

Acquiescence and Consent in Democratic Theory

By Andrew Tripodo

Tenacious men with strong wills, admirable aims, and impressive minds planned and executed the American Constitutional Convention of 1787. These men had neither a legal right nor popular mandate to forge a new government, overturning the existing Articles of Confederation. No authority granted them permission to draft this constitution, and the majority of the population, mostly farmers, hadn't an inkling that such a convention was even taking place. What these fifty-five men did have were keen insights into human nature---most importantly, that the natural human tendency for selfishness can be channeled to serve the public good. They also possessed strong understandings of the needs and wants of Americans and the means to act on these convictions. They succeeded in an obvious way: the United States exists today as a relatively stable democracy, with institutionalized electoral processes, term limits, and a system of checks and balances on government. The country is more or less free from abusive authority, and its citizens enjoy predictable stability and need not worry about the dangerous hand of arbitrary power. However, just because this strategy worked, does that mean it was also *legitimate*?

Questions on the legitimacy of government are as old as the study of government itself, and they are prominent elements of Russell Hardin's forthcoming book, *Why a Constitution*,¹ which shares its title with a chapter Hardin contributed to the *The Federalist Papers and the New Institutionalism* (1989).

Hardin begins by addressing the theory, prominent in the writings of John Locke, which claims that a government can only be legitimate if it first maintains order and second, protects the natural rights of its citizens. These principles are the foundation of Liberalism, a theoretical form of government that elevates the rights of individuals over the rights of rulers, and emphasizes the duty of a ruler over the duty of a citizen. Liberal principles underlie nearly all of the political dialogue of the modern age, whether it be between intellectuals or among the general public. Few will argue that the American government fails at either of these duties---the U.S. citizenry is on the whole threatened by neither anarchy nor arbitrary government action that jeopardizes people's life, liberty, or property rights. This government, then, is legitimate according to the classic liberal criteria.

¹ This forthcoming work was provided to the author by Professor Hardin in manuscript form. The following citations apply to the manuscript text as it was presented to the author of this report.

However, Hardin directs the reader's attention to an enormous rift between liberal theory and reality: at the time of the drafting and signing of the U.S. Constitution, the vast majority of American citizens had never heard of such claims to legitimate authority, and thus could not have consented to be governed in such a way. This is as true of the bulk of American citizens today as it was in 1787. But here they are, allowing themselves to be governed, abiding by the rules of a regime they never consented to, resting on a theoretical foundation that they are largely unaware of. The governing philosophy that centers around individual freedom, in the form of rights, fails to present those citizens with perhaps the most fundamental freedom (or right) of all: to truly accept or deny the constitution that will govern them. Here the claim could be made that, though Americans are not fully aware of the basis for their government's legitimacy, they clearly do not have serious enough qualms to actively and loudly *disagree* with the system, and this must *imply* consent.

Perhaps, but the word *consent* is far too strong. It denotes active, conscious agreement, and most American citizens are unaware of the possibility for such agreement, nor what they would agree *with*. Here, Hardin resurrects a more apt word to replace the concept of "consent of the governed". It was first articulated by David Hume to describe the general behavior of citizens under the U.S. Constitution (and constitutions in general): acquiescence. Citizens do not agree, they just do not disagree actively or fight back. They abide. Apathy underlies acquiescence, while *engagement* underlies consent.

Why do citizens acquiesce? Hardin explains that people acquiesce to political and legal orders (as they are outlined by constitutions) for the same reason that they follow social conventions: because resisting would be costly and, as long as the imposed sociopolitical conventions are not excessively offensive (that is, not radically different from prevailing trends), acquiescence has no real costs. In essence, Hardin concludes, "we acquiesce because it would be very difficult to organize what would de facto have to be a collective action to topple an ongoing convention or to organize a new one"². Even the most rigorous study of history would be hard-pressed to find an instance when the bulk of citizens actively agreed with the constitution they were about to be subjected to: there was a furious debate in the American states over ratification between the "Federalists" and the "Anti-Federalists". North Carolina and Rhode Island did not even formally ratify the Constitution until *after* George Washington had been elected as the first President of the United States: by that time, Hardin asserts, they decided to accept the consensus of the rest of the

² Russell Hardin, *Why a Constitution?* (forthcoming, 2015). p. 12 (manuscript).

states since they realized that holding out cost more than joining in. Many other countries' political systems today are governed by such constitutions and do not seek to change the underlying premise of these covenants: their citizens acquiesce. But acquiescence is not inevitable. History presents occurrences in which citizens do not abide by new rules placed upon them and will, as Locke put it, "appeal to Heaven" (revolt) in the face of requirements they find offensive or unduly burdensome. So, what will incite citizens past the realm of acquiescence and into the realm of active disagreement? Here, Hardin cites Hume's Dual Convention Theory: "government derives its power (not its right) to rule by some specific form of coordination that is a convention and the populace acquiesces in that rule by its own convention."³ Therefore, a Constitution that creates political conventions that are more or less aligned with the social conventions of the populace will be successful, by which we mean stable, unchallenged. If a political convention moves in direct opposition to a social convention, however, it will be offensive enough to justify action. Hardin explains this logic via the economic language of opportunity and transaction costs, but we do not need this language to understand the concept. What is important is that the political order created by a constitution does not create excessive friction with the traditional social order. A constitution that pushes people to change can wake them from their acquiescent slumber and jeopardize law and order.

Communities will not acquiesce on issues they feel passionately about, and here is where some comments on religion is relevant. Most religious believers consider following their beliefs as being in their ultimate interest, as it is the only interest that extends beyond death and, in life, defines whom they associate with and how they do so. A constitution that attempts to control the religious views of its populace can (and often will) spark impassioned conflict. Societies that are religiously homogenous are an exception to this observation: they are indeed more tightly bound by their shared spiritual beliefs, and constitutions that govern such societies are strengthened rather than compromised by their religiosity because it enshrines the status of that religion. But what gives religion its unifying power also endows it with destructive power. Hardin claims that if there is any hope of uniting people who hold *different* religious beliefs, the topic must be omitted—the absolute nature of the topic simply defies compromise. Since general acquiescence seems to be a necessary public condition for successful constitution-making, and religious differences do not lend themselves to acquiescence, the rational decision is to simply leave religion out of the constitution

³*Ibid*, 11.

and thus out of the realm of state regulation. Hardin rightly touts the strategy of removing religion from constitutions as “the single greatest achievement of political thought and practice in all the history of western political thought.”⁴ With religion omitted, acquiescence reigns supreme.

Still, the question remains: is a government that relies on acquiescence *legitimate*? Acquiescence is the compelling *fact* in successful governments, but should it be the *goal*? Is it sufficient?

The most widely accepted justification for the claim to constitutional legitimacy in the face of acquiescence lies in the theory of implied consent: that by virtue of reaping the benefits of the government into which citizens are born, they have implicitly consented to its existence. We have, in effect, entered into a contract that we never knew existed. This theory exists primarily for intellectuals, for they are among the few who are conscious of this problem. The rest think not of legal legitimacy, and, their conventions not being egregiously broken, acquiesce.

If we strip the “implied consent” theory of its venerable sheen, its obvious illogic will be revealed. A story will pull this theory down from abstraction: In downtown New Orleans, tourists are apt to come upon “shoe shiners” who run up to their unknowing patrons, apply some cleaning solution to their shoes, and expect compensation for their efforts. According to the implied consent theory, tourists should pay them. Just as citizens unknowingly benefit from the order and security provided by the government into which they are born, and thus are bound to “implicitly consent” to its rule, so the patrons reap benefits. Thus, they are obliged to compensate their provider. In the government case, the trade is consent for rights and security. But trade was made without the knowledge of one party. Given a true choice, some will pay, and some will want to walk away. All are indignant. They know that they have not consented to being governed in a *contractual* sense. *But this is the concept that underpins democratic legitimacy.*

It is crucial to emphasize that in an important way this argument is irrelevant---it misses reality. The reality is that order exists because a constitution successfully establishes political conventions that are aligned with previously held social conventions, thus enabling the politically significant members of the population to abide by the new government.

⁴ *Ibid*, 9.

Given the dubiousness of the “implied consent” theory, the pressing question arises: how can we legitimize a new constitution? In answering this question, Hardin asks that his audience let go of theories and focus on facts. The reality of acquiescence, he submits, need not lead to pessimism. After all, if the government took action that we found upsetting, the spell of acquiescence would be broken and citizens would loudly protest. So is the reality of acquiescence evidence that government is generally meeting the people’s needs? If people do not want to participate, does that mean they are content with the way things are?

This is where this author and Hardin’s views diverge. Hardin identifies the crucial difference between consent and acquiescence, and then concludes that acquiescence is good enough. It solves more problems than it spawns, and is evidence of overall governing success. If the government was failing to ensure stability or to protect private rights, people would surely not react with acquiescence, they would be moved to actually engage in politics. Governments functioning by virtue of widespread acquiescence are, by the criteria of Liberalism, successful. If we simply let go of the implied consent theory, we can easily come to terms with the reality of acquiescence. But to take this view is to give up on the democratic ideal of *representation*. If people are consumed with their private lives and unengaged with government, how can their views be represented? Consent is the lowest tier of representation. It makes no attempt to capture the nuance of opinion, but simply asks for wholesale rejection or acceptance of a proposal. If we give up on the possibility of widespread consent in a democracy, we must face a disturbing question: are democracies actually representative? Put even more starkly: are democracies responsive to their people? If citizens accept the reality of acquiescence, then do they simply regard the idea of democratic responsiveness and representation as a myth crafted to maintain order?

Clearly there is much at stake. Setting the precedent of consent instead of acquiescence will ensure that the government remains truly representative and responsive to citizen needs. If the government is founded on acquiescence, then it is very likely that the vast majority of the population will remain ignorant of the institutions erected by the constitutions and of the political arena thereafter. And, though the constitution may have been *founded* on social convention (which naturally aligns it with the wants and needs of the people), the two need not remain linked forever. That is, incremental political changes could slowly disempower a citizenry that is unaware of them. The acts of self-serving politicians could erode the political dynamics that enable citizens to comfortably acquiescence while remaining confident that order and right security will remain. While

the public slumbers in acquiescence, forces that could undermine the foundation of the system that allows for comfortable acquiescence are free to wreak incremental havoc. Nestled within a culture of acquiescence, citizens are unlikely to notice small changes—but small changes accumulate and over time could transform a population from one that acquiesces to one that is subjugated. Sudden, large, changes would likely rouse citizens to take action, but a culture of acquiescence could make them blind to small, pernicious shifts over time: new voter requirements, increased thresholds for parliamentary participation, loosening or tightening of controls on free speech, terms limits, and financial donations. Alternatively, the conventions that are the foundation of the constitution could themselves disempower and ignore large swaths of society, systematically depriving them of representation. After all, slavery was enshrined in the U.S. Constitution in 1787 and the document did not even grant voting rights to all American freemen (or women) until amendments were made over time to expand suffrage, a stark reminder that conventions have no inherent normative valence. Any institution created by the constitution to guard against abuses of power could fail to fulfill their function, as institutions that are neither respected nor understood by the populace can be ignored, manipulated, or changed by those in power. In other words, the same apathy that enables acquiescence has the potential to undermine the representative goals of democracy.

“If men were angels,” Madison famously remarks in *Federalist #51*, “no government would be necessary.” He goes on to call for a political order in which institutions are pitted against each other, a system where personal ambition is channeled to serve the general good, a government filled with selfish men who become the unwitting sentinels over the public health. He gives up on bettering men, dismisses selfish power-seeking as the natural human state, and resigns himself to figuring out how to manage that selfishness. He forgets that just because men are no angels does not mean that they are devils, and it does not mean that they cannot become more angelic with practice. Cultivating public virtue among the entire population is the only way to craft a democracy that lives up to its claim to representation. Institutions are not enough to protect an apathetic public. In fact, without an engaged and informed public, the very institutions meant to protect citizens can become perverted and distorted by those bent on acquiring personal power.

Andrew has lived in many places in the pursuit of myriad, mysteriously connected, interests. He revels in learning and teaching and is ever charmed by the difficulty in fully disentangling the two from each other. He currently studies political science, coaches high school debate, and enjoys writing on a wide range of subjects.