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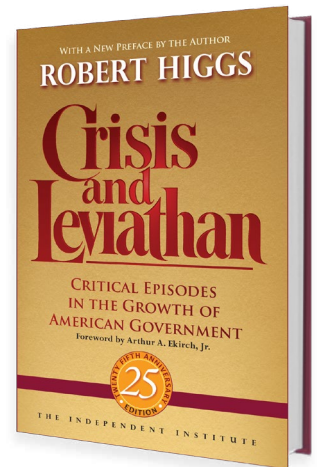
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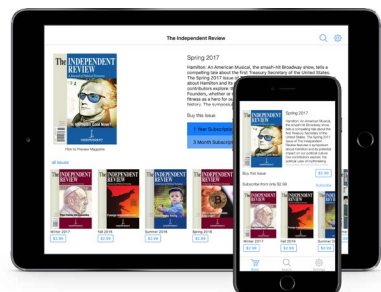
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Withdrawing Consent

Polycentric Defenses against Domination

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JAYME LEMKE

The “consent of the governed” is an idea that is better understood in theory than in practice. In social contract theory, government gains its legitimacy by virtue of the fact that it is an enterprise undertaken by the consent of the parties involved (e.g., Locke [1689] 1821; Raz 1987; Hobbes [1651] 2017). Similarly, in the contractarian paradigm of the constitutional political economy framework, the values and choices of the people involved give a government or any other collective enterprise both its purpose and its claim to efficiency or at least productivity (Buchanan and Tullock 1962; Buchanan 1975, 1988). Yet many collective enterprises often operate at a great distance from the majority of the governed, who know little of what their votes and allegiance have purchased and have even less authority to bring about meaningful change. Unlike in market contexts, where consumers are generally free to take or leave the options in front of them, most of us are never given the option to affirm or deny our consent to the political decisions that are made for us.

If a constitutional process is not one in which the entirety of a society is included, the situation becomes even more troublesome. If only a subset of the population has the opportunity to offer their ideas, their concerns, and ultimately their consent, then there is no justification for imagining the collective enterprise to be a legitimate and mutually

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beneficial one for the entire society (Holcombe 2014). Those whose interests are disregarded during the constitutional process may find that the rules decided upon have entrenched or introduced new political inequalities of the type that kept them away from the table in the first place. As a consequence, critics of social contract theory have objected to the contractarian program on the historical grounds that constitutional processes have rarely been inclusive of women and minority populations (Pateman 1988; Mills 1997).

The absence of the consent of so many of the governed is indeed disturbing for constitutional political economy and other contractarian theories, but hope is not lost. Comparative analysis resurrects the opportunity to meaningfully incorporate ideas of consent into the study of contractarian and self-governing systems. Instead of asking about consent as if it is a switch turned either “on” or “off,” the comparative approach asks for specifics about the extent to which the system is based on the consent of the governed and how the decision to offer or deny consent plays out in a particular institutional context. What are the conditions under which there will be *more* opportunities to offer or withdraw consent? When will the stakes of the individual decision have a greater impact on collective decision-making processes? The process will inevitably fall short of the contractarian ideal, but the opportunity to identify processes wherein the choice to offer or withdraw consent to be governed is more or less impactful remains.

The search for institutional characteristics that increase the opportunities and stakes of consent has particular salience for people currently on the order-taking end of existing political hierarchies. Where majorities or elites rule, being the “little guy” means having to comply with rules that contradict your own values and interests. This type of domination is limited within consent-based collective processes where action is undertaken only when the whole group can agree.

As such, to increase opportunities to offer or deny consent is to increase the power of the dominated, disenfranchised, and oppressed. Elise Boulding writes, “The discovery by the oppressed that they have power is the discovery that they can gain a kind of dominance through the withdrawal of compliance. This is the power of the women’s liberation movement, and of all liberation movements” (1976, 48). This is also the power of institutional characteristics that operationalize consent. Where the governed have choice, they have a defense against their own domination. As imperfect as that defense may be, it is a tool that would not otherwise be available and that has at times been put to great use.

In this article, I focus on the way that the set of institutional characteristics often grouped under the label *polycentricity* enable consent-based processes. The case of women in American history will serve as an exemplar of how consent can and has worked where polycentric institutional characteristics are present. In polycentric systems, there are multiple and overlapping chains of command (Ostrom [1972] 1999, [1991] 2014; Aligica and Tarko 2012). Decision making between these centers can be linked in many different ways, but if one chain of command sufficiently frustrates,

citizens can turn to alternative decision-making processes. The polycentric components of institutional systems are therefore the only ones for which a discussion of choice and consent is relevant. Without a division of authority in which institutional alternatives exist or are at least permitted to emerge, the idea of an individual choosing between institutional alternatives loses its meaning.

It is within these polycentric spaces that we see nineteenth-century American women—a group by and large excluded from formal economic and political institution building—able to meaningfully offer or withdraw consent from alternative governance arrangements. This argument is developed in the remainder of the article. In the next section, I review the literature on the notion of consent within political economy. Next I explore in greater detail the relationship between polycentric institutional characteristics and consent. After that, I draw on examples from the history of women’s economic rights in U.S. history to illustrate how polycentric institutional features have opened up opportunities for women to express or decline to consent to be governed in ways that would have otherwise been inaccessible to them. I focus on three particular polycentric institutional features and their role in amplifying women’s role in collective decision making in the nineteenth century: (1) the federalist structure of government, which permits variation in law through decentralization of authority; (2) openness to self-organization and civil society, which permits variation in norms and informal processes of governance; and (3) scope for public entrepreneurship along the frontier, in which institutional experimentation was not just permitted but also rewarded. Finally, I conclude with some thoughts on the nature of consent and the implications of the fact that it exists only in weak forms in most modern political systems.

Consent and Social Contract

John Locke was among the first to propose that people are born free and that because they are born free, government can gain legitimacy only through the consent of the governed: “Men being, as has been said, by nature, all free, equal, and independent, no one can be put out of this estate, and subjected to the political power of another, without his own consent” ([1689] 1821, 269). This social contract theory proposes that the relationship between ruler and ruled is not unalterably decreed but instead a mutual agreement among the members of a community that life will be better or more peaceful with government than without. From this contractarian point of view, the individual members of a community voluntarily give up some measure of their freedom of choice in exchange for others doing the same (Munger 2018).

This paradigm came to serve as the foundation for a wide range of contemporary democratic theories, including constitutional political economy. James Buchanan and Gordon Tullock’s *Calculus of Consent* (1962) invites us to imagine government as a cooperative venture between individuals who voluntarily sign on to the set of constitutional rules that will enable them to most effectively accomplish their shared ends. The title of the book is well chosen in that consent is critical to the constitutional

enterprise. In Buchanan and Tullock's framework, a group of people can be sure that they have selected the cost-minimizing—that is, benefit-maximizing—institutional arrangement only if they have chosen that arrangement through unanimous agreement. Under a unanimous-decision rule, it is impossible for a collective endeavor to generate net harm because agreement will obtain only if all members of the society believe themselves either to gain through the effort or to be adequately compensated for any expected losses.

Yet as beautiful as this type of consent may be in theory, it remains notoriously difficult to spot in the wild, in large part because unanimous agreement in any group large enough to consider attempting government will be so infuriatingly hard that it may as well be impossible. Representative governments are an implicit acknowledgment that inclusive collective decision making is so costly that even a democratic government can't really be expected to listen to *everybody*. Even schools and condominium associations, where the entire population of the collectivity might be only a few hundred people, have boards that exist to reduce the cost of decision making. Representative government can emerge in one of two ways. First, representation can be unanimously chosen by the group in period $t - 1$ in anticipation of reducing costs in period t . The choice to delegate to representatives in this way would be consistent with a contraction framework and does not obviously compromise consent, so long as the decision process in time $t - 1$ was inclusive of all members of the society and free from coercion.

The second way that representative government can emerge is through a decision-making process undertaken noninclusively, without prior unanimity or with some members of the community under duress. In their framework, Buchanan and Tullock (1962) propose a second best in which a group trades off the costs of a less-than-unanimous decision rule against the costs of coming to agreement (Holcombe 2014). Michael Munger describes this trade-off as the tension between the philosophical commitment to the fact that “values start with us” and the practical reality that “we start from where we are” (2018, 40). The result is that the group in charge sacrifices the voice of some other members of the society in order to get the collective enterprise off the ground. If the collective process more closely resembles these conditions than the ones discussed in the previous paragraph, then representative government serves as a *substitute* to consent rather than as a consensually chosen collective strategy. Contractarianism winds up at odds with voluntary consent.

Perhaps the most important implication of this is that when it comes to consent, process matters above all. If legitimacy and the duty of citizens to obey the laws as established and enforced by those representatives are due only to the consent of the governed, then whether a representative government can be considered legitimate depends entirely on the process through which the representatives became imbued with authority. So what does affirming or denying consent to be governed look like in practice? A. John Simmons suggests that political consent must be both intentional and voluntary (1976, 276). However, it has been recognized since the origins of social contract theory that many more people have been born into social contracts than have participated as intentional and voluntary signatories to them. Locke says that any other principle “would make the mighty *Leviathan* of a shorter duration, than the feeblest

creatures, and not let it outlast the day it was born in” ([1689] 1821, 272). As a consequence, in order to protect Leviathans at all stages of maturity, the individuals who are born into a social contract are usually offered a “take it or leave it” proposition rather than being asked to consent. If you choose to remain within a society, you are assumed to have given your tacit consent to be governed by its rules.

An important exception to this rule is that an individual who has given only tacit consent to a government can be obligated to obey its laws only for as long as he or she remains within the governed territory (Locke [1689] 1821, 293). These tacit consenters are only “temporarily obliged” rather than “permanently obliged” like those who expressed their direct consent either at the time of the initial contract or later (Simmons 1993, 82). However, of critical importance in actual social arrangements is the fact that the “it” in the “take it or leave it” proposition faced by those born into an existing social contract is not just the government. Withdrawing your consent by departing a society requires not just taking an expensive trip but also potentially giving up all of the people and places you have known up to the age at which you choose to end your temporary obligation. As a consequence of these costs, in practice many members of the society may not have the practical ability to say no, particularly once political constraints on international mobility are taken into account.

This state of affairs has led some to draw the conclusion that because consent is impossible in politics, there can be no such thing as a legitimate government (Wolff 1970; Simmons 1993, 201; Holcombe 2014). The issue is complicated even further by work such as Carole Pateman’s *The Sexual Contract* (1988) and Charles W. Mill’s *The Racial Contract* (1997), both of which make the important observation that entire populations have historically been excluded from participation in collective decision-making processes. Although emerging from quite different philosophical origins, the classically liberal philosophical anarchists and the radical political theorists studying class, race, and gender wind up converging on a skepticism of the idea that existing formal institutions are likely to have been based on anything akin to the consent of the population. So what do we do from here? Do we have to bid adieu to the contractarian dream?

Consent and Polycentricity

There is one possible way to move forward. A comparative approach is a promising alternative to asking whether a political system is based on the consent of the governed and then ending the conversation. When we enter this comparative paradigm, the questions become: Will a particular marginal institutional change make that system *more* or *less* compatible with the consent of the governed? What are the conditions under which there will be *more* opportunities to offer or withdraw consent? Where will the stakes of individuals’ decisions to affirm or deny consent have a greater impact on collective decision-making processes? All processes fall short of the contractarian ideal, but we can still try to understand which fall shorter than others.

As a first step, it may be useful to sketch out the extremes on the spectrum of political consent. At one end of the spectrum are political arrangements that do not

depend on the consent of the governed in any meaningful way. Citizens born into strong authoritarian regimes with bans on emigration are the archetypal example of individuals who have no choice within the political realm. They have no voice, no exit, and no alternatives. At the other end of the spectrum are those domains of collective action that are constructed purely voluntarily on the basis of mutual consent (Kukathas 2003; Leeson 2014). In order for consent to be meaningful, a person must have some alternative—some option she can take in lieu of saying yes. We don't consider ourselves as having consented to gravity because gravity is not optional. In the collective-action context, having an option means being able to choose to be governed differently. There are two ways this could take place. First, the individual could change the rules of the collective arrangements under which she currently lives. Second, the individual could choose to be governed by an alternative set of rules by either moving, changing membership, or otherwise exercising choice in a domain where there is more than one possible institutional regime. Albert Hirschman (1970) terms these two alternative paths "voice" and "exit."

A monocentric political order is one in which, by definition, there are no alternatives. In a monocentric order, there is a single chain of command through which all decision making is coordinated. An implication of the inherently homogeneous character of monocentric orders is that in order for the concept of choice among alternatives to be meaningful in a political system, that system must be polycentric (Ostrom [1972] 1999; Aligica and Tarko 2012). In polycentric systems, there are multiple and overlapping chains of command. Decision making between these centers can be linked in many different ways, but if one chain of command sufficiently frustrates, citizens can turn to an alternative decision-making process. The simplest version of this is typified by local geographic mobility, such as moving to a different neighborhood so your children can attend a preferred school. Less obvious but equally important are "choice of law" provisions (O'Hara and Ribstein 2009)—such as choosing to file a lawsuit in a different state—or opting for one political process over another in cases where authority is shared. Other examples of simultaneously functioning alternative decision-making processes include the checks and balances associated with federalism, the use of a bicameral legislature, and legal challenges to legislative and executive authority through the judicial system.

Within polycentric orders where choice and therefore consent is possible, there is still significant variation in the range of available alternatives. All polycentric orders are not equal. Whenever there are multiple centers of authority, these authorities can be linked together by very different systems of competition, contestation, and cooperation (Ostrom [1991] 2014). Competition between units or levels of government is usually the first systemic feature that comes to mind when thinking about polycentric systems. However, the rule systems that define a polycentric system can be set up to create any number of different linkages between the systems. Contestation is an important way in which institutional alternatives can be defined and a reason why citizens might exercise choice. The fact that one jurisdiction or center of authority can challenge another creates an opportunity for a person who wants to change the rules. Cooperation between jurisdictions

can function in a similar way in that the option to cooperate with another jurisdiction represents a set of alternative institutional arrangements that might be pursued.

The diversity of possible institutional alternatives within polycentric systems means that the particulars of the rules that shape collective decision-making processes will be important in shaping what it means to choose in that context. First, the rules that determine the division of authority among political organizations will shape the degree of that division, the range of choices available, and therefore the meaningfulness associated with exercising choice. The more that authority is subdivided, the easier it becomes to withdraw consent from some enterprises or systems without removing yourself completely from a geographic area. Second, the rules surrounding geographic mobility will be an important component of the feasibility of being able to select between alternatives. How costly and complicated a process is it to be able to move or to choose a different set of laws? The lower cost of voting with your feet in places with high numbers of nearby jurisdictions and low barriers to mobility lowers the cost of exercising choice and thus again increases the impact of offering or withdrawing consent. Third, what are the rules that govern the entry and exit of new jurisdictions or authorities? The possibility of creating a new rule-making entity or process cannot be assumed. Precedents and other expectations define whether a new jurisdiction will be allowed to emerge and whether new processes can be developed. Adam Martin and Diana Thomas (2013) explore an example of the emergence of new governance processes in their discussion of the formal and informal rules that govern the authority granted to congressional committees. The critical point with respect to consent is that some systems will be more conducive than others to the emergence of feasible alternatives.

In short, polycentricity makes it easier to pick up your ball and go home. The existence of multiple, overlapping systems for the governance of similar social activities opens the door for meaningful choice in political life. You aren't stuck with path A; you can choose path B instead. If you can refuse to choose at all, the role of consent becomes even stronger. The presence of this kind of meaningful choice (or at least *more* meaningful) brings consent and collective action into closer quarters than they would be otherwise. The costs of saying no to particular collective activities can still be incredibly high—higher than we would be comfortable accepting in other arenas of interpersonal exchange—but more institutional alternatives and more opportunities to be able to decline to participate are still better than less.

Relevance for Women's Rights

As demonstrated in the preceding section, processes of consent always fall pretty far from the contractarian ideal. As troublesome as this is for the social contract theory and other theories of voluntary government in general, additional complications emerge when we consider the relative status of men and women in these systems. Limits have been placed on women's ability to express consent in many collective-action contexts (Pateman 1988). In American history, such limitations have manifested in women's

formal exclusion from political office, the ballot box, and the practice of law, but these are really only the most obvious barriers. Less obvious but just as impactful was the practice of legally enforcing women's economic subservience. The doctrine of coverture, imported by the British and entrenched in early American state law codes, declared married women to have no legal identity separate from that of their husbands (Blackstone 1765). In practice, this lack of legal standing meant that married women could not own property, write wills, sign contracts, or represent themselves in court without the assistance of a male trustee (Chused 1982; Warbasse 1987; Hoff 1991). In effect, women's property, time, and other resources were usable only at the discretion of their fathers and husbands.

In addition to direct prohibitions on political activity, these legal barriers to women's economic activity limited their ability to consent to collective action in several important ways. First, the lack of resources and job opportunities that accompany economic dependence rendered women inherently less mobile. This means that even when the option to switch governance regimes by moving to a different jurisdiction existed for men, women were limited to secondary persuasive authority rather than empowered by direct economic decision making. Second, laws that subjected women's decisions to review by their husbands and fathers reduced their bargaining power. The fact that women couldn't credibly commit to exchanges and investments made it more difficult for them to successfully negotiate in collective arenas. Third, barring women from paths to employment considered to be more appropriately masculine domains served as justification for limiting women's educational opportunities. Why learn what you would never use? These barriers and disincentives to education discouraged and even prevented women from fully developing the intellectual capabilities that would enable them to maximally contribute to constitutional processes (Wollstonecraft 1793).

However, the comparative point bears reiterating. The limitation of women's economic rights inevitably led to disregard of their interests in the collective decision-making process, but the extent of this exclusion depended on the institutional particulars. If the offer or withdrawal of consent becomes *more* meaningful when institutions are *more* polycentric, then we should expect polycentric institutional features to reduce the extent to which women's political and legal disabilities impeded their ability to meaningfully participate in collective processes. Indeed, American history shows that polycentric institutional features have opened up opportunities for women to express or decline to consent in ways that would have otherwise been inaccessible to them. I discuss here three polycentric institutional features and their role in amplifying women's role in collective decision making in the nineteenth century: (1) the federalist structure of government, which permitted variation in law through decentralization of authority; (2) openness to self-organization and civil society, which permitted variation in norms and informal processes of governance; and (3) scope for public entrepreneurship along the frontier, in which institutional experimentation was not just permitted but also rewarded.

Perhaps the most obviously polycentric institutional feature of the nineteenth-century United States was its federal structure of many state governments operating

under a single national banner. The marital property laws that assigned economic rights to husbands within marriage were established by state courts, legislatures, and constitutional conventions. This made it possible for women who did not want to marry under such a legal regime to be able to cross jurisdictional boundaries in search of an alternative set of legal rules. Indeed, the nineteenth-century United States saw great variation in marital property law across the states, with some states adjusting property law in order to protect women's sole ownership of property and earnings as early as the 1840s and other states retaining traditional male-ownership doctrines into the twentieth century (Bishop 1856; Hoff 1991; Geddes and Lueck 2002). Further, evidence suggests that state governments were responsive to women's ability to withdraw their consent to particular state regimes. States were quicker to extend protections to women's ownership of property and earnings in situations where it was easier for women to choose to exit, such as in the northeastern part of the country, where the opening of textile mills along waterways and near shipping ports created unprecedented job opportunities, income, and economic independence for single women (Lemke 2016).

The impact that women's choice over government had in this case would not have been possible if it were not for the variation in property law across states. An important implication of this feature is that not all federal structures are necessarily polycentric (Wagner 2005). If states did not have scope to establish a substantively different set of property laws, then there would not have been an opportunity for women to withdraw their consent to legal regimes that refused to protect their sole stewardship of their economic resources. In a polycentric federalist system, "decision-making capabilities are assigned among the diverse decision structures of a government so that each decision structure can exercise essential prerogatives with independence of other decision structures" (Ostrom [1972] 1999, 64). This does not mean the individual jurisdictions act in isolation. They are still subject to constitutional checks and, as the example of jurisdictional competition over marital property law illustrates, to competitive pressures. However, the structure critically enables the substantive differences in law required for consent and choice to be meaningful.

A second polycentric institutional feature of particular importance in the history of women's role in governance is the renowned openness of the early United States to civil society (de Tocqueville [1835] 2012). Elinor Ostrom and Vincent Ostrom consider civic involvement to be critical to the maintenance of the self-governing properties of any political system (Ostrom 1997; Boettke, Lemke, and Palagashvili 2015). The ability to be able to engage in voluntary collective activities that were sometimes complementary and sometimes in competition with the activity of formal government enabled civil society organizations to make their own choices over how time, energy, and even material resources would be employed for collective purposes. This was fortuitous not just for the women involved in voluntary associations but also for the overall functioning of self-governing processes in the nineteenth century. Without the active involvement of the individuals on the ground, the system as a whole would lack the signals needed to direct public services and rule-making bodies toward better sets of decisions (Aligica and Tarko 2012).

If the institutional setting had been antagonistic rather than open to these kinds of overlapping, polycentric alternatives, women would not have been able to involve themselves in collective decision-making processes through club activities. During a time when women were often barred from the ballot and the ballot box, ladies' associations and women's clubs were a way for women to become actively involved in the decision-making processes that governed the provision of local public services (Lemke and Norgaard 2019). Through these clubs, women coordinated a variety of activities now commonly associated with local government, ranging from the creation and maintenance of local amenities such as sanitation, street lighting, and playgrounds to the provision of social services such as kindergartens, libraries, and care facilities for the sick and elderly. Black women's clubs emerged to step in and provide these services when current providers limited service to white citizens only (Lerner 1974). In the process of providing these services, women also used these associations as ways to educate themselves, which thus provided a partial corrective to their exclusion from many formal opportunities for higher education. The polycentric character of civic life in the nineteenth-century United States enabled women to offer and withdraw consent in meaningful ways that were not available to them through the formal political system.

A third polycentric institutional feature of particular relevance to women in the nineteenth century was the great scope for public entrepreneurship that existed in the young, rapidly evolving, frontier country. Although the American frontier was not lawless in that it was full of robust informal governance arrangements (Anderson and Hill 2004), frontiers are inevitably spaces in which there is a greater than usual distance from formal legal structures and existing established interests. As such, some of the most dramatic legal changes in women's rights in the nineteenth-century United States were observed along the frontier. Utah and Wyoming were the first states to enact women's suffrage (Alexander 1970); western territories frequently leapfrogged their more developed eastern counterparts in the passage of acts to protect women's property and earnings within marriage (Lemke 2012, 2016); and the frontier (wherever it stood at a particular moment in time) was a safe haven for divorce seekers throughout the nineteenth century and most of the twentieth century (Blake 1962; Jones 1987).

Further, the rapid pace of settlement and resettlement along the frontier fostered a set of incentives that encouraged institutional entrepreneurship. The nineteenth century was a time of great jurisdictional uncertainty. Where would settlers found new towns and villages? Would those fragile communities continue to grow or fade into history? Where would state and national boundaries be drawn? The answers to these questions had vitally important implications for the future of the United States, and the personal stakes for federal and territorial politicians, frontier developers, and railroad entrepreneurs were high (Lemke 2018). As such, the opportunity and incentive to make frontier settlement appealing to settlers were high, as illustrated not only through the history of the many liberalizations that occurred along the frontier but also in the many federal land grant programs created for the purpose of incentivizing settlers to move ever farther west in the quest for national expansion. The extent to which such great

scope for institutional innovation can exist in an increasingly formalized world is an unsettled question in institutional analysis.

Conclusion

Standards for what constitutes consent vary widely depending on what we are consenting *to*. Medical ethics emphasizes the idea of informed consent, in which the rights of patients are considered to have been violated if they were not well educated on the consequences of their decisions and the relevant alternatives. In intimate personal relationships, we are encouraged to seek out enthusiastic consent. In both medicine and intimacy, the severity of the consequences should action be taken without the full consent of all parties has led to a preference for clear and consistent standards. The idea of tacit consent, which suggests that just sticking around is good enough, would never stand up to any serious scrutiny in these areas of our lives.

How do the standards for consent in collective decision-making processes compare? Political systems have the ability to constrain our decisions for extraordinarily long periods of time, shape our lives in ways we didn't intend, and generate extremely harmful consequences when the political process runs counter to our interests. This is a serious set of consequences, particularly within hierarchical systems where some are afforded less opportunity to affirm or deny their consent than others. Fortunately, as I have argued in these pages, the fact that collective processes are not fully consent based does not rule out the possibility that they can become *more* consensual. The integration of polycentric institutional characteristics—such as choice in law, easy mobility, and opportunities for robust institutional experimentation—can increase the extent to which the consent of the disenfranchised matters in politics.

The process of reconsidering how well our institutions solicit and respect the consent of the governed might not always be pretty, particularly in a world where spaces outside the grasp of strong formal systems of government are increasingly rare. As Vincent Ostrom notes, “An enforceable system of constitutional rule will, also, depend upon citizens who are prepared to pay the price of civil disobedience” ([1972] 1999, 65). Disobedience—which we could also call nonconsent—is one of the ways that an unhappy citizenry can impose costs on political actors, nudging them toward governance practices that are more in line with the will of the people. Toleration for civil society, civil disobedience, and even countercultural attempts at alternative governance may turn out to be a critical component of maintaining some notion of consent within democratic systems.

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