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## Law and Legitimacy: Toward a Rawlsian Solution

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To the Graduate Council:

I am submitting herewith a dissertation written by Walter Joram Riker entitled "Law and Legitimacy: Toward a Rawlsian Solution." I have examined the final electronic copy of this dissertation for form and content and recommend that it be accepted in partial fulfillment of the requirements for the degree of Doctor of Philosophy, with a major in Philosophy.

David A. Reidy, Major Professor

We have read this dissertation and recommend its acceptance:

Otis H. Stephens, John Nolt, Betsy C. Postow

Accepted for the Council:

Carolyn R. Hodges

Vice Provost and Dean of the Graduate School

(Original signatures are on file with official student records.)

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John Nolt

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Betsy C. Postow

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Accepted for the Council:

Linda Painter

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Dean of Graduate Studies

(Original signatures are on file with official student records.)

LAW AND LEGITIMACY:  
TOWARD A RAWLSIAN SOLUTION

A Dissertation  
Presented for the  
Doctor of Philosophy  
Degree  
The University of Tennessee, Knoxville

Walter Joram Riker

May 2007

## DEDICATION

For Dawn. Thanks for your support and patience.

## ABSTRACT

John Rawls developed the most compelling normative account of liberal constitutional democracy of the 20<sup>th</sup> century. Today, however, prominent political theorists such as Jeremy Waldron and Ian Shapiro are calling for post-Rawlsian, “power friendly” approaches to democratic theory. Power friendly approaches surrender a significant historical strain of liberal democratic thought, often associated with Rawls—the hope for a politics of shared reason. Such “rationalist expectations” must be abandoned, says Shapiro. Power friendly theorists hold that disagreements over justice, and other issues, are so deep that political philosophers cannot say what justice requires even under ideal conditions. Democratic citizens can only constitute themselves as a democratic body politic through real time political processes. But this means that, for nearly every constitutional and legislative issue, the will of some citizens will govern all. There is no hope for a politics of shared reason; what we have is a struggle between reasons, where one side wins and the other side loses. Power friendly theorists seek to legitimate this unavoidable exercise of force by describing pragmatic, prudential or normative reasons for accepting such democratic outcomes as authoritative. Democratic institutions that produce a stable *modus vivendi*, in which the spiritual and material needs of citizens are at least minimally satisfied, should be regarded as authoritative on those (or similar) grounds. For instance, Shapiro argues that democracy deserves our allegiance because it is the best available way of “managing power relations among people who disagree about the nature of the common good,” but who must nevertheless live together. Of course, the loser is never happy about losing these struggles, but she has sound reason to accept the outcomes anyway, and she lives to fight another day.

Power friendly theorists have a point. But what they do not realize is that Rawls conceded this point around 1980, and then proposed his own power friendly account of democratic law and political authority. Rawls’s account centers on his liberal principle of legitimacy. What is significant about his approach is its faithfulness to the spirit, if not the fact, of the liberal ideal of shared reason. That is, while Rawls is not the shared reason rationalist that many accuse him of being, he does not surrender as much of the liberal project as the power friendly theorists do. Rawls’s view represents a third option, which sits between the rationalist and the power friendly poles. Unfortunately, few have understood his account, because few have read all of his work, or considered his intellectual debts. I construct a Rawlsian power friendly view of law and legitimacy that is philosophically rigorous, faithful to Rawls’s texts, and grounded in a thorough understanding of his intellectual debts, in particular to H. L. A. Hart and Philip Soper. In the end, I argue that the Rawlsian power friendly view is philosophically superior to both the rationalist view (wrongly attributed to Rawls) and the newer power friendly views of Waldron and Shapiro.

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PREFACE  
THE END OF LIBERALISM

“All government,” says John Dunn, “however necessary and expeditious, is also a presumption and an offence.”<sup>1</sup> States typically provide citizens with many practical advantages, but they also “insist on a very large measure of compulsory alienation of judgement on the part of their citizens.”<sup>2</sup> States claim they are justified in compelling citizens to follow certain rules and laws, through coercive sanctions when necessary, regardless of whether or not their citizens judge the rules or laws to be morally sound or otherwise in their self-interest. This assumed right to demand and compel compliance, says Dunn, is largely what makes a state a state. The levying of such demands, and the threats of sanction for noncompliance, are an affront to citizens in modern democracies because democratic citizens take themselves to be politically free and equal and capable of judging on their own exactly what they ought to do. Political philosophers have long recognized that might does not make right, so a central problem in political philosophy is justifying (apologizing for, according to Dunn) this aspect of the state’s relationship to its citizens. What we need is an account of justified political authority that is appropriate for modern democracies. The term “political authority” here is a stand-in for a set of related problems in political philosophy. When I say that we need to account for political authority in modern democracies, I mean, roughly, that we need to understand the source and nature of the law’s normative authority over citizens, and to know when, if ever, the

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<sup>1</sup> John Dunn, Democracy: A History (New York: Atlantic Monthly Press, 2005), p. 19.

<sup>2</sup> Dunn, Democracy, p. 19.



state has a right to use its power to compel citizens to act in certain ways, and when, if ever, citizens have a duty to obey, or at least to acquiesce or defer to, the state when it demands that its rules and laws be followed by all, and threatens to compel obedience with coercive force.

Ancient and medieval political philosophers justified political authority in terms of what they took to be uncontroversial natural or divine understandings of the human good. That these understandings were not widely available to the public, and were known only by some privileged few, was not important. What mattered was the fact that the nature of the human good could be known, and that the state could be an aid to, and might even be necessary for, the realization of this good. Insofar as the human good was seen as natural or divine in nature, the resulting political orders were also seen as naturally or divinely mandated. Plato's Republic is but one example.

Under the influence of the Reformation and the Enlightenment, liberal political theorists abandon this general approach. One type of liberal theorist, the social contract liberal, seeks instead to justify political authority by grounding it in public or shared reasons, reasons that all individuals could affirm.<sup>3</sup> This strand of liberalism aims to make the state's exercise of coercive power against citizens consistent with freedom of conscience, and at the same time an expression of the political freedom, equality, and sovereignty of citizens. For when the state's power is exercised in accord with and pursuant to political rules that all citizens could affirm, the state's power ceases to be an

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<sup>3</sup> Two helpful accounts of the relationship between liberalism and shared reason are Charles Larmore, The Morals of Modernity (New York: Cambridge University Press, 1996), chapters. 6-7, and Jeremy Waldron, "Theoretical Foundations of Liberalism," Philosophical Quarterly, v. 37 (1987), pp. 127-150.

external force exercised against citizens, and instead becomes an exercise of force by citizens for citizens.

This liberal ideal of shared reason has come under heavy attack in recent years, and not without some justification. Nevertheless, it is an ideal that I seek to vindicate in this dissertation. This liberal hope can be defended against many supposedly fatal attacks. Moreover, liberal shared reason approaches represent a more attractive vision of democratic political community than those offered by what I will call “shared interest” approaches. But I am getting ahead of myself. The story I aim to tell begins with what I call good faith disagreement, so it is to this that I now turn.

“Reasonable” or Good Faith Disagreement.

We know from experience that equally thoughtful and sincere individuals tend to disagree over how to answer many important questions about the human condition, including questions about the nature of the good life for human beings, and about what kind of political institutions we ought to have. Experience has also taught us that free and open discussion of these questions does not generally lead to consensus. In fact, deliberation sometimes sharpens disagreement, pushing us even farther apart. This happens often enough for us to doubt that consensus on many important questions is within our reach. It has become common instead to simply recognize that people tend naturally to affirm different and often irreconcilable answers to such questions, even after deliberation. People tend naturally to disagree.

Some of these disagreements are simple in nature, in the sense that they can be traced to e.g. uncontroversial factual or logical errors made by one or both parties to the dispute. Many more of these disagreements are rooted ultimately in what John Rawls calls the burdens of judgment.<sup>4</sup> Disagreements rooted in these burdens are not simple. The burdens explain how it is that equally diligent and sincere individuals can nevertheless reach different answers to questions about e.g. the nature of the human good. The burdens include the following conditions:

- (a) Empirical evidence is often complex and conflicting, and thus hard to assess.
- (b) Even when people agree about what the relevant considerations are, they may disagree about how to weigh them against one another.
- (c) Important concepts are often vague and subject to difficult, borderline cases.
- (d) The way a person assesses evidence and weighs values is partly determined by the totality of her experiences, but no two persons have had the same experiences.
- (e) There are often different kinds of normative considerations on both sides of an issue, so it is hard to make a judgment.
- (f) Any set of social institutions is limited in the set of values it can admit, so the nature of social life forces us set priorities among cherished values and make difficult choices about which to admit and which to restrict.

What the burdens describe are some of the many ways that the intellectual tools we share are simply inadequate to the task of publicly justifying any unique and determinate answers to many of the most important questions we face as individuals and as a society.

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<sup>4</sup> John Rawls, Political Liberalism (New York: Columbia University Press, 1992), pp. 54-8. Hereafter PL.

What the burdens imply is that disagreements over questions like the nature of the human good are not ultimately rooted in defects of either intellect or character, but are better understood as the result of the inadequacy of the common resources of human reason.

This is why this phenomenon is often referred to as “reasonable disagreement.” Two individuals may act “reasonably”—diligently and honestly trying to think through problems related to our human condition—and still come to affirm different and even irreconcilable answers. There are both moral and epistemic issues at play here. One moral issue has to do with honesty and diligence in the search for answers. When we call such disagreements “reasonable” we affirm that each participant has acted responsibly—each has honestly and diligently applied reasoning tools to the question—and thus deserves some measure of respect. This does not imply any univocal understanding of reason. My view is that reason is plural—there are many ways to do it. How then can people know if others are honestly and diligently applying reason to an issue? If pushed, I would appeal to something like Wittgenstein’s “family resemblance.” I do not believe we can identify necessary and sufficient conditions that distinguish reason strictly speaking from all other approaches to problems. We can, however, see some ways of approaching problems as resembling what we ourselves regard most fully as reason. This may seem unsatisfactory, and there is undoubtedly much more could and should be said, but I believe this is simply part of the (post-modern?) condition we face today.

One epistemic issue indicated by “reasonable” disagreement has to do with thinking. “Reasonable” in this sense acknowledges that these questions require careful and deliberate attention. We seek reasons for affirming that e.g. some ways of living are good for us, and that others are not. By calling these disagreements reasonable we

acknowledge that the parties have reasons for holding the views they do. Unfortunately, the intellectual tools we share cannot do all that we might want them to. They underdetermine unique and determinate answers to many of the questions we ask.

This leads, then, to another moral issue, what we might think of as each person's moral right to take a stand on controversial issues. The burdens explain not only why the diligent and honest search for answers does not lead to consensus, but also why we cannot simply reject other people's answers as dumb or immoral, as unworthy of consideration and undeserving of a hearing in our public spaces. So another reason for calling these disagreements "reasonable" is to acknowledge that, given the burdens of judgment, it is not a failing of some sort for a person to affirm a conception of the good life, or an understanding of politics or justice, that is different from our own, even if the view they affirm is controversial in some way.

It is of course naïve to deny that disagreements are ever rooted in intellectual or moral failures. Certainly some are. Nevertheless, it is a mistake to think that even most of our disagreements with our fellow citizens are like this. It is factually wrong, I believe, to insist that most of people who disagree with us do so because they are in some way intellectually or morally defective. And it is morally wrong too, because this suspicious attitude toward others fails to accord them the respect that is often due to them, and because this kind of suspicion corrodes public discourse and can become a disruptive force in society. In any case, although some people cheat, and all people make mistakes, it is nevertheless reasonable to believe that most of our fellow citizens are

sincere in their convictions, and that they have come honestly to the views that they affirm.<sup>5</sup>

Reasonable disagreement should not be confused with pluralism.<sup>6</sup> Pluralism is the idea that there are many human goods, not just one, and that these different goods are not reducible to something more fundamental, such as happiness or freedom. It is a claim about the nature of value. Reasonable disagreement is different. It is not a claim about the nature of value, but instead a claim about what we can justify to others. Our deliberations about theories of value, such as pluralism, are not themselves immune to the burdens of judgment, and so we should not be surprised that there is reasonable disagreement over whether or not pluralism is true.

There are many good reasons for using the term “reasonable disagreement” to refer to disagreements ultimately rooted in the burdens of judgment, but I will not refer to them this way in what follows. I prefer to use the term “good faith disagreement” to describe this phenomenon. Different theorists mean different things by “reasonable disagreement,” and, in fact, there are reasonable disagreements over the causes and implications of reasonable disagreement itself. (This is, in my view, one of the more interesting puzzles modernity forces on us.) But my main reason for avoiding the term has to do with my ultimate purpose in this dissertation. I develop a Rawlsian approach to law and the government’s right to enforce it, so I spend a good deal of time talking about Rawls’s work. Unfortunately, Rawls is not very clear about what he means by reasonable disagreement. Sometimes he appears to use the term to refer to any disagreement

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<sup>5</sup> John Nolt disagrees. That is, it is not obvious to him that it is reasonable to believe that most of our fellow citizens are sincere in the way I claim. Nevertheless, he says, it may be reasonable to act on the assumption that most people are sincere, even if you do not in fact believe it.

<sup>6</sup> Larmore, The Morals of Modernity, p. 12.

between individuals that is rooted in the burdens of judgment. This is what I will call a good faith disagreement. At other times he appears to use it to refer only to disagreements between individuals who affirm views of the human good that do not conflict with the essentials of liberal democracy. This is a more limited set of disagreements and represents just a portion of the total set of good faith disagreements. This significance of this difference will become clear later, as I develop my Rawlsian view. So, from here forward, I will use the term “good faith disagreement” to refer to any disagreement rooted in the burdens of judgment.

There are many kinds of good faith disagreements, but two kinds are especially important for my dissertation. Some disagreements are about the nature of the good for human beings. Here I have in mind something like what Rawls calls a comprehensive doctrine. These are more or less coherent moral, religious, or philosophical conceptions of the ultimate good for human beings. In modern democracies, citizens affirm a plurality of different and irreconcilable comprehensive doctrines. Other disagreements are over political matters. For example, there are good faith political disagreements over exactly what sort of democratic decision procedures a society ought to institute. Should we have winner take all democracy, or some form of proportional representation? Which is more consistent with the ideal of shared political authority? Which more reliably produces nearly just results over time? Other good faith political disagreements are more abstract. For example, there are disagreements over how we should understand and balance abstract ideals like freedom and equality, and how these abstract ideals should be implemented in actual policies. There are even good faith political disagreements over what justice ultimately requires. Though I single out good faith disagreements over (a)

the good for human beings and (b) political matters, in this preface, I do not take them to represent an exhaustive account of good faith disagreement. In fact, there are many other kinds of good faith disagreements. But I want to highlight this limited set of disagreements because they have a central place in this dissertation.

Good faith disagreements have played a role in the emergence of the modern liberal society. Disagreements have long been rooted in the burdens of judgment, though this was not always recognized. Our history is replete with examples of such disagreements being met with repression, violence, and even war. Majorities have often sought to impose their views on minorities. It is dissatisfaction with this constant struggle for supremacy, coupled with uncertainty about the possibility of final victory, that finally sets us on the path to our modern liberal society.

The Liberal Society.

Modern liberal societies emerged historically as a response to the Reformation and subsequent debates over religious toleration in the sixteenth and seventeenth centuries.<sup>7</sup> At this point in history it became evident to many that toleration of differences was preferable to the continual fighting that resulted from efforts to impose views on others, especially since there seemed to be little hope that any final victory could be achieved. A *modus vivendi* developed, where different factions stopped fighting, not out of respect for the other, or the implications of the burdens of judgment,

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<sup>7</sup> Nicholas Wolterstorff, "Do Christians Have Good Reasons for Supporting Liberal Democracy?", The Modern Schoolman, v. 78 (2001), pp. 232-4; Rawls, PL, pp. xxvi-xxvii.



but as a way of producing a tolerable if sometimes uneasy peace. Through time, what began as a mere *modus vivendi* evolved into a precursor of the liberal society—a society organized around something like our idea of freedom of conscience or thought. Thinking about toleration had changed. What once was viewed simply a tolerable means of maintaining the peace between different people eventually became a core value commitment shared by people living in these societies. This is the beginning of what we now think of as the liberal society.

The U.S. is a liberal society (liberal political society or liberal polity). Other examples of liberal societies include Great Britain, France, and Germany. Political theorists disagree about exactly what fundamental principles characterize such societies, distinguishing them from other, non-liberal polities, but the lists of characteristics they develop typically include principles of freedom, equality, toleration, individual rights, constitutionalism, and the rule of law.<sup>8</sup> Rawls defines liberal societies as those that (a) secure for their citizens some set of rights, liberties and opportunities, such as are commonly found in constitutional regimes, (b) give priority to these individual freedoms over perfectionist values or the common good, and (c) ensure that all citizens have access to sufficient means to make effective use of their rights, liberties, and opportunities.<sup>9</sup> He adds that they are well-ordered. The members of liberal societies constitute and govern themselves as a body politic through a public and (for the most part) voluntarily affirmed

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<sup>8</sup> For a representative sample, see, e.g., George Crowder, Liberalism and Value Pluralism (New York: Continuum, 2002), pp. 22-5; Gerald Gaus, Contemporary Theories of Liberalism (Thousand Oaks, Ca.: SAGE Publications, Inc., 2003), pp. 1-22; Robert Talisse, Democracy After Liberalism: Pragmatism and Deliberative Politics (New York: Routledge, 2005), pp. 15-32; Bert van den Brink, The Tragedy of Liberalism: An Alternative Defense of a Political Tradition (Albany: State University of New York Press, 2000), pp. 9-15; and Wolterstorff, “Do Christians Have Good Reasons?”

<sup>9</sup> Rawls, LP, pp. 140-1.

conception of justice, without excessive coercion, manipulation or deception.<sup>10</sup> They recognize that justice is centered on the inviolability of persons and understand their society to be a system of cooperation aimed at and justified by the good of all individual members, and not by some notion of aggregate or corporate good. Nicholas Wolterstorff offers a similar account of the liberal polity:

... a polity in which there is a constitutional-legal framework which guarantees to all its sane adult citizens due process of law along with the so-called “civil liberties,” foremost among those liberties being these: freedom of conscience, freedom of religious practice, freedom of speech, freedom of assembly, freedom from search and seizure without warrant, freedom from cruel and unusual punishment, and freedom from intrusions into one’s private life.<sup>11</sup>

The U.S., Great Britain, Germany, and France are certainly not perfectly liberal (according to either account or to common sense), nor are they perfectly just. Nevertheless, they each exhibit the core commitments of liberal societies.

None of the rights and liberties typically found in liberal polities are absolute. The lone exception may be freedom of conscience. In any case, all liberal polities institute some restrictions on citizens’ rights and liberties. For example, Germany is a liberal society, but it has laws that prohibit its citizens from denying that the Holocaust occurred. France too is a liberal society, despite its recent decision to restrict the wearing of head scarves by Muslim women in certain contexts. These and similar restrictions do not make these societies illiberal. Such restrictions may give us reason to wonder if any

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<sup>10</sup> Rawls, The Law of Peoples (Cambridge, MA: Harvard University Press, 1999), pp. 4, 19, 64-67. Hereafter LP.

<sup>11</sup> Wolterstorff, “Do Christians Have,” p. 232.

society is fully liberal, but restrictions do not imply that any particular society is illiberal. Generally speaking, such restrictions on liberties are intended to promote liberty, either by securing the conditions necessary for any system of ordered liberty, or by making possible a more adequate system of ordered liberty.

Liberal societies can differ quite a bit from one another. They often place different restrictions on the various fundamental liberties of citizens. Rawls's and Wolterstorff's accounts both leave room for this variation. This variation is rooted in the different histories, traditions, and self-understandings of different liberal societies. For example, while both Germany and the U.S. secure free speech rights for citizens, they disagree about how to handle Holocaust denial. German law forbids it. This does not mean that Germans deny or do not understand the importance of free speech. It may be that the German people have decided that the harm that accompanies Holocaust denial simply outweighs the value of allowing people to make such statements. If so, Germany may be less than fully liberal. Alternatively, the German people may have decided that Holocaust denial somehow threatens the conditions necessary for a system of ordered liberty at all, or that it somehow prevents them from securing the most adequate system. Exactly why the Germans have made this decision is not clear. What is clear is that their decision is a response to their role in the Holocaust and their own historical failings. On the other hand, the U.S. allows its citizens to deny the Holocaust. This does not imply widespread acceptance of such claims in the U.S. Rather, Americans have decided that limiting free speech is not the best way to handle this kind of claim. Americans have faith that a free marketplace of ideas can show such statements to be false, and mitigate the harm they tend to cause. There is nothing suspect about this variation among liberal

societies. It is the normal result of reasonable disagreements over how to specify the fundamental commitments of liberal societies, and reflects the different histories, sociological and material conditions, and self-understandings of different liberal societies. And any liberal society (in fact, any society) that respects the basic rights of its citizens can reasonably claim some measure of self-determination in setting up its own internal policies.

Liberal Political Philosophy.

Liberal political philosophy (or liberalism) attempts to offer a normative justification for the fundamental social and political institutions that characterize liberal societies. Wolterstorff describes the task this way: “assuming the liberties cited [in various accounts of liberal societies] and the restrictions allowed are not a mere grab-bag, what’s the governing Idea?”<sup>12</sup>

Different liberal theorists defend different governing ideas. Nevertheless, it is possible to identify certain key commitments shared by them all. Alan Ryan says, for instance, that liberalism is “the belief that the freedom of the individual is the highest political value, and that institutions and practices are to be judged by their success in promoting it.”<sup>13</sup> And Martha Nussbaum writes that

Liberalism holds that the flourishing of human beings taken one by one is both analytically and normatively prior to the flourishing of the state or the nation or

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<sup>12</sup> Wolterstorff, “Do Christians Have,” p. 233.

<sup>13</sup> See, e.g., Alan Ryan, “Liberalism,” in R. Goodin and P. Pettit, eds., A Companion to Contemporary Political Philosophy, (Malden, MA: Blackwell Publishing, 1993), pp. 292-3.

the religious group; analytically, because such unities do not really efface the separate reality of individual lives; normatively because the recognition of that separateness is held to be a fundamental fact for ethics, which should recognize each separate entity as an end and not as a means to the ends of others.<sup>14</sup>

These statements point to key commitments shared by liberal political philosophers: (a) the primacy of the individual, (b) freedom, and (c) equality. In the next few paragraphs I will describe these commitments in an abstract and (I hope) uncontroversial way.

(a) Liberalism holds that individual persons are primary in two ways.<sup>15</sup> First, liberalism affirms that the individual person is the fundamental element for political theorizing. Some see this commitment to the primacy of the individual as a metaphysical claim, while others see it as a prudential or practical one.<sup>16</sup> In any case, the main idea is that individuals are always ultimately distinct or separate from the various associations and groups (religious, political, filial) that they have membership in. The groups that individuals form do not have an ontological status equal to or more fundamental than that of the individuals themselves. The individual person is the ultimate unit of analysis.

Second, liberalism holds that the good of individuals—their liberties and opportunities—is normatively prior to the good of groups, including society as a whole. The good of individuals may not be subordinated to or sacrificed for the good or goals of

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<sup>14</sup> Nussbaum, quoted in Talisse, *Democracy*, p. 17.

<sup>15</sup> See, e.g., Talisse, *Democracy*, pp. 17-19.

<sup>16</sup> Talisse, *Democracy*, p. 17.

social groups.<sup>17</sup> This does not mean that people cannot choose to make sacrifices for the sake of various groups. It means that no one can be required to do so in a liberal society.

(b) The second fundamental theoretical commitment of liberalism is freedom.

Liberal political theorists hold that citizens should be free in two different, but closely related, ways. The first kind of freedom is referred to as “personal freedom” or “moral autonomy.”<sup>18</sup> It amounts to a deep respect for each individual’s capacity for self-direction.<sup>19</sup> Each normal adult human being is capable of developing, revising, and pursuing a “conception of the good,” a more-or-less systematic set of beliefs about what is valuable and worth pursuing for human beings. The general idea of freedom here is that each person should be able to decide for herself how to lead her life. Citizens respect one another’s freedom by allowing each other to exercise their capacities for self-direction.

The second kind of freedom is the citizen’s right to play a role in the government, i.e., to play a role in the constitution of the political rules that bind citizens into a body politic and organize much of their collective behavior. Some call this “public freedom” or “public autonomy.”<sup>20</sup> Citizens have different conceptions of the good. This would not be a problem if each of us lived on our own, in isolation from other citizens. But we do not live alone. We are social beings, and our goals and actions affect the lives of others. Sometimes one citizen’s understanding of the good conflicts with another citizen’s

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<sup>17</sup> This does not rule out practices like eminent domain, though it does require that such practices be limited to the purpose of securing the conditions necessary for a more adequate ordered system of liberty.

<sup>18</sup> E.g., van den Brink, *Tragedy*, pp. 10-2, and Talisse, *Democracy*, pp. 17-19, respectively.

<sup>19</sup> See, e.g., Talisse, *Democracy*, pp. 17-20; Waldron, “Liberalism,” Section 3; and Wolterstorff, “Do Christians Have,” p. 234.

<sup>20</sup> See, e.g., van den Brink, *Tragedy*, p. 11.

understanding. In order to deal with these conflicts, liberal societies need institutions and rules, e.g., a constitution and laws that define offices and powers of government officials and citizens, and that define the limits of personal freedom. The liberal political theorist's idea of public freedom includes the freedom of citizens to reflect on the legitimacy and justice of their institutions, and a fundamental right to play a role in the development of these institutions.

(c) The third fundamental theoretical commitment of liberalism is equality.<sup>21</sup> This does not mean that liberal political theorists are economic egalitarians, though some are. Rather, liberal theorists affirm some principle of the equal basic worth or status of all citizens. One aspect of equal basic worth is each citizen's right to have her interests given equal consideration in the development and operation of social and political institutions. A second aspect of it is each citizen's right to equal respect of her entitlement to choose and act on a conception of the good. This applies also to each citizen's public freedom.

Utilitarian versus Social Contract Liberalism.

Utilitarian liberals argue that the basic institutions characteristic of liberal societies are normatively justified because such institutions maximally promote the utility

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<sup>21</sup> See, e.g., Waldron, "Liberalism," Section 3; and Wolterstorff, "Do Christians Have," p. 234.

of citizens.<sup>22</sup> The freedoms secured and promoted in liberal societies tend to produce the most utility for all affected over time. Some complain, though, that utilitarian liberalism is not liberalism at all, but rather a species of perfectionism.<sup>23</sup> Roughly put, the charge is that utilitarian liberalism makes certain robust claims about the human good, e.g., that people's conceptions of the good are rooted in some notion of individual happiness or preference satisfaction. In making such bold claims, utilitarian liberals ignore good faith disagreement and the freedom to affirm one's own conception of the good. Liberalism is committed to the idea that people are free to choose even conceptions of the good that make no reference to happiness, or that are not rooted in the satisfaction of their own desires. They may even choose to affirm a conception of the good that defines the good life in terms of the flourishing of some group they belong to, rather than the flourishing of individuals.

Whatever one makes of these criticisms, (and I'm not saying they prove decisive) worries like these have provided some motivation for social contract liberalism. Social contract liberals argue that the basic institutions characteristic of liberal society are justified because they represent terms of political association that all citizens as free and equal might affirm or accept, from the common and shared moral point of view of citizen. For example, Gerald Gaus says that "liberals insist that moral and political principles are justified if and only if each member of the community has reason to

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<sup>22</sup> For general discussion, see, e.g., John Christman, Social and Political Philosophy: A Contemporary Introduction (New York: Routledge, 2002), pp. 108-111. For defenses of utilitarian liberalism, see, e.g., Russell Hardin, Morality Within the Limits of Reason (Chicago: University of Chicago Press, 1988), and John S. Mill's classic On Liberty (New Haven, CT: Yale University Press, 2003).

<sup>23</sup> See, e.g., Christman, Social and Political Philosophy, pp. 108-111.



embrace them.”<sup>24</sup> In another work Gaus says that “this idea of public justification is at the heart of contractual liberalism.”<sup>25</sup> Jeremy Waldron says something similar: “liberals are committed to ... a requirement that all aspects of the social order should either be made acceptable or be capable of being made acceptable to every last individual.”<sup>26</sup> And Thomas Nagel says that “the task of discovering the conditions of [political] legitimacy is traditionally conceived as that of finding a way to justify a political system to everyone who is required to live under it.”<sup>27</sup> Nicholas Wolterstorff agrees: “the liberal theorist sees the liberal polity as committed to the ideal of establishing rules of engagement which all citizens reflectively agree to.”<sup>28</sup>

This liberal ideal of shared reason can be traced to the Enlightenment, a time characterized by a growing faith and confidence in the human ability to understand the world.<sup>29</sup> Many thinkers of this period felt that reason could free us once and for all from the tyranny of tradition and superstition. Political and social theorists, made bold by progress in the sciences, sought to understand and justify our political and social worlds as well. Here, then, is the germ of the hope of shared reason: freedom of conscience, coupled with confidence in the human ability to understand and justify social and political arrangements. These lead naturally (though not inevitably) to a desire for political institutions that could be justified to all.

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<sup>24</sup> Gerald Gaus, “Public Justification and Democratic Adjudication,” Constitutional Political Economy, v. 2 (1991), p. 251.

<sup>25</sup> Gerald Gaus, Value and Justification: The Foundations of Liberal Theory (Cambridge, Ma.: Cambridge University Press, 1990), p. 456.

<sup>26</sup> Waldron, “Theoretical Foundations,” p. 128.

<sup>27</sup> Thomas Nagle, Equality and Partiality (New York: Oxford University Press, 1991), p. 3.

<sup>28</sup> Wolterstorff, “Do Christians Have,” p. 235.

<sup>29</sup> See, e.g., Waldron, “Theoretical Foundations,” pp. 134-140.

For contemporary liberalism, the hope offered by shared reason is that free and equal citizens, deeply divided by their differing and irreconcilable understandings of the right and the good for human beings, might nevertheless find terms of political association that each could affirm, or could publicly see as justified, from the common, shared moral point of view of “citizen.” If such terms are found, the state’s coercive power, exercised against citizens, is not only consistent with each citizen’s freedom and equality, but is also an expression of it. For when the state’s power is exercised in accord with and pursuant to constitutional rules accepted by all citizens, it is not an external force exercised against citizens, but is instead an exercise of force by citizens.

Power-friendly theorists think it is time for us to abandon this strand of liberal political thought. They hold that our disagreements over the right and the good are so deep that political philosophers cannot say what justice ultimately requires, even under the ideal conditions of political theory. What justice ultimately requires on the ground can only be worked out—if it can be worked out at all—by citizens through real-time political processes. An implication of this is that, for nearly every political issue, the will of some will govern all. There is no hope for a politics of shared reason; what we have is a constant struggle, where one side wins, and other sides lose. Of course, power-friendly theorists recognize that might does not make right, so they seek to legitimate the unavoidable exercise of force in democratic politics by describing normative, pragmatic or prudential reasons for accepting such outcomes as authoritative. For instance, democratic institutions that produce a stable *modus vivendi*, in which the spiritual and material needs of citizens are at least minimally satisfied, might be regarded as authoritative on those (or similar) grounds. No one is happy to lose these struggles, but if

the power-friendly theorists are right, those in the minority have sound reason to accept the outcomes anyway. At the very least, they live to fight another day.

Power friendly theorists would be right to reject shared reason, if it required consensus over some specific and determinate set of social and political institutions. Consensus accounts of shared reason are doomed to fail. For instance, a consensus account of shared reason would require that liberal democratic citizens find concrete and determinate democratic decision procedures for resolving disagreements. That is, it would require citizens to find democratic decision procedures that no person could reject in good faith. This would be possible only if questions of democratic institutional design were immune to the burdens of judgment. But we know that they are not immune. There are many good faith disagreements over what sorts of decision procedures are most appropriate for a liberal democracy. For instance, is winner take all democracy or proportional representation most faithful to an ideal of shared political authority? Is the ideal of shared political authority the right metric to apply to this question, or should we seek instead a decision procedure that will most reliably produce nearly just results over time? If we choose this option, what exactly does justice require? And so on. Good faith disagreement infects this discussion all the way down. This is but one example of the way that good faith disagreements put strong consensus accounts of shared reason well out of our reach.

Fortunately, the ideal of shared reason does not require consensus, at least not a consensus of this strong and implausible sort. Consensus accounts of shared reason are doomed, but relaxed, power friendly accounts of shared reason are not. For instance, Kant offers a non-voluntarist social contract theory that marries shared reason with the

fact that power must often be exercised in the face of good faith dissent and disagreement.<sup>30</sup> He argues that the law must be based on “the will of the entire people,” because “the will of another person cannot decide anything for someone without injustice.”<sup>31</sup> However, he continues,

... we need by no means assume that this contract ... based on a coalition of the wills of all private individuals in a nation to form a common, public will for the purposes of rightful legislation, actually exists as a *fact*, for it cannot possibly be so.... It is in fact merely an *idea* of reason, which nonetheless has undoubted practical reality; for it can oblige every legislator to frame his laws in such a way that they could have been produced by the united will of the whole nation.... This is the test of the rightfulness of every public law. For if the law is such that a whole people could not *possibly* agree to it (for example, if it stated that a certain class of *subjects* must be privileged as a hereditary *ruling class*), it is unjust; but if it is at least *possible* that a people could agree to it, it is our duty to consider the law as just, even if the people is at present in such a position or attitude of mind that it would probably refuse its consent if it were consulted.<sup>32</sup>

Kant provides an example:

If a war tax were proportionately imposed on all subjects, they could not claim, simply because it is oppressive, that it is unjust because the war is in their opinion

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<sup>30</sup> For discussion of Kant’s social contract theory see H. S. Reiss, ed., Kant: Political Writings (Cambridge University Press, 1991), Allen D. Rosen, Kant’s Theory of Justice (Cornell University Press, 1993), chapters 3 and 4, Waldron, “Theoretical Foundations,” pp. 141-143.

<sup>31</sup> Kant, “On the Common Saying ‘This may be True in Theory but it does not Apply in Practice’” in Kant: Political Writings, p. 77.

<sup>32</sup> Ibid., p. 79.

unnecessary. For they are not entitled to judge this issue, since it is at least *possible* that the war is inevitable and the tax indispensable.<sup>33</sup>

Kant recognizes that the exercise of power without any basis in public consensus is unavoidable in politics, but he does not give up on the liberal hope of shared reason. Instead, he offers a relaxed account of it. He does not insist that the law be something that all citizens do in fact agree to, or something that no reasonable citizen could reasonably reject; it is enough for the law to be something that all citizens *could* agree to.

One might reasonably ask if this relaxed or power friendly approach to shared reason is shared reason at all. After all, in Kant's example the citizens do not agree that the war is necessary—some see no or insufficient reason for it. Though this worry is reasonable, I think it is ultimately mistaken. What Kant proposes is a shared reason view of legitimate state action. The demand for shared reason is a demand for a certain kind of reciprocity. The demand for reciprocity is, in turn, a demand for a certain kind of respect. It is a demand that persons be treated in ways that each could see as justified. For now, I will set aside the issue of just what it means to offer reasons others “could” see as justified, since different political theorists take different positions on it. I want to make a couple of more general points here instead. First, by offering reasons at all for political activity, we show respect for each person's rational agency, for each person's capacity for judgment. Second, when we offer reasons we think another person could accept, from a shared moral point of view, we show respect as well for that person's political freedom and equal political status as a fellow citizen. While Kant does not require shared reason in the fullest sense (terms of association all persons do in fact converge on, or that

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<sup>33</sup> Ibid. See Kant's footnote.

could not reasonably be rejected by anyone), his view nevertheless requires reciprocity (laws that *could* have been produced by the united will of the nation) and thereby evinces a respect for the rational agency, liberty and equality of citizens (a law has genuine force only when it is the kind of thing that citizens *could* freely affirm).

This sort of liberal “power friendly” shared reason requires two kinds of reciprocity. First, it requires something similar to what Reidy calls “reciprocity in advantage.”<sup>34</sup> Terms of association must respect the interests of all citizens. Exactly what it means to respect the interests of citizens is a question I will leave open for now. But the basic point is that there is no reason to think any terms of association that ignored a citizen’s interests altogether, or, worse, positively threatened those interests, would be affirmed by that citizen. Citizens have no reason to see such terms of association as preferable to anarchy, to the state of nature.

Second, shared reason requires something similar to what Reidy calls “reciprocity in justification.”<sup>35</sup> This requires that citizens be prepared to defend their political activity in terms of reasons that are publicly available, that are part of some relevant public discourse. Again, for now I will leave open the question of just what should count as a “relevant” or available public reason. But the basic idea is that political activity should not be based solely on non-public reasons, as this does not properly respect others as free and equal citizens.

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<sup>34</sup> See David A. Reidy, “Reciprocity and Reasonable Disagreement: From Liberal to Democratic Legitimacy,” in *Philosophical Studies*, forthcoming 2006.

<sup>35</sup> See Reidy, “Reciprocity and Reasonable Disagreement.”

My Aims in this Dissertation.

John Rawls developed the most compelling normative account of constitutional liberal democracy of the 20<sup>th</sup> century. Unfortunately, Rawls is often read as offering an implausibly strong consensus account of the liberal ideal of shared reason. As a result, much of his work has been pushed aside as old-fashioned and irrelevant in our modern context. This is a mistake. What Rawls proposes is a power-friendly shared reason account of liberal democratic law and political authority. It centers on his liberal principle of legitimacy.<sup>36</sup> Unfortunately, few have understood his account, because few have read all of his work on it, or considered his intellectual debts.

I have three main goals in this dissertation. One of my goals is to construct a Rawlsian power-friendly shared reason account of political authority for modern pluralist liberal societies that is philosophically rigorous, faithful to Rawls's texts, and grounded in a thorough understanding of his intellectual debts, in particular to H. L. A. Hart and Philip Soper. Though some of the things Rawls says suggest that he might hold a strong consensus view of shared reason, I will show that there are sound exegetical reasons for rejecting this reading of Rawls. In any case, the strong consensus view is not plausible. Whatever its apparent merits, it is simply impossible to achieve. Rawls understood this, and instead offered a view that is in many ways like the views of his contemporary power friendly critics. Whether or not the view I develop is actually Rawls's view is a question that cannot be answered with any certainty, as Rawls's death means that many such

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<sup>36</sup> Rawls discusses the liberal principle of legitimacy in PL, p. 136, 216, and "The Idea of Public Reason Revisited," in The Law of Peoples (Harvard University Press, 1999), p. 137. "Idea" will be abbreviated in the notes as IPRR.

answers are now lost to history. But the view I develop is certainly Rawlsian, and I think it is one that Rawls would appreciate.

A second goal I have is to critically compare the Rawlsian view to those of political theorists such as Shapiro, Waldron, and Soper. All of these theorists recognize the need for accounts of political authority that do not wish away the fact of good faith disagreement. It is simply unrealistic to think that this will go away in our time. And just as citizens will always be divided by their differing conceptions of the good, so too will they always be divided by their differing views of what political institutions are appropriate for a liberal society. All of the views I discuss take this to heart. I will subject each of them to internal, immanent critique, and compare them to Rawls's view. In the end, I argue that the Rawlsian view is substantively (philosophically) superior to both the consensus view (wrongly attributed to Rawls) and the power-friendly views of Waldron, Shapiro, and Soper.

One reason for getting a good version of Rawls's account on the table is its faithfulness to the liberal ideal of shared reason. The liberal hope for a politics of shared reason is an overarching theme of my dissertation. This hope is rooted in sound normative commitments and is worth pursuing. But what it amounts to, once we recognize the depth and breadth of reasonable pluralism, is an open and largely unanswered question. A third goal then is to reflect on this issue. What hope do we have of achieving a politics of shared reason, given our deep disagreements over the right and the good? Can the liberal hope for a politics of shared reason be vindicated at all? As I will make clear, Rawls's view gets us closer to this liberal hope than others. However, his view may prove unworkable.



## CHAPTER 1

### POLITICAL OBLIGATION AND POLITICAL LEGITIMACY

In this dissertation I develop and defend an account of the conditions under which a democratic government has the right to enforce the law, and the nature of the reasons that citizens have to obey, or at least to acquiesce to, the government's demands when these conditions are in place.<sup>37</sup> In developing this account I draw on work on political legitimacy and political obligation. The problem of political legitimacy has to do with when, if ever, a state has sufficient normative justification to coercively enforce its laws against its citizens. The problem of political obligation has to do with when, if ever, citizens have a duty to obey, or at least to acquiesce to, the state's demand that its laws be followed. In this chapter I survey recent work in these areas of political philosophy. My purpose here is twofold. First, this chapter describes broadly the areas of philosophy that my project falls into. Second, it offers tentative accounts of concepts and themes relevant to my project.

I begin this chapter by discussing work on political obligation. The question this work seeks to answer is this: do citizens have a duty to obey the laws of their own government? This is a very old problem in philosophy, one examined by Plato in his Crito. Several traditional approaches have received extensive critical discussion. Unfortunately, dissatisfaction with the main traditional approaches to this problem has led to a general skepticism among political philosophers, many of whom now doubt that

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<sup>37</sup> The distinction between the duty to obey and the duty to acquiesce or defer to the government is significant and will be explained fully in the second half of this chapter.

a compelling account of political obligation is possible. As a result, many have concluded that no citizen has a duty to obey her government's laws. Some go even further, and hold that this implies too that no government is legitimate, i.e., that no government has a right to enforce its laws. This move requires something called the correlativity thesis, which holds roughly that the state has a right to enforce the law only if citizens have a duty to obey the law, and vice versa. Under the sway of this thesis, many political philosophers now affirm a kind of philosophical anarchism.

There have been two kinds of responses to this development. One response is to seek out new accounts of political obligation. Some of these alternative accounts are discussed in this chapter. One of them receives extensive critical analysis in Chapter 3. A second response has been to reject the correlativity thesis, in an effort to free the government's right to enforce the law from the citizen's duty to obey it. This move has led to new work on political legitimacy. In the last part of this chapter I develop a brief taxonomy of this new work.

Justice, Political Legitimacy, and Political Obligation.

Most political philosophers hold that political obligation and political legitimacy vary somewhat independently of justice. Justice refers in the broadest sense to some appropriate distribution of the benefits and burdens of social life (however defined) among the morally salient entities (e.g., individuals, groups, associations) in a society (domestic or global). Political obligation refers to the citizen's (supposed) duty to obey the laws in her own country. Political legitimacy refers to the government's (claimed)

right to coercively enforce its laws against its citizens. These are distinct virtues that the law might possess, and represent different ways of assessing the same law. In short, the question of whether or not a law is legitimately enforceable, or whether it generates a duty of obedience for citizens, is separate from the question of whether or not the law is just.

For instance, there is nothing implausible about the claim that some citizen might have a duty to obey a law, a political obligation, that she at the same time would have a moral duty to resist, out of considerations of justice. This is just the kind of situation that gives rise to civil disobedience. One example might be a law restricting gay marriages. Such a law might be unjust, perhaps because it treats people unequally, or because it fails to properly respond to their liberty rights. Nonetheless, if the law is properly enacted, it might still generate a political obligation, a duty to obey the law. What a person ought to do, all-things-considered, in such situations is not entirely clear. What is clear is that there is nothing particularly odd about thinking that individuals have conflicting duties in situations like these. Similarly, it could also be the case that a citizen would have no political obligation to obey a law that is clearly just. We can see this by turning around the gay marriage law example: a law permitting gay marriage might be just, but might not generate political obligations for citizens if the law were not enacted properly. Here an individual might have good moral reason to obey a law that she otherwise has no political obligation to obey. Similar examples could show political legitimacy varies independently of justice as well.

None of this implies that there is not, or cannot be, some relationship between justice, legitimacy, and obligation. For instance, some hold that laws that are too unjust

simply cannot generate political obligations or be legitimately enforced. Rawls holds, for instance, that laws allowing people to hold slaves could not be legitimately enforced, even if they were enacted properly.<sup>38</sup> Edmundson holds that only a nearly just state is capable of being legitimate.<sup>39</sup> But not everyone agrees. Some think that even the worst Nazi laws could have generated real political obligations, if certain conditions were met. Of course, proponents of this position do not hold that people should have obeyed the Nazis, all-things-considered. Rather, they hold that the law is a normative domain that is distinct from other normative domains, such as justice. The point is that the relationship between justice and either political obligation or legitimacy, if one exists, is complicated. It is a mistake to assume that justice and obligation or justice and legitimacy are identical. If there is some relationship between justice and these other virtues that the law might possess, it needs to be explained and justified.

#### The Problem of Political Obligation.

Socrates was sentenced to death for crimes he allegedly committed against his fellow Athenians.<sup>40</sup> While he was waiting to receive his punishment, his friend Crito

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<sup>38</sup> Rawls, *PL*, pp. 427-9.

<sup>39</sup> William Edmundson, *Three Anarchical Fallacies: An Essay on Political Authority* (New York: Cambridge University Press, 1998), especially Chapter 3.

<sup>40</sup> See Plato's *Crito* (New Jersey: Prentice Hall, 1948). It is perhaps anachronistic and a bit misleading to treat the problem Socrates faced in Athens, that Hobbes and Locke faced in seventeenth-century England, and that we face today as identical. The differing social and political circumstances and different background beliefs and assumptions that inform and shape the discussion through history should not be ignored. Nevertheless, we can acknowledge these differences without being forced to conclude that there is nothing we can identify as "the" problem of political obligation. The issues that concerned Socrates, Hobbes, and Locke are not that foreign to us today. If we back up a bit and look at the issue broadly, we can see that each confronts roughly the same issue. For discussion of the history of the problem of political obligation, see, e.g., John Dunn, *Political Obligation in Its Historical Context* (New York: Cambridge

came to visit. Crito believed that the Athenians were being unjust, that they were making a terrible mistake, and that Socrates ought to try to escape into exile. He developed a plan to spirit Socrates away, perhaps to Thessaly, where Crito had powerful friends, and he brought the idea to Socrates. Of course, Socrates wanted to think about it. He had to decide whether or not to obey a legal but apparently unjust decision by his government. This is the problem of political obligation: do citizens have a duty to obey the laws of their own country, simply because they are laws, and regardless of justice?

Accounts of political obligation try to show that citizens do have a duty to obey the laws of their government.<sup>41</sup> This duty is generally understood to be strict. First, it is a duty to obey all of the laws of the state. Second, it is a fairly strong duty, one that can only be overridden in extraordinary circumstances. Neither of these conditions imply that political obligation is an absolute duty. This is one common misconception about political obligation. If citizens have political obligations, these should always factor into their calculations about how to act. However, a duty to obey the law does not determine how a citizen ought to act, all-things-considered. Political obligation is a *prima facie* duty. It is one issue that anyone concerned to be moral ought to consider, but it is not the only one. For instance, individuals may have other political duties that are distinct from the duty to obey the law. We may have a duty of justice that is political in nature, but that is distinct from political obligation. Many political theorists argue that political obligation and justice vary independently, so that it makes perfect sense to say that a person could have a political obligation to obey a law that they also have a duty, rooted in

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University Press, 1980); John Horton, Political Obligation (London: Macmillan Press, 1992), Chapter 1; and N. O'Sullivan, The Problem of Political Obligation (New York: Garland Press, 1987), Chapter 1.

<sup>41</sup> Two good introductions to political obligation are Horton, Political Obligation, and A. John Simmons, Moral Principles and Political Obligations (Princeton, NJ: Princeton University Press, 1979).

considerations of justice, to resist. This is the essence of civil disobedience. And citizens may have non-political duties as well, such as person-to-person moral duties, that are distinct from political obligation. This is not meant to minimize the seriousness of the duty to obey the law. Citizens want to know how they ought to act, all-things-considered, so they need to understand how the duty to obey the law figures into these judgments.

Three standard accounts of political obligation seek to ground the duty respectively in consent, fair play, and gratitude. Voluntarist accounts of political obligation seek to ground an individual's obligation to the law in some voluntary act of commitment, e.g., an individual decision or choice of some sort.<sup>42</sup> The consent account is voluntarist. One construal of the fair play account is too. Non-voluntarist accounts seek to ground political obligation in something else. A second construal of the fair play account is non-voluntarist, as is the gratitude account. Before discussing these traditional accounts, I will discuss what can be called a "general moral reasons" approach. This approach is not very good, but it is worth discussing because it draws out central themes in the debate over political obligation. After that I will critically evaluate the three traditional accounts.

A False Start: The General Moral Reasons Approach.

Before I discuss the traditional approaches to political obligation, I want to introduce what we can call the "general moral reasons" approach.<sup>43</sup> This approach fails,

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<sup>42</sup> Horton provides a good critical discussion of political voluntarism in his Political Obligation, pp. 19-50.

<sup>43</sup> My discussion of the general moral reasons approach is informed by Rex Martin, "Political Obligation."

but its failure is worth noting, because it draws out central issues in the literature on political obligation. The general moral reasons approach is fairly straightforward: we have a duty to obey laws that have good moral content, and a duty to resist laws with bad moral content. On this view, the only reasonable ground for any supposed duty to obey the law is the law's moral worth. This central claim of the general moral reasons view is correct, in a sense, but this way of putting it obscures more than it uncovers. Whether or not we ought to obey the law, all-things-considered, is always an open question. However, this is not the question under consideration in the literature on political obligation. The question of political obligation has to do with why, if at all, something's "being a law" should factor into our deliberations about how to act, all-things-considered, and just what weight something's "being a law" should have. We want to know if law as such is one of the things that needs to be considered, and, if so, how it measures up against other "non-law" considerations. But the general moral reasons approach moves us away from the idea that we have any special obligation to obey the law just because it is the law.<sup>44</sup> In making this move, it abandons a central idea in the debates about political obligation. In the end, then, the general moral reasons approach is not an account of political obligation at all.

In any case, there are several other problems with this general moral reasons approach. First, people reasonably disagree about the moral content of different laws. Thus, in many cases it will be perfectly reasonable for those enacting a law to conclude that it has good moral content, even if it is reasonable for others to find it morally objectionable. How are citizens supposed to regard such laws? The general moral

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<sup>44</sup> Rex Martin emphasizes this feature of political obligation in "Political Obligation."

reasons approach does not help us with this situation. Second, some laws are morally indifferent. If the duty to obey the law depends on the law's moral content, we have no reason to obey these laws. But this doesn't seem right. Again, the general moral reasons approach fails us.

Finally, the general moral reasons approach does not meet what political philosophers call the particularity requirement. The particularity requirement demands that an account of political obligation explain why a citizen has a special relationship with her own government that she does not have with other governments.<sup>45</sup> But if the ground of the duty to obey the law is the moral content of the law, then it seems like citizens have a duty to obey all laws with good moral content, regardless of what government enacts them. This general moral reasons account makes no distinction between my own state and other states. As a result, it fails to explain the special relationship citizens have to their own state.<sup>46</sup>

### Consent Accounts of Political Obligation.

One traditional account of political obligation grounds the duty to obey the law in consent.<sup>47</sup> This is actually a family of accounts, since there are three distinct but common

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<sup>45</sup> See, e.g., Klosko, Political Obligations, p. 12; Simmons, Moral Principles, pp. 31-5.

<sup>46</sup> The particularity requirement does not imply that citizens of one state have no duties to other states. For instance, it is probably the case that all individuals have a duty (of justice) to support all just governments. Political obligation simply refers to something more specific than this: the citizen's duty to obey her own state's laws.

<sup>47</sup> Many works on political obligation discuss the consent theory. For a classic statement of the view, see John Locke, The Second Treatise of Government, chapters 7 and 8. For a sustained contemporary defense of consent theory, see Harry Beran, The Consent Theory of Political Obligation (London: Croom Helm, 1987).



versions of it: express consent, voting, and residence. On all of these accounts, citizens have a duty to obey the law because they have in some deliberate fashion promised or agreed to obey the government. This promise to obey the government is cashed out as a duty to obey the government's laws.

A. John Simmons offers one fully developed and powerful consent account.<sup>48</sup> His view grows out of his understanding of Locke's political philosophy. According to Simmons,

Political power is morally legitimate, and those subject to it are morally obligated to obey, only where the subjects have freely consented to the exercise of such power and only where that power continues to be exercised within the terms of the consent given. The legitimacy of particular states thus turns on consent, on the actual history of that state's relations with its subjects.<sup>49</sup>

Here Simmons affirms a version of the correlativity thesis, but I will set this aside for now. I want to emphasize two other points he makes. First, on his view a citizen's political obligation can only be grounded on free consent. No other account, he thinks, respects our fundamental commitment to the political freedom of all individuals.

Simmons, like Locke, affirms an initial state of nature, which includes freedom from political association. Individuals leave the state of nature and become citizens of some state, with all of the duties that implies, only when they consent to be governed. What should count as consent is still an open question. Second, this account of political obligation turns on actual, lived history. Simmons thinks this is very important.

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<sup>48</sup> See, e.g., A. J. Simmons, On the Edge of Anarchy: Locke, Consent, and the Limits of Society (Princeton, NJ: Princeton University Press, 1993) and Justification and Legitimacy (New York: Cambridge University Press, 2001).

<sup>49</sup> A. J. Simmons, "Justification and Legitimacy," Ethics, v. 109 (1999), p. 745.

How we have actually freely lived and chosen, confused and unwise and unreflective though we may have been, has undeniable moral significance; and our actual political histories and choices thus seem deeply relevant to the evaluation of those political institutions under which we live.<sup>50</sup>

Appeals to what would move us, were we perfectly rational (according to whose measure?), or even to what should move us (again, according to whom?), seem paternalistic and to have only impersonal and indirect moral force, if they have any moral force at all. Appeals to what I have actually chosen seem direct and personal: “I am constrained only by how I have in fact lived and chosen.” This makes the moral constraint of political obligation seem less external and more obvious, and also makes it more likely to be efficacious. “And it seems appropriate to suggest that a state’s authority over an individual ought to depend on some such personal transactions, given the coercive, very extensive, and often quite arbitrary sorts of direction and control that state authority involves.”<sup>51</sup>

But what counts as consent? One version of the consent account grounds political obligation in express consent. Express consent is an explicit and solemn promise to obey the government, to accept all valid laws and to be bound by them. Most believe that a promise of this sort could ground political obligation.<sup>52</sup> The main problem with this account is that it fails to meet what political philosophers call the “generality requirement.” The generality requirement holds that political obligation must bind all (or

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<sup>50</sup> Simmons, “Justification and Legitimacy,” p. 763.

<sup>51</sup> Simmons, “Justification and Legitimacy,” p. 762.

<sup>52</sup> While most think express consent could ground political obligation, some are not so sure. See, e.g., Rex Martin, “Political Obligation,” for one argument that express consent could not actually ground an obligation to obey all of the laws that a state might pass.

nearly all) citizens in a society.<sup>53</sup> Those who insist on this requirement hold that if we cannot give an account of why (nearly) everyone in some society has a duty to obey the law, then we can only conclude that no one has such a duty. For this reason, the express consent account fails. Few citizens, if any, have ever made any such promise to the government. Nor, many think, is it reasonable to expect that citizens generally would make such a promise, if (say) the government were to set up “pledge booths” in every city, in an effort to correct this problem with political obligation. So most conclude that express consent is an inadequate account of political obligation.

Express consent may not be the only way to promise to obey the government. Some argue that voting in free elections counts as consent.<sup>54</sup> Proponents of this view argue that the act of voting is a promise to obey the government. It would be odd to say, for instance, that someone who voted for Jane Smith did not consent to be governed by her if she won the election. In this situation, a free vote constitutes consent. But what about citizens who voted for the loser (say, John Kerry)? More broadly, voting constitutes consent because it is one form of political participation in the processes of government. From this perspective, a vote for a candidate is also a vote for a political system. It would be odd to say that someone who participates in the actual processes that constitute her government does not consent to that government as a political system.

But some simply deny that voting amounts to any such promise.<sup>55</sup> Simmons argues that we must distinguish acts that imply consent from acts that are signs of consent. Consent is a deliberate act of acceptance, a promise. But an act that merely

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<sup>53</sup> See, e.g., Klosko, Political Obligations, p. 10-11; Simmons, Moral Principles, pp. 55-6.

<sup>54</sup> See, e.g., Simmons, Moral Principles, and Martin, “Political Obligation,” for discussion of this argument.

<sup>55</sup> Simmons, Moral Principles, pp. 92-3.

implies consent may not in fact be such a promise. For instance, if citizens do not know that voting counts as consent—if they are not aware of the fact that voting constitutes consent to be governed—then we cannot count a vote as consent in anything but a “metaphorical” sense. We simply do not know if the consent-implying act of voting is in fact intended by the citizen as consent to anything.<sup>56</sup> While voting may imply consent, since most people have no awareness or intention of consenting to anything when they vote, we cannot assume it is a sign of consent. Some argue that it is possible for a state to turn voting into such a sign, e.g., by altering political processes in ways that make citizens aware of the fact that voting constitutes consent.<sup>57</sup> But no states have done this.

Another consent account is based on residence. On this account, when adult citizens have a right to emigrate, the fact that they have not exercised this right constitutes a promise or agreement to be governed by their country of residence. This is a common but controversial account of political obligation. Locke, Rousseau, and, more recently, W. D. Ross, all affirm versions of this account.<sup>58</sup> The heart of the controversy over it is whether or not residence, or rather the unexercised right of emigration, can be seen as a genuine choice situation. That is, is continued residence the kind of choice that constitutes consent?

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<sup>56</sup> This does not mean that consent requires positive action. For instance, suppose the board of directors of a hospital has a meeting one Friday, and at the end of the meeting the board’s chairperson says “we’ll have a mandatory meeting next Friday – does anyone have a conflict?” In this situation, silence can be taken as acceptance, as consent to appear at the meeting. Silence is a consent-implying act, but the circumstances in the boardroom case are such that silence is also a sign of consent. The fact that the chairman puts the question as he does, in the circumstances of the boardroom case, means that silence is a promise to attend the Friday meeting.

<sup>57</sup> This is what Klosko calls “reformist” consent (Klosko, Political Obligation, Chapter 6). Reformist consent theories argue that consent could ground political obligation, if political institutions were reformed in certain ways.

<sup>58</sup> Locke, Second Treatise of Government, section 119; Rousseau, Social Contract, IV.ii; W. D. Ross, The Right and The Good, p. 27.

In the Crito, the Laws insist that Athens did present itself to citizens as such a choice situation:

We openly proclaim this principle, that any Athenian, on attaining to manhood and seeing for himself the political organization of the state and us its laws, is permitted, if he is not satisfied with us, to take his property and go away wherever he likes. If any of you chooses to go to one of our colonies, supposing that he should not be satisfied with us and the state, or to emigrate to any other country, not one of the laws hinders or prevents him from going away wherever he lies, without any loss of property. On the other hand, if any one of you stands his ground when he can see how we administer justice and the rest of our public organization, we hold that by doing so he has in fact undertaken to do anything that we tell him.<sup>59</sup>

The question for us in the contemporary world, says Simmons, is whether or not we can alter our political processes in ways that make continued residence a sign of genuine consent.<sup>60</sup> If so, this is a plausible account of political obligation.

One popular objection to residence accounts was first suggested by Hume.<sup>61</sup>

Residence simply cannot constitute consent, the argument goes, because it is possible for self-professed revolutionaries, anarchists, spies, outlaws, and so on, to reside in a state.

But it is absurd to insist that such people consent, even tacitly, to be ruled by the government in their state of residence. So, even if we did arrange our political processes

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<sup>59</sup> Plato, Crito, 51d-e.

<sup>60</sup> Simmons, Moral Principles, p. 96.

<sup>61</sup> Simmons, Moral Principles, p. 97. This argument appears, for instance, in J. P. Plamenatz, Consent, Freedom, and Political Obligation, second ed. (New York: Oxford University Press, 1968), p. 7, and J. W. Gough, John Locke's Political Philosophy, second ed. (New York: Oxford University Press, 1973), p. 70.

so that continued residence did count as a choice, still we could not hold that residence constitutes consent to be governed. The scoundrels scuttle the project.

Despite its popularity, Simmons thinks this argument misses the point. The reason it seems absurd to conclude that (say) the anarchist consents to be governed is presumably the fact that she actively rejects the authority of the government. But this makes consent a matter of attitude, and not of residence. To make this scoundrel objection work, we have to assume that the anarchist cannot consent to be governed, no matter what she does. But, Simmons says, this is just false. Whether or not the anarchist has an attitude of consent is beside the point, if we see consent as some deliberate act that generates obligations (what Simmons calls the “occurrence” sense of consent). On this account, the act of consent is residence. It simply does not matter how the scoundrel feels about the government.

Another common objection to residence accounts is the difficulty inherent in exercising the right to emigrate. Hume put the problem like this:

Can we seriously say, that a poor peasant or partizan has a free choice to leave his country, when he knows no foreign language or manners, and lives from day to day, by the small wages which he acquires. We may as well assert that a man, by remaining in a vessel, freely consents to the dominion of the master; though he was carried on board while asleep, and must leap into the ocean, and perish, the moment he leaves her.<sup>62</sup>

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<sup>62</sup> David Hume, “Of the Original Contract,” in A. MacIntyre, ed., Hume’s Ethical Writings (Collier-Macmillan, 1965), p. 263.

Hume makes two points here. First, just like the man who is carried on board ship while asleep, none of us chooses our initial state of residence. We simply find ourselves in one, either by birth or by being carried to one by our parents or guardians. Second, the social nature and other exigencies of human life make it very difficult, if not impossible, for most citizens to emigrate. The truth is this: fate simply plunks us down in one place or another, and it is not easy or even possible for most of us to go someplace else. Thus, continued residence cannot be considered voluntary, and so it cannot be regarded as consent.

Not everyone finds this argument compelling. Joseph Tussman, for instance, argues that it mistakenly conflates convenience with consent.<sup>63</sup> As long as citizens know that residence constitutes consent, and know that emigration is possible, then we need not worry that emigration is unattractive or even difficult. The fact that a choice is unpleasant does not render it involuntary. But this clearly understates the problem. Emigration is not merely unpleasant or inconvenient. Many of the things we value most in life—home, family, friends—cannot be moved. These are tied to our state of residence and cannot be taken with us when we leave. For most of us, then, emigration would not be merely inconvenient, but would be a catastrophe. It would mean leaving behind many of the things that give our lives meaning and purpose. Thus, continued residence is not a politically meaningful choice.<sup>64</sup>

So consent accounts do not justify political obligation. Express consent accounts fail to meet the generality requirement, because few citizens have ever made an explicit

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<sup>63</sup> Joseph Tussman, *Obligation and the Body Politic* (New York: Oxford University Press, 1960), p. 38.

<sup>64</sup> Simmons considers this objection to residence accounts to be decisive. See *Moral Principles*, pp. 99-100.

promise to the government. Voting consent accounts also fail. Citizens do not generally regard a vote to be a sign of consent, so it cannot be counted as such. And even if citizens did regard a vote as consent, many citizens do not vote. Thus, the voting account fails the generality requirement. Residence consent accounts fail because continued residence cannot be seen as a politically meaningful choice. Continued residence does not count as consent because there is good reason to doubt that continued residence constitutes a politically meaningful voluntary act.

#### Fair Play Accounts of Political Obligation.

Another traditional account of political obligation grounds it in a duty of “fair play.” Both H. L. A. Hart and John Rawls defended versions of the fair play account.<sup>65</sup> The general idea is this. People are engaged in a cooperative practice or enterprise that is widely beneficial. For instance, many people must work together to produce the conditions necessary for a market economy, or to protect and preserve our environment. These and other important social goods are only possible through the concerted and coordinated efforts of large numbers of individuals. The benefits of these cooperative schemes emerge only if many people join in and maintain them. Joining the cooperative scheme comes with certain costs. People must restrict their behavior in certain ways if many social goods are to be possible. The problem is that many of these socially produced goods are free, in the sense any single citizen can gain the benefits, without

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<sup>65</sup> See H. L. A. Hart, “Are There Any Natural Rights?,” *Philosophical Review*, v. 64 (1955), pp. 185-6; and John Rawls, “Legal Obligation and the Duty of Fair Play,” in S. Freeman, ed., *John Rawls: Collected Papers* (Cambridge, Ma.: Harvard University Press, 1999), pp. 117-129.



contributing to the cooperative activity and incurring the associated costs of participation, just as long as most of the other citizens continue to do their part. This is the free-rider problem. The fair play account claims that a citizen who gets the benefits of some cooperative scheme has a duty of fair play to do his part to contribute to their production. Strictly speaking, the obligation each citizen owes is to other participants in the cooperative scheme. This obligation to other citizens becomes an obligation to obey the law because many of the beneficial cooperative schemes in question are organized through laws. For instance, the conditions necessary for a market economy can be maintained only if citizens follow the laws designed to promote and protect those pre-conditions. And government itself is a cooperative activity that produces important social benefits, as long as large numbers of people do their share to maintain it and do not cheat. It is not clear, though, if this argument is supposed to be voluntarist or non-voluntarist. Both alternatives will be considered in due course.

Robert Nozick rejects the fair play account in Anarchy, State, and Utopia.<sup>66</sup> He makes his case through a series of examples. Here is his Public Address (PA) example:

Suppose some of the people in your neighborhood (there are 364 other adults) have found a public address system and decide to institute a system of public entertainment. They post a list of names, one for each day, yours among them. On his assigned day (one can easily switch days) a person is to run the public address system, play records over it, give news bulletins, tell amusing stories he has heard, and so on. After 138 days on which each person has done his part, your day arrives. Are you obligated to take your turn? You have benefited from

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<sup>66</sup> Robert Nozick, Anarchy, State, and Utopia (New York: Basic Books, 1974), Chapter 5.

it, occasionally opening your window to listen, enjoying some music or chuckling at someone's funny story. The other people have put themselves out. But must you answer the call when it is your turn to do so? As it stands, surely not.

Though you benefit from the arrangement, you may know all along that 364 days of entertainment supplied by others will not be worth your giving up one day.

You would rather not have any of it and not give up a day than have it all and spend one or your days at it. Given these preferences, how can it be that you are required to participate when your scheduled day comes?<sup>67</sup>

Nozick recognizes that the PA example attacks a weak version of the fair play principle, so he makes suggestions for improving it. For instance, he suggests that a stronger fair play principle would build in the condition that the benefit should outweigh the cost of participation. The cooperative scheme should be useful to participants. But Nozick has an argument against this improved version of the principle too. For instance, what if others benefit more from the PA system than you do? Or what if you prefer some other joint activity to the one the group chooses, and you express your opinion by refusing to take your turn at the PA? Suppose that you would prefer that the group take turns reading the Talmud over the PA system instead of philosophy, and you believe that by reading philosophy when your turn comes up, you reinforce the status quo and make it harder to effect changes of the sort you envision. Nozick says even if the benefits outweigh the costs in these cases, it would be wrong to enforce the principle of fairness. And so on. Nozick further develops the fair play principle, in response to his own

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<sup>67</sup> Nozick, Anarchy, p. 93.

objections, and then provides more examples meant show its failings. In the end, he rejects the fair play argument.

There are a couple of ways to respond to Nozick's argument. Simmons provides one voluntarist response. He argues that we need to distinguish participants from innocent bystanders to make the fair play argument work. Participants voluntarily accept the benefits of the cooperative scheme, and so owe something to other participants. Bystanders do not. Nozick's man is a bystander, not a participant, so his criticism of the argument misses the mark. Klosko provides a non-voluntarist response. He argues that Nozick's examples are weak, because they all describe trivial benefits that are readily available. On Klosko's view, the fair play argument only works when the benefits are indispensable and can only be provided by the government.

Simmons rejects Nozick's arguments, because the individual in Nozick's PA example is not a participant in the sense that the fair play principle requires, but is instead merely an "innocent bystander."<sup>68</sup> Nozick's man has not volunteered for anything. Participants voluntarily take part in the cooperative scheme. The most that Nozick's examples could show is that no one should be able to force just any scheme and its obligations on us. But Simmons does not think that the fair play principle is meant to work in this way. If it were, he says, it would be just as outrageous as Nozick thinks it is. People who have no significant relationship to a cooperative scheme might benefit from it in incidental ways, but this does not mean that they have any duties as a result. For example, if your friend participates in a cooperative scheme that makes her a lot of money, and you benefit from the scheme incidentally, in the form of expensive gifts she

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<sup>68</sup> Simmons, Moral Principles, pp. 120-3.

gives you, you have no obligation to do your part in the scheme. To put this in a political context, citizens in Canada benefit indirectly from the efforts of the U.S. government to maintain the rule of law in the U.S., but this does not mean that these Canadian citizens have a political obligation to obey the U.S. government. The principle only works, Simmons argues, if it applies to individuals who are participants in the scheme in some significant sense. The dilemma faced by fair play theorists, then, is offering some meaningful account of the distinction between participants and bystanders. One problem to watch out for is that the participant/bystander distinction does not accidentally reduce the fair play account to a consent account.

Simmons suggests that we can get past this problem by making a distinction between accepting benefits and merely receiving them.<sup>69</sup> This is the heart of his voluntarist construal of the fair play argument. A participant in a scheme is someone who accepts the benefits of the scheme. People who simply receive benefits, like Nozick's PA man, are merely bystanders and not participants. But isn't accepting the benefits of a scheme the same as consenting to the scheme? Doesn't this move reduce the fair play argument to a consent account? Not according to Simmons. You can accept the benefits of a scheme without consenting to it. Suppose that Nozick's neighborhood is having trouble getting clean water. The water they get from the city lines is polluted, and nearly everyone wants something to be done about it. The government is unresponsive, so the neighborhood has a meeting to decide what to do. At the meeting, a vote is held and the majority votes to dig a public well in the neighborhood, that members of the neighborhood will pay for and maintain. But Jones voted against this scheme. He

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<sup>69</sup> Simmons, Moral Principles, pp. 125-9.

announces that he does not consent to this ridiculous plan, and that he will not support it in any way. Despite his objection, his neighbors dig, pay for, and maintain the well. Now that clean water is available to the neighborhood, Jones starts to envy his neighbors' easy access to clean water. So he goes to the well each night and gets some for his home, knowing that the water will never be missed. Simmons thinks this example shows two things. First, since Jones accepted the benefits of the cooperative scheme, he now has a duty to do his part. Second, Jones has not consented to this cooperative scheme. Jones may think his neighborhood's scheme is completely idiotic and absolutely the worst way to get water, and so he frequently and loudly expresses his dissent. Thus, the fact that he needs water and gets it from his neighborhood well instead of some other source does not show that he consents to the scheme. However, there is no question that he accepts the benefits of it. To Simmons, Jones has made himself a participant of the well scheme by taking the water, and has thereby accepted the duties of a participant, despite the fact that he refuses to give consent to it.

One serious problem for this voluntarist approach to fair play is created by open or non-excludable benefits.<sup>70</sup> These are benefits of government that citizens cannot easily avoid. For instance, the benefits we receive from the efforts of police officers who patrol our streets, catch criminals, and eliminate potential threats to our safety are open or non-excludable. Other examples include goods like national defense, public health measures, and efforts to protect the environment. The problem is this: does it make sense to say that citizens accept open benefits? Is there some way in which citizens could

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<sup>70</sup> See, e.g., Simmons, Moral Principles, pp. 129-132 and 135-6; Klosko, Political Obligations, p. 7 and Chapter 2.

refuse them? If not, then Simmons's strategy for defusing Nozick's objection does not work.

Simmons argues that we can make sense of the idea that some citizens accept open benefits, and that others do not. The crucial difference between them has to do with the citizen's attitude toward the open benefits received. We can say that a citizen accepts open benefits if she receives them "willingly and knowingly."<sup>71</sup> To say that a citizen knowingly accepts open benefits is to say that she understands that the benefits result from a cooperative scheme. She knows how the benefits are generated. And to say that a citizen willingly accepts open benefits is to say that she does not regard the benefits as forced on her. Citizens who do not know, or who never think about, where the benefits come from cannot accept them. Simmons is not clear about why this is so, but I think it has something to do with the fact that such citizens do not really know (a) what they are accepting, and (b) that what they are accepting comes with political obligations attached. And citizens who regard the benefits as forced on them do not accept them. Thus, he concludes, it is possible for citizens to accept even open benefits. However, this may be a pyrrhic victory.

Simmons thinks the fair play argument ultimately fails the generality requirement. It is implausible to hold that most citizens have accepted the benefits of government in the relevant sense, so it does not explain why nearly all citizens have political obligations. Many citizens barely notice the benefits they receive. Many other citizens think the benefits they receive from the government are not worth the costs of participation (e.g., taxes, military service, laws restricting personal behavior, and so on). Still other citizens

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<sup>71</sup> Simmons, Moral Principles, p. 132.

think that we buy benefits from the government (e.g., with our taxes). Thus, Simmons argues, most citizens do not accept the open benefits of government, either because they do not understand that the benefits result from a cooperative scheme, or because they regard the benefits as forced on them by the government. Thus, the fair play account fails the generality requirement.

Klosko offers a non-voluntarist response to Nozick. His account focuses on features of the benefits received instead of on features of the individuals who receive them.<sup>72</sup> On his view, Nozick's examples all share one fatal flaw—they describe cooperative schemes that produce benefits of strikingly little value. How valuable, really, is Nozick's communal PA system? It certainly does not provide anything citizens need in order to have decent lives. Nozick's other examples describe similarly trivial benefits: one example refers to a cooperative effort to sweep dirt from the street, while another describes a cad who enters your house to thrust books into your arms. Who needs these goods? No one, really. This, Klosko thinks, is what is wrong with Nozick's argument: Nozick's rejection of fair play accounts relies too heavily on benefits that no citizen really needs. To Klosko, Nozick simply misrepresents the fair play account. Fair play generates strong obligations only when the goods supplied by the government are "indispensable for satisfactory lives."<sup>73</sup> A good provided by the government is indispensable when (1) individuals must have them in order to have satisfactory lives, and (2) they can only be provided by the government. Examples of indispensable benefits include physical security (national defense and domestic law and order),

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<sup>72</sup> Klosko, Political Obligations, p. 6.

<sup>73</sup> Klosko identifies two other conditions as well: the goods must be worth the effort of recipients' to produce them, and have benefits and burdens that are fairly distributed (Political Obligations, p. 6).

protection from a hostile environment, and public health measures.<sup>74</sup> To Klosko it does not matter that these are open benefits, because the issue does not turn on whether or not citizens voluntarily accept them. What matters is that citizens receive benefits from the government that (a) they must have in order to live decent lives, but that (b) they cannot secure on their own.

One problem with Klosko's view is suggested by Simmons's discussion of Nozick. Simmons argues that the upshot of Nozick's examples is that any plausible account of fair play must make a distinction between participants and bystanders. But Klosko makes no such distinction. Klosko seems to insist that bystanders do have an obligation to do their part in cooperative schemes. Simmons claims that such a result is outrageous. Bystanders have no duty to contribute to cooperative schemes, even when they benefit from them. But we might defend Klosko on this point. Simmons' claim about the participant/bystander distinction seems to be informed by Nozick's examples, but, as Klosko points out, Nozick's examples are weak because they describe trivial goods. Klosko could admit that it is perfectly reasonable to make participation (in some sense) a condition of a fair play obligation when the scheme in question and its benefits are trivial. But the goods Klosko has in mind are not trivial. This may undercut Simmons' argument as much as it does Nozick's. For it would be odd to claim that participation is a requirement of obligation when a cooperative scheme provides indispensable benefits, i.e., goods that a person cannot secure on her own, and cannot live without. If participation is a requirement of obligation in this context, it may be so in only a trivial sense (i.e., in the sense that non-participation amounts to death). Or it may

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<sup>74</sup> Klosko describes these and other indispensable goods in detail in Chapter 2 of Political Obligations.



simply be nonsensical to require (most) people to “participate,” in the sense of voluntarily accepting goods that they need in order to live.

But the fact that Klosko’s view implies that bystanders have political obligations does suggest that it doesn’t meet the particularity requirement. For example, Klosko claims that the government’s provision of goods like public health and environmental protection generates a fair play duty for citizens. But it is clear that these benefits do not stop at national borders. For instance, people in Mexico and Canada, especially in border towns, benefit from U.S. government efforts to maintain national security, to produce internal social order, and to promote public health measures and environmental protection schemes. If the provision of these goods by the U.S. government generates a fair play obligation for U.S. citizens, then it would seem to generate the same obligation to the U.S. government for Mexican and Canadian citizens who also receive the benefits. And U.S. citizens who benefited from Mexican or Canadian government efforts at public health or environmental protection would have a fair play obligation to those governments. If this is correct, then Klosko’s version of the fair play duty may fail to meet the particularity requirement. It does not explain why U.S. citizens have a particular duty to their own government that they do not have to other governments.

Klosko might respond to this objection in a couple of ways. First, he might simply deny that the benefits in question actually do extend much beyond the U.S. border. I do not find this plausible for indispensable benefits generally, though it might be true with regard to certain goods, such as certain public health measures. Second, he might distinguish those who benefit directly from those who do not. For instance, he could say that U.S. citizens in San Diego benefit directly from public health measures

provided by the government, and that Mexican citizens in Tijuana benefit only indirectly. Third, he might concede the point the objection makes, and ground political obligation in a more limited set of goods, e.g., domestic and national defense. This might weaken political obligation a bit, but then it might escape the objection.

Thus, fair play accounts face certain difficulties as explanations of political obligation. The main objection to fair play is the open benefits problem. It is not clear that citizens who receive open benefits have any obligation to repay those who produce them by contributing to their cooperative schemes (i.e., Nozick's objection). One way of getting around this problem may be to make a distinction between those individuals who merely receive the benefits and those who accept them (e.g., Simmons's strategy). Those who make such a distinction, however, run the risk of reducing fair play to consent. Simmons seems to find a way past this problem, but in the end he is forced to concede that fair play does not meet the generality requirement, because few citizens accept the benefits in a way that generates political obligations. Another possible way of getting around the open benefits problem is to distinguish trivial from indispensable benefits (e.g., Klosko's strategy) and ground the duty in mere receipt of indispensable benefits. This strategy has two serious problems. First, some might still insist that we need to distinguish mere receipt of goods from acceptance of them. The fact that some good is indispensable does not itself show that mental attitudes towards its provision are morally insignificant, as I will explain below in my discussion of gratitude accounts. Second, the mere receipt approach seems to fail the particularity requirement.

## Gratitude Accounts of Political Obligation.

Gratitude accounts ground political obligation in a duty of citizens to repay the government for benefits received.<sup>75</sup> This is one of the views that Plato considers in the Crito. The Laws ask:

Are you not grateful to those of us laws which were instituted for this end, for requiring your father to give you a cultural and physical education?... Then since you have been born and brought up and educated, can you deny ... that you were our child and servant, both you and your ancestors?... We have brought you into the world and reared you and educated you, and given you and all your fellow citizens a share in all the good things at our disposal.<sup>76</sup>

On contemporary views, the benefits in question include things like public roads, schools, parks, private property, social security, a police force to protect us domestically, an army for national defense, and so on. The fact that the citizens receive these benefits from the government binds them to repay the government. This debt is rooted in a principle of gratitude. Repayment of this debt consists of supporting the government, which includes obeying the law.

Several objections have been made to gratitude accounts. One common objection points out that gratitude accounts imply that citizens of immoral and unjust governments have political obligations to them.<sup>77</sup> Even morally bad governments routinely provide

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<sup>75</sup> Plato has Socrates defend a version of the gratitude account in the Crito. A. D. M. Walker offers a contemporary defense of the view in "Political Obligation and the Argument from Gratitude," Philosophy and Public Affairs, v. 17 (1988), pp. 191-211.

<sup>76</sup> Plato, Crito, 50d-51d.

<sup>77</sup> See, e.g., Richard Flathman, Political Obligation (Atheneum, 1972), pp. 270-280.

some benefits to citizens. Thus citizens who received benefits from the Nazi government or from Saddam Hussein's government owe those governments a debt of gratitude, which is cashed out as political obligation. But this seems absurd. Many simply reject gratitude accounts for this reason.<sup>78</sup> This objection seems to overlook an important point, one made earlier in discussion of the general moral reasons approach. Political obligations are not the only morally relevant factors in our deliberations about how we ought to act. A citizen can have a political obligation to obey the laws of an immoral government, but still have an all-things-considered obligation not to obey, if her other moral obligations outweigh her political obligations. Political obligation is a prima facie duty, not an absolute one. A citizen's duties to fight injustice and cruelty might outweigh any duty to obey an unjust government.

Another objection to gratitude accounts claims that the government has a duty to provide citizens with benefits, so citizens do not owe the government anything for providing them. Citizens have a right to things like roads and private property and security. The government has a duty to provide these things. When the government provides these things, it is simply fulfilling its obligation to its citizens. But no one incurs a debt of gratitude for receiving benefits owed to them. So citizens owe the government nothing. This objection has some merit, but it is not clear that duty-fulfilling behavior cannot generate a debt of gratitude. Consider Simmons' Porsche:

Suppose that I am driving through the country and come upon an accident victim.

I am a medical student and know that if he does not reach a hospital in twenty

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<sup>78</sup> According to Simmons, this argument "is perhaps the most commonly used by those who reject the gratitude account." See Moral Principles, p. 184.

minutes, he will die. But I also know that the only hospital in twenty miles away over rough back roads. So I drive the victim at sixty miles an hour over rough roads in my new Porsche, saving his life and damaging its suspension. Now, I think that there are two things which can truly be said of this case. First, what I did, I had a duty to do; had I ignored the victim, or decided not to risk my Porsche, I would have earned the most serious moral blame. Second, the accident victim has an obligation to compensate me for the damage to my car, if it is within his means.<sup>79</sup>

Still, it is equally clear that duty-fulfilling behavior does not always generate a debt of gratitude. Consider: the accident victim has a duty to compensate Simmons for the damage to his Porsche, which he discharges by paying to have the car fixed. But suppose that Simmons' car already had a few dents in it, before he took the accident victim to the hospital. In discharging his debt of gratitude to Simmons, the accident victim ends up benefiting Simmons, by fixing dents that he is not responsible for. Now, even though Simmons has received a benefit from the accident victim, he does not now owe the accident victim a debt of gratitude. In this case, receipt of a benefit does not generate a debt of gratitude. In the end, the strength of this objection to gratitude accounts is not clear. However, discussion of this objection does suggest a more straightforward problem with gratitude accounts, grounded in the nature of debt-incurring acts.

Gratitude accounts often draw on an analogy between the relationship of a state to its citizens and the relationship of parents to their children. Just as children owe a debt of gratitude to their parents, for all the benefits provided during childhood, so too do citizens

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<sup>79</sup> Simmons, *Moral Principles*, p. 180.

owe a debt of gratitude to the state. There are many reasons to question the aptness of this analogy, but I want to set them aside and focus on something different. Part of the reason we think a debt of gratitude is owed to parents is the fact that parents make special sacrifices in order to provide for their children. Instead of going to Spain, they buy diapers and medicine and food. Instead of buying Porsches, they put money away for college. And so on. This idea seems to be at work in Simmons' Porsche example too. If Simmons had been able to transport the accident victim without damaging his car, or making any special effort—he might have been going to the hospital anyway to work his shift, and the road might have been smooth and clear—it is not clear what debt of gratitude the victim might have had, if any. So a debt of gratitude is owed to a benefactor only if the benefactor had to make some special sacrifice in order to provide the benefit. This suggests a different problem with gratitude accounts, because the state does not make any sacrifices in providing citizens with benefits. This does not mean that the state does not work to benefit citizens—it does. But this is not the issue. The work that the state does for citizens does not constitute a sacrifice made by the state. In fact, providing for citizens seems to be the state's *raison d'être*. Why else have a state? Children owe a debt of gratitude to their parents (if they do) in part because their parents might have done other things with their resources. But what would the state do, if it were not providing benefits for citizens? The state does not have other interests that it must give up in order to provide for the needs of citizens. Providing for citizens is the state's primary interest. So the state does not make any sacrifices in providing for citizens, and no debt of gratitude is generated by its duty-fulfilling behavior.

Finally, some reject gratitude accounts because it seems unlikely that the state can have the kind of attitude toward the transaction that is necessary for the provision of benefits to generate a debt of gratitude. The provision of benefits generates a debt of gratitude only when the benefactor provides them (a) voluntarily, (b) intentionally, and (c) for the right reasons.<sup>80</sup> For example, no debt of gratitude is owed to someone who is forced at gunpoint to provide a benefit. Some debt may be generated by this transaction, but it is not a debt of gratitude. The same is true when someone provides a benefit unintentionally. If I were to leave some change on a restaurant table as a tip, and it turned out that one of the coins I left was rare and worth quite a bit of money, the waiter might owe me something for providing this benefit, but he would not owe me a debt of gratitude. We are grateful to someone when they go out of their way to benefit us, but in both of the examples above, the benefactor did not go out of his way to provide the benefit. Finally, someone who passes out favors just because he hopes to benefit in return might be owed something, but he is not owed a debt of gratitude. When someone provides a benefit simply to advance his own cause, he is really just using the person he helps as a means to his own ends. This is a problem for gratitude accounts, because the state cannot have any of these mental attitudes towards its transactions with citizens.

Since the state is not the kind of entity that can have the appropriate mental attitudes towards any transaction between it and citizens, the state's activity cannot generate a debt of gratitude. In fact, critics say, the state cannot have any mental attitudes at all. One possible response to this would be to identify the state with the individuals

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<sup>80</sup> See, e.g., Simmons, *Moral Principles*, p. 171-5, P. F. Strawson, "Freedom and Resentment," in P. F. Strawson, ed., *Studies in the Philosophy of Thought and Action* (New York: Oxford University Press, 1968), pp. 75-6.

who comprise it. However, while this allows us to attribute attitudes to the state through individual government agents, it will not solve our problem if we cannot attribute some common attitude to all of them. This seems implausible. There are undoubtedly some government agents who do their jobs with the full, voluntary, intention of benefiting citizens, but it is not clear that this is required of them (as, say, a condition of doing their jobs well). Nor is it plausible to suppose that all or even most government agents have this attitude. Many do their jobs simply to enhance their positions, or to bring home a paycheck, or to have something to do and somewhere to go during the day. Now, we might speak metaphorically about the state's attitudes, but, if our politicians are any example, it is not clear we should believe that the state provides benefits intentionally, voluntarily, and for the right reasons. Even in good states benefits are often provided as payment for future votes. Sometimes states provide benefits to citizens in order to solidify claims to full and good standing in the international community. So this strategy won't work either. In the end, there is no obvious way to describe a state, such that we could then say that it has the attitudes necessary for the generation of debts of gratitude.

So the gratitude approach fails to account for political obligation. First, the debt of gratitude is only generated when the benefactor has the right kind of attitude about the benefits provided. But a state is not the kind of entity that can have any attitudes at all. We might anthropomorphize a bit, and suppose that the state does have attitudes about its acts, but it is far from clear that the state's attitudes would be the right kind for generating debts of gratitude. For instance, the state often provides benefits for self-interested reasons. We might try to equate the state's attitude with the attitudes of the government agents who comprise the state, but we will face the same problem. Second, the debt of



gratitude seems to depend on sacrifices made by the benefactor. We owe our parents a debt of gratitude (if we do), in part because they might have done something different with the resources they ultimately decided to spend on us. But the state does not make this kind of sacrifice for its citizens. The state's *raison d'être* just is providing for its citizens. It has no other interests that it must give up in order to take care of us.

### A Crossroads for Political Obligation.

The main traditional accounts of political obligation suffer from a number of serious defects. As a result, there is a growing skepticism about the possibility of a compelling account of political obligation ever emerging.<sup>81</sup> This has pushed political philosophers in three different directions. One group, undaunted by past failures, seeks to develop alternative accounts of political obligation, accounts that avoid the problems that plague the traditional accounts. I will briefly discuss two of these alternative accounts—Rawls's natural duty of justice and Dworkin's associative account—in the next section. A third alternative account, developed by Philip Soper, will be discussed in detail in Chapter 3. A second group, now convinced that no citizen ever has a duty to obey the laws of her state, simply rejects political obligation and legitimacy altogether, and affirms instead philosophical anarchism. This move depends on something called the

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<sup>81</sup> In recent years a number of political philosophers have expressed doubt about the possibility of a compelling account of political obligation. See, e.g., Leslie Green, *The Authority of the State* (Oxford: Clarendon Press, 1988); A. John Simmons, *Moral Principles and Political Obligations* (Princeton, NJ: Princeton University Press, 1979) and "The Anarchist Position: A Reply to Klosko and Senor," *Philosophy and Public Affairs*, v. 16 (1987); M. B. E. Smith, "Is There a Prima Facie Obligation to Obey the Law?," *Yale Law Journal*, v. 82 (1973), pp. 950-976; and R. P. Wolff, *In Defense of Anarchism* (New York: Harper and Row, 1976).

correlativity thesis. I discuss this position later in this chapter, after I examine some alternative accounts of political obligation. A third group argues that the question of political obligation has no implications for the question of political legitimacy. They reject the correlativity thesis. Thus, the failure of political philosophers to offer any compelling account of a citizen's duty to obey the law says nothing about the government's right to enforce the law. I end this chapter with a survey of several of these theories of legitimacy.

#### Alternative Accounts of Political Obligation.

One group of political philosophers is undaunted by past failures and is busy developing alternative accounts of political obligation. One family of alternative accounts are the theories that Klosko refers to collectively as reformist consent accounts. Reformist consent accounts offer suggestions about how we might alter our political and social institutions so as to rescue consent accounts from problems like those discussed above. For example, our political institutions might be altered in ways that would make voting into a sign of genuine consent, rather than simply a consent-implying act. Or we might, as Tideman suggests, give citizens a right to secede from the union, with their property intact, and insist that those who do not exercise this right thereby consent to be governed.<sup>82</sup> Another family of alternative approaches is founded on the belief that the traditional approaches make a fundamental conceptual error by assuming that political

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<sup>82</sup> Nicolaus Tideman, "Coercion, Justice, and Democracy," presented at the Amintaphil Conference on Coercion, Justice, and Democracy (St. Louis, MO, November 2006).

society might somehow exist without political obligation. These constitutive or conceptual arguments seek to show that political obligation logically must exist because “membership” in a polity is simply unintelligible without it.<sup>83</sup> Dworkin’s associative theory of obligation is an example of this constitutive approach. In this section I briefly discuss a third alternative, Rawls’s natural duty of justice, and then Dworkin’s view.

In A Theory of Justice (hereafter TJ), Rawls finally rejects the fair play account of political obligation that he defends in his earlier work, and replaces it with an account based on what he calls a natural duty of justice.<sup>84</sup> Rawls rejects the fair play account because he takes it to be voluntarist in nature.<sup>85</sup> It requires that individuals freely choose to take part in some cooperative scheme, in this case, that they freely accept their (just) constitutional order. But he is ultimately convinced by Hume that there is no plausible way to construe the association between (most) citizens and their political system in voluntarist terms.<sup>86</sup> Each of us is simply born into one political system or another, and there is nothing really voluntary about it. So he is forced to give up on fair play as a general account of political obligation.<sup>87</sup>

In TJ Rawls argues instead that the duty to obey the law is ultimately rooted in a natural duty to support and further just institutions.<sup>88</sup> According to Rawls, natural duties

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<sup>83</sup> One interesting conceptual argument is Horton’s Political Obligation. The earliest conceptual argument may be Margaret MacDonald’s “The Language of Political Theory,” in A. G. N. Flew, ed., Logic and Language (Oxford: Basil Blackwell, 1951).

<sup>84</sup> John Rawls, A Theory of Justice, revised edition (Cambridge, MA: Harvard University Press, 1999), pp. 308-313. Hereafter TJ.

<sup>85</sup> See Rawls, “Legal Obligation and the Duty of Fair Play.”

<sup>86</sup> TJ, p. 296.

<sup>87</sup> But Rawls does not give up on it altogether. He maintains, even in TJ, that the fair play account explains why some people—those who voluntarily assume certain offices and positions in society—have an obligation to obey the law. But he concedes that fair play simply cannot support any political obligation for citizens generally.

<sup>88</sup> See, e.g., TJ, p. 99, 308-313.

are distinct from obligations.<sup>89</sup> Obligations are moral requirements generated through voluntary actions. A promise is one kind of voluntary action that can generate an obligation for a person. If P promises to do X for Q, then P has incurred an obligation to do X for Q. Obligations are narrow in the sense that only the person who makes the promise, P, incurs the obligation to do X, and only the person to whom the promise has been made, Q, is owed X. Natural duties are different from obligations. They are not rooted in voluntary actions, but are simply moral requirements all people must follow. Further, they are owed to people generally. Natural duties are owed by all people to all people. One example is a natural duty of mutual aid, a “duty of helping another when he is in need or jeopardy, provided that one can do so without excessive risk or loss to oneself.”<sup>90</sup> Other natural duties include a duty not to harm others, and not to cause unnecessary suffering.

In TJ, Rawls grounds the duty to obey the law in a natural duty of justice, which has two parts:

This duty requires us to support and to comply with just institutions that exist and apply to us. It also constrains us to further just arrangements not yet established, at least when this can be done without too much cost to ourselves. Thus if the basic structure of society is just, or as just as it is reasonable to expect in the circumstances, everyone has a natural duty to do his part in the existing scheme.<sup>91</sup>

This does not imply that citizens have no duty to obey unjust laws. The natural duty of justice requires that citizens support the basic social structure, the fundamental

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<sup>89</sup> TJ, pp. 98-99.

<sup>90</sup> TJ, p. 98.

<sup>91</sup> TJ, p. 99.

constitutional rules that define a society politically, when the basic structure is just. The basic social structure is more or less the same as a constitution. It describes a society's basic social and political institutions, including its most fundamental procedures for enacting law. The natural duty of justice basically requires us to support just constitutional arrangements. However, no constitution, not even a just one, is perfect, in the sense that it only issues just laws. Even just constitutions sometimes fail us in this way. When otherwise just constitutional procedures result in an unjust law, the natural duty of justice requires citizens to support the constitution by obeying that law, despite the fact that it is unjust (within certain limits).

There are several problems with Rawls's natural duty of justice. One commonly noted problem is that it fails the particularity requirement.<sup>92</sup> It does not explain why citizens have a special relationship to their own government, a particular duty to obey its laws, that they do not have with other governments. According to this account, it seems as if people should have a duty to uphold just institutions, wherever they may be. If Mexico and Canada have just constitutions, then U.S. citizens have a duty to support those governments by obeying their laws too.

Horton has another worry.<sup>93</sup> Rawls claims the natural duty applies to political institutions that are "just or nearly just." But what about institutions that are not nearly just? Do we have no duty to obey the law in such situations? This is not a worry about reasonable disagreement over what justice requires, which Horton recognizes as a serious

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<sup>92</sup> This objection to Rawls's natural duty argument is made by, e.g., Horton, Political Obligation, pp. 104-5, and Ronald Dworkin, Law's Empire (Cambridge, Ma.: Harvard University Press, 1986), p. 193. Klosko discusses this problem as it applies more generally to the family of natural duty views in Political Obligations, pp. 107-110.

<sup>93</sup> Horton, Political Obligations, pp. 106-7.

problem. Rather, Horton doubts that it is true that people never or simply cannot have a duty to support or comply with unjust institutions. He admits that some political institutions are so unjust that the only decent response is full-fledged opposition. But, Horton says, there is injustice and there is yet worse injustice. We need not accept Hobbes's general theory to see that it is sometimes reasonable to support unjust institutions, when the only available alternatives are worse. Horton expresses this view with caution, because it can easily be exploited in defense of various forms of tyranny. But his point has merit nonetheless: there is no a priori argument that shows that we never have an obligation to support unjust institutions.

Horton also worries that Rawls's theory fails because, in his view, it is too abstract and ideal to be helpful. Horton doubts that many states, if any, past or present, can be considered even nearly just. If it is the case today that no state is nearly just, and Horton thinks it might be, then no one has an obligation to obey the law. This would make Rawls's theory a failure. Horton recognizes the value of ideal theory, and the fact that even non-ideal political philosophy cannot be done without some abstraction and simplification, but there is always a danger that such abstraction may lead us astray, that it will "degenerate into a philosophically idealized abstraction, bearing at best a very distant and obscure relationship to the world as we experience it." This, he thinks, has happened in the case of Rawls's natural duty of justice. Interesting though it may be as an intellectual exercise, it is not very helpful. What we need an account of political obligation to do is to make sense of people's relationships to the political societies they actually inhabit, not the societies they might inhabit if only they lived in a better world.

Dworkin grounds political obligation in associative or role obligations.<sup>94</sup> This is a species of conceptual or constitutive argument. According to Dworkin, “political association, like family and friendship and other forms of association more local and intimate, is in itself pregnant with obligation.”<sup>95</sup> It does not matter that people do not choose their political communities. Horton puts it this way:

... familial obligations share several features with political obligations, and ... the family provides a good example of a context in which obligations are experienced as genuine and rather open-ended, and are not the result of voluntary undertaking ... A polity is, like the family, a relationship into which we are mostly born.<sup>96</sup>

Political obligations are like associative obligations, special moral requirements attached to social roles and positions, whose content is specified by local practices. For Dworkin, “we have a duty to honor our responsibilities under social practices that define groups and attach special responsibilities to membership,” as long as certain conditions are met. Group members must believe the obligations hold within the group and are not duties owed to persons generally, that the obligations are run from each member to every other member, and not to the group as a collective, and finally, that the obligations emerge out of a concern for the equal well-being of all group members. These obligations do not need independent or external justification. Justification takes the form of showing that the obligations in question are constitutive of the community. Nor is it necessary that people generally actually feel and think this way. Dworkin’s theory of law is interpretive. In trying to understand the law and its requirements, e.g., to resolve

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<sup>94</sup> Dworkin develops his account of obligation and legitimacy in Law’s Empire, pp. 190-206.

<sup>95</sup> Dworkin, Law’s Empire, p. 206.

<sup>96</sup> Horton, Political Obligation, pp. 146, 150.

ambiguities in the law, we try to interpret what has happened in our legal system in the past in the best way possible given our present moral self-understanding. This helps us to understand what we ought to do right now and aim for in the future. In doing this sort of interpretation of law and political communities, we should suppose that people have the right feelings and thoughts because these are the “practices that people with the right level of concern would adopt.”

Dworkin’s view avoids the problem with particularity requirement that Rawls’s view faced. However, one common complaint raised against conceptual views is that they simply posit that membership in political society is a social or political fact about people that requires no explanation or defense.<sup>97</sup> But it is precisely this that is one of the most contentious issues in traditional debates about political obligation. There is some merit to this complaint. In any case, even if we grant that people are in communities that they quite literally constitute through their shared feelings and attitudes, still we might ask whether the feelings and attitudes they have imply any responsibilities that rise to the level of a moral obligation to obey the community’s laws. This depends, in part, on how strong we take political obligation to be. If it is a weak prima facie duty, then the feelings and attitudes of community members may be sufficient to generate it. If it is a stronger duty, then this may present a problem for conceptual accounts.

#### The Correlativity Thesis and Philosophical Anarchism.

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<sup>97</sup> See e.g. Simmons, “Associative Political Obligations,” *Ethics*, v. 106 (1996), pp. 254-5.



The correlativity thesis holds that a government has a right to enforce the law against citizens only if citizens have a duty to obey the laws of that government, and vice versa.<sup>98</sup> This is what Anscombe means when she says that “obedience/disobedience are the primary correlates of authority.”<sup>99</sup> According to the correlativity thesis, there is a strict correlation between the right to enforce the law and the duty to obey it. One cannot exist without the other. This thesis is a key component in one kind of argument for philosophical anarchism. This argument holds that the failure of political obligation, when coupled with the correlativity thesis, implies that no state has a right to enforce its laws. Since there is good reason to doubt that a compelling account of political obligation is possible, we lose one end of the correlativity thesis bi-conditional. If citizens do not have a duty to obey the government’s laws, then the government does not have a right to enforce them. This is philosophical anarchism.

Philosophical anarchism does not imply that disobedience or revolution are justified, or even that citizens do not have good reason to obey the law. Quite the contrary. There are reasons to obey the law, even when the government has no right to enforce it. For example, prudential self-interest and the obvious moral value of social order and institutions like private property give all citizens reason to obey. What philosophical anarchism holds is that citizens have no special duty to obey the laws of their own country, just because they are the laws of their own country, and that no government has a right, strictly speaking, to enforce its laws.

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<sup>98</sup> For discussion of the correlativity thesis, see, e.g., William Edmundson, Three Anarchical Fallacies, especially Chapter 2.

<sup>99</sup> Anscombe, “On the Source of the Authority of the State,” Ratio, v. 20, 1978, p. 6.

The correlativity thesis argument for philosophical anarchism is different from other arguments for anarchism. The correlativity argument ultimately grounds anarchism in skepticism about the possibility of political obligation. Wolff's anarchism is different.<sup>100</sup> Wolff argues that the state is simply inconsistent with the primary human obligation to be autonomous. The state is defined by authority, or the right to rule. A human being cannot submit to the state's authority in any way that is consistent with her obligation to be autonomous, to rule herself. Since the state is incompatible with the primary human obligation, the state cannot be legitimate. Simmons defends yet another kind of anarchism.<sup>101</sup> He believes that a state could be legitimate, if (nearly) all citizens consented to be ruled by the state. However, since no state in the world today can claim that its citizens have given this consent, no state today can be considered legitimate. He does not argue that it is impossible for a state to be legitimate, but only that no currently existing state is legitimate.

Many now reject the correlativity thesis.<sup>102</sup> In contemporary political philosophy, this rejection can be traced back to Robert F. Ladenson's "In Defense of a Hobbesian Conception of Law."<sup>103</sup> Ladenson claims that political legitimacy—the right to rule, or what he calls government authority—does not imply or depend on a duty to obey among citizens.<sup>104</sup> This is so because legitimacy is not a "claim-right," but a "justification-

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<sup>100</sup> Robert Paul Wolff, *In Defense of Anarchism*, second ed., (New York: Harper and Row, 1976).

<sup>101</sup> See, e.g., Simmons, *Moral Principles*, pp. 192, 194-5.

<sup>102</sup> Those who reject the correlativity thesis include, e.g., Allen Buchanan, "Political Legitimacy and Democracy," *Ethics*, v. 112 (2002), pp. 689-719; Rolf Sartorius, "Political Authority and Political Obligation," *Virginia Law Review*, v. 67 (1981), pp. 3-17; and A. John Simmons, "Voluntarism and Political Associations," *Virginia Law Review*, v. 67 (1981), pp. 19-37.

<sup>103</sup> Robert F. Ladenson, "In Defense of a Hobbesian Conception of Law," *Philosophy and Public Affairs*, v. 9 (1980), pp. 134-159. Ladenson develops the account of claim- and justification-rights he uses in the Hobbes paper in his earlier "Two Kinds of Rights," *Journal of Value Inquiry*, v. 13 (1979), pp. 161-172.

<sup>104</sup> Ladenson, "In Defense," p. 137-9.

right.” When a person asserts a claim-right, she makes a strong moral demand for something or against someone. This implies that others are morally required to behave in certain ways. In short, claim-rights are correlated with duties for others. This kind of right depends on the existence of some institutional background sufficient for handling such claims, e.g., sets of rules and procedures, political offices, military/police, and so on. One example of a claim right is the right to basic subsistence, in the form of food, water, and shelter. This right is a demand for something, and it requires others to behave in certain ways.

Justification-rights are different: “when one asserts a justification-right in a particular situation, one does not press a claim against others but rather responds to demands for justification of one’s behavior.”<sup>105</sup> Justification-rights do not require an institutional background, nor do they imply duties for others. Asserting a justification-right amounts to claiming that an act is justified or otherwise all right. For example, justification-rights are invoked when a person wants to justify an otherwise immoral or illegal act, such as self-defense. According to Ladenson, the right to harm another person in order to protect one’s self, or one’s family, is not a claim-right—a demand for something or against somebody—but a justification-right—an insistence that the act is justified, even if it appears immoral or unjust. In other situations, invoking a justification-right “amounts to contending that what one did was all right.” Here Ladenson cites Judith Thompson’s “famous violinist” example.<sup>106</sup> In this example, a person must allow his kidneys to be connected to a famous violinist, in order to keep the

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<sup>105</sup> Ibid., p. 138.

<sup>106</sup> Judith Jarvis Thompson, “A Defense of Abortion,” *Philosophy and Public Affairs*, v. 1 (1971), pp. 47-66.

violinist alive. A person's right to disconnect from the famous violinist is a justification-right. You are not asking for the provision of some good, or insisting that someone else do something for you; you are simply asserting that it is ok for you to disconnect yourself from the violinist.

Ladenson claims that the government's authority in the broadest sense is constituted by both justification- and claim-rights. The government's right to use coercive force in the name of law is a justification-right. When there are sufficient moral reasons for the government to use coercive force against citizens, the government is justified in using its power. Exactly what counts as sufficient reason is an open question, one that philosophers have not yet answered. But this does not mean that the government has blanket permission to do whatever it wants. There are limits and exceptions to the government's legitimate power. Again, philosophers have yet to determine just what these limits are. The government also has a right not to be usurped. This is a claim-right, a strong moral demand that citizens allow the government to perform the functions of government, and not to take these matters into their own hands (e.g., as a lynch mob might seek to carry out a death sentence on their own).

But this combination of justification- and claim-right does not imply that citizens have a duty of allegiance to the government, or a duty of obedience to the law as such. Strictly speaking, the government's right to enforce the law is a justification-right, and so it implies no such correlative duties. This does not mean that there is no duty to obey the law; it just means that the source of any such duty, if such a duty exists, is not the government's right to rule. The right to enforce the law and the duty to obey the law are distinct.

Some think this distinction is not sound. For instance, Finnis wonders why “arguments capable of justifying a claim to moral authority to make and enforce the law would not equally (or by addition of only uncontroversial premises) justify the claim that there is a generic moral obligation to obey the law.”<sup>107</sup> Soper wonders the same thing.<sup>108</sup> I believe that Simmons answers this challenge well.<sup>109</sup> Ladenson goes too far when he claims that a justification right is merely a liberty right that implies no correlative duties. A justification right does imply some duties, but these duties do not rise to the level of a duty to obey. For example, Simmons says, if I attack a would-be mugger in self-defense, other bystanders should not interfere with me, nor should the mugger resist my efforts to save myself. Thus, my justification-right to self-defense does imply some duties for bystanders and for the person I use my coercive power against, i.e., the mugger. Similarly, the government’s justification-right to enforce the law is correlated with a duty of citizens not to interfere with the government’s legitimate use of its coercive power, or to resist this power when it is applied against them. Thus, citizens have some duties correlated with the government’s justification-right. However, these duties do not amount to an obligation to obey the government or the law as such. The question we are trying to answer, as Simmons correctly sees it, is this: “under what conditions is a government morally justified in exercising the customary functions of government?”<sup>110</sup> Whatever these necessary conditions are, the right to command and be obeyed is not one

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<sup>107</sup> John Finnis, “The Authority of Law in the Predicament of Contemporary Social Theory,” Notre Dame Journal of Law, Ethics, and Public Policy, v. 1 (1984), p. 115, 116n.4.

<sup>108</sup> Philip Soper, The Ethics of Deference: Learning from Law’s Morals (New York: Cambridge University Press, 2002), p. 54n.5, 55n.7.

<sup>109</sup> Simmons, “Voluntarism and Political Associations,” p. 24.

<sup>110</sup> Simmons, “Voluntarism and Political Associations,” p. 25.

of them. The minimal conditions for justified or legitimate government do not include the right to command and be obeyed, despite what Anscombe or Wolff might insist.

Strictly speaking, then, the correlativity thesis is false. Political legitimacy does not imply political obligation, and vice versa. The government's right to enforce the law against citizens does not imply that citizens have a duty to obey the law, or the government, or depend on citizens having such a duty of obedience. But this does not mean that citizens have no duties to a legitimate government. Minimally, citizens have duties not to usurp the legitimate powers of government, and not to interfere with the government's exercise of its coercive power against citizens. These political duties amount to prima facie duties to acquiesce to, or to defer to, the government, when it legitimately exercises its power against citizens. To distinguish these duties from political obligation, I will refer to them as "political deference" or the "duty to defer."<sup>111</sup> Political legitimacy is not correlated with political obligation; it is correlated with political deference, or a duty to defer.

### The Problem of Political Legitimacy.

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<sup>111</sup> I borrow the term "deference" from Soper, who argues that the duties correlated with political legitimacy amount to a duty to defer to the government. However, unlike Soper, I do not believe that this duty is the same thing as political obligation.

Since the correlativity thesis is false, we do not need to show that that citizens have a duty to obey the government or the law as such, in order to show that the government has a right to enforce the law against citizens. Instead, an account of legitimacy must do two things.<sup>112</sup> First, it must explain the conditions under which some government has sufficient justification to use its coercive power against its citizens to enforce its laws. Second, it must explain why citizens under these conditions have sound reason to defer to, or to acquiesce to, the government when it seeks to exercise its legitimate power.<sup>113</sup> The problem of political legitimacy is not new, but it becomes foundational in political philosophy beginning with the modern era, when the idea of a divinely mandated or naturally given political order is rejected and we start to see persons as naturally free and equal, and each as possessed of natural authority over him or herself.<sup>114</sup> Political power makes people unequal—some people get to tell other people how to live—and inevitably involves restricting the freedom of some individuals, so the legitimacy of political power is prima facie problematic. From Hobbes to the present day, we have been trying to understand how, if at all, political power can be made consistent with the freedom and equality of persons. Some have concluded that this effort is futile, that there is no way to resolve this problem.<sup>115</sup> Others reject this skeptical view.<sup>116</sup>

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<sup>112</sup> See, e.g., Buchanan, “Political Legitimacy.”

<sup>113</sup> I will leave open for now the question of just how strong the duty to defer may be. Whether we are talking about an obligation or simply a reason to defer will depend on how each theorist understands the state’s legitimacy rights and the normative direction this right provides for citizens.

<sup>114</sup> Thomas Hobbes’ *Leviathan* appeared around 1641.

<sup>115</sup> See, e.g., philosophical anarchists like Green, The Authority of the State, Simmons, Justification and Legitimacy, and Wolff, In Defense of Anarchism. Simmons thinks consent could legitimate political authority, but argues that no government currently enjoys the consent of its governed.

<sup>116</sup> See, e.g. Buchanan, “Political Legitimacy,” Dworkin, Law’s Empire, Rawls, PL, and Waldron, Law and Disagreement.

The problem of political legitimacy is not new, but it is not well understood by political philosophers. Work in this area is nowhere near as developed as is work on political obligation or justice. There are a couple of reasons for this. First, though modern philosophers like Hobbes were interested in legitimacy, contemporary philosophy has largely ignored the issue. It has spent its time working primarily on justice. This is not time wasted, of course, but it is past time for work on legitimacy to catch up, especially since it is now quite common to claim that it is reasonable for citizens to disagree about what justice requires. And, in any case, legitimacy and justice are not identical issues. It is not clear to most that what is just can be legitimately enforced against all, simply because it is just. This requires argument. A second impediment to work on political legitimacy has been a general, albeit uncritical, acceptance of the correlativity thesis. Before Ladenson's paper twenty years ago, few seemed to think it possible to separate legitimacy from political obligation. Since the failure of political obligation was regarded as complete well before that time by many political theorists, few thought there was any point in talking about legitimacy. Until some compelling account of obligation could be offered, many felt this strand of political thought had reached a dead end. The recent rejection of the correlativity thesis has freed work on legitimacy. However, this work is still in its infancy today.

Not surprisingly, there is a lot of confusion in the literature on legitimacy. For instance, in one recent article noted political philosopher William Rehg claims that to say a law is legitimate is to say that it deserves to be obeyed by citizens.<sup>117</sup> This is exactly

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<sup>117</sup> William Rehg, "Legitimacy and Deliberation in Epistemic Conceptions of Democracy: Between Habermas and Estlund," *The Modern Schoolman*, v. 74 (1997), pp. 355-374.



wrong. It confuses the fundamental issues of political obligation and legitimacy. More confusion is revealed in a recent exchange between Richard J. Arneson and Christopher G. Griffin, published as a debate in the Journal of Political Philosophy.<sup>118</sup> Here I am less interested in the merits of their respective positions, and more interested in the basic confusion their debate reveals. Arneson argues that legitimacy (coercive power of government) requires democracy. He defends the claim with an instrumental “best results” account. On his view, democracy legitimates the coercive power of the government, because it is reasonable to think that over time this scheme promotes morally superior results to any other feasible alternative. Griffin rejects Arneson’s appeal to instrumentalism. He argues that democracy is intrinsically just, because the practice treats people appropriately, in this case by publicly expressing and affirming the equal political status of all persons. Justice requires such public affirmation of equal basic social status. This is a perfect example of the confusion that mars the current literature on legitimacy. Arneson and Griffin are talking about fundamentally different normative political ideas, legitimacy and justice respectively, and how each is related to democracy. Since Arneson and Griffin are talking about distinct normative issues, it is clear that their debate tells us little about either. It is never clear exactly what is at issue, nor is it clear how each thinks the arguments he deploys should be taken by the other. For what it’s worth, and despite the fact that the authors think they disagree with one another, one could coherently (though perhaps not comfortably) argue that Arneson is right about the link between legitimacy and democracy, and that Griffin is right about the link between

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<sup>118</sup> See Arneson, “Defending the Purely Instrumental Account of Democratic Legitimacy,” Journal of Political Philosophy, v. 11 (2003), pp. 122-132, and Griffin, “Democracy as a Non-Instrumentally Just Procedure,” Journal of Political Philosophy, v. 11 (2003), pp. 111-122.

justice and democracy. There are other examples of similar confusions. Political philosophers need to spend more time on legitimacy.

### Approaches to Legitimacy.

Approaches to the question of legitimacy can be divided into two broad camps: descriptive and normative. Many follow in the tradition of Max Weber and offer descriptive sociological accounts of legitimacy.<sup>119</sup> From this social scientific perspective, legitimacy is reduced to whatever the citizens of some society happen to believe legitimacy to be. If a people believes its government to be legitimate, for whatever reasons, then it is legitimate. The emphasis in this sociological project is on explaining why people obey authority, and why regimes persist, and not on whether or not particular regimes should continue to wield authority. One charge leveled against this approach is that it simply overlooks the important questions about legitimacy.<sup>120</sup> Another charge made is that this narrow focus on attitudes fails to recognize what history has taught us again and again—people easily come to feel obligated to those who wield power over them, whether that power is deserved and rightfully used or not.<sup>121</sup>

The normative political approach, inspired by Hobbes's *Leviathan*, Locke's *Second Treatise of Government*, and Rousseau's *Social Contract*, sees legitimacy as a

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<sup>119</sup> See e.g. Weber, *Essays in Sociology* (London: Routledge Publishers, 1991). Charles Taylor offers a contemporary version of a Weberian attitudinal approach in "Legitimation Crisis?" in *Philosophy and the Human Sciences: Philosophical Papers 2* (New York: Cambridge University Press, 1985), pp. 248-288. David Beetham discusses the descriptive sociological approach and argues for a modified normative sociological model in *The Legitimation of Power* (London: Macmillan Education, 1991).

<sup>120</sup> See, e.g., Beetham, *The Legitimation of Power*.

<sup>121</sup> See, e.g., Simmons, "Justification and Legitimacy," p. 749.

normative notion, justifiable in terms of normative considerations. On this view, the fact that people believe their government to be legitimate and are willing to acquiesce to its demands does not determine whether or not the government in question actually deserves to be considered legitimate. This does not imply that belief in the legitimacy of authority could have no moral relevance. But normative theories of legitimacy ultimately have a critical purpose—“to establish a standard against which individual rulers or regimes can be assessed, and, where need be, found wanting.”<sup>122</sup> This critical standard involves more than just descriptive facts. Within the normative political camp sit a number of different approaches to legitimacy.

One useful way of distinguishing normative approaches to legitimacy is by grouping them according to the relative weight or value they give (a) to the capacity for judgment of individual citizens, and (b) to some understanding of the interests of citizens.<sup>123</sup> At one end of the spectrum are respect for judgment views, views that give great weight to the choices citizens make, in real or idealized situations, and less weight to other interests. From this perspective, political authority and relations are legitimate only if they are consistent with genuine respect for the capacity for judgment of individuals seen as free and equal. Respect for judgment views are rooted in Hobbes, Locke, and Kant, and find expression today in several places, most influentially in consent theories<sup>124</sup> and the work of John Rawls.<sup>125</sup> The contemporary project here is to

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<sup>122</sup> Beetham, The Legitimation of Power.

<sup>123</sup> In most approaches to legitimacy, both the capacity for judgment and interests are valued. Rarely, if ever, does anyone place all value in one aspect and completely ignore the other. Thus it is useful to distinguish approaches according to the *relative* weight given to each value.

<sup>124</sup> See Harry Beran, The Consent Theory of Political Obligation (New York: Croom Helm, 1987) for a good review of several different versions of the consent theory.

<sup>125</sup> See, e.g., Rawls, PL and IPRR.

see whether free and equal citizens do affirm, or would all have reason to affirm (in some real or idealized forum), or would at least have no reason to reject, the essentials of democratic society. This project suffers from a host of serious problems. Some argue that it simply cannot accommodate the breadth and depth of reasonable disagreement.<sup>126</sup> There is simply nothing that even remotely resembles the kind of unanimity envisioned in these projects, nor is there reason to expect any such consensus to develop. If consensus is necessary, this is a serious problem. However, not all shared reason views are consensus views. For instance, the shared reason views of Kant, Soper, and Rawls do not depend on consensus. Others argue that the shared reason has an illicit secular slant, in that it inappropriately rules out comprehensive moral, philosophical, and religious commitments, and sneaks secular commitments in by the back door. This objection is most frequently advanced by those attempting to preserve room for appeal to religious belief in democratic public discourse,<sup>127</sup> but it could be raised by others as well, e.g., those whose serious moral commitments to preserving nature are grounded in reasons not generally shared by other citizens.<sup>128</sup>

At the other end of the spectrum are views that give great weight to the interests of citizens, and less weight to their capacity for judgment, to make decisions. From this

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<sup>126</sup> See, e.g., Christiano, "Waldron on Law and Disagreement," *Law and Philosophy*, v. 19 (2000), pp. 513-543, and Reidy, "Reciprocity and Reasonable Disagreement."

<sup>127</sup> See, e.g., R. Audi and N. Wolterstorff, *Religion in the Public Square* (New York: Rowman and Littlefield Publishers, 1996), Kent Greenawalt, *Private Consciences and Public Reasons* (New York: Oxford University Press, 1995), and Jeffrey Stout, *Democracy and Tradition* (Princeton: Princeton University Press, 2004).

<sup>128</sup> Some argue that "inaccessible" reasons, those not shared by (most) reasonable citizens, should be excluded from public discourse. Inaccessible reasons could include all kinds of moral and philosophical commitments, not just religious ones. So, for example, theories in environmental ethics that seek to extend the boundaries of our normal categories of moral analysis to include animals might be allowed, while theories that offer non-traditional or radical (and hence inaccessible) reasons for including animals might be ruled out.

perspective, political authority and relations are legitimate only if they are consistent with a genuine respect for the real or basic interests of each citizen (which may include an interest in making judgments and having them respected by others). This general approach focuses on the interest each citizen has in belonging to a political society that advances her interests, whatever her interests might be. This approach draws on ideas from the earlier utilitarian (e.g., Bentham and Mill) and constitutional republican (e.g., Rousseau) traditions and finds expression today in a number of approaches to democratic legitimacy. The basic idea is that government action is legitimate only insofar as the government acts to promote the common interests or good of its members. One problem with such approaches is understanding just what the common good or interest is when members see themselves as free equals possessing a wide range of conflicting interests, some of which they might value above membership in political society. There are a range of alternative positions, and all suffer from defects.

In the next few sections I will briefly discuss different respect for judgment and respect for interest views of political legitimacy.

#### Respect for Judgment Views of Legitimacy.

Some theories of legitimacy give pride of place to respect for the judgments of individuals. Two important families of views in this camp are consent accounts and shared reason accounts. There are several consent accounts of legitimacy, mirroring the variety of consent accounts of political obligation. The idea is roughly that a government is legitimate only if citizens have consented to be ruled by it. One compelling approach

to consent is the Lockean approach, represented in contemporary political philosophy by A. John Simmons. There are also a variety of shared reason approaches to legitimacy.<sup>129</sup> The idea here is roughly that government is legitimate only if it is reasonable from the perspective of every individual. Exactly what counts as “reasonable from the perspective of every individual” is an open question. It is fleshed out in different ways by different political theorists.

#### Consent Accounts of Legitimacy.

There are many kinds of consent theories.<sup>130</sup> In a number of works, A. John Simmons has developed a modern Lockean “actual consent” account of legitimacy.<sup>131</sup> Roughly, Simmons argues that a state’s legitimacy rights, held against specific subjects bound by state-imposed duties, arise only from some morally significant relationship between the state and its subjects. For the Lockean, the morally significant relationship is one of consent. Before any person consents to be ruled, she lives in a state of natural freedom from political association. According to Simmons, she need not join political society at any time.<sup>132</sup> States earn legitimacy by virtue of the unanimous consent of members to transfer certain rights to a central authority. Governments are legitimate only if they have been entrusted by the people with the exercise of those rights. What is most

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<sup>129</sup> A good survey of shared reason approaches is Fred D’Agostino, Free Public Reason: Making It Up As We Go (New York: Oxford University Press, 1996).

<sup>130</sup> See Beran, Consent Theory, for a good review and critical analysis of several consent theories.

<sup>131</sup> Simmons, Justification and Legitimacy.

<sup>132</sup> Simmons recognizes that individuals have moral duties to other individuals, but argues that joining some political association is not necessary for the fulfillment of those duties. See, e.g., Simmons, “Associative Political Obligations,” pp. 255-7.

important here, to Simmons, is that actual consent theories recognize that “how we have lived and chosen, confused and unwise and unreflective though we may have been, has undeniable moral significance; and our actual political histories and choice thus seem deeply relevant to the evaluation of those political institutions under which we live.”<sup>133</sup> It is this actual, lived sense of respect for individual judgment that Simmons takes to be vital to any discussion of legitimacy. This is, he argues, the only way to really respect individual judgments. And since this is what we must do, any proper claim to legitimacy must be built on this ground.

There are several problems with this approach. First, as many have pointed out, consent accounts of legitimacy are very demanding. Simmons concludes, as do many other consent theorists, that no state in the world today can be considered legitimate, because no state can reasonably claim that (nearly) all citizens have consented to be ruled.<sup>134</sup> But this seems like an absurd conclusion to many. Surely we want to be able to say that some governments are legitimate. Perhaps, then, we should reexamine the basic presuppositions of consent accounts, rather than reject the idea of legitimacy altogether. One presupposition of consent theories that often gets questioned is the idea of the state of nature. Rawls, for instance, rejects the idea that individuals persons are born free from political associations, and enter into them only voluntarily. He holds instead that political membership is a social fact—we are simply born into some political society. Thus, instead of rejecting the idea of legitimacy, some prefer to reject basic assumptions made by consent theorists.

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<sup>133</sup> Simmons, “Justification and Legitimacy,” p. 763.

<sup>134</sup> See, e.g., Simmons, *Moral Principles*, p. 196: “I am, in fact, quite prepared to accept the conclusion that governments do not normally have the right to be obeyed by their citizens, or to force them to obey, or to punish them for disobedience.”

Of course, consent theorists say that they do not actually reject legitimacy. They hold that a state could be legitimate, even if none actually are. But it is not clear what purpose is served by talking about a goal no state can approach. If no state is legitimate, the idea of legitimacy seems to have no value. Simmons recognizes this problem, but insists that legitimacy remains an important evaluative tool, even though all states are illegitimate.<sup>135</sup> An ideal of legitimacy could serve as a goal toward which governments might strive, or give us a way of establishing a scale of better or worse governments. Finally, some criticisms Simmons levels against Weberian attitudinal accounts seem equally challenging to his own view.<sup>136</sup> He says, for instance, that we should reject attitudinal accounts, because attitudes can be so easily manipulated. But it seems that this also applies to his own actual consent account. The attitudes that might lead one to consent to be ruled are surely not free from manipulation either. And he says that some states may be legitimate, even when they do not receive attitudinal support, especially in cases where people are stupid, immoral, deceived, manipulated, and so on. But it seems that this charge could be leveled against actual consent theories as well. If stupid, immoral or deceived people do not consent to be governed, why should this count against the legitimacy of the state?

Shared Reason Views of Legitimacy.

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<sup>135</sup> Simmons, "Justification and Legitimacy," p. 769, footnote 68.

<sup>136</sup> Simmons, "Justification and Legitimacy," pp. 749-50.



The idea behind shared reason views is roughly that government power is legitimate if it is exercised pursuant to and in accord with rules, e.g., constitutional essentials, that are reasonable from every individual's perspective. What it means to say that some rules are "reasonable from every individual's perspective" is an open question. Several issues distinguish different shared reason views, but here I will describe just two. One has to do with the appropriate perspective from which individuals assess political rules. The other has to do with whether shared reason requires consensus.

The first issue has to do with the appropriate perspective from which individuals should assess political rules. On one end of the spectrum are views that take people as they are, with their own actual and particular beliefs, desires and motives. This empirical perspective roots shared reason in actual individual's actual perspectives. On such views, political rules are reasonable only if each person concludes that she supports them, according to her own understanding of the issues she regards as relevant, and her own standards of reasoning. This view respects individual's actual beliefs and ways of reasoning, not those individuals would have if they were better informed, or better reasoners. At the other end of the spectrum are normatively loaded views. These views take people as they could be, if they were better informed, or better reasoners, and ask what they would judge reasonable, from some privileged, normatively significant perspective. The question is not what actual people would affirm, given their actual beliefs and modes of reasoning, but what they would affirm, if they had normatively appropriate beliefs and modes of reasoning.

The empirical view has certain virtues, but it also has serious defects. It respects each individual's capacity for judgment by giving pride of place to actually held beliefs

and standards of reasoning. It makes no demand that individuals conform to beliefs or standards that others regard as better or otherwise more appropriate for the situation. Unfortunately, people often believe and desire what they shouldn't. Given this, it is reasonable to worry that people might conclude that some governments are legitimate when they do not deserve this status, and that other governments are illegitimate when they ought to be considered legitimate.

This problem is less likely to occur on the normative end of the spectrum. However, the normative views suffer from other defects. It is not obvious what the proper normative perspective ought to be. There are good faith disagreements over what we ought to believe and desire. And even if people could agree that some normative perspective is the proper one, we should expect good faith disagreements over what might be accepted from that perspective. And there are even good faith disagreements over the demands of reason itself. If we could find an ideal perspective that is grounded in norms generally shared by all, it might serve as an appropriate base for reasoning about public political matters. But reasonable disagreements over what norms are appropriate, and over how we ought to reason from any particular normative perspective, pose a serious threat to this possibility.

The Rawlsian view I defend sits somewhere between these poles. Rawls holds that the legitimacy of state action in a liberal democracy depends on a sincere commitment of citizens to certain shared but abstract political values. Two things stand out. First, Rawls excludes citizens who reject democracy. The legitimacy of state action in a liberal democracy is ultimately rooted in the shared commitments of citizens not opposed to liberal democracy. Second, he holds that there are reasons actually held by

citizens that we can appeal to. However, he thinks that some of these reasons are very abstract, and that others are only implicit in public political discourse and need to be drawn out. Further, he does not deny that citizens might have self-interested reasons or moral, religious, or philosophical reasons for affirming democracy, but he privileges reasons drawn from the pool of political values for the purposes of legitimacy. Nevertheless, he thinks there are normative reasons actually shared by all citizens committed to liberal democracy.

The second issue has to do with whether shared reason requires consensus. This issue was introduced in the Preface. At one end of the spectrum, shared reason requires that we find terms of association that no reasonable person could reasonably reject. This is a weak position, philosophically speaking, because it is too demanding to be reasonable. The only terms of association that meet this requirement are too general or abstract to determine any particular constitutional or institutional order for any real polity. Values shared in this sense underdetermine any particular constitutional or institutional structure, even in the realm of ideal theory. At the other end of the spectrum, shared reason requires only that we believe that the terms of association we offer to others are cogent or otherwise sufficiently grounded in reason, and that the terms could be affirmed by all, from some suitable and shared point of view. (The nature of this shared perspective is an open question.) The main worry about this is that it is not actually shared reason. We can get around this worry, though, if we see shared reason as a commitment to a kind of respect for persons. Minimally this view of shared reason respects individuals by requiring something similar to what Reidy refers to as reciprocity in advantage and reciprocity in justification. Reciprocity in advantage means roughly

that terms of association must respect the basic interests of all to some degree. It is not reasonable to believe people could affirm terms of association that fail to respect their basic interests altogether. Thus, shared reason views require that the interests of all must be considered when designing political institutions. Reciprocity in justification means roughly that terms of association should be based on reasons that are publicly available to all. This means that individuals must seek reasons that are part of their culture's tradition of moral and political thought. Some theorists, like Soper, have a relatively open or broad understanding of what it means to say that reasons are publicly available, while others, like Rawls, have a more strict understanding.

#### Respect for Interest Views of Legitimacy.

Another family of approaches to legitimacy bases it on some conception of the common good or the common interests of individuals. The different members of this family of approaches can be distinguished by how they understand the content of the common good, or how they think we determine what the common good is. All of these views take respect for judgment to be important. That is, they all recognize that one important interest individuals have is the ability to make decisions and to have those judgments recognized by others. But unlike advocates of respect for judgment views, advocates of common good approaches do not see respect for judgment as the fundamental value in settling questions of legitimacy. They place the emphasis elsewhere in their political conception of persons as free and equal. Aggregative and deliberative approaches to democracy represent two kinds of respect for interest views.

They share the idea that the government's coercive political power is legitimate when it is exercised in accord with democratic outcomes that express the popular will, that is, when such power serves the common good as it is expressed in these ways.<sup>137</sup> They disagree about how we find the popular will. Other kinds of respect for interest views dispense with the idea of the popular will, or give it a less central place, and aim more directly at fundamental or basic interests shared by individuals. One such view is Richard Arneson's best results account. Allen Buchanan grounds another such view in what he calls the robust natural duty of justice.

Respect for Interests and the Popular Will: Aggregative and Deliberative Accounts.

On the aggregative approach, the common good is just what we get when we tally up people's votes with respect to their own interests. The common good is understood as nothing more than a simple aggregation of individual goods. Each individual citizen is taken to understand his own good best, and this knowledge is aggregated through democratic institutions. One common criticism of this approach is that aggregative arrangements, in themselves, "lack the "moral resources" required to generate and sustain legitimate collective solutions to politically contentious issues."<sup>138</sup> One worry that gives rise to this complaint is that electoral outcomes are vulnerable to distortion, since they are susceptible to a wide variety of influences, including arbitrary social, cultural and economic asymmetries. Social choice is a branch of rational choice theory concerned

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<sup>137</sup> See, e.g., J. Knight and J. Johnson, "Aggregation and Deliberation: On the Possibility of Democratic Legitimacy," *Political Theory*, v. 22 (1994), p. 283.

<sup>138</sup> Knight and Johnson, "Aggregation and Deliberation," p. 278.

with aggregating individual interests into social outcomes.<sup>139</sup> According to some, social choice theory shows two main problems with voting: instability and ambiguity.<sup>140</sup>

Voting is said to be unstable because all aggregation mechanisms can generate cyclical or intransitive social orderings.<sup>141</sup> It is said to be ambiguous, because electoral outcomes are, at least in part, artifacts of the process by which votes are counted. Here the problem is not that all outcomes are subject to manipulation, but that some may be, and that we have no reliable means for determining when this happens. All things considered, the aggregative approach seems faced with possibly insurmountable difficulties.

On the deliberative approach, the common good is what people arrive at after some appropriate deliberative process.<sup>142</sup> Advocates of this approach claim that deliberation transforms the substance of individual preferences, which serves to minimize conflict and, in the ideal case, produces consensus among participants. This transformation is said to occur in a number of ways, e.g., by exposing objectionable preferences or inducing reflection on the grounds for holding otherwise unobjectionable preferences. The main problem with this approach is that it hardly seems realistic to expect any consensus in preferences or values in the large, modern, and diverse

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<sup>139</sup> See, e.g., William Riker, Liberalism Against Populism (Prospect Heights, Il.: Waveland Press, 1982).

<sup>140</sup> For discussion see, e.g., Knight and Johnson, "Aggregation and Deliberation," and Riker, Liberalism Against Populism.

<sup>141</sup> Suppose voter A ranks her preferences  $X > Y > Z$ , voter B ranks her preferences  $Y > Z > X$ , and voter C ranks hers  $Z > X > Y$ . In this case, there is a majority for X (voters A and C), a majority for Y (voters A and B), and a majority for Z (voters B and C). This outcome is known as a voting cycle. It is troubling because it violates the principle of transitivity, which is generally taken to be an essential feature of rationality.

<sup>142</sup> For discussion see, e.g., Bruce Ackerman and James Fishkin, Deliberation Day (New Haven, Ct.: Yale University Press, 2004), and J. Cohen, "Deliberation and Democratic Legitimacy," in A. Hamlin and P. Pettit, eds., The Good Polity (New York: Basil Blackwell, 1989), pp. 17-34.

democratic societies under discussion. In fact, it seems clear that deliberation can and sometimes does sharpen disagreement, rather than resolving it.<sup>143</sup>

Neither of these views seems promising. The main problem they share is that of offering some compelling account of how we ought to determine the popular will. It seems clear that each view faces very serious problems, and it is not obvious how, if at all, these problems might be overcome.

Best Results Accounts of Legitimacy.

Another respect for interest view is what Richard Arneson calls a “best results account.” According to Arneson, democratic governments can legitimately enforce their laws because democracy produces better results for citizens over time than any available alternative form of government. A government only has the right to use its coercive power to direct individual’s lives when the exercise of this power works out well for all concerned parties. Democracy alone is legitimate, because it works out best for all concerned; any other available form of government would work out less well overall than democracy. For Arneson, legitimacy amounts to a kind of stewardship: a form of government is legitimate if it more reliably fulfills the fundamental rights of individuals than other forms of government. Other best results accounts offer different understandings of what it is reasonable to expect from democracy. For instance, Ian

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<sup>143</sup> Some deliberative accounts do not seek consensus. See, e.g., Amy Guttmann and Dennis Thompson, Why Deliberative Democracy? (Princeton, NJ: Princeton University Press, 2004). Guttmann and Thompson reject the idea that deliberation can produce consensus, and argue instead that deliberation has other valuable purposes, including giving all views a fair hearing, encouraging public-spiritedness, promoting mutually respectful decision-making processes, and rooting out errors and mistakes (pp. 10-13).

Shapiro offers a best results account in The State of Democratic Theory. One notable feature of his account is his fairly dim assessment of what “best results” it is reasonable for us to expect in modern democracies. I will discuss his view in detail in Chapter 3.

There are two main problems with best results accounts in general, both rooted in reasonable disagreement. I will illustrate this briefly using Arneson’s best-results account. Arneson argues that democracy works out best for all concerned because it maximally fulfills fundamental rights. One sort of disagreement is over what we mean by democracy. There are many different political institutions and decision procedures that can be regarded as democratic. Exactly which democratic institutions would produce the best results in terms of, say, individual rights, is not clear. In fact, it is likely that people will disagree about this, even if we get them to agree that rights are the appropriate metric to use. But other problems attach to the idea that rights are the best way to measure political institutions. First, even if we agree that rights are the appropriate metric for assessing political institutions, people reasonably disagree about what our rights are, and even what our most fundamental rights are.<sup>144</sup> Thus it is not clear that any uncontroversial assessment of democracy in terms of fundamental rights is even possible. Second, others argue that rights are simply the wrong metric to apply when assessing political institutions. That is, there is reasonable disagreement over just what terms are appropriate for such assessment. For example, contemporary utilitarians would argue that we ought to appeal to some notion of utility, rather than rights, when

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<sup>144</sup> Waldron, Law and Disagreement.



assessing political institutions.<sup>145</sup> And some communitarians would argue that we ought to give some notion of the common good more weight in such assessments, and individual rights correspondingly less weight.<sup>146</sup> The point is that even if we agree that political institutions ought to be assessed in terms of best results, it is not obvious what results we ought to consider “best.” Without some general metric that (nearly) all citizens affirm, it is likely that all assessments will be controversial, i.e., that political institutions reasonably regarded as legitimate by some citizens, because they are thought to produce the best results, will reasonably be regarded as illegitimate by others, because they are thought to be suboptimal in terms of results, when some different metric is applied.

Buchanan’s Natural Duty of Justice.

Allen Buchanan offers a respect for interest account of legitimacy that grounds it in what he calls the robust natural duty of justice.<sup>147</sup> On his view, a government is legitimate if and only if it (a) does a credible job of protecting the most basic rights of individuals, (b) provides this protection in ways (e.g., policies, procedures, actions) that themselves respect basic rights, and (c) is not a usurper (i.e., has not come to power by wrongly deposing the legitimate government). These conditions are rooted in what he

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<sup>145</sup> Two contemporary defenses of utilitarianism as the proper metric for evaluating political institutions are Robert Goodin, Utilitarianism as a Public Philosophy (New York: Cambridge University Press, 1995), and James Bailey, Utilitarianism, Institutions, and Justice (New York: Oxford University Press, 1997).

<sup>146</sup> For one good discussion of this aspect of communitarian political thought, see Will Kymlicka, Contemporary Political Philosophy: An Introduction (New York: Oxford University Press, 2002), Chapter 6.

<sup>147</sup> Allen Buchanan, “Political Legitimacy.”

calls the “robust natural duty of justice,” a limited obligation each of us has to help ensure that all persons have access to institutions that protect their basic rights. This duty is implied by the fact that we regard all persons as entitled to equal concern and respect. This is obvious, Buchanan says, because we cannot plausibly hold that all persons are entitled to equal concern and respect and then deny that each of us has an obligation to do something to ensure that the basic rights of all persons are protected.

Buchanan’s robust natural duty of justice is not an account of political obligation. Buchanan holds that only consent could ground political obligation, and he thinks that all consent accounts fail. But Buchanan rejects the correlativity thesis, so the fact that citizens have no duty to obey the law does not imply that government cannot be legitimate, that it cannot enforce the law against citizens. Here the natural duty of justice plays its role. It is the ultimate ground of Buchanan’s theory of legitimacy.

This robust natural duty of justice figures into political legitimacy in two primary ways. First, it gives citizens weighty reasons to comply with governments that satisfy the three conditions of legitimacy. Second, it provides a powerful normative justification for government to wield coercive political power against citizens, especially if (as Buchanan argues) individuals have no right not to be coerced into satisfying their duty of justice. Where democracy is not possible, it is sufficient for a government to satisfy the three legitimacy conditions. But where democracy is possible, legitimacy requires that leaders and laws be chosen democratically. This is so because it gives citizens an equal say in determining who wields political power, and in determining the content of the what laws that limit and otherwise regulate the use of that power.

Conclusion.

I do not share the general skeptical outlook of many regarding political obligation. I believe that it is possible to establish at least a weak prima facie duty to obey the law. In this I rely on Philip Soper, whose account of political obligation I discuss in depth in Chapter 3. Nevertheless, I reject the correlativity thesis. It is false. But this does not mean that there can be no relationship between political obligation and legitimacy. I argue in Chapter 4 that Soper's theory of political obligation forms the core of Rawls's theory of legitimacy. This is a big promise, and I hope to make good on it in Chapters 3 and 4. In Chapter 2, though, I will discuss two respect for interest approaches to law, obligation, and legitimacy. I have two main reasons for doing this. First, these theories are correct when they say that democracy protects and promotes certain important interests shared by all, even if they are mistaken to think that this alone can ground political obligation or legitimacy. Here democracy will be defended against some fairly serious charges. Second, I want to examine the ways that respect for interest views try to respect the freedom and equality of citizens without appeal to any notion of shared reason. In the end, I reject respect for interest approaches because they do not fully respect one of the most vital uses of our capacity for judgment: our capacity to determine for ourselves exactly what our basic interests are.

## CHAPTER 2

### SHAPIRO AND WALDRON

No liberal democratic society can constitute itself as a body politic without some exercise of force in the face of good faith dissent and disagreement. We simply disagree about too much, even from the shared moral point of view of democratic citizen. We disagree about religion and morality and philosophy, and we disagree about how to resolve disagreements between people who disagree about such things. We disagree about politics. We disagree about what it means to be a citizen, about how to specify our most fundamental rights, and about how to organize our most fundamental political institutions. And even when we agree on certain political issues, for instance, that all citizens are free and equal, politically speaking, we disagree about just what this commits us to. What this means for us, as citizens who constitute and work to continually sustain and improve our democratic polity, is that in the case of nearly every political dispute, the will of some must rule all. Each side to a political dispute can only present its case, and then (after some appropriate decision procedure is invoked or engaged) one side wins and the other side loses. In this sense, the continual constitution of a democratic body politic is always at the same time an act of political power and acquiescence.

This exercise of power in the face of good faith dissent is not merely a practical problem, but is also a theoretical problem. Political theory cannot be done without some abstraction and simplification. This is true of both ideal and non-ideal theory. But whatever else we might wish to simplify for the sake of political theory, we must not pretend that good faith disagreement will soon fade away. To do this is to distort our self-understanding and to turn democratic theory into something wildly utopian. Modern democratic society is characterized by good faith disagreement. We must not ignore this. This fact encompasses all citizens, including political philosophers. What this means for

political philosophers as philosophers is that they cannot even hope to say what political justice ultimately requires in a democracy, even under ideal conditions. What justice requires can only be worked out by actual citizens through real-time political processes. What political philosophers can do is mark out the conditions under which citizens have reason to respect the outcomes of these real-time political processes, even—and perhaps especially—those outcomes they find deeply morally troubling in some way.

A central historical reason for our faith in democratic politics, and for its claim on our allegiance, has been the Enlightenment conviction that public deliberation and rational inquiry will lead citizens to converge on some rational and robust conception of justice and the common good. But we have to give up on the idea that reason will lead us to some rational and shared moral vision. Reason is plural, fragmentary, and incomplete. It leads people in different directions, and so is inadequate to the task set for it during the Enlightenment. Unless we want to give up our faith in democracy too, we need some other explanation or account of it. This is a central task of post-Enlightenment political philosophy. Does democracy deserve our allegiance? Can democracy legitimately authorize the exercise of coercive state power?

Some argue now that a mere *modus vivendi* is the most we can expect from our post-Enlightenment situation. Good faith disagreement infects politics all the way down, since no political decision procedure is immune to the burdens of judgment, so every political decision can (and likely will) be seen as an illegitimate or unjust exercise of pure political power. Proponents of this view think the best we can hope for is that the different factions that wield the greatest political power will see a tolerable peace as

preferable to a war for supremacy. In essence, our post-modern condition has returned us to our pre-modern one. A *modus vivendi* is the best we can achieve.

Shapiro, Waldron, Soper and Rawls think we can hope for more. Each develops an account of democratic law and political authority that is normative and not merely prudential, but that also takes seriously the depth of good faith disagreement. What each aims to do is mark out conditions under which all citizens would have sound normative reason, and not mere prudential reason, to respect the outcomes of real-time democratic political processes. Shapiro and Waldron are discussed in this chapter. Soper and Rawls are discussed in Chapters 3 and 4 respectively.

Shapiro defends a normative conception of democracy rooted in principles of non-domination and “affected interest.” He argues roughly that democracy deserves our respect because it is the best way (among the available alternatives) to manage power relations between citizens who disagree about the good but who cannot move away from one another. When Shapiro calls it our “best” option, what he means is that democracy is the least worst form of government open to us. It does not work well, if our goal is realizing some robust understanding of justice or the common good. But, then, no other form of government does this well either. What distinguishes democracy from the alternatives is its capacity to minimize domination in a society. Democracy has this capacity when it requires politically powerful individuals and groups to compete for the votes of the individuals whose basic interests are most likely to be affected by any particular political decision. This is a respect for interests approach to political obligation and legitimacy. (Shapiro seems to assume that the correlativity thesis is true.)

Democratic law can be rightfully enforced by the government, and citizens have a duty to

obey the law, because democratic decision procedures do a better job of securing non-domination than available political alternatives.

Waldron offers a normative conception of democracy rooted in the idea that democratic law embodies important social achievements. On his view, although citizens recognize that they disagree about justice and the common good, they also recognize the need for concerted action to produce important social goods, such as the conditions necessary for a market economy, a system of health care, environmental protection, and so on. Waldron refers to this situation as the Circumstances of Politics. Law enacted in the Circumstances of Politics deserves respect as the embodiment of the achievement of a common plan of action in the face of disagreement over what we should do about our common problems. Waldron argues that majoritarian democratic decision procedures have special virtues that play an important role in generating the law's normative force. Waldron's view is a weak shared reason view. His version of reciprocity in advantage focuses on social goods created through democratic activity, and each person's interest in being respected in certain ways by the political process of voting. His version of reciprocity in justification is mentioned, but it's never really explained.

One of my aims in this dissertation is to discover the limits of reasonable hope for a liberal democratic society, to discover if it is at all possible to realize or achieve important elements of our liberal democratic ideals, once we acknowledge the fact that political power, even in democracies, must be exercised in face of reasonable disagreement and dissent. While both of the normative accounts discussed in this chapter are morally preferable to the prudential *modus vivendi* view, I will argue (in the last chapter) that they fall well short of key liberal ideals. In my view these liberal ideals are

plausible, to some extent at least, so the respect for interest views discussed here fall a bit short of our reasonable goals. Rawls's view is morally preferable to Shapiro's and Waldron's because it is more faithful, in spirit if not in practice, to the liberal ideal of shared reason. However, Rawls's view may turn out to be unworkable. If Rawls's vision cannot ultimately be sustained, and the best we can hope for is represented by views like Shapiro's, we may be forced to conclude that there is little hope of realizing many of our liberal democratic ideals.

Ian Shapiro and The State of Democratic Theory.

In The State of Democratic Theory, Ian Shapiro defends a normative conception of democracy founded on principles of non-domination and affected interest.<sup>148</sup> He argues that a democratic society's political institutions ought to be structured in ways that ensure that the basic interests of all members are protected from the politically powerful. The best institutional framework for achieving this goal of non-domination is a form of competitive democracy, which protects citizens by having political agents (e.g., officials and parties) compete for their votes. Here Shapiro draws on the work of Joseph Schumpeter. Exactly what we ought to do to protect the interests of citizens is something of an open question, because solutions to particular problems depend on many variable conditions, including just what interest or interests might be at stake, how basic they are, how they are threatened, and a variety of local conditions or contingencies, including,

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<sup>148</sup> Ian Shapiro, The State of Democratic Theory (Princeton, NJ: Princeton University Press, 2003). Hereafter State.



e.g., local history, economy, geography and so on. Thus, what needs to be done in Shapiro's native South Africa might be a bit different from what needs to be done in an established democracy like the United States.

At the heart of Shapiro's approach, though, is what he calls the "principle of affected interest." Institutional reforms are positive to the extent that they make democracy more responsive to those citizens whose interests are most likely to be affected, or whose interests are most strongly affected, by any particular decision, especially when the interests at stake are essential or fundamental interests. Sometimes this principle requires only that everyone whose interests might be affected by a decision gets to vote. At other times, when it seems like voting cannot adequately protect fundamental interests, the principle requires that we have experts redesign political and social institutions in ways that reduce or eliminate threats to fundamental interests.<sup>149</sup> Nevertheless, democratic decision procedures can still sometimes foster domination. When this happens, Shapiro argues that a limited form of judicial review is appropriate.

Shapiro's principle of affected interest is not a conception of justice, nor does it presuppose or entail one. It is a much thinner respect for interest view than, say, Buchanan's robust natural duty of justice view. Buchanan seems to think we can answer the question of what justice requires with some certainty, and in a fairly robust and determinate way. Shapiro doubts that this is so. There is no reason to think any robust and determinate conception of justice will be affirmed by democratic citizens generally.

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<sup>149</sup> For example, when (say) mining industry practices threaten the fundamental interests of mine workers and need to be revised, it may not help at all to put a slate of proposed revisions before the mine workers and to let them choose. In cases like this, merely being allowed to vote seems inadequate to protect fundamental interests. It is better (safer, more efficient) to ask experts—those who command some relevant specialized "insider's" knowledge—to solve the problem.

This does not give due respect to good faith disagreements. Of course, politically powerful individuals can seek to use their power to promote their own conceptions of justice, but this is not what Buchanan seems to imagine. Further, Buchanan seems to think that democracy can do a more or less good job of fostering some conception of justice. Again, Shapiro doubts that this is so. On his view, democratic decision making is controlled by politically powerful individuals. Democracy does not allow citizens generally to express or institute some conception of justice. All democracy provides for citizens is a means for replacing those politically powerful agents who threaten our fundamental interests with other politically powerful agents.

#### Shapiro's Method.

It is natural to ask, at the very start, if democracy is necessary at all, given Shapiro's stated aim of protecting the basic interests of persons. For unless a person has a basic interest in democratic participation, which Shapiro does not assert, it is not obvious that democracy is the only way, or even the best way, to protect basic interests.<sup>150</sup> If basic interests are normatively fundamental, and democracy's value is merely instrumental, then it is an open question whether any society ought to have democratic institutions.<sup>151</sup> Why not some form of guardianship instead?<sup>152</sup> It might be

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<sup>150</sup> Although Shapiro does not argue that democratic participation has intrinsic value, others do. See, e.g., the respective contributions of Joshua Cohen, Thomas Christiano, and David Estlund to Philosophy and Democracy: An Anthology, ed., T. Christiano (New York: Oxford University Press, 2003).

<sup>151</sup> Many political theorists argue that democracy's value is merely instrumental. See, e.g., the contributions of Richard Arneson, Ronald Dworkin, and Jon Elster to Philosophy and Democracy.

<sup>152</sup> For a good general discussion of guardianship, see Robert A. Dahl, Democracy and Its Critics (New Haven, CT: Yale University Press, 1989), especially Chapter 4, pp. 52-65.

the case that ordinary people simply cannot articulate and defend their own basic interests as well as, say, a group of philosopher-kings could, and thus that the aim of protecting basic interests is best served by putting society in the hands of a small group of persons specially qualified to govern (by virtue of, e.g., their high intelligence, or profound virtue, or both). It does no good to insist that people have a basic interest in justice, and that justice in turn requires democracy, because the relationship between justice and democracy (if any exists) is not at all clear.<sup>153</sup> In any case, people might simply prefer, all things considered, to have qualified guardians handle most, if not all, collective action problems. Now, whether or not one finds guardianship a compelling alternative to democracy is not the issue. The point is just that once democracy's value is seen as merely instrumental, it becomes an open question whether democracy is the best means for achieving whatever ends are sought. Thus, one might think Shapiro simply errs in asserting a need for democracy in the name of basic interests. At the very least, doesn't he owe us a defense of democracy?

Shapiro does not approach this question directly, but there is a response in his work. He acknowledges that democracy has for some time had a bad name among certain political theorists, especially the rational choice camp that follows in the tradition of Kenneth Arrow, and that some seek to justify alternative forms of government (or non-government, in the case of anarchists). But despite this theoretical skepticism, Shapiro says, "the democratic idea is close to nonnegotiable in today's world."<sup>154</sup> Democracy is more or less a given for the vast majority of people in the world—many already have it,

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<sup>153</sup> A good selection of essays on the sometimes antagonistic relationship between justice and democracy can be found in *Justice and Democracy: Essays for Brian Barry*, eds., K. Dowding, R. Goodin, and C. Pateman (New York: Cambridge University Press, 2004).

<sup>154</sup> *State*, p. 1.

and those who do not have it hope to. There are, of course, parts of the world that are ruled by dictators, but even these rulers tend not to reject democracy outright. Dictators generally argue instead that their societies, while not fully democratic, are transitioning toward democracy or are actually more democratic than they appear. Thus even authoritarian rulers understand the importance of democracy. There is, of course, good reason to doubt the sincerity of many such claims. Still, there was a surprising and dramatic increase in the number of democracies in the world between 1980 and 2002. According to the United Nations, eighty-one countries moved from some form of authoritarian government to democracy during this twenty-two year span. In thirty-three of these countries, military dictatorships were replaced by civilian governments. Thus, despite democracy's supposed defects as a form of government, and despite the many doubts and worries raised by political theorists, it is clear to Shapiro that democracy has "legitimacy in the world."<sup>155</sup>

But democracy's nonnegotiable status does not imply that people agree about what democracy ought to be. To the contrary, different people have different ideas about what democracy can and should be. And in every democracy, some people will feel that their society is not working as it should. But Shapiro thinks problems like these only serve to strengthen his point. Insofar as these are worries over what democracy should be, or objections that target malfunctions or corruptions of democracy, democracy's nonnegotiable status is affirmed. Within democratic systems, he says, no one doubts that people are free to despise their democratically elected leaders. However, neither does anyone doubt that the elected government has the right to *be* the government.

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<sup>155</sup> State, p. 2.

And so we get to a key element of Shapiro's method and purpose. Democracy has "legitimacy in the world," but people disagree about what it should be. This is where Shapiro enters the discussion. His aim is not to defend democracy, but to improve or perfect it. He assesses the state of democratic theory, not with an eye toward justifying it, but with an eye toward making it better. He complains that too many theorists act as if we can start over, as if we can begin anew. But, he says,

Despite the presuppositions behind much academic literature, human beings do not generally design institutions *ex nihilo*; they *redesign* existing institutions along the lines suggested by such metaphors as rebuilding a ship at sea.<sup>156</sup>

Thus, Shapiro intends to rebuild democracy. Democracy is the decision-making system we, U.S. citizens, have inherited. It is already the decision-making system of many peoples around the world. And where democracy is not already in place, people generally aspire to it. This understanding of the status democracy already has in the world shapes Shapiro's overall approach in The State of Democratic Theory.

Shapiro identifies two common metrics for assessing democracy. One is normative. This literature assesses normative justifications of democracy as a form of government. The other is explanatory. It assesses accounts of the dynamics of democratic institutions and practices. One of Shapiro's problems with current democratic theory is the fact that these two literatures have developed in relative isolation from one another. But speculation about what ought to be, when not informed by relevant information about what is possible, often has little real-world value. And explanatory theory, when divorced from significant normative concerns, often becomes "banal" and

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<sup>156</sup> State, p. 54. Emphasis in original.

“method-driven.” So Shapiro intends to take “an integrative tack, focusing on what we should expect of democracy, and on how those expectations might best be realized in practice.”<sup>157</sup>

For example, rational choice theorists have long argued that democracy is an irrational decision procedure, because it can lead to arbitrary and irrational outcomes.<sup>158</sup> Suppose (for the sake of argument) that three voters—I, II, and III—are faced with three policy choices—A, B, and C. If voter I ranks her choices  $A > B > C$ , and voter II ranks her choices  $C > A > B$ , and voter III ranks her choices  $B > C > A$ , then there is a majority for A over B (voters I and II), a majority for B over C (voters I and III), and a majority for C over A (voters II and III). This is known as a voting cycle, and it presents proponents of democratic decision making with certain problems. First, since a voting cycle violates the principle of transitivity, which is considered a basic feature of rationality, the rationality of democracy as a decision procedure can be questioned. Second, it opens up the possibility that whoever is in control of the order of voting can manipulate the outcome, if they know the preferences of voters. Third, even if there is no conscious manipulation of the order of voting, still, it seems, the outcome must be arbitrary, insofar as outcomes seem to have more to do with the order of voting than with actual voter preferences.

As a result, some argue that we should hem in democratic decision making (e.g., legislative action) with courts and multiple veto points. Since voting is irrational and subject to manipulation, it represents a potential threat to individual rights and welfare.

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<sup>157</sup> State, p. 2.

<sup>158</sup> State, p. 11-12, 15-16.

This threat can be reduced through the institution of counter-majoritarian practices, practices that reduce or restrict legislative activity.

At least, this is what rational choice theory says about democratic decision making. Fortunately for us, empirical research on democratic decision making does not support such dim conclusions.<sup>159</sup> A couple of recent studies suggest that voting cycles are actually quite rare. Other observers note that legislatures do not seem to show the arbitrariness, irrationality, and instability that rational choice theory predicts. These and similar empirical findings are surprising, and have led some to reevaluate the proper role of rational choice theory in political theory.<sup>160</sup> None of this shows that rational choice theory cannot contribute to democratic theory. What this does show is the need to draw together, to integrate, normative theory and empirical, explanatory research.

Despite all of this, one might still reasonably worry that Shapiro has not yet addressed the general concern, namely, whether democracy is necessary at all if our goal is to protect the basic interests of persons. I do not share this worry, though it is not without some merit. Shapiro doesn't answer this particular challenge. In this respect, however, Shapiro's work is not unlike Rawls's or Dworkin's. Rawls takes the democratic practice we have inherited as a starting point and asks, not whether we ought to have it—we do—but whether we can make it morally compelling or attractive in terms of our own best moral self-understanding. The goal of democratic theory, then, is to redeem what history has bequeathed to us. If, in the end, we cannot redeem it—if we simply cannot make our best understanding of our democratic practice fit with our own

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<sup>159</sup> For an overview see Daniel Farber and Philip Frickey, Law and Public Choice: A Critical Introduction (Chicago: University of Chicago Press, 1991).

<sup>160</sup> See, e.g., Donald Green and Ian Shapiro, Pathologies of Rational Choice Theory: A Critique of Applications in Political Science (New Haven, CT: Yale University Press, 1994).

best moral understanding of who we are, both as individuals and as a people—then the question of what form of government we ought to have, if any, would take on a special urgency, one that would put it solidly at the center of political theory. But we have not yet reached that point. So I agree with Shapiro, Rawls, Dunn, and others in this camp.

#### Domination and the Common Good.

Shapiro argues that democracy deserves our allegiance, not because it is a reliable means of expressing or institutionalizing the general will, but because it is “the best available system for managing power relations among people who disagree about the nature of the common good, among many other things, but who nonetheless are bound to live together.”<sup>161</sup> The main problem with viewing democracy as a means to producing the common good, says Shapiro, is just that there is no common good. At least, there is no common good in any robust sense. People’s interests simply conflict. There is no reason to think public democratic deliberation can reduce such conflicts.<sup>162</sup> In fact, deliberation may do exactly the opposite, by highlighting and sharpening disagreement, or by revealing to us the fact that some disagreements are simply irresolvable. We can, of course, simply aggregate people’s expressed interests, but such calculations can hardly be taken as expressions of the general will or the common good.<sup>163</sup> Why not? To Shapiro the main problem is that people’s expressed preferences may have been shaped or influenced by politically powerful agents. Different citizens control vastly different

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<sup>161</sup> State, p. 146.

<sup>162</sup> Deliberative accounts of democracy are discussed in Chapter 1.

<sup>163</sup> Aggregative accounts of democracy are discussed in Chapter 1.



amounts of political and economic power. Some citizens have enough of both to shape political agendas and maybe even to influence the development of others' sense of their own interests. Other citizens have very little power of either sort. So before we can aggregate people's expressed interests in any meaningful way, we need to make sure the relevant citizens are not dominated.<sup>164</sup> Fortunately, minimizing domination is something that democracy can do.

Shapiro offers non-domination as a "stripped down" version of the common good. The common good is just every individual's interest in avoiding domination.<sup>165</sup> This thin understanding of it is preferable to the versions offered by the aggregative and deliberative theorists, Shapiro says, because it does not have to contend with the collective rationality problems facing the others, and it is more sensitive to the reality of power. Further, this limited understanding of the common good is one that democratic government can achieve.

On Shapiro's view, democracy is valuable because it represents our best chance of reducing domination in society. But we should not expect too much from democracy, even when it is working properly. Shapiro follows Winston Churchill in this regard: democracy is "the worst form of government except all those other forms that have been tried from time to time."<sup>166</sup> What Shapiro means when he says that democracy is the best way to manage power relations is that democracy provides at least the possibility of

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<sup>164</sup> "The decisive role played by money in politics means that politicians must compete in the first instance for campaign contributions and only secondarily for the hearts and minds of voters. By ignoring this, Gutmann and Thompson attend too little to the ways in which power relations influence what deliberation should be expected to achieve in politics." *State*, p. 32.

<sup>165</sup> *State*, p. 3.

<sup>166</sup> Winston Churchill, Speech to the House of Commons, November 1947. See <http://adamsharp.com/RAVES/QUOTES/index.asp> [9/2/02].

diminishing or curtailing domination in any given society. This possibility is what draws people to it. But while democracy has this “constitutive commitment” to non-domination, there is no guarantee that democracy will reduce, even less eradicate, domination in any or all of its forms. There are no perfect decision procedures, and, even if there were, in real democratic societies many factors influence the contexts in which democratic decision-making takes place. The current distribution of wealth and political power are facts we must contend with, not facts we can wish away. Despite all of this, democracy still represents our best hope for reducing domination.

Ilya Somin complains that Shapiro’s theory of domination is vague, but we can get some idea of what he means from the way he contrasts his account of domination with Max Weber’s.<sup>167</sup> Weber defined domination as “the probability that a command with a specific content will be obeyed by a given group of persons.”<sup>168</sup> Thus, Shapiro says, for Weber “the existence of domination turns only on the actual presence of one person successfully issuing orders to others.”<sup>169</sup> Shapiro sees domination differently. He holds, roughly, that domination requires duress, i.e., that the dominated person acted as he did because some sort of threat had been made against his continued well-being. This understanding of domination is both wider and narrower than Weber’s. It is wider, because it does not require the actual presence of agents who issue explicit orders. While Shapiro does not go so far as someone like Foucault, who claims that domination does not require human agency at all, Shapiro does think domination can occur in a number of subtle and indirect ways. Domination can occur when a person or group can shape

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<sup>167</sup> Ilya Somin, “Book Review: The State of Democratic Theory,” The Cato Journal, v. 23 (2004), pp. 475-479.

<sup>168</sup> Max Weber, Economy and Society (Los Angeles: University of California Press, 1968), p. 53.

<sup>169</sup> State, p. 4.

agendas, or constrain options, or influence preferences and desires, in ways that affect people's interests. For example, domination occurs when group A secures the support of group B, largely because group A controls resources that are essential to group B's basic interests. This is domination, even if no identifiable member of A issues explicit commands to any member of B. It may simply be the case that A makes its desires well-known, and that B understands that A will be displeased with any group that acts to thwart A's aims.

Shapiro's insistence that domination results only from the illegitimate use of power is what makes his account narrower than Weber's. Power relations and hierarchy are common features of human life and interaction. Compliance is compelled in many human social institutions, including armies, companies, schools, and families, just to name a few. But requiring people to do things is not the same as dominating them. For instance, there is nothing wrong with using sanctions (grades) to compel students to do their homework. There is, however, something wrong with using the gradebook to secure money or sexual favors. Since hierarchy can easily facilitate domination, Shapiro says we have good reason to always view hierarchical relations with suspicion. We should take care to reform hierarchical social institutions in ways that reduce the likelihood of domination. But hierarchy is not itself a form of domination.

Then when are people subject to domination as Shapiro understands it? When their basic interests are threatened by others. Shapiro does not explicate our basic interests in any robust way, but he says that "we can think of people's basic interests by reference to the obvious essentials that they need to develop into and survive as

independent agents in the world as it is likely to exist for their lifetimes.”<sup>170</sup> He says his view is similar to the “resourcist” views of John Rawls, Ronald Dworkin, and Amartya Sen.<sup>171</sup> These different theorists each affirm a list of basic goods, the possession of which would make possible the pursuit of any one of many different conceptions of the good life. Anyone who can threaten a person’s basic interests can exercise a great deal of power over her. This presents a serious threat of domination. For instance, an employer who can fire an employee when there is no unemployment compensation has the opportunity to dominate the employee.

#### Controlling Government Power—Constraints and Incentives.

Governments wield an enormous amount of coercive power. One main function of government is the deployment and maintenance of this coercive power for the good of citizens. This is not the only function of government, but it is one of its most important ones. For Shapiro, the good of democratic government is just that it represents our best chance at minimizing domination. The question that arises now is how to control the exercise of state power so as to ensure (to the extent that we can) that the government limits and does not facilitate domination.

Two general institutional strategies for controlling power are constraints and incentives. Constraints are institutional roadblocks designed to make government action

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<sup>170</sup> State, p. 45.

<sup>171</sup> Shapiro’s inclusion of Rawls here is a bit unfortunate. I will show in Chapter 4 that Rawls’s view is not resourcist in the way that Shapiro thinks it is. In fact, while Rawls insists that citizens make an effort to identify such essentials, he does not think that they will converge on a single list. This is a key element of the Power Problem as Rawls understands it, and it is something that his theory of legitimacy is meant to handle. But more on this later.

difficult, or walls designed to keep government out. For example, multiple veto points are constraints meant to slow or reduce government action. The separation of powers is a constraint of this sort. The different branches of government are charged with resisting the overreaching of the other branches. Other constraints are private spheres defended by counter-majoritarian institutions such as the Supreme Court, the constitution, and so on. Incentives, on the other hand, are institutional features designed to give government reason to find solutions to problems that in some way satisfy everyone. There is an element of this in the separation of powers, insofar as this separation gives each branch incentive to seek solutions to problems that will not be rejected by the other branches. The authors of *The Federalist* argued that the best system would be comprised of both constraints and incentives. Unfortunately, Shapiro points out, there are serious problems with constraints, and relatively little work in the literature on incentives. This leaves us in a bad spot. The great virtue of Schumpeter's democratic theory, according to Shapiro, is that it is primarily an incentive-based account of democratic government.

According to Shapiro, constraints on government action are fraught with serious problems. Two of the main problems that constraints are meant to solve are the possibility of irrational and/or manipulated collective action. Multiple veto points are supposed to reduce this threat by making it harder for the government to do anything at all, thereby limiting government. The main problems with this, according to Shapiro, are that it is something of a false dilemma, and that it privileges the status quo. Proponents of multiple veto points tend to describe our choice as one between (a) more collective action and (b) less collective action. This is misleading. Even minimal government would be a massive collective undertaking, involving at least social institutions designed

to protect basic interests from both domestic and international threats, and to keep track of things like private property and to enforce contracts. That is, even minimal government would be very expensive and demand a lot from citizens. Thus, Shapiro says, we will have a massive collective action scheme, one way or the other. The real question is what do we want from our collective action? Our real choice is this: do we want (a) government institutions that protect everyone from domination, or (b) government institutions that protect the status quo?<sup>172</sup> Choosing multiple veto points is the same as choosing b. This does not mean that veto points cannot help us. They can, but only when used judiciously. What is wrong is to employ them willy-nilly, as a general strategy for managing irrational or manipulative uses of governmental power in a democracy.

Other constraints are meant to identify and protect private spheres of human life through institutions such as the Supreme Court, a constitution, and so on. However, these constraints have just as many problems as veto points. One problem with this strategy, according to Shapiro, is that such institutions are themselves often majoritarian institutions. The Supreme Court contains nine members who deliberate and then vote. This means that the Supreme Court may suffer from exactly the same pathologies that plague democratic decision making. Again, though, Shapiro does not argue that there is never a time for this kind of constraint. They can be helpful. But it is a mistake to see constraints as general strategies for controlling the problems associated with collective

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<sup>172</sup> One might wish that Shapiro held out for a third option, namely, government institutions that secure and promote justice. But Shapiro simply does not believe that any robust conception of justice is possible, given the disagreements that divide people. Further, he doubts that democracy is a powerful enough social institution to achieve justice, even if we could figure out what it requires. The reality of present disparities in wealth and political power are simply too great.

rationality. They are not a cure-all, but must instead be carefully and thoughtfully applied only in situations where they can do some good.

Thus, while constraints may help us reduce some of our collective choice problems, they are not an ideal solution, and should not be used indiscriminately. They can sometimes protect us from the possibility of irrational or manipulated collective action, but if they are not used carefully, they can contribute as much to the problem as to the solution. This is why it is important that we also have incentives. The great promise of Schumpeter's account of democracy is its focus on incentives.

Competitive Democracy.

Shapiro's model of competitive democracy draws heavily on the account Joseph Schumpeter develops in Capitalism, Socialism, and Democracy.<sup>173</sup> The core of Schumpeter's view is the idea that government power can be controlled by making it the prize in regular and competitive elections. Political agents must win control of the government by garnering more votes from citizens than competitors do. The winner gets control of the government for some specified period of time. When that time is up, then political power is put up for grabs again. For example, the U.S. holds a presidential election every four years. Power is controlled in such a system by making political actors compete for the hearts and minds of citizens every few years.

Schumpeter makes an analogy between political and economic competition. He says that we can think of voters as consumers, political parties and candidates as

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<sup>173</sup> Joseph Schumpeter, Capitalism, Socialism, and Democracy (New York: Harper, 1942).

companies, votes as profits, and government policies as political goods and services. When parties are seen as companies competing for the votes of citizens, Shapiro says, “leaders can be seen as disciplined by the demands of competition.”<sup>174</sup> Competition is thus valuable for two reasons. First, leaders are disciplined by the threat of losing power. Second, leaders have incentive to be more responsive than their competitors to the needs of voters.

Some criticize Schumpeter’s view on the grounds that it really rewards those with the most resources.<sup>175</sup> In theory, the ideal of one-person-one-vote is supposed to negate this. But in the U.S., for instance, politicians must compete first for campaign contributions, before it is even possible for them to compete for votes. Perhaps, Shapiro says, voters would support strong confiscatory taxation of estates worth over ten million dollars, but no party proposes this. Why not? Shapiro’s view is that politicians are probably afraid of the effect increasing taxes on the wealthy would have on their campaign coffers. He admits that empirical studies of such claims are inconclusive, but “it seems reasonable to suppose that the proposals politicians offer are heavily shaped by the agendas of campaign contributors; why else would they contribute?”<sup>176</sup> When this is added to the fact that most political systems have few major parties, what we end up with is oligopolistic competition.

Some criticize Schumpeter’s view on the grounds that the high rate at which incumbents are reelected suggests that electoral competition does not do much to

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<sup>174</sup> State, p. 58.

<sup>175</sup> State, p. 59.

<sup>176</sup> State, p. 60.



discipline politicians.<sup>177</sup> But, Shapiro asks in response, compared to what? Electoral competition may provide only modest incentives when measured against some ideal standard, but that ideal standards prevails nowhere. In the real world, even the modest discipline imposed by electoral competition would be a great benefit to the many who live under leaders who are not disciplined at all.

Shapiro acknowledges the force of the criticisms, but he is not discouraged by them. These criticisms do not attack the idea of competitive democracy per se, but instead point to imperfections in currently existing competitive systems. These can be remedied. Reforms can be made that reduce the power of campaign contributors and that allow more parties to be competitive. And in any case, Shapiro does not wish to limit the disciplining force of his version of competitive democracy to the incentives found in Schumpeter's account. It is likely that constraints will have to be added to discipline politicians in any real world case. For example, we might want to force political decision making into the open, and enact terms limits to fight incumbency.

Shapiro buttresses his account of competitive democracy with a limited form of judicial review.<sup>178</sup> He has two main reasons for this. First, we need some way of settling disputes between political agents and parties that is acknowledged by them to be more or less independent and legitimate. As Shapiro puts it, "the players of a game are not well situated to act as their own umpires."<sup>179</sup> Here institutions like the Supreme Court have a legitimate role to play in a democracy. Second, no decision procedure is perfect. Even a democratic system that is fully competitive in Shapiro's sense will sometimes enact

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<sup>177</sup> State, p. 60.

<sup>178</sup> State, pp. 64-77.

<sup>179</sup> State, p. 64.

legislation that dominates individuals. When this happens, judicial review is appropriate. However, Shapiro does not think any court should create law itself, in effect usurping one of the legitimate functions of the legislature. This just hampers democracy. Rather, when such a court judges that some legislation dominates individuals, the court should simply repeal the law and tell the legislature to try again. What the courts should do is protect and promote every individual's ability to participate in the democratic process. This it does by limiting domination. When the court tries to do more than this, it actually interferes with a citizen's ability to participate.

Problems for Shapiro.

Shapiro is never clear about whether he is offering an account of legitimacy or political obligation. He says that "we should recognize its [democracy's] claim to our allegiance," but this is vague.<sup>180</sup> I suspect he holds some version of the correlativity thesis, and thus thinks the problems of legitimacy and political obligation are one and the same problem. But as we saw in Chapter 1, the correlativity thesis (strictly speaking) is false. I will not pursue this issue further, however, because it does not make a difference to my analysis of Shapiro's account. The problems I will discuss in the next sections apply to his view in either case.

The first problem I will discuss is the vagueness of Shapiro's idea of basic interests. At least one commentator finds his view "too vague to be useful."<sup>181</sup> I do not

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<sup>180</sup> State, p. 146.

<sup>181</sup> Somin, "Book Review."

think this is a serious problem for Shapiro, but it is similar to a more serious problem.

The more serious problem is that people can and do disagree in good faith over just what our basic interests are. This is a broad problem that affects all respect for interest views.

These problems—the vagueness and disagreement problems—raise issues internal to Shapiro’s view. Internal problems have to do with the coherence or feasibility of a view. If they are serious, they raise questions about the plausibility of a view, insofar as they suggest it would be hard or impossible to realize or instantiate the view in a real society.

A third problem I will discuss is rooted in the kinds of reasons Shapiro’s democratic officials have for wielding power, and the kinds of reasons citizens have for obeying or acquiescing. Shapiro places no restrictions on the sorts of reasons government officials can appropriately appeal to in exercising their power. This may be a problem.

Two other problems I want to discuss are external ones. External problems assume that we can implement Shapiro’s view, but raise worries having to do with the implications or long-term consequences of such implementation. One external problem has to do with just how competition shapes or disciplines politicians. Competition does not guarantee an ever-increasing search for good among politicians. All that it guarantees is that citizens have the ability to choose the least of the evils they face. This is something, but it may not be much. Another external problem for Shapiro’s view is that it seems to be consistent with benign neglect. Shapiro’s competitive democracy allows powerful political agents to ignore almost all of the judgments or views of weaker

agents.<sup>182</sup> Citizens remain sovereign, in the sense that they choose which powerful agents take control of our political institutions, but citizens otherwise have no meaningful role in ruling themselves. We have to ask if this is an attractive understanding of democracy, of government by the people, for the people, given our democratic values and our moral self-understanding. The last problem I will consider is related to the problem of benign neglect. Rawls was very concerned about how political institutions might shape or influence the character of citizens raised in different societies. One reason for this is that Rawls sees one of the proper roles of political philosophy to be giving citizens reasonable hope for or faith in their society. Another reason has to do with stability. Political institutions deemed unattractive by citizens will not be voluntarily maintained by citizens. For reasons like these it is not clear that Shapiro's democracy provides the kind of utopian vision that we can expect citizens to freely and willingly endorse.

"Basic interests" are too vague to be useful.

Ilya Somin complains that Shapiro's theory of non-domination is too vague to be useful.<sup>183</sup> In her estimation, this is the most serious shortcoming of his work. Shapiro makes a brief attempt to define non-domination in terms of basic interests, which he describes as "the obvious essentials that [people] need to develop into and survive as independent agents in the world as it is likely to exist for their lifetimes."<sup>184</sup>

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<sup>182</sup> What is benign about this? Though it is not caring or compassionate behavior, in Shapiro's ideal competitive democracy, citizens have the basic goods they need to live as independent agents in the world, even if they have no meaningful role to play in their government.

<sup>183</sup> Somin, "Book Review."

<sup>184</sup> State, p. 45.

Unfortunately, Somin points out, there is extensive disagreement over just what these essentials are, and Shapiro never makes any real effort to develop and defend an account of them. He does provide one example as an illustration: the employer who can fire an employee in a world where there is no unemployment compensation can threaten an employee's basic interests. Somin does not find this example compelling. Its value is far from obvious, she says, and it involves all sorts of unexpressed assumptions about, e.g., labor markets, alternative employers, and so on. And although Shapiro says he need not attempt to resolve these issues right away, Somin insists that "some degree of resolution is essential if we are to understand what Shapiro's theory entails and what its institutional implications are for democracy."<sup>185</sup>

While much of what Somin says is true, I do not think this is a serious problem for Shapiro. Shapiro says that his view is one of a family of "resourcist" views. He includes Rawls, Dworkin and Sen in this group, because each offers a list of basic goods, the possession of which would make possible the pursuit of any one of a number of different conceptions of the good.<sup>186</sup> Presumably, then, Shapiro's list of essentials would be similar to these others, if he were to flesh it out.

I think that Shapiro's goal is broader or bigger than Somin gives him credit for. That is, I think Somin's criticism is unfair in a way. Shapiro is not really worried about exactly what the essentials are, but is instead trying to show how some set of essentials (however defined) might serve as a sound normative foundation and practical guideline for democratic reform. His goal is really just to set out the broad terms of his novel

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<sup>185</sup> Somin, "Book Review," p. 477.

<sup>186</sup> See note 23.

approach to democratic theory. Someone will eventually have to develop and defend a list of basic interests, and explain their implications for democratic theory and practice, as part of the long-term evaluation of Shapiro's proposal. But Shapiro's goal in The State of Democratic Theory is just to get this view off the ground, so he can be excused for glossing over some of the details.

### Good Faith Disagreement over Basic Interests.

A more serious problem for Shapiro is the fact that citizens can and do disagree in good faith over just what our basic interests are.<sup>187</sup> In fact, good faith disagreement is a problem for all respect for interest views. On respect for interest views, the moral underpinning of political authority (whether we are talking about legitimacy or political obligation) is the fact that some political arrangement or action protects or secures some normatively significant basic interest(s) of citizens.<sup>188</sup> In the case of legitimacy, this fact is said to give the government normative justification to enforce laws, and to give citizens sound normative reason to acquiesce to the government's demands. In the case of political obligation, this fact is said to obligate citizens to obey the government or its laws. The fundamental problem with all respect for interest views is the fact that citizens can and do disagree in good faith over when their basic interests are being met or threatened.

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<sup>187</sup> Jeremy Waldron argues that there are good faith disagreements over the nature of our most fundamental rights. See his Law and Disagreement, Chapter 10, where he argues that philosophers "have reason—grounded in professional humility—to be more than usually hesitant about the enactment of any canonical list of rights, particularly if the aim is to put that canon beyond the scope of ordinary political debate and revision" (p. 212).

<sup>188</sup> This is explained in Chapter 1.

In Shapiro's case, the basic interest in question is our interest in avoiding domination. For him, the moral underpinning of democratic political authority is the fact that democracy represents our best chance at securing for all citizens the essentials they need to develop into and survive as independent agents in the world. But what exactly are these essentials? Somin points out that citizens disagree about this, but she misreads the significance of this fact. The problem is not that we cannot develop lists of such essentials, but that citizens will always disagree about what it means to have their basic interests threatened, or what it means to be dominated.

One might defend Shapiro by pointing out that he does not claim that democracy eradicates domination, but only that it will do a better job of minimizing domination than other available forms of government. It is reasonable to disagree about exactly how much democracy can reduce domination, and exactly when it does reduce it, but it is not reasonable to claim that democracy is not the best form of government for reducing domination overall. This response does not solve the problem. First, Shapiro never actually compares democracy with other available forms of government. He never indicates what these other forms might be, or makes any effort to demonstrate their inferiority to democracy. Second, and more importantly, this response seems to overlook Shapiro's claim that what he is after is a way of morally grounding institutional reform, and not a way of defending democracy as such. On his view, democracy already has legitimacy in the world. The justificatory claim is not the one that he wants to defend. What he seeks is an account of democracy's constitutive elements that shows it in its best light (even if that light is fairly dim) and that allows us to make meaningful institutional reforms. This is where the problem of reasonable disagreement crops up.

Shapiro claims that institutional reforms are positive to the extent that they make government more responsive to the citizens whose basic interests are at stake in any given situation. But what are these basic interests? People reasonably disagree about what these are. Some citizens think women have a basic interest in abortion, and some disagree. So is legislation prohibiting women from getting abortions a threat to their basic interests or not? Some citizens think homosexuals have a basic interest in marriage, and others disagree. So is legislation prohibiting gay marriage a threat to the basic interests of gays or not? Some citizens think we have a basic interest in keeping guns for protection, and some disagree. So does gun control legislation threaten basic interests or not? And so on at the level of actual policy.

One might respond that this objection misses the point. What institutional reform needs to protect is the right to democratic participation, to a say in what policies will be enacted. This possible response has several problems. First, Shapiro's stated understanding of our basic interests seems to be broader than this. He identifies basic interests with the essentials people need to survive as independent agents. This requires more than democratic participation. Second, citizens disagree in good faith over what it means to make government more responsive. There are many good faith disagreements over what kind of democratic institutions we ought to have, even if we understand the purpose of democracy to be limited to non-domination.<sup>189</sup> For instance, should we have winner take all democracy, or some form of proportional representation? Is it better to

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<sup>189</sup> For an introduction to the breadth and depth of reasonable disagreement over democratic institutions, see R. A. Dahl, *Democracy and Its Critics*, Thomas Christiano, ed., *Philosophy and Democracy* (New York: Oxford University Press, 2003), and R. A. Dahl, I. Shapiro, and J. A. Cheibub, eds., *The Democracy Sourcebook* (Cambridge, Ma.: MIT Press, 2003).



have a parliamentary or a presidential system? Citizens will disagree in good faith about how to answer such questions.

The point of this is that there is no obvious way to answer the question of just which democratic institutions best serve the common good, even when the common good is understood thinly as a each person's common interest in avoiding domination. People can and do disagree over what even something as thin as this might require.

No Restrictions on Reasons.

Shapiro does not place any restrictions on the kinds of reasons that government officials may reasonably appeal to when making decisions regarding law. What matters is that basic interests of citizens are met, and that they have the potential means to remove public officials from office when they judge that others might better protect them. But it does not matter to Shapiro why officials make the decisions they do. For example, Shapiro seems to allow public officials to shape public policy in ways intended solely to promote their perceived self-interest, just so long as this activity does not threaten the basic interests of citizens. This is troubling. For example, if this is a theory of legitimacy, the idea seems to be roughly that democratic officials have sufficient normative justification to enforce the law, just as long as the law does not threaten the basic interests of citizens. It does not matter if this is why officials enforce the law, nor does it matter that they may have intentionally shaped the law to maximally promote their own self-interest. And citizens have sound reason to acquiesce, just because their political system meets their basic interests better than alternatives, but regardless of

exactly why their public officials make the demands they do on citizens, or whether or not the law is intended to benefit them in some way. This is a problem, because under these conditions, citizens can reasonably regard government action as directed only at official self-interest. Officials need not be concerned with the basic interests of citizens, just so long as their personal political agendas are more amenable to the basic interests of citizens than their competitors. Competitive elections will drive out powerful political agents who show too little regard for the interests of citizens, but it does not guarantee that those interests will be seen as a priority by officials, or serve even as a reason for acting. Nevertheless, competitive elections may ensure that the basic interests of citizens are met, even if they are met accidentally or peripherally.

#### The Lesser of Two Evils.

Shapiro argues that competitive democracy makes politicians more responsive to voters because politicians depend on voters to win access to political power. It would be a mistake, though, to think that this means that competition will lead to ever-increasing improvements in the social goods offered to voters by politicians. The analogy to economic competition might suggest that some political version of Adam Smith's invisible hand will force bad politicians out and lead good politicians to offer more and more to voters. But this will not work any better in politics than it does in markets. Whether or not such improvements are offered depends on who chooses to run for office, and what they offer to citizens. Shapiro and Schumpeter's analogy may deserve greater scrutiny. In Shapiro's democracy, all a politician needs to do to win is offer more than

her competitors. This may not be very much. What this suggests is that Shapiro's market analogy deserves further scrutiny. Still, electoral competition does guarantee citizens the potential means to choose the least of the evils they face. This should count for something.

#### The Problem of Benign Neglect.

Power friendly views of democracy may be susceptible to the problem of benign neglect. When the right to exercise power and the duty to obey or acquiesce are divorced from consensus, it becomes possible for the minority to become bound to the will of the majority, even when the majority ignore the judgments of the minority. In this case, the citizens are sovereign in name only. They practice self-rule only to the extent that they get to choose the least objectionable option offered to them. Citizens get to choose which powerful agents will control their government, but they otherwise have no meaningful role to play in the myriad governmental decisions that will shape much of their lives. And it is entirely possible that some segment of society will always lose, and never have even the minimal say in how things are organized that you get from choosing political officials. This is a problem, because democracy has a constitutive commitment to meaningful participation.

Shapiro's proposed competitive democracy may be particularly susceptible to the problem of benign neglect. Shapiro holds that democracy deserves our allegiance because it represents our best chance at minimizing domination. This is a very weak understanding of democracy's constitutive commitments. It seems to allow citizens to be

pushed to the margins of society, just so long as their essential interests are not threatened. Or, rather, it holds that a citizen is not marginalized, as long as her basic interests are met.

For instance, it is not hard to imagine the Christian right coming together in an effort to control U.S. politics. We can imagine them making many of their political decisions solely on the basis of their Christian convictions, regardless of the fact that others disagree with them in good faith over the nature of the good life for human beings, and over the proper role of religious convictions in democratic politics. We can imagine further that opponents of the Christian right are marginalized and have no effective or real role to play in their politics. Now, my point here is not that it is wrong to base voting or other political activity on religious convictions (though this issue will come up later). My point is rather that this provides an example of what I mean by benign neglect. The Christian right might have no reason and no interest in considering the views of non-Christians when making political decisions that affect everyone. This would not necessarily mean that the fundamental interests of non-Christians would be in danger. What it would mean is that non-Christians would be denied a meaningful role in self-government.

Is Shapiro's Democracy a Stable and Realistic Utopia?

Rawls was very concerned about the ways that the fundamental social and political institutions in a society might shape or influence the character of citizens raised under them. One reason for his concern has to do with his understanding of the proper role of political philosophy. One of its most important functions is to give citizens a reasonable hope for their society, and thus to give them reason to participate in good faith. Another reason has to do with stability. Political institutions deemed unattractive by citizens—as immoral, unfair, unjust, or what have you—will not be voluntarily maintained by citizens. Such institutions will be unstable and may fall, unless they are propped up by force. Neither option is attractive, so we should aim to avoid this problem. But it is not clear that Shapiro’s view provides the kind of utopian vision that we can reasonably expect citizens to freely and willingly endorse.

It is hard to imagine citizens having much faith in Shapiro’s democracy. It is not an attractive vision of democratic politics, and is certainly not the kind of political society likely to inspire anything in citizens but apathy, cynicism, and hopelessness. It falls well short of many of the ideals citizens voice regarding democratic politics, and seems instead to be exactly the kind of political society that many citizens claim to reject. To the extent that it seems unfair, or unjust, or immoral to citizens, we have reason to wonder if it could and would be voluntarily affirmed and maintained by citizens.

This is, of course, mere speculation. How citizens might be shaped by Shapiro’s democracy is ultimately an empirical question that only time can answer. The same is true of the question of whether or not citizens might come to voluntarily affirm and maintain it. But this sort of speculation is one way of testing an account of democratic

politics. We can make some educated guesses about Shapiro's democratic citizens might eventually become, and I think we might have reason to worry.

#### Summary of Key Points.

Shapiro correctly judges that our worries about democracy's alleged irrationality may be overblown. It can protect important basic interests of democratic citizens, and in this limited sense can promote the common good. Further, hierarchical relationships are not necessarily immoral or unjust. This seems obvious, but it has long been a bone of contention in political philosophy. But under the conditions of modernity, it is a mistake to think that politics can work without exercises of power under conditions of good faith disagreement and dissent.

Unfortunately, the widespread belief among democratic citizens that non-domination is the best they can hope for from their political order may not be sufficient to sustain a reasonable hope for their future or the future of their society. It may end up encouraging only cynicism and apathy, and not conscientious and thoughtful participation. The problem of benign neglect, which may plague all power friendly views, seems especially troubling for Shapiro's democracy. We will have to see if other views do better on this score.

Jeremy Waldron and Majority Rule.

Citizens in modern democracies disagree not only about the nature of the good for human beings, but also about political issues such as what justice requires. Citizens disagree about how to order fundamental but abstract political rights like liberty and equality, and even citizens who agree on how to order these abstract values are likely to disagree over just what particular rights follow from them. In Law and Disagreement and The Dignity of Legislation, Jeremy Waldron argues that decisions reached by majority rule deserve a certain kind of respect from all citizens, even from those who reasonably disagree with the outcome on the grounds that it is unjust in some way.<sup>190</sup> Majority rule is often denigrated by legal theorists, many of whom feel that it amounts to little more than a mindless counting of heads. This hardly seems like a reasoned way of resolving disagreements over matters of principle and complex social policy. Surely something as important as law ought to result from reasoned debate and reflect some rational consensus as to what ought to be done. Waldron argues that this is a mistake. Rational consensus is not possible. However, this does not mean that majoritarianism is nothing more than the least worst option. Majoritarianism deserves more respect than it gets, because law produced in this fashion represents a significant social achievement—action in concert in the face of deep disagreement. This is the ultimate basis of legal authority for Waldron. But majoritarianism has other virtues as well. It has the “technical” virtue of not assuming controversial normative positions, it respects disagreements about justice

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<sup>190</sup> Jeremy Waldron, Law and Disagreement (New York: Oxford University Press, 1999); The Dignity of Legislation (New York: Cambridge University Press, 1999).

and the common good, and it embodies a principle of respect for each person in the process by which laws are made.

Waldron's view is a weak shared reason view. It requires both reciprocity in advantage and reciprocity in justification. Reciprocity in advantage is satisfied by the appeal to our common interest in important social goods achieved through law, and to each person's interest in having a political system that respects her as a voter. Waldron also appeals to reciprocity in justification, because he holds that the law's normativity also requires that citizens participate in good faith. This means citizens must base their votes on their considered and sincere views about justice or the common good, and not solely on their sense of their own narrow self-interest. Unfortunately, Waldron never explains just what this requires of citizens. This is a significant oversight. Soper and Rawls, discussed in Chapters 3 and 4 respectively, do offer accounts of what it means to responsibly engage in public political activity. In this way their views represent important correctives or extensions of views like Waldron's.

Waldron's Method and Purpose.

One of Waldron's aims is to correct an imbalance he finds in political theory today.<sup>191</sup> The same political theorists who denigrate majoritarianism and legislation write in rosy terms about the courts and judicial review as sources of law. Majority rule has been marginalized by political theorists. Empirical research on legislation reveals the practice to involve deal-making, pandering, pork-barreling, Arrowian cycling, and a host

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<sup>191</sup> Waldron, Law and Disagreement, pp. 28-33.



of other activities that suggest to many that it is anything but principled political decision making. As a result, many question the law's claimed authority. But some are now beginning to defend legislation against such criticisms. For example, there is a growing body of evidence that suggests that legislatures generally do not act in the irrational or manipulated ways that Condorcet and Arrow predict. Nevertheless, many are still skeptical about the possibility of virtuous civic deliberation in legislatures. Legislation is often treated as a last-ditch means of producing law, to be tolerated only until a more refined and reasoned method becomes available. Until then, we have institutions like judicial review to protect us from our legislators. In fact, though, while a great deal has been said about how judicial review ought to get done, relatively little has been said about whether or not it is justified. Political theorists tend to move quickly from their dim accounts of the failure of legislation to their rosy accounts of how the courts can save us. But Waldron wonders why we think the courts are any less messy than legislatures. The collective rationality problems that plague legislatures apply equally to courts as deliberative bodies. This, then, is the imbalance Waldron wants to correct. He wants to develop a rosy picture of majoritarianism and legislation as sources of law.

The many books and articles that disparage the legislative process work to undermine the claimed authority of law produced by legislatures. Waldron works against this trend, by developing an admittedly rosy normative account of legislation and law that links the law's claimed authority to the legislative process. He admits that this may seem naïve, but this does not mean that he is satisfied with the conditions of the enactment of law today. To the contrary, he feels we have good reason to be cautious about the law's claimed authority in our current situation. But "unless we propose to treat the authority

claimed for legislation as pure superstition, eventually that claim requires philosophical explication.”<sup>192</sup> This explication is what Waldron attempts to provide. In any case, even if one judges that the conditions of the enactment of law today invalidate the law’s claimed authority, there is still value in describing the conditions under which law would have genuine authority. We need to know what we should measure the current context of law-making against.

Waldron spends a good deal of time performing a detailed normative analysis of important structural features of legislatures. Three important features are textuality, intention, and voting. The issue of textuality has to do with the fact that laws are written down, that a statute is in actuality an enacted form of words. The issue of intent has to do with just how we are to understand what a legislature meant to do when it enacted some particular form of words and not another. Both of these issues are complicated by the fact that legislatures are composed of individuals who have and represent diverse points of view.

The third issue is voting. Voting has a bad name: “It seems so mindless—counting heads and letting a single vote at the margin decide, when what is at stake is some great issue of principle or some complex matter of policy.”<sup>193</sup> But Waldron thinks voting deserves a better hearing. In his defense of voting, Waldron switches his attention from legislatures and representative democracy to direct democracy. In a representative democracy, citizens (usually) vote only for representatives, and their representatives vote on laws and policies. This adds a layer of complexity that Waldron wishes to avoid in his

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<sup>192</sup> Waldron, Law and Disagreement, p. 33.

<sup>193</sup> Waldron, Law and Disagreement, p. 27.

project. His normative analysis thus focuses on direct democracy, in which citizens vote directly on issues that affect them and their society. He confesses that this is one of the main failings of his argument in Law and Disagreement, but it cannot be helped. His purpose is to sketch out the broad outline of a new and better understanding of democratic law and authority, and for this purpose theorizing direct democracy is sufficient, even if not ideal.

My analysis will focus on Waldron's account of voting. His normative analysis of the other features of legislatures is important, but his understanding of democratic law and authority are most directly linked to his arguments about the kind of achievement majority decision making represents, and the way majority rule respects citizens.

The Achievement of Law in the Circumstances of Politics.

One of the main demands that the law makes is that citizens comply with it. However, the law makes other demands too. One of these is a demand for recognition or a certain kind of respect. In Waldron's words, the law demands "that we not immediately disparage it" as an enactment, or simply try to get around it. This does not mean that respect for the law forbids us from seeking to overturn or repeal it. It has more to do with the attitude people have toward the initial enactment. What the law demands is this:

It is a demand for a certain kind of recognition, and, as I said, respect—that this, for the time being, is what the community has come up with and that it should not

be ignored or disparaged simply because some of us propose, when we can, to repeal it.<sup>194</sup>

The law makes this demand even of people who think the law is a mistake. This demand for respect is not predicated on the moral worth or the correctness of the law's content, but on something else. For Waldron, this something else has to do with the special virtues of voting and majority decision making. He puts it this way:

The dignity of legislation, the ground of its authority, and its claim to be respected by us, has to do with the sort of achievement it is. Our respect for legislation is in part the tribute we should pay to the achievement of concerted, cooperative, coordinated, or collective action in the circumstances of modern life.<sup>195</sup>

The circumstances of modern life Waldron refers to he calls the Circumstances of Politics.

Two conditions characterize the Circumstances of Politics.<sup>196</sup> The first condition is disagreement among citizens over what laws and policies are best in terms of justice and the common good. The second condition is the felt need among the citizens for large-scale coordinated action. Most of us understand that many important goods can only be achieved through the concerted and coordinated efforts of large numbers of individuals. Protecting the environment, operating a health care system, maintaining the conditions necessary for the operation of a market economy, and so on, all require that large numbers of citizens act in concert by following a variety of rules, practices and procedures. These goods will disappear if citizens do not act together. For this reason,

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<sup>194</sup> Waldron, Law and Disagreement, p. 100.

<sup>195</sup> Waldron, Law and Disagreement, p. 101.

<sup>196</sup> Waldron, Law and Disagreement, pp. 101-3; Dignity, pp. 156-7.

many of us think we should act and organize things together. This sort of coordinated activity is not easy to achieve, especially when individuals realize that large-scale coordination often requires the sacrifice of individual projects. Thus, when citizens come together and actually enact a law, despite their disagreements about exactly what should be done, it is a big achievement. Law commands respect as one kind of embodiment of that achievement.<sup>197</sup>

Waldron draws out his understanding of the Circumstances of Politics by comparing three kinds of coordinated action problem (CAP).<sup>198</sup> Two kinds of CAP are Prisoners' Dilemmas (PD) and pure Coordination Problems (CP). Since most are familiar with the PD, I won't rehearse the details of the thought experiment here. The point of the PD is that sometimes the rational strategy—judged from the perspective of individual self-interest—actually prevents individuals from reaching the outcome preferred by all. The CP is exemplified by the driving example. In the driving example, motorists can drive on either the right or the left side of the road. The best pay-off is achieved when all motorists choose to drive on the same side of the road, but it doesn't matter which side of the road they choose. Each chooser prefers either of two coordinated outcomes to non-coordination, but choosers have no real preference for one coordinated outcome over the other. All that matters is that they coordinate their activity by choosing to do the same thing.

Law can contribute to the solutions of both PD's and CP's. In the case of PD's, law can provide an incentive/sanction that discourages choosers from giving in to the

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<sup>197</sup> Waldron, Law and Disagreement, p. 104.

<sup>198</sup> Waldron, Law and Disagreement, pp. 103-105.

temptation represented by the difference in value between S and Q. In the case of CP's, law can mark either doing X or doing Y as salient for choosers, thereby making coordinated activity more likely. But neither the PD nor the CP capture the Circumstances of Politics. For this we need a Partial Conflict coordination problem (PC).

The PC best represents Waldron's understanding of law and the Circumstances of Politics.<sup>199</sup> In the PC, each chooser prefers either of two coordinated outcomes to non-coordination, but they differ over which coordinated outcome they prefer. One example of a PC is the "Battle of the Sexes:" "he prefers to go to a boxing match, she prefers to the ballet; but most of all they want to go out together rather than each to his or her favourite entertainment alone."<sup>200</sup> Waldron does not claim that law solves PC's, and that this is why we should respect it. Of course, law can contribute to the solution of PC's, by attaching sanctions to the options in ways the reduce the difference in value between P and Q. But this is not what grounds the law's claim to respect. Before sanctions can be attached to any outcomes, "the society must have decided which of the coordinative outcomes to select as the one to be bolstered by sanctions in this way."<sup>201</sup> Any group decision of this sort is an important social achievement, and "it is by embodying that achievement that law commands our respect."<sup>202</sup>

Raz argues that pure CP's (e.g., the driving example) tell us little about legal authority, because many legal rules simply don't resemble these problems. For instance,

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<sup>199</sup> Waldron says he learned this from Jean Hampton, Hobbes and the Social Contract Tradition, Ch. 6. He learned from her that "in Hobbes's theory, for example, we face a many-person version of PD in the state of nature; to solve it we must set up a sovereign; we may all accept that fact; but if more than one person wants to be sovereign, then we face a PC." See note 45 on p. 104 of Law and Disagreement.

<sup>200</sup> Waldron, Law and Disagreement, p. 104.

<sup>201</sup> Waldron, Law and Disagreement, p. 104.

<sup>202</sup> Waldron, Law and Disagreement, p. 104.

“laws like the prohibition of rape and murder differ from laws which coordinate the efforts of large groups.”<sup>203</sup> Waldron admits this, and also that it would be a mistake to force laws of all kinds into one group. But he discusses one of Raz’s examples, to demonstrate how PC’s might be more useful than Raz imagines.

In his discussion of rape law, Raz argues correctly that our reasons for refraining from rape should have nothing to do with respect for law, and everything to do with respect for persons. And our reasons have little to do with collective action: rape is wrong, even if it is a common practice. So, Raz concludes, analysis of rape law in terms of collective action problems looks like a non-starter. But Waldron points out that the issue is more complicated than Raz realizes. For when we consider the controversial aspects of rape law, we can see that many legal issues do resemble PC’s. Many aspects of rape law are controversial, such as statutory rape, marital rape, homosexual rape, the possibility of inferred consent, the bases on which consent might be inferred, mistakes about consent, and so on. Reasonable people will disagree on such issues. Nevertheless, we may all share an interest in a common scheme of rape law that deals with these matters. Each of us may prefer some rape law, even rape law we oppose, if the option is no rape law, or rape law that is limited only to uncontroversial and simple matters. Waldron’s point is that when we move from simple prohibitions (e.g., rape is wrong) to the complex sets of rules and procedures that are law (e.g., contemporary rape law), it appears that law is more like a PC than Raz understands.

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<sup>203</sup> Raz, Ethics in the Public Domain (Oxford: Clarendon Press, 1986), p. 333. See also Leslie Green, who argues in “Law, Coordination and the Common Good” that law does not add anything distinctive to the solution of CAP’s.

I think Waldron makes a good point here, but I still think this is a problem for him. I am not convinced that Waldron's account is general enough to account for respect for law as such. If not, his account may be inadequate and we will have to consider whether a partial account of respect for law can help us. But for now I just want to get his view on the table, so I will set aside further discussion of this issue until later in this chapter. My point now is to emphasize the nature of the claim law makes for respect. When people are able to produce law in the circumstances of politics, they have achieved something important. The law deserves respect because it embodies this social achievement. But so far Waldron has said little about majoritarianism. There are a number of ways that laws might be produced under the circumstances of politics. Does law produced through majoritarianism have any special claim on us? Yes it does, Waldron argues, because of certain special features of majoritarianism.

#### The Virtues of Majoritarianism.

Laws produced through majoritarian decision procedures deserve respect from citizens because they embody a significant social achievement in the circumstances of politics. But majoritarianism has other virtues as well. First, it has the "technical" virtue of not assuming controversial moral positions. Second, it respects individual citizens by taking seriously the disagreements that divide them. Third, it embodies a principle of respect for each person in the process by which the group decides on a view as "theirs."



## The Virtue of “Technicality.”<sup>204</sup>

In the Circumstances of Politics, it is important that a group’s decision procedure be a neutral, technical device. Suppose we feel we have good reason to act together, but we disagree about what we should do. Suppose too that we face a rapidly approaching deadline—that if we don’t act now, we will surely lose the good we might have gained from some (from any) concerted action. In this situation, we might settle on a common course of action by tossing a coin. But would a decision reached by a coin toss deserve any respect? It would, insofar as a coin toss is neutral between our choices. That is, a coin toss can be seen by all not to assume any substantive values that might bias it toward one or the other of the options that we might pursue as a group. A bit of anthropomorphism may help to make this clear: the tossed coin appeals to no substantive values when making its choice—it simply chooses one or another of the options before it. The coin’s special virtue is that it really is a neutral agent. Waldron argues that majoritarianism has this same virtue. He is not claiming, though, that majoritarianism is a better decision procedure than others because it alone has this virtue. Many arbitrary decision procedures share it. What Waldron does here is cut off an objection to majoritarianism, namely, the objection that it is morally suspect because it amounts to a “mere” headcount or a coin-toss.

Some complain about this neutral or technical aspect of voting. To many, voting is a poor decision procedure just because it appears to be arbitrary. If voting is really just counting heads, then it is not a reasoned decision procedure. Well, so what? We must

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<sup>204</sup> Waldron develops this point in Law and Disagreement, pp. 107-8.

take care when creating law, because the dangers of oppression and injustice are serious and real. Creating law through a reasoned process seems to be important, because of the high stakes of questions of policy, morality, and justice. But voting—if it is really just counting heads—does not seem to be the kind of careful and reasoned process that justice requires. It seems a lot like flipping a coin. Surely the authority of law requires more than this. Why take law seriously when it is enacted in such an arbitrary way? The problem with reasoned decision procedures is that they tend to invoke controversial values.

Suppose, Waldron says, that some of us face a Partial Conflict (PC) decision-problem regarding a matter M. We agree that the common policies under consideration (X and Y) are each preferable to no policy, but we disagree about which policy to enact. Some of us think it is better to follow X, and some of us think it is better to follow Y. Each policy X and Y requires individuals to play an independent but necessary part in the common scheme. No one has good reason to think that one of us is a better judge of M than any of the others. We have to find a way of choosing a common policy that all of us can participate in, despite our disagreements about what to do. We know that this won't work: "each does whatever he thinks it is important to do about M." We need a way to identify one of the policies as "ours" that does not depend on any criterion such as "what it is important to do about M," because disagreement over this issue is why we face a decision problem in the first place. So the way we identify a policy as ours must be arbitrary in relation to our different understandings of "what it is important to do about M." Majority voting satisfies this requirement. Each of us can see that (say) Y is the

policy favored by the majority, regardless of how we individually feel about Y as a response to M.

#### Respect for Disagreement.

Another virtue Waldron sees in majoritarian decision making is the way it respects disagreements about justice and the common good.<sup>205</sup> Majoritarianism “does not require anyone’s view to be played down or hushed up because of the fancied importance of consensus.”<sup>206</sup> Majoritarianism does not pretend there is consensus when there really is not. It does not pretend that opposing views do not exist. And more importantly, it does not treat opposing views “as beneath notice in respectable deliberation by assuming that it is ignorant or prejudiced or self-interested or based on insufficient contemplation of moral reality.”<sup>207</sup> Waldron sees this as a dangerous temptation. It is right to think that truth about justice and the common good are important. But it is mistake to think that consensus is the natural expression of our search for truth, and dangerous to think that some special explanation—defects of character or mind—are needed to excuse our failure to reach consensus.

Waldron argues that it is wrong to think that consensus is the natural expression of our search for truth. In defending his claim he draws on Rawls’s burdens of judgment. These burdens are “the many hazards involved in the correct (and conscientious) exercise

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<sup>205</sup> Waldron develops this point in Law and Disagreement, pp. 111-13.

<sup>206</sup> Waldron, Law and Disagreement, p. 111.

<sup>207</sup> Waldron, Law and Disagreement, p. 111.

of our powers of reason and judgment in the ordinary course of political life.”<sup>208</sup>

Roughly put, Rawls’s claim is that citizens trying to answer questions that involve abstract value judgments and complex empirical issues will inevitably reach different conclusions. Given the imperfect and limited nature of our common human reason, and peoples’ different experiences and social positions, it is just not reasonable to expect even conscientious persons who possess full powers of rationality to reach the same conclusion on many important questions about human life. Waldron argues that the burdens of judgment apply not only to disagreements over the nature of the good for human beings, but also to disagreement over justice and the common good. Thus, it is simply unreasonable to expect citizens to reach a consensus on political questions.

Majoritarianism takes seriously the burdens of judgment and their implications for human political activity.

Thus, Waldron argues, we ought to reject the “dangerous temptation” to see our inability to reach consensus on important questions as a failure somehow rooted in the ignorance or selfishness of our fellow citizens. In fact, Waldron claims that most citizens do act conscientiously, that is, from their own considered and impartial understandings of justice and the common good.<sup>209</sup> We tend to doubt this when people disagree with us, but Waldron says that our reasons for this doubt are often “quite disreputable.” This does not mean that citizens never fail to act conscientiously. Still, it is better overall—less disrespectful—to acknowledge that disagreement is often quite reasonable.

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<sup>208</sup> See, e.g., Rawls, PL, p. 56.

<sup>209</sup> Waldron, Law and Disagreement, p. 14.

None of this implies that we must reject the search for a singular truth. Waldron is not arguing for a kind of relativism. Rather, “respect has to do with how we treat each other’s beliefs about justice in circumstances where none of them is self-certifying, and not how we treat the truth about justice itself.”<sup>210</sup> And he is not talking about fallibility, though no one ought to ignore the possibility that they may be wrong about justice. Rather, each of us must understand that ours is not the only mind working on our problems, and that it is not unexpected or unreasonable for citizens to disagree about how to solve them.

Respect for Individuals.

Majoritarianism respects individuals by giving each a full and equal say in collective decision-making.<sup>211</sup> Waldron illustrates this point by comparing majoritarianism to the coin toss and the Hobbesian sovereign as decision-methods.

The coin toss has virtues that make it a respectable method for making collective decisions under certain conditions, but it does not respect citizens in the way the majoritarianism does. Unlike majoritarianism, the coin toss does not give “positive decisional weight” to the fact that a given individual holds a view. Waldron’s view here is more or less the same as Ackerman’s idea of “minimal decisiveness.”<sup>212</sup> Ackerman illustrates this idea in terms of tie-breaking:

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<sup>210</sup> Waldron, Law and Disagreement, p. 111.

<sup>211</sup> Waldron, Law and Disagreement, pp. 113-6.

<sup>212</sup> Bruce Ackerman, Social Justice in the Liberal State (New Haven, Ct.: Yale University Press, 1980), p. 287.

If, say, there are 99 people in the Assembly, then majority-rule gives me a decisive voice when the rest of you are split 49-49; and the same is true of your decision as well. When confronted with the prospect of a tied vote, the majoritarian does not appeal to some unresponsive decision-procedure, but instead recognizes each citizen's right to have his considered judgment determine the social outcome.<sup>213</sup>

The problem with the coin toss, says Ackerman, is that it does not give each citizen's view minimal decisiveness. Waldron agrees: majoritarianism's special value over the coin toss is that it holds that "in the case of each individual, the fact that that individual favours option X is a reason for the group to pursue option X." One individual's judgment does not constitute a conclusive reason for the group to act, of course, because there is disagreement, but it counts in favor of the group's doing X. This is one important way that majoritarianism respects each person.

Consideration of the Hobbesian method reveals another way that majoritarianism respects individuals. The Hobbesian method gives great weight to the fact that one individual holds a certain view, and relatively little weight to the fact that others hold different views. But it is not the case that the Hobbesian ignores disagreement. Rather, the way the Hobbesian handles disagreement is to put one person—the sovereign—in charge of everyone else. Majoritarianism is preferable to the Hobbesian method because it "involves a commitment to give equal weight to each person's view in the process by which one view is selected as the group's."<sup>214</sup> In fact, Waldron says, majoritarianism

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<sup>213</sup> Ackerman, Social Justice, p. 283.

<sup>214</sup> Waldron, Law and Disagreement, p. 114.

gives each person's view the greatest weight possible without giving any person's view more weight than any other's.

Thus, majoritarianism respects each individual in the process of selecting the group's view on some issue. In contrast to the coin toss, majoritarianism makes each person's view minimally decisive, by making sure that each person's view counts as a reason for the group to pursue some course of action. And in contrast to the Hobbesian method, majoritarianism makes each person's view maximally decisive, by giving it the greatest weight possible consistent with the equal weighting of other persons' views.

#### Summing Up Respect for Law.

To sum up, law produced through majoritarian decision procedures deserves our respect for several reasons. First, law produced this way embodies an important social achievement in the Circumstances of Politics. Second, majoritarianism has the technical virtue of not assuming controversial moral positions. It is a neutral decision procedure. Third, majoritarianism respects disagreements between citizens. It does not try to quiet anyone in the name of some (implausible) ideal of consensus. Fourth, the majoritarian process respects the contribution of each individual, by giving each person's view both minimal and maximal decisiveness.

## The Authority of Law.

Although Waldron feels that he has shown why law produced through majoritarian decision procedures deserves the respect of all citizens, he admits that he has yet to account for “the sense of constraint associated with authority.”<sup>215</sup> Waldron is not very clear here, but I think he is referring to the fact that law binds citizens. Waldron seems to be saying that it is one thing to show that law has genuine normative force, and another thing to show why we ought to feel bound to enforce and obey the law. Majoritarianism has virtues that make it a respectable source of law. This is why law does not lose its claim to normativity just because it is enacted through majority decision. For example, rape law does not lose its claim to being genuine law just because it is enacted through a statistical and mechanical “head count.” But this does not explain how the law binds us. The law requires us to act in certain ways. This constraining sense of the authority of legislation is missing from his account of majoritarianism. This is not a flaw in his account, he says; it is just that the source of the law’s normativity is a bit different from the source of its binding force. The constraining sense of law’s authority must come primarily from our sense of the moral urgency and importance of the problems that it is necessary for us to address—the things that (morally) need to be done and must be done by us, in our millions, together, if they are to be done at all.<sup>216</sup>

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<sup>215</sup> Waldron, Law and Disagreement, p. 117.

<sup>216</sup> Waldron, Law and Disagreement, p. 117.



The source of the law's binding force is our shared sense of the moral importance of the social issues that require concerted action.

The Authority of Law and the Moral Attitude.

Waldron assumes in his account that citizens generally base their votes on their considered and impartial opinions about justice and the common good.<sup>217</sup> He does not spend a lot of time on this, but it is an important part of the authority of legislation as he understands it. Citizens must vote responsibly if the law is to have genuine authority. If citizens vote solely out of self-interest, the authority of legislation comes into question. But Waldron doesn't worry much about this, because he thinks that, as an empirical matter, people generally do vote for the right kinds of reasons. In any case, he has also stated that his work is an effort at ideal theory. His goal is to draw a rosy picture of majoritarianism, in order to show how and why it might be a normatively respectable source of law. He is trying to show how it could be the case that law produced through majoritarian institutions is dignified. Still, it is reasonable to think that some citizens will always vote out of self-interest. And it is reasonable to think that even responsible citizens will sometimes slip up, disregarding their considered and impartial opinions, and voting out of self-interest. So one issue we need to consider is the possibility of a mixed situation, in which some citizens base their votes on their views on justice, and others on self-interest. Waldron anticipates this possibility, and says that if it happens, "we must

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<sup>217</sup> Waldron, Law and Disagreement, pp. 14-5.

face the fact that we have a mixed and indeterminate situation so far as legitimacy and authority are concerned.”<sup>218</sup>

In effect, Waldron acknowledges the problem and then puts it off for another day. This is not a problem, really, since Waldron admits that this work is ideal. Nevertheless, there are a host of questions raised by the possibility of a “mixed and indeterminate” situation, and I want to list a few of them here.

- (a) Is there some minimum percentage of voters that must be reached before legislation can be said to have any authority at all? If so, what is this threshold? Must at least half of all citizens vote responsibly, i.e., on their considered and impartial convictions about justice and the common good? I think the figure should be higher than one percent, but that one-hundred percent is too much to expect. So what number between these is appropriate? Are all choices arbitrary? Is a simple majority sufficient?
- (b) If a politician wins an election largely as a result of irresponsible voting among her supporters, does this pollute her authority? Does it mean that every time she votes (in Congress), her vote is suspect, even if she votes according to her own considered opinions about justice?
- (c) Would it be better to think of legislation as having authority just to the degree that citizens voted responsibly? In other words, should we think of policies as more or

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<sup>218</sup> Waldron, Law and Disagreement, p. 15.

less authoritative, depending on just what percentage of citizens voted responsibly?

- (d) What are citizens supposed to make of legislation whose authority is “mixed and indeterminate”? How is it supposed to factor into their calculations about how to act?
- (e) What if citizens disagree about what counts as responsible voting? For example, what if one citizen’s understanding of justice appears to be absurd or unreasonable to another citizen? What if one citizen’s understanding of justice is based on moral and metaphysical beliefs not shared by most other citizens? What if citizens disagree in good faith over whether some particular vote was cast from self-interest alone?

Despite these problems, I believe that Waldron is right to link citizens’ attitudes toward the law to the law’s normative force. I will explain why in the next two chapters. Many of these questions I mentioned above will come up again when I discuss Soper’s and Rawls’s accounts of law and authority. Since my ultimate goal is to defend a Rawlsian approach to law, I will put off answering these questions for the time being. In my discussion of Rawls, I will consider the questions that seem to raise the biggest challenges for the Rawlsian view. Here my intention is only to get some of them on the table, as a way of pointing out unresolved issues that such an approach must consider. I

do not know if there are good answers to these questions. If not, the link between attitudes toward law and the law's authority may come into question.

### Is Waldron's Account of Law Too Limited?

Waldron's account of the law may be too limited in scope, because it only applies to situations relevantly similar to the Partial Conflict (PC) collective action problem. Waldron's account of the law's authority is rooted in his Circumstances of Politics. He makes an analogy between the Circumstances of Politics and a PC problem. In a PC situation, choosers prefer concerted action to no concerted action, but they disagree over which possible common course of action they should follow. One example is the Battle of the Sexes—he prefers the boxing match, she prefers the ballet, but both prefer a night together over a night apart. He would rather accompany her to the ballet than go to the boxing match alone, and she would rather accompany him to the boxing match, rather than go to the ballet alone. Waldron illustrates this in the legal context by discussing the way rape law might profitably be seen as a PC situation. However, many voting situations do not resemble the PC problem at all.

The situation I have in mind is one where the different proposals under consideration are mutually exclusive or cancel each other out. For example, votes over proposed laws that would prohibit or allow gay marriage do not seem to be PC situations at all. In the gay marriage case, for instance, one side would prefer a law restricting gay marriages, and the other side would prefer that this law not be enacted. One side hopes to enact a proposed law, and the other side would rather leave the matter unresolved. This

makes the gay marriage situation seem different than a PC situation. The same may be said of the abortion debate, and perhaps many other debates.

Waldron could respond in two ways. First, he might say, as he does in the case of rape law, that the issue of gay marriage should be viewed in the broader context of marriage law. All citizens would rather have some marriage law than none, even though there are some controversial issues that all acknowledge as problem areas. From this perspective, he might say, gay marriage law is a PC situation. But I do not find this response compelling. There is no reason to think that the choices are (a) some gay marriage law or (b) no marriage law. This seems to be something of a false dilemma.

Second, Waldron might admit that gay marriage law is not a PC situation, but deny that it is representative of a large class of laws. He could just insist that gay marriage law is one of a handful of exceptions to his general account. He might hold that issues like gay marriage and abortion are exceptions, rather than the rule.

Does Waldron's Majoritarianism Escape The Burdens of Judgment?

According to Christiano, Waldron grounds his majoritarianism in the fact of disagreement and the moral demand for respect for judgment. But, Christiano argues, this strategy is self-defeating.<sup>219</sup> Disagreement over political matters extends to disagreement over the proper authority of collective decision procedures themselves. For example, Christiano points out, people disagree about the basic principle of equal respect for judgment. Some argue that people's judgments are not worthy of respect, and others

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<sup>219</sup> Christiano, "Waldron on Law and Disagreement."

that they are not worthy of equal respect. Some people who agree that people's judgments deserve equal respect disagree about what this requires of us. Some think it requires majority rule or consensus, while others think it requires plural voting.

One response to Christiano's objection is to appeal to higher order procedures. For example, we might try to design a fair constitutional convention, and hold that some lower order decision procedure is legitimate because it was chosen according to the higher order decision procedure. But as Christiano points out, there are two problems with this. First, it seems to lead to an infinite regress. Why think there won't be disagreement over the nature of the higher order procedure too? Since we cannot agree on a lower order decision procedure, there is no reason to think we can agree on a higher order procedure. Appealing to some even higher order procedure just pushes the problem back. Second, if the regress did stop somewhere, there is every chance that the process might not issue a majoritarian decision procedure at all. Suppose, Christiano says, the regress stops at the third order. We have somehow agreed on a procedure for determining what our second order procedure ought to be. At this point, Christiano says, it is a contingent fact whether those who must choose will decide on a majoritarian decision procedure at all. The lowest order decision procedure might not turn out to be majoritarian at all, even if the higher order procedures are.

A second response to Christiano's argument is to simply insist on majoritarian decision procedures and ignore disagreement. Christiano claims that proponents of this view think that "disagreement about the best procedures ought not to be taken seriously

when choosing majority rule.”<sup>220</sup> But, he asks, why not? He sees no relevant difference between disagreements over substantive matters and disagreements over procedures. The insult done to dissenters when substantive views are forced on them appears to be no different from the insult done to them when procedures are forced on them.

Christiano is not entirely fair here to Waldron. Waldron does not argue that fairness or equal respect for persons requires majority-decision.<sup>221</sup> He argues instead that majority decision is not only an important technical device, but also a respectful one. He admits, for instance, that there are perfectly plausible arguments in favor of plural voting. Fairness need not require us to regard the view of a wise and intelligent person as having the same weight as the view of someone ignorant and thoughtless; in fact, fairness might require the opposite. Proven or acknowledged differences in wisdom or intelligence could justify plural voting of some sort. But Waldron worries about whether any such criteria of wisdom or intelligence could be justified in the circumstances of politics, since citizens are likely to disagree over what counts as wisdom or intelligence, or even whether high marks in either of these merits greater voting power.

Waldron illustrates his view by turning something Charles Beitz said on its head. Beitz said that an inference from equal respect to majority decision would “reflect an implausibly narrow understanding of the more basic principle [i.e., equal respect], from which substantive concerns regarding the content of political outcomes ... have been excluded.”<sup>222</sup> Waldron admits that Beitz is right about this. When people talk about equal respect they usually do mean to refer to both the way the decisions are reached and

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<sup>220</sup> Christiano, “Waldron on Law and Disagreement,” p. 521.

<sup>221</sup> Waldron, Law and Disagreement, p. 115.

<sup>222</sup> Charles Beitz, Political Equality, p. 64, quoted in Waldron, Law and Disagreement, p. 116.

the substantive impact that outcomes may have on individuals. From this point of view, it is not clear that equal respect requires majority-decision, because it can lead to outcomes that do not equally respect persons. However, Waldron says, this broad notion of respect won't help us in the circumstances of politics, because citizens disagree in good faith about what counts as a disrespectful outcome. This is why we need a decision procedure. Adding substance to a decision procedure merely privileges one controversial view at the expense of others. So, Waldron insists, "in the circumstances of politics, all one can work with is the 'implausibly narrow understanding' of equal respect." Majority decision is the only procedure consistent with equal respect in this "necessarily impoverished sense."

My sense is that the root of the disagreement between Waldron and Christiano is whether or not there is some default position or starting point that is ontologically or morally simple and beyond disagreement. I think Waldron takes majoritarianism—one-person-one-vote—to be a default or fundamental (ontologically and morally simple) starting point, such that moves away from this point require justification. Christiano, on the other hand, thinks that majoritarianism is as much in need of justification as any other voting scheme. But suppose, for the sake of argument, that Christiano could give a justification of majoritarianism? Would Waldron object? I think that Waldron might object, on the grounds that no such defense of majoritarianism could be immune to the burdens of judgment. All such arguments would be subject to good faith disagreements. In any event, I find Waldron's view more compelling than Christiano's, but I am not sure it is unreasonable to disagree with me.



There is something simple and compelling about the idea that each one of us—each individual unit—has the right to determine how his or her life should go, and so also a right to an equal say in how our common life should go. In this sense, majoritarianism just seems naturally fundamental. It doesn't seem necessary in a way to have to defend the claim that each person deserves an equal vote. However, the claim that some people's votes ought to count for more than other people's votes does seem to require defense. For reasons like this, it seems to me that majoritarianism is the default position. Still, I am not sure that anyone who disagrees with me is thereby unreasonable.

#### Summary of Key Points.

Majoritarian voting does not deserve the scorn it often receives. Its many virtues show that it is a respectable source of law. Whether majoritarianism is immune to the burdens of judgment is open question. My own sense is that it represents a primitive or default position and that we cannot in good faith reject it, but I am not strongly committed to this. In any case, the creation of law in the Circumstances of Politics represents a significant social achievement. For these reasons, democratically produced law deserves some significant measure of respect.

But, as Waldron admits, his account is insufficient as it stands. It is also important for citizens to base their votes on their considered beliefs about justice and the common good, and not solely on their sense of their own narrow self-interest. This effort to vote responsibly is one component of the law's authority. Unfortunately, Waldron never explains the difference between responsible and irresponsible voting. This is a

significant missing piece. In essence, he does not explain reciprocity in justification. Soper and Rawls do offer accounts of responsible voting and other public political activity. These views will be discussed in the next two chapters.

## CHAPTER 3

### HART AND SOPER

This chapter describes the development of a line of thought that Rawls takes up as a core element of his theory of legitimacy. It comes from the works of H. L. A. Hart and Philip Soper. Hart offers an influential account of the law and its normative force. Soper modifies Hart's view in certain ways and develops a shared reason account of political obligation. Rawls turns Soper's account of political obligation into a shared reason account of political legitimacy. In this chapter I discuss Hart and Soper. I discuss Rawls in Chapter 4.

The law claims to give those subject to it at least prima facie reasons for behaving in certain ways and not in others. Theories of legal validity attempt to define exactly what is to count as a law, strictly speaking. There are two aspects to this problem. First, we need to know what distinguishes law from similar phenomena such as religion, morality, or convention. Second, we need to know how to distinguish actual or genuine laws from proposed or potential laws that somehow fail to become law. Theories of legal obligation attempt to account for the normative aspect of law.

Legal obligation is not necessarily the same thing as political obligation or legitimacy. An account of legal obligation seeks to explain what makes law the kind of command that merits the respect of citizens. Accounts of political obligation and legitimacy seek to explain why citizens have a duty to obey the law and when the state has a right to enforce it. Though it seems clear that there might be some significant relationship between legal obligation and political obligation and legitimacy, this

relationship is not well understood by either legal or political theorists. This chapter considers one important effort to make sense of this relationship.

John Austin, an early legal positivist, sought to define law so as to distinguish it from similar social phenomena (such as morality) and to clearly demarcate the boundaries of a science of law.<sup>223</sup> He defines law roughly as those commands backed by threats that are issued by a sovereign who is habitually obeyed by most people in the society. For Austin, the law is essentially coercive. Insofar as his approach equates might and right, people are now rightly skeptical of it.<sup>224</sup> Nevertheless, in its day, it was an influential theory of legal obligation. Both Hart and Soper compare their theories to Austin's.

In The Concept of Law, Hart rejects Austin's account and seeks to replace it with a better one.<sup>225</sup> He offers a descriptive, positivist theory of legal validity and legal obligation. A key element of his account of legal obligation is the attitude of government officials toward the law-making process. Roughly, Hart argues that the law-making process must be rule-governed. Officials must take the rules that constitute the legislative process to be shared and enforceable standards of behavior. This distinguishes law from the arbitrary exercise of power and sets the ground for his account of legal obligation.

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<sup>223</sup> John Austin, The Province of Jurisprudence Determined (London: J. Murray, 1832).

<sup>224</sup> Despite its lack of popularity today, central elements of the Austinian approach have been revived in Matthew Kramer's In Defense of Legal Positivism (New York: Oxford University Press, 1999). He suggests, for instance, that legal systems might work by "sheer imperatives." For discussion of Kramer's arguments, see Philip Soper, The Ethics of Deference: Learning from Law's Morals (New York: Cambridge University Press, 2002), chapter 3.

<sup>225</sup> H. L. A. Hart, The Concept of Law, 2<sup>nd</sup> ed. (New York: Oxford University Press, 1994).

In A Theory of Law, Philip Soper uses some of Hart's premises to develop accounts of legal and political obligation.<sup>226</sup> Soper rejects Hart's positivism and his descriptive approach to legal theory, but accepts the idea that officials must have a certain shared attitude toward the law. He worries about Hart's non-moral understanding of the official attitude, however, and argues instead that this attitude must be explicitly moral, if the law is to be the kind of thing that might merit the respect of citizens. Only in this way can work on legal obligation move in a meaningful direction. One virtue of this approach, he argues, is that it gives us a way to solve the problem of political obligation. By connecting legal and political theory in this way, Soper hopes to rescue them both from what he perceives as a period of stagnation and irrelevance.

Rawls accepts the broad strokes of Soper's accounts of legal and political obligation. One key difference is that where Soper talks about legal and political obligation, Rawls talks about political legitimacy. Rawls's intent in making this conceptual shift is not entirely clear, but it introduces new issues to the discussion. In any case, Soper's theory is generic and flexible enough to apply to many (if not all) societies with legal systems. In several of his works, Rawls applies Soper's generic account to specific types of societies. In The Law of Peoples, for instance, he applies it to what he calls "decent" societies. These are non-democratic and non-liberal constitutional republics, similar to the political societies described by Cicero, Machiavelli, and Rousseau. In his work on liberal democratic societies—the setting for his liberal principle of legitimacy—Rawls applies Soper's theories to the context of

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<sup>226</sup> Philip Soper, A Theory of Law (Cambridge, Ma.: Harvard University Press, 1984).

democratic political culture, where all reasonable citizens regard one another as the free and equal co-authors of their law.

This chapter describes and critically assesses the works of Hart and Soper that most influenced Rawls. The next chapter critically assesses Rawls's theory of legitimacy. All three accounts represent viable approaches to key issues in legal and political philosophy today. Thus, while this chapter is primarily a prelude to the next, the ideas of Hart and Soper deserve consideration on their own. Since both Hart and Soper compare their theories to Austin's command theory, it is helpful to begin this chapter by briefly describing Austin's account. This sets the stage for more complete discussion of Hart and Soper.

#### Austin's Command Theory of Law.

Austin's command theory holds that laws are general orders, backed by threats of sanction.<sup>227</sup> The orders are issued by an independent sovereign, a person or group of persons who generally take orders from no one. They may also be issued by representatives of the sovereign. In general, commands from the sovereign are laws when most subjects comply with them, and they believe that punishment is likely to follow disobedience. On this view, the law is essentially coercive. It gives people reason to act because people want to avoid punishment.

One problem with this command theory is that it seems to distort as many kinds of legal rules as it explains. It appears to fit criminal law fairly well. This area of law is

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<sup>227</sup> Austin, The Province of Jurisprudence Determined.

comprised of commands forbidding certain types of behavior, and sanctions to be meted out to those who disobey. But Austin's command theory does not fit many other kinds of law. For instance, some laws tell people how to make wills and contracts. These acts create new rights and obligations between parties. When people violate one of these power-conferring laws, no one is punished. Instead, their efforts produce nothing. No will or contract is created when power-conferring laws are violated. Some argue that this "nullity" represents a sanction, but this seems to misrepresent what happens. A nullity is not a sanction the government imposes upon rule violators. In such cases, the government simply denies that the efforts of the parties have produced a valid will or contract.

A deeper problem is revealed by Hart's criticism of Austin's idea of legal obligation. Hart claims that coercion alone cannot produce obligations. When a gunman threatens a person—"your money or your life?"—the person may suffer great harm if he does not comply with the gunman's request. He has sound reason to do what the gunman wants. In fact, we might even say it would be foolish or dangerous to disobey the gunman, and thus that this person is actually obliged to do what the gunman wants. But it would not be right to say that the person has an obligation to obey. While it would be unreasonable to resist the gunman in this case, there is no reason to think the victim owes the gunman anything, or that the gunman's claim is morally sound. Might does not make right. The deeper problem with Austin's theory of legal obligation is that the sovereign is the gunman "writ large." The sovereign can oblige subjects to comply with her commands, by threatening to harm them if they do not comply, but her threats can never

obligate them to obey her. Since laws create obligations, commands from Austin's sovereign are not laws. Austin's theory fails to distinguish governments from gunmen.

H. L. A. Hart and The Concept of Law.<sup>228</sup>

In The Concept of Law (hereafter Concept), Hart attempts to develop a philosophically sound account of the essential features of law. Chief among his aims are accounting for legal validity and legal obligation. The question of legal validity has to do with identifying the laws of a legal system. A theory of legal validity describes criteria for distinguishing genuine laws from other kinds of rules, and from rules incorrectly claimed to be laws. The question of legal obligation has to do with law's claimed authority. A theory of legal obligation explains how the law binds subjects, or generates obligations. It is about how law produces reasons for subjects to act in certain ways.

Hart's method is descriptive.<sup>229</sup> We can describe rule-governed social practices, like law, from both "internal" and "external" perspectives. The internal perspective is the point of view of a participant, someone who is part of the group and affirms its rules. The external perspective is the point of view of an outside observer, someone who is not part of the society and does not affirm the rules. Methodologically speaking, Hart's legal project is a particular kind of external account: he argues that a sound external

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<sup>228</sup> Hart, Concept.

<sup>229</sup> Hart claims to be engaged in "descriptive sociology," but his work bears little resemblance to sociology as traditionally understood and practiced. He makes almost no reference to social theory or to any social scientific research in his work. He does make certain sociological claims, for instance that the law's primary function is social control, but his sociology is the armchair variety. For discussion see, e.g., Michael Martin, The Legal Philosophy of H. L. A. Hart: A Critical Appraisal (Philadelphia: Temple University Press, 1987), pp. 27-8.



description of the internal perspective can answer many philosophically important questions about law. He accounts for the important features of law by describing the different external behaviors and internal mental attitudes of group members immersed in law as a rule-governed social practice. Thus he accounts for legal obligation by describing the law's rule-governed internal aspect, and he solves the problem of legal validity by describing a certain kind of legal rule, the rule of recognition, which he claims is common to all legal systems.

Hart is a positivist, so he makes no attempt to morally justify the legal structures he identifies. While the law is often influenced by a society's beliefs about morality and justice, its validity and normativity need not be a function of either. The law is ultimately a matter of social convention.

Rules and Obligations.

In Concept, Hart holds that legal obligation is ultimately a matter of social convention or practice. His account of social rules has come to be known as the "practice theory." A practice rule exists when four conditions are met: (a) members of a group generally conform to some behavioral standard; (b) they see deviation from the standard as a lapse or offense that merits criticism and correction; (c) criticism of deviation is generally regarded as appropriate; and (d) at least some have an internal attitude toward the standard, using it as a guide and a tool in evaluating their own behavior and the

behavior of others.<sup>230</sup> At least one commentator doubts that Hart intended this account to be a complete theory of rules, rather than simply a test for the existence of rules.<sup>231</sup> A test for the existence of something need not say much of the nature of that thing: Geiger counters detect radiation but tell us little about it.<sup>232</sup> Hart may have meant to do nothing more than distinguish rule-governed behavior from habit or coincidence.

The distinction between rule-governed behavior and social habits and coincidence is important to Hart's account. When we say that a group follows a rule, we mean more than most group members behave in a certain way. Social habits also cause convergence. What distinguishes rule-governed behavior from social habits are the ways people respond to deviations from established behavioral patterns. Suppose Dan goes to a church that has a rule against wearing hats during the service, and no rule about where people must sit. Dan never wears his hat during church, and he always sits in the front left pew. Suppose now that Dan forgets to take his hat off one Sunday. Since there is a rule against this behavior, other church members will see Dan's behavior as a lapse that merits criticism and ought to be corrected. They will regard his behavior as *Something One Should Not Do*. Someone may give him a look, or point to his head, in an effort to get him to change his behavior. At the extreme, someone might interrupt the service and insist that he remove his hat, or challenge him to explain his unruly and offensive behavior. Both Dan and his critics will regard such efforts as reasonable or justified. Many church members will correct Dan unreflectively, without considering the nature of

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<sup>230</sup> Hart, *Concept*, pp. 55-7.

<sup>231</sup> See, e.g., Leslie Green, "Positivism and Conventionalism," *Canadian Journal of Law and Jurisprudence*, v. 12 (1999), p. 37.

<sup>232</sup> For elaboration of this distinction, see Leslie Green, "The Concept of Law Revisited," *Michigan Law Review*, v. 94 (1996), 1692-7.

what they are doing, but some will correct him because they see his behavior as a violation of a standard of behavior that applies in the church setting. Some will have internalized the standard and use it to guide the community. These kinds of responses and attitudes toward patterns of behavior and deviations often indicate the presence of a rule.

Now suppose Dan sits in the front right pew one Sunday. It is not unusual for people to become accustomed to sitting in certain seats in social settings like church, so other church members may regard this as odd, or surprising. However, since there is no rule requiring Dan to sit anywhere in particular, no one will regard his behavior as an offense or lapse in judgment. If someone did try to force him to move to the front left pew, others would regard this effort as unjustified, in the absence of some further explanation. These differing internal attitudes toward behavioral patterns, and deviations from them, are what separate coincidence and social habit from rule-governed social practices.

Whether Hart's practice theory successfully distinguishes rule-governed behavior from coincidence and habit is an open question. A common objection to the practice theory is that it does not distinguish rules from generally applicable reasons.<sup>233</sup> Many examples are thought to show this point. One common example has to do with chess. In chess, there are several standard openings. These are standard sets of initial moves, commonly regarded by serious players as the best or proper way to begin the game. Those who know chess well can sometimes tell which opening a player has chosen by

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<sup>233</sup> See, e.g., Joseph Raz, Practical Reason and Norms (Princeton: Princeton University Press, 1990), pp. 55-6.

observing which piece he moves first, and where he moves it. These openings are not required by the rules of chess, but serious players generally use them, and those who do not tend to get criticized for it. This criticism is regarded as appropriate and justified, at least by serious players, and at least some see the standard openings as the way chess ought to be played: “if you’re going to play chess, this is how you should do it.” Of course, chess can be played like checkers, with each player simply attacking the others’ pieces willy-nilly, until only one king is left standing. But to chess aficionados, this is like watching a chimp bang on a piano, or watching elephants paint. Chess, at its best, pits intellect against intellect in a complex game of strategy and misdirection. Many think this chess example (and others like it) shows that the practice theory incorrectly characterizes generally applicable reasons (e.g., standard chess openings) as rules. They have a point. Still, some doubt that these counterexamples prove decisive.<sup>234</sup> For instance, while the rules of chess say nothing about the standard openings, it is possible that there are rules of teaching chess. In any case, in the Postscript (published 30 years after Concept) Hart concedes that the practice theory is inadequate as a general account of rules. Nevertheless, he maintains that it successfully accounts for key elements of legal systems.<sup>235</sup>

Rule-governed behavior is different from merely patterned behavior. A special kind of social rule is what Hart calls a “rule of obligation.” On Hart’s account, all social rules give subjects reasons for action—this is just what it means to have a rule—but only some impose obligations. Rules of obligation are distinguished from weaker rules by

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<sup>234</sup> Green, “Positivism and Conventionalism,” p. 37.

<sup>235</sup> Hart, Concept, pp. 254-63.

three features: (a) they are vigorously enforced by group members; (b) they are thought to promote essential or prized features of social life; and (c) they are recognized as rules that often require sacrifices from individuals.<sup>236</sup>

The main characteristic separating rules of obligation from ordinary social rules is the strength and insistence of the social pressure members exert against rule violators and those who threaten to break the rule.<sup>237</sup> A rule imposes an obligation when group members take the rule very seriously and enforce it with a great deal of social pressure. Hart admits that the line separating ordinary rules from rules of obligation is a bit fuzzy—all rules are enforced with social pressure; how much is needed to make an ordinary rule into a rule of obligation?—but this does not obscure the fact that some rules are more vigorously enforced than others. Rules enforced with great determination and strong social pressure clearly impose obligations.

Hart adds two features to this characterization of rules of obligation.<sup>238</sup> First, rules of obligation are thought to protect or promote essential or “highly prized” features of social life. These include rules that restrict the use of violence, or that require honesty and the keeping of promises. For example, since child-rearing is essential to social life, there are rules of obligation that define certain duties parents have to their children. No particular rule is essential in this case, but the common fundamental needs of children give some content and place some limits on what can be done. Children need certain kinds of nurturing and basic care in order to develop and grow into healthy adults. The nature of parental obligations varies cross-culturally, but this does not mean that anything

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<sup>236</sup> Hart, Concept, p. 86-7.

<sup>237</sup> Hart, Concept, p. 86-7.

<sup>238</sup> Hart, Concept, p. 87.

goes. Minimally children need to be given the tools they will need to reproduce their society, and to be successful members of it. In our own society, parents are typically given some latitude in determining how they will raise their children. However, this does not mean that just any parental behavior is permitted. For example, parents who leave their young children alone while they run off to Las Vegas for the weekend deserve at least social censure and probably legal censure as well.

Second, people generally recognize that rules of obligation often require conduct that conflicts with the particular self-regarding desires of the agent. This is why obligations are generally thought to require sacrifices from people. (You simply cannot leave your young children alone while you run off to Vegas!)

Hart anticipates one objection to his analysis of rules of obligation: if the primary characteristic of these rules is strong social pressure to conform, why insist that the internal attitude is so important to understanding obligation? It just seems superfluous. Hart's view is just the opposite. He says that if we do not see the significance of the internal attitude, "we cannot properly understand the whole distinctive style of human thought, speech, and action which is involved in the existence of rules and which constitutes the normative structure of society."<sup>239</sup> The distinction between the "external" and "internal" aspect of rules is essential to any understanding of law or even of human society.

Here Hart contrasts two kinds of external comments an outside observer can make about a society. She can assert that group members accept certain rules, and in this way describe their internal attitude, without herself affirming the rules. Or she can simply

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<sup>239</sup> Hart, Concept, p. 88.

record regularities in the external behavior of group members. Hart calls this the extreme external point of view.<sup>240</sup> The outside observer can learn quite a bit about a society from this extreme position. She could correlate deviations with sanctions and develop a fairly robust ability to predict the kinds of reactions different behaviors will provoke. She could learn enough to get along fairly well with those she observes. But she will miss out on a key dimension of social life. The extreme external perspective never reveals how group members view their own patterns of behavior. In this way it fails to account for why people behave as they do. It overlooks the way rules function in society. Austin's command theory is an extreme external account. It is based solely on the external aspect of law—observable patterns of behavior as responses to perceived threats of sanction—and misses completely the internal aspect of law (or any other system of rules).

#### The Legal System and Validity.

Hart holds that the core of every legal system is a union of primary and secondary rules.<sup>241</sup> Some primary rules simply tell people what they must or must not do. They include rules against theft and the free use of violence. Other primary rules confer powers on subjects, enabling them to create new rights and duties. These primary power-conferring rules make it possible, for instance, for people to get married, or to make wills and contracts. Secondary rules are about primary rules, and there are three kinds: the rule of recognition, rules of change, and rules of adjudication.

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<sup>240</sup> Hart, Concept, p. 89.

<sup>241</sup> Hart develops the core of his account of law in chapters 5 and 6 of Concept, pp. 79-124.

The rule of recognition specifies the characteristics that identify the rules of a group. Every legal system must have an authoritative way of resolving questions about the existence of other legal rules, a conclusive way of identifying the rules that belong to a group. The rule of recognition defines these criteria. In doing so, it serves as the ultimate rule for identifying the “valid” laws of a legal system. Valid laws are just those that meet all the requirements of the rule of recognition. In the U.S., the rule of recognition is a complex mix of the Constitution and the three branches of government. Laws are produced in a couple of ways. The legislature enacts some laws. Some law is created when judges decide hard cases. The ultimate rule of recognition in the U.S. is the Supreme Court’s power of judicial review. The Court now has the authority to conclusively decide whether any proposed law is Constitutional, and thus whether it is one of the laws of the U.S. or not. Laws judged unconstitutional are not U.S. laws and have no legal authority. What makes judicial review the ultimate rule of recognition is not that it is written down somewhere, but rather that public officials generally accept this as the Court’s appropriate role.

Rules of change specify procedures for introducing new primary rules, and for modifying or eliminating old ones. The rules that create and define the legislature’s power to create or repeal laws are rules of change. They explain who has the power to make laws, the procedure for implementing that power, and its scope or reach. They are often closely associated with the rule of recognition.

Rules of adjudication specify procedures for determining whether primary rules have been violated on any particular occasion. They define who has the power to make



such determinations, the procedures that must be followed in making them, and the jurisdiction covered by various judicial officials.

A legal system exists when two conditions are met. First, valid laws must be generally obeyed by citizens and officials. In many cases citizens will see valid laws as common standards of behavior and sources of obligation, but this is not necessary. If citizens and officials generally obey the valid laws, for whatever personal reasons each may have, the first condition is met. Second, the secondary rules must be accepted as common public standards of behavior by officials. In particular there must be shared official acceptance of the rule of recognition. Officials must take the secondary rules to be rules of obligation that apply to all them in their public roles as officials. It is not necessary for private citizens to have this attitude toward the secondary rules.

Law and Morality.

Hart holds that the law need not be a function of morality. Some genuine legal systems are completely separate from what are generally recognized as moral codes. But the belief that there is some necessary relationship between law and morality is not entirely wrong. Every legal system has two moral elements: the formal aspect of justice and minimum natural law content. While these conditions are part of every legal system, they are not sufficient to guarantee the morality of any legal system.

Every human legal system contains the formal aspect of justice. Justice claims have two parts: (a) the formal principle that like cases be treated alike, and (b) criteria used to determine when cases are alike. The first feature appears in all cases of justice

claims, but it offers no guidance until the second feature is filled out. The claim that a law is unjust often means that the first feature is missing, i.e., that the law treats people unfairly, because it does not treat like cases alike. This same formal principle of justice—that like cases should be treated alike—is also a key feature of all rule-governed social practices. Treating like cases alike is just part of what it means to follow rules. Rules identify sets of conditions that people ought to respond to with particular more-or-less well-defined patterns of behavior. When people treat like cases differently, it is hard to see their behavior as rule-governed. This applies to legal systems, since they are rule-governed social institutions. Thus, a legal system must treat like cases alike, or else it risks losing its claim to being rule-governed. Thus every legal system necessarily shares with justice claims this formal principle. In this way, every legal system contains an element of morality.

Every enduring human legal system also has laws containing the “minimum content” of natural law.<sup>242</sup> In order to survive, every human society must have certain minimal standards of behavior. Simple reflection on human nature, the purpose of society, the natural environment, and so on, makes this evident. For instance, social life requires restrictions on the free use of violence. Such rules are necessary because human beings are vulnerable to attacks by others. If there were no rules restricting the free use of violence, there would be little point in having any rules at all. Every legal system must recognize such standards. Hart calls these universally recognized standards the minimum content of natural law. But while this minimum content is necessary for the continued existence of human society, and thus must be recognized by all legal systems, it is not a

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<sup>242</sup> Hart, Concept, pp. 193-200.

necessary characteristic of law as such. The minimum content is necessary because of the kinds of beings we are, but human nature is a contingent fact. If human beings were different than they are now, e.g., less vulnerable, the minimum content would be different, or might not exist at all. Laws restricting the free use of violence are universal only because human beings are vulnerable in certain ways, not because the concept of law requires any specific moral content. The continued existence of human society requires this content, not the concept of law.

Since Hart admits that these two elements of morality can be found in every legal system, why does he deny the claim that law is founded on morality in some way? Because these two moral elements do not guarantee the morality of any society or its law. A society need not extend the minimum natural law content to all, nor need it treat all individual persons as “free equals.” In a caste society, for instance, people in different castes may be thought of as naturally superior or inferior to others, and so to have more or less moral value, rights or permissions than others. Formal justice requires that members of one caste be treated in similar ways, but it does not require that all castes be treated the same. And the minimum natural law content needs to be extended to most of the castes, but it need not be extended to all castes. In slave societies, masters may be morally sensitive to each other, while at the same time treating slaves as objects. Law generally follows conventional morality, so where this morality allows discrimination, the law will too. Hart identifies the Nazi regime and South Africa during Apartheid as contemporary examples of societies that have genuine legal systems, in part because they meet the conditions of formal justice and the minimum content of natural law, but that are nevertheless immoral and unjust regimes.

## Potential Problems for Hart's Theory of Law.

Hart's philosophical account of the law has two main aims. The first is explaining legal validity. The second is accounting for the law's normativity. A great deal of critical work has targeted both of these projects. Since I am not primarily concerned with the validity question, I will set this issue aside. In the next few sections I will consider three objections to Hart's account of legal normativity. First, some object that Hart's notion of legal obligation is obscure. If legal obligation is not moral or prudential in nature, then what exactly is it? Some see no middle ground. Second, some object to Hart's account because it implies legal duties to immoral and unjust governments. Could one really have a legal obligation to the Nazi regime? Third, some think Hart fails to distinguish law from force. If this is true, Hart's account of legal obligation fails, because he claims force cannot generate obligations.

### Is Hart's Legal Obligation Too Obscure?

Hart tries to develop an account of legal obligation that does not reduce it to either morality or force, but if legal obligation is not one of these, what exactly is it? The prudential ought is fairly straightforward. It says that you ought to do some X, because X is in your self-interest in some way. The reason you should do X is because doing X would benefit you. The nature of the moral ought is not quite as clear as the prudential ought, but we do have some idea what it means too. Broadly speaking, morality has to do

with what it means to be a good person, or what is ultimately good for human beings, or what it means to do the right thing. The moral ought describes behavioral requirements based on such moral considerations. But what is legal obligation if it is distinct from moral and prudential concerns? What kinds of reasons does it give people for conforming to the law's demands? Our notions of prudential and moral obligation provide more or less clear ways of answering these questions. On the prudential account, you ought to obey the law, simply in order to avoid punishment or sanction. On the moral account, legal obligation is based on moral considerations. You ought to obey the law, because the law is based on or in some way contributes to the ultimate good of human beings. It is not clear how, if at all, a distinct notion of legal obligation answers these questions. (This has implications for political obligation and legitimacy, but I want to put off explaining just how until a little later.)

As a result, one might claim, as Philip Soper does, that Hart makes a mistake in trying to account for legal obligation in non-moral and non-prudential terms. Soper seems to have two problems with Hart's approach. First, Soper sees no clear middle ground between moral and prudential obligation. What else could legal obligation be? So he thinks it must be moral or prudential in nature. Second, Soper thinks it just muddies the water to introduce an obscure notion like Hart's legal obligation. Prudential and moral obligations and reasons for action are complex and difficult enough to sort out and compare on their own. Introducing some distinct legal notion of obligation adds unnecessary complexity to an already messy situation. Soper thinks we need to approach legal obligation from the common sense point of view of the average citizen. Citizens can understand prudential and moral duties and reasons for action. They want to plan a

course of action through life, so they want to know if they will be punished for behaving in certain ways, and how to act morally. On Soper's view, these concerns exhaust the average citizen's interest in the law. They want to know what the law forbids, and how the law connects to their moral duties. But if the law is distinct from morality and prudence, it is not clear how citizens should regard it, or factor it into their calculations about how to live. How much do legal obligations weigh against moral or prudential ones? This question is easier to answer (so Soper argues) if we characterize legal obligation as either moral or prudential in nature. This is one reason Soper gives for rejecting Hart's approach to legal obligation.

Hart could respond that he distinguishes legal obligations from moral and prudential ones because, as a matter of descriptive fact, legal obligations are distinct from the others. That legal obligation may be hard to understand, or that it may add complexity to an already difficult situation, is irrelevant from this descriptive perspective. Descriptively speaking, the law is what it is, even if it is difficult to understand. Soper ultimately rejects Hart's descriptive approach, for reasons I will explain later. I will set this issue aside for now, but it will come up again. The point I wish to emphasize here is that some find Hart's notion of legal obligation too obscure to be helpful. Soper and Rawls agree with Hart that legal obligation is not the same thing as moral obligation, but, unlike Hart, both link the law's normative force to a kind of moral sincerity among individuals (officials or citizens) responsible for the law. According to Soper and Rawls, this link gives the law a distinctively moral quality. In this way they avoid Hart's problem.

Alternatively, one might claim, as Michael Martin does, that Hart does not think law creates “real” obligations at all, but only “descriptive” ones.<sup>243</sup> Hart’s descriptive account of obligation is anthropological. It describes the duties a person is said to have, according to the behavioral standards of his society. But descriptive obligations are not real obligations, Martin says. He seems to think Hart’s “merely descriptive” obligations have no genuine moral claim on a person’s behavior. Martin thinks this is why Hart insists that we should always morally evaluate the law’s demands, before we decide to comply with the law. On Martin’s account, the obscurity of Hart’s notion of legal obligation is not a problem, because so-called legal obligations have no real genuine moral claim on citizens. Citizens will recognize, of course, that it would be prudent to obey the law, since laws will be enforced by the state. As a result, citizens will factor their “legal” obligations into their deliberations about how to act, but for prudential reasons only, not legal or moral ones. And they will do this despite the fact that legal obligations are not real moral obligations.

I think Hart would resist Martin’s claim that legal obligations are not real. Martin seems to think moral obligations are essentially different from legal ones, because legal ones are conventional and (Martin assumes) moral ones are not, but on Hart’s account both are fully conventional in nature. From Hart’s perspective, if legal obligations are merely descriptive, then so are moral obligations. But I do not believe he would say either kind of obligation is merely descriptive, if this means not real or genuine. Rather, he would say that real obligations, moral or legal, are rooted in conventional social practices.

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<sup>243</sup> Martin, Legal Philosophy, p. 19.

In any event, I do not hope to resolve this issue here. I will leave that to Hart scholars. But I wanted to bring the issue up, because both Soper and Rawls will take a different approach. While both reject the claim that legal obligation can be reduced to morality or justice, each sees the law's normative force as essentially connected to the moral values of a society.

Can there be a Legal Obligation to Immoral and Unjust Governments?

On Hart's account, even the worst Nazi laws may have been genuine laws.<sup>244</sup> Nazi laws were generally obeyed, so if Nazi officials had the proper internal attitude toward their secondary rules, their laws gave German citizens genuine prima facie reasons to comply with even the worst and most immoral laws of that regime. Of course, Hart does not think people should obey the Nazis. But for positivists, the question of the law's normativity is distinct from the question of its moral value. It may be that no one ought to obey immoral Nazi laws, all-things-considered, because the moral obligations outweigh the legal ones. Nevertheless, an immoral law is still a law, so even immoral laws may generate genuine prima facie duties to comply. Some see this as a major failing of Hart's theory of normativity and of positivism in general. No plausible account of legal normativity could hold that people have reason to comply with the immoral interests of such an evil government. Thus, there must be something wrong with Hart's approach to obligation.

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<sup>244</sup> See, e.g., Hart, Concept, p. 270.



For instance, Edmundson rejects accounts like Hart's on these grounds.

Edmundson insists that citizens have a prima facie obligation to obey only sufficiently just laws, and no duty (not even prima facie) to obey laws as such. Why? When a person fails to perform a prima facie duty, because it is overridden by other considerations, it is appropriate for there to be a "residue of regret or remorse." This is because the reasons a person has for performing a prima facie duty still exist, even when a prima facie duty is overridden. But no one should feel regret or remorse for failing to obey clearly immoral or unjust laws. In Nazi Germany, for instance, no one should have felt regret for violating laws requiring them to turn in Jews. Such regret is just not consistent with our considered moral convictions. Thus accounts of legal normativity like Hart's fail. They imply positions that are not morally sound.

Hart could respond in a couple of ways. He might reject Edmundson's claimed account of our considered moral convictions. Edmundson insists that our considered moral convictions indicate that regret is not an appropriate response for one who violates immoral Nazi laws, but this might not be as obvious as he says it is. Hart could respond that a weak or mild form of regret is appropriate, simply because a valid law has been broken, even when the law is clearly immoral. This regret need not imply any undue sympathy for the Nazi cause. If one thinks that law as such is valuable, then some regret may not be inappropriate. This just seems to be a battle of intuitions.

Alternatively, Hart might argue that legal reasons that get overridden by moral reasons are not simply defeated, as Edmundson insists, but silenced altogether.<sup>245</sup> A defeated reason is one that is overridden by another reason, but continues to apply to the situation. A silenced reason is one that is overridden by another reason and, as a result, ceases to apply. Thus Hart might hold that a person's legal obligation to the Nazis is silenced by that person's moral obligations. It is probably wrong to say that just any moral reason can silence a legal one, but it is plausible to claim that some especially weighty moral reasons could silence legal ones. In such cases, there would be no residue of regret, because the legal duty would no longer factor into the deliberation about how to act. This would not mean that the legal duty was not real. It would just mean that the competing considerations changed the situation in some key way. In the first instance I had only prudential and legal reasons to consider, but now I have moral reasons to weigh too. When certain weighty moral reasons apply to a situation, one might hold, the other kinds of reasons cease to. There is no obvious or a priori reason to rule out the possibility.

Hart might also respond that the appropriateness of regret depends on the content of the obligation that gets overridden. He might admit that overridden moral reasons still apply to a situation, and generate an appropriate residue of regret, but deny that overridden prudential reasons follow the same pattern. That is, one might hold that overridden prudential reasons still apply to a situation, but insist that they need not be accompanied by any residue of regret. A moral reason is a fairly serious matter, having

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<sup>245</sup> For discussion of silencing, see, e.g., Jonathan Dancy, Moral Reasons (Malden, Ma.: Blackwell Publishers, 1993), pp. 47-55; and John McDowell, "Are Moral Requirements Hypothetical Imperatives?", Proceedings of the Aristotelian Society, v. 52 (1978), pp. 13-29.

to do (in at least a minimal sense) with the welfare or dignity of some morally salient agent. Prudential reasons need not be related to such serious matters. Thus, while an overridden moral reason may always be an occasion for regret, an overridden prudential reason need not always be such an occasion. If this is plausible, Hart might insist that overridden legal reasons are more like prudential reasons than moral reasons in this respect.

One issue this problem raises is the relative weight or strength of legal obligations. Should we think that all legal obligations have equal weight? Or should we hold that the normative force attached to different laws can vary from law to law? On Hart's account, all legal obligations seem to carry the same weight, to have same amount of normative force. So Hart cannot easily claim that some legal obligations are weaker, and more easily overridden, than others. Soper claims that both legal and political obligation can vary in strength. On his account, any particular law has normative force in part because (he argues) having a legal system is better overall for everyone than having no laws at all. It might seem that we would be better off without some particular law, but other laws are clearly beneficial. The strength of the obligation correlated with any particular law depends in part on the plausibility of the claim that the particular law contributes something to the common good that having a legal system generally promotes. We can hold consistently that a legal system is good overall, and still have good reason to think some particular law is especially good or helpful, that some other law is particularly harmful, and that the bulk of particular laws fall somewhere in between. Given this kind of variation, Soper holds, some particular laws have greater normative weight than others. And political obligation—the duty to obey the law—is in

part a duty to respect those officials who are responsible for the law. On Soper's account, the normative weight a particular law carries depends in part on how much officials want that law to be obeyed by citizens. Thus citizens have the strongest duty to obey the laws officials feel strongest about, and less of a duty to obey the laws officials are least concerned that citizens obey.

Does Hart Distinguish Law from Force?

Some critics question whether Hart's account of obligation distinguishes it from force. There are a couple of ways of advancing this charge against Hart. One approach focuses on the reasons citizens have for complying with law. Another focuses on reasons officials have for accepting the secondary rules. In each case, it is argued, citizens cannot distinguish law from force, so we have reason to doubt that the law has genuine normative force.

The first challenge to Hart's distinction between law and force is based on his claim that citizens need not have any particular attitude toward their laws. Hart says that in order for a legal system to exist, private citizens must obey the primary rules. However, he does not require that citizens accept the rules for any particular reason. Each citizen can accept them for any reasons whatsoever.<sup>246</sup> At the extreme, Hart says, we can imagine a genuine legal system in which all citizens view the law as a set of demands backed by threats of sanction. Citizens may comply with the law just because they fear harm or punishment. The problem with this is that it is the same reason people

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<sup>246</sup> Hart, Concept, pp. 115-7.

have for complying with the gunman. When the gunman demands obedience and threatens to punish disobedience with violence, people have reason to comply, because they fear being hurt. If this is the only reason citizens have for complying with law, then it is not clear how Hart's account distinguishes law from force.

Hart rejects this, because for him the issue does not turn on the way citizens understand law and force, but on whether or not official conduct is constrained by rules. The key distinction is between governments that conform to the rule of law and governments that do not. The gunman does not follow rules. He controls citizens arbitrarily, in any way he chooses. The government that is not constrained by secondary rules is like the gunman. In such a situation, official exercise of government power is merely an arbitrary act of official will. On the other hand, officials guided by secondary rules cannot exercise their will on citizens in this arbitrary way. Their conduct is constrained by the rules they accept. Government control of citizens cannot be distinguished from force when government power is exercised arbitrarily. When government power is exercised according to rules, it is not reducible to force. This is the key to understanding Hart's view of legal obligation.

One response to Hart is to ask why he ignores citizens' attitudes toward the law. After all, law is supposed to create obligations for citizens. Why, then, is their attitude toward the law irrelevant? Citizens need to know what their obligations are. This means they ought to be able to distinguish situations that obligate them from those that merely oblige them. Hart could answer that his view does not contradict this. Citizens can distinguish law from force, by paying attention to what officials do. They can see, in principle anyway, whether officials are following the rules or not. Hart insists only that

the law's normative force does not depend on the knowledge of citizens. But if some citizen does not understand the law to create obligations, can it create obligations for her? There is nothing odd about this. People can have obligations that they do not know they have. For instance, I might join a club, and agree to participate in all of the club's functions, even before I know what all of the club's functions are. In this situation, I would have obligations to the club that I do not yet know that I have. It would be a problem to claim that people have obligations that they cannot know that they have. If it were simply impossible for me to know that I have an obligation to R, it might be odd to claim that I in fact have an obligation to R. But Hart does not claim this about law. Citizens can understand the difference between law and force—it is located in the rule of law. Hart just does not want to make this a necessary condition of legal obligation. In any case, both Soper and Rawls will move away from Hart's position, and insist that it is important for citizens to actually see that their laws generate genuine moral obligations.

A second challenge to Hart's distinction between law and force focuses on the reasons officials have for accepting the rules. Hart claims that officials who accept the rules voluntarily need not do so for moral reasons.<sup>247</sup> They can accept them for self-interested reasons, or because they have some non-moral interest in others (as, say, an amoral social engineer might). They can inherit them unreflectively, or merely because they want to do what others do. In fact, those who accept the rules can conclude that they have sound moral reason to reject the rules, but accept them anyway for any number of reasons. Hart says that none of this changes the fact that the rules generate obligations for citizens. However, some critics think maybe it should. One consequence of Hart's

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<sup>247</sup> Hart, Concept, p. 203.

view is that it makes law arbitrary in a way. Hart thinks that the key difference between law and force is that law is governed by rules and force is not. Force is an arbitrary exercise of power. But by allowing officials to take up the rules for any reason whatsoever, Hart adds an element of arbitrariness to the rule of law. When a citizen asks, “why are these rules being enforced?”, the answer is “no reason in particular.” Some officials enforce them unreflectively, out of habit, while others enforce them because the rules benefit them personally in various ways. And so on. This makes the exercise of power, even when it is governed by rules, seem arbitrary, and so law seems to collapse back into force. Hart can respond that there are two senses of “arbitrary” at work here. The complaint that acceptance of the rules is arbitrary indicates a worry about the ultimate justification for some set of rules. To ask about reasons for acceptance is to ask if there are good reasons for accepting the rules. But on Hart’s view this is irrelevant, because law is ultimately a matter of social fact, not of critical reason. This is a different sense of “arbitrary” than the one that distinguishes law from force.

A third challenge to Hart’s account comes from another consequence of officials accepting rules for non-moral reasons. On Hart’s view, citizens can reasonably see official exercise of power as force and not law. Suppose an official accepts the rules for self-interested reasons. When this happens, citizens have reason to worry that the laws enacted through the legislative process serve only the interests of officials. If the official is involved in law only because it benefits him, this gives citizens reason to worry about the law’s purpose and its proper role in a citizen’s life. If the law serves primarily the interests of officials, and not (or only incidentally) the interests of citizens, then for citizens the only reason to comply with the law is fear of punishment. But this seems to

turn law into force, and force cannot generate obligations. It does not matter that the exercise of force is rule-governed. For example, there is nothing contradictory about the idea of a gang exercising power over citizens according to some set of rules accepted by gang members. Consider the Mafia. So if Hart allows officials to accept the rules for non-moral, self-interested reasons, his distinction between force and law collapses, at least from the perspective of citizens.

#### Key Points.

1. A legal system must be rule-governed if it is to generate genuine legal obligations. This is a necessary, but perhaps not sufficient, condition of the law's having normative force.
2. If legal obligation is not prudential or moral in nature, it is hard to understand exactly what it is. There is good reason not to equate legal obligation with force, so it may be helpful to think of legal obligation as essentially connected to morality in some way.
3. If legal obligation is moral in nature, the acceptance of the rules (by officials and/or citizens) that constitute the legal system may need to be moral acceptance of some sort. This is consistent with a respect for judgment approach to law and legitimacy.
4. Since legal obligations create duties for citizens, it may be important to take seriously the perspective of citizens.



In A Theory of Law, Philip Soper claims that the central problem in political theory is the question of political obligation: why should I, or anyone, obey the law?<sup>249</sup> But he feels that neither legal nor political theory have made much progress. Legal theory asks the wrong question—“what is law?”—and is now of no interest to anyone but professional philosophers.<sup>250</sup> Political theory asks the right question—“should we obey the law?”—but assumes poor accounts of law that make inevitable a negative conclusion.<sup>251</sup> We can avoid this “remarkably counterintuitive” negative conclusion, and make excursions into both political and legal theory profitable again, by bringing them together to answer this question: “what is law that it should be obeyed?”<sup>252</sup> A philosophically sound answer to this question makes legal theory meaningful, and also makes it possible for political theory to solve the problem of political obligation.<sup>253</sup>

Soper’s work has two main parts. In the first he develops his theory of law, which is primarily aimed at accounting for legal obligation. His account is guided by his concern for what law must be like if it is to deserve the respect of citizens. Only law so understood can have genuine normative force. In the second part he builds on his theory of legal obligation, and develops a solution to the problem of political obligation. Given that law deserves the respect of citizens, how should it figure into their thinking about

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<sup>248</sup> Philip Soper, A Theory of Law (Cambridge, Ma.: Harvard University Press, 1984).

<sup>249</sup> Soper, Law, p. 7.

<sup>250</sup> Soper, Law, pp. 1-7.

<sup>251</sup> Soper, Law, pp. 7-12.

<sup>252</sup> Soper, Law, pp. 7-12, 91-100.

<sup>253</sup> Soper, Law, pp. 91-100.

their moral obligations? In the end he argues that all citizens who are concerned to act morally have sound moral reason to obey the law.

### What Is Law That It Should Be Obeyed?

Soper finds the oft-heard contemporary claim that there is not even a prima facie duty to obey the law to be “remarkably counterintuitive.”<sup>254</sup> He takes the existence of this duty to be part of the data to be explained by theories of legal and political obligation. Some contemporary philosophers argue against the existence of such an obligation, but “most moral philosophers who have shaped Western consciousness, from Plato to Kant, seem to have assumed or explicitly argued for the opposite view.”<sup>255</sup> So Soper locates himself in good company. The question for him is not “does law obligate?”, but “if law is to obligate, what must it be like?”

Soper’s theory of law is aimed primarily at accounting for the law’s normativity. The claim that law has normative force amounts to the claim that law as such deserves at least minimal moral respect from citizens.<sup>256</sup> What Soper has in mind is accounting for, and justifying, the difference in attitude a person tends to experience when confronted respectively by the mugger and the tax man. When the mugger demands money, and threatens to punish disobedience with sanctions, a person tends to feel outrage. When the tax man does the same, and with no more care for the personal interests or desires of the citizen than the mugger, a person tends to feel at least a minimal kind of respect. What is

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<sup>254</sup> Soper, *Law*, p. 8.

<sup>255</sup> Soper, *Law*, p. 94.

<sup>256</sup> Soper, *Law*, p. 59.

the difference? The tax man represents the law. This is why there is at least a minimal moral response to the tax collector that is absent in the case of the mugger. This minimal moral respect is what Soper means by the law's normativity. His theory of law is aimed at explaining when and why this moral response is justified.

Soper emphasizes differences between his theory and Hart's, but he also draws much from the positivist tradition. Soper does not offer a full-blown definition of law, as positivists like Hart do, but instead works with a citizen's rough, "common sense," idea of law: "a set of directives issued or accepted by officials who enforce the directives with organized sanctions."<sup>257</sup> Here Soper's theory both resembles and differs from Hart's.

Soper distinguishes descriptive theories from definitional ones.<sup>258</sup> A descriptive theory, like Hart's, identifies common features of standard examples of legal systems. Definitional theories identify conceptually necessary features of legal systems. Soper rejects descriptive accounts like Hart's. He argues that Hart's emphasis on the external perspective prevents him from adequately accounting for the internal perspective. For instance, this is why he thinks Hart seems to vacillate on the reasons officials must have for accepting the rules. Early in Concept, when Hart talks about rules of obligation, he says that they are often thought to protect or promote prized or essential features of society. Later, when discussing morality and law, he seems to back away from this claim, and allows that officials might accept the rules for all kinds of non-moral reasons. This waffling, Soper thinks, is a result of Hart's insistence on maintaining an external, descriptive perspective. He seems to feel that Hart is so worried about maintaining a

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<sup>257</sup> Soper, Law, p. 4.

<sup>258</sup> Soper, Law, p. 20-9.

distinction between law and morality that he cannot fully appreciate the internal perspective. At times, Soper even seems to go so far as to insist that the internal perspective can only be understood internally.

Soper's theory of law is definitional. He makes definition proper a function of human purposes. A sound definition of a thing identifies its essential features by determining what human beings can do with it, or how they can use it. This is how Soper approaches the definition of law. He seeks to define law's essential features, including its normative force, by identifying the ways that law connects with significant human practical interests. One interest citizens have is knowing when they might be punished by officials for violating laws. But citizens also have a second practical interest in law: they want to act morally, so they want to know how the law is connected to their moral obligations. Soper says Austin's command theory was on the right track, because it attempted to define law in terms of human interests, but it ultimately failed because it defined law in terms of the first interest alone. Soper thinks that an adequate definition of law must take account of both interests. Thus he seeks to develop a definition of law that conceptually connects it to moral obligation.<sup>259</sup>

So we can summarize Soper's normative project in the following way:

Law is a set of directives issued and accepted by officials, and enforced by them with organized sanctions; what traits must these directives have if they are to

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<sup>259</sup> In a later paper, Soper says he does not mean to define law as such, but only to define law that merits moral respect. He leaves open the question of whether or not something might properly be called "law" that nevertheless does not deserve respect. See "The Obligation to Obey the Law," in Ruth Gavison, ed., Issues in Contemporary Legal Theory: The Influence of H. L. A. Hart (Oxford: Clarendon Press, 1987), 127-55.

deserve at least minimal moral respect from citizens, and thereby fit into citizens' moral calculations about how to act?

Soper answers that “legal systems are essentially characterized by the belief in value, the claim in good faith by those who rule that they do so in the interests of all.”<sup>260</sup> The law deserves the respect of citizens when citizens have good reason to believe that officials sincerely regard the law as promoting justice or the common good. Soper uses the terms “the interests of all,” “the common good,” and “justice” interchangeably as placeholders, and they must be read loosely.<sup>261</sup> He makes no strong claims about what should count as a theory of justice, or a commitment to the common good, for two main reasons. First, he intends his theory to be generic, to account for the law's normativity in all societies with genuine legal systems, and not just in liberal democratic ones. He does not presume that only liberal democracies have legitimately enforceable law. Second, he recognizes that individuals in all societies disagree about what justice requires. If he were to say much at all about justice or the common good, he would run the risk of violating his own commitment to reasonable disagreement. Soper insists on only two things. First, a theory of justice must give some consideration to the interests of all citizens. Second, officials must appeal only to theories of justice that are publicly available to members of their society, that are part of a known discourse or tradition of political thought. This is necessary, Soper holds, because citizens will not see any normative reason to respect the

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<sup>260</sup> Soper, *Law*, p. 55.

<sup>261</sup> Soper does not mean that law must actually do the good that officials claim it does, or that officials correctly judge their law to be just or to otherwise promote the common good. He is trying to give an account of the law's normative force that respects reasonable disagreements about what justice requires. I will say more about this below.

law if they cannot see it as grounded in some commitment to justice. These two conditions form the core of Soper's approach to reciprocity and shared reason.

This is what makes Soper's theory a shared reason view. It requires two kinds of reciprocity. First, it requires something similar to what Reidy calls "reciprocity in advantage."<sup>262</sup> Soper requires that officials sincerely consider the interests of all citizens when proposing and enforcing law. Reciprocity in advantage is a central component of shared reason. We cannot expect citizens to authorize law if they have reason to regard having a legal system as worse than not having one. If the law ignores a citizen's interests altogether, or, worse, if it threatens her interests, she has no reason to regard law as preferable to anarchy, to the state of nature or of no law. It is not reasonable to expect citizens to accept law under these conditions. Thus, a minimum condition of law being something citizens could affirm is that citizens can see the law as something that respects (in some way) their interests. While this requires the law to show some consistency (e.g., what Hart calls the law's "formal aspect of justice" and its "natural law content"), it does not imply that all citizens must be treated equally. The interests of citizens could be respected in many ways short of full and equal status, and we might expect to find just this in societies that do not share modern, liberal democratic values.<sup>263</sup>

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<sup>262</sup> See David A. Reidy, "Reciprocity and Reasonable Disagreement."

<sup>263</sup> John Rawls's decent societies are one example of this kind of society. See LP. Decent societies are non-liberal, non-democratic societies that nevertheless have genuine law, i.e., law that is legitimately enforceable. In fact, Rawls holds that decent societies deserve full and good standing in the international community, not because they are just (they are not just, on his view), but because they are genuine structures of political authority (i.e., political authority in decent societies is authorized by citizens insofar as it is consistent with reciprocity and shared reason in Soper's sense).

Second, Soper's theory requires something similar to what Reidy calls "reciprocity in justification."<sup>264</sup> Soper holds that if the law is to have genuine normative force, officials must make a sincere appeal to a theory of justice or the common good that is part of a publicly available or known discourse or tradition. Every society with a legal system also has a public discourse about things like law, justice, the common good, the good for human beings, citizenship/membership, and so on. In any given society, this public discourse is typically vast and contains many conflicting ideas. The exact nature of these ideas also varies from society to society. For example, in the U.S. today it is unreasonable to deny women the right to vote, but this was not so early in the 19<sup>th</sup> century. At that time this was a question over which reasonable people could disagree. Today, of course, this is no longer the case in the U.S., but in other societies it still may be deemed reasonable to deny women the vote. On Soper's view, the law's normativity does not depend on whether or not women get to vote. What matters instead is that officials draw the reasons they offer in support of such laws from their publicly available discourse on political society. Here is another example. Today in the U.S. we affirm the ideal of one person, one vote, but some societies may reject this ideal, perhaps because they think it is a mistake to regard individual persons as having an equal basic right to political participation.<sup>265</sup> Even in these non-liberal, non-democratic cases, law-makers go some distance toward reciprocity in justification simply by appealing to publicly available ideas. In effect, officials say to citizens the following: "people relevantly similar to you—some of your fellow citizens—actually do affirm these ideas, so it is

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<sup>264</sup> See Reidy, "Reciprocity and Reasonable Disagreement."

<sup>265</sup> Rawls finds this view expressed by Hegel in The Philosophy of Right. See Rawls, LP, p. 73.

reasonable to believe that these are ideas that you *could* affirm as well (even if you don't).”

Soper does not mean that officials must correctly judge their law to be just or otherwise to promote the common good. He is trying to give an account of the law's normative force that connects it to significant shared commitments like justice and the common good, but that also respects reasonable disagreements about what justice and the common good require. In the case of particular laws that are obvious failures, of course, officials would be hard pressed to offer sincere defenses of them. But with most laws it is not so obvious. People reasonably disagree about the justice of many laws, and about the impact many laws have on the common good. Nor does Soper think it necessary for citizens to agree with officials about the justice of the law; it is sufficient that citizens can see that officials sincerely believe that the law takes everybody's interests into account in a morally significant way (at least as morality is understood in the culture/society in question).<sup>266</sup>

Hart would accept Soper's claim that the law need not actually promote any value, but he rejects the claim that official acceptance must be moral acceptance. Soper rejects Hart's account, because (Soper argues) Hart's refusal to adopt moral acceptance means that his account fails to distinguish law from the gunman. On Hart's view, officials may accept the rules without making the moral claim that the rules serve the common good. For instance, official acceptance may be based wholly on prudential

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<sup>266</sup> How can citizens know when officials are being sincere about their claims? For this reason, Soper says citizens always have a “right to discourse” in any society with genuine law (Soper, Law, pp. 119-125). This is roughly a right to engage public officials in dialogue and debate about the law's relationship to justice and the common good. This is not a right to free speech. It is intended mainly to allow citizens to accurately judge the commitment of officials to the general welfare.



reasons, such as the desire for income, security, or prestige. In this situation, citizens are likely to see official acceptance of the rules as indicating only that laws will be coercively enforced with sanctions. From the perspective of citizens, the law collapses into coercion, and the government becomes the gunman. When citizens have no reason to think the law serves any genuine moral purpose, they have no reason to think law counts in their own deliberations about how to act morally. When the law is not morally loaded, its practical significance for citizens is merely self-interested and prudential.

#### Respect for Authority and Political Obligation.

Political obligation—a citizen’s prima facie duty to obey the law—has to do with respect for authority. Soper finds the appropriate paradigm of respect for authority in his analysis of filial duty. On his view, filial duty provides a good analog for political obligation.<sup>267</sup> In a family, a person is confronted by demands for conformity, even though that person’s membership is not the result of choice, or any other form of complicit behavior (e.g., willful negligence, unjust enrichment, estoppel). The idea that political obligation is analogous to filial duty has been around for a long time, but discussion of it has been flawed, because both defenders and critics center their arguments on benefits supposedly conferred by family membership. The problem with this approach is that it makes filial duty arguments similar to unjust enrichment (fair play)

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<sup>267</sup> Soper, Law, pp. 77-80. Soper analyzes the lifeboat case in the same way he does filial duty, and feels it too provides an appropriate model for political obligation. Someone must control the rudder, and if it happens to be you, your good faith attempt to bring us all to safety deserves my respect. The fact that you listen in good faith to my views at least lessens the sting of your rejecting my position. Unless and until I become convinced that your actions are clearly mistaken and will assuredly bring our doom, I ought not disobey your directives.

arguments,<sup>268</sup> which are weak and cannot ground political obligation.<sup>269</sup> And even if the focus on benefits could ground political obligation, it would leave untouched the problem of deriving the specific content of political obligation.

So if it is not the benefits, then what is it about the family that generates filial duty? The mutual acknowledgement of the members that an enterprise like a family is valuable, coupled with the fact that the person who happens to be in charge is trying in good faith to act in the interests of all family members, by acting in the interests of the family as a whole. Soper says this makes plausible the following reaction to demands for compliance from an authority:

1. Here is a job—directing an enterprise—that I concede someone needs to do.
2. The person who happens to be in charge is trying to do that job in good faith, taking my interests equally into account along with the interests of others who also find themselves part of the same scheme.
3. That effort deserves my respect and provides me with a moral reason to go along, though at some point this reason may be outweighed by the seriousness of error I think is being made.<sup>270</sup>

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<sup>268</sup> Soper discusses John Rawls's fair play argument as a contemporary example of an unjust enrichment argument. See *Ibid.*, p. 70. The version of Rawls's fair play argument in question is in "Legal Obligation and the Duty of Fair Play", in Law and Philosophy, Ed. Sidney Hook (New York: New York University Press, 1964), pp. 9-10.

<sup>269</sup> See Soper, Law, pp. 69-74, for his discussion and rejection of unjust enrichment as a source analog of political obligation.

<sup>270</sup> Soper, Law, p. 79.

One virtue of this approach, says Soper, is that this attitude of respect for authority can be connected to themes in moral philosophy stressing empathy (“how would I want others to respond if I were in charge?”) and fallibility or the dangers of hubris (“I could be wrong about what ought to be done”).

For Soper, this analysis of filial duty provides a paradigm example of respect for authority. This is, he argues, the best way to understand political obligation. On his view, two features are sufficient to establish political obligation.

Those features are (1) the fact that the enterprise of law in general—including the particular system, defective though it may be, that confronts an individual—is better than no law at all; and (2) a good faith effort by those in charge to govern in the interests of the entire community, including the dissenting individual.<sup>271</sup>

These two features are sufficient to generate a prima facie duty to obey the law. They provide a rational basis for moral respect for the law. This resolves, for instance, Wolff’s worry that the state’s demand for compliance is not consistent with every person’s moral duty to exercise autonomy.<sup>272</sup> Soper’s view allows a person P to autonomously defer to the authority of another, A, even when P judges that A’s view is incorrect.

Soper concedes that feature (1) of his account leaves a gap in his solution to the problem of political obligation.<sup>273</sup> The anarchist insists that (1) is false. The anarchist holds, according to Soper, that people would be better off overall without any state enforced legal system. Whatever person-to-person moral duties people have could be handled privately (e.g., through voluntary associations). If the anarchist is correct, then

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<sup>271</sup> Soper, *Law*, p. 80.

<sup>272</sup> Robert Paul Wolff, *In Defense of Anarchism*.

<sup>273</sup> Soper, *Law*, p. 81.

there is no obligation to the law. That is, if the enterprise of law in general is not better than no law at all, there can be no political obligation.

Soper does not think it is hard to show the anarchist is wrong, because the standard claim that law promotes security and stability is almost universally accepted. Further, this flaw in his own theory should be easier to accept than the conclusion that political obligation does not exist. But the anarchist does present a difficult problem: does an individual who honestly believes that all law is bad have a political obligation to obey it?<sup>274</sup>

Soper admits the appeal of arguing that, even if the anarchist is correct, still he has an obligation to obey.<sup>275</sup> Is not the good faith effort of officials to govern in the interests of the entire community sufficient to generate obligations even for the anarchist? The answer is no. Respect for others obligates the anarchist to listen to others in good faith. But if the anarchist is correct that we would be better off without law, he cannot be obligated to comply with law without threatening his autonomy. Soper's account of political obligation depends on the falsity of anarchism.

Here Soper points to an asymmetry between (a) disagreements about what kind of legal system is best and (b) disagreements about whether any legal system is defensible at all.<sup>276</sup> Disagreements of the former kind are matters of degree, while disagreements of the latter are disagreements in kind. Between those who accept the value of law, there is common ground—a community of value—that makes the possibility of persuasion real. If you and I agree that law in general has value V, then it is possible that I can persuade

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<sup>274</sup> Soper, *Law*, p. 82.

<sup>275</sup> Soper, *Law*, p. 82.

<sup>276</sup> Soper, *Law*, p. 83.

you that my law L contributes more to V than your law M, and vice versa. This common ground, coupled with good faith concern for the whole community, generates respect for others. But with the anarchist there is no such community of value. How then can the anarchist have an obligation to obey the law? Why should he respect it? Soper says that if we are to hold that the anarchist has an obligation to the law, we must hold that he is wrong about its value. The law is valuable, and deserves the anarchist's respect, whether he believes it or not.

Feature (2) of Soper's account of political obligation holds that those in charge must make a good faith effort to rule in the interests of all, including the interests of dissenters. This is important because it emphasizes autonomy and mutual respect, especially between citizens in general and officials in the legal system.<sup>277</sup> First, it is rational for citizens to acknowledge the value of a legal system when the system promotes their self-interest. In this case, respect for authority is consistent with autonomy. Second, the respect officials have for citizens' autonomy requires them to consider the interests of citizens when they use their authority. Finally, in the case of citizens, respect is owed to officials because they do an important job and honestly think that compliance with their directives is required, if the job is to get done. The content of the respective obligations of citizens and officials varies and depends on the interests of each, but in each case the resulting obligations are generated by respect for the interests of the other.

On Soper's view, respect for the law is, more precisely, a duty to obey those in charge, who make law and desire that citizens obey it. "My respect for those in charge

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<sup>277</sup> Soper, *Law*, p. 84.

provides a reason for doing what these persons believe I should do: comply with the law.”<sup>278</sup> He does not focus on large-scale effects of disobedience (e.g., social disintegration) or on specific benefits received as the source of obligation. These will not work. He says that one could develop a utilitarian defense of his view. Such a defense would focus on

the persons one confronts and their response to one’s disobedience rather than on the effects of disobedience on the enterprise itself. Disobedience cannot easily be linked to societal disintegration; but it can be linked in an ascending scale to sadness, disappointment, concern, anxiety, and fear on the part of those who think the laws are important and my obedience desirable.<sup>279</sup>

But Soper feels his theory fits more naturally into a non-utilitarian background, “with the tradition that traces the source of all moral obligation to the respect that is due other equally autonomous, rational beings, mutually concerned for each other.”<sup>280</sup>

Soper’s theory of political obligation should not be confused with those that analyze it in terms of gratitude.<sup>281</sup> On Soper’s view, my duty to obey the Bush administration is not a duty of gratitude, but of respect. In fact, I am not grateful at all for many of the things they are doing domestically and around the world. But Bush and I share at least two beliefs: (1) we both value the enterprise we are in, i.e., we both value our democratic society, and (2) we both believe anarchy is worse than government (even Bush’s version). Bush and I agree that our democratic society is good and worth preserving and improving. Is Bush really doing the kinds of things that will strengthen or

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<sup>278</sup> Soper, *Law*, p. 84.

<sup>279</sup> Soper, *Law*, p. 86.

<sup>280</sup> Soper, *Law*, p. 86.

<sup>281</sup> William Edmundson makes this mistake in his *Three Anarchical Fallacies*, pp. 24-5.

preserve what is good about our society? Well, he is not doing what I would do. But here I have to acknowledge Soper's version of good faith disagreement. Insofar as Bush sincerely believes that his policies are good for our democratic society, and his actions are not clearly out of the moral ballpark, I have to admit that his view is one a moral person could rationally affirm. I am not grateful for his actions, but must concede that one might honestly see his efforts as good for something we both care about. I could be mistaken about what is best for us, and he could be right. I doubt it, but I cannot rule it out. Since Bush is making a sincere effort to do what is best for all, me included, and is willing to defend his actions in terms of values publicly available in our society, I have reason to respect his actions. Since he happens to be in power, my respect for him gives me sound reason to defer to him, to acquiesce, when he demands that I act in certain ways that he honestly believes contribute to the common good. He wants me to obey the law, so, out of respect for his sincere commitment to the common good, and his sincere commitment to my good as well, I ought to do what he says. There may come a time when I think Bush's moves are so bad, so wrong-headed, that we have left the area of good faith disagreement over how to govern and preserve what is good about our democracy. In that case, I may still have a prima facie obligation to obey the law, but I have even greater non-political moral reason to resist it. The sincerity of his belief may give the law normative force, but my strong moral objection to his positions may override the political obligation his sincerity entails. But until that point is reached, our common beliefs, coupled with reasonable disagreement, give me sound reason to obey. Gratitude has nothing to do with it.

One virtue of Soper's approach to political obligation is that it helps us understand and derive the weight of the prima facie obligation to obey.<sup>282</sup> The weight of any particular law, and the accompanying obligation, is determined by how seriously those who demand compliance view the law in question.

If I do not believe that abortion is wrong, the intensity with which others hold the opposite moral view makes the obligation to obey a law against abortion strong

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The intensity with which others hold a moral view can be estimated by considering how serious are the sanctions attached for disobedience. If, on the other hand, no one cares much about a law—running a stop sign at 2 A.M.—the obligation to obey can be outweighed by less important moral considerations. The law that no one cares much about has less prima facie moral weight than the law about which many people have very strong convictions.

Soper recognizes that many will object to that his theory of political obligation is too modest.<sup>284</sup> Traditionally, political obligation has been understood to require more than minimal moral respect for the law, more than a mere prima facie duty to obey. So even if he were to account for minimal respect, he would not thereby account for political obligation. Soper rejects this for two reasons. First, accounting for minimal respect is more than either legal or political theory can do today. If he is successful, this will be quite an accomplishment in itself. Second, once one admits that political obligation is not absolute—that is, that political obligation can be overridden by other moral

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<sup>282</sup> Soper, *Law*, 86-7.

<sup>283</sup> Soper, *Law*, p. 87.

<sup>284</sup> Soper, *Law*, p. 59-60.



considerations—the problem becomes understanding just how much weight political obligation carries. In other words, unless one wants to hold the untenable position that political obligation is absolute, (wiping out, for instance, the moral value of civil disobedience) one must talk about political obligation in terms of prima facie duties.

### The Limits of Law.

Soper makes officials' sincere belief in the justice of a legal system a necessary condition of the existence of law's normativity and political obligation. This sincerity condition places limited constraints on the content of law.<sup>285</sup> Official justifications for a legal system must be (a) consistent with the minimal basis for recognizing the value of a legal system, and (b) believable in fact. These conditions do not imply anything substantial about the appropriate content of law, but they do imply certain "natural" rights that all legal systems must respect. These include (i) a minimal right to security of life, liberty, and property, (ii) a right to formal justice (formal equality), and (iii) a "right to discourse." These rights are largely formal, but they do place limits on law, mainly by ruling out certain extremely harmful situations.

Soper's sincerity condition places few substantive constraints on the forms government can take or on the content genuine laws can have. Did the Nazis have a legal system? Did South Africa have a legal system during apartheid? Answers to these and similar questions turn on whether officials sincerely believe they are ruling justly, and not on whether their beliefs are correct. A sincere or good faith belief is not necessarily an

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<sup>285</sup> Soper, *Law*, pp. 119-25.

accurate one. History tells us that thoughtful and otherwise decent individuals can sincerely believe that institutions like slavery are consistent with the common good. “Officials who accept the beliefs that underlie such moral judgments are acting in the interests of justice and fairness as they see it, and in that sense in the interest of all.”<sup>286</sup> Thus a slave-holding society could have genuine laws and obligations. Fair does not mean equally weighted. From the official standpoint, the advantaged and the disadvantaged in a slave-holding society each fairly get what they deserve.

But the sincerity condition does put limited constraints on the law.<sup>287</sup> Officials who sincerely believe that a legal system promotes the common good must also sincerely believe that having a legal system is better than not having one. That is, having a legal system must be better than anarchy or the state of nature. This limits law, because any particular law that clearly would leave subjects in a condition worse than anarchy cannot generate obligations. For example, a policy of genocide could not generate obligations for those affected by it, because no official could sincerely hold that laws designed to exterminate a class of people are better for those people than no law at all.<sup>288</sup> This is implied by the sincere belief that law is better than anarchism. In fact, any policy that undermines the minimum security of individuals runs counter to the sincerity condition. Thus the sincerity condition entails a sincere commitment to minimal security rights (life, liberty, property). The same is true of the right to formal justice. A legal system must not be wholly capricious, but must in some minimal sense treat like cases alike. This is

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<sup>286</sup> Soper, *Law*, p. 121.

<sup>287</sup> Soper, *Law*, pp. 119-34

<sup>288</sup> Several readers have suggested that some Nazi officials were probably sincerely convinced that Jewish blood was so degenerate that if one were a Jew it would be better not to live than to live. Soper never considers this possibility, but it does raise a problem for his view.

necessary if any official is to sincerely hold that having a legal system is better than not having one. In fact, a legal system without formal justice is pretty much the same thing as no law at all. Thus all genuine legal systems must secure rights to minimum security and formal justice (formal equality) for subjects.

So the sincerity condition implies limited natural rights, and thus minimal constraints on law. But sincerity is difficult to judge. How can we know when an official sincerely believes a policy is just? We test sincerity with consistency.<sup>289</sup> We examine policies to try to determine whether or not they are consistent with the claim that law is better for those affected by it than the state of nature. For instance, it is clear that a policy of genocide is worse for those affected by it than the condition of no law at all. No one could sincerely claim that a policy that clearly leaves citizens worse off than they would be in the state of nature is consistent with the claim that having a legal system is better than not having one for those citizens. However, most laws are not such obvious failures as a policy of genocide. Suppose officials insist that a policy of slavery is consistent with the common good. Could this meet the sincerity condition? It is not obvious that slavery is inconsistent with the sincerity condition. That is, some forms of slavery are not necessarily worse than anarchism, even for slaves. Certainly some forms of slavery are worse, but not all. In the anarchist condition, many things worse than slavery could happen to a person. Thus it seems that slavery is not inconsistent with the sincere belief that having law is better than not having it.

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<sup>289</sup> Soper distinguishes “conceptual” from “empirical” consistency, but it is not clear exactly what he means by this distinction, nor is it clear why he thinks it might be important. I do not think the distinction is important, so I have dropped it from my discussion.

Judging sincerity of belief is very difficult, and the consistency test will often be indeterminate, leaving us without any firm conclusion. This leads Soper to insist on a third right, which he calls the “right to discourse.” The right to discourse is a limited right of citizens to request evidence of sincere belief among officials, by engaging them in dialogue and debate. Judging sincerity is difficult to do, but knowing when officials are sincere is key for citizens who want to know if the law deserves moral respect and thereby fits into their moral calculations. Thus citizens have a limited right to probe official claims to sincerity in the public square. Soper offers several reasons for thinking this right is a necessary component of all legal systems. First, the sincere exercise of power in the name of justice implies a commitment to a theory of justice and not just a thoughtless response to tradition or self-interest. A sincere official can reveal the process of reflective judgment that supports his personal world view, and will respond to dissidents with more than a simple “that’s just how it is.” Second, officials are charged with making disinterested choices in situations that also impact their self-interest. If citizens are to regard claims of justice in such situations as sincere and not merely self-interested demands for compliance, officials will want to be able to demonstrate how they arrived at their conclusions. One way to do this is by developing decision procedures that are impartial, consistent, and objective, and maintaining a certain level of transparency. When no such procedures are in place, officials have a duty to explain their decision process. Third, it is not uncommon for people to confuse self-interest and public-interest, and to willfully overlook important facts or implications relevant to their decision. Sincerity requires a willingness to admit this possibility and to confront apparent discrepancies between theory and action. Fourth, sincerity requires that officials treat

citizens as fully competent. Citizens can understand the value of the legal system, and can judge official sincerity by talking with officials about how proposed laws contribute to that value. Citizens have reason to doubt the sincerity of officials who simply refuse to engage in such discussion. In the broadest terms, discourse is necessary because it counteracts self-deception and expresses mutual respect between officials and citizens.

The right to discourse is not a right to free speech. The discourse right ensures that officials consider all relevant sides of political issues, which gives citizens some reason to think officials are sincere. Discourse has more to do with “soothing wounded autonomy,” and producing peace and mutual respect, than it does with the reasons traditionally thought to support free speech. It is not required as a means of developing individual capacities, or as a means of ensuring participation in government, or even as a means of getting closer to truth, though this plays some role. Discourse is ultimately about making it possible for citizens to sincerely believe they are not simply being taken advantage of by government officials. It affords citizens a certain amount of self-respect, by allowing them to conclude that their legal system really does (or could) promote the common good.

Discourse thus differs from free speech in many ways. For example, sincere officials can prevent debate of all substantive political issues, without violating the discourse right, provided that they are willing to engage in honest discussion of the justifications for such restrictions on discourse. The discourse right does not give every citizen the right to make political statements, to confront public officials, or even to try to persuade officials or other citizens. What is required is that the reasonable challenges each person might mount against official claims of justice find some public expression.

A state that offers a more-or-less thorough justification of its basic structure has already engaged many potential challenges to its claim to justice. But since laws and cultures evolve, and officials need continuously to impress upon citizens their sincerity, some form of discourse must always be possible.

#### Potential Problems for Soper's Theory.

Two potential problems for Soper are the Who? and What? problems. Who exactly must make the moral claim? What exactly must they claim is moral? These seemingly simple questions interact in complex ways to produce difficulties for Soper's theory. Another potential problem is the claimed link between respect for officials and having reasons to comply with their commands. These are separable issues, and so the link between them needs defense.

#### The Who? and What? Problems.

According to Soper, the law merits the moral respect of citizens only when officials sincerely affirm that the law is just. But Who must make the justice claim? And What must they claim is just?<sup>290</sup> The Who? problem has two elements. The first has to do with exactly which government officials must make the claim. The second has to do with the number or percentage of government officials who must make the claim. The

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<sup>290</sup> Commentators have noted that Soper is vague on these questions. See, e.g., David Lyons, "Soper's Moral Conception of Law," *Ethics*, v. 98 (1987), p. 1611; and Steven J. Burton, "Law, Obligation, and a Good Faith Claim of Justice," *California Law Review*, v. 73 (1985), pp. 1966-74.

U.S. Government, for instance, is composed of the legislative, executive, and judicial branches. Must members of all three branches make the justice claim? Is it enough if members of one (e.g., the legislature) make the claim? Also, how many members must make the claim? All? A simple majority? At least one? The What? problem asks whether officials must claim justice for (a) the legal system as a whole, or (b) particular laws. The Who? and What? problems interconnect in complicated ways. I will start by describing alternative interpretations of the What? problem. I will discuss the Who? problem as it arises for each interpretation of the What? problem.

A. Government officials claim legal system LS1 as a whole is just.

This is one generic answer to the What? question. Below I discuss different interpretations of A. None of them are free from difficulties.

A1. Some official(s) sincerely believes that every law Px in legal system LS1 is just.

On A1, the claim that the legal system LS1 is just means that every single law Px that comprises it is just. This is not a plausible interpretation of the justice claim. It is unlikely that any government official could sincerely claim that every law in a legal system is just. Every citizen, officials included, who is aware of all the laws of a legal system will certainly find at least one of them morally objectionable. As a standard of legal and political obligation, A1 is simply too demanding. In this case, the Who question is irrelevant. If we cannot expect even one official to sincerely make this justice

claim, there is no point in asking whether we should require that some significant number of them sincerely affirm it.

A2. For each law  $P_x$  in LS1, at least one government official sincerely deems it just.

One might hold that the whole legal system can be deemed just when, for each law, at least one government official affirms that it is just. On this reading, no single official need hold that all of the laws are just. It is sufficient if official justice claims overlap enough to encompass all of the laws. This is a possibility, though there is certainly no guarantee that every law will be affirmed as just. A potential problem is the possibility that some law may be deemed just by only one official, and rejected by one or more other officials. This issue falls under the heading of the Who problem.

Exactly how many government officials must make the justice claim? And what does it mean when government officials disagree over the justice of a particular law? Suppose, for the sake of argument, that it is necessary for members of the legislative branch to make the justice claim. (Leave aside for now the question of whether or not this is sufficient.) Must every member of the legislature make the justice claim? Is a simple majority sufficient? Is it enough if just one makes the claim?

On A2, the legal system as a whole is held “by officials” to be just, because at least one official affirms the justice of each and every law. But this means that for some laws, only one official may affirm it. This is a potential problem in conflict situations. Suppose one official affirms that a law is just, but another official rejects it. Could we



then hold that legal system LS1 as a whole is deemed just by government officials? This seems odd. We might amend A2 as follows:

A2.1. For each law Px in LS1, at least one official sincerely deems it just, and in no case do more officials reject any law than affirm it.

As a matter of social fact, A2.1 seems implausible. I think it likely that in every legal system at least some laws are rejected by more officials than affirm it as just, and this can change through time. If this is wrong, however, the modified A2 is a possible reading of the justice claim for whole legal systems. But suppose then that only one official does affirm the justice of a law, and the rest are not sure about it. Would this be enough to support the claimed legal and political obligations? I do not find this compelling. In a complex modern state, in which the government is comprised of many different officials, it hardly seems plausible to hold that the sincere belief of one official alone could generate the normative force necessary for legal and political obligation.

A3. An official sincerely believes that legal system LS1 is more just on balance than any available alternative legal system LSx.

On A3, a whole legal system is considered just by an official when she regards it as more just overall than any alternative legal system. That is, an official of LS1 considers it more just, on balance, than potential legal systems LS2, LS3, and so on, and so considers LS1 as a whole to be just. No one need claim that all of the laws are deemed

just. The claim is only that the legal system as a whole is regarded as more just than other alternatives. This seems like the most plausible interpretation of the claim that officials must affirm that the whole legal system is just. Nevertheless, it is not without problems.

One problem with A3 is that it is not inconsistent with the sincere belief that some particular law P1 of LS1 is not just. That is, an official can sincerely claim that a legal system LS1 is more just than any alternative, but still sincerely hold that policy P1 of LS1 is not just. She might hold that the reasons for thinking that LS1 is just (e.g., maximizing liberty) actually count against thinking that P1 is just (e.g., because it sacrifices certain freedoms for the sake of other goods). As we saw above in the discussion of A1, it is highly unlikely that any official will hold that every law in a legal system is just, even if he sincerely considers the legal system just overall. When an official considers LS1 just overall, but considers P1 unjust, does P1 have normative force? Since the official in question considers P1 unjust, there is no reason to think that it merits the moral respect of citizens.

B. Government officials claim particular laws Px of LS1 are just.

In contrast to A, which had officials claiming justice for the legal system as a whole, B has officials claiming that particular laws are just.

B1. Government officials claim this particular law P1 is just.

Who must make this claim? In a democracy like ours, for instance, must officials from all three branches affirm the justice of P1? Is it sufficient if the members of only one branch make the justice claim? If so, does it matter which branch?

How many must make this claim? Suppose, for the sake of argument, that members of the legislature must make the justice claim. It is implausible to hold that all of the members have to make the justice claim for P1. And as I suggested earlier, in complex societies like our own, we probably need more than one official to make the justice claim, if a particular law is to have the normative force necessary for legal and political obligation. But if one is too few, and all is too many, what number seems right?

On the face of it, it seems like a simple majority might be sufficient. However, this gets complicated in a two party system like our own. Imagine a situation in which Republicans effectively control Congress. For the sake of simplicity, I will focus only on the Senate, and posit that there are 55 Republicans and 45 Democrats. When the Republicans decide on a policy, they have the political muscle to enact it. Should we require that a simple majority of all Senators makes the justice claim (51), or is it enough if a simple majority of the controlling party's Senators make the claim (28)? Both options have problems.

One option requires a simple majority of all Senators (51). I will describe a scenario that is not uncommon but that reveals a potential problem with this simple majority reading. Suppose there are 55 Republicans and 45 Democrats. On certain important issues, e.g., gay marriage, different Republican and Democratic leaders will

propose different policies. That is, different Republican Senators may offer different proposals, PR1, PR2, and PR3, and different Democratic Senators may do the same, PD1, PD2, and PD3. The Republican Senators may be divided over the justice or moral merits of their three proposed laws: 20 favor PR1, 18 favor PR2, and 17 favor PR3. The Democratic Senators may be divided too. In this case, the Republican Senators are likely to settle on one of their own proposals, PR1, and put all of their support behind it, even if most of them do not think it is the just proposal. Why? Because the greater proportion of Republican Senators support it (20), and all of the Republican Senators are likely to feel it is better than any of the Democratic proposals. In this example, the law enacted, PR1, is not thought of as best for the community by most Senators, even Republicans. Does this law merit the moral respect of citizens? Can we say that a majority of Senators have affirmed it as just? I do not think so. Nevertheless, I do not think there is anything particularly morally suspect about the situation I have described, so I think we need to say laws produced this way are genuine laws with the normative force that entails. Thus, if B1 is the best way to read Soper's theory, there may be a problem.

These Who? and What? problems are complex and largely overlooked by Soper. Neither interpretation A nor B are free from problems, and it is not obvious that any interpretation is clearly superior to the others. Since Rawls draws on Soper, he faces similar problems. I will discuss Rawls's answers in the next chapter..

## From Respect to Obligation.

Soper argues that when officials sincerely claim that the law is just, citizens have a moral reason to respect the officials. This respect for officials in turn gives citizens a reason to do what officials want them to do, namely, obey the law. Some question this link.<sup>291</sup> Respect and obligation are clearly separable issues, so the move from one to the other needs defense. Those who act on sincere moral convictions plausibly deserve respect, but it is not obvious that this respect implies a duty to obey. In some cases, for instance, respect for moral sincerity might require only a less harsh response to those whose behavior we judge foolish or immoral, however sincere they may be. The mugger who steals to feed his family deserves less scorn than the one who does it to feed himself, but neither deserves to be obeyed. Lyons puts the challenge this way: “the kind of respect (if any) that a sincere champion of chattel slavery is due seems to provide me with no reason at all to respect (that is, to comply with) his slave laws.”<sup>292</sup>

Three points need to be made on Soper’s behalf. First, Soper’s notion of political obligation amounts to a weak *prima facie* moral reason for citizens to obey the government. It is not an absolute duty, or even a strong *prima facie* reason to act. Of course, it is still possible to question the link between respect and this weak sense of duty. They are separable issues. But Soper’s weak notion of duty lowers the burden of proof for him. It is easier to draw a connection between respect and a weak duty than it is to draw one between respect and a strong or absolute duty.

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<sup>291</sup> See, e.g., Lyons, “Soper’s Moral Conception,” 162.

<sup>292</sup> Lyons, “Soper’s Moral Conception,” 162.

Second, Soper does not assume that respect as such implies his weak duty to obey. Rather, he argues that certain social contexts make the move from respect to duty both natural and plausible. Soper is not talking about all relationships of respect and obligation, but the political relationship between government officials and citizens. He assumes as background context this conventional authority relationship, and wonders if this conventional relationship can be morally justified. He posits (a) a state with government officials who give orders backed by sanctions, and (b) citizens who think that these commands are “laws” that give them sound reason to obey the government, and asks when (if at all) this respectful attitude that citizens have toward law is morally sound? His answer is that this respect is morally justified when citizens have reason to think officials are honestly ruling in (what officials believe to be) the interests of all. This might be the wrong way to approach the problem of political obligation, but it is not the same as assuming that respect implies a duty to obey.

Third, Soper’s theory is context or culture sensitive. What can be sincerely affirmed in any society depends on the belief system of the people in question. Chattel slavery could not be sincerely held to be in the interest of slaves in any society, because it represents a condition no better for citizens than the state of nature. But some forms of slavery might be sincerely held to be just in some societies today. In a modern democratic society like our own, chattel slavery could not be sincerely held to be just. Our science clearly refutes crude determinist or racial arguments for natural superiority or inferiority for classes of people that were sometimes offered in the past as justification for slavery. And our deep moral commitments to the freedom and equality of persons also count against slavery. Thus, in a modern democracy like our own, no one could sincerely

hold that chattel slavery is just. But does this not contradict Soper's contention that sincere belief is not necessarily correct belief? No. It is true that sincerity does not depend on correctness, but there is a complex relationship between them. The greater the evidence against a position, the harder it becomes for anyone to maintain and demonstrate sincere belief in it. For example, a government official could maintain, against all evidence and reason, that a practice like chattel slavery is just, but this is less an example of sincerity than it is an example of dogmatic insistence. These are not the same thing. Sincerity requires a rational commitment to a position. What a person can rationally commit to depends in part on her society's belief system, on her society's views of the natural and moral world. This implies that where practices like slavery can be sincerely held to be just, there will be traditions of natural and moral inquiry that support the view. This does not mean they will not meet opposition, even in those societies. It does mean that possibility that slavery might be sincerely held to be just does not amount to an obvious reductio argument against his view.

Soper and Liberal Democracy.

There is one last issue I would like to take up. The question is whether or not Soper's view is adequate as a theory of political obligation for a liberal democratic society like our own. This is not so much a criticism as it is a reflection on the larger theme of the liberal hope of shared reason. Soper's view is generic and intended to apply to all societies with genuine legal systems. What does Soper's view imply for a liberal democratic society? To the best of my knowledge, Soper never explicitly addresses this

question.<sup>293</sup> But if we take what he says at face value, we can see how it might work. The key is that public officials must base their political activity on some considered conception of justice that is publicly available, that has some traction in their particular liberal democratic society. So, for instance, in the U.S. today we can imagine different officials acting on the basis of all sorts of different conceptions of justice, including utilitarian, explicitly liberal, libertarian, Marxist, socialist, and communitarian conceptions, and a variety of religious conceptions as well. There are resources in our public discourse that make it possible for someone to sincerely affirm many views that fall into any of these families of conceptions of justice. In fact, serious and thoughtful persons do offer sincere defenses of versions of all of these conceptions in an attempt to bring justice to our society. While it is clear that we can find defects in all of these views too, this is not the issue. What matters is that all of these conceptions are publicly available, and all of them give consideration to the interests of all citizens. Thus, a public official in the U.S. could sincerely affirm any of the above views as correct for us.

There is reason to worry about this. Even though Soper's view is a shared reason view, it may be inadequate as an account of the law's normative force in modern liberal democracies like the U.S. Soper's account of reciprocity and shared reason is very relaxed and open. This relaxed standard raises two kinds of worries in the liberal democratic context. First, Soper's view encourages and legitimates types of political behavior that some liberal theorists regard as forms of political domination. Second, it

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<sup>293</sup> In fact, Soper no longer affirms the view he developed in [A Theory of Law](#). His new view can be found in [The Ethics of Deference: Learning from Law's Morals](#) (Cambridge University Press, 2002). Interestingly, Rawls was much influenced by Soper's original account, and continued to apply it in his work even after Soper had moved away from it. Soper's influence on Rawls is explained in the next section.



authorizes or allows for illiberal political activity, or activity rooted in illiberal political views.

One worry is that Soper's view legitimates political behavior that some liberal theorists regard as forms of political domination. I have in mind the kind of complaints that (e.g.) Rawls, Nicholas Audi, and Amy Guttmann and Dennis Thompson make against political behavior that is ultimately rooted in controversial comprehensive understandings of the human good, such as religious views.<sup>294</sup> By permitting, e.g., religious government officials to ground political activity in controversial and comprehensive views taken from just any publicly available discourse or tradition, Soper leaves his view open to a number of criticisms, e.g., that it fails to respect the fact that other citizens can reasonably reject religious and other comprehensive views; that it does nothing to show citizens that official decisions are based on the merits of the various political views in question and not on the sheer bargaining power of the different parties; that it discourages truly public-spirited political activity; or that it does not promote mutually respectful decision-making processes. In essence, the worry is that Soper's view is so relaxed about shared reason and reciprocity, that it fails to properly constrain political behavior. This amounts to a kind of domination if (as Rawls, Audi, and Guttmann and Thompson argue) there are less controversial, more fully shared (or at least potentially shared) public reasons that officials can appeal to in politics. In Soper's defense, though, he does insist that political behavior must be rooted in some conception of justice. So e.g. religious citizens could not simply enforce their religious views as

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<sup>294</sup> See, e.g., Audi's contribution to Robert Audi and Nicholas Wolterstorff, Religion in the Public Square; Amy Guttmann and Dennis Thompson, Why Deliberative Democracy?; and Rawls, PL, pp. 212-254, and "The Idea of Public Reason Revisited," in LP, pp. 129-180.

such, but only conceptions of justice related to or based on those views. Further, on Soper's view religious citizens would not simply be exerting their will against others, but would be acting within constraints imposed by a common commitment to justice, similar to the way Hart's legislators are constrained by secondary rules.<sup>295</sup>

A second potential difficulty is that Soper's view allows for political action ultimately rooted in non-liberal or even illiberal views. Soper's view authorizes, e.g., official law-making aimed at realizing libertarian conceptions of justice. Rawls has argued that libertarianism is at best an impoverished form of liberalism, since, inter alia, it does not share liberalism's desire to prevent social and economic inequalities from becoming excessive.<sup>296</sup> (Libertarianism does not meet Rawls's more demanding understanding of shared reason and reciprocity, which I discuss in the next section.) Freeman has argued that libertarianism is illiberal because it sees political power as ultimately rooted in private contracts, and "rejects the idea, essential to liberalism, that political power is a public power, to be impartially exercised for the common good."<sup>297</sup> If Rawls and Freeman are correct, then we might regard Soper's generic view as inadequate to the needs of a liberal democracy, since it legitimates lawmaking aimed at realizing non-liberal (e.g., libertarian, Marxist, Christian, and so on) conceptions of justice.

If it turns out that Soper's generic view cannot be rescued from these problems, this does not necessarily mean that we ought to reject it, even as an account of the law's authority in a liberal democracy. It may simply turn out to be the best that we can hope

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<sup>295</sup> Whether this avoids the Mafia problem mentioned in note 17 is not clear.

<sup>296</sup> See e.g. Rawls, *LP*, p. 49.

<sup>297</sup> Samuel Freeman, "Illiberal Libertarians: Why Libertarianism is Not a Liberal View," *Philosophy and Public Affairs*, v. 30 (2002), p. 107.

for from any view that takes seriously both respect for individual judgment and reasonable disagreement. But if Soper's view represents the best that shared reason can do in the face of such disagreements, the liberal political project as many understand it may have reached its end. Shared reason may prove inadequate to securing and promoting a liberal society.

Hart, Soper and Rawls.

Rawls was influenced by both Hart and Soper. In The Law of Peoples, Rawls argues that certain non-democratic, non-liberal constitutional republics ("decent" societies) deserve full and good standing in the international community.<sup>298</sup> Decent societies meet enough conditions of right and justice to merit the respect of liberal democracies and the right to self-determination, to be free from the interference of other societies. One condition of decency is that a society's system of law imposes genuine moral duties and obligations on citizens.<sup>299</sup> An early version of this idea appears in Political Liberalism.<sup>300</sup> There Rawls says that in order to be viable, the legal system of a decent society must be guided by something like Soper's common good idea of justice, coupled with either Hart's minimum content of natural law or Soper's natural rights to security, formal justice, and discourse. Later, in The Law of Peoples, Rawls mentions only Soper's ideas. Rawls's liberal principle of legitimacy can be understood as an application of Soper's generic account of legal and political obligation to the context of

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<sup>298</sup> Rawls, The Law of Peoples.

<sup>299</sup> Rawls, The Law of Peoples, pp. 65-6, especially footnote 5.

<sup>300</sup> Rawls, Political Liberalism, pp. 109-10, especially footnote 15.

democratic political culture. A large part of Rawls's liberal project is aimed at providing the background context against which sincerity can be judged. Rawls's liberal legitimacy is the subject of the next chapter.

While Rawls clearly draws inspiration from Hart and Soper, he does not offer a definition of law. He rejects Soper's claim that the sincerity condition and its implied natural rights define law proper, and says he does not want to argue that entities like the antebellum South did not have legal systems. But Rawls does seem to regard Soper's theory as an adequate account of the class of laws that do give rise to obligations, regardless of whether it adequately defines law as such. Rawls actually leaves open the question of whether some command that does not give rise to obligations might properly be called law. Soper makes the same move in a paper published soon after A Theory of Law.<sup>301</sup> He scales back his goal, from defining law as such, to accounting for the class of obligation producing laws. It is not clear if either Rawls or Soper was aware of this parallel move.

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<sup>301</sup> Philip Soper, "The Obligation to Obey the Law," in Ruth Gavison, ed., Issues in Contemporary Legal Theory: The Influence of H. L. A. Hart (Oxford: Clarendon Press, 1987), 127-55.

## CHAPTER 4

### RAWLS

In the 1960's, Rawls affirmed a fair play account of political obligation. By the 1970's, he had rejected this view and replaced it with his natural duty of justice. By the 1990's, when he published Political Liberalism (hereafter PL) his natural duty of justice had given way to the liberal principle of legitimacy. This chapter develops and evaluates an exegetically sound interpretation of this principle and its role in Rawls's political liberalism. Theories of legitimacy account for or justify a government's claimed right to coercively enforce laws against citizens, and any duties citizens may have to acquiesce or defer to the government when it seeks to exercise this right. Rawls's theory is aimed at accounting for legitimacy in modern pluralist democracies like our own. It is not a theory of legitimate state power as such, but of the legitimate power of this one kind of state.

Hart, Soper, and Rawls.

Rawls holds, like Hart and Soper, that political institutions and practices must be governed by rules, if they are to be just or legitimate. Rules are a necessary restraint on the arbitrary use of political power, and are an essential element of constitutional government. A fundamental organizing idea in Rawls's political liberalism is the idea that society is a fair system of cooperation over time.<sup>302</sup> For Rawls, this means more than just that cooperation among citizens is effectively coordinated by some ruler. It means

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<sup>302</sup> See, e.g., PL, pp. 15-18.

that cooperation among citizens is structured by rules that citizens publicly recognize as mutually advantageous and as properly governing their coordinated behavior.

Rawls's commitment to rules is evident in his appeals to a constitutional form of government. The term "constitution" has two meanings.<sup>303</sup> It may refer to a text, to some written document that proclaims certain fundamental social rules. The U.S. has a constitution in this sense, while England does not. And it has a prior, deeper meaning, which Samuel Freeman calls its "institutional" sense.<sup>304</sup> In this institutional sense, a constitution is a set of fundamental, shared rules for making and applying laws. In this respect, institutional constitutions are very much like Hart's secondary practice rules. An institutional constitution is a set of behavioral standards internalized by citizens, and used by them as a guide in political interaction. These fundamental norms define the offices and positions of political authority in a political system, their qualifications, rights, powers, duties, and so on, and the procedures for making, applying and enforcing laws. Constitutions may be written when no institutional constitution exists, but these often have little purchase on those whose behavior they are meant to guide.<sup>305</sup> The most effective written constitutions proclaim important social norms shared by the writers and those they represent. Both the U.S. and England have institutional constitutions. Institutional constitutions do several things. Most importantly, they restrict the arbitrary rule of leaders.

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<sup>303</sup> Samuel Freeman, "Original Meaning, Democratic Interpretation, and the Constitution," Philosophy and Public Affairs, v. 21 (1992), pp. 3-42.

<sup>304</sup> Freeman, "Original Meaning," p. 6.

<sup>305</sup> This is one reason why it is important to include all major social and religious groups in the current effort to produce a constitution for Iraq. Of course, any group that simply rejects constitutionalism may and probably should be excluded. We should separate the question of how those who affirm the rule of law ought to organize their political society from the question of how they as a political society ought to structure their interactions with those who reject the rule of law.

But Rawls follows Soper in rejecting Hart's purely procedural or pedigree account of legal normativity. Instead, Rawls accepts the broad strokes of Soper's generic account of legal and political obligation, which holds that the law has genuine normative force only if it is sincerely held to be just by government officials. In his political liberalism, Rawls applies Soper's generic account to the context of liberal democratic political culture. In liberal democracies, citizens regard each other as the free and equal co-authors of their law.<sup>306</sup> The state's power is public power, the power of free and equal citizens as a collective body. For Rawls, then, the law has genuine normative force only when it is consistent with an account of justice that all citizens could reasonably affirm.

But Rawls rejects Soper's notion of political obligation. Rawls holds that obligations can only be generated through voluntary acts, but since political society is closed—we enter at birth and leave only when we die—citizens cannot have political obligations.<sup>307</sup> Critics like Simmons would complain that Rawls assumes too much here.<sup>308</sup> Simmons chastises theorists who assume that membership in political society is a social or political fact about persons, because this is one of the more hotly contested issues in traditional debates about political obligation.<sup>309</sup> No answer should be assumed without explanation or defense. But Rawls and Hume have got it right: the state's authority cannot be freely accepted, because “the bonds of society and culture, of history

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<sup>306</sup> PL, p. 136, 217.

<sup>307</sup> PL, p. 136, 217.

<sup>308</sup> See, e.g., A. John Simmons, “Associative Political Obligations,” Ethics, v. 106, 1996, pp. 247-273.

<sup>309</sup> Some philosophers, such as Soper and Rawls, assume that (nearly) all individuals are in fact members of some political association, such as a state, and see the primary task of political philosophy to be accounting for or making sense of this fact. From this perspective, membership is a basic fact about people that needs to be explained. Other philosophers, like Simmons and Wolff, assume that all individuals are initially free from all political associations, that we all start in the state of nature, and that no one is a member of a political association until she joins one. From this perspective, the primary task of political philosophy is explaining why someone would join such an association, and what constitutes the act of “joining.”

and social place of origin, begin so early to shape our life and are normally so strong.”<sup>310</sup>

Not even a right of emigration could change the fact that leaving one’s nation is a “grave step” that involves

leaving the society and culture in which we have been raised, the society and culture whose language we use in speech and thought to express and understand ourselves, our aims, goals, and values; the society and culture whose history, customs and conventions we depend on to find our place in our social world. In large part we affirm this society and culture, having an intimate and inexpressible knowledge of it, even though much of it we may question and even reject.<sup>311</sup>

Membership in political society is not a choice. For Rawls, this means there is no point in talking about political obligation as such. Instead, he offers an account of legitimacy. Whether or not citizens have an obligation to obey the law, it is still important to try to understand the conditions under which it would be appropriate for the state to use its power to coercively enforce laws against citizens.

The conditions outlined in Soper’s account of political obligation cannot generate obligations, according to Rawls, because obligations require voluntary commitment. But here we might borrow a page from Finnis and Soper. Finnis and Soper are not comfortable rejecting the correlativity thesis, because any conditions that would account for political obligation should also provide justification for the state’s use of force, and vice versa. Finnis and Soper are wrong about the correlativity thesis, but there is something to be said for their observation. The interesting insight is that an account of

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<sup>310</sup> Rawls, Justice as Fairness (Cambridge, Ma.: Harvard University Press, 2001), p. 94. Hereafter JF.

<sup>311</sup> JF, p. 94.



political obligation might also work, and might even work better, as an account of political legitimacy. And the proper correlate of legitimacy (as a justification right) is not the duty to obey, but the duty to defer. So Rawls might think that, even though Soper's account cannot explain political obligations (because they don't exist), it could still account for the state's legitimacy right, and the citizen's correlative duty to defer to the state.

Thus, I argue, one way of understanding much of Rawls's post-1980 work on political liberalism is to see it as an effort to explain what it means for democratic citizens, in their common role as public officials who jointly co-author their law, to evince a sincere commitment to the justice of their constitution. Rawls's work describes what might be thought of as Soperian "sincerity conditions" applicable to modern pluralist democracies. But these conditions no longer explain a citizen's duty to obey the government; instead they account for the state's right to use its power against citizens.

Both Soper and Rawls hold that the law has genuine normative force only when those responsible for it sincerely hold that the law is just. Soper is careful to avoid saying too much about justice. He makes no claim about what problems it might solve, or about what its basic subject might be. One reason for this is that he wants his account of obligation to be generic, to apply to all societies with genuine legal systems. He does not want to bias his account toward any particular sort of society, so he remains largely agnostic about the nature of justice. He also wants to respect what I call good faith disagreements about it. Every society's tradition of political thought contains a plurality of views about justice and the common good, and in every society, people disagree in good faith about which of the various publicly available accounts of justice is most

appropriate for them. Thus, Soper intends his view to respect both inter- and intra-cultural disagreements about justice. This does not mean that Soper thinks that, say, something like Apartheid would be just, according to our modern liberal democratic political values. He simply does not want to presume that only liberal democracies have genuine legal orders. Soper offers just two minimal conditions of justice: no official can sincerely hold that terms of political association are just for some citizen if those terms of association ignore altogether or threaten (what the official sincerely believes to be) the interests of that citizen; and no terms of association can be considered just if they cannot reasonably be linked to some publicly available political discourse. The interests of all citizens (as these are understood by officials) must be taken into account, at least in some minimal way, if citizens generally are going to have political obligations. Further, they must see that officials are not acting solely on the basis of self-interest, and are instead acting on the basis of ideas about justice that have some weight in their culture.

Rawls applies Soper's generic account to a specific cultural and political context: modern liberal democracies. He has a well-developed and fairly specific understanding of the nature of justice in this context, which forms the heart of his political liberalism.

From TJ to PL: Rawls's Turn to Legitimacy.

Rawls holds that liberal democracies are constituted by citizens who share a commitment to democracy, but who cannot resolve their political differences, or even find mutual understanding, in terms of their irreconcilable religious, moral and

philosophical understandings of the good for human beings.<sup>312</sup> This situation—the condition of reasonable pluralism—raises three fundamental political problems: how can citizens so divided constitute themselves as a democratic body politic that is (a) just, (b) legitimate, and (c) stable? Over the course of his career, Rawls proposed solutions to all of these problems. In A Theory of Justice (hereafter TJ), his first sustained effort to answer them, he develops and defends an answer to (a) that he calls “justice as fairness.”<sup>313</sup> Not long after he finished TJ, he realized that the work contained a serious flaw. Roughly put, in answering (b) and (c) in TJ, Rawls assumed that citizens raised in a society organized by justice as fairness would eventually converge on a Kantian moral outlook, and that everyone would eventually come to see internalizing and acting from justice as fairness as a component of his or her own good, as a bit of self-realization as an autonomous being.<sup>314</sup>

In TJ, after Rawls generated the two principles of justice as fairness, he wanted to show that a society guided by them would become stable for the right reasons, that is, that they could effectively regulate society if publicly affirmed by most reasonable citizens. So he tried to show that citizens have a duty to obey the laws of their just regime, and can reasonably be expected to have motivation to live up to their duties. He offered his “principles of natural duty” and “fair play” arguments to solve the first part of the problem.<sup>315</sup> He offered the so-called “congruence argument” in Part III of TJ to solve the second part. In this congruence argument Rawls assumed citizens raised under just

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<sup>312</sup> Rawls recognizes that some individuals in every liberal democracy reject democracy. He calls these people unreasonable and says we need to “bracket” them, to keep them from disrupting our society.

<sup>313</sup> Rawls, TJ.

<sup>314</sup> This is the subject of Part III of TJ.

<sup>315</sup> See TJ, chapter VI, sections 51-52.

institutions would converge on a Kantian comprehensive doctrine and come to see doing justice as part of their own good. Thus, he claimed, citizens can be expected to voluntarily comply with the law. But by 1980, Rawls realized the congruence argument was flawed and rejected it. There is no reason to expect citizens raised under liberal institutions shaped by even justice as fairness to converge on any single comprehensive doctrine, let alone Rawls's favored Kantian moral outlook. Once Rawls recognized the true problem presented by reasonable disagreement, he faced a much more serious problem than the one he dealt with in TJ.

Reasonable disagreement allows citizens to affirm comprehensive doctrines that do not make Rawlsian (or any other notion of) self-realization as an autonomous being a part of the human good. Thus, for some reasonable citizens the human good is completely distinct from self-realization or even the realization of justice in society. Further, while Rawls recognized in TJ that citizens could reasonably disagree over whether or not justice as fairness was the most appropriate understanding of justice for a liberal democracy, he did not seem to think that (many) citizens would disagree, especially once they had converged on his favored Kantian moral outlook.<sup>316</sup> But once he gives up the convergence argument, reasonable disagreement about justice as fairness becomes much more likely. At this point Rawls had to find new answers to (b) and (c). Under what conditions would it be legitimate to enforce something like justice as fairness, given that citizens may reasonably reject it as an account of justice? And, given

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<sup>316</sup> Citizens would likely disagree about exactly how to apply justice as fairness to their political institutions, but they would not disagree about whether justice as fairness was the most appropriate account of justice for a liberal democratic society.

the likelihood of such reasonable dissent, would a society organized around justice as fairness prove stable through time? These issues are at the heart of PL.

But very few seem to understand Rawls's post-1980 work. Rawls certainly shares some of the blame for this. PL is a difficult book to read, largely because Rawls is not very clear in the body of this work about his aims. This is partly due to the fact that the book was composed of lectures and papers written separately and at different times in Rawls's career. Nevertheless, one of his principle aims is showing what legitimacy requires, and demonstrating that justice as fairness meets these requirements.<sup>317</sup> His theory of legitimacy has been the subject of a great deal of confusion. In fact, a common but incorrect reading of Rawlsian legitimacy has taken on a life of its own. I will explain and reject this reading later in the chapter. Much of this confusion can be traced to the fact that the theory of legitimacy is presented in the broad strokes in PL, but it is not fully worked out there. Rawls continues to develop it through time, and though he never radically revises it, it finds its most complete expression only in his later works.

Two often overlooked keys to understanding the project of PL are the "Introduction to the Paperback Edition" and the "Reply to Habermas."<sup>318</sup> Burton Dreben claims these additions are so important to understanding Rawls's project in PL, that we are warranted in thinking of the paperback edition, published in 1996, as a *second edition* of the hardback edition, published in 1993.<sup>319</sup> These additions provide a context for the

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<sup>317</sup> One might wonder, then, why Rawls spends so much time talking about justice as fairness in PL, and comparatively little time on legitimacy. The short answer is that while his theory of legitimacy is fairly straightforward, showing that some principles of justice (e.g., his two principles,) meet the demands of legitimacy is a major undertaking. This will become clear as my exposition of Rawls's theory develops.

<sup>318</sup> See PL, "Introduction to the Paperback Edition," pp. xxxvii-lxii, and "Reply to Habermas," pp. 372-434.

<sup>319</sup> Burton Dreben, "On Rawls and Political Liberalism," p. 320

body of PL that, on Dreben's view, modifies the basic thrust or emphasis of the main arguments in it. Whether these additions are meant to alter the meaning of the text, or simply to provide proper context for its main parts, it is clear that PL cannot be understood without them. The hardback edition of PL is, in this sense at least, incomplete. In any case, PL is decidedly not a second or revised edition of TJ; the goals and methods of these works are simply very different. A third oft-overlooked but essential key to understanding Rawls's post-1980 work is "The Idea of Public Reason Revisited" (hereafter IPRR).<sup>320</sup> It is here that Rawls gives his most complete account of his theory of political legitimacy.<sup>321</sup>

But I am getting ahead of myself again. In the next section I want to describe the basic problem that Rawls intends his political liberalism to solve. This will clarify Rawls's understanding of the problem of legitimacy.

#### Political Liberalism and Reasonable Pluralism.

Rawls's political liberalism is not an effort to justify constitutional democracy as such.<sup>322</sup> In neither TJ nor PL does he make any effort to defend democracy against those critics who reject it. His work is more practical than this. It is aimed at solving a particular set of political problems that arises within the liberal democratic state for citizens whose particular and diverse understandings of the good are not in conflict with

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<sup>320</sup> IPRR, pp. 129-180.

<sup>321</sup> LP, p. vi.

<sup>322</sup> See, e.g., Dreben, "On Rawls and Political Liberalism," p. 323; and Christine M. Korsgaard, "Realism and Constructivism in Twentieth-Century Moral Philosophy," Philosophy in America at the Turn of the Century, p. 112-115.

the essentials of democratic government.<sup>323</sup> To use Rawls's language, political liberalism addresses only "reasonable" citizens. Reasonable citizens are divided by their particular moral, philosophical, and religious commitments, but they are united insofar as their different conceptions of the good are not in conflict with the essentials of constitutional democracy. Rawls's overarching goal in PL is to show this diverse group of citizens how they might constitute themselves as a just, legitimate, and stable body politic, despite the irreconcilable disagreements about the good that divide them.

A reasonable citizen affirms what Rawls calls a reasonable comprehensive doctrine (RCD).<sup>324</sup> RCD's have four main traits:

- (a) "Theoretical reason." A person's RCD expresses a more or less consistent and coherent account of value for human beings, covering the important religious, philosophical, and moral aspects of human life.<sup>325</sup>
- (b) "Practical reason." A person's RCD, in singling out human values and ordering them when they conflict, provides practical guidance through life.<sup>326</sup>
- (c) Tradition. Most RCD's belong to and draw on some major religious, moral, or philosophical tradition. They are not fixed, but tend to evolve slowly.<sup>327</sup>
- (d) Democratic. RCD's are consistent with the essentials of constitutional democracy and the idea of legitimate law.<sup>328</sup> Comprehensive doctrines not consistent with

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<sup>323</sup> Rawls says he is working on "long recognized questions" that to some "seem more political than philosophical." But he is not overly worried about this, because "it doesn't matter which we say, so long as we recognize the nature of the questions." See PL, p. xli.

<sup>324</sup> PL, p. 59.

<sup>325</sup> PL, p. 59.

<sup>326</sup> PL, p. 59.

<sup>327</sup> PL, p. 59.

<sup>328</sup> PL, pp. xviii-xix; IPRR, p. 132: "The basic requirement is that a reasonable doctrine accepts a constitutional democratic regime and its companion idea of legitimate law."

these essentials are not reasonable. This does not mean that comprehensive doctrines need to be democratic (in fact, most won't be); they simply must not be in conflict with democracy.

To summarize, a reasonable comprehensive doctrine is a broad conception of the good for human beings that is consistent with the idea of legitimate democratic government.

There has been some confusion in the literature over the nature of Rawls's RCD's, for which Rawls shares some of the blame. Rawls describes the first three traits (a-c) in the body of PL. But the fourth trait (d) does not appear in the body with (a-c). Trait (d) appears in the "Introduction" to the first edition of PL, and in various places in IPRR (Rawls's revised account of public reason). This has hindered discussion of PL. For example, in a well-regarded and much-read paper, Leif Wenar rejects Rawls's characterization of reasonable comprehensive doctrines as "unsuccessful" because it fails to rule out comprehensive doctrines that Rawls clearly regards as unreasonable, such as Muslim fundamentalism, white supremacy, and rational egoism.<sup>329</sup> The problem with Wenar's objection is that he thinks RCD's are fully characterized by traits (a-c) alone. This is not correct as an interpretation of Rawls. Thus Wenar's criticism fails because it is based on an incomplete account of Rawls's idea.

Traits (a-c) are distinct in ways from trait (d). Traits (a-c) appeal to one sense of reasonable, and focus primarily on the life of an individual person. RCD's are efforts at theoretical and practical reason, drawn from some tradition of moral, religious, or philosophical thought. They represent our efforts to make rational sense of our individual

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<sup>329</sup> Leif Wenar, "Political Liberalism: An Internal Critique," Ethics, v. 106 (1995), pp. 35-6. This paper is included in The Philosopher's Annual, v. 18 (1996) as one of the 10 best articles published in philosophy in 1995.



lives.<sup>330</sup> In this way, at least, Muslim fundamentalism, rational egoism, and even white supremacy (reprehensible though it is) can be regarded as reasonable. Characteristic (d) invokes something different. Here “reasonable” has less to do with thinking as such, or with practical guidance for some individual, and more to do with political cooperation or fairness in a society of individuals. Further, it suggests that there is a tradition we might draw on for some understanding of how we ought to cooperate in this society that is distinct from the traditions drawn on by traits (a-c).

In a way, Wenar’s complaint shows that he does not recognize the limited and practical nature of Rawls’s political liberalism. The problem that Rawls is trying to solve in PL is this: how is it possible for persons who might affirm democracy, but who are deeply divided by their different comprehensive doctrines, to constitute themselves as a just, legitimate, and stable democratic society? Traits (a-c) can be seen as fully characterizing reasonable comprehensive doctrines, only when they are seen in the context of this practical problem that Rawls tries to solve in PL. Trait (d) puts traits (a-c) in the proper context. For Rawls, the possibility that a person might commit to constitutional democracy is part of the very idea of a reasonable person in democratic societies like our own.

The distinction between traits (a-c) and trait (d) mirrors Rawls’s belief that each democratic citizen is partly the product of some particular moral, philosophical, or religious tradition, but also partly the product of a democratic political culture. Our particular moral, philosophical, and religious views divide us, while our shared

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<sup>330</sup> This does not rule out the possibility that some person might think his individual good is, in fact, identical with his community’s good. It is just that each person must make this determination on his own.

democratic political culture unites us. The reasonable citizen is, of course, an ideal, but it is an ideal that Rawls thinks that “you and I, here and now”—real democratic citizens in real democratic societies—hope to realize. The way we realize such an ideal is to figure out just what it commits us to, and then to start living up to those commitments.

Rawls recognizes, of course, that every society contains people who hold unreasonable, irrational, or even mad comprehensive doctrines, but these people present a different kind of problem for reasonable persons: the issue is not how we might see unreasonable persons as cooperative members of democratic society, but rather how “to contain them so that they do not undermine the unity and justice of a society.”<sup>331</sup> A democratic society is constituted as a body politic, as a set of social and political institutions, by citizens who share fundamental political values. This is the root or institutional meaning of constitutionalism. As reasonable citizens work to constitute themselves as a just, legitimate, and stable democratic body politic, they need not consult those who reject their democratic values. Such communication would serve no real purpose.<sup>332</sup>

In the same way that Rawls distinguishes comprehensive doctrines with traits (a-c) alone from those with traits (a-d), he also distinguishes pluralism as such from

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<sup>331</sup> PL, pp. xviii-xix.

<sup>332</sup> Richard Rorty says something similar in his defense of “solidarity” in Objectivity, Relativism and Truth (New York: Cambridge University Press, 1991), p. 30. We have to be “ethnocentric” about value, he argues, because useful conversation about values is only possible with others who share a certain amount of our beliefs. Here he draws on Bernard Williams’s distinction between “genuine confrontation” and “notional confrontation” (Moral Luck, New York: Cambridge University Press, 1981, p. 142). Notional confrontation is the kind that occurs between modern liberal democratic citizens and members of primitive tribes. Their belief systems do not represent “real options” for us, according to Williams. Genuine confrontation occurs only when there is some significant overlap in belief systems. Rorty ultimately rejects Williams’s relativism, but otherwise finds this point enlightening.

reasonable pluralism.<sup>333</sup> In a free society, we expect a variety of comprehensive doctrines to develop. What impresses Rawls is that “... among the views that develop are a diversity of reasonable comprehensive doctrines” (my emphasis). That is, in a free society, many views develop, some of which are reasonable. “These [reasonable ones] are the doctrines that reasonable citizens affirm and that political liberalism must address.” So “pluralism as such” refers to the totality of comprehensive doctrines that develop in a free society. (This might be what I call good faith pluralism in the Preface.) “Reasonable pluralism” refers to a subset of that totality, which Rawls defines as those doctrines that are not inconsistent with democracy (at least, this makes his use of “reasonable” here consistent with his use of it when identifying certain normatively significant comprehensive doctrines).

Political liberalism (the book and the theory) is about how reasonable citizens, those holding reasonable comprehensive doctrines—i.e., those persons who hold comprehensive doctrines not inconsistent with the essentials of constitutional democracy—can constitute themselves as a stable, (nearly) just, and legitimate democratic society, despite the fact that they don’t share a comprehensive view. Political liberalism is about politically managing reasonable pluralism, not pluralism as such. PL has little or nothing to say about unreasonable people, except that they must be “contained” to protect “the unity and justice of society.”<sup>334</sup>

I think there is a kind of “Lockean” moment here for Rawls. Locke develops a two-stage account of the formation of civil society in the Second Treatise. For Locke, a

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<sup>333</sup> E.g., PL, p. 36.

<sup>334</sup> PL, p. xix.

“community” is formed when persons, wishing to leave the state of nature, agree to transfer some of their individual rights to the collective comprised by those entering the compact. In essence, each person voluntarily gives up individual control of certain natural powers for an equal share in the joint of control of the community’s pooled power. The formation of this community requires unanimous consent. It is comprised only of people who choose to be part of it. (Locke’s appeal to tacit consent in this context does present certain problems for this account.) But this community is not yet a state. In the second stage, the members of the community must develop a constitutional form of government that can remedy the problems associated with the state of nature. (If joining a political community were not preferable in some way to living in the state of nature, no one would join.) Those who have agreed to form a political community will disagree over what form their government should take, so, after discussion, they will vote and the majority decision will settle the issue. On Locke’s view, those who agreed to the initial compact have implicitly agreed to be bound by the majority decision on what form of government to have.

Rawls does something similar. Each person must reflect on his or her comprehensive doctrine, and decide whether they can accept democracy or not. Some will find their doctrines incompatible with democracy. Rawls calls them unreasonable. When these individuals judge their comprehensive doctrines to be inconsistent with democracy, they basically remove themselves from the democratic community. Rawls does not think those committed to democracy need to consult those who reject it, when they are trying to settle the question of what democratic institutions ought to govern their democratic political relations. Other people will find their doctrines compatible with

democracy. Rawls calls these people reasonable. Here, I think, is the formation of something analogous to the Lockean pre-state “community.” That is, in our society, some people agree that democracy is consistent with their comprehensive doctrines. These reasonable people come together to constitute themselves as a democratic society. Rawls must believe most members of actual democratic societies will (or could) find their comprehensive views compatible with democracy, or else there would be little point to his political liberalism, even as ideal theory. It is not a philosophy of the minority, but an effort to come to grips with the political problems faced by the bulk of the members of any actual democratic political community. The trick is showing this society of reasonable citizens how they might have a just, legitimate, and stable government, when they do not share a comprehensive view. Here Rawls must develop something like Locke’s second stage. And while unreasonable persons almost always live in the same territory with reasonable persons, the unreasonable are not part of the democratic community, in the sense that they are not part of a community of value (though of course the unreasonable have the full slate of rights and so on).

According to Dreben, Rawls has no interest in arguing against those who reject democracy, nor any interest in consulting them or considering their views when discussing what democracy entails or requires.<sup>335</sup> Rawls takes democracy as a given, and tries to see if it can work, given the fact that the people committed to it do not share a comprehensive view. Dreben notes Rawls’s emphasis on our “working out” or “working through” notions implicit in the tradition of democratic thought that is publicly available

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<sup>335</sup> Burton Dreben, “On Rawls and Political Liberalism,” p. 323.

to citizens, and which most of them have some familiarity with.<sup>336</sup> Rawls does not argue for this democratic tradition, but instead intends to see what it leads to. He is not trying to justify liberal democracy, but is instead trying to see how it might work, and what it demands of us.

My reading of Rawls's aims may leave some readers cold. If reasonable pluralism is defined as consistent with democracy, how is it a problem? To some, the project will now seem less ambitious, and less interesting, than it is generally understood to be. Nevertheless, I believe that Rawls has the aims that I have described. As I have indicated above, political communities are quite literally constituted through the shared commitments of individuals. Rawls restricts political liberalism to his understanding of the community of the "reasonable." I think there are reasons to question his understanding of this community. In my view, Rawls may have restricted the community too much. I will explain this later. In any case, even if Rawls's project is limited in the way I've suggested, many serious problems still remain. First, he has to explain to citizens when it is and is not appropriate to appeal to RCD's in political debate. Our RCD's describe some of our deepest value commitments, so it will be natural for citizens to want to appeal to them when disagreements arise over what justice requires, especially when it is not clear what our democratic political values are, or how they apply to some question. Rawls has to explain why citizens ought to resist the natural urge to fall back on RCD's, and why citizens must forge ahead with political values, as difficult as this may be. Second, he has to say something about how citizens can appeal to their political culture. It is one thing to claim that we share some democratic political culture, and an

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<sup>336</sup> See, e.g., PL, p. 14.

altogether different thing to explain what exactly this amounts to. At first glance, the political culture of any liberal democracy seems to be an incoherent mix of competing ideas. Rawls admits as much, but holds that if we look deeper, we can see that certain shared political commitments are implied in these public political debates, e.g., freedom, equality, the common good, and so on. What we need, according to Rawls, is an (“Dworkinian”) interpretation of our political practice that shows it in its best light, that shows how it is organized around important shared political norms, and, perhaps most importantly, that shows how this interpretation of our political practice fits into a compelling account of our moral self-understanding. This is no easy task, and it is made more difficult by a third problem, “liberal” pluralism.<sup>337</sup>

So far I have just talked about reasonable pluralism, but another problem is raised by “liberal” pluralism. The burdens of judgment (described in the Preface) apply paradigmatically to disagreements over comprehensive doctrines, but they also apply to disagreements over political matters. Even if, as Rawls insists, we share a democratic political culture, we should not expect that citizens will converge on a single understanding of that culture. Rawls thinks that the best interpretation of our political practice is captured by what he refers to as a family of liberal views. These views share certain important features, but it is impossible to publicly justify one as uniquely correct. There will always be reasonable disagreements about political matters, even between the members of this liberal family. Explaining how we might manage liberal pluralism is another difficult task that Rawls faces.

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<sup>337</sup> I borrow the phrase “liberal pluralism” from Dreben.

So even my stripped down version of Rawls's political liberalism leaves Rawls, and democratic citizens, with several serious problems. When and why is it appropriate to restrict appeals to RCD's in political debate? What are the values implicit in democratic political culture? How can we determine what the values are? How should we put these ideas together to solve our political problems? How do we manage liberal pluralism? What are we to make of these reasonable disagreements about political matters? How could any particular constitutional order be considered just, legitimate, or stable under these conditions?

Reasonable Citizens, RCD's, and Shared Democratic Values.

The fundamental political problems that reasonable citizens face are how to constitute themselves as a just, legitimate, and stable democratic body politic. According to Rawls, they must find basic terms of political association that all could accept as appropriately explicating the various rights, liberties, and opportunities of liberal democratic citizens. Reasonable pluralism prevents citizens from basing such terms of association solely on one RCD. Reasonable citizens understand the burdens of judgment (described in the Preface) and accept their consequences for the legitimate use of public power.<sup>338</sup> One consequence of the burdens is simply the fact of reasonable pluralism itself. The free exercise of human reason, even under a just and democratic regime, does not lead to convergence on one RCD, but instead leads inevitably to a plurality of often

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<sup>338</sup> See, e.g., PL, p. 36-8.



irreconcilable RCD's.<sup>339</sup> This is not an accident of history, but a permanent fact about societies with free and open social institutions. It is not an “unfortunate condition,” but is simply the result of the free exercise of human reason. A second consequence of the burdens is what Rawls calls the fact of oppression. The only way we could get all citizens to affirm one RCD is through the oppressive use of state power. If political society requires that all citizens share one RCD, then political society requires oppressive state power. The only way to have a political community that rests on one doctrine—even liberal Kantian or Millian doctrines—would be to impose that doctrine on all with the state's might. Unless the free exercise of human reason is suppressed, divergent views will develop.

Reasonable citizens do not agree on the truth of any particular religious, moral, or philosophical doctrine. They do not agree, for instance, that just terms of association can be found in the Christian Bible, or that we have access to an independent moral order that we can use to produce such terms. As a result, reasonable citizens will not insist that their own favored RCD should structure their political society. To insist on this is to be unreasonable. Acceptance of the burdens lead to a kind of toleration.<sup>340</sup> Reasonable citizens recognize the fact of reasonable pluralism. They do not view this with suspicion, but see it a natural result of the difficulties involved in human judgments regarding especially questions that involve judgments about complex empirical matters and abstract values. Reasonable citizens recognize that the burdens affect everyone equally. All are subject to these problems. Reasonable citizens believe that their RCD's are probably

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<sup>339</sup> This is where Rawls eventually thinks he goes wrong in *TJ*. There he assumes that citizens raised under just democratic institutions (i.e., structured by his “justice as fairness”) will eventually converge on a Kantian RCD. This assumption, he later sees, is unreasonable.

<sup>340</sup> See, e.g., *PL*, pp. 58-61.

true, but they recognize that everyone else feels the same way. Almost all reasonable citizens think their RCD's are true. But since there are no generally agreed upon standards for determining the truth or falsity of comprehensive doctrines, it is clear that no comprehensive doctrine has any particular claim on people generally. No shared dictates of reason require citizens to believe any specific comprehensive doctrine. Given this, reasonable citizens regard people who insist that fundamental political issues be resolved in terms of the own favored comprehensive doctrine as unreasonable, not because they believe that their view is true—most of us do—but because these people fail to appreciate the burdens and the limits this places on what can be justified to others generally. Reasonable citizens thus understand that their RCD's cannot serve as the basis for public justification of political decisions on fundamental issues.<sup>341</sup>

There seems to be an important difference here between Rawls's and Soper's shared reason views. Soper's understanding of "publicly available" reasons is much broader than Rawls's. For Soper, an RCD itself may be publicly available, if it can be demonstrably and not unreasonably linked to some current tradition or discourse. If the RCD contains (resources for) a conception of justice, Soper holds that it could generate genuine legal and political obligations. For example, on Soper's view a Christian conception of justice could be sincerely held to be just by a liberal democratic public official, since there is a viable and current tradition of Christian political thought, as long as the Christian political view in question respects the interests of all in some way. If these conditions are met, our Christian politician could base his political activity solely on what Rawls regards as a comprehensive view, without this interfering with the law's

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<sup>341</sup> See, e.g., PL, p. 8, 14, 25, 43, 175.

normativity. For Soper, reciprocity in justification requires only that public officials can say to citizens, “people relevantly similar to you—some of your fellow citizens—actually do affirm this view, so it is possible that you could too (even if, in fact, you don’t).” Soper sees just about everything in a culture as publicly available, as long as it is part of a discourse or tradition of thought that remains current, that still carries some weight. He does not require what we might think of as active or engaged sharing of ideas. You just need to be part of the culture. Rawls, on the other hand, has a much more stringent understanding of what is publicly available. It is not enough that other citizens do affirm a view, so you might too. This is too weak a sense of what “could” be affirmed for Rawls. For him, ideas are publicly available only if they are part of some more actively shared tradition or discourse. Rawls thinks liberal democratic political culture provides just such an actively shared discourse. Thus, it represents a public pool of ideas from which democratic citizens may appropriately draw reasons that others “could” affirm.

So Rawls argues that the shared public democratic political culture could serve as the basis for public justification of political activity in a democratic society. Democratic citizens share a political culture that provides certain fixed and general points that could serve as starting points that everyone could at least reasonably accept. Democratic political culture contains a wealth of political ideas about democratic values, that most citizens are familiar with, e.g., a more perfect union, justice, domestic tranquility, and the values they imply or assume, such as equal basic rights, liberties, and opportunities.<sup>342</sup> According to Rawls, reasonable citizens see their task as working these democratic ideas into some understanding of the basic terms of political association for their society. An

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<sup>342</sup> IPRR, p. 144.

idea of political justice worked out from such recognizably democratic political values can be seen to stand free from any particular RCD. As such, it is the kind of view that any citizen could affirm, as a democratic citizen.

At the heart of Rawls's public/non-public split there is a distinction between persons as individuals and persons as citizens. The idea of a person does not necessarily require the idea of political community. That is, we can think of persons as individuals in a "pre-political" sense. Individuals' RCD's often require community for their realization, but they need not require specifically political community. Many RCD's might be realized in the state of nature. However, there are no citizens in the state of nature. Persons are not citizens until they enter a political community. The term "citizen" describes an office in a political society. It is through the constitution of that political society that the office of citizen comes to be, with all of its attached rights and duties. The proper understanding of democratic citizen, Rawls holds, comes not from our understanding of ourselves as individuals pursuing particular RCD's, but from our understanding of ourselves as a democratic society committed to the sort of freedom and equality that makes it possible for individuals to pursue their RCD's. This does not mean that RCD's can make no reference to citizenship. There is nothing that prevents any RCD from making this sort of political participation an element of the human good. The point is that RCD's need not require this political participation. But citizenship is a fundamental element of democratic political culture. In democracies, final political power rests in the hands of individuals as free and equal citizens. This is simply part of what we mean when we talk about democracy. This is not to imply that there are no disagreements about what rights and duties of citizens have, nor disagreements about just

how they wield final political authority. What it means is that it wouldn't make sense to talk about a democracy that is completely devoid of any notion of citizen.

So reasonable citizens must find political terms of association that can be justified in terms of shared democratic values. But what are these democratic political values? And how are they to be worked into basic political terms of association? On Rawls's view, these terms are produced through "political constructivism."<sup>343</sup>

Constructing Justice.

Rawls explicitly distinguishes political constructivism from ethical constructivism. Ethical constructivism is generally considered an anti-realist approach to ethics.<sup>344</sup> Ethical constructivists claim that moral facts are not real or true, but constructed in some way from our beliefs or attitudes about human beings and what is ultimately good for us. Rawls's Kantian constructivism is one version of ethical constructivism.<sup>345</sup> Rawls's political constructivism is not anti-realist. It is intended to be neutral between all controversial comprehensive commitments. It does not assert the truth of anti-realism or deny the truth of realism. It remains agnostic on such issues. This neutral stance is important to political constructivism, because one of its main purposes is to construct principles of justice that citizens could affirm at the same time as

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<sup>343</sup> Rawls discusses his political constructivism in Lecture III of PL, 89-130. See also Christine M. Korsgaard, "Realism and Constructivism in Twentieth-Century Moral Philosophy," for discussion of Rawls's constructivism.

<sup>344</sup> See, e.g., the entry for "ethical constructivism" in Robert Audi, ed., The Cambridge Dictionary of Philosophy (New York: Cambridge University Press, 1995), p. 283.

<sup>345</sup> See "Kantian Constructivism in Moral Theory," in CP, pp. 303-358. Rawls presented this paper, in three lectures, when he gave the Dewey Lectures at Columbia University in 1980.

they affirm their particular RCD's. There must be no conflict between them. This is necessary if they are to serve as publicly affirmed political principles for people who share a commitment to democracy but are also committed to a plurality of incompatible RCD's. In other words, the process of construction, and the principles of justice constructed, must not conflict with the essentials of RCD's, or they will not be publicly affirmed by all reasonable citizens. Political constructivism would conflict with some RCD's, if it took a stance on the realism/anti-realism issue. If the process of construction itself cannot gain such an overlapping commitment, no principles constructed through it have any chance of success. Thus the process of construction must be such as to gain the support of an "overlapping consensus" of comprehensive doctrines. So Rawls is careful to make political constructivism consistent with, for example, Kantian constructivism. For instance, those committed to Kantian constructivism as a moral doctrine must be able to affirm that it does not reject Rawls's political constructivism. A reasonable person committed to Kantian constructivism must acknowledge the facts of reasonable disagreement and oppression. The aim of political constructivism is to provide a method for resolving the political problems posed by reasonable disagreement that is consistent the essentials of comprehensive doctrines. Thus, a reasonable citizen committed to Kantian constructivism as a moral doctrine should also be committed to political constructivism as a method of resolving political differences.

It is certainly possible, though, that different citizens will feel different levels of commitment to political constructivism. Citizens' RCD's will vary in terms of the relationship they draw, if any, between the human good and a just political society. The weakest forms of commitment will be felt by citizens whose RCD's make political justice

irrelevant to the human good. These citizens might affirm democratic society, just because it produces a more or less stable political setting, which makes possible the pursuit of their own RCD's. Otherwise, though, these citizens may have little interest in political justice, and so little commitment to political constructivism. They will be satisfied with any political society that is stable enough to allow them to live out their RCD's. Other citizens might be more strongly committed to political constructivism, because their RCD's tie the realization of the human good in some important way to the realization of political justice in their society. Rawls's Kantian constructivism, for instance, makes pursuit of political justice an important part of the human good of self-realization as an autonomous being. Kantian constructivists, then, may have a particularly strong affinity for political constructivism.

Principles of justice are constructed through the development of "political conceptions of justice." There are many possible political conceptions of justice (hereafter political conceptions) in any society. All political conceptions have three main features.<sup>346</sup> First, a political conception is a moral conception of the basic terms of political association for a society.<sup>347</sup> Its subject is what Rawls calls the basic structure of society.<sup>348</sup> The basic structure is the set of basic social, political, and economic institutions in a society, the way they fit together as a whole, and the basic rights and duties they assign to various political offices, including the office of citizen. All of this is structured by, or is ultimately consistent with, principles of justice that form the core or "content" (to use Rawls's term) of the political conception. The content of Rawls's

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<sup>346</sup> PL, pp. 11-15; JE, pp. 26-27; IPRR, p. 143.

<sup>347</sup> See, e.g., PL, pp. 11-2.

<sup>348</sup> See Lecture VII of PL, pp. 257-288.

political conception justice as fairness are his “two principles.”<sup>349</sup> Other political conceptions may specify different content. This content is what gets “constructed.”

Rawls argues that the basic structure is the first subject of justice for two main reasons.<sup>350</sup> First, we need a way to maintain what Rawls calls the background conditions of justice. If we were to prescribe an initial just distribution of goods, and social conditions under which fair agreements might be reached, still it would be possible for inequalities in wealth and property to become large enough to threaten important political values, such as equality of opportunity, the fair value of political liberties, and so on. This is a serious threat to political justice. The basic social structure, when properly organized, can regulate these inequalities, and thereby maintain the background conditions necessary for justice. Second, the basic structure has a “profound and pervasive influence on the person who live under its institutions.”<sup>351</sup> Even in a just society, many contingencies affect a person’s prospects in life. These include the social class a person is born into, their native endowments and their opportunities to develop them, and good or bad fortune over the course of a life. The basic structure does not seek to eliminate these differences, or otherwise to remedy them. It does, however, have a role to play in ensuring that these contingencies do not render a citizen simply incapable of making effective use of her liberties, opportunities, and so on. For these two reasons,

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<sup>349</sup> Rawls’s formulation of his two principles of justice has changed a bit through time. In *JF* (p. 43) the two principles read as follows: “(a) Each person has the same indefeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all; and (b) Social and economic inequalities are to satisfy two conditions: first, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least-advantaged members of society (the difference principle).”

<sup>350</sup> See, e.g., *JF*, pp. 52-57.

<sup>351</sup> *JF*, p. 55.



the basic structure is the first subject of justice, and so a necessary component of all political conceptions.

Second, a political conception does not depend on any particular comprehensive doctrine, but is presented as free-standing.<sup>352</sup> The goal of a political conception is to gain the acceptance of reasonable citizens holding a plurality of reasonable comprehensive doctrines, to become the subject of an “overlapping consensus” of them, so it cannot depend on any one of them. A political conception needs this kind of support if it is to play its “public role” in society, and thereby “well order” it.<sup>353</sup> A well-ordered society is one effectively regulated by publicly recognized principles of justice. In a well-ordered society, everyone accepts, and knows that everyone else accepts, the same principles of justice, and they have good reason to believe that the basic structure of their society satisfies these principles. Further, citizens have a normally developed sense of justice, so most see the basic structure as just and comply with its rules. Rawls admits that this is highly idealized, but any political conception that cannot well order a democratic society is inadequate as a democratic conception. A sound and enduring democratic regime must be stable “in the right way,” that is, it must be affirmed and supported by the majority of politically active citizens. A political conception that does not gain such support is one that is not stable, that can only be maintained through manipulation, deceit, or force. Of course, unpopular political conceptions are forced on people all the time, but none of them counts as a democratic regime.

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<sup>352</sup> Free standing also means that a political conception does not depend on a disjunction of reasons taken from some diverse set of CD’s. Rawls does not consider this possibility, probably because he is doing ideal theory, but it is worth noting that this possibility is not clearly ruled out by Rawls’s theory.

<sup>353</sup> PL, pp. 35-40.

Third, a political conception is worked out of ideas implicitly or explicitly expressed in the public political culture of a democratic society, and does not depend on ideas explicitly drawn from any RCD. A political conception must be explainable in terms of shared democratic values, without any reference to comprehensive religious, philosophical, or moral commitments such as Christian salvation or Utility. Proper political ideas include some that are explicit in democratic political culture, such as the idea that citizens are free and equal, politically speaking, and political values such as those expressed in the preamble to the Constitution of the United States: a more perfect union, domestic tranquility, the common defense, the general welfare, and so on.<sup>354</sup> Other proper political ideas are implicit in democratic political culture. One of the more important ones for Rawls is the idea of society as a fair system of cooperation.

The idea that society is a fair system of cooperation means three things. First, a democratic political order is more than mere coordinated effort among citizens. It is not enough for a ruler to effectively coordinate the behavior of citizens, even if this leads to more-or-less effective government (i.e., basic human rights are secured and people are materially and spiritually satisfied). Fair cooperation is social cooperation between citizens that is structured by rules those citizens publicly affirm as appropriately governing their cooperative activity. It is a specific kind of rule-governed social activity. Second, the rules that structure the political order must specify “fair terms” of cooperation. This is Rawls’s idea of reciprocity. It has two aspects.<sup>355</sup> One aspect is the idea that each citizen can reasonably accept the rules, provided that others accept them

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<sup>354</sup> IPRR, p. 144.

<sup>355</sup> Rawls never explicitly distinguishes these two aspects of his idea of reciprocity, but Reidy does in his “Reciprocity and Reasonable Disagreement.”

too. It is a kind of reciprocity in judgment or justification. Another aspect is the idea that “all who are engaged in cooperation and do their part as the rules and procedures require, are to benefit in an appropriate way as assessed by a suitable benchmark of comparison.”<sup>356</sup> This we can call reciprocity of advantage. According to Rawls, this idea of reciprocity lies between “impartiality, which is altruistic (being moved by the general good), and the idea of mutual advantage.” Reasonable citizens try to create a democratic political order that allows them to advance their own lives, in terms of the values expressed in their particular RCD’s, but that also allows others to do the same. This idea is implicit in democratic political culture, and does not depend on any particular RCD. As such, it is properly seen as part of the shared democratic culture

Principles of justice—“substantive principles specifying the content of political right and justice”—are constructed through the development of a political conception.<sup>357</sup>

The starting points for the process of construction are basic conceptions of society and the person, the principles of practical reason, and the public role a political conception must play. I will illustrate this by briefly discussing Rawls’s notion of “justice as fairness,” which is one example of a political conception. According to Rawls, the fundamental idea implicit in democratic political culture is that society is (or should be) a fair system of social cooperation. Other fundamental ideas include the idea of democratic citizens as free and equal and the idea of a well-ordered society. These ideas can be described in many different ways. A conception is a more-or-less well-developed description of an idea. Thus, there are many possible conceptions of the ideas at the heart

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<sup>356</sup> PL, p. 16.

<sup>357</sup> See, e.g., PL, p. 104.

of democratic political culture. Different conceptions, while possible, are not necessarily equally compelling. Citizens in every particular democracy must make a judgment about which interpretation of their democratic political practice shows it in its best moral light, which interpretation makes it most morally appealing, and that also makes it fit best with their own past political practice and moral self-understanding. Which interpretation the citizens of any particular democracy will judge best is, in a way, an empirical and contingent matter, partly shaped by vagaries of history and culture. In defending justice as fairness, Rawls fleshes out the bones of these key ideas by developing conceptions of them that he believes most accurately represent the shared ideals of our society. These conceptions are intended to clarify or make explicit our own implicit self-understanding. After describing these conceptions in detail, Rawls draws on them to lay out a procedure for determining which principles of justice best fit that self-understanding. According to Rawls's favored political conception, "justice as fairness," the "original position" is the procedure for finding principles of justice that is most consistent with our self-understanding.

The original position models what Rawls sees as our conceptions of our fundamental ideas of citizenship and society as these are expressed in our public political culture. The original position has agents, who represent citizens, choose principles of justice for those citizens from behind a veil of ignorance. The agents model the "rational," the capacity for a conception of the good for human beings. They also model the idea of a well-ordered society. Thus, they are guided in their choice by two main considerations. First, they seek principles of justice that maximize the rational self-interest of those they represent. Second, they know that the principles they choose will

be publicly recognized, so they must keep in mind the consequences of the mutual recognition of whatever principles they choose, for instance, the way common acceptance of any chosen principles would affect the self-understanding of those raised according to them. The veil of ignorance prevents the agents from knowing exactly who they represent, and exactly what interests they have. The agents know they represent rational and reasonable democratic citizens, and that these citizens have and are trying to realize the ideals of their comprehensive doctrines, i.e., their conceptions of the good, but they do not know what comprehensive doctrine is affirmed by the person they represent. Here the veil of ignorance models the capacity for a sense of justice, by hiding from the agents information that we (you and I, here and now) think of as improperly influencing fair decision-making. Once the agents and the veil of ignorance are fully laid out, the agents are presented with a list of principles of justice. If we have done a good job of developing our conceptions of the fundamentals of democratic political culture (society as a fair system of cooperation, free and equal citizens, and so on) and of representing these commitments in our decision procedure (e.g., the original position) then the principles of justice indicated by the procedure are reasonable for us—you and me, here and now. In this way we can construct principles of justice implied by and consistent with our own self-understanding, with our own ideals as they are expressed in our public political culture.

There are two ways that disagreement can arise here. First, citizens might disagree with Rawls about conceptions of the different ideas of citizenship and society expressed in public political culture. Different citizens might offer different conceptions of, e.g., society as a fair system of cooperation. Second, citizens might accept Rawls's

conceptions of these ideas, but think that the agents in the original position would pick different principles of justice.

The original position does not represent a hypothetical agreement, nor is it intended as a method for discovering the objective truth about justice. It is a way of constructing a solution to a practical problem faced by us as reasonable democratic citizens. The original position is a “thought-experiment for the purpose of public- and self-clarification.”<sup>358</sup> On Rawls’s view, we—“you and I, here and now”—face a practical political problem: we are reasonable citizens, divided by reasonable pluralism, who must develop just terms of association for our society. How are we to do this? The original position helps us to see what our considered political convictions commit us to. It models our ideas of citizens as free and equal, reasonable and rational, and our ideas of fairness, and so on, and thereby helps us to see what principles of justice “we regard—here and now—as fair and supported by the best reasons.”

While political constructivism does not attempt to discover the objective truth about justice, taken in realist terms, when performed properly it does produce results that are inter-subjectively objective. Inter-subjective objectivity requires a public framework of thought that: (a) is sufficient to support an idea of judgment, where conclusions can be generated from reasons and evidence after due deliberation; (b) specifies an idea of correct or reasonable judgment; (c) specifies an order to reasons to be weighed; (d) distinguishes an “objective” point of view from that of any particular agent or group; and (e) accounts for agreement in judgment among agents.<sup>359</sup> Political constructivism meets

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<sup>358</sup> JE, p. 17.

<sup>359</sup> PL, pp. 110-112.

these requirements. For example, justice as fairness provides a public framework that meets conditions a-e.

While justice as fairness is Rawls's favored political conception, there are many possible political conceptions.<sup>360</sup> Rawls does not deny this. The ideas from which political conceptions are formulated, ideas like free and equal citizens, are open to a variety of interpretations. These ideas are subject to the burdens of judgment. As there are many possible ways to interpret these ideas, there are many ways to develop political conceptions of justice. Rawls identifies Habermas's discourse conception of legitimacy and Catholic views of the common good as potential rival conceptions. He requires only that these views be expressed in terms of political conceptions, that is, that they be developed as free standing prescriptive models of the basic structure from ideas implicit or explicit in public political culture. Since principles of justice are constructed from political conceptions, there are also many possible principles of justice.

Political conceptions can be divided in two groups, liberal and illiberal. Liberal political conceptions share three features.<sup>361</sup> First, they contain a list of basic rights, liberties and opportunities, such as those commonly found in democratic societies. Second, they give priority to these rights, liberties and opportunities over, for example, the common good or perfectionist values. Third, they secure basic social security, by ensuring that all citizens have all-purpose means sufficient to make use of their freedoms. Since all of these ideas can be specified in a variety of ways, there are many possible liberal political conceptions. They may differ in how they specify and order the various

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<sup>360</sup> IPRR, pp. 140-143.

<sup>361</sup> IPRR, pp. 140-143.

rights and liberties, or in what form social security is provided, and so on. Political liberalism does not specify any one liberal political conception as correct.<sup>362</sup> Rawls thinks his favored conception, justice as fairness, has a “special place” in the family of liberal political conceptions, but there are always several possible political conceptions. If a few conceptions come to dominate, or if one eventually takes a central role in a society, still it is always permissible and appropriate to propose new conceptions, to supplant old conceptions with new ones, and for old conceptions to fade from the public consciousness.

This is where the liberal principle of legitimacy comes into play.

#### The Liberal Principle of Legitimacy.

Legitimacy is one of the fundamental political problems faced by democratic citizens under conditions of reasonable pluralism. Democratic citizens are the free and equal coauthors of their political order. In this way the coercive power of the state is always theirs as a collective body. They determine, through their constitutional order, how and when political power may appropriately be used. A constitutional order is part of or expressed by a political conception. Reasonable citizens face two related legitimacy problems. First, many different political conceptions (constitutional orders) are possible in any given society. Since citizens can reasonably affirm different political conceptions, under what conditions can the terms of one political conception be legitimately enforced against all citizens? For instance, we need an account of why the state might enforce

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<sup>362</sup> IPRR, p. 142.



something like justice as fairness, even though it is open to reasonable dissent. Second, even when citizens affirm the same political conception (constitutional order), they may disagree about how its content, the basic principles of justice it specifies, are to be worked out in practice in their actual society. For instance, citizens may agree that each should have claim to “a fully adequate scheme of equal basic liberties,” but disagree over whether or not this includes a right to abortion. Thus, the second problem is this: since citizens may and will reasonably interpret the content of a political conception in more than one way, under what conditions is it legitimate to enforce one interpretation against all citizens? Rawls’s liberal principle of legitimacy is meant to solve both problems.<sup>363</sup>

Rawls’s theory of legitimacy belongs to his ideal of public reason.<sup>364</sup> Public reason does not apply to all political discussion, but mainly guides public officials—legislators and executives, candidates for political office, and judges—engaged in deliberations over constitutional rights and liberties and other matters of basic justice.<sup>365</sup> Rawls claims that citizens rarely have the opportunity to vote on fundamental political issues, so public reason guides citizens mainly in voting for representatives.<sup>366</sup> The theory of legitimacy explains how public reason can generate enforceable laws.

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<sup>363</sup> These two questions are not always as distinct as I make them here, because “there is not . . . a sharp line between where a political conception ends and its interpretation begins.” IPRR, p. 145, footnote 35. Happily, it does not matter for my discussion whether we describe this issue as two problems, or two aspects of one problem. Rawls’s liberal principle of legitimacy works the same way in either case.

<sup>364</sup> IPRR, p. 133.

<sup>365</sup> IPRR, p. 133, especially footnote 7.

<sup>366</sup> IPRR, pp. 135-6. Rawls claims citizens rarely have the opportunity to vote on fundamental political issues. Their most significant role, in this context, is selection of representatives who do vote on these issues. Thus the impact of citizens’ political behavior on the legitimacy of law is almost always indirect. This raises some interesting issues. For instance, if citizens fail to live up to the ideal of public reason, does this affect the authority of the persons they put in office? Suppose that Wyatt is put in office by citizens who reject public reason. Is Wyatt’s authority as a member of Congress somehow corrupted? Is it possible for him to take part in the enactment of legitimate law, or does his participation corrupt the process, even if he lives up to the ideal of public reason?

The liberal principle of legitimacy receives its most complete treatment in IPRR.

The liberal principle of legitimacy holds that

Our exercise of political power is proper only when we sincerely believe that the reasons we would offer for our political actions—were we to state them as government officials—are sufficient, and we also reasonably think that other citizens might also reasonably accept those reasons.<sup>367</sup>

To these two conditions Rawls adds a majoritarian democratic principle: “on a constitutional essential or matter of basic justice ... the legal enactment expressing the opinion of the majority is legitimate law.”<sup>368</sup> In summary, Rawls’s theory of legitimacy has three parts: (a) the Reasonableness Condition, (b) the Sufficiency Condition, and (c) the Majority Principle. My discussions of the Sufficiency Condition and the Majority Principle are brief, so I will present them first. My discussion of the Reasonableness Condition takes up most of the remainder of the chapter.

The Sufficiency Condition.

The Sufficiency Condition is in one respect straightforward—we must sincerely believe that we have adequate justification for the political positions we offer to fellow citizens in the public square. This is a somewhat open-ended condition, as there is no

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<sup>367</sup> IPRR, p. 137. This formulation of the principle of legitimacy is relevantly similar to Rawls’s formulation of it in other works. See, e.g., PL, where he says legitimacy requires a constitution “the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason” (p. 137), and JF, where he says it requires a constitution “the essentials of which all citizens, as reasonable and rational, can endorse in the light of their common human reason” (p. 41).

<sup>368</sup> IPRR, p. 137.

shared public standard for determining what counts as sufficient justification. In many cases, people may disagree over whether or not sufficient justification actually exists for various positions. This is not a problem. Such agreement is not necessary for legitimacy. What is necessary is that the person offering the position to fellow citizens sincerely believes (and reasonably believes, as the Reasonableness Condition holds) that she has sufficient justification for doing so. How we might know when someone is sincere is not obvious, for, as we saw in the discussion of Soper, testing sincerity is not an easy thing to do. Nevertheless, this is part of the Sufficiency Condition.

The Sufficiency Condition also requires that political conceptions be “complete.”<sup>369</sup> A complete political conception describes principles, standards, and ideals, and guidelines of inquiry, that are sufficient to generate and unify a determinate order of values that gives reasonable answers to most questions involving constitutional essentials and matters of basic justice. Justice as fairness is well-worked out and might be regarded as more or less complete. Completeness is significant for two reasons. First, when some citizen’s political values are seen as unified by a political conception, and not viewed separately, it is evident to other citizens that the political values are not being distorted by any comprehensive doctrine. Any order of political values so distorted is clearly unreasonable. This is one of the consequences of the burdens of judgment. An order of political values may mirror the order generated by any comprehensive doctrine, without losing its claim to reasonableness, as long as the order in question is also demonstrably supported by a political conception. Second, an incomplete political conception does not provide a sufficient framework for public discussion of fundamental

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<sup>369</sup> IPRR, pp. 144-146.

political issues. A political conception is supposed to make it possible for reasonable citizens to resolve such issues without appeal to comprehensive doctrines. A complete political conception provides all of the basic values necessary for such political resolutions.

It does not seem plausible, though, to think that most citizens have or ever will have a complete political conception. One might defend Rawls by pointing out that he holds that the liberal principle of legitimacy does not apply to all political discourse, but is meant mainly as a constraint on discussion and action regarding constitutional essentials and matters of basic justice that occurs in what Rawls calls the public political forum.<sup>370</sup> This forum consists of the discourse and action of judges (especially supreme courts justices), of government officials (especially legislators and the executive), and of candidates for public office (in particular when they make public political statements). Constitutional essentials have to do with e.g. what political rights and liberties could reasonably be included in a written constitution, and matters of basic justice have to do with questions of basic economic and social justice not covered in the constitution.<sup>371</sup> The principle applies only indirectly to citizens, mainly in their selection of public officials.<sup>372</sup> Thus, it might be sufficient if public officials have complete political conceptions, even if citizens do not.

But this issue is not clear. Citizens do have an important role to play, even if they do not get to vote on the most fundamental political issues. Citizens realize the ideal of

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<sup>370</sup> IPRR, p. 133.

<sup>371</sup> IPRR, p. 133, note 7.

<sup>372</sup> For example, suppose the citizens of some county in the U.S. face a vote on whether or not to allow alcohol to be sold on Sunday's in their county. In cases like this, neither officials nor citizens need to seek or provide public reasons. No constitutional essentials or matters of basic justice are at issue in instances like this.

public reason by holding government officials to it.<sup>373</sup> Ideally, citizens should think of themselves as if they were public officials: they should “ask themselves what statutes, supported by what reasons satisfying the criterion of reciprocity, they would think it most reasonable to enact.” When citizens generally start to see themselves as ideal legislators, they will reject public officials who ignore public reason. If citizens do not do this, their democracy will lose its strength and vitality. Does this role require citizens to have complete political conceptions? It is hard to see how they could ask themselves what statutes are best supported by what reasons without one. This seems to require that citizens have some more or less well-worked out political conception.

#### The Majority Principle.

Rawls’s theory of legitimacy holds that when we are resolving a dispute over a constitutional essential or matter of basic justice, “the legal enactment expressing the opinion of the majority is legitimate law” (provided that citizens and the relevant public officials have followed public reason).<sup>374</sup> This is clear enough, but one might well ask how Rawls can justify this appeal to majoritarian democracy. There is a regress problem here. Democratic institutional design is an issue subject to the burdens of judgment. Thus, there are several decision procedures that might reasonably claim to be “democratic.” We have to decide which of these possible democratic decision procedures can legitimately be used to resolve disagreements. But how can we make this

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<sup>373</sup> IPRR, pp. 135-6.

<sup>374</sup> IPRR, p. 137.

decision? Our decision on this issue will not be legitimate, unless it results from a decision procedure that is itself legitimate. But this just pushes the problem back a step. So it is not clear why Rawls thinks we can regard any particular democratic decision procedure as a legitimate means of resolving disagreements. It is certainly not obvious why he thinks it is safe to assume majoritarian democracy.

#### A Common Misreading of The Reasonableness Condition: The Consensus Reading.

The Reasonableness Condition requires that citizens, when attempting to resolve disagreements over constitutional essentials or matters of basic justice, appeal only to reasons that “may reasonably be accepted by other citizens as a justification of those actions.”<sup>375</sup> This is one aspect of Rawls’s familiar commitment to reciprocity.<sup>376</sup> By honoring this requirement, citizens show the proper kind of respect for one another. This solves part of the problem of legitimacy by requiring that the constitution of political authority be acceptable to all members of the body politic, from an appropriate and shared moral point of view. Distinct political actions should be acceptable to all as at least consistent with that authority, even if some see the action as unwise, unjust, etc., and express this view by voting against certain measures or candidates.

Before discussing the Reasonableness Condition in more detail, it will be helpful to describe and dismiss one common misreading of Rawls’s principle of legitimacy. Rawls is often read as insisting that legitimacy requires constitutional essentials no

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<sup>375</sup> Rawls, PL, p. xlvi.

<sup>376</sup> See, e.g., TJ, pp. 88-90; PL, p. 16; JF, p. 6; LP, p. 14.

reasonable person could reasonably reject. I will refer to this misreading as the Consensus Reading in what follows. Commentators who hold this view think that Rawls's liberal principle of legitimacy requires that we find a liberal political conception that all reasonable citizens would converge on and affirm without reservation, i.e., one that is somehow immune to the burdens of judgment and thus free from what I earlier referred to as liberal pluralism. This would be a very demanding theory of legitimacy, one that is similar in ways to Scanlon's moral philosophy.<sup>377</sup> On the Consensus Reading, the liberal principle of legitimacy requires citizens, when voting or acting as public officials, to act from principles they could justify in terms others could not reasonably reject. It requires us to find reasons somehow immune to the burdens, that are somehow free from reasonable disagreement. It should be clear from what I have already said that this is not actually Rawls's view of legitimacy. But this Consensus Reading is attributed to Rawls by many prominent political theorists, including Jeffrey Stout, Joseph Raz, Kent Greenawalt, and Nicholas Wolterstorff.<sup>378</sup> Since this misreading has taken on a life of its own, I want to spend a little time showing that it is not actually Rawls's view. I will describe two exegetical problems with the Consensus Reading, and reject two potential sources of support. After that, I will offer a better reading of the Reasonableness Condition.

First, Rawls does not say that legitimacy requires constitutional essentials no reasonable person could reasonably reject. His statements are ambiguous.<sup>379</sup> For

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<sup>377</sup> T. M. Scanlon, What We Owe To Each Other (Cambridge, Ma.: Harvard University Press, 1998).

<sup>378</sup> See e.g. Joseph Raz, "Disagreement in Politics," American Journal of Jurisprudence, v. 43 (1998); Stout, Democracy and Tradition, p. 10; Greenawalt, Private Consciences and Public Reasons, p. 113; and Audi and Wolterstorff, Religion in the Public Square, pp. 113-4.

<sup>379</sup> David Reidy, "Reciprocity and Reasonable Disagreement."

instance, in “The Idea of Public Reason Revisited” he says that legitimacy requires that “we sincerely believe the reasons we would offer for our political actions . . . are sufficient, and we also reasonably think that other citizens might reasonably accept those reasons” (my emphasis).<sup>380</sup> This can be read several ways. The Consensus Reading describes one way. But Rawls could be asking for something less: reasons any (and thus every) person could reasonably affirm, that is, that it would not be unreasonable to affirm. This reading describes a less demanding theory. I believe this is his view, but for now I just want to establish that he does not use the language of the Consensus Reading.

Second, the Consensus Reading contradicts Rawls’s claims about reasonable disagreement and the burdens of judgment.<sup>381</sup> These ideas are central to his work, so this is exegetically troubling. This problem can be demonstrated in many ways. I will give one example, which has to do with the implementation of democratic decision procedures.<sup>382</sup>

In democratic societies, Rawls says, legitimacy requires a liberal constitution.<sup>383</sup> Minimally, liberal constitutions assign basic and familiar rights and opportunities to individuals, give them priority over the common good and perfectionist values, and secure their effectiveness with adequate social security. But citizens who share these commitments will still disagree over many issues, e.g., how to specify and order the

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<sup>380</sup> IPRR, p. 137.

<sup>381</sup> See, e.g., PL, pp. 54-58, JF, pp. 35-37.

<sup>382</sup> I borrow this example from Reidy’s “Reciprocity and Reasonable Disagreement,” though I have a different purpose for invoking it than Reidy does. In his paper, he describes two possible readings of Rawls’s theory, but is agnostic on the question of whether or not what I call the Common Reading is actually Rawls’s view. He argues convincingly that this view (no matter who holds it) suffers from several serious philosophical defects, including the one discussed here, and is thus weak as a theory of legitimacy. I argue the exegetical point—that the example shows that Rawls did not in fact hold the view described in the Common Reading.

<sup>383</sup> IPRR, pp. 140-143.



rights and opportunities.<sup>384</sup> Rawls says such disagreements should be resolved democratically, because this is most faithful to the ideal of citizens sharing ultimate political authority.<sup>385</sup> But even if we agree, we face more questions. For instance, which procedures best satisfy this condition? Does shared authority require winner-take-all democracy or proportional representation? Some argue that the latter is most consistent with shared authority, others that the former is, and still others that the former could be, in the context of certain prohibitions on gerrymandering. In any case, every reasoned answer depends on abstract value judgments, e.g., how to describe and order freedom and equality, and solutions to complex empirical issues, e.g., how the drawing of districts affects the representation of minority groups in elections. Here the Consensus Reading founders.

Democratic decision procedures are constitutional essentials, so, on the Consensus Reading, legitimacy requires procedures no reasonable person could reasonably reject. Otherwise citizens could claim the outcomes were illegitimate. But Rawls's view is that questions like this, which involve judgments about abstract values and complex empirical situations, are subject to the burdens of judgment.<sup>386</sup> The burdens explain how thoughtful and sincere individuals can arrive at different answers to such questions, and why these differences always exist in free societies. They apply paradigmatically to disagreements over comprehensive doctrines, but also to questions of

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<sup>384</sup> IPRR, p. 141.

<sup>385</sup> Rawls also thinks democratic decision procedures are necessary because they most reliably produce nearly just outcomes.

<sup>386</sup> PL, pp. 54-58; JF, pp. 35-37.

constitutional design.<sup>387</sup> When the burdens of judgment apply to a question, every answer could be reasonably rejected (even if they could also be unreasonably rejected).

This is just what Rawls means by the burdens of judgment and reasonable disagreement.<sup>388</sup> This illustrates a family of problems for the Consensus Reading, because the issue of democratic design involves many questions over which citizens will reasonably disagree.<sup>389</sup> In fact, the explication and implementation of all constitutional essentials will involve such reasonable disputes. The Consensus Reading has Rawls insisting on consensus in situations he identifies as those where consensus will never appear.

Still, some things Rawls says appear to support the Consensus Reading. First, he seems to use its strong language in TJ. Second, he cites approvingly T. M. Scanlon's work, and Scanlon clearly uses language like that of the Consensus Reading.<sup>390</sup> In fact, neither case actually supports it.

Rawls's search for unanimous agreement in TJ appears to support the Consensus Reading. His goal is to find principles of justice appropriate for democratic societies. An appropriate principle is one that would be accepted by parties suitably situated behind his

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<sup>387</sup> Rawls holds that ideas like freedom and equality can be interpreted in various ways, and that this leads to different understandings of basic principles of justice and the content of public reason. See e.g. IPRR, p. 141. This has important implications for his theory of legitimacy, as I will explain below.

<sup>388</sup> Similar reasoning could show that Rawls's second condition, reliable nearly just outcomes, also fails to determine a unique answer to the question of democratic design. Free citizens, using the common resources of human reason, will disagree about what justice requires and which decision procedures most reliably produce those outcomes. The burdens of judgment present any such resolution. See Reidy, "Reciprocity and Reasonable Disagreement," for a good discussion of this problem.

<sup>389</sup> There are many reasonable disagreements over the most appropriate way to design and implement democratic political institutions. For an introduction to the breadth and depth of disagreement on this issue, see, e.g., Dahl, Democracy and Its Critics, Shapiro, The State of Democratic Theory, and Guttman and Thompson, Democracy and Disagreement.

<sup>390</sup> See, e.g., Scanlon, What We Owe to Each Other.

veil of ignorance.<sup>391</sup> This is his “original position.” The agents behind the veil are moved by rational self-interest and seek principles all could agree to.<sup>392</sup> They express our sense of the rational.<sup>393</sup> The veil models our sense of the reasonable, our willingness to advance fair principles of justice, by removing from consideration factors that might improperly influence us.<sup>394</sup> In TJ, Rawls develops one version of the original position argument that he believes all citizens could reasonably affirm. In fact, he thinks it is the most reasonable conception of justice for a liberal democracy. He develops a conception of citizens from ideas found in the public political culture of a democracy. These form the basis of his construction of the agents and the veil. From this perspective, he feels, his two principles would meet unanimous consent. But if we find his substantive principles too at odds with our moral convictions, we should not reject his approach. Instead, we should adjust the original position argument, by reconstructing the veil, the agents, or both, until we find an arrangement of them, and principles they support, that fits our convictions. He seems to think that, in the end, some version of the original position argument will produce principles of justice that (nearly) all citizens would (in fact) affirm, even if they could (in principle) be reasonably rejected.<sup>395</sup> Rawls says we just need the right construction of the argument.

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<sup>391</sup> See, e.g., TJ, chapter 3, section 20.

<sup>392</sup> It is perfectly acceptable, on any reading of liberal legitimacy, to characterize the agents behind the veil of ignorance as seeking unanimous agreement. But this has little to do with legitimacy. The agents so described represent only one of our two moral powers. They are not reasonable, and so cannot reasonably reject anything. They simply do not possess this moral capacity.

<sup>393</sup> See TJ, pp. 123-130, for discussion of the significance of “the rationality of the parties.”

<sup>394</sup> See TJ, pp. 118-123, for discussion of the significance of the veil of ignorance.

<sup>395</sup> See, e.g., TJ, p. 18.

Then why think the Consensus Reading mistaken? In TJ, Rawls's concern is justice; in most of his post-1980 work, it is legitimacy.<sup>396</sup> These are different virtues states might possess, and are subject to different evaluative standards.<sup>397</sup> Rawls holds that justice as fairness best answers the question of what justice requires, but he admits it is just one possible answer.<sup>398</sup> What if people disagree? We must make some laws. Can we do this legitimately? Much of his post-1980 work deals with these problems. Rawls's claims in TJ do not support the Consensus Reading.

Rawls's appeal to Scanlon's work seems to provide a second reason for affirming the Consensus Reading, since Scanlon uses the "could not reasonably reject" language.<sup>399</sup> But this support is only apparent. Rawls appeals to Scanlon when discussing what Rawls calls the "reasonable," our willingness and desire to find fair terms of cooperation and to offer justifications for action others might accept.<sup>400</sup> What Rawls does here is explain one of our two moral powers, not offer a principle of legitimacy. In fact, it is reasonable to think many of our desires will never be wholly satisfied. We may desire to find justifications for political action that no reasonable person could reasonably reject, but be forced by the burdens of judgment to settle for justifications reasonable persons could reasonably affirm. This seems most consistent with Rawls's view that it is unreasonable to deny the burdens of judgment and the reasonable pluralism that results.<sup>401</sup>

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<sup>396</sup> This includes PL, IPRR, and JF. Even The Law of Peoples centers on legitimacy. Rawls holds that "decent" peoples deserve respect and have a right to self-determination, not because they are just, (they are not just, on Rawls's view,) but because they are legitimate structures of authority and obligation. I owe David Reidy for valuable discussion on this point.

<sup>397</sup> PL, pp. 427-429.

<sup>398</sup> See, e.g., IPRR, p. 142.

<sup>399</sup> See, e.g., PL, p. 49, note 2, and p. 124; JF, p. 7, note 6.

<sup>400</sup> See PL, pp. 49-50.

<sup>401</sup> See, e.g., JF, pp. 33-38.

## A Shared Reason Reading of the Reasonableness Condition.

Rawls's view is a shared reason account of legitimate state power. Following Kant and Soper, Rawls does not insist that citizens converge on some particular liberal conception of justice, or that they find one that no reasonable person could reasonably reject. Such a requirement is simply unrealistic. What Rawls does with his liberal principle of legitimacy is to apply Soper's generic understanding of the law's normative force to the liberal democratic political context. It is enough if public officials treat all citizens with a certain kind of respect, a respect that is captured by reciprocity in advantage and reciprocity in justification. Rawls's theory of legitimacy is thus less demanding, and more plausible, than many suppose. This relaxed version of reciprocity is the heart of Rawls's account of shared reason, and the core of his Reasonable Condition. Roughly put, public officials in a democracy show respect for democratic citizens when they base their political activity (regarding, in particular, constitutional essentials and matters of basic justice) on the liberal political conception they judge best, because doing so responds to the requirements of reciprocity in advantage and reciprocity in justification.

When public officials in a democracy base their political activity on the liberal political conception each judges most appropriate, public officials show respect for citizens by fulfilling the requirements of reciprocity in advantage and reciprocity in justification. For example, Rawls insists that the basic structure is the first subject of justice, because this network of institutions deeply affects people's characters, plans and

aspirations, and prospects, and because it can protect the background conditions of justice, by keeping inequalities in wealth and property from getting large enough to threaten poor citizens' political liberties. This is a kind of reciprocity in advantage—citizens would have little reason to affirm the law if it ignored their interests altogether, or was obviously insufficient as a means of protecting those interests. And he insists that only liberal political conceptions are reasonable. For instance, he holds that it is not reasonable to believe that liberal democratic citizens could accept a political conception that put some citizens' perfectionist values ahead of the individual liberties of all citizens. And it is not reasonable to believe that such citizens could accept a political conception that did not guarantee the effectiveness of their rights and opportunities with some form of social security. This again is reciprocity in advantage. But he also insists on reciprocity in justification. For instance, he insists that the ideas used to develop political conceptions be drawn from the public political culture of a liberal democracy, because (he holds) these are ideas shared by citizens committed to liberal democracy (i.e., by those individuals whose common commitments quite literally constitute their liberal democratic body politic). It is wrong for a person to include in her political conception her controversial comprehensive commitments, because it is unreasonable for her to believe that every reasonable person would accept such a conception, given the obvious fact that many citizens reasonably reject her comprehensive doctrine. This is reciprocity in justification. But while appeal to public reasons is necessary, it is not sufficient to demonstrate sincerity. This requires that public reasons be drawn together into a more-or-less coherent whole (i.e., a conception of the whole basic structure).<sup>402</sup> If an official in

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<sup>402</sup> This is what I refer to above as the Sufficiency Condition. I will say more about it below.

were to appeal to public reasons willy-nilly, citizens might regard her behavior as simply opportunistic. Here we find another idea that Rawls takes from Soper. Soper argues that officials sincerely committed to the justice of their law can do more than simply give public reasons in defense of it—they can also explain why they offer the particular public reasons they do, by explaining how these reasons fit into some larger understanding of the common good. For Rawls, officials do this by being prepared to show that the public reasons they invoke are firmly rooted in their own favored political conceptions of justice. This is necessary for reciprocity in justification.

Thus, when officials in a liberal democracy base their political activity on a liberal political conception, citizens have good reason to think their officials are sincerely committed to justice and the common good. Of course, some citizens will always see their constitution and laws as suboptimal in ways—as not the most just, or not the most reasonable—but their normative authority does not depend on such agreement. The constitution, and laws enacted pursuant to it, deserve moral respect when they are reasonably seen as rooted in shared democratic ideals, that is, when they are linked to some liberal conception of democratic justice. When laws are generated in this way, the process respects all citizens as citizens, through reciprocity in justification and reciprocity in advantage. Further, it results in laws that at least approximate liberal justice. This is the most that we can expect of shared reason under the conditions of reasonable disagreement and dissent that we face in modern liberal democracies.

## A Challenge to Rawls's Reasonableness Condition: Only Liberal Political Conceptions are Reasonable?

Rawls holds that only liberal political conceptions meet the demands of his liberal principle of legitimacy. This means that only liberal political conceptions of justice may reasonably be offered by citizens to others understood as free and equal. Only liberal conceptions can be offered by citizens in the right spirit, that is, as reasonable terms that respect citizens in the right ways (reciprocity in justification and advantage). Rawls's view is not troubling insofar as it rules out extremely illiberal conceptions of justice, for instance, a new Nazi regime or a slave society, which reject the very idea of citizens as free and equal and deserving of respect. But Rawls also seeks to rule out as unreasonable less extreme views, like Libertarianism, Marxism, and Communitarianism. He rejects Libertarianism as unreasonable, because it does not take seriously the idea that the basic structure is the first subject of justice. He rejects Marxism and Communitarianism as unreasonable, because these views give priority to the good over the right. What is not clear is just what sort of mistake Rawls thinks that each makes. Why are these issues over which reasonable citizens cannot reasonably disagree?<sup>403</sup>

Rawls rejects libertarianism as unreasonable because libertarians do not take seriously the idea that the basic social structure is the first subject of justice. But exactly why this makes libertarianism unreasonable is not clear. Rawls could be claiming that

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<sup>403</sup> Reidy argues that Rawls reject these views because he takes them to be based on simple errors, i.e., obvious factual or uncontroversial logical mistakes. See his "Reciprocity and Reasonable Disagreement."



libertarianism is unreasonable because it is based on a simple error.<sup>404</sup> Libertarian principles of justice govern the acquisition and transfer of holdings. People are entitled to hold whatever they obtain without violating these principles. If we start from a state of nature where the existing distribution is just, then all future distributions are just as long as everyone follows the rules. Rawls's problem with this could be the libertarian reliance on the initial state of nature. Why think that initial distribution was just or unjust? Here the libertarian seems to need an account of the basic social structure. When the libertarian rejects this, he makes a simple mistake. The problem with this, as Reidy points out, is that it's hard to see what the mistake is here. If we need a basic social structure, then it is a mistake to reject it. But libertarians like Hayek and Nozick seem to reject the idea that we need a basic social structure in the first place, or even that there is any sense to talking about distributive justice as a virtue of social systems taken holistically in the first place. What is the simple error here? Given the burdens of judgment, there is no reason to think the libertarian makes such an error. Why then is libertarianism unreasonable?

There is another way of reading the problem. We can see Rawls's dispute with the libertarian as what I call a good faith disagreement, a disagreement rooted in the burdens of judgment. However, it may not be what Rawls calls a reasonable disagreement. That is, it is not one that occurs between citizens who share a commitment to democracy. The libertarian view is not founded on a simple mistake, but it is nevertheless unreasonable. That is, Rawls might see generic liberalism (the family of liberal political conceptions) as the dividing line between democratic and other forms of

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<sup>404</sup> Reidy reconstructs Rawls's argument this way in "Reciprocity and Reasonable Disagreement."

government. I think this is how Freeman reads Rawls's rejection of libertarianism.<sup>405</sup>

What is not clear is how Rawls might justify this dividing line.

It is not obvious that libertarianism is inconsistent with democracy. Nozick does reject democracy in the "Demoktesis" in Anarchy, State, and Utopia.<sup>406</sup> And Nozick's libertarian project seems inconsistent with Rawls's liberal one. Libertarianism is rooted in an ideal of persons as free individuals who own themselves and their assets and cooperate only on the basis of private contracts. Rawls rejects voluntaristic accounts of political society. His liberalism is based on an ideal of persons as free and equal citizens permanently engaged in a cooperative activity that is structured by reciprocity. Political society is not something we can join or opt-out of. So if the only reasonable conception of democracy is Rawls's, then libertarianism is unreasonable. But there is no reason to think that Rawls's conception of democracy is the only reasonable one. To make good on the claim that libertarianism is inconsistent with democracy, we would have to show that libertarianism is inconsistent with democracy simpliciter. But I do not believe that this is the case. That is, if a libertarian argued that libertarianism is consistent with some form of democracy, it is not obvious to me that he would be wrong. I cannot see any reason to say, before looking at the argument, that he must be mistaken.

Rawls could be arguing that libertarianism is not consistent with liberal democracy (even if it could be consistent with some understandings of democracy). This strategy is suggested by some of what Rawls says about inequalities and the possibility of democracy. Vast inequalities in wealth undermine fair equality of opportunity, the fair

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<sup>405</sup> See Samuel Freeman's "Introduction" to The Cambridge Companion to Rawls (New York: Cambridge University Press, 2003), pp. 43-4.

<sup>406</sup> Robert Nozick, Anarchy, State, and Utopia, pp. 276-294.

value of political liberties, and so on.<sup>407</sup> If we ignore vast inequalities, and the way these affect people's prospects in life, we do not take seriously the idea of society as a fair system of cooperation.<sup>408</sup> A person's self-understanding is deeply influenced by the public's understanding of the social institutions of the society in which he is born. In societies where huge inequalities are allowed, it is difficult for people to come to see themselves as free and equal citizens, and those low on the social ladder have little reason to be hopeful or optimistic about their own life prospects.<sup>409</sup> This is not to say that libertarianism does not treat people as free and equal, but that it does not do so in a way that is consistent with the democratic values implicitly expressed in our public political culture.

According to this argument, libertarians can, in good faith, reject democracy for philosophical or moral reasons, but they cannot do so reasonably, because the reasonable implies a commitment to liberal democracy. Unfortunately, if this is Rawls's strategy, it is not a good one. It amounts to nothing more than the claim that libertarians reject liberalism. But we already know this.

So it is not clear that Rawls has good reason to reject libertarianism as unreasonable. The different arguments that he might make for this claim seem vulnerable to reasonable disagreement or otherwise very weak. This problem and others like it suggest that Rawls's view does not adequately deal with the scope of the burdens of judgment. His view seems too demanding.

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<sup>407</sup> JE, p. 53.

<sup>408</sup> JE, p. 56.

<sup>409</sup> JE, pp. 56-7.

Similar problems arise for Rawls's rejection of Marxist and communitarian views. He rejects these views as unreasonable because they give priority to the right over the good, but it is not clear why he thinks this makes them unreasonable. Rawls could hold that it is a simple mistake to give priority to the good over the right. But, once again, it is not clear just what the simple mistake is. Disagreements over whether the good or the right has priority are better understood as rooted in the burdens of judgment, and not as based on simple factual or logical errors. Alternatively, he could hold that views that give priority to the good are not consistent with democracy simpliciter. But, again, this hardly seems plausible. The only strategy left seems to be arguing that Marxist and communitarian views are unreasonable because they are not liberal. Of course, this is not satisfying either.

In the end, it is not clear why the problems Rawls has with libertarianism, Marxism, and communitarianism, should be taken as evidence that these views are unreasonable. It seems like the disagreement between liberals and libertarians over the basic structure, and the disagreement between liberals and Marxists and communitarians over the priority of the good and the right, are best understood as disagreements rooted in the burdens of judgment. On my view, this makes them good faith disagreements. I think Rawls sees these disagreements as rooted in the burdens of judgment too, but that he does not see them as reasonable disagreements. What I do not see is how Rawls can justify this.

There is one more possibility that we can consider. Rawls holds that every body politic is literally constituted by those individuals who share certain fundamental values and norms, which define the offices and positions of political authority in a political

system, their attached right and duties, and so on. This is the root or institutional meaning of constitutionalism. Rawls also draws on Hart's understanding of rules. Rule-governed behavior is more than regular, patterned of behavior; it is better understood as an internal attitude toward patterns of behavior. Rawls could be rejecting libertarian, Marxist, and communitarian views because the people who hold these views simply do not share the fundamental norms and values that are held by people who affirm liberal democracy. That is, Rawls may think that liberals and libertarians share some values, e.g., a commitment to citizens as free and equal, but that they do not ultimately share the kinds of values that would allow them to constitute themselves as a body politic that is just, legitimate, and stable. Libertarians are, in this sense, "foreign" to liberals. And Rawls may think that liberals do share some values with Marxists and communitarians, but that these groups do not ultimately share the kinds of values that would allow them to constitute themselves as a just, legitimate, and stable body politic. Marxists and communitarians are also foreign to liberals. Rawls may think that libertarians, Marxists, and communitarians simply live outside of the liberal community of value. From this perspective, it could be the case that his problem with libertarianism, Marxism, and communitarianism is that they are not liberal.

If this explanation is correct, we should read the arguments that Rawls offers in defense of his political liberalism as aimed specifically at his reasonable (i.e., liberal democratic) citizens, and not at citizens as such (i.e., all those people who happen to have political membership in a liberal democracy). From the perspective of those committed to liberal democracy, libertarians, communitarians and Marxists are unreasonable. They insist on values not shared by individuals committed to liberal democracy. These

unreasonable views are not based on simple errors, but those who affirm them remove themselves from the liberal democratic community. This is significant, because citizens as such cannot constitute a liberal democracy. A liberal democracy can only be constituted by citizens who share liberal democratic values. It is not clear if citizens as such can constitute a body politic at all, insofar as they do not share the values that might make this possible. Rawls might think it is simply not possible for them to do so.

Does this reading imply that Rawls is simply assuming the legitimacy of liberal constitutional democracy? In a way, yes. In IPRR he holds that “a reasonable doctrine accepts a constitutional democratic regime and its companion idea of legitimate law.”<sup>410</sup> What he is trying to understand is how citizens committed to liberal democracy can see their law as legitimate in the face of both reasonable pluralism and liberal pluralism. But the reading I am suggesting now does not require Rawls to assume that liberal democratic values are immune to the burdens of judgment, that is, that there are not good faith disagreements about whether the basic structure really is the first subject of justice, or whether the right really does have priority over the good. What he seems to be assuming is that citizens committed to liberal democracy form a community that is in important ways distinct from the communities of libertarians and the communities of Marxists and communitarians. This again is not the same as assuming that liberal democracy is legitimate. It is, rather, to assume that liberals form a community apart from these others.

In a way, this is similar to Rawls’s approach to the problem of international relations in The Law of Peoples. There Rawls develops “laws” meant to regulate

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<sup>410</sup> IPRR, p. 132: “The basic requirement is that a reasonable doctrine accepts a constitutional democratic regime and its companion idea of legitimate law.”

relationships between different societies in the global community. But when he develops these laws, he does not ask what terms of association all societies would adopt. Rather, he begins by asking what terms of association all liberal democratic societies would adopt as properly regulating international relations between societies. He then wonders if other types of societies might not also adopt these terms of association. Perhaps Rawls's arguments in political liberalism are aimed simply at his reasonable (i.e., liberal democratic) citizens.

In the end, I am not sure if this is Rawls's view. I think it is one way to understand his rejection of libertarianism, Marxism, and communitarianism. If this view is correct, Rawls does not hold that his generic liberalism is immune to the burdens of judgment, but he nevertheless does hold that reasonable citizens do not reject it.

#### A Plurality of Legitimacy Theories?

One problem Rawls's theory of legitimacy faces is the possibility of an incompatible plurality of theories of legitimacy. His theory is based on his conceptions of shared ideas implicit in our public political culture (e.g., free and equal citizens, reciprocity), roughly those that support his favored political conception, justice as fairness. But Rawls insists that there are many reasonable ways to describe these shared ideas. They are subject to the burdens of judgment. This suggests that it is possible to have good faith disagreements over theories of legitimacy. Apparently, one can reject Rawls's theory of legitimacy in good faith, and prefer a different one, so long as it is suitably grounded in some conception of shared democratic ideas. This seems like the

only approach that respects the burdens of judgment. Rawls insists that reasonable persons acknowledge the burdens of judgment and accept their consequences for public justification of solutions to political problems. Thus, reasonable persons must be willing to accept the fact that different theories of legitimacy will develop in any society, and that it is not reasonable to expect all citizens to converge on a theory of legitimacy. This seems to be implied by Rawls's understanding of reasonable persons, unless some conceptions of our shared commitments are simply immune to reasonable disagreement. But this seems unlikely. So Rawls's view implies a plurality of reasonable and possibly incompatible theories of legitimacy.

For example, Rawls holds that legitimacy is rooted in reciprocity. On his view, reciprocity has two aspects, reciprocity in justification, and reciprocity in advantage. Reciprocity in justification has to do with each person offering reasons others could reasonably affirm. Reciprocity in advantage has to do with each person benefiting in an appropriate way from political arrangements. But it is not obvious that this is the only way to develop a conception of the idea of reciprocity implicit in our political culture. Amy Gutmann and Dennis Thompson have developed an idea of reciprocity that is different from Rawls's version.<sup>411</sup> Rawls ultimately rejects their view, for his purposes at least, because it is grounded (he claims) in a comprehensive doctrine and is not properly political, i.e., neutral between competing conceptions of the good.

Reidy has developed an account of legitimacy that draws on Rawls's theory and that is, in Rawls's terms, appropriately political. Reidy narrows Rawls's idea of

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<sup>411</sup> Amy Gutmann and Dennis Thompson, Democracy and Disagreement (Cambridge, Ma.: Harvard University Press, 1996). See especially chapters 1 and 2.



reciprocity to reciprocity in advantage. Reidy calls his approach Democratic Legitimacy, to distinguish it from Rawls's Liberal Legitimacy. Democratic legitimacy is Rawlsian in spirit, but avoids certain problems by dropping Rawls's commitment to reciprocity in justification. It is enough, Reidy says, if we can develop an account of reciprocity in advantage that does justice to our understanding of democratic citizens as free and equal and committed to particular comprehensive doctrines.

The point is not that Reidy's Democratic Legitimacy solves all of our problems, but that it is a plausible account of legitimacy, in that it is developed from properly political ideas. It does not depend on any comprehensive commitments, but seems instead to have the kind of political neutrality that Rawls seeks. What this shows is that it is possible to develop many "free standing" accounts of legitimacy. The problem is that it is not obvious how we might decide between them. None of them are free from the burdens of judgment. Nor are there any publicly recognized methods or standards for determining if any are true, or which might be regarded as most reasonable. Thus, Rawlsian political liberalism seems to leave us with an irresolvable legitimacy problem.

## CONCLUSION

“What we affirm, when we align ourselves with democracy, is hesitant, confused and often in bad faith.... Above all what we deny is that any set of human beings, because of who or what they simply are, deserve and can be trusted with political authority. We reject, in the great Leveller formula, redolent of England’s seventeenth-century Civil War, the claim (or judgement) that any human being comes into the world with a saddle on their back, or any other booted and spurred to ride them.”

John Dunn<sup>412</sup>

“The utility of moral and political philosophy is to be estimated, not so much by the commodities we have by knowing these sciences, as by the calamities we receive by not knowing them.”

Thomas Hobbes<sup>413</sup>

### A Reasonable Hope for the Future of Liberal Democratic Society?

In this dissertation I have sought to develop and defend an account of the conditions under which a modern democratic government could rightfully enforce the law against its citizens, and the nature of any duties that citizens might have to obey or

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<sup>412</sup> John Dunn, Democracy: A History (New York: Atlantic Monthly Press, 2005), pp. 69-70.

<sup>413</sup> Thomas Hobbes, Elements of Philosophy. Quoted in C. B. Macpherson, ed., Thomas Hobbes: Leviathan (New York: Penguin Books, 1985), p. 10.

acquiesce. My account draws on a line of thought that develops through the works of Hart and Soper and reaches its culmination in Rawls's political liberalism. Soper's generic account of political obligation is a helpful way of thinking about the normativity of political relations. There is reason to think, though, that this generic account is inadequate as it stands for a modern liberal democratic context. Rawls's account of legitimacy is an advance on Soper's, insofar as it represents one way to apply Soper's generic account to this democratic context. Thus, although I am not sure that Rawls's account ultimately succeeds, I think that Rawls is on the right track. I find the Soper/Rawls line of thought particularly attractive for several reasons. First, it takes seriously the depth and breadth of good faith disagreement. Second, it respects the judgment of individuals in a particularly strong way. Third, it is particularly faithful to the liberal ideal of shared reason. Finally, it offers what Rawls's might call a reasonable hope for the future of democratic society.

Good faith disagreements are a fact of social life. The common resources of human reason are simply inadequate to the task of publicly justifying answers to many of the most important questions we ask about our individual good and the good of our society. The burdens of judgment get in the way. Political theory must recognize this fact. The line of thought I have developed in this dissertation does just that, by putting good faith disagreements front and center in our thinking. The Soper/Rawls line makes the law's normativity a function of a sincere commitment to justice, but it does not depend on any implausibly strong consensus regarding what justice requires. It requires only the much weaker notions of reciprocity in justification and reciprocity in advantage. While Soper never talks explicitly about the liberal democratic context, I have suggested

one fairly straightforward way of constructing such a Soperian view. On this direct Soperian reading, we end up with a very generous and open understanding of what public officials are allowed to affirm in the name of justice. But as we saw, this view may be too open, as it may allow too much. Rawls has a more narrow understanding of liberal democratic justice. It is rooted in an ideal of free and equal citizens who, as co-authors of their law, offer terms of political association to one another that they think those others might reasonably accept, from their shared moral point of view as citizens. While Rawls's view avoids the problems that the Soperian view faces, by developing a robust understanding of justice appropriate for liberal democracies, it has problems of its own. In particular, while Rawls's view of liberal democratic justice makes some room for good faith disagreement, it is not clear that the room it makes is sufficient to encompass all of the views of justice that might be held in good faith in any modern liberal democracy, even if we require that conceptions of justice be couched in political terms. So although Rawls's view does not depend on the implausibly strong notion of consensus, which is correctly rejected by the power friendly theorists, it may still depend on a sort of consensus that is implausible nonetheless. Nevertheless, I think the Soper/Rawls line represents a more promising way of handling the issue of good faith disagreement than does the family of respect for judgment views.

One worry I have about respect for interest views, such as Shapiro's competitive democracy, is that they do not make sufficient room, or the right kind of room, for good faith disagreement. The family of respect for interest views that includes Shapiro's view makes the law's normativity (or the government's right, or the citizen's duty) a function

of some significant shared interest of citizens.<sup>414</sup> Shapiro argues that democracy “deserves our allegiance” because it represents our best chance of minimizing domination in society. Individual persons face the possibility of domination any time someone else can threaten their basic interests, which Shapiro defines in terms of the essentials any person needs to become and survive as an independent agent in the world. Democracy, in particular Schumpeter’s competitive democracy, reduces the threat of domination by making politically powerful agents compete for the allegiance of politically weak individual citizens. Competitive elections give citizens the means to remove from office elected officials who do not take seriously their basic interests. This gives politicians incentive to protect these basic interests. While I think there is much that can be said in favor of Shapiro’s competitive democracy, the reason that I cannot whole-heartedly affirm it is that there are good faith disagreements over just what our basic interests are, and, maybe more importantly, over what sorts of democratic decision procedures best protect and promote those interests. One might think that we can easily resolve such disagreements over the nature of our basic interests through democratic political processes themselves, but before we can see the results of any such decision procedure as authoritative, we would need to overcome the problem of good faith disagreement over what sorts of democratic decision procedures any society ought to have, even given the stated goal of protecting basic interests. But it is not obvious how we might do this.

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<sup>414</sup> Another family of respect for interest views seeks to add up citizens’ expressed interests in various ways. See my discussion of aggregative and deliberative democracy in Chapter 1.

Respect for interest views all suffer from versions of this problem. And here we bump up against a worry expressed by Waldron.<sup>415</sup> Respect for interest views tend to reject some people's considered judgments about their basic interests, or about what form of democracy best protects those interests, in the name of (as Waldron puts it) some fancied consensus regarding how to answer these questions. But there is no such consensus, and we should not pretend that such a consensus is even an achievable goal. Of course, one might simply reject the idea that consensus plays any important role in the identification of the relevant normatively significant basic interest, but this puts us in the position of asserting that some people do not really understand what their basic interests are, or of admitting that they do understand their basic interests, but that this is irrelevant to a discussion of the nature of their relationship to the state. Both of these options are unattractive, in particular because they seem to fail to give sufficient weight to the idea that people are capable of understanding and determining for themselves how they ought to live, or to the basic normative ideal that people ought to be free to exercise this capacity in their actual political lives (i.e., political autonomy is threatened or ignored). While I reject Simmons's consent account of political obligation, I think there is something right in his insistence that political authority (broadly construed) ought to have some close relationship to the way citizens freely choose to live.

This is one reason that I find the Soper/Rawls line particularly attractive. It respects the judgments of individuals in a particularly strong way. Not only does it make room for good faith disagreements over comprehensive doctrines, it also makes room for good faith disagreements about justice and democracy and other political matters. It does

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<sup>415</sup> Waldron, Law and Disagreement, Chapter 1.

not presuppose or assume some consensus about what justice or democracy require, but instead makes room for each person to express his or her good faith views about these issues. The views that people actually hold take on a fundamental significance. The free choices that citizens actually make determine what justice requires, what our basic interests are, and so on. There are limits to this, of course, and one of the problems with Rawls's view in particular is where and how he sets the limits. Nevertheless, individual judgment is given more room, and a more appropriate place, in respect for judgment views like Shapiro's and Rawls's, than it is in respect for interest views like Shapiro's or Buchanan's.

Another reason that I find the Soper/Rawls line particularly attractive is the way these views come together to further the liberal ideal of shared reason. Neither Soper nor Rawls ignores the fact that good faith disagreements deserve a central place in political theory, but this does not lead either to give up on the idea that terms of political association might still be shared in some normatively significant sense. They offer instead a relaxed account of shared reason, that is rooted in reciprocity of justification and reciprocity in advantage. Rawls sees in the relaxed account of shared reason an opportunity to make good on the liberal claim that democratic state power is the power of free and equal citizens as a collective body, in a way that responds as well to freedom of conscience or political autonomy. This resolves the worry, expressed forcefully by Wolff, that state power is always immoral because it is simply incompatible with individual moral autonomy. The relaxed account of shared reason reconciles individual autonomy with the fact that democratic power must often be exercised under conditions of good faith disagreement.

Finally, any theory of justice, political legitimacy, or political obligation must be concerned (at least instrumentally) with civic virtue.<sup>416</sup> Liberalism recognizes that people have differing views of the value of political participation, and that many citizens are generally uninterested in political issues. Nevertheless, it is important to maintain what Rawls calls republicanism.<sup>417</sup> The idea here is roughly that certain political virtues need to be instilled in some minimum number of citizens in order to keep a liberal democratic society from degenerating into some form of tyranny or fanaticism (e.g., religious or nationalist). Citizens should recognize a minimal duty to foster and uphold just social and political institutions. In addition, citizens should develop what Kymlicka calls the virtue of “civility” or “decency.”<sup>418</sup> Minimally this requires that citizens generally do not break the law, or harm others, and so on. It also requires that we treat other citizens as free and equal citizens.

Much more could be said about civic virtue, but I do not intend to develop and defend any robust account of it here. My point in raising this issue is to indicate one way that I think the Soper/Rawls line is superior to Shapiro’s view. Republicanism and civility are instrumentally necessary for the maintenance of any decent democratic political order. But we have reason to worry about whether or not citizens would willingly affirm and support democracy under the conditions described by Shapiro. He hardly presents an attractive vision of democracy. This is not a problem for all respect

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<sup>416</sup> For an introduction to the issue of civic virtue, see, e.g., Kymlicka, Contemporary Political Theory, pp. 299-312.

<sup>417</sup> This is not a form of perfectionism. Perfectionist theories argue that civic virtue is necessary because this sort of political activity is essential for the realization of some significant component of the human good. I do not find perfectionism compelling. My interest in civic virtue is instrumental. I am mainly concerned with the minimal conditions necessary for the promulgation of a decent liberal democratic society.

<sup>418</sup> Kymlicka, Contemporary Political Theory, p. 300.



for interest views. It is a problem for Shapiro because he presents a fairly grim account of what it is reasonable for us to hope for from a democratic society. Justice has little to no role to play in his proposed democratic society, even as a regulative ideal. The best that the majority of us can reasonably hope for is that we will not be dominated by those who wield political power. This is better than nothing, I suppose, but it is hardly inspiring. We do not need to be inspired, of course, to develop civic virtues, but Shapiro's dim assessment makes me doubt that his democratic society would find much support at all among citizens. He may be correct when he says that many people around the world aspire to have democracy largely because it represents their best chance at avoiding domination. However, it does not seem unreasonable to think that people in other democratic societies, where the worst sorts of domination have been relegated to the past, might hope for more than this from their democratic society. We might prize democracy initially because it protects us, but once we have achieved that aim, is it wrong to hope that democracy might also bring something more?

The Soper/Rawls line presents a more hopeful vision of the future of democracy than does Shapiro's view. Even the straightforward Soperian understanding of democratic political authority does better than Shapiro's view on this measure. For in Soper's proposed society, officials are at least guided by their own understanding of the common good. This is what gives their political activity its distinctively moral character, and what gives citizens reason to respect it, at least a little bit. In Shapiro's democracy, the law can be made to serve any private interests whatsoever, just as long as citizens maintain the means to "throw the bums out" when they deem it necessary. In the Soper/Rawls version of democracy, the law is made to serve justice and the common

good. This gives citizens a reason to affirm the Soperian/Rawlsian society that is simply missing from Shapiro's democracy.

In the end, I agree with Dunn when he says that our commitment to democracy is often hesitant and confused, because it is fairly clear that We, the People, do not hope for the same things from our democratic society. We agree, of course, that people are free and equal, but this agreement does not get us very far. We disagree at the deepest levels over what these ideals commit us to, and over how a democratic society committed to these ideals ought to be organized. But I believe that if we all seek justice in our democratic political order, even though we know that there is no real hope that we will reach a consensus on what justice requires, what we will achieve instead is a political order society that is legitimate, that is comprised of genuinely authoritative relations of authority between citizens and their democratic state. In this way we can avoid the calamities that so worried Hobbes, the chief of which, in his estimation, was a society divided against itself, a society in a state of civil war.<sup>419</sup>

Moving Forward.

I want to end this dissertation by briefly describing two directions for further research that develop out of this project. First, despite my worries about Soper's and Rawls's views, I think this line of thought is a helpful way of thinking about political authority in modern liberal democracies. I am not convinced that the generic Soperian account of political obligation works for a liberal democracy, nor am I convinced that

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<sup>419</sup> Hobbes, Elements of Philosophy, p. 10.

Rawls's effort to apply Soper's generic view to the context of liberal democratic political culture is entirely successful. However, I do think that Soper and Rawls are on the right track, so one of my projects for the future will be to develop an account of liberal democratic political authority in the Soper/Rawls line. One way to do this might be simply to find a better way to apply Soper's generic account to the liberal democratic context.

Second, I ended Chapter 4 with the suggestion that, because of the burdens of judgment, we might be faced with an irresolvable plurality of legitimacy theories. This gives us reason to worry about the possibility of there being a legitimate democratic state. Nevertheless, the prospect of such an irreconcilable plurality need not be the end of the road for the Soper/Rawls line. Most theorists recognize a distinction between legitimacy and justice.<sup>420</sup> These are different virtues that a state or the law might possess. Justice refers, in the broadest sense, to some appropriate distribution of benefits and burdens (however defined) among the morally significant entities (e.g., individuals, associations, peoples) in a society (domestic or global). Political legitimacy refers to a state's right to use coercive force against its citizens to compel obedience to its laws. Most believe justice and legitimacy vary somewhat independently of each other. The upshot is that it may be legitimate to enforce appropriately enacted but unjust laws, and illegitimate to enforce just laws that are not enacted properly. For instance, one might argue that current laws against same-sex marriage are legitimate, insofar as they have been properly enacted, but unjust, as they fail to treat people equally, or to properly respect liberty rights. Or one might argue that justice requires a more equitable distribution of wealth in

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<sup>420</sup> This is discussed in Chapter 1.

(for instance) the U.S., but that it would be illegitimate to do this by executive order without legislative input, or by overthrowing the current government and placing society under the care of some bureau of benevolent guardians.

With this in mind, perhaps Soper and Rawls make a mistake when they insist that a sincere commitment to the justice of the law is sufficient to generate the law's normative force. It might more appropriate, all-things-considered, to see the justice claim as one, but not the only, necessary condition. The other condition might be the sincere conviction that the just law is also legitimate. Since we recognize a distinction between justice and legitimacy, and we have resources available to support claims to each, we might want to insist that public officials show a sincere commitment to both. Thus, a citizen may have good moral reason to respect the law only when government officials sincerely hold that the law is both just and legitimate, even if the citizen disagrees with the normative evaluations of the officials in question. What I am suggesting is that a sincere claim that the law is legitimate might deserve respect in the same way that the sincere claim that the law is just merits respect.

How does this help us? It offers a more complete account of respect for the law, and it makes room for good faith disagreements over what legitimacy requires. We recognize that it is sometimes illegitimate to coercively enforce just laws. What, then, determines when citizens ought to respect the law? We could require government officials to make both the justice and legitimacy claims. This is important for two reasons. First, since legitimacy and justice vary somewhat independently, citizens cannot tell from either the justice or the legitimacy claim alone if the law merits respect. Citizens can only know that the law merits respect when officials sincerely make both the

justice claim and the legitimacy claim. Here something like Soper's sincerity condition comes into play, but we must now judge sincerity according to two normatively significant measures, justice and legitimacy. Second, the exercise of government power in the name of justice, when it is not exercised legitimately, amounts to an abuse of government power. The sincere commitment of government officials to both justice and legitimacy might resolve this problem, and so it seems that both a commitment to justice and to legitimacy are needed as constraints on the appropriate use of state power.

## BIBLIOGRAPHY

Ackerman, Bruce. Social Justice and the Liberal State. New Haven: Yale University Press, 1980.

Ackerman, Bruce and James S. Fishkin. Deliberation Day. New Haven: Yale University Press, 2004.

Anscombe, E. "On the Source of the Authority of the State." Ratio, v. 20 (1978).

Arneson, Richard J. "The Principle of Fairness and Free-Rider Problems." Ethics, v. 92 (1982), pp. 616-633.

\_\_\_\_\_. "Debate: Defending the Purely Instrumental Account of Democratic Legitimacy." Journal of Political Philosophy, v. 11 (2003), pp. 122-132.

Audi, Robert, ed. The Cambridge Dictionary of Philosophy. New York: Cambridge University Press, 1995.

Audi, Robert and Nicholas Wolterstorff. Religion in the Public Square: The Place of Religious Convictions in Political Debate. New York: Rowman and Littlefield Publishers, 1996.

Austin, John. The Province of Jurisprudence Determined. London: J. Murray, 1832.

Bailey, James. Utilitarianism, Institutions, and Justice. New York: Oxford University Press, 1997.

Barber, Benjamin. Strong Democracy. Berkeley, Ca.: University of California Press, 1984.

Barker, Rodney. Political Legitimacy and the State. Oxford: Clarendon Press, 1990.

Barnard, F. M. Self-Direction and Political Legitimacy: Rousseau and Herder. Oxford: Clarendon Press, 1988.

Beetham, David. The Legitimation of Power. London: Macmillan Education, 1991.

\_\_\_\_\_. "Legitimacy." In E. Craig, ed., Routledge Encyclopedia of Philosophy. London: Routledge. Retrieved 07 March 2004, from <http://www.rep.routledge.com/article/S034>.

Beitz, Charles. Political Equality. Princeton: Princeton University Press, 1989.

Bellamy, Richard and Andrew Mason. Political Concepts. Manchester, England: Manchester University Press, 2003.

Bentham, Jeremy. A Fragment on Government and An Introduction to the Principles of Morals and Legislation. W. Harrison, ed. Oxford: Clarendon Press, 1948.

\_\_\_\_\_. Of Laws in General. H. L. A. Hart, ed. London: Athlone Press, 1970.

Beran, Harry. The Consent Theory of Political Obligation. New York: Croom Helm, 1987.

Bohman, James and William Rehg, eds. Deliberative Democracy: Essays on Reason and Politics. Cambridge, Ma.: MIT Press, 1997.

Buchanan, Allen. "Recognitional Legitimacy and the State System." Philosophy and Public Affairs, v. 28 (1999), pp. 46-78.

\_\_\_\_\_. "Political Legitimacy and Democracy." Ethics, v. 112 (2002), pp. 689-719.

Burton, Steven J. "Law, Obligation, and a Good Faith Claim of Justice." California Law Review, v. 73 (1985), pp. 1966-74.

Christiano, Thomas. The Rule of the Many: Fundamental Issues in Democratic Theory. Boulder, Co.: Westview Press, 1996.

\_\_\_\_\_. "Waldron on Law and Disagreement." Law and Philosophy, v. 19 (2000), pp. 513-543.

Christman, John. Social and Political Philosophy: A Contemporary Introduction. New York: Routledge, 2002.

Cohen, Joshua. "An Epistemic Conception of Democracy." Ethics, v. 97 (1986), pp. 26-38.

\_\_\_\_\_. "Reflections on Rousseau: Autonomy and Democracy." Philosophy and Public Affairs, v. 16 (1986), pp. 275-97.

\_\_\_\_\_. "Deliberation and Democratic Legitimacy." In Alan Hamlin and Philip Pettit, eds., The Good Polity: Normative Analysis of the State, New York: Basil Blackwell, 1989, pp. 17-34.

Coleman, J. and S. Shapiro. Oxford Handbook of Jurisprudence and Philosophy of Law. New York: Oxford University Press, 2002.

Crowder, George. Liberalism and Value Pluralism. New York: Continuum, 2002.

D'Agostino, Fred. Free Public Reason: Making It Up As We Go. New York: Oxford University Press, 1996.



- D'Agostino, Fred and Gerald Gaus, eds. Public Reason. Ashgate, 1998.
- Dahl, Robert A. A Preface to Democratic Theory. Chicago: University of Chicago Press, 1956.
- \_\_\_\_\_. Democracy and its Critics. New Haven: Yale University Press, 1989.
- Dahl, Robert A., Ian Shapiro, and Jose Antonio Cheibub, eds. The Democracy Sourcebook. Cambridge, Ma.: MIT Press, 2003.
- Dancy, Jonathan. Moral Reasons. Malden, Ma.: Blackwell Publishers, 1993.
- Dowding, K., R. Goodin, and C. Pateman, eds. Justice and Democracy: Essays for Brian Barry. New York: Cambridge University Press, 2004.
- Dunn, John. Political Obligation in Its Historical Context. New York: Cambridge University Press, 1980.
- \_\_\_\_\_. Western Political Theory in the Face of the Future. New York: Cambridge University Press, 1993.
- \_\_\_\_\_. Democracy: A History. New York: Atlantic Monthly Press, 2005.
- Dworkin, Ronald. Taking Rights Seriously. Cambridge, Ma.: Harvard University Press, 1978.
- \_\_\_\_\_. Law's Empire. Cambridge, Ma.: Belknap Harvard, 1986.
- Eberle, Christopher J. Religious Conviction in Liberal Politics. New York: Cambridge University Press, 2002.
- Edmundson, W.A. Three Anarchical Fallacies: An Essay on Political Authority. New York: Cambridge University Press, 1998.
- Estlund, David. "Making Truth Safe for Democracy." In The Idea of Democracy, ed. David Copp, Jean Hampton, and John Roemer. New York: Cambridge University Press, 1993, pp. 71-100.
- \_\_\_\_\_. "The Epistemic Dimension of Democratic Authority." The Modern Schoolman, v. 74 (1997), pp. 259-276.
- \_\_\_\_\_. "Jeremy Waldron on Law and Disagreement." Philosophical Studies, v. 99 (2000), pp. 111-128.

Farber, Daniel and Philip Frickey. Law and Public Choice: A Critical Introduction. Chicago: University of Chicago Press, 1991.

Finnis, John. "The Authority of Law in the Predicament of Contemporary Social Theory." Notre Dame Journal of Law, Ethics, and Public Policy, v. 1 (1984).

Flathman, Richard E. Political Obligation. Atheneum, 1972.

\_\_\_\_\_. The Practice of Political Authority: Authority and the Authoritative. Chicago: University of Chicago, 1980.

\_\_\_\_\_. "Legitimacy." In R. Goodin and P. Pettit, eds., A Companion to Contemporary Political Philosophy, Malden, Ma.: Blackwell Publishing, 1993, pp. 527-533.

Freeman, Samuel. "Reason and Agreement in Social Contract Views." Philosophy and Public Affairs, v. 19 (1990), pp. 122-157.

\_\_\_\_\_. "Original Meaning, Democratic Interpretation, and the Constitution." Philosophy and Public Affairs, v. 21 (1992), pp. 3-42.

\_\_\_\_\_. "Illiberal Libertarians: Why Libertarianism is Not a Liberal View." Philosophy and Public Affairs, v. 30 (2002).

Gans, C. Philosophical Anarchism and Political Disobedience. New York: Cambridge University Press, 1992.

Gaus, Gerald. Value and Justification: The Foundations of Liberal Theory. Cambridge, Ma.: Cambridge University Press, 1990.

\_\_\_\_\_. "Public Justification and Democratic Adjudication." Constitutional Political Economy, v. 2 (1991).

\_\_\_\_\_. Contemporary Theories of Liberalism. Thousand Oaks, Ca.: SAGE Publications, Inc., 2003.

Gilbert, M. "Reconsidering the 'Actual Contract' Theory of Political Obligation." Ethics, v. 109 (1999), pp. 236-260.

Goodin, Robert. Reflective Democracy. New York: Oxford University Press, 2002.

\_\_\_\_\_. Utilitarianism as a Public Philosophy. New York: Cambridge University Press, 1995.

- Goodin, Robert and Philip Pettit, eds. A Companion to Contemporary Political Philosophy. Malden, Ma.: Blackwell Publishing, 1993.
- Gough, J. W. John Locke's Political Philosophy, second ed. New York: Oxford University Press, 1973.
- Green, Donald, and Ian Shapiro. Pathologies of Rational Choice Theory: A Critique of Applications in Political Science, New Haven, CT: Yale University Press, 1994.
- Green, Leslie. The Authority of the State. Oxford: Clarendon Press, 1988.
- \_\_\_\_\_. "The Concept of Law Revisited." Michigan Law Review 94 (1996) 1692-7.
- \_\_\_\_\_. "Positivism and Conventionalism." Canadian Journal of Law and Jurisprudence 12 (1999).
- Greenawalt, Kent. Religious Convictions and Political Choice. New York: Oxford University Press, 1988.
- \_\_\_\_\_. Private Consciences and Public Reasons. New York: Oxford University Press, 1995.
- Griffin, Christopher G. "Debate: Democracy as a Non-Instrumentally Just Procedure." Journal of Political Philosophy, v. 11 (2003), pp. 111-121.
- Gutmann, Amy. "Democracy." In Robert Goodin and Philip Pettit, eds., A Companion to Contemporary Political Philosophy. Malden, Ma.: Blackwell Publishing, 1993, pp. 411-21.
- Gutmann, Amy and D. Thompson. Democracy and Disagreement. Cambridge, Ma.: Belknap Harvard, 1996.
- \_\_\_\_\_. Why Deliberative Democracy? Princeton, NJ: Princeton University Press, 2004.
- Hardimon, M. "Role Obligations." Journal of Philosophy, v. 91 (1994), pp. 333-363.
- Hardin, Russell. Morality Within the Limits of Reason. Chicago: University of Chicago Press, 1988.
- Hampton, Jean. Hobbes and the Social Contract Tradition. New York: Cambridge University Press, 1996.
- Hart, H. L. A. "Are There Any Natural Rights?" Philosophical Review, v. 64 (1955), pp. 185-6.

- \_\_\_\_\_. Essays on Bentham. Oxford: Clarendon Press, 1982.
- \_\_\_\_\_. The Concept of Law, second ed. Eds. P. Bulloch and J. Raz. New York: Oxford Clarendon Press, 1994.
- Hobbes, Thomas. Leviathan. Ed. C. B. MacPherson. New York: Penguin Books, 1968.
- Horton, J. Political Obligation. Atlantic Highlands, N.J.: Humanities Press, 1997.
- Hume, David. "Of the Original Contract." In Essays Moral, Political and Literary, ed. E. Miller. Indianapolis, In: Liberty Classics, 1985.
- Jeske, Diane. "Associative Obligations, Voluntarism, and Equality." Pacific Philosophical Quarterly, v. 77 (1996), pp. 289-309.
- Kant, Immanuel. Kant: Political Writings. H.S. Reiss, R. Geuss, and Q. Skinner, eds.; H. B. Nisbet, trans. New York: Cambridge University Press, 1991.
- Klosko, George. "Presumptive Benefit, Fairness and Political Obligation." Philosophy and Public Affairs, v. 16 (1987), pp. 241-259.
- \_\_\_\_\_. The Principle of Fairness and Political Obligation. Lanham, MD: Rowman and Littlefield, 1992.
- \_\_\_\_\_. Political Obligations. New York: Oxford University Press, 2005.
- Knight, Jack and James Johnson. "Aggregation and Deliberation: On the Possibility of Democratic Legitimacy." Political Theory, v. 22 (1994), pp. 277-296.
- Korsgaard, Christine M. "Realism and Constructivism in Twentieth-Century Moral Philosophy," Philosophy in America at the Turn of the Century, p. 112-115.
- Kramer, Matthew. In Defense of Legal Positivism. New York: Oxford University Press, 1999.
- Kymlicka, Will. Contemporary Political Philosophy: An Introduction, second edition. New York: Oxford University Press, 2002.
- Laden, Anthony Simon. "Democratic Legitimacy and the 2000 Election." Law and Philosophy, v. 21 (2002), pp. 197-220.
- Ladenson, R. "Two Kinds of Rights." Journal of Value Inquiry, v. 13 (1979), pp. 161-172.

- \_\_\_\_\_. "In Defense of a Hobbesian Conception of Law." Philosophy and Public Affairs, v. 9 (1980), pp. 134-159.
- Larmore, Charles. The Morals of Modernity. New York: Cambridge University Press, 1996.
- Locke, John. Political Writings of John Locke. David Wootton, ed. New York: Mentor Penguin, 1993.
- Lyons, David. "Soper's Moral Conception of Law." Ethics, v. 98 (1987), p. 1611.
- MacDonald, Margaret. "The Language of Political Theory," in A. G. N. Flew, ed., Logic and Language, Oxford: Basil Blackwell, 1951.
- Machiavelli, Niccolo. The Discourses. Bernard Crick, ed.; Leslie J. Walker, Jr., trans. New York: Penguin Books, 1970.
- Martin, Michael. The Legal Philosophy of H. L. A. Hart: A Critical Appraisal. Philadelphia: Temple University Press, 1987.
- Martin, Rex. "Political Obligation." Manuscript.
- McDowell, John. "Are Moral Requirements Hypothetical Imperatives?" Proceedings of the Aristotelian Society v. 52 (1978) 13-29.
- Mill, James. James Mill: Political Writings. Terence Ball, ed. New York: Cambridge University Press, 1992.
- Mill, John Stuart. On Liberty, and Other Essays. John Gray, ed. New York: Oxford University Press, 1991.
- Nozick, Robert. Anarchy, State and Utopia. New York: Basic Books, 1974.
- O'Sullivan, N. The Problem of Political Obligation. New York: Garland Press, 1987.
- Pateman, Carole. The Problem of Political Obligation. New York: Cambridge University Press, 1979.
- Plamenatz, J. P. Consent, Freedom, and Political Obligation, second ed. New York: Oxford University Press, 1968.
- Plato. "Crito." New Jersey: Prentice Hall, 1948.
- Pogge, Thomas. "What We Can Reasonably Reject." Philosophical Issues, v. 11 (2001), pp. 118-147.

Rawls, John. Political Liberalism (with “Reply to Habermas”). New York: Columbia University Press, 1993.

\_\_\_\_\_. A Theory of Justice, revised edition. Cambridge, Ma.: Belknap Harvard, 1999.

\_\_\_\_\_. Collected Papers. Ed. Samuel Freeman. Cambridge, Ma.: Harvard University Press, 1999.

\_\_\_\_\_. The Law of Peoples; with, “The Idea of Public Reason Revisited”. Cambridge, Ma.: Harvard University Press, 1999.

\_\_\_\_\_. Justice as Fairness: A Restatement. Erin Kelly, ed. Cambridge, Ma.: Belknap Harvard, 2001.

Raz, Joseph. The Authority of Law. Oxford: Clarendon Press, 1979.

\_\_\_\_\_. “The Obligation to Obey: Revision and Tradition.” Notre Dame Journal of Law, Ethics, and Public Policy, v. 1 (1984), pp. 139-155.

\_\_\_\_\_. The Morality of Freedom. Oxford: Clarendon Press, 1986.

\_\_\_\_\_. Practical Reason and Norms. Princeton: Princeton University Press, 1990.

\_\_\_\_\_. “Disagreement in Politics.” American Journal of Jurisprudence., v. 43, 1998.

Rehg, William S.J. “Legitimacy and Deliberation in Epistemic Conceptions of Democracy: Between Habermas and Estlund.” The Modern Schoolman, v. 74 (1997), pp. 355-374.

Riker, William H. Liberalism Against Populism. Prospect Heights, Ill: Waveland Press, 1982.

Rorty, Richard. Objectivity, Relativism and Truth. New York: Cambridge University Press, 1991.

Rosen, Allen D. Kant’s Theory of Justice. Cornell University Press, 1993.

Ryan, Alan. “Liberalism.” In R. Goodin and P. Pettit, eds., A Companion to Contemporary Political Philosophy, Malden, MA: Blackwell Publishing, 1993, pp. 292-3

Sartorius, Rolf. “Political Authority and Political Obligation.” Virginia Law Review, v. 67 (1981), pp. 3-17.

- Scanlon, T. M. What We Owe to Each Other. Cambridge, Ma.: Belknap Harvard, 1998.
- Schumpeter, Joseph. Capitalism, Socialism, and Democracy. New York: Harper, 1942.
- Shapiro, Ian. The State of Democratic Theory. Princeton: Princeton University Press, 2003.
- Simmons, A. John. "Voluntarism and Political Associations." Virginia Law Review, v. 67 (1981), pp. 19-37.
- \_\_\_\_\_. Moral Principles and Political Obligations. Princeton, N.J.: Princeton University Press, 1979.
- \_\_\_\_\_. "The Anarchist Position: A Reply to Klosko and Senor." Philosophy and Public Affairs, v. 16 (1987).
- \_\_\_\_\_. The Lockean Theory of Rights. Princeton, N.J.: Princeton University Press, 1992.
- \_\_\_\_\_. On the Edge of Anarchy: Locke, Consent, and the Limits of Society. Princeton, N.J.: Princeton University Press, 1993.
- \_\_\_\_\_. "Associative Political Obligations." Ethics, v. 106 (1996), pp. 247-273.
- \_\_\_\_\_. "Justification and Legitimacy." Ethics, v. 109 (1999), pp. 739-771.
- \_\_\_\_\_. Justification and Legitimacy. New York: Cambridge University Press, 2001.
- Smith, Dale. "Disagreeing with Waldron: Waldron on Law and Disagreement." Res Publica, v. 7 (2001), pp. 57-84.
- Smith, M.B.E. "Is There a Prima Facie Obligation to Obey the Law?" Yale Law Journal, v. 82 (1973), pp. 950-976.
- Somin, Ilya. "Book Review: The State of Democratic Theory." The Cato Journal, v. 23 (2004), pp. 475-479.
- Soper, Philip. A Theory of Law. Cambridge, Ma.: Harvard University Press, 1984).
- \_\_\_\_\_. "The Obligation to Obey the Law." In Ruth Gavison, ed., Issues in Contemporary Legal Theory: The Influence of H. L. A. Hart, Oxford: Clarendon Press, 1987, pp. 127-55.
- \_\_\_\_\_. The Ethics of Deference: Learning from Law's Morals. New York: Cambridge University Press, 2002.

- Stout, Jeffrey. Democracy and Tradition. Princeton: Princeton University Press, 2004.
- Strawson, P. F. "Freedom and Resentment." In P. F. Strawson, ed., Studies in the Philosophy of Thought and Action, New York: Oxford University Press, 1968, pp. 75-6
- Talisse, Robert. Democracy After Liberalism: Pragmatism and Deliberative Politics. New York: Routledge, 2005.
- Taylor, Charles. "Legitimation Crisis?" In Philosophy and the Human Sciences: Philosophical Papers 2. New York: Cambridge University Press, 1985, pp. 248-88.
- Thompson, Judith Jarvis. "A Defense of Abortion." Philosophy and Public Affairs, v. 1 (1971), pp. 47-66.
- Tideman, Nicolaus. "Coercion, Justice, and Democracy." Presented at the Amintaphil Conference on Coercion, Justice, and Democracy (St. Louis, MO, November 2006).
- Tussman, Joseph. Obligation and the Body Politic. New York: Oxford University Press, 1960.
- van den Brink, Bert. The Tragedy of Liberalism: An Alternative Defense of a Political Tradition. Albany: State University of New York Press, 2000.
- Waldron, Jeremy. "Theoretical Foundations of Liberalism." Philosophical Quarterly, v. 37 (1987), pp. 127-150.
- \_\_\_\_\_. Law and Disagreement. Oxford: Oxford University Press, 1999.
- \_\_\_\_\_. The Dignity of Legislation. Cambridge: Cambridge University Press, 1999.
- Walker, A. D. M. "Political Obligation and the Argument from Gratitude." Philosophy and Public Affairs, v. 17 (1988), pp. 191-211.
- Williams, Bernard. Moral Luck. New York: Cambridge University Press, 1981.
- Wolterstorff, Nicholas. "Do Christians Have Good Reasons for Supporting Liberal Democracy?" The Modern Schoolman v. 78 (2001), pp. 232-3
- Weber, Max. Economy and Society. Eds. G. Roth and C. Wittich. New York: Bedminster Press, 3 volumes, 1968.
- \_\_\_\_\_. Max Weber: Essays in Sociology. H. Gerth and C. Wright Mills, eds. London: Routledge, 1991.



Wellman, C.H. "Associative Allegiances and Political Obligations." Social Theory and Practice, v. 23 (1997), pp. 181-204.

Wenar, Leif. "Political Liberalism: An Internal Critique." Ethics, v. 106 (1995), pp. 35-6.

Wolff, Robert Paul. In Defense of Anarchism. New York: Harper and Row Publishers, 1970.

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