, chs. 6-7.

granted, and therefore begs the question. In contrast, social contract theory explains how states first come into being. Social contract theory does not assume the existence of a legitimate state, but instead justifies a state as the product of private agreement in a state of nature." The social contract theorist might add that once a legitimate state is formed, it can use consent theory to justify its powers over persons who either are born in the state or enter the state's territory at a later date.

Whether such a social contract theory escapes bootstrapping objections depends on the nature of the state that is created. Nozick's apparent goal is to justify the existence of the sort of territorial nation-states that we normally take for granted — although Nozick's state possesses admittedly minimal powers.<sup>51</sup> If justifying this type of state is the object, the problem of prior assumption of territorial sovereignty remains unresolved. Nozick's analysis does not answer the question of how the individuals who initially set up the state possess the requisite territorial sovereignty over the particular landmass. Territorial sovereignty is still assumed, although it is assumed at the initial stage to be in the hands of individuals rather than vested in the yet-to-be created state.

To see why social contract theory necessarily involves an assumption of territorial sovereignty, consider how nation-states are thought to emerge. How does a state created by a group of individuals come to claim authority over land that is the functional equivalent of territorial sovereignty? Perhaps the response to this question relies on the fact that this group of individuals started out with some sort of ownership rights to the land. This requires that some notion of ownership already exist; and acquisition of property is itself a problematic notion.<sup>52</sup> But that is another matter. Perhaps establishing ownership rights is easier than justifying the territorial sovereignty of governmental authority. Let us start, then, with a group of neighborhood people who all own land and get together to create a sovereign state. We can imagine them exchanging vows of obedience so that the new entity they create can function as a legitimate territorial government.

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51. Nozick claims, for instance, that a private protection scheme falls short of constituting a state because it does not have a monopoly of force in a particular territory. R. NOZICK, *supra* note 2, at 51. On his preference for a minimal state, see *id.* at 144-296.

52. Nozick recognizes this clearly. See *id.* at 174-78. See also L. BECKER, PROPERTY RIGHTS: PHILOSOPHICAL FOUNDATIONS 32-48 (1977) (criticizing Locke's labor theory of property acquisition).

The transition from property ownership in private hands to territorial sovereignty in the state's hands, however, is somewhat mysterious. Territorial sovereignty and property ownership are not necessarily the same thing. It is possible for sovereignty to be vested in one entity's hands, while property ownership is vested in another's. For example, New York's purchase of property in Connecticut does not make New York sovereign over that land.<sup>53</sup> Connecticut, not New York, possesses the right to tax and regulate the property. Admittedly the precise difference between ownership and property is difficult to articulate. The distinction probably depends on one's idea of property and one's idea of sovereignty, and both of these concepts no doubt have changed in content historically. Territorial sovereignty, however, clearly includes the right to regulate persons within the state's territory, for instance by applying local criminal law. It includes, as Nozick argues,<sup>54</sup> the ability to create a monopoly of force upon a particular piece of land.

Territorial power must also encompass the right to regulate nonsignatories to the agreement. Nozick for instance recognizes the need to bind dissenters or holdouts, and seeks to explain why this regulation is fair.<sup>55</sup> In addition, the new state, if it resembles contemporary state institutions, must be able to make the original agreement not only irrevocable but also binding against future property holders. The power that Nozick seeks to vest in nation-states is, in this respect, quite substantial. The state is presumed to have these sovereign powers by the end of the social contract process. How does the state acquire these powers? Can such powers be granted by private individuals who merely have private ownership rights?

Perhaps the property rights of the original participants already include such legitimate powers.<sup>56</sup> If so, then at the time

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53. See, e.g., *Georgia v. Chattanooga*, 264 U.S. 472, 480 (1923) (holding that land one state owns may be subject to eminent domain power of another state).

54. See generally R. NOZICK, *supra* note 2, at 108-10, 113-18 (explaining how independents might come to be included within the private protective association that is dominant within a territory, so that the private association might come to have a monopoly).

55. *Id.* at 108-10.

56. Nozick, for example, states that "[t]he *rights* possessed by the state are already possessed by each individual in a state of nature" and adds that there are no rights unique to states. *Id.* at 118. On the other hand, he does not seem to believe that an individual has sovereign rights over his own property — he seems to envision governmental units having some minimum size or popula-

the social contract is entered into, they might retain mere ownership rights but cede the territorial sovereignty to the new state. For individuals to transfer such powers to the newly created state, however, they must possess something rather like territorial sovereignty over their initial holdings. This assumes, however, that prior to state formation there existed in essence a group of small kingdoms with each owner of territory essentially possessing governmental power over his or her property. Merely locating territorial sovereignty in human hands does not solve the problem of identifying the initial source of territorial sovereignty. In a monarchy, all governmental power is vested in the hands of a single person but the problem of the initial assignment still exists. An individual must possess sovereignty before he or she can extract consent from persons that enter onto the territory. The social contract theory assumes a human being possesses such sovereignty and thus, ultimately, encounters the bootstrapping objection.

The bootstrapping problem arises because bargaining necessarily occurs between an individual and some other entity that already possesses the power to regulate or exclude. Whether the bargaining entity is human, social, or bureaucratic is unimportant because consent-based arguments do not justify the vesting of territorial sovereignty in the hands of any entity. Although the line between what constitutes ownership rights and what constitutes sovereignty rights is difficult to draw, basing *sovereignty* on an agreement among property *owners* does not explain how the owners can grant more power than they possess. If ownership does not include sovereignty, the owners cannot grant the new state a power over others that the owners do not possess. If ownership does encompass this power, the individual owners already enjoy full sovereign powers over their land and this sovereignty itself must be explained.

These bootstrapping objections to contractarian formation of a government do not necessarily arise when parties create governmental entities that lack territorial status. One might, for instance, agree with another individual that in the event of a dispute both will submit to binding arbitration. Although the arbitrator's authority is established by consent, its authority is not territorial. In such cases, only the actual participants are bound; the extent of authority is not defined territorially. Simi-

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tion. *Id.* at 117. It is not clear, therefore, whether Nozick believes that territorial sovereignty is unique to the state or whether it is also possessed by individuals.

larly, through a forum selection clause, two individuals might agree to submit their dispute to a judicial decision maker in a particular state's courts. Neither of these devices, however, explains the origin of territorial nation-states: territorial nation-states cannot be established without a prior showing of territorial sovereignty.

Furthermore, consent does not establish territorial sovereignty. In most instances, territorial sovereignty is established by sheer force or power, although it occasionally results from the sale or exchange of territory.<sup>57</sup> If one's obligation to obey one's state depends on territorial sovereignty, the role consent plays becomes exceedingly thin. Territoriality instead occupies the crucial role and consent arguments become superfluous. The reasons why this consent problem arises in the political theory context are revealed by examining the foundations of contract law.

### C. CONTRACTS

The problem with developing a consent-based approach to state authority is endemic to the theory of contracts and markets. Like consent theories of jurisdiction and social contract or consent theory of state political authority, contract law depends on the logic of exchange and mutual advantage. Justification for private contract or market theory can be found in the fact that contract involves exchange in which each side voluntarily assumes obligations in order to obtain some advantage from the other.<sup>58</sup> After the exchange, each side supposedly is better off because each used the bargain to improve his or her situation.

This, at least, is the main contracts paradigm. Today, this paradigm is associated with the law and economics perspective. The justification for a market system is derived from the consensual nature of market transactions, but not every aspect of a market system is a product of consent. In particular, contractual exchange depends on every participant having something to exchange. This results in two related difficulties.

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57. See generally L. BRILMAYER, *supra* note 7, at 75-78 (discussing the difficulty of justifying a distribution of territory that was, historically, a product of force).

58. Not all contracts specialists analyze contractual relationships in terms of exchange. See, e.g., C. FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 1-17 (1981) (analyzing contract formation in terms of moral obligations).

First, the individual who has nothing of market value can obtain nothing in exchange, because he or she cannot find a trade to make. One's ability to participate in exchanges depends upon one's initial assignment of property rights. Second, this initial assignment of property rights is not derived from the participants' consent. It antedates consensual transactions, and cannot be justified in market terms. Combined, these two observations suggest that even if the overall contracts paradigm is found persuasive, the eventual distribution of property in society does not result entirely from consensual behavior. The initial allocation of property is determined in some other manner, and at best, subsequent consensual exchanges dilute the effect of that initial distribution. At worst, the subsequent consensual exchanges may have no effect on original inequities, or may under certain circumstances make the inequities worse.<sup>59</sup>

The private market problem of the initial distribution of goods is structurally analogous to the problem of consent-based approaches to political authority. Consent or social contract theories of the state depend on the state having initially been granted territorial sovereignty. If consent theories are based on exchange, each individual must receive something in exchange for incurring a political obligation. The state must, therefore, start out having something to trade. This problem is a feature of voluntary exchange transactions generally, rather than of consent theories of jurisdiction or political theory specifically. Our critique of consent theory is essentially a critique that has been leveled against the law and economics school.

In some respects, in fact, the critique is far more powerful when leveled against consent-based theories of government than when leveled against market exchange theory in general. The reason has to do with the way that consensual transactions tend to dilute the effect of the initial distribution of goods over time. A market system requires an initial assignment of property rights for exchange to take place. This initial assignment determines to some extent the subsequent transactions that occur and the eventual distribution of property. The eventual distribution is thus a product of two things: the initial distribution and the subsequent history of trading.

One might illustrate the respective roles of these two elements by analogy to a card game. Imagine a game in which the

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59. For example, if one of the parties has a monopoly of a good that is necessary to another's survival, that party might take advantage of this situation.

dealer distributes five cards to each player, each player adds up the total face value of his or her hand, and the winner is the player with the largest number of points. In this game, the identity of the winner is uniquely determined by how the cards are originally dealt. Contrast this game with a more complicated (and interesting) game such as bridge or poker. In bridge or poker the hand initially dealt to each player influences the course of play, and the eventual outcome of the game is in part a product of the original deal. There is much room, however, for skillful maneuver, and the abilities of the players as well as the initial distribution of cards determine the winner. The relative roles of initial assignment and subsequent transactions in particular card games are a matter of degree and are determined by the games' rules.

I would argue that the private market for goods is analogous to the latter, more complicated game while the "market" for consent to state authority is analogous to the more deterministic game. In the political market, bargaining individuals do not alter the initial assignment of territorial sovereignty in the course of making exchanges. When an individual agrees to obey state authority in exchange for entrance into the territory, the state does not relinquish any of its sovereignty to the individual. The state retains the same amount of sovereignty over its territory after the transaction as before. The effects of the initial distribution in the political market are not diluted because the elements assigned in the initial distribution do not change hands.

The political market is a market in which the initially assigned rights and goods are not freely alienable. Thus, a better analogy than a free market in goods would be a hypothetical rental market in which the landlords are allowed to rent, but not to sell, their rental property. In this hypothetical market, the landlord class is fixed, and tenants may negotiate with different landlords. Tenants do not bargain with landlords for ownership rights, however, and at most receive the right to use particular pieces of property. Exchanges may take place between landlords, just as nation-states may exchange particular portions of their territory, but tenants themselves never come to own property outright. The basic contours of the distribution — the delineation into two classes, each with a distinctive type of property — remains unchanged.

We should examine at this point one possible objection that is suggested by our analogy between contract enforcement

and social contract theory. One might object that consent theory is based on a theory of gratuitous promise. Contract law itself suggests that there may be differences between gratuitous promises and legal obligations based on mutual exchange.<sup>60</sup> Our earlier analysis of consent and social contract theory required the equivalent of consideration on both sides.<sup>61</sup> When the analysis involves an exchange, both parties to the exchange must bring something to the bargaining table. This is where the problem arises in consent and social contract theory. Either the nation-state or the collected citizens must possess some power over the would-be entrant, such that there is something to offer the individual in exchange for his or her promise to obey. This power, however, arises out of pre-existing territorial sovereignty, not consent.

Focusing on an individual's gratuitous promise of obedience might avoid this territoriality problem. Under a gratuitous promise model, the state does not need anything to offer in exchange. Although contract law generally does not accord legal enforcement to gratuitous promises, it does not deny their moral status. Political philosophers, moreover, are not bound by the vagaries of consideration doctrine. Gratuitous promises thus may provide a possible basis for moral and political obligation.

To frame the problem this way, however, is to highlight the potential theory's difficulties. When the basis for moral and political obligation moves away from the bargain model, two difficulties arise. First, people are unlikely to gratuitously enter such an agreement and, second, if they did, its terms might be unfair. Certainly, some individuals may gratuitously promise to obey the state; some, however, may not. What can the state do about holdouts? Under a gratuitous promise theory the state cannot exclude holdouts from the territory or otherwise bribe or threaten them into obedience. Setting aside the problem of holdouts, how does the state even know which individuals agreed and which did not? Consent theory uses territoriality both to define the benefits the state has to offer and to distinguish which individuals tacitly consented to state authority. Under a theory of gratuitous promise, receiving benefits cannot determine which persons consented because the

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60. Most contracts under common law are supposed to be supported by consideration. See 1 A. CORBIN, *supra* note 34, § 110, at 490-91, § 114, at 498.

61. "Consideration" is the benefit that is sought or detriment that is undertaken through the process of mutual exchange. *Id.* § 110, at 491-93.

state has no benefits to bestow. Territoriality also is essential, therefore, under a theory of gratuitous promise. Unless the individual explicitly agrees — and this is not likely in very many cases — the state cannot, absent a prior assignment of territorial sovereignty, ascertain whether an implicit promise ever was made.

Even if a gratuitous agreement took place, the fairness of enforcing such an agreement is unclear. A gratuitous agreement is one-sided and therefore seems potentially unfair even if express consent exists. Contract law certainly deems extremely one-sided contracts suspect under the doctrine of unconscionability.<sup>62</sup> Although social contract theorists are not bound by the contours of American contract law, the moral reasoning underlying the unconscionability doctrine should have some application to gratuitous contracts in the social contract context. Why should a one-sided promise to obey the state be enforceable?<sup>63</sup>

## II. CHOICE AND CONSENT

Consent is a seductive notion because it seems to explain obligations in terms of the obligated individual's voluntary choice. By focusing on choice, however, consent theory discourages analysis of an unresolved and important problem: how did the individual come to have that set of choices and not another? The set of choices available to any individual engaged in bar-

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62. See, e.g., U.C.C. § 2-302(1) (1989) (stating that courts may refuse to enforce unconscionable contracts).

63. Here we encounter something of a paradox. On the one hand, it seems that a bargain that offers little advantage to the individual might be suspect, precisely because it is one-sided. A fairer agreement would be one that offers the individual a substantial benefit. On the other hand, to the extent that the agreement is obviously of great advantage to the individual, the assumption that the agreement is a product of true choice is somewhat undercut. This is particularly true in the international context, for the great advantage to be achieved by entry into a particular state may in some cases tend to show duress.

Consider, for example, an individual's decision to seek entry into the United States. If the individual is persecuted in her home state, then obviously there is a very great incentive to seek refuge elsewhere. Precisely because she would be so greatly advantaged by entry into the United States, we might think that her agreement to obey United States law might be unenforceable for reasons of duress. On the other hand, to the extent that it makes little or no difference to her whether she is admitted to the United States, this undercuts the argument that it is fair to hold her to her agreement because of the benefits that she received.

gaining is a function of the prior assignment of rights and obligations that all other participants bring to the bargaining table.

The set of choices is determined by the prior assignment of rights because it includes only choices that are advantageous to all participants. If all transactions must be consensual, then the range of available alternatives includes only transactions that are advantageous to both parties to the transaction. "Advantageous," furthermore, means *at least as generous* as the current assignment. A set of choices is not advantageous if all alternatives make the individual worse off. This is true even though the individual "has been given a choice." Merely giving an individual a choice between alternatives seems to show that a true choice has been offered, and that the individual's chosen alternative results from consent. Yet, if all alternatives offered are less attractive than the individual's current assignment, allowing the individual to select the least undesirable alternative does not mean that the individual consented.

Two implications follow. First, when an individual and the state enter into an exchange relationship, the state constrains the individual's set of choices because the only choices available are transactions advantageous to the state given its initial assignment of territorial sovereignty. Allowing an individual to choose among available options does not make the state's ability to limit the range of choices a product of consent as well. In this respect, consent or choice plays a limited role in justifying particular exercises of coercive power. When an individual selects one alternative over another, the imposition of that alternative initially seems explainable in terms of choice or consent. For example, an individual's decision to leave one state for another may express a preference through exit or entrance.<sup>64</sup> Emigration, however, is very costly, and one's choice to remain may only show that changing states is not worth the price. Moreover, if all other states have the same objectionable features, an individual who remains in the state does not really *choose* to put up with these features. The individual's choice of one alternative over another is a function of the range of available alternatives, and the state, by restricting these choices, already exercises its sovereign prerogative.

The second implication is that the state cannot argue that an individual *absolutely* consents to anything. Phrasing things in terms of choice highlights the fact that preferences and agreements are relative. An individual consents to a transition

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64. See A. HIRSCHMAN, EXIT, VOICE, AND LOYALTY 96-98 (1970).

from one position to another to improve his or her condition but does not thereby consent to the subsequent position in the abstract. As a political theory, consent justifies moving from one distribution of assets or power to another based on the individual's consent to alter the distribution. Choice and consent, however, are relative and not absolute concepts. Consent cannot justify a state of affairs as an absolute matter, because an individual's consent to some particular state of affairs turns only on whether it is preferable to the status quo. Consent is a process value,<sup>65</sup> not a justification of a particular state of affairs.

These two observations often are overlooked; it is sometimes assumed that a given state of affairs is consensual merely because a choice was offered. In the 1960s, bumper stickers declared "America: Love It or Leave It." The underlying assumption was that it was legitimate to limit the available alternatives to being loyal to the United States as it was, or leaving the country. An individual who chose to stay in the United States, therefore, promised loyalty to existing institutions. Although representing a somewhat primitive form of the logic, this bumper sticker is a version of the argument from tacit consent. In both situations, the individual is denied the most desirable choice: remaining in the country while denying the legitimate right to govern of existing institutions.

The characterization of available alternatives as offering a free choice depends on whether one should concede the right of the other participants to structure the range of choices. Why should a nation be able to demand obedience in exchange for an individual's entrance into or residence within the country? The state asserts a sovereign prerogative by claiming that an obligation of loyalty follows from an individual's entrance or residence. The individual is denied certain options because they are not attractive to the state. This is acceptable if the state starts out with certain sovereign or property rights; rights to narrow the range of choices. If both participants initially possess rights against the other, the situation is symmetric; each has the authority to narrow the range of choices because the bargain must be advantageous to both sides. Consent arguments, however, cannot establish this sovereign prerogative in the first instance. It remains for us to come to grips with such

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65. For a general discussion of process values see J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 73-179 (1980), and Summers, *Evaluating and Improving Legal Processes—A Plea for "Process Values,"* 60 *CORNELL L. REV.* 1, 1-52 (1974).

assumptions generally, to evaluate their normative acceptability and outline their normative foundations.

### III. APPLICATION OF CONSENT-BASED ARGUMENTS

Consent theory focuses on the choice made after the set of choices is already structured. This observation casts doubt on arguments purportedly based on nothing more than the parties' voluntary submission to state authority. The arguments previously set out regarding consent and territory are potentially relevant to a number of different areas. One of these areas is jurisdiction in the usual technical sense: whether a particular court has the adjudicative authority to entertain a dispute. In some cases the parties' obligations really can be established by consent — primarily cases involving private contracts — but in most other situations, consent masks the true rationale: territoriality.

Another area is immigration law; recent arguments suggest that liberal, consensual, notions of political theory should inform our immigration policies.<sup>66</sup> In both of these areas consent-based arguments are quite misleading. Consent is an important concept in many areas of law and legal theory, and these examples illustrate the broad applicability of consent arguments as a basis for authority.

#### A. PERSONAL JURISDICTION

The earlier discussion outlined how consent theory has been used to justify the assertion of state authority.<sup>67</sup> We can differentiate between private and public agreements to submit to a particular state's adjudicative jurisdiction because the implications of consent theory for jurisdictional problems depend on the precise source of the consent. Private stipulations to submit to a state's jurisdiction are agreed to in the context of contractual relations between private persons. Public agreements are relations between an individual and a state that ostensibly constitute the individual's consent to state authority.

Private agreements to submit to a state's jurisdiction are very different from public agreements. Private consensual submissions to jurisdiction may result from a genuine exchange and should be accorded greater deference than public ones.

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66. See P. SCHUCK & R. SMITH, *CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY* 116-40 (1985).

67. See *supra* notes 40-57 and accompanying text.

Although private exchanges sometimes involve an imbalance in the parties' bargaining power, often they do not. A contractual stipulation is an actual (as opposed to a tacit or hypothetical) agreement, and it also avoids the bootstrapping objection. The bootstrapping problem is more severe in the public context because an assumption of state authority must precede the state's ability to make concessions. In the private context, however, the concession is an exchange of property — the jurisdiction selection clause is agreed to in exchange for a lower price or some reciprocal concession. Thus, in the private context, the forum's argument for authority is based on a prior assumption of the contracting parties' property ownership, rather than on a prior assumption of state authority. Although the concept of property ownership is philosophically troublesome, it avoids rationalizing state authority by an assumption of state authority.

Despite this fact, the inference of consent from a private contractual relationship nonetheless has problematic aspects. Private contracts do not simply interpret themselves without the aid of law. In particular, the apparent simplicity of the inference of private consent is misleading. Although interpretation of a contractual relationship at first might appear to involve nothing more than a factual inference, in reality, more complicated legal assumptions also are at work. Perhaps the best example of the need for legal assumptions concerns adhesion contracts.<sup>68</sup> Although adhesion contracts and contracts resulting from fraud or overreaching generally are not enforced,<sup>69</sup> the line between enforceable and unenforceable contracts is difficult to draw.<sup>70</sup> Some source of legal standards is necessary, therefore, to show where the line should be drawn.

In addition, assumptions about agency such as those pres-

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68. An adhesion contract is a "take it or leave it" contract where one side sets all the terms; such contracts often are a product of unequal distribution of bargaining power. 3 A. CORBIN, *supra* note 34, § 559, at 271 n.20, § 559, at 262.

69. *See, e.g.,* *Sherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 n.14 (1973) (stating that courts will not enforce contract clause that results from fraud); *Morton v. Zidell Explorations, Inc.*, 695 F.2d 347, 351 (9th Cir. 1982), *cert. denied*, 460 U.S. 1039 (1983) (stating that courts will not enforce contract clauses that result from overreaching); Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1195 (1983) (stating that the modern trend is for courts to decide in favor of the adhering party).

70. *See, e.g.,* *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 18 (1972) (suggesting that a court might not honor an inequitable forum selection clause).

ent in the *Szukhent* case are based on norms of agency law.<sup>71</sup> In *Szukhent*, the defendants by contractual stipulation had appointed the plaintiff's wife as their agent for service of process.<sup>72</sup> Even if the conclusion that the plaintiff's wife was the defendant's agent had been factually unimpeachable — and it was not — this does not obscure the necessity for legal assumptions to infer the defendant's consent in this manner. By the same token, imputing consent through other legal connections, such as corporate relationships or conspiracies, is not a simple factual inference but requires a legal conclusion.<sup>73</sup> Unfortunately, courts often address such questions as though some general common law supplied the answers.<sup>74</sup>

Of course, in many circumstances the need for a source of positive law is not fatal. For example, the involved states' substantive law may be identical and may recognize the agency relationship or enforce the contract provision. In some cases, the facts may unequivocally demonstrate that consent exists under any of the potentially applicable legal principles. The point is merely that consensus of this sort cannot be taken for granted. One should not fall back unreflectively on some "general common law" notion of what constitutes consent, agency, or other legal relationships. Consent is a complicated notion and "general common law" is notoriously unreliable.<sup>75</sup>

In contrast to private contractual agreements, public agreements involve direct relations between an individual and a state that ostensibly constitute consent. Traditionally two types of public relationships have served as a basis for jurisdiction. The first such public relationship is waiver: a defendant's waiver of his or her rights to protest jurisdiction purportedly is established through certain types of litigation conduct. For instance, if the defendant does not object to personal jurisdiction at the outset of litigation, the objection is waived under Rule 12(h) of the Federal Rules of Civil Procedure. In *Phillips Petroleum*, the Supreme Court held that absent plaintiffs consented to

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71. *National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311 (1964).

72. *Id.* at 313.

73. See Brilmayer and Paisley, *Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracy, and Agency*, 74 CAL. L. REV. 1, 8-15 (1986) (discussing the methods by which substantive legal relationships influence assessments of personal jurisdiction).

74. *Id.* at 24.

75. "General common law" has been a discredited notion ever since the decision of *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

jurisdiction by not opting out of a class action.<sup>76</sup> The defendant's failure to comply with a discovery request in *Insurance Corp. of Ireland* effectively waived its jurisdictional rights.<sup>77</sup>

The problem of applicable legal standards, discussed earlier in private consent cases, also arises in the context of jurisdictional waivers. The existence and legitimate applicability of a legal rule that infers consent or waiver from certain litigation behavior is necessary before a valid waiver or consent can be inferred. This objection was raised in both *Phillips Petroleum* and *Insurance Corp. of Ireland*; in both cases the defendant protested the bootstrapping nature of the consent or waiver inference.<sup>78</sup> Waiver involves bootstrapping because the conduct in question does not constitute consent without applying some legal rule inferring consent from such conduct. The courts deciding waiver cases, however, do not address the state's right to impose its regulations on the defendant. Rather, courts employ their own waiver or consent rules to establish their jurisdiction.<sup>79</sup> As with interpretation of consent in private contracts, however, the need for a source of law is not fatal if all the potentially applicable positive laws allow the inference.<sup>80</sup>

In contrast, reliance on pre-existing sovereignty is the greatest and most problematic in the second application of consent theory to public agreements. In these cases, the state infers consent from the defendant's acts directed toward the state rather than from litigation conduct. Consent may be either express or implicit. Consent is implicit when the state infers it from, for example, the defendant's entrance and commission of a tort in the state. When the state requires a corporation to submit to jurisdiction in exchange for the right to do business there, consent is explicit.<sup>81</sup>

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76. 472 U.S. at 806-14.

77. 456 U.S. at 709.

78. *Phillips Petroleum*, 472 U.S. at 812; *Insurance Corp. of Ireland*, 456 U.S. at 694.

79. See *Insurance Corp. of Ireland*, 456 U.S. at 704.

80. The choice of law issue in *Insurance Corp. of Ireland* may have been intractable because many foreign nations do not allow the extensive pre-trial discovery that U.S. courts permit. For this reason, the defendant may have had a genuine objection to producing the disputed documents; in this case the trial court's sanction for the failure to comply with the discovery order was, in effect, an assumption of jurisdiction. *Id.* at 698-99. Perhaps the strongest argument that might be made on behalf of application of the waiver rule is that forum procedural rules usually apply, and that the defendant had chosen to litigate the issue in that particular forum rather than default and later collaterally attack.

81. On this issue, the author is indebted to M. Kipp, *Inferring Express*

Although a prior assumption of territorial sovereignty is necessary for the state to base such jurisdiction on consent, this reason alone does not make the inference of consent unreasonable or unconstitutional. Territorial sovereignty exists and is a reasonable basis for state power. It is territoriality, however, that constitutes the most important part of the jurisdictional justification — consent plays at most a minor role. Consent-based analysis is misleading because it assumes that power rests on nothing more than the defendant's voluntary actions. But this is false; the old-fashioned notions of territorial sovereignty that characterized early personal jurisdiction decisions still persist.<sup>82</sup> Today, the genteel gloss of liberal consent theory merely hides the raw fact of territoriality.

This realization should cause us, in addition, to take a skeptical look at any assertions of sovereignty that territoriality cannot directly justify; for if territoriality is lacking, it is not clear in what respect consent can substitute for it. Take for example the question of a corporation's submission to jurisdiction as a condition of doing business in a particular state. Many states require foreign corporations to register, qualify to do business, and appoint an agent for service of process.<sup>83</sup> To what extent does territoriality alone justify this requirement, and to what extent does the concept of consent provide an essential element of the justification? Consent is superfluous when the forum merely claims jurisdiction over the corporation for its activities within the state.<sup>84</sup> In such cases the state could assert jurisdiction directly, and the foreign corporation registration laws serve only as a procedure for facilitating service of process.

On the other hand, sometimes a forum claims that such expressions of consent establish jurisdiction that would not otherwise exist.<sup>85</sup> For instance, the forum might rely on the

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Consent, The Paradox of Permitting Registration Statutes to Confer General Jurisdiction Over Foreign Corporations (1989) (unpublished paper on file with author).

82. See *supra* notes 24-26 and accompanying text.

83. See generally Walker, *Foreign Corporation Laws: The Loss of Reason*, 47 N.C.L. REV. 1, 19-23 (1968) (discussing the content of state statutes regarding foreign corporation laws); Walker, *Foreign Corporation Laws: A Current Account*, 47 N.C.L. REV. 733, 734-47 (1969) (discussing state foreign corporation laws).

84. See *supra* pp. 15-17.

85. See, e.g., *Sternberg v. O'Neil*, 550 A.2d 1105, 1111 (Del. 1988) (holding express consent a valid basis for jurisdiction even where no other basis exists). *But see In re Mid-Atlantic Toyota Antitrust Litig.*, 525 F. Supp. 1265, 1278 n.10 (D. Md. 1981) (criticizing express consent as a jurisdictional basis).

corporation's consent to assert a right of general jurisdiction over litigation arising out of corporate activities elsewhere. Thus, according to the forum, the defendant's consent authorizes it to assert jurisdiction over the defendant's activities that are unrelated to the state. In this situation, consent is essential to expansion of the state's jurisdiction because it enables the state to assert otherwise inappropriate authority.

Although the case law on this issue is not entirely clear, such assertions of jurisdiction may be unconstitutional.<sup>86</sup> Presumably, the state cannot constitutionally exclude an individual from entering the state or engaging in interstate commercial activities there.<sup>87</sup> Of course, the state can require such an individual to comply with valid local regulations while doing business there; "interstate business must pay its way."<sup>88</sup> This right to regulate locally, however, does not necessarily entitle the state to regulate the individual's activities elsewhere.<sup>89</sup> By using consent to establish general jurisdiction, the state attempts to extract the individual's consent to the extraterritorial application of its authority. This exercise of state authority, moreover, apparently threatens to deny the individual a constitutionally protected right: the right to come into the state or engage in trade there. By consenting to such an arrangement, the individual relinquishes rights but receives nothing to which he or she is not already entitled. Thus, the state effectively expands its power without providing the individual anything in return.<sup>90</sup>

Territorial sovereignty does not directly establish a right to regulate particular activities unrelated to the state; thus, the state should not be able to achieve indirectly the same effect by extracting consent. The state cannot withhold a right that the individual already possesses under the federal constitution, and it cannot grant such a right in exchange for the individual's concessions to state authority. Although consent is a superfi-

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86. *See, e.g.,* Bendix Autolite Corp. v. Midwesco Enter., 108 S. Ct. 2218, 2220-21 (1988) (holding unconstitutional a state statute that conditioned the benefits of the statute of limitations on submission to the state's general jurisdiction).

87. This is a consequence of the right to travel. *See* Shapiro v. Thompson, 394 U.S. 618, 630-31 (1969).

88. *Postal Tel.-Cable Co. v. Richmond*, 249 U.S. 252, 259 (1919).

89. *See, e.g.,* *Western Union Tel. Co. v. Kansas*, 216 U.S. 1, 37-38 (1909).

90. The Delaware Supreme Court apparently has decided to treat some expressions of consent as both gratuitous and enforceable; it upheld consent to general jurisdiction even though, under its analysis, the defendant received nothing in exchange. *Sternberg v. O'Neil*, 550 A.2d 1105, 1112-13 (Del. 1988).

cially seductive argument, it is less convincing when closely examined. We cannot unreflectively accept consent-based arguments. Instead, in each instance, we must identify what the individual received in return. Usually, the answer is "nothing" — although often this result does not matter because territoriality supplies the missing rationale.

## B. IMMIGRATION

At first, immigration law seems to present very different problems from those involved in judicial jurisdiction. Immigration law does not address whether a state may reach out to assert its authority over an individual, but rather whether an individual may enter or remain within the nation-state. A recent book by Peter Schuck and Rogers Smith, however, attempts to explain certain aspects of United States immigration law in terms of consent theory.<sup>91</sup> In particular, Schuck and Smith use consent theory to explain why individuals born within United States territory should not automatically be entitled to United States citizenship. Although this conclusion conflicts with the apparent requirements of the fourteenth amendment,<sup>92</sup> the authors try to reconcile their conclusion with the amendment's history<sup>93</sup> and also assert that their interpretation is more consistent with the liberal democratic theory that, they argue, underlies the constitutional scheme.<sup>94</sup>

Schuck and Smith's conclusion is undeniably controversial.<sup>95</sup> Although some critics strongly disagree with Schuck and Smith's arguments about the framing of the fourteenth amendment,<sup>96</sup> the subject of our analysis is their application of consent theory. Schuck and Smith's basic argument is as follows: John Locke wrote his famous discussion about consent theory in response, at least in part, to Coke and Filmer's theory of

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91. P. SCHUCK & R. SMITH, *CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY* (1985).

92. U.S. CONST. amend. XIV, § 1 states: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

93. P. SCHUCK & R. SMITH, *supra* note 91, at 72-89, 129-30.

94. *Id.* at 42-54.

95. For a critical review of P. SCHUCK & R. SMITH, *supra* note 91, see Neuman, *Back to Dred Scot?* (Book Review), 24 *SAN DIEGO L. REV.* 485 (1987); Schwartz, *The Amoralism of Consent* (Book Review), 74 *CALIF. L. REV.* 2143 (1986).

96. Neuman, *supra* note 95, at 489-97.

birthright citizenship.<sup>97</sup> Filmer's theory was patriarchal and was written in an effort to offer support for absolute monarchy.<sup>98</sup> Citizenship under Filmer's theory turned on the place of one's birth and in this sense, was *ascriptive* rather than *consensual*.<sup>99</sup> One's obligations to the monarch (like one's citizenship) resulted from being born in a particular place.

In Schuck and Smith's view, Locke sought to rebut Filmer's analysis and replace it with a consent-based theory; this consent requirement, moreover, encompassed both one's political obligations and one's citizenship.<sup>100</sup> Under Locke's view, voluntarism provides the key to a legitimate theory of citizenship.<sup>101</sup> As Schuck and Smith argue, recognition of an individual as a citizen simply because of his or her place of birth is not voluntaristic but ascriptive and territorial. Furthermore, because citizenship and political obligations turn on historical coincidence, they are arbitrary. Schuck and Smith also assert that allowing persons to become members without the existing polity's consent contravenes the consensual foundation of political rights and responsibilities in our liberal society.<sup>102</sup> Birthright citizenship is impermissibly ascriptive because citizenship should turn on the voluntary acts of the individual and the other members of the polity.<sup>103</sup>

Schuck and Smith's argument has many interesting twists and turns, such as their ultimate conclusion that the United States should nonetheless extend citizenship rights to the children of current citizens because the current citizens would have bargained for this right on entering society in the first place.<sup>104</sup> Schuck and Smith's consent-based argument also triggers many interesting objections. For one thing, the fourteenth amendment's apparent provision for birthright citizenship arguably proves adequate consent.<sup>105</sup> One also wonders why such a "consent" theory necessarily gives current citizens the right to

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97. P. SCHUCK & R. SMITH, *supra* note 91, at 10, 12-22 (discussing Coke and Filmer), at 11, 23-26 (discussing Locke's response).

98. *Id.* at 16-20.

99. *Id.* at 4, 13-20.

100. *Id.* at 22-27, 31-35.

101. *Id.* at 36.

102. P. SCHUCK & R. SMITH, *supra* note 91, at 36, 115.

103. *Id.* at 21-22, 36, 135-36.

104. *Id.* at 117.

105. In other words, if Schuck and Smith are wrong on the point of textual interpretation, see *supra* note 93 and accompanying text, then they are wrong on the point of political theory also. If the text actually provides for birthright citizenship, then consent has been given.

“blackball” prospective entrants. Ownership of stock in a corporation is consensual in the sense that an individual cannot be forced to buy or retain shares; yet this “consent” does not necessarily give the current stockholders a veto right over prospective purchasers.<sup>106</sup> When a new homeowner moves into a neighborhood, purchase of the new home is voluntary; but “consent” does not enable existing owners to keep new homeowners out.<sup>107</sup> Perhaps citizenship is like stock ownership or living in a neighborhood: who is to say? Consent does not supply the answer.<sup>108</sup>

For our purposes, a more central concern is whether, without a prior showing of territorial sovereignty, the consent analysis can really bear the weight of Schuck and Smith’s argument. Their consent-based argument assumes away many of the difficult questions about whether current United States citizens have a valid claim to exclude the children of illegal aliens. The contract metaphor suggests, first, that we need to be sensitive to prior assumptions about distribution of property and sovereignty rights. What sovereignty rights does Schuck and Smith’s argument assume? Schuck and Smith argue that a certain contract was *not* made between the current citizens and the state, rather than that an agreement *was* made and therefore certain political obligations follow.<sup>109</sup> They also assert that the current polity must consent to a new member’s admission into citizenship and that birth within the territory cannot establish such consent.<sup>110</sup> Schuck and Smith’s argument thus seeks to establish a right not to contract.

Schuck and Smith’s consent argument relies on several assumptions. Suppose I said, “I refuse to sell you my car,” but you thrust some type of compensation at me and tried to take my car anyway. My consent-based argument would be that you cannot force me to sell my property. For my consent argument to succeed, the car in question must be my car. Although I can

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106. This is particularly true in large, publicly-traded corporations.

107. This analogy is from M. WALZER, SPHERES OF JUSTICE 36 (1983).

108. The answer must be found in other notions about what states are, or should be, like. For example, one might differentiate nation-states from corporations in this respect by acknowledging that one’s fellow citizens form an important part of one’s political life and therefore one should have veto power. The point is merely that it is this theory of the purpose of a state, and not consent theory, which determines whether veto power over would-be entrants should exist, since other types of membership that are “consensual” are possible.

109. P. SCHUCK & R. SMITH, *supra* note 91, at 1.

110. *Id.* at 128-29, 134-37.

rightfully refuse to sell you something I own, consent does not determine whether you may legitimately take from me something I do not own. This illustration simply reiterates our earlier point that contract law presupposes an initial assignment of property. This point applies whether we analyze actual agreements or refusals to enter into an agreement.

It is not possible to discuss citizenship and immigration without acknowledging the importance of pre-existing territorial sovereignty. Schuck and Smith discuss citizenship as if membership in some private club was at issue.<sup>111</sup> Illegal immigrants, however, arguably do not want membership *per se* but only a right of territorial access. Although sovereignty issues rarely arise in the context of private clubs,<sup>112</sup> national citizenship clearly involves more than club membership and implicates questions of territorial sovereignty. Immigrants seek admission to a particular territorial nation-state. It is not clear whether membership itself matters very much at all, except, perhaps, as it ensures that the right of entrance will be permanent.

At the bottom of the consent objection to birthright citizenship is an unexpressed assumption that the current citizens legitimately control some particular piece of land. The consent argument assumes that current citizens have sovereignty rights over land and that they are entitled to exclude people from that land. Without prior territorial sovereignty, the consent argument fails. Could the current United States polity deny an outsider the right to emigrate to Canada? Presumably not; outsiders can only be denied entry into the United States. Under any theory, access to any Canadian land is not legitimately within United States control. Consent arguments presuppose sovereignty, yet an assumption of sovereignty renders consent theory superfluous.

Furthermore, the territorial right to control parcels of land is not itself consent-based. Certainly the right to control land is

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111. Schuck and Smith discuss territoriality only once — in a list of the problems of consent theory. *Id.* at 38-39. There they recognize that territoriality is an important feature of Anglo-American law even though it is ascriptive. Their response to this obviously non-consensual feature is puzzling: “its ascriptive aspect can be defended by appealing not to any presumed natural order but simply to the realities of existing national authorities and actual, interdependent communities.” *Id.* at 39.

112. It is possible to hypothesize “sovereignty” arguments in a private club context. For example, a club might assert a proprietary interest in the club name, and claim a right to prevent others from using it, even though those outsiders had not consented.

not based on *everybody's* consent — the consent of persons who are excluded from the land, for example. Although the state's decisions substantially affect excluded persons, the excluded have no voice in those decisions. This, perhaps, seems eminently fair if one starts out with the assumption that the excluded have no right to enter the state except at the generosity of the current citizens. This conclusion, of course, relies on the prior distribution of state sovereignty that underlies all consent arguments in the nation-state context.

If the state's right to exclude people is simply assumed, an argument for excluding people need not rest on liberal consent theory. My property right in my car directly explains my right not to sell my car to you without recourse to any consent notion. Indeed, it only confuses the matter to rely on consent. It lends an air of high-minded principle to one's decision to exclude. If one holds on to one's property doggedly, despite the needs of those nearby, then this selfishness is ill-explained by reference to liberal consent theory. It is simply a result of the fact that if one chooses not to share, a property right — or sovereignty right — protects this choice. What remains unexplained is how the individual — or state — acquired the sovereignty or property right in the first place.

### CONCLUSIONS

Consent often turns out not to be the argument it appears. Focus on the consensual nature of a transaction distracts attention from two important features of the state of affairs that consent typically is used to justify. First, a consensual transaction does not approve some state of affairs as an absolute matter, but at most indicates the relative superiority of the post-transaction state of affairs to the prior status quo. One does not consent to some state of affairs in the abstract, but only to the transition from one state of affairs to another. Thus, a particular political regime cannot use consent theory to compel obedience.

Second, and as a corollary, consent does not justify the prior state of affairs. The prior state of affairs in the case of nation-states instead is typically based on territorial sovereignty. This does not mean that territorial sovereignty cannot be rationalized — perhaps it can<sup>113</sup> — but the rationalization does

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113. The author's reservations are expressed in L. BRILMAYER, *supra* note 7, at 75-78.

not proceed in terms of the involved individuals' consent. Consent arguments can be described as a sort of moral "if . . . then" argument. *If* the prior distribution of power was legitimate, and the obliged individual came within the scope of that power voluntarily, *then* the new political obligation also is legitimate. This phrasing reflects, once more, the structural similarity between political and market transactions; in market transactions, the resulting distribution is not considered fair but only Pareto superior<sup>114</sup> to the earlier one.

Although consent-based arguments are not false per se, they are sometimes misleading and often superfluous. "If . . . then" arguments require substantial and important work to establish the validity of the preconditions necessary for the inference to follow. The "if" must be shown. Critical examinations of consent-based arguments must identify the underlying presuppositions. Territorial sovereignty cannot merely be posited; its origin requires full-scale philosophical investigation. The task of explaining territorial sovereignty is akin to justifying the acquisition of private property. Indeed, in the sense that territory constitutes the "assets" of a state, it represents a political analog to private property. This analogy may cause a certain amount of pessimism, because a generally accepted theory of private property does not exist. The comparison does clearly indicate, however, the direction our energies should take.

Perhaps the ultimate message is that we should not eagerly and unreflectively embrace justifications that explain things in terms of the parties' consent. Beneath liberal arguments about consent are hidden assumptions that do not seem very liberal at all. Applications of consent-based reasoning must be dissected to discover and illuminate such underlying premises. Having had a clear look, we may decide to retain the assumptions or to reject them — at least we will make a free and informed choice.

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114. A condition is Pareto superior to another only if at least one individual is better off and no individual is worse off as a result of the condition. Wiley, *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 749 n.167 (1986).

