

POLITICAL AUTHORITY AND DEMOCRACY

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For Heather

ACKNOWLEDGMENTS

My life has included a fair number of false starts. That is a good thing. As an undergraduate, I was bound for medical school only to end up in philosophy and law. It is not surprising then that this dissertation started out being about philosophical theories of tort law only to end up as a dissertation about the legitimacy of political authority.

I have been interested in questions related to political authority for some time. As an undergraduate at Syracuse University, I took a course with Laurence Thomas titled, “Civic Duty.” It was a mix of communitarian texts, readings from John Rawls that no one else seemed to read (*A Theory of Justice*, Part III), and Stanley Milgram’s *Obedience to Authority*. I am still not exactly sure why those items were taught together, although I hope to have the job security to teach such a class in the future. Nevertheless, the contrasting concerns about the importance of the state and abuses of power have remained in my mind since.

Before that class, in high school, I wrote a thesis on the origins of national socialist ideology. That was the only thesis I have ever written prior to this dissertation. I was always interested in the history and power of ideas. At that time, I was especially interested in how ideas could be abused for the purposes of evil — in that case the evils of the Nazi regime. Thinking back, I cannot imagine that thesis was that good. While this dissertation is, in a way, on the same topic, I hope that it is of higher quality.

The members of my committee have helped to ensure that is in fact the case. Stephen Perry’s influence on this dissertation should be evident. Stephen has been a brilliant mentor. He is always patient and kind when pushing my thinking in a better

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It is difficult to decipher the impact of one's parents except to say that it is large. I don't imagine that my parents have ever fully understood what makes me tick or why. Nevertheless, they have always provided a great deal of love and support. I am grateful to them for teaching me the value of hard work and the importance of always keeping in mind those who are most vulnerable.

Finally, I would like to thank my other writing partner, Heather. I love you immensely. I am so lucky that we will be writing partners forever.

Philosophy is more of a journey than a destination. This dissertation is certainly no destination. I anticipate that it will provide more questions than answers.

ABSTRACT

POLITICAL AUTHORITY AND DEMOCRACY

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Political institutions and actors have a moral responsibility to secure the equal freedom of those subject to their rule. It is in virtue of that responsibility that political authorities can possess certain moral rights to rule. Here, I argue that such political authorities can possess moral rights to create and employ the positive law to secure equal freedom. In doing so, I will address a number of common problems that theories of political authority face, including the subjection problem, the problem of consent, and the particularity problem, among other things. I also present an account of the role that democracy can play in an adequately framed theory of legitimate political authority.

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CHAPTER 1 - THE PROBLEMS OF POLITICAL LEGITIMACY

For a variety of reasons, it is unfortunate that the question of whether a state has political legitimacy — a moral right to rule — has become synonymous with the question of whether there is a general moral obligation to obey the law. According to most theorists, that misfortune should be because we should not reasonably expect to be able to provide a theory that successfully establishes the existence of such an obligation. Defending such an obligation is too difficult, even impossible. First, there is the well-known concern that such an obligation would be at odds with an individual's apparently more fundamental right and responsibility to be autonomous, to judge things for themselves and to take responsibility for their actions. Authority, it is argued, requires an individual to give up their independent judgment about what to do and to make important moral decisions simply according to what others say. Second, but related, is the charge that such an obligation could only be the product of a voluntary exercise of choice, such as consent or a robust willful acceptance of benefits from the state. But, any obligation to obey the law, at least as the state sees it, is not contingent on such undertakings, and it is unlikely that most individuals do or could voluntarily undertake that obligation. Third, it is quite easy to point to the legislative, executive, and judicial failures of the past, and we reasonably expect a future replete with additional failures. The historical non-existence of such an obligation, even within modern liberal democracies, should reasonably cause us to be pessimistic about the possibility or likelihood of any such obligation existing in the future. Fourth, many violations of law are apparently harmless. The desert stop sign is a common example. How can running a stop sign in the desert with no one else in sight be morally wrong? No harm, no foul, the

argument goes. Fifth, the notion that a moral obligation can come into existence simply in virtue of an act of law has been likened to pulling something out of thin air. How can moral obligations arise simply in virtue of the law's say so, rather than in virtue of whatever moral considerations independently support such obligations? Finally, the philosophical literature is replete with failed attempts to establish or explain the possibility of a general obligation to obey the law: consent theory, associativism, the natural duty of justice, and the principle of fair play, to name a few.

Ultimately, I will address each of those views at some point in this dissertation. If we want to defend the possibility of politically legitimate states and related ideas, we will have to come to terms with many of those difficulties. In any event, I want to begin by discussing how a general moral obligation to obey the law can actually be too easy to establish, with the goal of making a basic point about any plausible theory of the legitimacy of the state.

Imagine a primitive state. This state has de facto political power, meaning that individuals within its jurisdiction will generally acquiesce to what it says. The state claims that individuals have a moral obligation to obey its law, and its subjects even believe that to be the case. It backs up its law with force and punishes those who violate the law. However, this primitive state is unlike the modern states that we are familiar with. This primitive state only has a single law. That law prohibits individuals from intentionally killing other individuals absent self-defense. That's it. It does not care to do anything else.

It seems fairly straightforward that there is a general moral obligation to obey the law in the primitive state that I just described. Its single legislative act mirrors a basic

moral requirement that nearly any reasonable theorist would agree must be followed and upheld with force. Any individual subject to that law is morally required to obey that law. The primitive state would have a moral right to secure compliance with that law by threatening to punish violators, intervening to protect individuals against attempts on their lives, and punishing those who violate that law. If we believed that a general obligation to obey the law is a morally significant objective for theories of political legitimacy and modern states, states that have vast and complex legal structures and institutions, then that desiderata would be easy to achieve. Modern states could simply eliminate all of their laws save for the prohibition against purposeful killing.

Any plausible theory of the legitimacy of the state should characterize the primitive state that I have just described as extremely defective. It is illegitimate. That is so notwithstanding that it obviously carries the mantle of a general moral obligation to obey the law. And, no theory would recommend that modern states jettison all but that single legal prohibition. What we should conclude is that the primitive state would not have a moral right to keep its job. Why is that?

The key to thinking about the legitimacy of the state and the moral rights that states have is that states have incredibly important moral jobs. What I mean by that is that states have certain necessary moral responsibilities, or moral duties, that make up their job description. At a minimum, we expect our states to do certain things and not to do certain things. For the moment, I want to leave that job description undescribed. But, needless to say, the primitive state that I have described would not live up to the job description articulated within anyone's most basic political theory of the state. We, and our political

morality, expect much more of our states and our political leaders than what the primitive state has to offer.

To deflate the import of the example, one might object that there isn't *really* a general moral obligation to obey the law in the primitive state that I described. Of course there is a moral obligation not to kill other people without provocation, but what the primitive state has done is merely reproduce what is independently morally required. When we talk about a general moral obligation to obey the law, we are referring to something different and more interesting, namely an obligation to obey the law *because* it's the law.¹ What that means is that the moral obligation to obey a particular law arises from the fact that it is a valid law and not, or at least not completely, because the action that the law prohibits is independently morally prohibited. That is the so-called requirement that any moral obligation to obey the law be a "content-independent" obligation. Such an obligation is supposed to be morally binding because it is a valid legal obligation, not because of the independent moral merits of the content of the law in question.

Throughout this dissertation, I will have more to say about the moral purpose that content-independence serves. Nonetheless, the primitive-state example can be reformulated to accommodate that point without altering the basic argument that political

¹ Cf. Stephen Perry, "Law and Obligation," *The American Journal of Jurisprudence* 50 (2005): 270 ("[T]he most theoretically interesting justification for a general obligation to obey will . . . begin with the fact that we are dealing with a system of directives and then ask which moral property or properties of the system, considered as a whole, might give rise to an obligation to obey each of its directives regardless of their individual moral content.").

legitimacy in some sense involves a threshold satisfaction of a certain, perhaps minimal, job description. Many defenders of the idea that legal obligations can be morally obligatory have focused on the moral importance of certain kinds of coordinated social activities that only states have the capacity to bring about.² Such coordination is achieved through public decision making by the state.

We can simply reformulate the primitive-state example in terms of a legal obligation that is addressed to bringing about some sort of morally important coordinated activity. Let's say that the primitive state, instead of legislating that intentional killings are prohibited, legislates and enforces a law that requires all individuals to drive on the right side of the road.³ That again is all the primitive state does. Coordination of activity on roads is a morally important end, and the law's arbitrary insistence that individuals drive on one side of the road rather than the other serves that end. Coordination is achieved because individuals can simply look to the rules of the road to determine how they should drive. The moral obligation to abide by the legal rules of the road, in this case a single rule, is perhaps one of the least controversial examples of a content-independent state-created moral obligation that one can come up with. And, the previous point still holds true. A primitive state that makes a single demand that all those subject to its authority drive on the right side of the road would have satisfied the requirement that there be a

² E.g., John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 1980), 231-33; Joseph Raz, *The Morality of Freedom* (Oxford University Press, 1986), 49-50; Stephen R. Perry, "Political Authority and Political Obligation," in *Oxford Studies in Philosophy of Law*, ed. Brian Leiter and Leslie Green, vol. 2 (Oxford: Oxford University Press, 2013), 57-58.

³ If another example of morally necessary coordination would be preferred, it can easily be swapped in, and the argument can proceed along those lines.

general obligation to obey the law. But, it should not pride itself in that because it surely has no legitimacy; it has no moral right to keep its job. Instead, it must do more.

One of the points I will make in the chapters that follow is that the state is morally necessary and has a morally necessary job because of its capacity to solve certain wide-scale coordination problems through the issuance of legal rules despite reasonable moral disagreement between equal moral persons. The state's coordinative capacity and its ability to serve as an arbiter of disagreement are morally necessary to secure a life in which individuals can live independently of each other in ways that are consistent with each and every individual's freedom to live their own lives. The state's job description, therefore, is to secure equal freedom amongst its citizens. That job includes solving certain moral problems that would arise without a state and coordinating systematic legal solutions to moral problems that arise from living amongst one another, including creating and maintaining legal solutions to private law, criminal justice, healthcare, the environment, the economy, basic constitutional rights, and so on. Rightful coordination demands that a legal rule bind primarily in virtue of its status as a valid law that resolves reasonable disagreement, rather than it bind simply in virtue of some sort of independent assessment by individuals of what they believe is the morally best approach. Toward that end, I build off certain ideas found in Kantian political theory.⁴

⁴ While at points I rely heavily on ideas in Kant's political philosophy, the arguments are not meant to be explications of Kant's own writings. Instead, the goal is to present a view that is Kantian in spirit but that relies on and engages with modern day disputes within the jurisprudence and political theory literature.

This dissertation proceeds in the following chapters. The present chapter focuses on the basic question of what it means to say that the legitimate state has a moral right to rule in cases in which the state, like any modern state that we are familiar with, is not perfect. I assess several models for that right in light of the notion that a theory of legitimacy needs to be responsive to the idea that state's have certain moral responsibilities in virtue of which they are enabled with the rights that they can legitimately possess. I argue that a minimal conception of legitimacy will invoke the notion of a threshold responsibility in virtue of which the ruler can claim a modest right to continue in the position of performing the moral task.

Chapter Two focuses on the moral right to equal freedom of all persons, a right that is inherent in all liberal political theories. I argue that a fundamental aspect of the idea that persons are free and equal is that they have a moral right to equal freedom, which means that each individual must have legal rights that secure their capacities to pursue their own ends in a way that is not subject to the will of another. I argue that moral indeterminacy and reasonable disagreement necessitates an authoritative legal order that publicly defines and coordinates our personal rights. Basically, it is the state's job to exercise its moral authority through the law to secure equal freedom by publicly and decisively defining, and coordinating our rights. I maintain that the law is up for the task and that rights cannot serve their practical purpose of protecting individual equal freedom absent laws and legal actors to systematically define and secure our rights. Law serves the dual purpose of securing our rights and a form of equality. Chapter Two emphasizes the static character of some laws, with a focus on the law's ability to secure and to coordinate legitimate

expectations. Chapter Two also addresses the voluntarist objection that legitimate political authority requires consent.

Chapter Three emphasizes the dynamic character of legal authority and the broader collective tasks that legitimate political authority serves. There I argue that the law plays a fundamental role in coordinating the behavior of individuals subject to its authority for the purpose of achieving large-scale collective objectives in a fair manner. Specifically, I maintain that securing equal freedom is a collective project in which we can be forced to share responsibility in a fair manner. In the course of doing so, I address several comparable accounts that ground the authority of the law in both the need for coordination and the principles of fairness.

Chapter Four explains the broader idea of specificationism that was in the background of the discussions in Chapters Two and Three. I argue that the law's task is to publicly define what actions count and do not count as being consistent with the freedom of other individuals. The law legitimately serves that function when it mandates a specification that is drawn from a larger set of reasonable interpretations of what freedom demands. I draw on several examples to explain how freedom can be consistent with a variety of ways in which we might order collective living and responsibility.

Chapter Five is about democratic authority and its relationship to equality. Here I argue that where popular political control can effectively secure equal freedom, then political authority must be democratic to be legitimate. Otherwise, those who are in political power would be treating those subject to their rule as inferiors and subjecting them to their own private purposes. Here, I discuss several competing accounts of democratic

legitimacy, concluding that there are a range of “democratic” forms of government that are consistent with the underlying requirements of equal treatment.

Finally, Chapter Six briefly addresses the particularity objection. A number of theories of political authority falter because they cannot explain the particularity or specialness of the relation between a state and its citizens. For example, in the everyday case, Pennsylvania citizens are required to abide by the laws of Pennsylvania, not the laws of New Jersey or France. In Chapter Six, I articulate the basic problem. Then, I explain why it is important to distinguish between particularized authority in contrast with particularized obligation. That distinction, I argue, allows us to avoid the problematic conclusion that individuals only have political obligations to their own state or their own citizens. In the end, I argue that particularity is primarily grounded in instrumental considerations about the ability of a given state to coordinate behavior and secure rights. National borders, in a sense, serve as proxies for a state’s effectiveness rather than limits on its responsibilities.

1.1 - The Moral Task Framework

As the primitive-state examples indicate, states have huge moral responsibilities — jobs — that go well beyond merely satisfying a general moral obligation to obey the law. Any adequate theory of political legitimacy will have to grapple with that fact. The idea that states have jobs and that their doing or not doing their job impacts their legitimacy suggests a specific form of argument that theories of political legitimacy should follow. First, any adequate account of the state’s political legitimacy will have to offer an explanation of the state’s job description in broad or specific detail. Put in different terms,

it will identify the legitimate state's moral role, responsibility, function, purpose, point, or task. Part of that explanation will address the issue of why the state, rather than some other human institution, is uniquely suited and/or morally necessary to do that job. One upshot of this first requirement is that the legitimacy of any given state can be measured by the extent to which it is doing its job. Accordingly, its legitimacy may be partial rather than an all or nothing thing.

Second, a theory of political legitimacy will then explain why the state has a legitimate claim to any of a broad range of moral rights in virtue of its job and its discharging its moral responsibilities. We can ask why the state's job demands that it be enabled with certain moral rights. Those moral rights are what John Rawls refers to as "enabling rights," rights that are had so as to "fulfill certain duties that are prior in the order of grounds."⁵ The upshot of that latter point is that the nature and scope of a state's rights should be determined by its underlying moral responsibilities and the extent to which it is living up to its job.

According to some, the state's right to rule is a right to command and be obeyed. That is best understood as the claim that the state is enabled with a moral power to impose obligations on those subject to its authority.⁶ But a moral power is not the only category of enabling right that the legitimate state might claim to possess. Wesley Hohfeld has explained that there are four distinct species of right, with each species of right having a

⁵ John Rawls, *Lectures on the History of Political Philosophy* (Cambridge: Harvard University Press, 2007), 144. See also Leif Wenar, "The Nature of Claim-Rights," *Ethics* 123, no. 2 (2013): 206-07.

⁶ For this point, see Raz, *The Morality of Freedom*, 24, and Perry, "Political Authority and Political Obligation," 1.

distinct logical form. The basic framework is captured in Hohfeld’s table of “jural correlatives”:

<i>Right:</i>	Claim Right	Privilege	Power	Immunity
<i>Correlative to:</i>	Duty	No Claim Right	Liability	Disability ⁷

The top row captures the four different species of rights. The columns designate jural correlates, namely pairs of “incidents” that logically entail one another. To say that the state possesses a general moral power-right to obligate its citizens is to say that its citizens are generally morally liable to have an obligation imposed on them. That liability is essentially what any individual’s purported moral obligation to obey the law actually consists in.⁸ States of course claim to have the moral power to change their citizens’ moral situations in any number of other ways.⁹ For example, the state might have a moral power to confer rights or take them away. What that means is that a state’s citizens are liable to be conferred rights or have them taken away. Nonetheless, the state’s enabling right to rule might consist in any number of Hohfeldian rights adequately described, such as a claim-right to use coercion, a privilege-right to do the same, or simply a claim-right to continue in the role as ruler. I will have more to say about those rights later, but suffice to say that there are a host of distinct, non-mutually-exclusive enabling rights that the state might

⁷ Wesley Newcomb Hohfeld, “Some Fundamental Legal Conceptions as Applied in Judicial Reasoning,” *The Yale Law Journal* 23, no. 1 (November 1913): 30. The basic Hohfeldian scheme is described in Judith Jarvis Thomson, *The Realm of Rights* (Harvard University Press, 1990), 37-60, and Leif Wenar, “The Nature of Rights,” *Philosophy & Public Affairs* 33, no. 3 (2005): 224-37.

⁸ Perry, “Political Authority and Political Obligation,” 1.

⁹ *Ibid.*

possess in light of its moral responsibilities. What is most important is that any candidate theory of political legitimacy must explain the nature and scope of the Hohfeldian right invoked and do so with reference to the state's moral responsibility.

The structure of argument that I have just described is not novel and can be broadly described as a "moral-task framework" of political legitimacy. Elisabeth Anscombe described the general form of such a theory, in which rights arise in those who bear certain necessary moral tasks: "If something is necessary, if it is, for example, a necessary task in human life, then a right arises in those whose task it is, to have what belongs to the performance of the task."¹⁰

The moral task framework is appealing because it isolates and connects two central questions in political philosophy. First, what is the moral point of the state? There is no shortage of candidates, often explicitly identified as such but often not, in the existing literature:

Hobbes: "[T]he procurement of *the safety of the people* . . . [and] by safety here is not meant a bare preservation, but also other contentments of life, which every man by lawful industry . . . shall acquire to himself"¹¹

Locke: "[T]he enjoyment of [] Properties in Peace and Safety."¹²

¹⁰ G.E.M. Anscombe, *Collected Philosophical Papers Vol: III* (John Wiley & Sons, 1991), 145. Leslie Green describes such accounts under the heading of a "task-efficacy account." Leslie Green, "The Duty to Govern," *Legal Theory* 13 (2007): 179.

¹¹ Thomas Hobbes, *Leviathan*, ed. Edwin Curley (Indianapolis: Hackett Publishing, 1994), ch. XXX, ¶ 1.

¹² John Locke, *Two Treatises of Government*, ed. Peter Laslett (Cambridge University Press, 1988), II, ch. XI, § 134.

Hume: “[P]reserving peace and order among mankind.”¹³

Kant: “*Freedom* (independence from being constrained by another’s choice), insofar as it can coexist with the freedom of every other in accordance with a universal law.”¹⁴

Rawls: “[S]ociety as a fair system of cooperation over time, from one generation to the next.”¹⁵

Raz: “[T]heir role and primary normal function is to serve the governed. . . . It is to help them act on reasons which bind them.”¹⁶

Finnis: “[C]o-ordinating action to the common purpose or common good.”¹⁷

For any candidate moral purpose, we can ask: Is that really the state’s job? Is that all the state has to do? Is that exclusively or specially the state’s job? And, why? The role of the state in liberal society is obviously an important question. Once those questions are asked and answered in the abstract, then we can begin to ask of any actual state whether it is doing its job and what that means for its legitimacy.

The second component of the moral task framework asks another important question: What moral rights do states have in light of their jobs? That is in part an inquiry into how the state must or can go about doing its job? As noted above, such rights are

¹³ David Hume, *An Enquiry Concerning the Principles of Morals*, ed. Tom L. Beauchamp (Oxford University Press, 1998), § 4 (emphases omitted).

¹⁴ Immanuel Kant, *Practical Philosophy*, ed. Mary J. Gregor (Cambridge University Press, 1996), 387.

¹⁵ John Rawls, *Political Liberalism* (Columbia University Press, 1993), 15.

¹⁶ Raz, *The Morality of Freedom*, 56.

¹⁷ Finnis, *Natural Law and Natural Rights*, 232.

“enabling rights.” The basic idea is that certain moral rights are crucial for the state to discharge its moral responsibilities. Insofar as those rights aid the state in fulfilling its moral purpose(s) those rights are minimally instrumental in nature.¹⁸ This view fits well with the idea in jurisprudence that the law, through which the state exercises its moral rights to rule, is in part a tool with a moral function or purpose.¹⁹ Scott Shapiro has emphasized this recently in his “planning theory” of law. According to Shapiro, the law, which he understands to be a kind of massive shared plan, is a tool, a technology even, that can be used to manage decisions, motivations, and social activity more generally.²⁰ The state obviously has other tools at its disposal, such as printing presses, traffic lights, police vehicles, and construction equipment, among other things. But the state’s capacity to utilize those tools fundamentally boils down to its being able to rightfully exercise its moral authority through the law. Taxes are raised through laws that impose obligations to pay taxes. Budgets are passed with laws, and money is ordered to be directed to certain agencies. State workers build roads after they are ordered by other state workers who have the authority to tell them what to do. The state’s moral right to rule therefore pervades

¹⁸ That is not to say that such enabling rights cannot also have intrinsic value. Later, I will argue that a state’s right to rule, especially a democratic state’s right to rule, and law more generally, can have intrinsic value insofar as those elements (partially) constitute the value of equality amongst persons.

¹⁹ E.g., Finnis, *Natural Law and Natural Rights*, 3-9; Mark C. Murphy, *Natural Law in Jurisprudence and Politics* (Cambridge University Press, 2006), 29-36; Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford: Oxford University Press, 2009), 166-81; Scott J. Shapiro, *Legality* (Harvard University Press, 2011), 213-14

²⁰ Shapiro, *Legality*, 36.

even the most tangible aspects of statecraft. Understanding the nature of that authority is therefore paramount.

Any adequate theory of political legitimacy cannot work outside the moral task framework. That is in part exhibited by looking at theories that attempt to do so. Before addressing such accounts specifically, let's look at another example of how easy it can be to generate a general moral obligation to obey the law, an example that fails to address the two moral task questions. An easy way to assume an obligation to obey the law is to promise your mother that you will always obey the law. We can imagine a number of reasons why one might do that. Perhaps your mom has anxiety about you going to jail, perhaps she just happens to be a supporter of the state that you both live under. The reason does not very much matter. Insofar as we can agree that individuals have a moral obligation to uphold their promises, one would have a general obligation to their mother to abide by the law.

The difficulty with the scenario just described is that although it has offered a moral ground for your obligation to follow the law, that ground has nothing to do with the legitimacy of the state or the law. It tells us nothing about what job we expect the state to do. It tells us nothing about the rights the state has with respect to you. It tells us nothing about why the state exercises its authority by issuing laws. It does not even tell us whether states are good things generally or whether your state in particular is any good. We've only described a moral relationship between you and your mother. You very well could have promised to abide by the demands of someone else, such as the local psychic or life coach. The account in no way addresses the state, or its rights and responsibilities with

respect to you at all. What is more, the obligation in the above case is not even any of the state's business. It is not its role to make sure that you uphold your idiosyncratic promises to your mother. It is your mother's right to hold you to account if you break the promise. It is her business, not the state's, at least according to the promise-to-your-mom account of the obligation to obey the law.

A number of contemporary theories of political legitimacy face a similar difficulty largely because they fail to connect the two issues that form the core of the moral task framework. Instead, they seek out sources of legitimacy in places that have very little to do with the state or the law. In doing so, they fail to offer any apparent account of what moral rights the state has and for what purpose it has them. Take Ronald Dworkin's well-known associative-obligation theory of political legitimacy.²¹ Dworkin is rightly motivated to offer an account of the obligation to obey the law. He maintains that "no general policy of upholding the law with steel could be justified if the law were not, in

²¹ It is interesting that Dworkin conceives of the problem of political obligation as a part of his more general theory of the nature of law. Dworkin thinks that a rule or principle is law if "[it] figure[s] in or follow[s] from "the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice." Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986), 225. Yet, neither his theory of law nor his theory of political legitimacy identify any apparent function for legal rules, legal systems, or the state, aside from the purposes of those values more generally. Moreover, Raz thinks things are even worse for Dworkin's account insofar as Dworkin's theory of law is at cross purposes with what Raz believes is actually the moral function of legal rules, namely to mediate between person's and the reasons that apply to them. See Joseph Raz, *Ethics in the Public Domain* (Oxford University Press, 1994), 225-26. For a critical but sympathetic account of Dworkin's view, see Stephen R. Perry, "Associative Obligations and the Obligation to Obey the Law," in *Exploring Law's Empire: The Jurisprudence of Law's Empire*, ed. Scott Hershovitz (Oxford: Oxford University Press, 2006), 183-205.

general, a source of genuine obligations.”²² That is an important claim, which I will return to later on. Dworkin conceives of the obligation to obey the law as an “associative obligation,” which is an obligation that arises within human associations that satisfy certain conditions. He observes, correctly I think, that membership in certain social groups, like friendships and families, can generate obligations between members. Those obligations are not necessarily a consequence of choice or consent, which makes them appealing candidates for political obligations given the political reality that not many people willfully choose to assume such obligations. Instead, they depend in some way on the moral value of participation in specific categories of social groups. Dworkin then identifies what he believes are the common features of those membership-based social practices, features that can ground special obligations amongst members of those social groups, with the goal of explaining political legitimacy along those lines. Dworkin explains that “the members of a group must by and large hold certain attitudes about the responsibilities they owe one another if these obligations are to count as genuine fraternal [or associative] obligations.”²³ Those attitudes must exhibit four features. First, members of the group must view their “responsibilities as special, holding distinctly within the group, rather than as general duties its members owe equally to persons outside it.”²⁴ Second, “they must accept that these responsibilities are *personal*: that they run directly from each member to each other member.”²⁵ Third, “members must see these responsibilities as flowing from a moral

²² Dworkin, *Law's Empire*, 191.

²³ *Ibid.*, 199.

²⁴ *Ibid.*

²⁵ *Ibid.*

general responsibility each has of *concern* for well-being of others in the group.”²⁶ Finally, “members must suppose that the group’s practices show . . . *equal* concern for all members.”²⁷ If those conditions are met in a political community, like friendships and families, special obligations will arise amongst and between members of the political community.

The initial difficulty is that it is not at all clear how *attitudes about* moral responsibilities amongst group members can generate *actual* moral responsibilities. That difficulty would apply to how the account explains any associative obligations within any social group. Instead, we need a moral argument for why those attitudes amongst members are morally justified or reasonable, or even morally required. Those issues aside, the state does not seem to condition its exercises of authority or its doing of its job generally on the existence or not of certain attitudes amongst its citizenry. Thus, it is unclear how the presence of such attitudes is supposed to address any state’s general policy of employing force.

Nonetheless, there is a larger problem, which returns us to the point made earlier about addressing the specific moral responsibilities of the state and how the state has certain moral rights in virtue of those responsibilities. Dworkin’s account of political obligation does not explicitly address the moral point of the state or the law. Based on his associativist account and his writings more generally, we might reasonably assume that the state’s primary responsibility is to secure equal concern for the well-being of its members.

²⁶ *Ibid.*, 200.

²⁷ *Ibid.*

Or, to protect rights. Or, to act with integrity. But, it is not at all obvious how those moral tasks or goals inform the question of what enabling rights constitute the state's legitimacy or why the state needs any such rights in particular. In likening political obligations to obligations that exist amongst friends or family members, Dworkin effectively declines to explain why states play fundamentally different roles in our lives.²⁸ States have distinct moral jobs, which do not include acting as a friend or family member. They claim distinct rights, foremost of which are a right to tell people what to do and a right to force them to do it. The relationship between parents and young children aside, friends and family do not claim such rights. States also are comprised of and operate through often highly complex legal systems. Those features of the state need to be explained and legitimized in their own right. Otherwise, we have not offered an account of political legitimacy but some other social phenomena that might arise in social groups. Although parallels may be drawn, friendships, families, and other forms of human association have distinct normative characters.²⁹

²⁸ I will note one benefit about Dworkin's argument. Many theorists urge that political authority and political obligation are problematic because they are not voluntary. But if Dworkin is correct about certain forms of human relationships, we cannot insist that a lack of voluntariness is automatically morally problematic. Pointing to analogous obligations can address certain objections even if doing so is not sufficient as a stand-alone account of political legitimacy.

²⁹ Although not the same point, my point here overlaps with parts of Rawls's argument that the "basic structure" of society is the primary site of principles of justice. Rawls, *Political Liberalism*, 257. On Rawls's view, distinct normative principles must be addressed to the basic structure of society because it plays a fundamentally distinct role in our social lives by securing the background conditions for social cooperation. *Ibid.*, 265-69. Another way to put Rawls's point is that a theory of justice has to address and be responsive to the special role that the basic structure plays. My point here is that we need to think about the legitimacy of the state in a similar way: what special role does the state play? Rawls's

Other prominent views face similar difficulties. Take the principle of fair play as initially propounded by Rawls as an account of the conditions under which one can have a moral obligation to obey the law.³⁰ The basic idea behind the principle of fair play is that individuals who “accept” the benefits of a fair cooperative scheme have a responsibility to do their fair share in the scheme. To follow the law is to do one’s fair share.³¹ The principle of fair play has obvious difficulties. The first is that in most states that we are familiar with, people simply do not choose to accept the benefits that they receive from the state in any normatively meaningful way. So, it is hard to see how any state would satisfy the principle of fair play as a broad or narrow matter. The second problem is that it is not clear why doing one’s fair share requires one to follow the law. It would seem that a duty to do one’s fair share is just that: a duty to do one’s fair share. That duty can be discharged in any number of ways besides following the law.³²

A larger problem is the problem noticed earlier. The principle of fair play in no way addresses the special responsibilities of the state, why it has those responsibilities, and why those responsibilities give it certain rights. To be sure, Rawls conceives of the state

arguments about the importance of the basic structure are actually more suitable as a theory of the state.

³⁰ John Rawls, *Collected Papers*, ed. Samuel Freeman (Harvard University Press, 1999), 117-29. The principle of fair play is often attributed to H.L.A. Hart, but it is unclear why. Hart’s brief fairness-based account, which is based on the idea of mutuality of submission and obedience, is quite different than the view that Rawls and other fairness theorists have described. See H.L.A. Hart, “Are There Any Natural Rights?” *Philosophical Review* 64, no. 2 (1955): 185. I will discuss Hart’s view in Chapter 3.

³¹ Rawls, *Collected Papers*, 128.

³² Such should be clear from the fact that Rawls thinks voting is a duty based in fair play. Voting is not even a legal obligation in many democracies. Therefore, actions other than legally mandated actions are capable of satisfying the principle of fair play.

as a system of fair social cooperation. Fair social cooperation is its purpose. The principle of fair play fits with that purpose. Yet, the principle does not identify any benefits, cooperative or otherwise, that are exclusively provided by the state, benefits that at least in some way would make the state distinctive and warranting special rights to achieve those benefits. The state just looks like any other cooperative enterprise, like a baseball team or a prom committee, enterprises that do not share the state's rights. Our laws may reflect many of the political obligations that the principle of fair play would suggest. Yet, nothing in the account indicates that we could not get rid of states completely and, in their place, participate in non-state social cooperatives. Thus, to explain the legitimacy of a state, the principle of fair play is inadequate.³³

Stephen Perry has made similar points under the heading of what he calls, “the reverse-entailment problem”:

[T]he proposition that a right to rule entails a general duty to obey does not itself entail, certainly as a matter of logic, that a general duty to obey entails a right to rule. Moreover, we can easily imagine circumstances in which there is a general obligation to obey the law, at least in the sense that there is an obligation to conform one's conduct with each and every legal directive, but we nonetheless remain, at best, uncertain as to whether or not the state has a right to rule. Let me call this the “reverse-entailment” problem. Its essence is that the existence of legitimate authority logically

³³ Later, I will discuss Rawls's principle of liberal legitimacy, which rests on a more accurate conception of the state and its peculiar role in securing compliance with the principles of justice.

entails an obligation to obey, but an obligation to obey does not logically entail the existence of legitimate authority.³⁴

One genesis of the problem is the failure of political theorists to recognize that when the state has legitimate authority it has a moral power to *change* the moral situation. The state's right to rule, insofar as it has a moral power that it can exercise, instead is fundamentally dynamic. What one subject to authority has is a political liability rather than a static moral obligation.³⁵

The problem, however, is deeper. We can't address the problem simply by switching gears and talking about moral liabilities. Return to the example above with your mother. In that case, you promised your mother that you would always follow the law. You assumed not just obligations currently in existence but a liability to have your moral situation altered when the state issues a new legal directive. Hence, even if the state ends up with an actual ability to change your moral situation, there is no sense in which we have offered a moral argument that directly addresses whether the state possesses a moral right, even a moral power, to do so. For any moral right to rule, whether it is a power, claim, privilege, or immunity, the relevant Hohfeldian relationship must exist between the state and whoever is subject to its rule. The moral task framework will satisfy that requirement

³⁴ Perry, "Political Authority and Political Obligation," 10. A. John Simmons and Stephen Darwall have made comparable points. The gist is that even if one has a reason to go along with what the law demands, that fact does not entail that the state has any moral right to make those demands of you. See A. John Simmons, *Justification and Legitimacy: Essays on Rights and Obligations* (Cambridge University Press, 2001), 122-57, and Stephen Darwall, *Morality, Authority, and Law: Essays in Second-Personal Ethics I* (Oxford: Oxford University Press, 2013), 142-50.

³⁵ Perry, "Political Authority and Political Obligation," 4.

because it is focused directly on what rights the state possesses with respect to those subject to its rule and why.³⁶

1.2 - The Forward-Entailment Problem, Coercion, and Legitimacy Light

Ultimately, I will argue that states can possess expansive moral authority over their subjects to alter their moral situations in a variety of ways through the law and to enforce its demands to secure equal freedom. Such rights enable the state to discharge its moral responsibility of coordinating our moral rights and responsibilities to each other in a way that decisively resolves our reasonable moral disagreements about what those rights and responsibilities should be. Legal rules are necessary to secure a relationship of equality between persons. That is a relationship in which no person has the unilateral authority to decide for others how we are to live together and secure freedom. It will be helpful, however, to consider another scenario that brings us back both to the lingering difficulty of establishing a general moral obligation to obey the law and the concern about tethering the state's right to rule to such an obligation.

Imagine in this example that a modern, complex state, with all of its laws, lives up to whatever standard is set by your ideal moral or political theory of the legitimate state.³⁷

³⁶ Instead of speaking about enabling rights, we could just as easily speak in terms of enabling relationships, where those are Hohfeldian relationships that exist between the state and those subject to its authority.

³⁷ Those who think it is completely impossible to legitimize states presumably would be unable to engage in this thought experiment. But, it should be doable even for the more

In such a state, there is a general moral obligation to obey every law. This state is that good. Now, assume that the state then issues an obligation-imposing law that is in plain conflict with whatever your ideal moral theory requires. It makes a single mistake, and there is no longer a general moral obligation to obey the law of that state. How does that affect its legitimacy? A realistic theory of political legitimacy should say, “not much.” That is especially so when we compare the state just described with the perfect, but primitive, single law systems described above. The primitive state that lived up to its responsibility once could not be more legitimate, or legitimate at all, when put up next to the nearly perfect state that makes a single mistake. A theory of legitimacy that identified the perfect primitive state as legitimate and the complex but slightly imperfect state as illegitimate has gone awry. What that means is that any requirement that the state’s legal directives morally bind in all cases so as to satisfy the generality requirement will have to be relaxed.

That conclusion makes sense. If states are so important and have such important moral jobs, as we should argue, we should not expect their legitimacy to be undermined so easily.³⁸ Hobbes and Hume were correct that political institutions are for the most part artifice, products of human invention.³⁹ We would not create such enduring enterprises that are so easily undermined. Of course, legitimacy determinations all depend on how big

libertarian types who demand robust forms of consent to legal governance. Consent would just need to be assumed.

³⁸ Certainly we do not think of the rights of human beings any differently. Persons are never fully stripped of their rights notwithstanding substantial moral failures.

³⁹ Hobbes, *Leviathan*, ch. XVII; Hume, *An Enquiry Concerning the Principles of Morals*, § 3.

of a mistake the law makes, how often it makes mistakes, and whether there are reasonable procedures in place to remedy such mistakes. But, mistakes, honest or not, around the edges ought not undermine the legitimacy of a particular state on any realistic theory of political legitimacy, even though those mistakes would seemingly undermine a general obligation to obey the law. That is, states, political officials, and political institutions should be legitimate *in some sense* even if the over-demanding expectation of a general moral obligation to obey the law is not met now or ever. The thought is that legitimate states are not just possible but are practical.⁴⁰

The upshot of that point is that a judgment that an authority is politically legitimate, that it has a right to rule, should not automatically entail that there is a general moral obligation to obey the laws of that authority. Call this the “forward-entailment problem.” The problem is that we can imagine political authorities that are legitimate even where they do not satisfy the demand of a general moral obligation to obey the law. Here I want to discuss that problem, how it has led a number of theorists astray, and how the problem is best addressed.

To start, notice what happens if we think that forward entailment is not a problem. Many theorists accept forward entailment: that the state has a right to rule entails that it has the general moral power to impose obligations on those subject to its authority and, therefore, that there is a general moral obligation to obey the law. As Raz has articulated the view (and the forward-entailment problem) as follows: “If there is no general obligation

⁴⁰ For a similar point, see William A. Edmundson, *Three Anarchical Fallacies: An Essay on Political Authority* (Cambridge University Press, 1998), 8.

to obey the law, then the law does not have general authority, for to have authority is to have a right to rule those who are subject to it. And a right to rule entails a duty to obey.”⁴¹ So if we accept forward entailment, we accept that a judgment that a state is politically legitimate requires an inference that there is a general moral obligation to obey the law of that state.

Forward entailment has created significant difficulties for defenders of the state. If we accept forward entailment, we also have to accept that if there is no general moral obligation to obey the law, then, by modus tollens, the state is not legitimate and has no right to rule. Exploiting forward entailment has been the basic strategy of anarchist thinkers over the past four decades. For example, Robert Paul Wolff famously argues that a moral obligation to obey the law is at odds with the moral requirement that “we acknowledge responsibility and achieve autonomy wherever and whenever possible.”⁴² Wolff uses that requirement to defeat any general moral obligation to obey the law and therefore any possibility of a politically legitimate state:

If all men have a continuing obligation to achieve the highest degree of autonomy possible, then there would appear to be no state whose subjects

⁴¹ Raz, *Ethics in the Public Domain*, 341. Raz’s own view is reasonably interpreted as being that the right to rule and legitimacy need not be general but can be partial in the sense that those moral attributes of the state are the function of the number of people over whom the state has authority and the extent to which it has authority over those individuals considered one-by-one. For an explanation of Raz’s view to that effect, see Perry, “Political Authority and Political Obligation,” 8. A view that recognizes partial moral authority like Raz’s and my own can avoid the forward-entailment problem even though it accepts the entailment relationships that exist between Hohfeldian correlates, which I will explain later in this chapter.

⁴² Robert Paul Wolff, *In Defense of Anarchism* (University of California Press, 1998), 17.

have a moral obligation to obey its commands. Hence, the concept of a *de jure* legitimate state would appear to be vacuous⁴³

A. John Simmons also exploits the apparent logical relationship between political legitimacy and a general moral obligation to obey the law and legitimacy. Simmons's argument is straightforward: None of the traditional accounts of political obligation can explain why any or all citizens are obligated to obey the laws of their state. In light of those failures, we are forced to "deny[] that there are any governments which are legitimate (or which are legitimate with respect to a large number of citizens)."⁴⁴

Defenders of the state have attempted to rescue the possibility and actuality of political legitimacy by severing the forward-entailment relationship between political legitimacy and the moral obligation to obey the law. The basic strategy is to articulate a less robust conception of political legitimacy, one that does not rest on a general moral power to bind one's subjects.⁴⁵ The strategy of rejecting forward-entailment is a viable

⁴³ *Ibid.*, 19.

⁴⁴ A. John Simmons, *Moral Principles and Political Obligations* (Princeton University Press, 1979), 195-96. Simmons thinks that a robust form of consent could ground an obligation to obey. But, it is unlikely that any and definitely not all citizens consent to such a thing.

⁴⁵ Scott Shapiro has described this strategy as "weakening the concept of authority." Scott J. Shapiro, "Authority," in *The Oxford Handbook of Jurisprudence and Philosophy of Law*, ed. Jules Coleman and Scott J. Shapiro (Oxford University Press, 2002), 393-94. Edmundson also seems to understand the matter that way. Edmundson, *Three Anarchical Fallacies*, 35-44. One might quibble that this is more a weakening of the concept of political legitimacy, not political authority. Nonetheless, as will be urged below, the paradigm understanding of authority is a moral power to change the moral situation. See Perry, "Political Authority and Political Obligation," 1. Some of the watered-down conceptions of political legitimacy still attribute moral powers to legitimate states, just not the general moral power to obligate. Thus, it would be fair also to describe them as conceptions of political authority.

strategy because the *right* to rule is not a univocal concept. As I noted earlier, there are a host of Hohfeldian rights that might constitute the legitimate state's right to rule.

A common proposal is that the state's right to rule does not consist in a general moral power but instead a general moral right to use coercion to enforce the law. Theorists seem to differ on the precise Hohfeldian nature of such a right, either a privilege-right or a claim-right. Here, I discuss some of those views with the goal of showing that they are both conceptually and morally problematic. They may be conceptually problematic to the extent that such accounts inadvertently invoke moral powers and thereby face most of the same problems that they seek to avoid. They are also morally problematic insofar as they commit to the view that the state can force a person to comply with a law, and even punish them for disobeying such a law, even where the person had no obligation to do so.

As noted, in *Law's Empire*, Dworkin argues that under certain conditions there is a moral obligation to obey the law. Recall that such an obligation is an "associative obligation" that arises within human associations that satisfy certain conditions. Before Dworkin presents that account, he explains why the question of the moral obligation to obey the law is so important for questions about the legitimacy of the state: "no general policy of upholding the law with steel could be justified if the law were not, in general, a source of genuine obligations."⁴⁶ Call that Dworkin's Point. Dworkin's Point is that the question of whether the state has a right to use coercion to enforce a law cannot be separated from the question of whether individuals have a moral obligation to abide by that law. If an individual has no obligation to follow a law and does no moral wrong in violating that

⁴⁶ Dworkin, *Law's Empire*, 191.

law, then the state cannot be permitted to coerce them to do so. The state cannot rightfully uphold the law with steel unless it has some moral right to demand one's compliance with its law. Thus, a *general* moral obligation to obey the law must be part of the basis for any *general* moral right to force compliance with the law.

Dworkin is correct. Building off Kant, my view is that the moral right to equal freedom makes legitimate political institutions morally necessary. In light of their purpose of securing equal freedom, those institutions must be enabled with a variety of rights, including both a broad moral power to alter our moral situation through the public issuance of laws and a moral right to extract compliance with those laws. Any right to employ coercion therefore cannot be legitimized separately from the state's moral power to bind. As Arthur Ripstein has put the point in presenting the Kantian view, "the state's claim to authority is inseparable from the rationale for coercion."⁴⁷

In light of the sustained and mostly successful attacks on the idea that there could be a general moral obligation to obey the law, a significant contingent of political theorists have come to reject Dworkin's Point. According to such theorists, a state's political legitimacy consists in its holding a general right to uphold the law with coercion without its holding a general moral power to create morally binding laws. Christopher Wellman summarizes one variant of the view as follows:

[P]olitical theorists often suppose political legitimacy and political obligation to be inseparable insofar as they are logical correlates of one

⁴⁷ Arthur Ripstein, "Authority and Coercion," *Philosophy & Public Affairs* 32, no. 1 (2004): 2.

another. This is a mistake. The correlative of a state's right to coerce is not a citizen's moral duty to obey: it is a citizen's lack of right to not be coerced. Political legitimacy entails only the moral liberty to create legally binding rules, not the power to create morally binding rules.⁴⁸

A moral liberty is just another term for a Hohfeldian moral privilege. Political legitimacy, on this account, does not entail a moral power to change the moral situation through the issuance of legal rules. Rather, it simply consists in a moral privilege to enforce valid laws. The legitimate state can have a right to force you to comply with the law without you having any moral obligation to do what it demands. The benefit is that such a view does not entail a general moral obligation to obey the law. The expectation then is that such a view can avoid the pitfalls attendant to that sort of obligation, along with the *modus tollens* attack that undermines the legitimacy of the state.

Versions of this view have been around for some time now. Robert Ladenson was an early proponent, arguing that the state's right to rule consists in a moral privilege, specifically a moral privilege to use force to uphold the law.⁴⁹ On his view, the state has the privilege to uphold the law with force if it has uncontested *de facto* power to maintain peace and order. Its possession of that privilege is justified by its ability to maintain general

⁴⁸ Christopher Wellman, "Toward a Liberal Theory of Political Obligation," *Ethics* 111, no. 4 (2001): 741. Adherents to variants of this view include: Allen Buchanan, "Political Legitimacy and Democracy," *Ethics* 112, no. 4 (July 2002): 703; Christopher W. Morris, *An Essay on the Modern State* (Cambridge: Cambridge University Press, 1998), 106; Robert Ladenson, "In Defense of a Hobbesian Conception of Law," *Philosophy & Public Affairs*, 1980, 137-38.

⁴⁹ More accurately, Ladenson says that the right to rule is a "justification right." Ladenson, "In Defense of a Hobbesian Conception of Law," 139. It is clear, however, that he is invoking a privilege right.

peace and order through sanctions. Although the state is privileged to use force to uphold the law, no one else is so privileged.⁵⁰ There are several perceived benefits of such an account. First, where the state has a general privilege-right to rule it has no duty to anyone not to enforce the law generally or in specific instances. Even if an individual does not have an obligation to obey a particular law, the state supposedly does not violate that individual's rights when it enforces that law against them. They are not wronged by the state upholding its laws with force. Second, and more importantly, there is no general moral obligation to obey the law. While the state has a privilege to enforce legal obligations, there is no automatic moral obligation to abide by those legal obligations. That would only follow from the state's possession of an equally broad moral power to impose obligations.

Wellman's account follows the same basic structure. He conceives of the state's right to rule in terms of a privilege to issue legal rules that are coercively enforceable. Like Ladenson, he offers a substantive moral argument that identifies the moral grounds for that right. Wellman dubs that argument "samaritanism." On the samaritan account, the state benefits individuals by rescuing them from the perils of the state of nature, a circumstance in which there is no security and no chance for a meaningful life. That rescue is achieved by issuing and coercively enforcing laws, thereby providing political stability. No other institution, for example, a private corporation or a free market, could realistically supply that benefit. What is more, because individuals have a positive right to be rescued from the state of nature, legal actors (or primordial legal actors) with the de facto power to

⁵⁰ *Ibid.*, 137-38.

perform the rescue have a positive responsibility to secure that benefit for individuals.⁵¹ They have a moral duty to exercise the privilege to secure the benefit.

It is notable and commendable that those accounts straightforwardly fit within the basic moral-task framework I have outlined. Legal actors are enabled with a general privilege-right to uphold the law with force in virtue of their moral responsibility and de facto capacity to secure peace and order. In light of that de facto capacity, legal actors have a general moral permission and privilege to uphold the law with force because they have a general responsibility to maintain peace and order. The argument is instrumental in character. The core difference with accounts of the right to rule that entail a general moral obligation to obey, however, is that a different Hohfeldian element seems to be invoked.

The privilege-centric view is subject to conceptual uncertainty. There are two reasonable ways to interpret the privilege-centric view just described. On the first, interpretation, although such views attempt to abstain from Hohfeldian powers, they unwittingly invoke such powers. On the second interpretation, the state possess a general privilege to coerce its citizens and individual laws serve simply as fair warnings about when the state is going to use force.⁵² That view, however, paints a non-standard picture of the law.

The privilege-centric account says that the right to rule is a privilege, not a moral power. On the first understanding of what is going on, that is not the case. To make that point clear, let me describe what happens on my own account when the state exercises its

⁵¹ Wellman, "Toward a Liberal Theory of Political Obligation," 742-47.

⁵² I thank Stephen Perry for suggesting this alternative interpretation.

legitimate moral authority and issues a legal rule or directive, specifically an obligation-imposing one. In that case, the state is exercising its moral power by exercising its legal power to impose legal obligations. When it does so, its obligation-imposing legal directives are morally binding and morally enforceable. What does that mean? The legitimate state's exercise of its moral power in this case has several intended consequences. First, the state has imposed a moral obligation in virtue of its legislative action. But that is not all. Second, the state now has created a claim-right to enforce that law. What that means is that the state has a right against interference with the enforcement of that law and that individuals subject to the law now have a correlative obligation not to interfere with the enforcement of that law. Finally, the state now has a moral privilege to uphold that law with force, meaning that it does no wrong in enforcing that law.⁵³ Before its legal enactment, the state did not have that privilege.

Notice that the account that I have just described also invokes a moral privilege to enforce the law. The moral privilege to enforce a law stems from the creation of that law and accompanies the moral obligation to abide by that law. Also notice that the privilege-centric accounts described above do not simply say that the legitimate state has a general privilege to use coercion to do whatever it desires, or even simply to bring about peace and order.⁵⁴ Rather, any privilege to use coercion comes into existence as the result of a duly

⁵³ I am not suggesting that there are not other changes in the moral situation that would be consistent with this account. For example, we might argue that in virtue of that law, the state now has a moral obligation to enforce that law. These, however, are the most relevant changes for the present discussion.

⁵⁴ Justin Bernstein has suggested to me that Ladenson is better interpreted as arguing that the state's right to rule is simply a moral privilege to use coercion to uphold peace and order rather than a moral privilege to use coercion to enforce the law. Ladenson's view is

exercised power to create legal rules. What that means is that the right to rule that Wellman and Ladenson would have described is not simply a moral privilege. Instead, it is a moral power to create moral privileges through the issuance of legal rules. So, even on the privilege-centric account, the state is exercising a moral power and changing the moral situation when it issues a legal directive. When the legitimate state issues a law, it creates a moral privilege to enforce that law, thereby changing the moral situation. Obviously the state is creating a moral privilege, not a moral obligation. But, it is a moral privilege that is derivative of an antecedent moral power to change the moral situation. Therefore, what Wellman and Ladenson would have described are really exercises of moral powers rather than simply moral privileges. And the products of those exercises are morally binding regardless of whether they are obligations or some other Hohfeldian incident.

On the second interpretation, the state possess a general moral privilege the create laws and to coerce its citizens, a privilege that is justified generally by the need to secure peace and order. On this account, laws serve merely as fair warnings about how the state is going to use force. Hart described such a view as the “external point of view” of law; it is the point of view of the individual who is only concerned to abide by the law to avoid unpleasant consequences and the point of view of the person who does not believe in the

fairly abstract and therefore difficult to grasp, and that is not an unreasonable interpretation. Nonetheless, I think Ladenson is best interpreted as describing a moral privilege to enforce the law. Such a moral privilege is justified in virtue of the state’s ability and need to bring about peace and order. That interpretation is more plausible because Ladenson claims to be offering a “conception of law” that engages with views proffered by Hart and Dworkin about obligation-imposing legal rules. So, he is offering an account of what he takes to be the conceptual core of legal authority and legal rules.

moral legitimacy such laws.⁵⁵ The difficulty with the privilege-centric view, then, would be that notwithstanding whether the external point of view could be a plausible conceptualization of the nature of such laws, it could hardly be a plausible understanding of anything that looks like political legitimacy. To some extent, political legitimacy has to be understood from the point of view of someone who believes that the state can actually be just, and the external point of view does not support that basic picture.

With those more-conceptual issues out of the way, we can think more clearly about whether such a view would evade any of the criticisms faced by the general moral obligation to obey the law. One difficulty had to do with the notion that such an obligation improperly involved being subject to the will of someone or something other than oneself. The first interpretation still faces that problem. Moral powers, as a conceptual matter, involve the willful and intentional exercise of a right to change the moral situation. A moral power to create a privilege runs into that same problem. That difficulty attends to any exercise of authority by the state over its subjects.

A second difficulty involves the claim that the moral obligation to obey the law requires individuals to act according to someone else's judgment of what should be done. Later in this dissertation, I will say more about whether enabling the state with a moral power to impose obligations actually demands that individuals give up their own independent judgment, at least in any way that should be of concern. Nonetheless, any privilege-centric view does not take us far from that problem. On the privilege-centric

⁵⁵ H.L.A. Hart, *The Concept of Law*, ed. Joseph Raz and Penelope A. Bulloch, 2nd ed. (Oxford: Oxford University Press, 1994), 89-91.

view, the state achieves its end of securing peace and order by backing up any demands with threats to impose serious sanctions for non-compliance. People do not like jail or substantial fines. The state gets people to do what it wants not by giving them a mandatory moral reason but by giving them a sufficiently weighty self-interest-based practical reason to follow the law. With the use of either “technique,”⁵⁶ however, the individual has no real option to act in accordance with their own independent judgment of what should be done because the state has demanded otherwise. So, individuals would still not be permitted to do what they would otherwise do if they acted according to their own judgment of what should be done.

The privilege-centric view also faces the same instrumental concerns faced by views that assert general moral powers. Hume urged that we are bound to obey the law “because society could not otherwise subsist.”⁵⁷ The plain difficulty with that view, however, is that the subsistence of society does not hang in the balance like that. The law can tolerate some level of non-compliance without ending up in ruin, so complete or general compliance is not necessary to that end.⁵⁸ Hume’s argument does not adequately

⁵⁶ Green has emphasized that authority to impose obligations is simply one technique among others that the state can employ to get people to change their behavior. Leslie Green, *The Authority of the State* (Clarendon Press, 1988), 63.

⁵⁷ David Hume, “Of the Original Contract,” in *Essays: Moral, Political, and Literary*, ed. Eugene F. Miller (Indianapolis: Liberty Fund, 1985), 481. Along similar lines, Hume wrote, “society cannot possibly be maintained without the authority of magistrates, and that this authority must soon fall into contempt where exact obedience is not paid to it. The observation of these general and obvious interests is the source of all allegiance, and of that moral obligation which we attribute to it.” *Ibid.*, 480.

⁵⁸ As Leslie Green notes, “[l]aw does not in fact enjoy exact obedience, and disobedience in certain small or unjust things does not bring cities to ruin.” Leslie Green, “Law and Obligations,” in *The Oxford Handbook of Jurisprudence and Philosophy of Law*, edited by Jules Coleman and Scott J. Shapiro, Oxford University Press, 2002, 537. Edmundson

support a general obligation to obey the law. The privilege-centric approach fares no better on that score. Although political stability is a laudable end, and the state might be legitimized in part based on its ability to secure that end, it is unclear why a general content-independent privilege to uphold the law in all cases is necessary to secure that end. It would seem that the state could still achieve that end without the privilege to enforce every law in every single case.

Recall the price that is paid by replacing the notion that the state's legitimacy consists in a general moral power to impose obligations with the notion that the state's legitimacy simply amounts to a general moral privilege to uphold the law with force. Privilege-centric views have to reject Dworkin's Point that the right to use force has to be predicated on the moral right to demand compliance or some other basis for asserting that one has an obligation to obey a particular law. The privilege-centric view does not really avoid any of the problems faced by the general moral obligation to obey the law and faces its own problem. So, there is little reason to pay the price of denying Dworkin's Point.

Before sketching a different deflationary account of the state's right to rule, I want to press two points. First, obviously it is important to keep in mind objections to the duty to obey when crafting one's own view. But the driving force behind any theory of political

echoes that when he says that, "[t]he main objection is that civilization as a we know it simply does not hang in the balance every time one of us jaywalks." Edmundson, *Three Anarchical Fallacies*, 28. Neither is it the case that the resolutions of many important moral tasks, such as maintaining an adequate social minimum, are completely undermined without full conformity. As Simmons remarks, "Legal systems tolerate quite impressive levels of noncompliance without performing the tasks in question interestingly less well (than they would with greater compliance)." Christopher Wellman and John Simmons, *Is There a Duty to Obey the Law?* (Cambridge University Press, 2005), 136.

legitimacy should not be a desire simply to respond to possible objections. We should always keep in mind that political legitimacy is about the state having a moral purpose. Any account of its rights should derive from that purpose, not the need to skirt objections. Second, in offering a competing conception of political legitimacy, we need to do more than simply craft a conception that looks different on the Hohfeldian surface. We need to be sure not to face the same exact problems that we sought to avoid.

Seeking to avoid the apparent difficulties with what I have described as forward entailment, William Edmundson also proposes a different conception of political legitimacy that emphasizes the coercive enforcement of the law. On his account, the state's political legitimacy consists instead in its possessing a general claim-right to one's compliance with the direct orders of legal actors (e.g., "Stop the car now!"; "You are ordered to pay a \$5 fine."), in contrast with one's compliance with more generalized legal rules (e.g., "Driver's must stop at all stop signs."; "The penalty for putting your garbage out before 5 p.m. shall be \$5."). The legitimate state also has a general claim-right to non-interference with such orders and the forceful administration of such orders.⁵⁹ Edmundson's reasons for why such a view avoids the difficulties that attend to the general moral obligation to obey the law are opaque. The primary reason seems to be that "[i]n general, it is harder to have an assurance of harmlessness when [disobeying] a traffic cop, rather than a traffic law."⁶⁰ Because of "the relative directness of administrative [orders]," "a train of consequences" "more firmly attaches to disobedience" of such orders.⁶¹ Similar

⁵⁹ Edmundson, *Three Anarchical Fallacies*, 48-70.

⁶⁰ *Ibid.*, 50.

⁶¹ *Ibid.*

difficulties as those noted above face such a view. That aside, Edmundson's view faces difficulties. First, what he has described is not really a claim-right but some sort of moral power to issue orders that require obedience and non-interference. Thus, any apparent difficulties with moral powers should be reproduced here. But, second, even if we assume that harmful consequences can stem from ignoring or violating a direct order, it is unclear that we should attribute such consequences to the lawbreaker rather than the legal actors enforcing the order. If there is no obligation to stop at a desert stop sign in the first place, any harmful consequences that result from fleeing from police enforcing that law are not the fault of the motorist but rather the police.⁶² In fact, the account lays bare the basic point that Dworkin made: forceful administration of a law that one had no obligation to follow in the first place seems like a illegitimate abuse of de facto political power.⁶³ It is a mark on the character of the state or its agents, not the lawbreaker.

Next, I will outline a modest view of political legitimacy that strikes me as a more intuitive way to account for the idea that imperfect states can be politically legitimate, a way that does not demand that all of a state's laws or actions be legitimized in virtue of the state itself being legitimate. I will use views presented by Alan Buchanan and Rawls to articulate the position, and I will suggest that the model I propose is a better way of understanding their own views.

⁶² One might also object that reliance on the consequences of disobedience makes the account depend on the independent moral merits of the action proscribed by law.

⁶³ Perry has offered a similar critique of the argument that one should obey the law because to do otherwise is to set a bad example. The problem is that disobeying the law only sets a bad example if one had an obligation to obey it in the first place. Perry, "Political Authority and Political Obligation," 19.

1.3 - A Threshold Model of Political Legitimacy

Most people do not do their jobs perfectly. But, if a person does their job well enough, they have a right to keep their job. For any given job, a person has certain defined responsibilities, and is provided with certain tools or abilities so as to effectuate those responsibilities. If they do an adequate enough job satisfying their responsibilities, then they have a claim to stay in or keep the job. They have a right to continue to use the tools and abilities provided to them in an effort to satisfy their responsibilities as best they can. That right is held against any individuals who would strip them of that job or severely impair them in their ability to do that job. The up-to-par worker would have a rightful grievance or complaint if they were stripped of their job. Something that rightfully belonged to them and that they deserved to keep was taken away.

The language of claims and complaints invokes the notion of a Hohfeldian claim-right. A claim-right stands in a correlative logical relationship with a duty.⁶⁴ If A has a claim right against B to state of affairs X, then B has a duty to A to ensure state of affairs X. For example, if Alice's job is to stock shelves, and she generally does a good job, she has a claim-right to her job. Others have a correlative duty not to strip her of that job. She has a right to continue to take on her shelving responsibilities. She would have a claim or

⁶⁴ Stephen Darwall, following Joel Feinberg, seems to understand claim-rights in a more robust way. According to Darwall, a claim-right includes a moral power to demand. Stephen L. Darwall, *The Second-Person Standpoint: Morality, Respect, and Accountability* (Harvard University Press, 2006), 8. Here, I understand claim rights along Hohfeldian lines.

complaint against anyone who would strip or try to strip her of her job. That is so even though she admittedly makes mistakes.⁶⁵

What does this have to do with a state's right to rule? As I noted earlier, states also have jobs. In fact, states perform morally necessary jobs or services, and certain rights attach to them in virtue of those responsibilities. Throughout this dissertation, I will speak more extensively about the different species of rights that states can possess in virtue of their specific moral responsibilities. But suffice to say, a claim-right-to-keep-the-job account of the right to rule is available. In the chapters that follow, I will argue that the fundamental job of the state is to secure the freedom of individuals to live independently of each other in ways that are consistent with each and every other individual's freedom. The state's right to use the law for that purpose is crucial. On the threshold account of the right to rule, insofar as the state, or whatever relevant legal entity, is doing an adequate job at securing freedom, meaning that it has satisfied a certain threshold for keeping the job that is specified by its job description, then it has a claim to keep its job.

What I have described is a normatively weak notion. The threshold account is normatively weak because there is no claim that any particular action of the jobholder is correct or that the jobholder has a right to perform any particular action. The jobholder is not beyond reproach. If the shelf stocker created a dangerous condition by leaving cans on the floor, then one would be able to pick them up and offer criticism. Or, if a store manager

⁶⁵ Another way of expressing the point is that the jobholder *deserves* to keep the job in virtue of doing what is an adequate job. For example, we would say that a student who passes her courses deserves to continue in her major. Or, someone who is a good but not great parent can still assert that they deserve to be a parent.

mistakenly told an employee to sell a product at an obviously incorrect price, then the manager should be corrected. The same holds for the state.

The fact that it was the rightful jobholder's job should not cause us to ignore the jobholder's mistakes. Instead, there is simply a claim that the person lives up to the previously defined responsibilities of the job to a sufficient extent. They have a right to keep the job in virtue of doing an adequate job, notwithstanding that they will do things incorrectly or irresponsibly at times, though within limits.⁶⁶ There is a commonsense, and even reasonable, expectation that they will not be perfect. We can say as much about states, the law, or political officials. In such cases, we have to be careful about who or what we are attributing the mistake to. A theory of legitimacy that demanded perfection for any of them simple to stay in the job would be unrealistic and unreasonable.

The threshold model invokes a kind of moral right, which means that it is a normatively weak candidate for how we can understand the right to rule, or the legitimacy of a state. So, the threshold model of legitimacy is distinct from a mere claim that the state possesses some less-definite positive moral value. In the last few decades, A. John Simmons probably has done the most to dispel any beliefs in the general obligation to obey the law or the legitimacy of modern states, while at the same time deflating the moral significance of those conclusions. According to Simmons, "the traditional notion of governmental legitimacy . . . is not really at the center of the important problems in political philosophy."⁶⁷ That conclusion does not leave us without any meaningful ways to

⁶⁶ One virtue of the model is that it is flexible. Where the state does make mistakes, we can assess either or both the quality and quantity of its mistakes.

⁶⁷ Simmons, *Moral Principles and Political Obligations*, 199-200.

distinguish between good and bad governments. Governments can still broadly possess, or not possess, whatever political virtues we expect them to possess, for example, justice, fairness, goodness, integrity, and so on. Those qualities, however, merely serve to distinguish between governments that deserve our support and those that do not, rather than between governments that have a moral right to rule and those that do not.⁶⁸

Built into Simmons's point is his well-known distinction between the justification of the state and the legitimacy of the state. According to Simmons, we provide a justification of the state "by showing that some realizable type of state is on balance morally permissible (or ideal) and that it is rationally preferable to all feasible nonstate alternatives."⁶⁹ Justification on Simmons's account is comparative in nature. The basic idea is that life in a state can be morally preferable to some other state of affairs, say life in a state of nature, or life in a neighboring morally less preferable state.⁷⁰ One's state can thus be morally justified even if it does not have all or any of the moral rights to rule that it claims for itself. Simmons admits that states do morally important, perhaps morally necessary things, but whether they have any moral rights with respect to those subject to their laws and legal actions is quite a different story.

A justification contrasts with a showing of legitimacy:

⁶⁸ *Ibid.*, 198. This connects with Simmons critique of accounts of political legitimacy that rely on the natural duty to support just institutions. We can have a duty to support a just state regardless of whether it has any right to rule.

⁶⁹ Simmons, *Justification and Legitimacy*, 125-26.

⁷⁰ As well as the state/no-state comparison, a justification of the state might involve a good-state/bad-state comparison or a good-state/better-state comparison.

A state's (or government's) legitimacy is the complex moral right it possesses to be the exclusive imposer of binding duties on its subjects, to have its subjects comply with these duties, and to use coercion to enforce the duties. . . . A state's "legitimacy right" is in part a right held specifically against the subjects bound by any state-imposed duties, arising from morally significant relations . . . between state and subject.⁷¹

That is the traditional understanding of the right to rule. As should be clear at this point, it is not the only conception of legitimacy. The traditional view is standardly associated with the related idea that individuals living under a legitimate state have a general moral obligation to obey the law and that the state has a general moral right to uphold all of its laws with force.

Accounts of legitimacy in the literature often elide the distinction that Simmons draws.⁷² For example, G.A. Cohen contends that legitimacy is "the property that something has when, to put it roughly, no one has the right to complain about its character, or, perhaps a little less roughly, when no one has a just grievance against it."⁷³ Those characterizations, however, are too broad. On the one hand, it seems over-inclusive. An individual might have no right to complain because they cannot do anything to rectify an

⁷¹ *Ibid.*, 130.

⁷² Simmons has his own views about which theorists and theories elide the distinction, and discusses a number of such theories. I do not agree with him in all cases even though I agree that he has articulated an important distinction. For example, Simmons believes that Kant's theory of the state is justificatory in nature. The view that I present here is Kantian and definitely has the form of a theory of political legitimacy.

⁷³ G. A. Cohen, *On the Currency of Egalitarian Justice, and Other Essays in Political Philosophy* (Princeton University Press, 2011), 125.

unjust situation or because they may do more harm in attempting to do so. That would not be legitimacy, and it might not even be a justification. On the other hand, an individual might have a right to complain and have a just grievance because the state is acting beyond the scope of any of the legitimate moral rights that it has or is capable of having. Nonetheless, then the account does not explain what legitimacy is but merely identifies the types of attitudes or responses that are appropriate to direct toward the state when it acts outside of the scope of its legitimate right to rule.

What is key to an account being one of political legitimacy is not the particular set of moral rights described by Simmons. Instead, what makes political legitimacy distinct from mere justification is that political legitimacy invokes moral rights. The state or a particular state is not merely justified when it has certain moral enabling rights to rule. At the most abstract level, a state's political legitimacy just is a right to rule. But, as we have seen, accounts of political legitimacy can vary dramatically according to what sorts of moral rights the legitimate state could or should possess.

The threshold model of the right to rule is not a justification of the state but a normatively weak account of political legitimacy. Notice, first, that it is not comparative in nature. There is no comparison to a state of affairs in which the person performs her job perfectly. Nor is there a comparison to a state of affairs in which the person does not discharge any of the responsibilities of the job at all. Nor is there any comparison to a state of affairs in which someone else performs the job better. Such comparisons would tell us whether some state of affairs would be better or worse. But they would not tell us whether the jobholder has any claim to keep his job or not. The job holder is assessed according to

a certain threshold standard that determines whether they are performing their responsibilities adequately or not, and therefore whether they have a right to keep their job or not. Second, the account provides a moral argument for a specific moral right that attaches to an individual or entity that is performing a job. Any account of political legitimacy has to identify the specific right or combination of specific rights that constitute a state's right to rule. The threshold model identifies a specific right, a claim-right to continue in the job.

A claim that a particular state possesses some form of legitimacy serves to distinguish the legitimate state from a slaveholder or a highway gunman. A mere justification of a state cannot do that. Begin with the slaveholder, a benevolent slaveholder. The benevolent slaveholder is independently wealthy and runs a large farm that provides fresh produce for free to local families. He uses slaves to get the job done. The slaveholder rules over his slaves; he tells them what to do and lives off of their labor. This slaveholder treats his slaves well. The work hours are reasonable and the work is not particularly hard. The room and board is not just adequate, but downright luxurious. The slaves live in the finest quarters and eat the finest food. Nonetheless, if a slave disobeys or seeks freedom, the consequences range from beatings, death, or being sold off to another slaveholder who is not benevolent.

There is nothing legitimate about the slaveholder. He has no right to rule over those he deems his property. His commands carry no moral weight. They are "mere demand[s],"

as Joel Feinberg would say.⁷⁴ But his slaves can justify living under his rule. The slaveholder's support of local families is of significant moral value. And, the alternatives to obeying his demands are beatings, death, or becoming the property of an even worse slaveholder. Yet, it does not matter at all that a slave is better off going along with his say so or that the enterprise does moral good for local families. We don't want merely to justify the state along similar lines because we do not want to place it in the same realm as the benevolent slaveholder.

A gunman situation can also be used to prove the same point. Hart famously deployed the case of the highway gunman to show that John Austin's theory that laws are merely commands backed by threats mischaracterized *legal* authority as the gunman situation writ large.⁷⁵ We can make a related point with respect to the *moral* authority of the state. The gunman does not have any sort of right to force you to give up your money. Nor does the gunman have any sort of right generally to continue in the job of being a gunman. If faced with a gunman, however, we often have good reason to comply with their demands. Giving up one's money is a rational response when the alternative is death. And, there may be moral reasons to abide by the demand too. Perhaps you have a child to care for. Perhaps the gunman has informed you that he is going to use the money to pay for medicine for his ailing wife, and you would just spend it on beer. Despite some justification, none of those reasons give him the right to your money though. Defending

⁷⁴ Joel Feinberg, *Rights, Justice, and the Bounds of Liberty: Essays in Social Philosophy* (Princeton University Press, 1980), 152.

⁷⁵ Hart, *The Concept of Law*, 7.

the legitimacy rather than the justification of state action serves to insulate the state from the charge that it is really just the gunman situation writ large.

The comparison between the state and a person with a job is not perfect. There are a few important differences. In fact, the state's right to keep its job can be seen as more robust than that of your average worker. For one, when we speak about the state we may be referring to a number of things that form part of a complex entity. In the case of the state or the legal system, we are speaking generally about a complex organization of persons operating according to a complex set of rules. To use David Copp's helpful description, the state is a "system of animated institutions that govern [a] territory and its residents, and that administer and enforce the legal system and carry out the programs of government."⁷⁶ To say that the institutions are "animated" is to say that "flesh-and-blood" people fill and act within the offices and roles that are necessary for governance by a legal system.⁷⁷ Thus, we could sensibly speak about an individual legal official's right to keep her job, or a political/legal institution's right to keep its job, or the legal system's right to keep its job, or the state as a whole's right to keep its job. That is not just a technical point. States and legal systems are not monolithic things that we can only evaluate in totum. We should not expect massive and complex modern states to possess robust forms of legitimacy that exist independently of the legitimacy of their parts. That fact sits well with the threshold model. There is no need to legitimize every single thing a legitimate

⁷⁶ David Copp, "The Idea of a Legitimate State," *Philosophy & Public Affairs* 28, no. 1 (1999): 7.

⁷⁷ *Ibid.*, 6. Similarly, according to Hart, law is a complex social practice that is in part constituted by a complex relationship between the behaviors and attitudes of legal officials with legal rules. Hart, *The Concept of Law*, 89-91.

state happens to do. Or, every single thing any individual legal official happens to do. For any state action, we must always ask whether it reasonably counts as the performance of the state's job.

A state's claim to keep its job is also normatively different from your average case of a person's right to keep their job in that the state's right — actually any one of its rights — is held on behalf of those whom it serves. Normally, your average worker has a claim to his job because he has certain personal (moral) interests in his job.⁷⁸ He deserves it because he is doing well at it. By contrast, the point of a state is to serve its subjects (or even people more globally) and to secure equal freedom on their behalf by legitimately exercising its rights to rule. When it deserves its job, we would also say that the people whom it serves have a right to the state doing its job and staying in its job. It is in virtue of the state's moral responsibility to serve its subjects and to secure equal freedom that it has a claim to continue in its job so long as it does an adequate job. When a given state makes a claim to keep its job, it is doing so on behalf of those whom it serves. Its claim is therefore derivative of the moral rights of those whom it serves.⁷⁹

A number of plausible theories of political legitimacy in the literature seem to fit the basic contours of the modest threshold account I have just described, though perhaps unwittingly. So I want to pause to discuss a few such theories, describe how they fit into

⁷⁸ Most broadly, his job and his compensation secure his ability to pursue his conception of the good. Jobs also have intrinsic value.

⁷⁹ There is a common criticism that the state could not have a right to rule because that would absurdly imply that the state is wronged when an individual violates the law. That criticism fails insofar as the state possesses its right on behalf of others, namely those individuals who are wronged when one fails to abide by a legitimate law.

the model, and urge that such theories should be construed along those lines. Such accounts offer a way to fill out the state's threshold job description and to understand the threshold model more generally. Alan Buchanan offers an account of political legitimacy that broadly fits the contours of the modest account of the legitimacy of the state:

The central idea is this: a wielder of political power (the monopolistic making, application, and enforcement of laws in a territory) is legitimate (i.e., is morally justified in wielding political power) if and only if it (*a*) does a credible job of protecting at least the most basic human rights of all those over whom it wields power, (*b*) provides this protection through processes, policies, and actions that themselves respect the most basic human rights, and (*c*) is not a usurper (i.e., does not come to wield political power by wrongly deposing a legitimate wielder of political power).⁸⁰

Notice that the account centers on a threshold responsibility: protecting basic human rights and not violating basic human rights in the process of doing so. Insofar as a state credibly lives up to that responsibility, it has a claim to stay in the job and to continue to use the means employed in generally doing the job, namely political power and its enabling rights to rule. That includes issuing legal directives and upholding those directives with force. There is no requirement that the job be done perfectly, only that it be done credibly, which is to say that a certain threshold has been met. Even the last criterion, that the wielder of

⁸⁰ Buchanan, "Political Legitimacy and Democracy," 703. Notice that Buchanan conflates justification and legitimacy here. Moreover, one reading of Buchanan is that he is offering a view akin to that offered by Wellman and Ladenson. We can ignore those difficulties in light of the earlier discussions.

political power is not a usurper, meaning the state did not steal the job from some other entity that had a claim to the job, fits within the model I have described. You cannot violate someone else's right to the job and then seek to stand on the very same ground when your right is challenged. Notice too how the account fits in the basic moral task framework discussed earlier. The state has a job, specifically protecting and securing basic human rights. And, it has a right to make, apply, and enforce law in order to do that job. Moreover, we can say that such a state is minimally politically legitimate insofar as it is credibly discharging that moral responsibility to the extent identified by the threshold described in (a) and (b).

It is important to remain within the moral task framework even when simply offering a threshold account. That is best exhibited by looking at a theory of legitimacy that identifies a threshold but does not explicitly present a moral task analysis. Rawls offers a threshold-based account of legitimacy that does not fit into the moral task framework in a straightforward way but we can extrapolate to present one consistent with that offered by Buchanan. Rawls's liberal principle of legitimacy states that an "exercise of political power is fully proper only when it is exercised in accordance with 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."⁸¹ The liberal

⁸¹ Rawls, *Political Liberalism*, 137. Later, I will explain that despite the modesty of the liberal principle of legitimacy discussed here, the principle is also unreasonably overdemanding in that it requires that constitutional principles that *all* persons would reasonably endorse. But the moral need for legal rules that can resolve reasonable disagreement is premised on the idea that not all reasonable persons will endorse the same principles. So, we need an account that recognizes the need for authority to resolve

principle of legitimacy is used to determine whether a political regime is legitimate rather than whether it is fully just.⁸² A state must satisfy “constitutional essentials and questions of basic justice,” which is a threshold requirement.⁸³ Rawls describes constitutional essentials along the following lines. First, constitutional essentials include the “fundamental principles that specify the general structure of government and the political process,” including “the powers of the legislature, executive and the judiciary,” as well as “the scope of majority rule.”⁸⁴ Second, constitutional essentials include the “equal basic rights and liberties of citizenship that legislative majorities are to respect.”⁸⁵ That list of basic rights and liberties includes: freedom of thought and conscience, freedom of association, freedom of speech, the right to security and independence (including freedom of occupation and freedom of movement), a right to personal property, a right to a social

reasonable disagreement without the expectation that all persons would reasonably endorse every legislative or constitutional act.

⁸²John Rawls, *Justice as Fairness: A Restatement*, ed. Erin Kelly (Cambridge: Harvard University Press, 2001), 47. That is clear from the fact that the principle does not require satisfaction of the second of Rawls’s two famous principles of justice, namely the difference principle, which requires fair equality of opportunity and social and economic equality unless inequality in those things would benefit the least advantaged. Interestingly, one constitutional essential is that “careers [be] open to talents.” *Ibid.* In *Theory of Justice* Rawls rejects careers open to talents as a defensible interpretation of the difference principle, since it “permits distributive shares to be improperly influenced by . . . factors so arbitrary from a moral point of view.” Rawls, *Theory of Justice*, 72. That is an example of why the issue of legitimacy should not be confused with the issue of justice. Rawls’s charge of moral arbitrariness, however, must be too strong if liberal legitimacy is not also to be guilty of permitting what is morally arbitrary. Even legitimacy should seemingly be insulated from moral arbitrariness.

⁸³ Rawls, *Political Liberalism*, 227.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

minimum that provides for basic needs, and the protections of the rule of law.⁸⁶ In effect, the liberal principle of legitimacy identifies the features that a political regime must minimally possess, because it is its primary responsibility to secure those rights, before it counts as reasonably just and therefore legitimate. Insofar as it satisfies that principle, apparently the state has a right to continue to exist and continue doing what it has been doing, but Rawls is not explicit on the point.⁸⁷

Notice what Rawls does not say in describing the liberal principle of legitimacy. First, there is no explicit account of the moral point or job of the state in Rawls's brief discussion. The implicit idea seems to be that the state has to satisfy or secure constitutional essentials because it has a responsibility to secure those rights for its citizens. Insofar as it does that job, then it is legitimate. Second, there is no moral argument for why the legitimate state, in light of its job and its adequately discharging its responsibilities, has the moral right to make, apply, and enforce legal rules. That is surprising in light of the fact that Rawls maintains that the liberal principle of legitimacy is addressed to "two special features" of political institutions: political institutions are non-voluntary and "political power is always coercive power backed by the government's use of sanctions,

⁸⁶ *Ibid.*, 227-29. Although Buchanan refers to the need to protect "the most basic human rights," he does not spell out the specifics of those rights beyond saying that there are "certain basic human interests [] of such profound moral importance that they merit the extraordinarily strong protection that the recognition of rights accords." Buchanan, "Political Legitimacy and Democracy," 705. We could interpret Rawls's principle as identifying the specific basic human rights that must be protected.

⁸⁷ Earlier, I noted that for Rawls the more general point of a just state is to secure society as a fair system of social cooperation amongst equal persons. That idea is not explicitly invoked in Rawls's discussion of political legitimacy.

for government alone has the authority to use force in upholding its laws.”⁸⁸ Those obviously are two central issues in discussions of political legitimacy. Yet, the threshold requirements of the liberal principle of legitimacy address neither of those concerns.

A modest account of political legitimacy does nothing more than identify a threshold standard that a given state or legal system must credibly meet to continue to have a right to continue in its job. That seems to be the core idea in Buchanan and Rawls and the best way to defend such views. A threshold account does not tell us that any particular exercise of political authority or power is legitimate. It does not lend legitimacy to any particular exercise of political authority or power. A state’s modest political legitimacy is consistent with significant failures at securing and protecting fairly basic rights so long as they do not happen regularly enough and are not particularly egregious. So, a state’s right to keep its job does not legitimate everything it does. Moreover, the modest account, as a formal matter, does not say anything about the nature of the particular rights the state might have beyond its right to continue in the job. More work needs to be done on that for us to explain why the specific character of the state’s responsibilities require certain specific Hohfeldian rights to discharge those responsibilities.

States obviously claim the general moral right to create morally binding legal rules and uphold those rules with force. However, the modest account does not say that the modestly legitimate state has a general right to create morally binding laws or to enforce those laws. It just says that it has the right to keep its job, which includes generally attempting to create moral obligations but perhaps failing.

⁸⁸ Rawls, *Political Liberalism*, 135-36.

The modest account also does not justify or legitimize all of a state's laws or exercises of force. According to many theorists, states claim that all of their laws are morally binding. That claim is most commonly associated with the claim that there is a general moral obligation to obey the law. However, the modest account does not say that the modestly legitimate state has that moral power. Nor does it identify the conditions under which a state's demands are morally binding generally or in specific instances. It merely identifies the threshold that a state must meet for it to keep its job.

There is a tendency in political philosophy to think of states or legal systems as monolithic things. If the state is legitimate, then all of the things that it does through its valid legal processes are legitimate. The threshold model permits us to reject that view. Put differently, we need not hold on to forward entailment. States, at least modern states, are not monolithic things like the primitive states discussed earlier. Modern states consist of numerous branches of government, agencies, and bodies of law, not to mention the thousands of human legal actors that animate all of those institutions. Each of those animated parts have their own jurisdiction or own roles in virtue of which they have certain rights to do certain things, each of which can reasonably be described as exercises of political authority. Each of those animated parts make decisions on a daily basis. Many may make responsible decisions. Many may not. There is not one ruler but many. On any theory of legitimacy, we should be able to assess the legitimacy of any and all of those parts.

There are perhaps reasons to think of states as indivisible entities. For one, many political philosophers are in the business of ideal theory. I don't mean that in the sense that

their theories are built on idealized assumptions about the circumstances in which we live. There is obviously a lot of that type of theorizing, and there are legitimate reasons for engaging in that type of theorizing. Some of that will probably happen in this dissertation. Instead, I mean to say that political philosophers are often in the business of painting a broad picture of the ideal that we should strive for. In the case of the state, that would be the fully just state, one that, as a whole or systematically, always acts and organizes itself and all of its parts according to whatever our the ideal principles of justice demand. In that case, it makes sense to speak about the state as a whole *as if* it is a unitary thing.

More important though, according to a number of theorists, the state itself understands its authority in that manner. It claims that those subject to its authority are bound by any and all of its laws equally unless it permits otherwise. Its moral authority is comprehensive and systematic. As John Finnis puts the point, the law “presents itself as a seamless web. Its subjects are not permitted to pick and choose among the law’s prescriptions and stipulations.”⁸⁹ In light of that, the task for political philosophers would seem to be to offer an account of the legitimacy or justice of a state that lives up to the state’s image of itself. To be sure, that task is not primarily motivated by a need to preserve conceptual sincerity. The law does not just claim that all of its laws are morally binding. It also claims the systematic right to uphold its laws with force. The legitimacy of the

⁸⁹ John Finnis, “Authority of Law in the Predicament of Contemporary Social Theory,” *Notre Dame Journal of Law, Ethics and Public Policy* 1 (1984): 120. Elsewhere, Finnis makes a similar point: “[L]egal thought . . . embodies the postulates that each obligation-stipulating law is a member of a system of laws which cannot be weighed or played off one against the other but which constitute a set coherently applicable to all situations and which exclude all unregulated or private picking and choosing amongst the members of the set.” Finnis, *Natural Law and Natural Rights*, 317.

state's self-image is therefore not just a matter of conceptual analysis but of justifying the authority of the law to those who would face its worst consequences. It is an attempt to address Dworkin's Point.

The threshold account does not tell us much beyond that there is a threshold job description beyond which a legal actor or entity gets to continue in its job. Such a right protects it from revolution and actions that broadly undermine its ability to credibly do its job. We work with and within such legitimate states rather than attempting to overthrow them.

In not presupposing the idea that political legitimacy entails a general moral right to compliance with the law or a general moral right to uphold the law with force, the threshold model permits "a piecemeal approach to the question of the authority of governments," as Raz puts it.⁹⁰ For Raz that means, first, that the extent of the state's authority can be partial and more limited than what the government claims, and, second, that its authority can vary from individual to individual.⁹¹ My own account rejects that latter claim insofar as part of the moral necessity of authoritative legal rules is to create reciprocal, meaning equally applicable to all persons, rights and responsibilities. Raz's piecemeal approach thus is at least in tension with the importance and assumption of equality in liberal political theory. Nonetheless, we should accept that the state's moral power to impose obligations and enforce them can be partial and limited by what we

⁹⁰ Raz, *The Morality of Freedom*, 80.

⁹¹ *Ibid.*

identify as its moral responsibilities or tasks. The threshold model of minimal political legitimacy fits with that picture.

In the rest of this dissertation, I will broadly lay out what the state's job is, the conditions under which it has the moral rights to rule that it claims, and why law is so important. It is the legitimate exercise of those rights that lends to the state's legitimacy on the threshold account. To determine whether a state is credibly doing its job, we need to be able to assess broad categories of state activity, as well as its individual actions. Accordingly, we need to be able to identify when the state is actually doing its job.

CHAPTER 2 - COORDINATING RIGHTS DESPITE DISAGREEMENT

In liberal political theory, rights have an important job to do — protecting the freedom and independence of the individuals who hold them. This chapter is about the moral function of enforceable rights and how the law has a necessary practical role to play in securing those rights. Because rights have a job to do, the law has a job to do.⁹²

The law is morally valuable and necessary for its dynamic nature, as well as its static nature. The law is dynamic in that legal officials are empowered to exercise political authority to alter the moral landscape in a variety of ways over time.⁹³ They do so, for example, by imposing obligations and conferring rights on those subject to their authority. That capacity is important in the face of changed circumstances, recognition that a previous legal solution is unworkable, or because regular discretion is required or valuable. I will focus more on the dynamic character of the state's authority in the next chapter, which focuses on the importance of political authority for achieving broader public ends, ends that do not straightforwardly implicate the personal sphere in which we live our lives.

Here, I want to talk about how the law is also valuable and necessary for its static qualities. The law *settles* disagreements, often permanently, and in doing so creates and

⁹² The idea that the law has a moral job or function is important in both the natural law and legal positivist traditions in jurisprudence. See, e.g., Murphy, *Natural Law in Jurisprudence and Politics*, 25-60; Shapiro, *Legality*, 119 (“The[] function [of the fundamental rules of legal systems] is to structure legal activity so that participants can . . . achieve goods and realize values that would otherwise be unattainable.”); Joseph Raz, *The Authority of Law: Essays on Law and Morality*, 2nd ed. (Oxford University Press, 2009), 163-79.

⁹³ For similar points, see Hart's discussion of secondary “rules of change,” *The Concept of Law*, 95-96, and Raz's discussion of “the dynamic aspect of rights” more generally, *The Morality of Freedom*, 171.

secures legitimate entitlements and legitimate expectations in our private interactions with others. In doing so, the law serves a morally important guidance function and, in turn, a morally important protective function.

In this chapter, I will focus on the specific problem that reasonable moral disagreement about the abstract right to equal freedom creates for the possibility of living amongst others while respecting the freedom of others. The argument is Kantian in character and runs as follows.⁹⁴ First, each person has a fundamental right to equal freedom. What that means is that each individual has a right to a determinate and secure normative space in which their person, property, and choices are not subject to the interference or control of other individuals. That normative space is articulated by determinate bundles of Hohfeldian rights.) Second, the right to equal freedom is fraught with moral indeterminacy, meaning that in a broad range of cases well-meaning reasonable people aiming to respect the freedom of others will regard reasonable but inconsistent courses of action as consistent with respecting the abstract rights of others. Indeterminacy and the resulting disagreement undermines the very point of equal rights, namely that individuals retain a determinate and secure normative space in which their person, property, and choices are not subject to the interference or control of other individuals. Third, what is a morally necessary task for equal freedom is coordination around a

⁹⁴ Kant's defense of political authority and his account of private rights are found in the *Doctrine of Right*. Kant, *Practical Philosophy*, 363-506. A comprehensive account of Kant's political philosophy is provided by Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Harvard University Press, 2009). That account is generally followed in Anna Stilz, *Liberal Loyalty: Freedom, Obligation, and the State* (Princeton University Press, 2009), 27-56.

reasonable scheme of equal rights. Fourth, public political authority is able and necessary to complete that moral task, and partly in virtue of that capacity, it is its responsibility to do so.⁹⁵ Therefore, finally, if a public political authority exists that is effective at resolving that task, then that political authority has the legitimate authority that it claims in completing that task. That authority is in no way contingent upon the voluntary consent of those subject to its authority. The view is broadly a moral task account of the legitimacy of political authority, as described in the previous chapter.⁹⁶ The account describes one of the broad roles of that state in virtue of which it possesses and legitimately exercises its enabling rights to alter the moral situation and enforce our legal obligations. The basic point is that one of, if not the, central moral tasks of the law is to *specify* or *constitute* a public system of individual moral rights and duties that define and secure our freedom from other individuals.

⁹⁵ The Thomist tradition offers a comparable approach articulated in terms of the common good. John Finnis says of justice that “[b]ecause one’s pursuit of fulfillment would be unreasonable and self-mutilating if it were indifferent to friendship and to the worth of the instantiation of human goods in the lives of other people, one needs look to getting order into one’s relations with one’s fellows, one’s communities. The name for that order, and for one’s constant concern for it, is justice.” John Finnis, *Philosophy of Law: Collected Essays* (Oxford University Press, 2011), 47.

⁹⁶ Green describes such a view as a “task-efficacy” account. Green, “The Duty to Govern,” 165. The argument in broad form tracks Elizabeth Anscombe’s argument: “authority arises from the necessity of a task whose performance requires a certain sort and extent of obedience on the part of those for whom the task is supposed to be done.” Anscombe, *Collected Philosophical Papers*, 138. And, then: “If something is necessary, if it is, for example, a necessary task in human life, then a right arises in those whose task it is, to have what belongs to the performance of the task.” *Ibid.*, 145. The second formulation is subtly different in that the individual or entity who performs the task holds the right to the performance. But we could think that this right is held by someone other than the task performer. For example, as I will argue here, one’s fellow citizens have the right against their fellow citizens to a legal system that performs a moral task. Political obligation therefore is fundamentally owed to our fellow citizens and not the state.

2.1 - The Philosophical Anarchist's Challenge

Before explaining how rights protect freedom, it will be helpful to articulate the primary argument offered to block the inference that the state has a practical role to play in our lives. Legitimate political authority, many would agree, consists in the right to rule, where that right is understood at least to consist in a Hohfeldian moral power to impose obligations and a right to demand conformity with those obligations.⁹⁷ The point can equally be framed in terms of the power to confer rights and the right to demand compliance with those rights. We can also include a right to use coercion as an element of legitimacy. The state exercises its moral authority through its legal directives, meaning that a legitimate political authority's directives are not just legally binding but morally binding.

The philosophical anarchist, however, urges that there is no moral obligation to obey the directives of the state, even the reasonably just state,⁹⁸ and challenges the legitimacy of political authority. On the philosophical anarchist account, such obligations, according to the philosophical anarchist, could only arise after satisfying fairly stringent standards, such as universal voluntary consent. Although such standards could be satisfied in principle, as an empirical matter they are unlikely to be satisfied with respect to most people and most laws. Nonetheless, the philosophical anarchist's broader point is that if

⁹⁷ See, e.g., Perry, "Political Authority and Political Obligation," 1; Raz, *The Morality of Freedom*, 23-24.

⁹⁸ According to Raz, one has even less reason to obey just laws because "[t]he more just and valuable the law is . . . the more reason one has *to conform to it*, and the less *to obey it*." Raz, *Ethics in the Public Domain*, 343.

one already has duties grounded in justice (or some other moral value) to do what the law happens to require, then the law has no practical role to play. As Green puts the point, the “general requirements of justice, and [any] special obligations acquired through consent” would “pretty much exhaust our political duties.”⁹⁹ Non-consenting individuals subject to the authority of the law would not have a moral obligation to obey the law on the ground that the law results from legitimate exercises of the state’s legal authority. Thus, the fact that something is the law does not provide one with any independent moral reason to act beyond what morality (plus the empirical facts) already require.

As noted in the previous, those who are philosophical anarchists do not disagree that states or legal systems can be morally justified in a broader sense. As Simmons, who defends the position, puts the point:

Some illegitimate states may thus be justified by reference to the good that they do, which is just to say that they merit our support, and thus we have moral reason to provide it. But saying that some states merit support is not at all the same as saying that they have a right to direct and coerce us, which we are bound to honor.¹⁰⁰

Nor must the philosophical anarchist deny that we have non-voluntary duties of justice to others. According to Simmons,

[e]ven in a relatively disorganized state of nature (as Locke emphasizes), it is perfectly possibly — even if sometimes difficult — for persons to do their

⁹⁹ Green, *The Authority of the State*, 267.

¹⁰⁰ Simmons, *Justification and Legitimacy*, 156.

duty, obeying the natural law requirement of respect for others' rights. . . .

But if the duty of justice could be discharged in a nonpolitical social condition, then it is hard to see how we could reasonably derive from the duty of justice a duty to obey our countries' laws.¹⁰¹

The philosophical anarchist therefore aims only to reject the particular idea that the directives of the state are reason-giving or obligating in any way over and above what our determinate natural duties and rights already require. The law, even the just law, is therefore normatively inert. What matters, according to Simmons, is that we do what we have all-things-considered most moral reason to do, including respecting and protecting the rights of others and doing our fair share in pursuing our collective ends. Thus, the problem for the defender of the idea that the state can legislate moral obligations is to avoid the claim that there are moral obligations to obey unjust laws but to explain how the law still has a moral role to play over and above pre-existing natural morality in the case of just laws.

The philosophical anarchist is mistaken about the extent to which our natural duty to respect the rights of others is able to serve the role of protecting freedom without practical help from the law. The law, I argue, has a moral role to play in decisively identifying or specifying which actions or forbearances count as respecting the right of others when we interact. The law's specifications change our moral situation in that they give us clear and equality-preserving guidance on how to respect the rights of our fellow citizens. Outside the context of the law, our abstract natural duty to respect the equal

¹⁰¹ Simmons, *Is There a Duty to Obey the Law?*, 152.

freedom of others cannot play that role. Because the role of the law is to specify requirements of equal freedom, any law that could not reasonably count as a specification of equal freedom need not be binding.

2.2 - *Freedom and Rights*

The commitment to equal individual freedom or liberty is at the core of liberal political theory. Here, my point of departure is the basic liberal commitment that each moral person has an equal right to freedom insofar as that right can coexist with the equal rights of others. That of course is Kant's view too. Kant contends that we have a single innate right to "freedom as independence." That innate right is the ultimate ground of the authority of the state and the law. Kant articulates that right as follows: "Freedom (independence from being constrained by another's choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right belonging to every human being by virtue of his humanity."¹⁰²

Kantian freedom as independence can be abstractly defined in a number of interrelated ways. First, the right to be independent of the choice of others is the right to be your own master. Most broadly, it protects one's capacity for choice. As a consequence no other person can be permitted to be the master of another, and persons have a right not to be placed in circumstances in which that would be the case. This protects individuals

¹⁰² Kant, *Practical Philosophy*, 6:237. The principle is analogous to Rawls's framing of his first principle of justice: "each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others." John Rawls, *A Theory of Justice* (Harvard University Press, 1971), 60. As will become clear later, Rawls's later understanding of the first principle imports the idea that a right to freedom must be specified.

against having their person or property be subject to or dependent upon the discretionary choice of another. Second, an individual's right to independence is a right against wrongful interference in one's "purposiveness." As Arthur Ripstein explains, this means "that you, rather than any other person, [are] the one who determines which purposes you will pursue. . . . [I]t is your right that no other person determine what purposes you will pursue, not that you exercise that capacity successfully."¹⁰³ Accordingly, wronging someone involves interfering with a person's capacities or powers rather than undermining the particular ends that a person happens to have. Third, freedom as independence is a right not to be treated as a "mere means" by others. In this way, an individual could not rightfully be bound by a legal duty that required or permitted otherwise. Equally, others have a rightful duty not to make others a mere means. So, individuals cannot simply be the pawns of other's purposes. Finally, the right to freedom as independence protects one's capacity for choice against being used or destroyed.¹⁰⁴ For example, just as you, absent my consent, would not be permitted to cut my arm off, you equally would not be permitted to use my arm to hold an umbrella over your head. Such constitutes an interference in my capacity to use my arm in the way I see fit. Similarly, absent consent, one could not use or otherwise destroy the property of another because such would constitute an interference with one's capacity to choose to use one's property in whatever way one sees fit.

¹⁰³ Ripstein, *Force and Freedom*, 40-41.

¹⁰⁴ Kant's presentation of the abstract right to freedom as independence can be found in the *Metaphysics of Morals* at 6:238. For a general overview of the Kantian right to freedom as independence, see Ripstein, *Force and Freedom*, 30-56.

In practice, what all of that amounts to is that each individual has an equal claim to an equal, definite, and secure normative space in which their person, property, and choices are not subject to the interference or control of other individuals.¹⁰⁵ Within that space, one need not ask the permission of others. Persons have that right in virtue of the fact that they are free and equal moral persons, namely persons who have the capacity to set and pursue their own ends, and who have the capacity to recognize and abide the by the rights of others.¹⁰⁶ At the very least, following T.M. Scanlon, we can agree that “the ability to influence outcomes and protection from interference or control by others are things people care about.”¹⁰⁷

Central to the idea that individuals have a right to a certain sphere of control and choice that is insulated from the discretionary control and choice of others is the idea that

¹⁰⁵ Stilz, following Kant, urges the following: “To be free . . . is not to be forced to obey the will of another person; it is to enjoy a sphere of independent self-government within which others cannot interfere.” Stilz, *Liberal Loyalty*, 37.

¹⁰⁶ These are essentially what Rawls describes as the two moral powers: the capacity for a sense of justice, which is the capacity to understand, apply, and act from principles of political justice; and the capacity for a conception of the good, which is the capacity to have, revise, and rationally pursue a conception of the good. Rawls, *Justice as Fairness*, 18-19. As here, for Rawls, “[the] basic rights and liberties protect and secure the scope required for the exercise of the two moral powers To exercise our powers . . . is essential to us as free and equal citizens.” *Ibid.*, 45. For criticism of the idea that possession of such capacities is the appropriate locus of value for liberal political theory, see Martha C. Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Harvard University Press, 2006), 14-35.

¹⁰⁷ T. M. Scanlon, *The Difficulty of Tolerance: Essays in Political Philosophy* (Cambridge University Press, 2003), 29. Scanlon goes on to comment, consistent with the view defended here, that rights protecting such values may vary from society to society: “[T]he case for rights derives in large part from the goal of promoting an acceptable distribution of control over important factors in our lives. This general goal is one that would be of importance to people in a wide range of societies. But the particular rights it calls for may vary from society to society.” *Ibid.*, 36.

there determinate limits on how we can treat each other.¹⁰⁸ Broadly, rights are valuable because they articulate the fixed normative limits within which individuals are protected in the exercise of their choice and control and through which they can form reasonable expectations about the choices of others. Most directly, rights secure the freedom of those who hold them. To do that, our rights must be “determined (with mathematical exactitude).”¹⁰⁹

What specific rights one has specify and define the contours of that sphere of control.¹¹⁰ To start, the way in which a right secures that sphere depends on the species of right possessed. It will therefore be helpful to gain a basic understanding of the conceptual distinctions between different species of rights and identify the manner in which particular species of rights protect¹¹¹ the freedom of the right holder. To do so is in part to explain the normative significance of rights within liberal political philosophy.¹¹²

¹⁰⁸ This cuts across the distinction between positive and negative duties.

¹⁰⁹ Kant, *Practical Philosophy*, 6:233.

¹¹⁰ Cf. John Oberdiek, “Specifying Rights Out of Necessity,” *Oxford Journal of Legal Studies* 28, no. 1 (2008): 128 (“[D]ynamism . . . distinguishes specified rights. A right, on this picture, can stand against different behaviour in different circumstances, so that what conflicts with a right in one context may not conflict with it in another.”).

¹¹¹ I will generally use the terms “protect” and “secure” to describe the relationship between one’s rights and one’s freedom. As will become clear, however, that relationship is more nuanced. We ought not conceive of one’s freedom as something completely distinct from the rights that one possesses. Our rights not only protect our freedom, they also constitute our freedom. I discuss this point more in this Chapter and in Chapter Four, which discusses specificationism more generally.

¹¹² These distinctions are also helpful in understanding the variety of accounts on legitimate political authority that are discussed here.

As noted in the previous chapter, Hohfeld described the conceptual framework for characterizing different species of rights, with each species having a distinct logical form.

The basic framework of legal relations is captured in Hohfeld’s table of “jural correlatives”:

<i>Right:</i>	Claim Right	Privilege	Power	Immunity
<i>Correlative to:</i>	Duty	No Claim Right	Liability	Disability ¹¹³

The columns designate jural correlates, namely pairs of “incidents” that logically entail one another. For example, that Ann has a claim-right against Bob, logically entails that Bob has a duty to Ann. Moving diagonally between the columns, we have pairs of jural opposites, pairs in which the negation of one incident logically entails the other. For example, that Ann has no duty to wash Bob’s car entails that Ann has a privilege not to wash Bob’s car. I will flesh out the relationships more in the course of explaining how each species of right secures freedom.

The way in which a right secures the freedom of the right holder depends on the particular Hohfeldian right possessed. A basic starting point for and the core of the idea that individuals have rights is the idea that there are determinate limits on how individuals can treat each other. The idea of a limit is the core of a claim-right. Every claim-right is logically correlated with a duty. So, insofar as an individual has a claim-right, someone or

¹¹³ Hohfeld, “Some Fundamental Legal Conceptions as Applied in Judicial Reasoning,” 30.

some entity has a duty to that individual. Other individuals are *limited* to complying with their duties and therefore lack discretion to do what the limit proscribes.

Two examples will suffice to explicate the idea of a claim-right, the two examples chosen from each side of the traditional distinction between positive and negative rights or duties. A negative right is a claim-right that imposes a negative duty on another individual not to act in a certain way. Such a right calls for a forbearance. For example, if Abe has a claim-right against Barb that she not intentionally touch him absent his consent, then Barb has a duty to Abe not to touch him in that manner absent his consent. By contrast, a positive right entails an affirmative obligation on another to do something for or to provide something to the right holder. If Abe has a claim-right against Barb to a watch in Barb's possession, then Barb has a duty to ensure that Abe gets the watch. Nonetheless, in both cases, a logical relationship holds between the claim-right holder and the duty holder. As Judith Jarvis Thomson puts the point, a claim-right is something "a person has against a person [or entity]." ¹¹⁴ One cannot have "a claim out into the blue." ¹¹⁵ Rather, a claim-right is held against some other person or entity.

Claim-rights protect the freedom of the right holder by imposing obligations on others. Claim-rights against specified forms of interference most clearly exemplify that point. Rights against certain forms of interference in one's person protect one's ability to do as one chooses with one's own body. Similarly, a right against interference in one's property protects an individual's right to do as one chooses with one's property.

¹¹⁴ Thomson, *The Realm of Rights*, 38.

¹¹⁵ *Ibid.*, 41.

Insofar as powers, privileges, and immunities are types of rights, it is not the case, as Thomson puts it, that “[e]very right is a right *to* something.”¹¹⁶ Claim-rights are rights *to* something, namely a correlative duty, but that is not true of other rights. Under the Hohfeldian scheme, a privilege-right is not a right to something; it is a right that consists in the right holder *not* having something, namely a duty. The Hohfeldian correlate of a privilege is a “no right.” What that means is that having a privilege to do something entails that someone else does not have a claim-right that the privilege holder not do that something. For example, if Abe has a privilege to swim in the lake with respect to Barb, Abe does not owe Barb a duty not to swim in the lake. Often when we speak loosely of an individual having a privilege, we mean to say that the individual has that privilege with respect to everyone. For example, if Abe has a privilege to swim in the lake, then he does not owe a duty *to anyone* not to swim in the lake.¹¹⁷

A privilege-right protects the freedom of an individual insofar as having a privilege entails that one does not have an obligation that limits one’s conduct. A privilege by itself does not protect an individual from interference from others; that job is left to claim-rights.¹¹⁸ Rather, a privilege merely entails that one is not bound in some way and is

¹¹⁶ *Ibid.*, 37. Thomson is referring to rights “in the strictest sense,” namely claim-rights that are correlative with duties.

¹¹⁷ Of course, that will not always be the case. One can have a privilege with respect to one person but not another. For example, if Abe promised Cindy that he would not swim in the lake, then he would not have a privilege with respect to Cindy but would have a privilege with respect to Barb.

¹¹⁸ For example, exercising one’s privilege-right to use a single-use bathroom does not interfere in the privilege-right of another person to use that same bathroom.

therefore free from an obligation. The privilege holder therefore lacks certain specifiable limits.

A power-right gives the right holder a moral capacity intentionally to alter the moral situation of oneself or another, for example, by altering the duties or rights of another or oneself. We recognize a number of circumstances in which having such capacities constitute part of the power-right holder's freedom. These include the moral power to bind oneself by making promises and entering into contracts, the power to consent to things that would otherwise be wrong absent one's consent, and even the power to seek redress of wrongs done against one's person or property, among other things.¹¹⁹ Such powers are essentially expressions of each individual's power to make choices about their person and property in the course of pursuing one's conception of the good, including entering into certain sorts of relationships with other people. As Raz explains, moral powers are constitutive of how "[w]e are all to a considerable degree the authors of our moral world."¹²⁰

Finally, a Hohfeldian immunity-right makes the right holder free from having their moral situation changed. An individual's immunity-right entails that someone else lacks a power-right with respect to that individual. That individual therefore is not subject to the moral control of another insofar as they have immunity from such control. For example, individuals in liberal societies possess immunities against public and private demands that

¹¹⁹ For a discussion of promises and agreements in terms of moral powers, see Raz, *The Morality of Freedom*, 173-76. For a discussion of the importance of power rights in thinking about private law causes of action, see Benjamin C. Zipursky, "Rights, Wrongs, and Recourse in the Law of Torts," *Vanderbilt Law Review* 51, no. 1 (1998): 79-86.

¹²⁰ Raz, *The Morality of Freedom*, 85-88.

they participate in a particular religion. So, any attempt to impose an obligation to praise the Pope would be *ultra vires*. No obligation would be imposed and the attempt to do so would be normatively fruitless. Immunity against the decisions of others protects one's freedom in that one is not subject to the moral control of another. In different terms, insofar as one has an immunity, one does not have a master and is not subject to another's authority.

Rights in common political discourse are most often not atomistic in the way described. That is because when we speak loosely about rights, we are speaking about collections of Hohfeldian rights. Take for example our right to bodily integrity. Such a right arguably includes 1) certain claim-rights against interference in one's person (e.g., non-consensual touching); 2) certain immunities from being subject to the choices of others (e.g., the decision of another to sell your body); 3) certain privileges to use your body in the way you choose (e.g., your privilege to waive at your neighbor or not); and 4) certain power-rights to alter your own moral situation (e.g., consenting to let another hold your hand).

The moral order that Kant describes is an order in which individuals are universally and equally secure in a normative space in which: 1) they can determine the course of their actions and property through their own choice in a way that is free from interference from others within limits (claim-right), 2) in a way that is not subject to the discretion of others within limits (immunity-right), 3) in a way in which they do not wrong others with their actions within limits (privilege-right), and such that (4) they can alter their own rights against and responsibilities to others within limits (power-right). Beyond that, however,

the Kantian right to equal freedom alone does not tell us much about the specific content of the rights that we have in our person or property. Rather, it tells us that we have an equal right to have rights and that they have to be determinate and systematic to do their job.

That all serves to make the more general point that rights secure the freedom of rights-holders in a variety of ways. Below I explicate that point further in discussing how a system of equal rights secures freedom and how the law plays an important role in the life and vitality of our rights.

2.3 - Moral Indeterminacy and the Defects of the State of Nature

Rights that articulate the space within which individuals can live independent of the choices of others must be effectively coordinated in an public, univocal, and determinate way to do their job. To understand that point, it will be helpful to look at life absent those features.

At its core the state of nature in liberal political theory is a state of reasonable disagreement spawned by moral indeterminacy in our rights to person and property rather than a morally permitted war of all against all for private gain. Only against such a baseline can we make sense of a mutual requirement and goal of ensuring the equal freedom of others notwithstanding indeterminacy.¹²¹ That baseline establishes the standpoint from which we should assess the question of how laws can morally bind. Most agree that the

¹²¹ Thus, the Hobbesian state of nature is not a state of reasonable disagreement. Rawls describes the appropriate standpoint as follows: “disagreement between reasonable persons: that is, between persons who have realized their two moral powers to a degree sufficient to be free and equal citizens in a constitutional regime, and who have an enduring desire to honor fair terms of cooperation and to be fully cooperating members of society.” Rawls, *Political Liberalism*, 54.

law plays an important coercive function in that the law authorizes and uses force to provide assurance and security for our rights, particularly against those who choose not to respect the rights of others. But to justify the legitimacy of the practical role that the state claims to play is also to justify that role to the reasonable citizen, one who aims not to do arbitrary violence against others but one who aims in good faith to respect the rights of others and to equally stand up for his own rights.¹²²

According to the philosophical anarchist, the reasonable citizen does not need the state's political authority to provide him with guidance about what he must do to satisfy his obligations not to violate the freedom of others. On such a view, the state is permitted to use force to protect individuals against those who will or who do violence to the rights of others. But, in that respect, the philosophical anarchist believes the state is no different than any other individual who is authorized to use force to protect their own rights or the rights of others. Therefore, we need to understand why life without political authority is not as the philosophical anarchist claims.

Arthur Ripstein, interpreting Kant, maintains that the state of nature suffers from three defects. Those defects are moral in nature and make the state morally necessary to secure our right to freedom as independence. First, acquired rights to property, which are a necessary extension of freedom, are not possible in a state of nature. Second, acquired rights cannot be secure outside of the assurance-providing coercive institutions of the state. And, third and finally, in a state of nature our rights are indeterminate and subject to

¹²² One thing to point out is that the state of nature is reproduced in a small way within the state whenever there is a reasonable disagreement about rights and no public solution has been offered.

disagreement, as “objective standards cannot be established in a state of nature.”¹²³ For those reasons, rights to property can only be provisional in a state of nature. Ripstein sees those defects as interconnected but distinct. I am going to suggest that the primary defect in the state of nature is indeterminacy in our rights and that the discrete problem of acquisition would disappear in the absence of indeterminacy. But, for now, I will rehearse Ripstein’s three defects.

According to Ripstein, it must be possible to obtain property rights in objects, including land, because objects must be able to “serve as means for setting and pursuing purposes.”¹²⁴ A secure capacity to set and pursue one’s own purposes within determinate limits just is one’s freedom. It is that more general right that is constituted by our rights in our person and property. The original acquisition of property, however, raises a problem “because it does not simply change the world,” rather “it places others under new obligations” as a result of the unilateral choice of the person acquiring the property.¹²⁵ What that amounts to is one person subjecting other persons to his own private will for his own private purposes. That is the problem of unilateral choice or private authority. Freedom is inconsistent with being subject to the private will of another person. That is because each individual has an immunity that protects them against being subject to the private will of another.

¹²³ Ripstein, *Force and Freedom*, 146.

¹²⁴ *Ibid.*, 149. For the same reason, freedom “precludes any requirement that all others consent to any acquisition. Such a requirement would make the use of a usable thing depend on the *matter* of other people’s choices, and so subject everyone to the choice of each other private person.” *Ibid.*

¹²⁵ *Ibid.*, 153.

The problem of private authority is raised because a private individual is unilaterally interpreting his own rights and the rights of others. In doing so, he is unilaterally using another person's person and property for his own private purposes. The problem is not raised, however, "if I move from one place to another, [such that] I occupy space which is not available for your occupation while I am there."¹²⁶ According to Ripstein, that "change does not place you under a new obligation, but simply applies [my right to my person] to a different circumstance."¹²⁷

A legal system with publicly defined rules for acquiring property resolves the problem in two ways. First, our right of acquisition of property must be reconciled with the rights of others. I cannot acquire property rights that result in unfair property distributions or acquire rights that systematically undermine the rights of others. A systematic solution is required. And, one must be able to tell where their property right begins and ends. Second, and more importantly, the exercise of a power to acquire property must be an exercise of a public power that is equally conferred to all. So, a private individual cannot exercise the power of acquisition in a manner that serves only his own private purposes. Acquisition in accordance with public authority, an authority that has a public responsibility to all to ensure that all could be reasonable in abiding by the common scheme, is the exercise of a public power with a public purpose.

The second defect is the lack of assurance or security for equal rights. According to Ripstein, "without public enforcement, people lack the assurance that others will refrain

¹²⁶ *Ibid.*, 151.

¹²⁷ *Ibid.*

from interfering with their property and, as a result, have no obligation to refrain from interfering with the property of others.”¹²⁸ The point is not just that coercion is necessary to protect one’s rights. Rather, if assurance is absent, then the problem of private authority arises again: “If you refrain from taking what is mine, without assurance that I will refrain from taking what is yours, then you are permitting me to treat what is yours, and so an aspect of your capacity to set and pursue purposes, as subject to my purposes.”¹²⁹ Your freedom is thus subject to my will because the security of your rights depends on whether or not it happens to be my private purpose not to take what I am claiming is mine. The solution to that problem is a coercive state that provides security and assurance that one’s rights will be protected just like everyone else’s.

Before moving on to the third defect, I want to briefly discuss the notion of coercion involved in securing our rights. For Kant, coercion is not primarily understood in terms of punishment, which is how many would perhaps understand that term. Instead, coercion is understood as a morally permitted constraint on the freedom of another to secure freedom, or, as Kant puts it, a “hindering of a hinderance to freedom.”¹³⁰ Such hinderances are necessary to secure one’s rights. As a practical matter, there are three basic categories of such hinderances. The first is preventive. Public and private actors are permitted to intervene and hinder the freedom of another to prevent that person from violating the rights of others. For example, one would be permitted to restrain an individual who is attempting to punch another person. The second is remedial. Public and private actors are permitted

¹²⁸ *Ibid.*, 159.

¹²⁹ *Ibid.*, 162.

¹³⁰ Kant, *Practical Philosophy*, 6:231.

to remedy continuing and past hinderances. For example, if a person is trespassing on one's property, they can be physically removed from the property. Or, if someone steals property, they can be forced to return the property or pay for it. The third category would cover what we traditionally refer to as punishment. These are hinderances attached to criminal offenses. Such hinderances serve both the purpose of deterring (or simply confining) those who are not otherwise deterred by law or its remedial character, and the purpose of punishing by imposing proportional retribution on those who commit wrongs. Each of those categories describes a manner in which rights are enforced or upheld.¹³¹

Returning to the moral defects in the state of nature, the third defect is that in the state of nature our rights are not determinate. That is also the basic point that I am emphasizing in this chapter. As Ripstein puts the point, "general rules are not sufficient to classify particulars falling under them."¹³² More specifically, a general rule that individuals are to respect to the rights of others is not sufficient to guide their actions in particular cases because each person can disagree in good faith about what that requires. It is partially but not fully determinate. The argument differs from the Lockean argument that the state is necessary simply to settle rights disputes that tend to result in rancor and violence. Of course, the state will do that too. But, even if there were no actual disputes,

¹³¹ For a discussion of Kantian coercion that highlights some of these categories but casts them in a different light, see Ripstein, *Force and Freedom*, 303-24. I do not mean to suggest that each of the three categories can be justified together. The primary point is that they can be consistent with freedom insofar as they can be understood as hinderances to a hinderance. Although the preventive and remedial nature of the use of force seems uncontroversial, the jump to punishing certain categories of offenses requires more moral theory.

¹³² *Ibid.*, 168.

the state would still be necessary to settle the content of our rights. The point is that “rights are necessarily subject to dispute, not that they are always disputed. The application of concepts to particulars is always potentially indeterminate, and so requires judgment, as a result of which the classification of particulars is always, at least in principle, indeterminate.”¹³³ The view is also not the skeptical view that “the basic terms of social life have no answers but somehow require them, so that institutions must step in to answer them.”¹³⁴ There are certain precepts of freedom that are not subject to reasonable disagreement, such that there is no role for the law to play in resolving a reasonable disagreement.

Broadly the point is that ,
concepts of right do not always generate a single answer, but because they demarcate aspects of a system of reciprocal limits on choice, their application to particulars must be given a single answer in every case. . . . [N]either the normative concepts nor the relevant facts nor any combination of them guarantees agreement. Again, different people may . . . agree in a wide range of cases. Any such agreement is, from the standpoint of right, mere coincidence, and so rights are by their very nature subject to dispute.¹³⁵

¹³³ *Ibid.*, 170.

¹³⁴ *Ibid.*, 169. Ripstein attributes this view to Jeremy Waldron, *Law and Disagreement* (New York: Oxford University Press, 1999). I am not sure that Ripstein accurately captures Waldron’s view, but such a discussion is beyond the scope of this chapter.

¹³⁵ Ripstein, *Force and Freedom*, 170-71.

In the case of acquisition of property, for example, there is always going to be “indeterminacy, with respect to quality as well as quantity, of the external object that can be acquired.”¹³⁶ Notwithstanding a determination not to violate the rights of others, in the state of nature, the best that individuals can do is what they have a right to do, namely, “what seems right and good” in the situation. Not to do that would be to subject their own decisions about what is right to the private authority of other individuals with whom they are interacting. Again, that is the problem of private authority.

Political authority resolves that problem by making our rights systematically determinate in a univocal way that secures the freedom of all. In the state, no longer are one’s rights dependent on what others subjectively deem to be right and good in the situation but are now dependent on determinate public standards.

The broad theme running throughout the previous discussion is that the three defects amount to the problem of private authority. Private authority is contrary to freedom as independence because what freedom consists in is being able to choose the course of one’s life independent of the private purposes of other individuals. That problem is a real problem that needs to be cured by the state.

Moreover, although assurance is a defect in its own right where we cannot assume that others will abide by the law, the first defect turns primarily on the third defect, namely moral indeterminacy. The problem of acquisition arises because, first, there is no

¹³⁶ Kant, *Practical Philosophy*, 6:266; Ripstein, *Force and Freedom*, 23. Nozick raises this point in discussing Locke’s labor-mixing theory of property acquisition, questioning whether “[b]uilding a fence around a territory presumably would make one the owner of only the fence (and the land immediately underneath it).” Robert Nozick, *Anarchy, State, and Utopia* (Basic Books, 1974), 174.

reasonable expectation that any one individual's acquisition of property can be made consistent with the equal property rights of others absent a univocal specification of our rights. And, second, such acquisition in a state of nature involves one individual imposing obligations on others in their own private manner and according to their own private interpretation of what right requires. Those problems, however, go away if we assume for the moment, as the philosophical anarchist does, that there is a true account of equal natural rights that governs our property rights, including the mechanisms by which we acquire property. Assume that something like the Lockean account of property acquisition is correct, that we have a right to appropriate property through the use of our labor insofar as "there is enough, and as good left in common for others."¹³⁷ The Lockean who acquires a particular piece of property, say land, alters the moral situation of others insofar as those persons now have certain duties not to violate the Lockean's property rights by trespassing on that land.

If that is indeed the case, no problem of private authority arises, as the Lockean's property was acquired by exercising the same and singular right and capacity to labor that each other free human being is endowed with. That capacity can be exercised for whatever purpose any individual chooses, just like an individual in the modern state can exercise a legal power to acquire property for whatever purpose she chooses. What is more, if the Lockean account is true, the Lockean can raise a private authority objection of his own to the Kantian: by disregarding the Lockean rights of others and placing state-imposed normative conditions on property rights, the Kantian is attempting to alter the moral

¹³⁷ Locke, *Two Treatises of Government*, II, § 27.

situation of those who have acquired bona fide property rights through the use of their labor. So, the Kantian needs the indeterminacy argument to find a defect in acquisition.

The Kantian can make that argument. The problem of private authority arises because the Lockean account of property acquisition is woefully indeterminate with respect to the mechanism of acquisition and the character of the right acquired. First, there are just no clear answers as to what constitutes enough and as good left: Is that measured by the area of the property? The agricultural quality of the property? The market value of the property? And, so on. What is more, even if that could be determined, it is unclear how the necessary coordination between each acquisition is supposed to happen. Second, is there a minimal amount of labor that must be used to acquire property, and must that labor continue for the property right to continue. Third, when one labors on a particular piece of property there will be “indeterminacy, with respect to quality as well as quantity, of the external object that can be acquired.”¹³⁸ Nozick raises that point in discussing Locke’s labor-mixing theory of property acquisition, questioning whether “[b]uilding a fence around a territory presumably would make one the owner of only the fence (and the land immediately underneath it),” or all of the property within its bounds.¹³⁹ Finally, even if one acquires a property right to a particular piece of property, that does not settle the question of the content of the right acquired. Is the right absolute, or are there exceptions? Are there limits on what can be done with the property? Is there a time limit on the right? And so on.

¹³⁸ Kant, *Practical Philosophy*, 6:266; Ripstein, *Force and Freedom*, 23.

¹³⁹ Nozick, *Anarchy, State, and Utopia*, 174.

It is only because of that indeterminacy that the problem of private authority is generated. That is because in unilaterally interpreting what the nature of one's property rights are, one imposes one's own view of what the moral situation ought to be on other individuals. Such a right would confer unequal authority on that individual, authority that could not be shared by all. Because of indeterminacy, others also have different reasonable views about what our property rights consist in. As an equally free moral person, each person has no reason to defer to another private individual's judgment about what property rights they have.

2.4 - Necessary Features of Rights

In light of the previous discussion, I want to focus on how indeterminacy undermines the ability of rights to articulate equal spheres of independence. We have already seen that indeterminacy in the state of nature results in the problem of private authority. Here I want to explore that idea more broadly and explain what is needed for rights to articulate a domain within which individuals can lead independent lives.

Rights that articulate the space within which individuals can live independent of the choices of others require several important features that cannot be satisfied outside of the state. First, rights must be systematically coordinated between persons and across time. Largely that means that our rights must be coordinated in a univocal and settled way such that they are mutually consistent and universal. For an given right, all persons must know, or be easily able to know, the legal content of the right such that it makes sense to say that there is in fact a specified legal rule in existence that governs conduct. Call that the coordination requirement. Second, our rights must be action guiding in a decisive and

determinate way in broad cases. There must be definite courses of action that count as respecting rights. Call that the decisive-reason requirement. Third, rights must be publically knowable. Call that the publicity requirement. Fourth, the state must be broadly effective in satisfying those requirements. Call that the effectiveness condition. Those requirements are interconnected and mutually reinforcing, but it is helpful to separate them out.

The basic idea behind the coordination requirement is that the mandate of a system of equal rights presents a kind of coordination problem in light of the fact of moral indeterminacy. What that means is that there is a moral need for all members of a community to act or “coordinate” according to a single scheme of rights that is internally consistent and egalitarian. This obviously is not a coordination problem in the traditional sense in which individuals need to choose a course of action and the outcome is jointly determined by the actions of all of the agents.¹⁴⁰ Rather, the point is that groups of individuals who interact must have a settled rule that specifies the content of a right, which they will conform their actions to and upon which they can assert their claims against others. People are not coordinating their behavior simply by acting in accordance with what everyone else is doing; instead, they are coordinating around a legal rule that they regard as legitimate.¹⁴¹ The first and foremost reason for that is egalitarian in nature.

¹⁴⁰ See, e.g., David Lewis, *Convention: A Philosophical Study* (Blackwell: 2002), 8.

¹⁴¹ To some extent the law does not care why individuals follow the law. But it does matter that a relevant community of individuals (perhaps just legal officials) coordinate around a shared understanding of what the law requires, as the status and content of legal rules is partly determined by the attitudes the members of the relevant community have toward the conduct covered by the rule. Hart discusses this idea in terms of the “internal point of view.” See Hart, *The Concept of Law*, 89-91. For discussions of the idea, see Scott J.

Insofar as we are all equal moral persons, we have the same basic rights that articulate our freedom. That equality must be coordinated between people despite indeterminacy (or inequality) between the various interpretations of our rights. But, finally, rights are valuable because they protect one's ability to form and follow plans around one's conception of the good. One cannot plan one's life if what one is entitled to varies broadly depending upon whom one is interacting with and how they interpret one's rights.¹⁴²

Accordingly, the problem of unilateral authority represents a failure to coordinate our interpretations about what rights each of us have. Outside of the state, each person has a right to do what seems right and good to him. What that means is that the security of one's claims is arbitrarily dependent upon whom one happens to interact with and whether their conception of one's rights happens to coincide with one's own. That is a problem both because one is then subject to the private authority of another and because that authority could not be shared equally. Of course we can enter into private agreements with others, but then what rights we have is subject both to the bargaining power of others and their own private purposes in deciding who to enter into agreements with. Moreover, even if that were acceptable, we would constantly be forced to haggle with others about the

Shapiro, "On Hart's Way Out," *Legal Theory* 4, no. 4 (1998), 489-92, and Matthew D. Adler, "Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?," *Northwestern University Law Review* 100, no. 2 (2006), 745-69.

¹⁴² The coordination requirement can also be understood as one of the "formal constraints of the concept of right" from Rawls. Rawls, *A Theory of Justice*, 131. There Rawls articulates a series of constraints on principles of justice, but several of the constraints are of equal applicability in this context. These include the generality constraint and the universality constraint. The former requires that the existence, nature, and scope of an individual's right do not depend on the proper identity of that individual or whom he is interacting with. The universality constraint requires that if one person has a right in virtue of their status as a moral person, then all must have that right.

terms of our interactions, which is hardly desirable from the perspective of freedom. By contrast, if our rights are coordinated in a univocal and equal manner, those problems are resolved.

The second requirement is that our rights must be action guiding in a decisive and determinate way in broad cases. Rights must provide clear guidance as to what counts as respecting the right, what is protected by the right, and/or how the right is to be utilized (in the case of a power-right). Rights have the capacity to be action guiding in several ways. First, rights guide the actions of those who possess them in that a right possessor can form reasonable expectations about what he is and is not permitted to do and what others are and are not permitted to do. That is important with respect to one's ability to plan the course of one's life. Second, rights can guide the actions of those who are looking to avoid violating the rights of others insofar as rights specifically define what counts as respecting the rights of others. Finally, with power-rights, one must know specifically how to exercise a moral power successfully insofar they are permitted to do.

We can first explain the idea with respect to claim-rights. A claim-right is correlative with an obligation. Obligations are commonly regarded as special types of reasons for action, namely reasons for action that are "presumptively decisive," namely "reasons which, although they are capable in principle of being outweighed or overridden, nevertheless present themselves as considerations upon which I must act."¹⁴³ The decisiveness of such reasons for action is part and parcel of the "trumping" quality of

¹⁴³ Samuel Scheffler, *Boundaries and Allegiances: Problems of Justice and Responsibility in Liberal Thought* (Oxford: Oxford University Press, 2001), 100.

rights.¹⁴⁴ But, the decisiveness of such reasons requires that those reasons precisely identify how one is to proceed to satisfy the obligation. And, insofar as a right-holder expects others to abide by their obligations, the right-holder must have a precise expectation as to how others are going to act, insofar as the right-holder has a reasonable expectation that others will respect his rights. Rights must be “determined (with mathematical exactitude).”¹⁴⁵

Because of indeterminacy, however, freedom-based considerations cannot decisively settle which courses of action are consistent with the freedom of others. Indeterminacy does not just create reasonable disagreements between people; it also creates reasonable disagreement within people about which course of action to take. For example, I may believe that I would be reasonable to think that I have freedom-based right to use a grill in my backyard despite the fact that the smell of barbeque will waft across my neighbor’s yard, as she can close her windows. Such an intrusion, I might reason, does not unduly burden my neighbor. On the other hand, I might reasonably think that the smell from my barbeque violates my neighbor’s freedom-based right to enjoy her property as she sees fit. Nonetheless, I would not be unreasonable in having either of those views. Therefore, I do not have a decisive reason to choose one course of action over the other and am left without a clear way to respect my neighbor’s freedom.¹⁴⁶

¹⁴⁴ See Dworkin, *Law’s Empire*, 153-67.

¹⁴⁵ Kant, *Practical Philosophy*, 6:233.

¹⁴⁶ If I choose to grill, my neighbor is similarly situated and does not know if she has a right to complain about my grilling or if it is her responsibility to close her windows or wear a mask to block the smell when I am grilling.

Comparable points can be made with respect to moral powers. Not only must a possessor of a moral power have clear guidance on how to exercise the power, others must have a clear understanding of the circumstances under which moral powers are effectively exercised. For example, one seeking to exercise the power of contract must be able to ascertain the circumstances under which an attempt to exercise the power to bind oneself or another in an agreement will be effective and enforceable. And, those putatively subject to someone else's power must know under what circumstances their moral situation will be altered so that they can plan accordingly.

The publicity requirement is connected with the previous two requirements in a fairly straightforward way. If there are to be equal rights that are action guiding, they must be publicly discernible. For rights to coordinate action in a univocal and decisive manner, and create and secure reasonable expectations, the fact of a right must be epistemically accessible in a fairly robust way. Rights could not serve their practical role if they were not capable of being readily known. They would not be able to guide action and therefore not be able to coordinate our actions in a way that is consistent with all having equal and secure rights. An unknowable right cannot be acted upon. It is also important that individuals be able to see that others are respecting each other's rights. They could only do so if they can assess others' actions against a public standard.¹⁴⁷

¹⁴⁷ This is also important for the effectiveness of the system, or the "stability" of the system, as Rawls puts it: "[T]he general awareness of [the principles of justice's] universal acceptance should have desirable effects and support the stability of social cooperation." Rawls, *A Theory of Justice*, 133. Similarly, Thomas Christiano urges that publicity requires that "each person can see that he or she is being treated as an equal." Christiano, *The Constitution of Equality*, 4.

Finally, a state that is tasked with satisfying those requirements must be broadly effective at doing so. Roughly, that is just to say that the above constraints must actually be satisfied by the state. A law that is not broadly followed or enforced is not serving its purpose. The state possesses effectiveness insofar as it not only has the capacity to decisively coordinate behavior in a public way, but effectively does so. That point is emphasized and at the core of John Finnis's account of legitimate political authority. According to Finnis, "the sheer fact that virtually everyone *will* acquiesce in somebody's say-so is the presumptively necessary and defeasibly sufficient condition for the normative judgment that that person has (i.e. is justified in exercising) authority in that community."¹⁴⁸ Of course we need not go as far as to say that effectiveness is a sufficient condition, but it is definitely a necessary condition.

The importance of assurance in Kant's view is largely explained by the importance of the state's effectiveness at getting people to follow its directives. That the state needs to rely on force to uphold the effectiveness of a system of equal rights is tangential to the basic point that the state needs to uphold the effectiveness of a system of equal rights. If we were all fully motivated to abide by the state's articulation of our rights, there would be no need employ force to maintain the effectiveness of our rights. Assurance is assurance that others will abide by rights, not that they will abide by those rights because those rights are backed by force.¹⁴⁹

¹⁴⁸ Finnis, *Natural Law and Natural Rights*, 250.

¹⁴⁹ Kant conceives of a right as involving a moral title to coerce. Kant, *Practical Philosophy*, 6:232. However, title to use force in defense of rights does not imply that force will be necessary to secure rights, just that it always be an option.

Here I have argued that life outside the state is problematic from the perspective of freedom. Reciprocal rights of freedom must be effectively coordinated in a public, univocal, and determinate way to do their job. Insofar as the state has effectively done that, it possesses the legitimate authority it claims to have with respect to our rights. In the next two chapters I will say more about why the positive law is specially suited for that task, first focusing on the importance of law for achieving broader collective goals and then focusing on how specification of our rights and responsibilities works.

CHAPTER 3 - DYNAMIC AUTHORITY, COLLECTIVE ENDS, AND FAIRNESS

In the previous chapter, I argued that that the law has a necessary practical role to play in ensuring the freedom of those subject to it. Specifically, I argued that all individuals have a right to a determinate and secure normative space in which their person, property, and choices are not subject to the interference or control of others. Because of moral indeterminacy in the right to independence, the law is morally necessary to publicly settle how we are to interact with others in such a way that we do not violate their independence. Reciprocal rights of freedom must be effectively coordinated in a public, univocal, and determinate way to do their job. Insofar as the law effectively settles how we are to avoid using and interfering with the person and property of others, we have moral obligations to obey those laws. The legal rights and responsibilities that govern the face-to-face interactions between persons and property determine and secure our independence.

Here, I want to focus on how we use law to achieve and specify our broader collective ends. This topic is normally discussed under the heading of public goods,¹⁵⁰ where our concern is not with individuals using or injuring the personal means, one's person or property, that uniquely belong to any discrete individual. Instead, our concern is with individuals who do not participate in the relevant way in the state's discharging of its public responsibilities. Our public responsibilities are collective for two reasons. First, they are derivative responsibilities that each of us have in virtue of being part of a state-

¹⁵⁰ Here my concern is not to present a defense of public goods as those are discussed in the rational- and social-choice literature, namely goods that are non-excludable and non-rivalrous. For a discussion of public goods and references, see generally George Klosko, "Presumptive Benefit, Fairness, and Political Obligation," *Philosophy & Public Affairs* 16, no. 3 (1987): 241-59.

linked collective that has certain responsibilities. Second, they are collective in that they are discharged on behalf of and usually for the sake of the equal freedom of all members of the collective. This obviously raises the issue of what collective responsibilities we actually have. Put differently, what ends are states permitted to pursue through its authority? How do such ends relate to freedom? How do such responsibilities implicate what individual citizens are responsible for doing? This raises issues connected with taxes and compelled civil service. Contemporary theorists usually explain the responsibilities of individual members of the collective by reference to the principle of fairness. Here, I will seek to understand that principle in terms of the moral responsibility of the state to secure equal freedom in a fair way.

I will begin by sketching how securing and maintaining equal freedom in the face of changing circumstances requires that political authority in part be dynamic. Following, I explain how political authority has a coordinative role to play in discharging our collective responsibilities. Next, I will discuss and criticize variants of the view that fairness requires individuals to obey laws that effectively execute our collective responsibilities. I will end by articulating a better way of understanding how fairness is involved in legitimizing our collective obligations.

3.1 - Securing Equal Freedom through Dynamic Authority

Securing equal freedom is a big undertaking that requires fair, coordinated collective action in the face of reasonable disagreement amongst a diverse populace about the nature of our collective responsibilities and how they are to be discharged. Individuals generally do their part in two ways: they pay, or they participate. Those activities need to

be coordinated in some fashion. Here I will discuss in broad terms the nature of our collective responsibilities or problems, and how the state's capacity to coordinate behavior is necessary to specify and discharge those responsibilities.

Any public projects that are the legitimate responsibility of the state must be reasonably understood to secure and maintain equal freedom. Put differently, the state's legitimate power is limited to securing and maintaining equal freedom. Otherwise, participation in public projects could not be mandatory and coercively enforceable. As Ripstein puts the point, "[t]he only powers a state may exercise are ones that fall under various aspects of its duty to create, maintain, and improve a rightful condition."¹⁵¹

There are perhaps three interrelated categories of public projects that roughly¹⁵² fit that bill: securing rights, securing institutions, and securing relations of independence through distributive justice. I described the first project in the previous chapter. We require effective political institutions to specify and secure our rights in our person and property, and to enforce agreements between us. The second project concerns adequately securing the organs or instruments of government so that they can effectively discharge their responsibilities to secure equal freedom. Put differently, the state has a responsibility to maintain itself and maintain the means reasonably necessary to do its job. We need effectively funded and staffed legislative, executive, and judicial bodies; public buildings to house those entities; entities that protect those institutions, including the military, law

¹⁵¹ Ripstein, *Force and Freedom*, 223. This is a more general way of capturing Kant's point that legitimate force must be a "hindering of a hindrance to freedom." Kant, *Practical Philosophy*, 526.

¹⁵² To be sure, there may be other ways of dividing up categories of public projects.

enforcement, and fire department; and other administrative agencies that deal with the economy, public health, education, and so on to ensure that there are people able to take on those responsibilities effectively. I do not mean to provide a comprehensive list, as the nature and extent of any necessary government bodies is in many respects subject to reasonable disagreement. The basic point is that insofar as any of those government bodies are needed to secure our right to equal freedom, we need to collectively secure the ability of those bodies to do their jobs effectively. We either need to pay or participate.¹⁵³

Ripstein identifies public roads and thoroughfares as a paradigm case of a mandatory public end. The example is a good place to start. The necessity of roads can be seen as derivative of the necessity of the first two projects I just identified. First, public roads are necessary because without them private property rights in land would not be consistent with equal freedom. If all land were privately owned, then individuals would ultimately get trapped on their own land or that of others. The only way to move around, pursue your own ends, and associate with whom you desire would be to seek permission from one's neighbors. But that creates a situation in which your freedom is dependent on the choices of others.¹⁵⁴ Second, a similar problem arises in light of the state's responsibility to secure equal freedom, for example, by deploying law enforcement to prevent an attack. Law enforcement would not be able to do its job of preventing an attack if it was not able to get to the victim without trespassing on land or seeking permission from owners of land adjacent to where the victim is located. The idea, then, is that public

¹⁵³ For a good discussion of this issue, see Ripstein, *Force and Freedom*, 243-66.

¹⁵⁴ *Ibid.*, 244-45.

roads are a precondition without which private rights in land or public responsibilities to protect would not be possible.

The third project deals with the state's role in distributing resources for the purpose of ensuring that individuals do not fall into impermissible relationships of dependence and domination. Even if the state secures those rights that are covered by the private law, we might still be concerned about how inevitable natural and social processes and happenstance can place people in circumstances that are inconsistent with equal freedom. Recall that freedom as independence requires not only that individuals be free from interference by others by that they not be subject to relationships that are inconsistent with their equal status as independent persons not subject to will of others. For example, that sort of rationale can be used to account for the state's responsibility to combat poverty. The person who falls into poverty is effectively subject to the choice of those who are fortunate to have more. Although such individuals have a duty of charity, that duty on the Kantian account is an imperfect duty, meaning that individuals have latitude or discretion in how and when they discharge the duty. The result is that the impoverished person finds himself in a relationship in which his capacity to set and pursue his own ends independently of others is subject to the discretionary charity of others. To resolve the problem, there needs to be public provision of resources to secure those who might fall into poverty.¹⁵⁵

The basic rationale for poverty relief can be brought back to the rationale for public roads. Recall that roads are necessary to prevent situations in which individuals are

¹⁵⁵ This is the basic argument presented by Ripstein, *ibid.*, 267-99, and Stilz, *Liberal Loyalty*, 98-101.

landlocked and cannot pursue their own ends without asking leave of their neighbor. The situation is analogous to a case in which a person falls into a deep pit and cannot leave the pit without assistance.¹⁵⁶ In effect, the person is landlocked in a hole, and he is completely at the whim of possible rescuers who may or may not choose to rescue him, which is inconsistent with his freedom. Mandatory public rescue is therefore necessary to cure the dependence, just like mandatory public roads are necessary to cure the dependence when someone is landlocked. Poverty relief can be analogized to mandatory public rescue. The person who falls on hard times is like the person who falls in the hole: he is dependent on the charity of others. He therefore has a right to be rescued with some sort of social safety net.

The previous discussion was simply a sketch of how we should think about the relationship between public responsibilities and equal freedom. Surely, we will have reasonable disagreements about how to address the moral problems discussed. In any case, the point is that for any proposed public responsibility we need to seek out justifications that are grounded in the right to freedom as independence.

How can those collective responsibilities be discharged? The answer provided by the moral task account defended here is that only effective political authorities enabled with certain moral rights, most prominently moral powers to change the moral situation, for example by imposing obligations, can discharge those responsibilities. The above responsibilities are collective in nature. That is so primarily because of the scale and

¹⁵⁶ This example is drawn from Raz's example of the man in the pit. Raz, *The Morality of Freedom*, 373-74.

complexity of those projects, which require the expenditure of significant amounts of time, manpower, and money. But they are also collective because we regard them as a shared responsibility that must be discharged fairly. I will have more to say about that latter point below.

In the previous chapter, I focused on the moral importance of the static character of legal rules. When it comes to the rights and responsibilities that govern interactions between private persons, the law is morally necessary to settle reasonable disagreement between competing but reasonable interpretations of our right and responsibilities. Otherwise, our person and property would not be secure even from morally motivated individuals.

Not only is the law meant to settle such disagreement for the time being, it is meant to settle it for good. That is especially important when it come to the laws governing our person and property. Individuals require a stable sphere of dominion in which they can make choices about their person and property, often over a lifetime, based on the legitimate expectations set by the law. The laws governing those rights could not serve their purpose of securing equal freedom if they changed much over time. This is one of the principles inherent in the principle of the rule of law.¹⁵⁷

Notwithstanding, equal freedom must also be secured over time in the face of constant changes in our physical, social, economic, and technological circumstances, changes that have the capacity to undermine equal freedom. In addition, reasonable disagreements that were once settled often reemerge. Recall that one aspect of political

¹⁵⁷ Raz, *The Authority of Law*, 214-15.

legitimacy is the moral power to change the moral situation. That power is dynamic in the sense that it is a prospective capacity to alter how the current contours of the moral landscape.¹⁵⁸ Insofar as that capacity can be used to alter the moral situation, for example by imposing enforceable moral obligations, it is also a capacity that can be used to guide and secure *changes* in the coordinated behavior of those who are subject the state's authority.¹⁵⁹

That a state with the dynamic capacity to alter the moral situation is morally necessary should be evident from our earlier discussion of the need to intervene to protect individuals from falling into relationships of dependence through time and the need to secure institutions and rights over time. In the face of such changes, political authority with the capacity to alter our coordinated behavior is necessary. Political institutions themselves are also subject to degradation over time and require regular supervision and revision. This is as true in mundane cases, such as allocating resources to fix infrastructure, as it is in the more exceptional cases of allocating resources to military defense in the face of real security threats. The broad point is that not only must we secure a rightful condition,

¹⁵⁸ This discussion is informed by Perry's analysis of political authority in terms of the "value of intentionality" and "prospectivity" conditions. Perry, "Political Authority and Political Obligation," 4-5. Although he mentions it only in passing, I take Shapiro to be pointing to a similar virtue in legal authority when he remarks that legal systems "provid[e] a highly nimble and durable method of social planning." Shapiro, *Legality*, 213.

¹⁵⁹ I will leave out of this chapter a discussion of how to conceptualize judicial application of the law to disputes. On the one hand, we might say that judges applying law to particulars are simply stating what the law requires rather than changing the moral situation. In this way, they act like theoretical authorities. On the other hand, judicial authority plausibly may be understood to involve significant moral powers to alter the moral/legal situation of the parties before the court and those outside the court within its jurisdiction.

to use Kant's terminology, we need to sustain it over time in the face of natural and social forces that would slowly or dramatically undermine that condition.

This discussion is limited in a number of ways. First, it is not meant to be an exhaustive discussion of the range of cases in which moral change is necessary and reasonable. The discussion is just meant to show that our legal circumstances are not fixed by a system of rights and responsibilities that falls from the sky and is set for time immemorial. Law is purposive and dynamic, and there are reasons having to do with equal freedom to defend the need for law with that character. Second, although the authority to change the moral situation is necessary, like any aspect of authority, it can be abused. Obviously, we expect authority to be exercised consistent with the rule of law. Notwithstanding a need for change, we expect that laws will still generally be reasonably stable over time. That is both because law could not secure legitimate expectations if it were to change constantly and because it could not coordinate our behavior if it were to constantly change course. Although an exhaustive discussion of the relationship between moral powers and rule of law principles is beyond the scope of this discussion, I highlight the problem to show the limits of the discussion before pressing on to the next section.

3.2 - Coordination and Positive Law

Political authority is in large part legitimized by the moral necessity of resolving large-scale coordination problems between persons through public laws that give easily discernible guidance. Not only is coordination necessary for rights, it is necessary to get large-scale projects done. Because the above responsibilities are collective in nature, they necessarily require coordination between the broad range of persons who share in that

responsibility.¹⁶⁰ How is that possible? The inability to coordinate our behavior without law is not due simply to the frailties of the human condition, including limitations in the reason, foresight, knowledge, or motivation of any given individual or association. Although, those are legitimate concerns. Rather, even our most ideal well-motivated citizens will reasonably disagree about what the right course of action should or must be to discharge our collective responsibility to secure equal freedom.

Disagreement comes at two points. First, we may disagree about what it means to secure equal freedom where that is understood as a certain state of affairs over time that satisfies one's conception of equal freedom. Second, we may reasonably disagree about the means (including the timeline) according to which that state of affairs is to be secured. Reason cannot be our only guide in many cases. And, even in cases where perhaps there is an obvious better option, coordinating around a less-ideal option may be better than not doing so. Absent a unitary legal authority to direct action, we would not be able to realize our collective ends.

Political authority is able to coordinate our actions because instead of being guided simply by our own conception of right, we are to be guided predominantly by the law. The law is able to serve that purpose in part because of its positive nature. To determine what equal freedom requires, and hence what course of action is required, we simply look to what the law says. To determine that, we need only look to social facts about what legal

¹⁶⁰ In Chapter Six, I will account for the range of this class of people in terms of the instrumental effectiveness of the state.

officials, or bodies of legal officials, have done and said.¹⁶¹ As Waldron expresses the point, “law must be such that its content and validity can be determined without reproducing the disagreements about rights and justice that it is law’s function to supersede.”¹⁶²

More is required for the law to play its coordinative role beyond its positivity. The law must be reasonably communicated to all those whom it seeks to coordinate. And, its demands must be reasonably easy to understand. The law must also be effective both in the sense that people generally abide by it but also in the sense that it is enforced and seen to be enforced where individuals fail to abide. If individuals have no assurance that others are following the law’s dictates, then they will see themselves as being duped into serving the ends of others rather than coordinating with others for the purpose of sharing responsibility in securing equal freedom.

Additionally, the moral need for political authority to achieve large-scale collective ends is not just instrumental in nature. Rather, it matters that those ends are achieved through the rule of law. Placing authority in legal rules and offices with public mandates addresses the problem of private authority, in which we are subject to the private purposes of others. In that way, law has intrinsic and necessary value apart from being a means to securing a collective end. It puts each of us in a relationship of equality with our fellow citizens.

¹⁶¹ Another way to put this is that the law makes a candidate course of required action *salient*.

¹⁶² Jeremy Waldron, “Kant’s Legal Positivism,” *Harvard Law Review* 109, no. 7 (1996): 1540.

The law's authority has limits. Its purpose is to resolve reasonable disagreement about equal freedom, not to impose demands that no reasonable person would accept as consistent with equal freedom. Where there is no possibility of reasonable disagreement, then the state's authority to specify our rights and responsibilities ends. For example, we would be hard pressed to account for the permissibility of using public dollars to fund sports arenas or religious celebrations. The moral task of equal freedom therefore also sets limits on the uses of political power. For any possible public purpose, we need to identify how it can be justified in terms of securing a system of equal freedom.

This point can be easily missed in discussions of political authority because of the assumption that in legitimizing authority, we are demanding that individuals completely surrender their judgment about what is right and what is not.¹⁶³ However, the point of law is to coordinate our actions, not exclude thinking about how action should be coordinated. The background assumption of this dissertation is that others are actively reasoning about what course of action is right, but they will inevitably reasonably disagree. There is nothing unreasonable or concerning from the perspective of equal freedom about that. Individuals only become unreasonable in the event that they insist on *acting* according to their own personal judgments about what freedom requires once the law settles the matter. It is at that point that they unilaterally impose their will on others and unilaterally undermine fair solutions to securing equal freedom. They hinder freedom rather than simply thinking or reasoning about doing so.

¹⁶³ *E.g.*, Wolff, *In Defense of Anarchism*, 13.

3.3 - *The Principle of Fairness and Political Authority*

It is perhaps not that controversial that much of the law's moral value comes from its ability to coordinate human activity to achieve valuable ends.¹⁶⁴ A number of theorists have therefore questioned whether we can draw the inference that laws rationally related to such ends will bind all of those subject to the law. Recall my earlier discussion in Chapter One of Hume's defense of political obligation. Hume urged that we are bound to obey the law "because society could not otherwise subsist."¹⁶⁵ The plain difficulty with that view, however, is that the law can tolerate some level of non-compliance without society falling into ruin.¹⁶⁶ The same can be said about almost any of the public tasks that are reasonably the responsibility of the state.¹⁶⁷ Thus, one might ask how the general moral necessity of legal solutions to collective problems implies the moral necessity of any

¹⁶⁴ Even Simmons, for example, seems to think that state coordination can be a good thing in some cases. Wellman and Simmons, *Is There a Moral Obligation to Obey the Law?*, 193.

¹⁶⁵ Hume, "Of the Original Contract," 481. Along similar lines, Hume wrote, "society cannot possibly be maintained without the authority of magistrates, and that this authority must soon fall into contempt where exact obedience is not paid to it. The observation of these general and obvious interests is the source of all allegiance, and of that moral obligation which we attribute to it." *Ibid.*, 480.

¹⁶⁶ This is supported by the fact that the law often permits exceptions so long as they are on the law's terms.

¹⁶⁷ As Simmons remarks, "Legal systems tolerate quite impressive levels of noncompliance without performing the tasks in question interestingly less well (than they would with greater compliance)." Wellman and Simmons, *Is There a Duty to Obey the Law?*, 136. Wellman agrees: "[A]n average citizen's (dis)obedience typically has no discernable effect whatsoever upon a government's capacity to perform its functions, so it appears that no strictly consequential account of our duty to obey the state's commands can be plausible." *Ibid.*, 33.

individual person complying with the law. Theorists have sought to resolve that problem with an appeal to the notion of fairness. Fairness brings into the fold those actors and actions that are not necessary to bring about whatever end needs to be achieved because those individuals whose compliance is not marginally necessary would violate a duty of fairness if they failed to comply.

Rawls was an early proponent of the principle of fairness, so our discussion must begin there. Rawls argued that under the following conditions, an individual will have an obligation to obey the law: First, there is a just scheme of social cooperation that yields benefits. Second, the individual can benefit from the scheme even if he does not do his part. Finally, the individual voluntarily accepts and intends to continue to accept the benefits of the just scheme.¹⁶⁸ If those conditions are met, then the individual has an obligation to cooperate and do his fair part, which in the case of the state amounts to his obligation to follow the law.

There are a number of difficulties with the view, which I will address by looking at the steps in reverse order. The first major difficulty is the step from the duty to do one's fair part to the duty to follow the law. We might accept for the sake of argument that if one accepts benefits from a just social scheme of cooperation, then one has a duty to do one's fair share in producing that benefit. For example, say that I live in a town with an ordinance that requires payment of a \$5 tax that is used to pay for the daily services of a river-cleanup technician. All of my fellow citizens pay the tax. I refuse, despite the fact that I accept and enjoy the benefits of the clean river. It is where I fish for my dinner.

¹⁶⁸ Rawls, *Collected Papers*, 122-23.

Although I refuse to pay the tax, I clean the river on the day that the town does not hire the technician. There is no difference in the cleanliness of the river because I clean the river on that day, just like I do every other day when the town hires me as the technician. The difficulty is that if one can do one's fair share in a way that the law has not specified, then one has not violated one's duty to do one's fair share even though one has violated the law. Accordingly, the failure to do one's fair share without additional premises cannot account for why one's failure to follow the law violates the principle of fairness.

The second problem is with the inference from receiving benefits from a just scheme of cooperation to a duty to do one's fair share in producing the benefits. Say that 364 of my co-workers agree to create a cooperative coffee scheme whereby everyone is assigned a day to contribute a bag of Primo coffee.¹⁶⁹ I did not participate in the agreement, nor was I somehow made aware of it prior to taking the job, but pursuant to the agreement my name is put on a list with all of my other co-workers designating the date on which each of us is responsible for buying one giant bag of Primo coffee for the pot. As a result of the scheme, there are 365 cups of coffee available each morning, and a hot cup of coffee is placed on my desk each day. I drink it each day because I like coffee, and I don't want to, and should not have to, walk down the hall to pour the cup out in the kitchen sink. According to the principle of fairness, when it comes to my day, I am supposed to contribute a bag of Primo coffee.¹⁷⁰ Yet, there is no apparent reason why I can be required,

¹⁶⁹ This example models Nozick's public address system of entertainment. Nozick, *Anarchy, State, and Utopia*, 93-94.

¹⁷⁰ The example can also be used to challenge the inference from the duty to do my fair part to the duty to obey the rule. Even if I believe that I have a duty to do my fair part in the coffee scheme, there may be another way to do that. For example, instead of buying a

let alone forced, into such a thing. The Primo coffee scheme is just a case of other people foisting their own private purposes on me, which is a violation of my rights.

The next difficulties arise because the conditions that are supposed to trigger the duty of fair play are rarely, and therefore not generally, present. Moreover, in part because of that, those conditions in no way seem relevant to the question of whether one has a moral obligation to obey a law. First, the applicability of the law to an individual is not conditional on their voluntary acceptance. Laws, unless explicitly stating so, do not condition their applicability on the voluntary acts of those subject to them.¹⁷¹ There is a good reason for that. We saw this earlier in Chapter Two. Conditioning the applicability of the law on the voluntary actions of those subject to it permits individuals to unilateral impose their own will on their fellow citizens. Second, the applicability of a law is also not contingent upon whether an individual benefitted from that law. There may be a broad sense in which we expect citizens generally to benefit from the law, not in the sense that they are better off than some comparative state of affairs or that they receive discrete discernible benefits, but in the sense that they can exercise their freedom to personally pursue whatever benefits they want so long as they abide by the rights of others. That just

bag of Primo as required, I might buy a bag of Sub-Primo but spend thirty minutes cleaning the deposits out of the coffee machine, which needs to be done to make good tasting coffee even though no one else recognizes that fact. Nonetheless, a lot depends on how we describe the benefit that is produced by the scheme. If the benefit is that all drink Primo coffee each day, perhaps because Primo has special nutrients, one's substitution is not doing one's fair share. If the benefit is that all drink good-tasting coffee each day, then one has offered an adequate substitution.

¹⁷¹ The nature of the acceptance necessary to ground the obligation of fair play is also subject to dispute. Simmons, for example, defends a more robust conception of the acceptance necessary for any duty of fairness. Simmons, *Justification and Legitimacy*, 20.

means the state is generally doing its job. However, whether a particular law is legitimate and binding, fully or partially, on a person does not turn on whether they actually received some benefit from it. For example, part of my tax dollars may be spent to fund a battered women's shelter. Being a man, I do not receive any obvious personal benefits from that. Yet, surely the state's funding of that program can be understood to be securing the equal freedom of the women who need that shelter, and the state can demand some of my tax dollars on that basis. I can be called upon to share in the responsibility of securing the equal freedom of those women.

Several observations should be made at this point. First, I have not argued that the principle of fairness, perhaps with some adjustments, is not applicable in contexts outside of the law. For example, Simmons's has articulated a version of the principle of fairness with reasonably robust requirements that, if met in the context of our everyday voluntary associations with others, would seem to ground a moral obligation to do one's fair share.¹⁷² Second, despite that, it seems obvious that notions of fairness would somehow be relevant and important in any discussion about what the state can demand of individuals when it comes to the broader public responsibilities that make coordination necessary. Accordingly, and finally, the implication is that the state is sui generis in that it is not simply your average association amongst teammates or co-workers. Any fairness account should presume that fact. This, as I remarked earlier, is the problem with conceiving of the state simply as a system of social cooperation. Instead, the state is singular in the

¹⁷² *Ibid.* However, any such duty would have to be specified by the law.

mandatory role it plays and the mandatory responsibilities that it discharges with respect to securing equal freedom.

With those lessons in mind, a number of theorists have sought to combine the principle of fairness with moral task theories of the state. For example, David Estlund argues that we have a collective duty to solve humanitarian problems, which translates into a duty that individuals have to do their “fair share” to solve such problems.¹⁷³ And, Wellman argues that only states have the effective capacity to benefit us by rescuing us from the state of nature. Therefore, states have a samaritan duty to benefit us by securing peace and protecting rights. The principle of fairness then comes in to account for why we all are subject to the law in furtherance of those ends even though any one of us would not be marginally necessary to achieve the goal.¹⁷⁴

I will discuss Estlund’s use of the principle of fairness some in Chapter Five because it fits with his account of the authority of democratic institutions. Because Wellman offers a more developed and nuanced account of the issues of fairness relevant in this chapter, I will focus on his view. Wellman summarizes his view as follows:

The samaritan model of political legitimacy explains that a state has a right to force even those who do not consent because this force is necessary to rescue this person and others. Adding samaritan duties and fairness to this,

¹⁷³ Simmons describes the most defensible way in which fair play could bind one to a joint enterprise. *See ibid.*, 1-42. While Estlund’s account employs the fair-share requirement, it is not based on the idea of voluntarily accepting benefits and free-riding on others. David Estlund, *Democratic Authority: A Philosophical Framework* (Princeton University Press, 2008), 147.

¹⁷⁴ Wellman, “Toward a Liberal Theory of Political Obligation,” 749.

we can now explain that each person has an obligation to obey the law as her fair share of this samaritan task. By invoking fairness in this fashion, we may freely admit that no one would slip into peril if a single individual disobeyed the law. Instead, we point out that it would be unfair to shirk one's share of the samaritan chore. Securing political stability is a communal responsibility that falls upon all of us; it is wrong to leave all the work to others.¹⁷⁵

I will not say much about Wellman's view of the specific task that he identifies for the state. There are surely questions about what exactly it means to say that the state's responsibility is to rescue us from the state of nature and secure political stability. We could interpret that responsibility more or less narrowly. It is difficult to understand how many of what we reasonably take to be the state's responsibilities could be understood as derivative of the state's responsibility to rescue us from the state of nature. What is important, nonetheless, is that the account reasonably fits within the basic moral task framework. That is crucial because it addresses any difficulties that would arise in applying the principle of fairness to demand fair contributions to benefits that are not mandatory or moral in nature (such as daily coffee).

Wellman uses fairness to capture, and subject to the state's authority, those actors and actions that are not strictly necessary to bring about whatever end needs to be achieved. The basic idea is that if others are required to expend effort to resolve an important task,

¹⁷⁵ *Ibid.*

then everyone else, as a matter of fairness, must do so too. I will challenge that idea in part later on, but for now it is not particularly controversial to accept that view.

The view still faces a substantial difficulty, one that was discussed above. The problem is with the inference from the duty to do one's fair share to the duty to "obey the law as [one's] fair share" of the collective end.¹⁷⁶ Even if we assume that individuals have a duty to do their fair share, it would seem that in most everyday cases there are any number of ways in which individuals might discharge their fair-share responsibility, ways that do not involve compliance with the law.¹⁷⁷ For example, if some of my tax dollars would be spent on a poverty relief program, why can I not forgo paying those dollars to the government and instead direct them to a different poverty relief program that does as good or an even better job relieving poverty? The picture that emerges from that difficulty is one in which the law is a guide for how to do one's fair share, but it is not a mandatory guide. There is the possibility that individuals can do their fair share in a manner that is

¹⁷⁶ *Ibid.* Estlund is aware of this difficulty too: even if "I might get an obligation to direct my efforts to some local portion of the system that is addressing [some] need, something more would be needed to explain why I would be obligated to *follow orders*, to do what I am told because I am told." Estlund, *Democratic Authority*, 151. Estlund employs the idea of "normative consent" to address the problem. In Chapter Five, I discuss why that resolution is unsuccessful.

¹⁷⁷ A comparable point has been made in the literature on the supposed division of labor between political institutions and individuals in reconciling the co-existence of impartial values (e.g., justice) with partial values (e.g., family). See, e.g., Samuel Scheffler, "The Division of Moral Labor," *Proceedings of the Aristotelian Society, Supplementary Volumes* 79 (2005): 250; Kok-Chor Tan, *Justice, Institutions, and Luck: The Site, Ground, and Scope of Equality* (Oxford University Press, 2012), 32. There the issue has to do with why political institutions *limit* and *mediate* one's responsibilities founded in justice when one can, the argument goes, better discharge those responsibilities directly. As Liam Murphy puts the point, "[i]f people have a duty to promote just institutions, why do they lack a duty to promote whatever it is that just institutions are for?" Liam Murphy, "Institutions and the Demands of Justice," *Philosophy & Public Affairs* 27, no. 4 (1998): 280.

not mediated by political authorities.¹⁷⁸ Obviously, whether someone in fact lives up to that responsibility would have to be considered on a case-by-case basis, and adjudicatory bodies would be necessary to adjudicate disputes about that. However, insofar as we accept the idea that individuals can do their fair share independent of the law, we cannot draw the inference that compliance with the law is necessary as a matter of fairness.

Wellman attempts to solve this problem. His answer is that discretion in how to do one's fair share is "a good of which one may not take more than one's fair share."¹⁷⁹ In requiring that all individuals obey the law, we are fairly distributing the good of discretion. The individual who disobeys but still does what is her fair share in support of important moral task is taking more of her fair share of discretion.

Although interesting, this strategy is not successful. There are two problems. The first problem is that requiring a fair distribution of discretion does not entail full obedience with the law unless there is already full obedience with the law. Hart offered an early version of the principle of fairness, what he called "mutuality of restrictions," that helps to explicate the idea. Hart argued that "when a number of persons conduct any joint enterprise according to rules and thus restrict their liberty, those who have submitted to these

¹⁷⁸ One point that is often lost in the literature is that there are at least two ways in which the state mediates one's duties in justice. First, the state specifies one's responsibilities with a law that identifies what action is required. For example, pay \$5 for poverty relief by some date. Second, the state plays an administrative role. The tax is paid *to the state*, and the state administers how the fund is to allocated and so on. But, we can imagine institutional arrangements where the state mediates one's responsibilities in the first way but not the second. For example, the state may require that \$5 for poverty relief be paid directly to Oxfam rather than the state. Obviously, we will have reasonable disagreements about what arrangements should be chosen, which is why the law is needed in the first place.

¹⁷⁹ Wellman and Simmons, *Is There a Duty to Obey the Law?*, 40.

restrictions when required have a right to a similar submission.”¹⁸⁰ It fairly captures the idea that Wellman is invoking here. If everyone else restricts their liberty, i.e. their discretion, in furtherance of the collective task, then they have a right to the same “submission.” So, if everyone else obeys the law in furtherance of the state’s responsibilities, then I must submit in the same way and obey the law.

A difficulty arises, however, if we do not assume that everyone obeys the law, which is not an unreasonable assumption in light of human experience. As an empirical matter, compliance is only ever partial: people break the law. What that means is that so long as the state’s moral responsibilities are sufficiently discharged, a fair distribution of submission and discretion will not require full compliance from all persons but only partial compliance from all persons. Whether there is a fair distribution is determined by reference to how people in a given state are actually behaving.¹⁸¹

The second difficulty is that discretion is not always a good and, in fact, is not a good in this context. Having an obligation obviously impacts whether one has discretion with respect to a certain action. If a person has a decisive moral obligation to do X, then she has no discretion not to do X. If she has no decisive moral obligation to do X, then she

¹⁸⁰ Hart, “Are There Any Natural Rights?,” 185. In “Legal Obligation and the Duty of Fair Play,” Rawls makes no reference to the “mutuality of restriction” aspect of the principle of fairness, which perhaps would be one way to bridge the gap between the duty to do one’s fair share and the duty to do one’s fair share in the same way that everyone else does. Rawls, *Collected Papers*, 117. However, in other writings, Rawls invokes that idea through what he describes as the right to “similar acquiescence.” *Ibid.*, 60, 99, 209.

¹⁸¹ Even in a case where everyone else fully complies, the principle of mutual restriction might not compel full compliance. The individual deciding whether to comply might just say to everyone else, “I am going to do my fair share in a different way this one time, and to keep things fair, you also should do the same some time too.”

has discretion to do X. The question of discretion is thus conceptually related to the question of whether there is an underlying moral obligation. It is therefore true that if everyone has the same obligation with respect to X, then everyone has the same discretion with respect to X. But, if an individual has a moral obligation to do X, then having the discretion to do otherwise is not a moral good. Their exercise of discretion would amount to violating their moral obligation. It would be odd to aim to fairly distribute permissions to violate moral obligations.

More generally, the issue of whether a law is politically legitimate seems to have little to do with how much discretion individuals are given in how they discharge their fair-share responsibilities. For example, say that a Pennsylvania law requires that all Pennsylvanians contribute to the state-run poverty program. Assume also that New Jersey has a similar requirement, but New Jersey requires contribution either to the New Jersey-run poverty program or a private option run by a company in Princeton. Assuming that such programs function adequately, I see no reason to think that New Jersey is any more legitimate, or even politically preferable, simply because it permits more discretion. Nor do we think that Pennsylvania citizens are being treated unfairly when compared to New Jersey citizens. Obviously, citizen's within each state might reasonably disagree about which program the state should employ, which is why each state must pick an alternative to resolve the disagreement and coordinate everyone's behavior. But, either option could be legitimate.

Those problems represent a broader difficulty with the distributive argument: it gets the order of explanation wrong. Although perhaps a fair distribution of discretion is a

consequence of full compliance with the duty to obey the law, securing a fair distribution of discretion does not explain why individuals have a duty to obey the law.

3.4 - Securing Equal Freedom Fairly

The prior discussion of the principle of fairness and the distributive argument compels a different way of thinking about the relationship between fairness and the obligation to obey the law. In the views described above, fairness was to be determined by focusing on the acts or discretion to act of individuals. Those arguments took two forms: Individuals have an obligation to do their fair share. Or, each individual is to have the same amount of discretion. Our focus should be elsewhere. Instead, we should focus on the law itself and whether the law secures freedom in a fair manner.

Earlier I noted that the primary ways in which individuals participate in collective projects is by paying or participating. Here, I want to use that distinction to make a point about how thinking about political legitimacy in terms of a moral power allows us to think about whether the principle of fairness really requires everyone do the same exact thing or have the same amount of discretion. Say that there is a legitimate national security threat, and a special operations team of 200 soldiers is required to supplement the existing 200 soldier volunteer force. Now, as a general matter, the law requires taxes to fund the military and more money may need to be raised to support the additional special operations force. But, if you are a soldier, your taxes are discounted some because of your military service. How is the state to raise 200 additional soldiers? Well, it could ask for 200 more volunteers. But let's say that instead it will choose to draft 200 additional soldiers by lottery.

The solution specifies a fair system of shared responsibility. No citizen has been treated unfairly in the example. Yet, they fall into three unequal categories: payers, volunteers, and draftees. What should be evident is that the example does not straightforwardly fit the principle of fairness as it was discussed earlier. Between the three categories, citizens are not contributing in the same manner. Nor is there obvious distributive equality in the amount of discretion afforded each citizen. At present, the volunteers have very little discretion. They are living the military life and constantly subject to the say of their commanders. But, the volunteers chose the life, so at least they had more discretion than the draftees who had no choice. The draftees will have little discretion soon enough but before the draft they have more discretion than the volunteers. The payers, well they have a lot of discretion in contrast with the soldiers. But the payers also lack discretion in that they have to pay more in taxes. Perhaps they need to work longer hours to buy things they have wanted to buy. Plus, they had no ability to choose to join up. The only way to get into the additional special force unit was to be selected in the lottery.

There are three lessons here. First, fairness does not require everyone to do the same thing or to have the same amount of discretion. You can end up a volunteer, a draftee, or a payer. Second, there is no obvious way in which we would measure the discretion of each category of citizen with the goal of treating them equally. For example, as between a payer and a volunteer, in one sense, payer has more discretion because a member of the military will end up with way less discretion. But, in another sense, they each have the

same discretion insofar as each was given the discretion to limit their discretion or not.¹⁸² Finally, what we are primarily concerned with is coordinating everyone's behavior in a fair way such that the job of securing the nation is completed. Insofar the law specifies a reasonable approach to that job, it has resolved any reasonable disagreements that might exist about whether the same actions must be required of all or whether discretion must be distributed equally if possible. Undoubtedly, there may be cases where equal action is the choice that resolves a reasonable disagreement, but it is not a requirement.

Articulating the principle of fairness as a principle used to assess the law directly offers an additional advantage over the standard accounts. We can now respond to an important criticism of fairness-based accounts of political obligation. Jules Coleman offers the following argument against the principle of fairness as an account of the obligation to obey the law:

[L]ooking at duties of fair play to help us understand how the law can be a source of content-independent moral reasons is like looking for love in all the wrong places. . . . If there is a duty of fair play to comply with law it is not grounded in law, but is instead contingent upon the compliance of others with law. It is not a duty to obey the law whose ground is the law, but a duty we owe others not to take advantage of their compliance with law.¹⁸³

¹⁸² A fuller discussion of this is beyond the scope of this chapter. However, there is a broad and interesting literature on the related issue of the extent to which distributive justice is choice-sensitive and what that could mean. For discussion and references, see Kok-Chor Tan, "A Defense of Luck Egalitarianism," *The Journal of Philosophy* 105, no. 11 (2008): 665-90.

¹⁸³ Jules L. Coleman, "Beyond the Separability Thesis: Moral Semantics and the Methodology of Jurisprudence," *Oxford Journal of Legal Studies* 27, no. 4 (2007): 591.

The account that I just described avoids this criticism. Because the principle of fairness applies to how the law chooses to coordinate our behavior rather than our behavior directly, it is not the case that any duty is explained by a need not to take advantage of the compliance of others. Instead, the bindingness of any duty that results from fair legal coordination is grounded in the fact that the law is coordinating our behavior in a fair manner. Therefore, the law is, at least in part, the ground because the law resolves any reasonable disagreement about what fairness requires. Another way of putting this is that the principle of fairness is a principle that applies to institutions.¹⁸⁴

That is not to say that there is not a related background duty that applies to individuals. Citizens have a moral responsibility to participate in fair legal solutions (to the extent they are called) to secure equal freedom. The state in part determines the character of that shared responsibility through the law. In addition, it is only because we each have a shared responsibility that the state can call on us at all. In that sense, there is a correspondence between moral reasons that apply to the state and those that apply to individuals.

Perry echoes this criticism as showing that the principle of fairness violates the directive-as-ground condition Perry, "Political Authority and Political Obligation," 23.

¹⁸⁴ Rawls, *Political Liberalism*, 257.

CHAPTER 4 - LEGAL SPECIFICATIONISM GENERALLY

I have argued that moral indeterminacy without enforceable political institutions undermines the possibility of equal freedom. A legal system is necessary to provide a univocal specification of what our rights and responsibilities consist in. The primary reason for that is so that individuals can pursue their own good in a way that is consistent with the pursuit of the good by others. But, what does it mean to specify our abstract right to equal freedom? And, why must specification be performed by the state rather than simply by each individual? This chapter addresses those issues.

It will be helpful to begin with a commonplace example to understand the relationship between an abstract requirement and a specification of that requirement. Law schools demand that prospective students demonstrate proficiency in critical reasoning and critical writing prior to admittance. Nonetheless, most law school-bound students will tell you that what is required is demonstrated proficiency on the LSAT, the Law School Admission Test. Thus, law school applicants are required to demonstrate proficiency through a particular test that is created and administered by a particular company, namely the Law School Admission Council (LSAC). That is the demand that law schools make on applicants and applicants must comply if they have a hope of admittance. Only the LSAT counts.

Say that a trash man, Lenny, gets ahold of an actual version of the upcoming LSAT, with answer key and all, after one is accidentally tossed in the trash. Convinced that the LSAC is a corrupt enterprise that should not have so much influence, but acknowledging that his law school-bound kid, Junior, has to demonstrate proficiency to gain admission,

Lenny brings the test home to administer to his kid free of charge. Mainly for spite, he changes the name to the “LAST” (Lenny’s Anarchically Standardized Test). He administers the exam to his kid in the same way that it would be administered by the LSAC and scores the exam according to the answer key. Has the kid demonstrated proficiency in critical reasoning and critical writing? You bet! He only missed two questions! Junior is a smart cookie. Yet, despite demonstrating proficiency on the LAST, Junior is not admitted into any of the law schools to which he applied. In fact, all of the law schools refuse to read his application because he never took the LSAT.

In this case, demonstrating proficiency in critical reasoning and critical writing is the abstract demand. Demonstrating proficiency on the LSAT is a specification of that demand. Insofar as prospective law students intend to comply with the abstract demand, they must do whatever counts as complying with that demand, namely doing well on the LSAT administered by LSAC. That is because only demonstrating proficiency on the LSAT *counts* as satisfying the more abstract demand as far as law schools are concerned. Proficiency on no other exams or in other academic exercises will count as demonstrating proficiency for purposes of law school admissions. With that example in mind, I will now provide a more general theoretical framework for how to understand specification of abstract requirements.

4.1 - A Framework

Philosophers writing about political authority have described the practical effect of exercises of authority in a variety of ways: “the law modifies the way morality applies to

people” (Raz)¹⁸⁵; our political duties are “mediated” and thus “filled out” by the law (Stilz interpreting Kant)¹⁸⁶; the law has a role in “constituting” and making “determinate” our rights and responsibilities (Ripstein interpreting Kant)¹⁸⁷; or the law provides “determinations”¹⁸⁸ of principles (Murphy, Finnis, and Aquinas).¹⁸⁹ I will describe all of these practical effects under the heading of specificationism, which is the view that the state, through the law, has a responsibility and a right to specify the abstract right to equal freedom.

Henry Richardson offers an account of how specification works for individuals deliberating about their own moral ends and how they are to act in light of those ends. It will therefore be helpful to begin with Richardson’s account and build from there. Richardson’s account most directly concerns our reasons for action and thus is easily used to build an account of specifications of political obligations, but we can equally use it to cover the variety of Hohfeldian rights discussed earlier.

Richardson aims to present an account of deliberation about ends that is rational and action guiding in real-life cases, notwithstanding conflict and incommensurability between many of our important goals. So, while I have described specification as an interpersonal problem, Richardson presents it as an intrapersonal problem. How is an

¹⁸⁵ Raz, *Between Authority and Interpretation*, 192.

¹⁸⁶ Stilz, *Liberal Loyalty*, 21.

¹⁸⁷ E.g., Ripstein, *Force and Freedom*, 9 & 197 n.24.

¹⁸⁸ Murphy, *Natural Law in Jurisprudence and Politics*, 88. Murphy is following the natural law view articulated by Aquinas and later Finnis. Finnis, *Natural Law and Natural Rights*, 249.

¹⁸⁹ Jon Garthoff speaks similarly about social institutions, which he argues “embody” morality. Jon Garthoff, “The Embodiment Thesis,” *Ethical Theory and Moral Practice* 7, no. 1 (2004): 15.

individual to act in the face of competing commitments, such as personal success and close family ties? Richardson characterizes specification as a deliberative process that supplements both intuitive balancing of values or reasons, and deduction from general practical principles. Specification, on his account, is important not just for acting but so that one can systematize their practical commitments into a reasonably coherent scheme in which one is able to act according to principle.

Specification of norms, according to Richardson, involves “setting out substantive qualifications that add information about the scope of applicability of the norm or the nature of the act enjoined or the end aimed at.”¹⁹⁰ A specification does that by “describing what the action or end is or where, when, why, how, by what means, by whom, or to whom the action is to be done or the end is to be pursued.”¹⁹¹ More broadly, a specification “will involve spelling out the ways or circumstances in which it is to be pursued.”¹⁹² So, returning to our example of law-school admissions, the norm that specifically requires that proficiency be demonstrated on the LSAT administered by LSAC adds information about the specific nature of the act and circumstances required to demonstrate proficiency more generally.

Richardson is primarily concerned with norms or ends that are non-absolute in character, norms that display a “kind of looseness” that Kant described in his account of imperfect duties using the idea of “latitude.”¹⁹³ Some norms describe more general policies

¹⁹⁰ Henry S. Richardson, *Practical Reasoning about Final Ends* (Cambridge University Press, 1997), 73.

¹⁹¹ *Ibid.*

¹⁹² *Ibid.*, 70.

¹⁹³ *Ibid.*, 71.

or goals that can be satisfied in any number of ways. For example, Kant argued that we have an imperfect duty to ourselves to develop our talents. Nonetheless, that duty does not tell one which talents to develop or the manner in which they are to be developed. Similarly, we have an imperfect duty to promote the happiness of others. But that duty does not tell one whose happiness to promote, when, how much, or in what manner. Of course, here we are not concerned with ethics but political right, an account of what individuals can be required and forced to do by the state. Below, I will return to why Richardson focuses on non-absolute norms or ends, and note a problem.

Take the following example, from Richardson, of an abstract, non-absolute norm or end that is in need of specification: “Within reason, do what is necessary to improve my chances of getting into medical school.”¹⁹⁴ How is a budding medical student to go about satisfying that norm in a reasonable manner? He has a number of commitments to family and friends. He also must look out for his own welfare. And, he wants the options of specializing and getting a good job. One specification of the above norm would be, “Generally speaking, while I am at school, do whatever morally acceptable acts are necessary to assuring myself a reasonable chance of getting into a premier East Coast medical school.”¹⁹⁵ Notice that the latter norm incorporates relevant substantive information into the norm such that the budding medical student has reasonably clear guidance on what to do in the face of a broad range of choices. First, the abstract norm is specified to require certain actions only when one is at school. That limits the

¹⁹⁴ *Ibid.*, 73.

¹⁹⁵ *Ibid.*

circumstances in which the end is to be pursued. When at home, he can close the books. Second, the norm now only permits choices that are morally acceptable. So, for instance, the student would not be permitted to study instead of abiding by his promise to spend the afternoon with his sister. Third, the norm narrows the range of necessary actions to those that reasonably improve one's chances of not just getting into an East Coast medical school but a premiere East Coast medical school. Hence, despite consistently scoring above average on his practice exams compared to students who got into average medical schools, the student cannot leave the library to go watch television; he must press on until he masters those practice exams and scores above average for premiere East Coast schools. In the end, "[f]ulfilling the more specific end is a *way* of fulfilling the more abstract one," but not the only way.¹⁹⁶

There are two consequences to specifying the norm. First, once a norm is sufficiently specified, prospectively, it should be "sufficiently obvious" which actions will count at satisfying the norm.¹⁹⁷ Specification therefore serves a purpose in guiding action in a range of cases that pose real ethical problems. Second, retrospectively, once a norm is sufficiently specified it becomes sufficiently clear which actions "count" as satisfying the norm or not. Thus, others and oneself will be able to determine if one has satisfied the abstract norm by looking to see if one has satisfied the additional criteria set out in the norm that specifies the manner in which the abstract norm is to be satisfied.

¹⁹⁶ *Ibid.*, 75.

¹⁹⁷ *Ibid.*, 75-77.

Richardson offers the following helpful definition of the specification relationship between two norms. Norm p is a specification of norm q if and only if:

- (A) every possible instance of . . . p would count as an instance of . . . q (in other words, any act that satisfies p . . . also satisfies q . . .);
- (B) p qualifies q substantively . . . by adding clauses describing what the action or end is or where, when, why, how, by what means, by whom, or to whom the action is to be done or the end is to be pursued; and
- (C) none of these added clauses in p is substantively irrelevant to q.¹⁹⁸

(A) imparts the notion that one can satisfy the more abstract norm by satisfying the specified version of the norm. The idea is that the set of actions that satisfy p is contained within the set of actions that satisfy q. (B) imparts the notion that more specific information is incorporated into the norm. Obviously, more or less specific information can be added to the norm. How much information is enough has much to do with what is the purpose of specification. For present purposes, it should be the case that enough information is added to offer practical guidance in real decision scenarios. (C) is included for completeness but merely follows from (B) insofar as irrelevant information could not substantively qualify q. For example, incorporating irrelevant conjuncts into the norm would be ruled out.

Now, Richardson says that if a norm is “logically absolute in that it is to be pursued in *all* circumstances, then specification could add nothing that is already implicit in it.”¹⁹⁹ It is for that reason that he focuses on norms qualified by “generally,” norms that therefore

¹⁹⁸ *Ibid.*, 72-73. I have omitted some of the more technical language for clarity.

¹⁹⁹ *Ibid.*, 70.

permit some sort of latitude. That claim would seem to rule out the argument for specification that I have offered here. For one, it is expected that one must always respect the equal freedom of others. And, one must also always do their fair share in securing equal freedom for others. Those are logically absolute norms insofar as they must be followed in all instances, and it is the job of the state to secure compliance to the fullest extent possible.

Richardson nonetheless overstates the point. To begin, take the following example that he offers to make the point that logically absolute norms cannot be specified: “For example, if we began with ‘always do whatever is required for personal success,’ then ‘always dress in the way required for personal success’ would be redundant.”²⁰⁰ The idea is that the latter norm is not a specification of the former more general norm because the latter norm directly follows from the former. It is a simple entailment. The latter norm therefore adds nothing to the former norm. The same would be the case if we reframed the example in terms of respecting the rights of others. For example, from, “always act in a way that does not violate the rights of others,” one can infer, “always drive in a way that does not violate the rights of others.” From the example, Richardson infers that logically absolute norms cannot be specified. It is “the nonabsolute character of our norms [that] ensure[s] that judgment has a role in deliberation,” according to Richardson.²⁰¹

Another way to articulate the problem is in terms of the view of practical authority that Raz calls the “no difference thesis.”²⁰² The no difference thesis says that an “exercise

²⁰⁰ *Ibid.*

²⁰¹ *Ibid.*, 76.

²⁰² Raz, *The Morality of Freedom*, 30.

of authority should make no difference to what its subjects ought to do.”²⁰³ Instead, practical authority, including political authority, does change reasons and what subjects ought do. It would not be practical authority otherwise. Similarly, if the contents of all legitimate legal norms were simply entailed by natural political morality, there would be no sense in which such norms made a practical difference. They would not be specifications.

Although it is true that norms that are entailed by logically absolute norms cannot be specifications, it is not true that logically absolute norms cannot be specified. Even logically absolute norms can be specified insofar as there is any indeterminacy in the norm, meaning that there are a number of viable qualified norms satisfaction of which would also satisfy the indeterminate norm. Return to the mandate of personal success. Even Richardson’s example can be specified insofar as “personal success” is indeterminate. There are innumerable standards by which personal success can be measured. For example: Does personal success demand prestige, money, a doctorate, or fame? Does dressing for personal success require functional clothing or clothing designed to foster a certain image? What one does to satisfy the abstract norm ultimately depends on how one defines personal success. Consequently, that the norm is logically absolute is not dispositive. What matters is that there are number of ways to satisfy the norm and that adding more information will identify which course of action to take.

The point is not of mere technical importance. As I explained earlier, practical authority, authority that is able to alter the moral landscape, can only be legitimized if there

²⁰³ *Ibid.*, 48-50.

is a moral need for that authority. If all logically absolute moral norms provided sufficiently clear moral guidance in all circumstances, there would be no role for practical authority to play aside from the need for coercive enforcement. The law could make no practical difference, and the law could no more than merely recite our pre-existing logically absolute rights and responsibilities and what follows from them. Even logically absolute norms, like the norm mandating satisfaction of the right to equal freedom, require specification, such that there is a practical role that the law can play.

We are now in a good position to offer a general definition of the specification relationship between two norms, building off Richardson's account. Moral norm B is a specification of abstract moral norm A if and only if:

- (1) Every action or state of affairs that satisfies the specified moral norm B could reasonably count as satisfying the abstract moral norm A;
- (2) Specified moral norm B is not logically entailed by moral norm A; and
- (3) Specified moral norm B adds relevant substantive information (content) about the who, what, where, when, why, and how for satisfying the abstract moral norm A.²⁰⁴

Here I have largely followed Richardson's exposition with some minor changes in language and the inclusion of (2) to capture the point made in the above discussion. (2) makes clear that a practical difference is made by the specification. So we could even revise (2) to state:

²⁰⁴ The model described is a bit simplistic in that the specification of equal freedom is not contained in a single legal norm but in a system of legal norms.

(2') Moral norm B makes a practical difference in the moral landscape.

In the case of norms that require action, for example an obligation-imposing norm, the specification of that norm makes a practical difference with respect to what an individual must do. The broad norm language is still useful. It encompasses both norms that describe obligations and norms that describe rights. A norm can describe any Hohfeldian incident.

As I have argued so far, the law is required to specify our abstract equal right to freedom as independence. Although still interpreted in abstract terms, the abstract right can be interpreted to obligate individuals to respect to rights of others and to obligate individuals to do their share in securing the background conditions necessary for equal freedom. The state can force individuals to comply with those obligations by forcing them to comply with the law, law that provides specifications of those obligations. As I have explained, we reasonably disagree about what more specific norms, actions, and states of affairs constitute satisfaction of the abstract rights to equal freedom and the abstract responsibilities that flow from it, which is why political authority is morally necessary to specify our rights and responsibilities in the first place.

In light of the language I have been employing to discuss the need and importance of political authority, (1) can also be reformulated in a way that employs less philosophical jargon:

(1') Specified moral norm B is a reasonable interpretation of abstract moral norm A.

The core idea is that we have competing but reasonable interpretations about what freedom requires. Nonetheless, freedom requires the law to coordinate our interpretations so that we can live among each other in a way that is consistent with the freedom of each other.

4.2 - Sources of Indeterminacy

At this point, it will be helpful to address some of the sources of indeterminacy in our shared and undisputed moral commitment to freedom. Moral indeterminacy is the primary defect in the statute of nature that the state's practical authority is supposed to cure. Beyond agreement on the abstract value of freedom, there is likely broad agreement on a broad range of examples of violations of freedom. We presumably agree that the core cases of wanton intentional homicide and intentional theft count as rights violations. Nevertheless, there is still broad room for reasonable disagreement.

There are numerous sources of moral indeterminacy.²⁰⁵ The first source of indeterminacy in the abstract concept of freedom itself. First, the concepts of freedom and its cognate political values, including justice and fairness, are quite abstract. Although we might all agree that all moral persons have a right to freedom it is unlikely that we all share the same conception of freedom and therefore will reasonably disagree about the scheme of rights that is necessary to realize freedom.²⁰⁶ Our abstract concepts contain a range of core conceptions about which we reasonably disagree.²⁰⁷

²⁰⁵ Rawls broadly refers to these as the “burdens of judgment.” Rawls, *Political Liberalism*, 54-58.

²⁰⁶ See Rawls, *A Theory of Justice*, 5; Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977), 134-36.

²⁰⁷ Recently, Amartya Sen has emphasized that point in describing how the values of impartiality or justice fail to choose between three competing rules that determine

Second, our moral concepts contain vagueness and therefore admit of borderline cases.²⁰⁸ Take the concept of battery, defined broadly as any “harmful or offensive contact with a person, resulting from an act intended to cause the [victim] to suffer such contact”²⁰⁹ A paradigm instance would be a violent beating with one’s fist. A borderline case would be a slight nudge to move another out of the way in a crowded bar. Terms obviously can be more or less vague. Nonetheless, agreement about core cases still leaves disagreement about borderline cases.

Third, oftentimes, while in theory there might be a right answer upon which all would agree, the choice requires a difficult and complex “overall assessment” and yet a decision must be made.²¹⁰ In some cases with this structure, it is more important that a decision between reasonable interpretations be made than that the most reasonable option prevails.²¹¹

entitlement to a flute between three children. Child A claims entitlement to the flute on the ground that she is the only one who knows how to play the flute and that therefore giving it to her would maximize happiness. Child B claims entitlement to the flute on the ground that he is the poorest and that therefore giving it to him will further egalitarian equality. Finally, child C claims entitlement to the flute on the ground that she made the flute and that individuals who expend the time and energy to make something are entitled to the fruits of their labor.²⁰⁷ Sen’s basic point is that the abstract concept of justice alone cannot resolve the matter. The concept of freedom suffers from the same difficulties. Amartya Sen, *The Idea of Justice* (Cambridge: Harvard University Press, 2009), 12-15.

²⁰⁸ Roy Sorensen, “Vagueness,” in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, 2012, <http://plato.stanford.edu/archives/sum2012/entries/vagueness/>.

²⁰⁹ William L. Prosser et al., *Prosser and Keeton on the Law of Torts*, 5th ed. (West Group, 1984), 39.

²¹⁰ Rawls, *Political Liberalism*, 57.

²¹¹ Thus, some resources can be devoted to continuing to make the overall assessment such that a new and better decision could be made down the road.

Fourth, while we might all agree that freedom-based considerations must be brought to bear on political decisions, we might reasonably disagree about the relative weight or ordering of the competing freedom-based considerations.²¹² Our disagreements result from diversity in our backgrounds, natural makeup, and our judgments about what other things are important.²¹³ Such diversity is inevitable, especially in liberal societies. Two examples will suffice to demonstrate the point. Rules governing the rules of the road, including speed limits, balance freedom-based considerations about freedom of movement with freedom-based considerations about security in one's person. Similarly, rules governing the workplace, for example, rules governing workplace safety, balance freedom-based considerations about freedom of contract with considerations about personal safety. Nonetheless, our plural and incompatible commitments cannot all be satisfied at the same time. Thus, there has to be a "moral loss" and there is reasonable disagreement over where the losses are to lie.²¹⁴

Finally, in some cases, an arbitrary choice needs to be made among equally morally acceptable options. There are multiple options and any option will do. The choice between

²¹² Similarly, we might both agree that liberty and equality are important considerations in crafting a scheme of rights but reasonably disagree about the weight of each consideration. *See ibid.*, 5.

²¹³ Rawls notes that "the way we assess evidence and weigh moral and political values is shaped by our total experience, our whole course of life up to now; and our total experiences must always differ." Rawls, *Political Liberalism*, 56-57. Diversity may also cause us to have difficulty understanding the legitimate interests of others and to downplay burdens that ultimately have to fall on others if our own view is to win out. See Thomas Christiano, *The Constitution of Equality: Democratic Authority and Its Limits* (New York: Oxford University Press, 2008), 58-59.

²¹⁴ As Rawls notes, "any system of social institutions is limited in the values it can admit so that some selection must be made from the full range of moral and political values that might be realized." Rawls, *Political Liberalism*, 57.

options is arbitrary. That is the broad description of the well-worn case of choosing which side of the road cars must drive on. Our moral commitment to freedom, does not supply the answer. The required decision, then, is indeterminate.

It is important to note that those with whom we reasonably disagree are not regarded as being understandably mistaken in their interpretations and therefore merely *excused* for holding to the unreasonable beliefs that they do. We can imagine the person who was cultivated as a vehement racist who believes that the enslavement of some races is permissible and laudable. In such cases, there is an explanation for why they hold the unreasonable beliefs that they do, but there is not a rational explanation, or justification, for their wrong beliefs. No reasonable political theory could support the view. Perhaps they are merely excused. But, their excused viewpoint could not count as a plausible interpretation of what freedom demands and therefore could not bind. In light of the diversity of reasonable viewpoints that are explained by the factors described above, individuals are justified in what they take to be the requirements of equal freedom when they reasonably disagree. Some interpretations of what counts as respecting the freedom of others will be clearly mistaken.²¹⁵ Those interpretations are not candidates for binding law.

The indeterminacy in abstract right has the capacity to generate three types of reasonable disagreement. First, we might have a disagreement between different conceptions of freedom. For example, a sufficientist about distributive justice would

²¹⁵ For example, someone who interpreted justice as the principle “to each according to his threat advantage,” would not be offering an interpretation of justice.

disagree with an egalitarian who requires broader equality wealth. Second, we might agree on a conception of freedom, for example that inherent in Rawls's justice as fairness, but reasonably disagree about the institutions and rules that should realize that conception of justice. So, we might disagree about whether the law should realize a property-owning democracy or market socialism.²¹⁶ Finally, even with institutions and rules in place, we might reasonably disagree about the application of those institutions and rules to particular facts. Such disagreements require some form of adjudication.²¹⁷

4.3 - Some Examples and a Clarification

As I noted, specified norms can describe any of the Hohfeldian incidents. That is important because all Hohfeldian rights can secure freedom. For example, moral powers are subject to specification. There are reasonable disagreements about how a given moral power must be exercised to be successful and there are reasonable disagreements as to the limits on our moral powers. Contract law exemplifies this point. If one aims to sell their land to another individual, we can reasonably disagree about the conditions that must be met for them to successfully exercise their power to do so. Perhaps the land-sale agreement must be in writing. Maybe a certain number or kind (e.g., a notary) of witness is required.

²¹⁶ On this debate within Rawlsian scholarship, see Martin O'Neill and Thad Williamson, *Property-Owning Democracy Rawls and Beyond* (Malden, MA: Wiley-Blackwell, 2012), 1-14.

²¹⁷ The picture is also complicated by the reciprocity of our interactions. When someone suffers harm as a result an interaction with another person, it is not the case that one of the individual's actions uniquely caused the harm and therefore violated the rights of the other person. Rather, the harm results from the interaction of the two persons equally. See Stephen R. Perry, "Libertarianism, Entitlement, and Responsibility," *Philosophy & Public Affairs* 26, no. 4 (1997): 352. As a result, a normative question about who should be responsible for a given harm remains and that question has to be answered.

Perhaps there is a review period in which the contract can be cancelled. Such decisions create certain consequences for parties to agreements and to the public more generally. But, freedom is served by coming up with a decisive and univocal specification of how moral powers can be exercised, regardless of the ultimate decision between reasonable views. The same goes for possible limits placed on our power to contract. For example, there is reasonable disagreement over whether individuals can contract to work in certain work conditions, say to work more than a certain number of hours a week. Such details must be hashed out politically.

Cases involving rights against harms that result from certain categories of risks also exemplify the point. Currently, the law imposes strict liability for harms that result from certain activities that are categorized as abnormally dangerous, for example, blasting. Thus, a blaster who causes a foreseeable harm to another's person or property as a result of blasting violates the right of the victim regardless of whether the blaster was negligent and regardless of the broader social value of blasting. Whether that should be the case is a political question that is subject to reasonable disagreement. It would not be unreasonable to advocate a fault-based policy rather than a strict liability policy.

I want to discuss a final example involving necessity exceptions in trespass cases. The example also affords an opportunity to discuss a related view that has been described under the heading of "specification" and to explain how the other view differs. According to John Oberdiek, the "specified conception of rights" is the view, that "[a]lthough [rights] have a determinate and predictable content in a wide variety of contexts, . . . their content

nonetheless depends entirely upon context.”²¹⁸ Oberdiek’s view is that we can only identify “the content of a right in light of and indeed in response to what is justifiable to do under the circumstances.”²¹⁹ Thus, a moral right will be “specified so as not to conflict . . . with justifiable behaviour.”²²⁰ That view contrasts with a view he describes as the “general conception” of rights, which is the view that rights are not circumstance dependent. The general conception of rights countenances cases in which individuals can justifiably infringe the rights of others.

Accordingly, in defending the specified conception, Oberdiek’s concern is also to reconceptualize and unify intuitions about those cases in which individuals seem to be permitted and even justified in infringing or violating the rights of others. In particular, he focuses on Joel Feinberg’s well-known Cabin Case, a case that raises the issue of whether there is a necessity exception to the right against trespasses on one’s property.

In the Cabin Case, a mountain hiker must decide whether to break into another person’s cabin or remain outdoors in the face of a deadly snowstorm. According to Oberdiek, “[t]here is widespread consensus that the hiker would be justified in breaking into the cabin under such circumstances.”²²¹ Nonetheless, the view of “proponents of the general conception of property rights is that the hiker would be justified in breaking into the cabin out of necessity even though the cabin owner has a right that the hiker should not do so.”²²² Oberdiek’s take is that the cabin owner’s right is specified to permit exceptions

²¹⁸ Oberdiek, “Specifying Rights Out of Necessity,” 128.

²¹⁹ *Ibid.* (emphasis omitted).

²²⁰ *Ibid.*

²²¹ *Ibid.*, 134.

²²² *Ibid.*

for cases of dire necessity. The hiker's justified intrusion does not conflict with the cabin owner's right because the intrusion falls within an exception. The overall picture is that "[a] right . . . can stand against different behaviour in different circumstances, so that what conflicts with a right in one context may not conflict with it in another."²²³ So, if it were a beautiful day outside and thus no necessity, the intrusion would not be permitted.

That idea meshes well with the basic idea of specificationism articulated here. One goal of specificationism is to reconcile decisively the competing freedom-based claims that individuals could potentially make against each other in what look like conflicts of rights cases. Specified rights, which will often mark out exceptions in our rights to person and property, exhibit a complexity that cannot be captured by sole reference to our abstract rights to freedom, person, or property. I therefore agree that exceptions can be built into the content of our rights.

But we should part ways with Oberdiek in several respects. First, what the hiker is permitted to do and how the content of the cabin owner's property right is to be specified seems to me to be subject to reasonable disagreement. It is not the case that our rights "have a determinate and predictable content."²²⁴ Note that there are a number of ways in which rights might be structured in the Cabin Case. To describe a few, first, there is the position that the cabin owner's right should be unqualified and that there are no exceptions for necessity. The hiker violates the cabin owner's right if he trespasses. It was his responsibility to prepare better for the hike. Second, there is the position that the cabin

²²³ *Ibid.*, 128.

²²⁴ *Ibid.*

owner's right is unqualified if the cabin owner is present but there is an exception for the hiker if no one is home. Such a scheme obviously emphasizes interests that attach more to the cabin owner's person than his property, such as his interests in safety and privacy. Third, there is the position that the hiker is permitted to enter the property and use it for his safety but that he must compensate the cabin owner. Insofar as he compensates the owner, he does not violate the cabin owner's right. On that view, the cabin owner should expect that hikers will need to use the cabin in extreme cases and he should plan accordingly. Finally, there is Oberdiek's view that the hiker is justified in entering the cabin to save himself regardless of the cabin owner's consent, that the cabin owner has no right that the hiker not do so, and that compensation is not owed. On my view, the law ultimately settles the question of which scheme structures our interactions, as we can reasonably disagree about the options.

That the nature of the scheme that should be in place is subject to reasonable disagreement brings me to the second difference. Oberdiek contends that only specified rights are "fully moralized," and that generalized rights are not, insofar as the content of a specified right is conditioned on the question of what individuals are justifiably permitted to do in the circumstances. I agree with Oberdiek that one cannot be both permitted to do something and prohibited from doing something. On my view, however, what one is permitted to do in the circumstances is determined by what the law selects from the range of reasonable views about how rights ought to be specified in given circumstances.²²⁵ Law

²²⁵ To some extent, I also disagree with Oberdiek's point that rights cannot be "normative primitives." *Ibid.*, 131. Oberdiek argues that we argue toward rights that are justified according to the balance of reasons rather than on the basis of certain primitive rights.

could specify or select a “generalized” property right that would prohibit the hiker from utilizing the cabin despite the circumstances. In which case, the hiker would not be permitted to trespass despite the circumstances. On that view, it was his responsibility to plan for foreseeable emergencies. We therefore cannot determine what behavior is permitted independent of a determination of how our rights are specified in the circumstances.

4.3 - The Necessity of Political Authority and Consent Theory

I now want to discuss a challenge to the argument that the moral necessity of authoritative political specifications entails the conclusion that the state in fact has the exclusive moral right to specify our rights and responsibilities through the law. Return to the challenge from consent theory discussed in Chapter Two. Consent theorists do not necessarily deny the moral importance of the state or the possibility of legitimate political authority. Instead, they believe that some form of consent is necessary for political authority. Accordingly, the consent theorist might agree that specifications are morally necessary components of our moral lives yet reject the notion that the state retains any authority in virtue of that. Mark Murphy is a consent theorist who offers such a view.

Murphy appreciates the moral importance of specifications. Nonetheless, he defends a version of consent theory that relies on consent in the “acceptance sense.”²²⁶ On Murphy’s view, binding consent need not require the performance of a speech act or an

Ibid., 135. On my view, our abstract right to equal freedom is primitive but it must be specified or interpreted in light of competing and reasonable freedom-based considerations.

²²⁶ Murphy, *Natural Law in Jurisprudence and Politics*, 112.

attitude of approval.²²⁷ By contrast, one can consent to be bound by the state's specifications merely by accepting those specifications into one's practical reasoning as the principles upon which one will act.²²⁸

That version of consent theory, Murphy maintains, is “consistent with the central thesis of natural law political philosophy — that the law's authority derives from the common good of the political community.”²²⁹ The core principle of that view is the requirement that “each person is bound to do his or her share for the common good.”²³⁰ The common good is a “comprehensive state of affairs in which each person's good is fully realized.”²³¹ Nonetheless, the common good principle exhibits “normative openness,” meaning that the principle, like the abstract right to equal freedom, underdetermines how we ought to act rationally in order to satisfy the principle.²³² Murphy explains that normative openness “makes room” for the law to serve an important and necessary practical purpose with respect to the common good, as the law can “provid[e] a partial [specification] of what one is to do in fulfilling the common good principle.”²³³ A specification on Murphy's account is either “a realizable approximation of an unrealizable ideal” or “a more precise specification of a vague objective.”²³⁴

²²⁷ *Ibid.*

²²⁸ *Ibid.*

²²⁹ *Ibid.*

²³⁰ *Ibid.*, 86.

²³¹ *Ibid.*, 114.

²³² *Ibid.*, 59, 88.

²³³ *Ibid.*, 88.

²³⁴ *Ibid.* I should point out that Murphy uses the Thomistic language of “determinations” to describe the same phenomena that I describe here.

Nothing in Murphy's account of specification is *prima facie* inconsistent with the view defended here. However, although Murphy recognizes that there is a morally necessary role that the law can play, he does not believe that fact is enough to conclude that the law has the exclusive moral authority to specify the common good principle:

[T]he fact that authority is needed, and that the law is the best candidate to serve this role, does not actually make the law authoritative. It does not show that citizens are acting wrongly by failing to act in accordance with the law's dictates. At most, it shows that if citizens fail to do their part to make the institution authoritative — perhaps by consenting to it, or something of that sort — then they are acting unreasonably. . . . There still exists a gap that is not crossed: that it would be a good thing for the law to be authoritative does not mean that the law is in fact authoritative.²³⁵

At first glance, Murphy's argument looks like Simmons's rejection of the justification-legitimacy inference. It will be remembered that Simmons argues that one cannot reason directly from the fact that a state is (or states are) on balance beneficial or generally justified to the conclusion that a state is legitimate, meaning that it has the kinds of moral rights that it claims to have.²³⁶ Notwithstanding, Murphy's argument is slightly different and more akin to Stephen Darwall's challenge against Raz. Darwall charges that even if someone might have good or decisive reason to abide by the demands of another, for example, because he would do better in complying with the reasons that apply to him, no inference

²³⁵ *Ibid.*, 110.

²³⁶ See, e.g., Simmons, *Justification and Legitimacy*, 125-26.

can be drawn that the latter has moral authority over the former.²³⁷ In a similar vein, Murphy rejects the inference from the moral value or moral need of moral authority to the actual existence of that authority.²³⁸ Merely because something would be of great moral value does not make it so.

That political authority would be morally valuable instead is a sufficient reason to consent to be bound by the state's specifications. Murphy believes that individuals have good reason to consent to be bound by the law's specifications in light of the law's coordinative and epistemic capacities, and that perhaps they would be unreasonable for not doing so.²³⁹ But, that one would act unreasonably in not abiding by the law's demands does not entail that one would act wrongfully in not doing so.

Why accept and act according to specifications at all rather than on a case-by-case or willy-nilly basis? Murphy argues that we run afoul of the common good principle not just by "performing an act that is ruled out by the content of the principle" but also by acting in an "unprincipled way."²⁴⁰ We might understand that as a basic requirement that one act with integrity.²⁴¹ The reason to stick with a given specification "does not . . . result from the character of the requirement specified but from the rational unseemliness of changing one's mind without adequate reason for doing so."²⁴² Accepting and utilizing

²³⁷ See, e.g., Darwall, *Morality, Authority, and Law*, 146.

²³⁸ Murphy, along with Simmons, therefore would reject Perry's "value-based" conception of political authority. See Perry, "Political Authority and Political Obligation," 5.

²³⁹ Murphy, *Natural Law in Jurisprudence and Politics*, 120.

²⁴⁰ *Ibid.*, 117.

²⁴¹ Dworkin describes integrity as the "requirement that [individuals] act in important matters . . . according to convictions that inform and shape their lives as a whole, rather than capriciously or whimsically." Dworkin, *Law's Empire*, 166.

²⁴² Murphy, *Natural Law in Jurisprudence and Politics*, 118.

the law's specifications, in the end, is merely one way in which individuals can act with integrity and according to principle with respect to the common good, while at the same time discharging their obligation to do their fair share. It is not the only way however. Insofar as individuals act on their own private specifications of the common good principle and do so consistently, they do not run afoul of the common good principle or the requirement that they act in a principled manner. "[S]o long as one accepts a certain determination of [some principle], one ought to act on it."²⁴³ That is so regardless of whether the specification is the law's or one's own.

We should agree with Murphy that specifications are normatively important in our practical lives and that specifications provide a vehicle by which we can live principled lives. That seems to be the gist of Richardson's account as well. Nonetheless, we must grapple with Murphy's argument that although specifications are morally important and the state is capable of resolving important moral problems, we have not shown that the state must be the exclusive specifier of our political rights and responsibilities rather than private individuals. To respond to Murphy's consent-based challenge, it will be helpful to remember the task that the law's authority addresses. The point of legal authority is to secure equal freedom and resolve the problems of the state of nature. Insofar as Murphy's natural law view cannot address those moral problems, the view presented here is on better footing.

As was argued earlier, legal specifications are necessary to resolve the difficulties that indeterminacy creates for equal freedom. The first is the problem of unilateral

²⁴³ *Ibid.*, 117 (emphasis omitted).

authority. Insofar as there is indeterminacy and each individual has an equal right to interpret the boundaries of the rights of others, we each becomes subject to the private authority of other individuals. The second problem is that indeterminacy prevents us from forming legitimate expectations that our capacity to make choices within a particular domain of freedom will be respected and be free from interference. Those problems are solved insofar as the state has the authority to decisively and public coordinate our rights and we have assurance that others will abide by those rights. The same can be said with respect to those responsibilities individuals have in light of our collective responsibility to secure equal freedom in a fair way. By ignoring the law and acting according to one's own specifications one is imposing one's will on others. Murphy's consent theory, like any other consent theory, leaves one's right to a system of equal freedom subject to the private authority of individuals. It therefore recreates the very problem that political authority is to resolve.

Beyond recreating the problem of private authority and not addressing the tasks that freedom requires, there is a broader problem with Murphy's reliance on the idea of personal integrity as a basis for consenting to be bound by the state's specifications. The law is fundamentally concerned with our interactions with others and securing freedom. In that way, the law is interpersonal. By contrast, integrity is an intrapersonal virtue. At best, integrity is a matter of personal responsibility, not the state's responsibility. Individuals themselves must ensure that they lead a life of integrity. At worst, perhaps there is no moral requirement that an individual lead a life of personal integrity. So long as individuals respect the legitimate claims of others, integrity is a matter of personal choice.

Although the law and others are perhaps prohibited from undermining one's ability to live a life of integrity, they could not make one accountable for not living such a life and surely could not force one to live such a life. Suffice to say, integrity is just a reason of the wrong kind when it comes to justifying the state's authority and the fact that it backs that authority with the right to extract compliance with its demands. If integrity is a moral upshot of a commitment to follow the law, then perhaps that is a good thing.²⁴⁴ However, personal integrity is not an appropriate ground of political authority. More importantly, however, integrity is not a proper basis for acting in a way that violates or undermines the equal freedom of others.

²⁴⁴ Dworkin notably makes integrity central in his account of political legitimacy. Dworkin, *Law's Empire*, 176-224.

CHAPTER 5 - EQUALITY AND DEMOCRATIC AUTHORITY

Democracy serves the values of freedom, justice, equality, fairness, respect, publicity, participation, education, truth, and so on.²⁴⁵ That democracy serves those values is to say that democracy can be morally justified in certain ways. But as we have seen, that the state, specific kinds of political institutions, or specific laws are morally valuable in certain ways does not directly speak to the question of whether and how they are politically legitimate. More needs to be said. A theory of political legitimacy, as I have explained, accounts for the state's right to rule — its right to bind its citizens through law, its right to uphold the law with force, and minimally its right to continue in the job of exercising those rights. Here, I have argued that the state's task is best understood in terms of securing equal freedom. Accordingly, we need to locate a theory of democracy within that theory of political legitimacy.

A majority of the theorizing about democracy is concerned with moral ideals and democratic values more generally. That is, theorists are responsive primarily to justificatory questions about the moral values that democracy serves: What makes democracy valuable? Or, how can our democracy be better? Or, what would make our democracy more responsive to some specific moral value, say equality or education. Obviously, those are important questions that will be fruitful in discussions about the political legitimacy of democracies. Yet, here we want to address questions about political legitimacy, questions that would include: Must a state be democratic for it to be politically

²⁴⁵ Robert Dahl offers a more comprehensive list. Robert Alan Dahl, *On Democracy* (Yale University Press, 1998), 45.

legitimate? Can laws that do not issue from democratic procedures be legitimate? How does democracy affect legitimacy? Here, I want to focus on how democracy figures in questions about the political legitimacy of political institutions, the human beings that occupy roles within those institutions, and the laws that demand our compliance.

6.1 - Four Models of Democracy

I want to begin by outlining four models for how we might conceptualize and understand the political legitimacy of democratic decision making: the Aggregative Model, the Self-Rule Model, the Deliberative Model, and the Arbitration Model. My goal is to note any internal difficulties within these models and to highlight any manner in which they can be fit within the equal-freedom moral-task framework that I have discussed to this point.

It should be said that for a number of reasons, these models are somewhat artificial. First, no view in the literature necessarily, explicitly or implicitly, defends any particular model exclusively. Theorists instead tend to defend hybrid views that include element of a number of models. Not one of these models is on its face mutually exclusive from the other, but each captures core elements of the major views present in the literature. Second, with each model, I do not aim to capture the elements of every view that reasonably could fit within that model. For example, theorists working within the deliberative democracy tradition disagree about how much agreement on fundamental moral principles is necessary for democratic decisions to be legitimate or ideal in some way. But we need not focus extensively on that fact. The goal simply is to assess some of the more common ideas and to articulate what each model identifies as the core moral purpose of democratic

institutions. Finally, as any theory of democratic legitimacy will rely heavily on the value of equality, which has been central to this point, it will be useful to see how equality fits within each model.

Before going further, we need to begin with a working understanding of what it means to say that a political entity or process is democratic. For now, it will be helpful to begin with the folk understanding of democracy. First, in a democracy, citizens have an equal right to participate, partly though not exclusively through voting, in the political decision making process, and disagreements within that process are resolved through some principle of majority rule. Second, political offices are open to all in the sense that any person has an equal right to occupy any political office insofar as they are capable of adequately performing the tasks of that office.²⁴⁶ Finally, debate is free and open in the sense that no one is restricted from voicing their opinion on the basis of who they are or what their view is. Later, I will suggest that democracy can and should be conceived more in terms of the broader notion of political equality. The result is that the folk understanding of democracy is but one institutional specification of democracy, and majority rule is not as sacrosanct a rule of decision as it is often made out to be. Nonetheless, it will be helpful

²⁴⁶ This basically restates what Rawls would describe as a political institutionalization of “careers open to talents.” Rawls, *A Theory of Justice*, 72. Rawls thinks that careers open to talents is a minimal requirement of political legitimacy. Rawls, *Justice as Fairness*, 47. However, in *Theory of Justice* Rawls rejects careers open to talents as a defensible interpretation of the difference principle, since it “permits distributive shares to be improperly influenced by . . . factors so arbitrary from a moral point of view.” Rawls, *A Theory of Justice*, 72. This is an example of why the issue of legitimacy should not be confused with the issue of an ideal specification of justice.

to begin from a point of common understanding, and each of the four models below attempt to present the moral foundation for our common understanding.

The *Aggregative Model* is common among social choice theorists. It also probably captures how ordinary citizens would explain the legitimacy of democratic decision making. According to social choice theorists, democratic decision making effectively maximizes preference satisfaction while giving equal consideration to each individual's preferences. We might understand the latter point to express a broader democratic commitment to equality. Whatever democracy requires, it requires that people be treated equally in some obvious sense.²⁴⁷ The Aggregative Model does that by ignoring individual differences and treating each person's preferences like anyone else's preferences. In a democracy, persons reveal their preferences with their votes, and each vote is counted equally. Satisfying the preferences of more people is an important moral goal, and majority rule is an effective way to satisfy the political preferences of more people.

There are of course well-known internal theoretical problems with the Aggregative Model, which I will leave to the side.²⁴⁸ Here, I want to focus on how the Aggregative Model is problematic for moral reasons from the perspective of political legitimacy and equal freedom.²⁴⁹ The core difficulty is that the legitimacy of a political decision has little

²⁴⁷ E.g., Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press, 2000), 184 (“[G]overnment must act . . . with equal concern for the life of each member.”).

²⁴⁸ For a discussion of these issues, see William Riker, “Social Choice Theory and Constitutional Democracy,” in *Philosophy & Democracy*, ed. Thomas Christiano (New York: Oxford University Press, 2003), 161-94.

²⁴⁹ Theorists have rejected this model for other reasons that I will not address. For example, Joshua Cohen argues the Aggregative Model may fail to protect religious liberty. Joshua Cohen, “Procedure and Substance in Deliberative Democracy,” in *Philosophy &*

to do with the maximization of preference satisfaction.²⁵⁰ This problem can be presented from two different directions. First, that a political decision satisfies any person, a majority of persons, or even all persons' preference(s) is not sufficient to make a political decision legitimate, where that is understood to mean that it is morally binding and coercively enforceable. It is simply a reason of the wrong kind when the issue is forcing people to do things.²⁵¹ Individuals cannot be forced to abide by their own preferences. In the previous chapters, I sketched a view of the reasons of the right kind that account for the legitimacy of political authority, namely that political decision making is necessary to specify and secure equal freedom.

With that in mind, we can also challenge the Aggregative Model from a second direction. One might propose that although maximizing preference satisfaction is not a sufficient condition, it is necessary to make a political decision legitimate. The idea would be that a political authority could only be legitimate in discharging its moral responsibilities if it treats each person's preferences equally and maximizes satisfaction of such preferences. Democratic decision making, one could argue, is a necessary means to that

Democracy (Oxford: Oxford University Press, 2003), 20. And, Amy Gutmann and Dennis Thompson charge that the Aggregative Model affirms and reinforces unjust power distributions in society and does not take deliberation seriously. Amy Gutmann and Dennis Thompson, *Why Deliberative Democracy?* (Princeton: Princeton University Press, 2004), 16.

²⁵⁰ That is not to suggest that preference satisfaction cannot be connected with some other desiderata of political legitimacy like effectiveness. So, if democracies happen to be more effective at guiding behavior because more people prefer the policies then that can be important. That is not how the social choice theorist views the matter however.

²⁵¹ Building off the work of P.F. Strawson, Darwall makes the related point that “[d]esirability is a reason of the wrong kind” to ground our moral practices of holding culpable individuals morally responsible for wrongdoing. Darwall, *The Second-Person Standpoint*, 15-17.

end. The problem is that it is not the responsibility of the state, or the political community more generally, to satisfy anyone or more people's personal preferences. Responsibility for that lies with individuals who are to take responsibility for their own personal pursuits. Beyond that, if one's preferences do not align with a political decision, individuals must alter their preferences or at least not demand that others act to satisfy those preferences.²⁵²

The upshot is that the Aggregative Model does not fit within the basic picture of the state that has emerged thus far: the state has a moral responsibility to secure equal freedom, and creating an enforcing the law discharges that responsibility.

The Aggregative Model fares no better if we jettison preference-satisfaction in favor of another "currency" that is to be maximized.²⁵³ One might suggest that instead of maximizing preferences, democracy maximizes satisfaction of the legitimate *claims* of equal persons.²⁵⁴ Because each person has an equal claim to determine how society is ordered, each person gets an equal vote by which they communicate that claim. The notion of a claim invokes the notion of a right. We can think of democratic procedures as

²⁵² Rawls makes a similar point: "It is within the limits of this division of responsibility [with society] that individuals and associations are expected to form and moderate their aims and wants. . . . [T]here is an understanding that as citizens they will press claims for only certain kinds of things, as allowed for by the principles of justice." Rawls, *Collected Papers*, 261.

²⁵³ Cf. Cohen, *On the Currency of Egalitarian Justice, and Other Essays in Political Philosophy*, 3-43.

²⁵⁴ Peter Singer, in presenting a fairness-based view, understands parties to a disagreement as "making competing claims to determine what the association shall do." Peter Singer, *Democracy and Disobedience* (Oxford: Clarendon Press, 1973), 35. Thomas Christiano offers similar characterizations of the dynamic between individuals: "social justice concerns the kinds of claims people can make against each other." Christiano, *The Constitution of Equality*, 47.

aggregating and maximizing satisfaction of equal rights or claims. Yet, by invoking rights, the Aggregative Model fares no better.²⁵⁵

For simplicity, focus on a disagreement between an individual dissenting against a majority decision (Dissenter) and an individual who is a member of the majority (Majority Member). Majority Member claims a right to Dissenter's conformity with his view, which also happens to be the majority view. Consider the situation from the perspective of Dissenter. Dissenter thinks that Majority Member is either wrong or equally right. If Majority Member is wrong, then Dissenter does not have an obligation to go along with what Majority Member demands. But, if Majority Member is equally right, then we have something akin to a conflict of rights between Dissenter and Majority Member. Let's look at the conflict case. How can Majority Member bolster her claim against Dissenter? On the Aggregative Model, she points out that a majority of people have the same claim against Dissenter, and a larger number of rights in some sense outweighs Dissenter's right.

Nonetheless, on the standard view about how rights operate, Majority Member cannot bolster her claim in that way. That is one of the upshots of John Taurek's famous argument that the numbers do not count in conflict of rights cases. Because of the generally accepted liberal commitment to the separateness of persons, an individual's legitimate claim against another is in no way augmented by the fact that others, no matter how numerous, have the same sort of claim against that individual.²⁵⁶ Similarly, the legitimacy

²⁵⁵ One might object that a claim should be considered to be distinct from a claim-right. Theorists generally seem to use them interchangeably. I do not deny that a conceptual distinction can be drawn, but that distinction is beyond the scope of this chapter.

²⁵⁶ John M. Taurek, "Should the Numbers Count?," *Philosophy & Public Affairs* 6, no. 4 (1977): 309; Nozick, *Anarchy, State, and Utopia*, 33; Rawls, *A Theory of Justice*, 191.

of an individual's claim against another is in no way diminished by the fact that there are a fewer number of others who share his claim. Each individual considered as a separate person has their own equal claim against any individual with whom they disagree. If we are to understand democratic processes as providing a justifiable resolution of the competing legitimate claims of Dissenter and Majority Member, that there are more claimants on Majority Member's side is not normatively relevant to their dispute. In effect, Dissenter says to Majority Member: "I will speak with each member of the majority separately. But for now, this is between you and I, and I have as much of a claim as you." Therefore, the Aggregative Model, as an account of the political legitimacy of democratic decision making, faces substantial obstacles. I will not discuss it further.

Next, consider the *Self-Rule Model* of democracy. The Self-Rule Model invokes the prominent idea that democracy is rule by the people. The basic idea is that those who participate in democratic institutions are somehow (individually and/or collectively) binding themselves through democratic law, by contrast with a system of government in which the government decides for us and binds us. As Scott Hershovitz puts the point, "[t]he idea behind this view of democracy is that we are binding ourselves through acts of legislation. . . . [I]n democracies, people decide together what they shall be bound to do."²⁵⁷ He goes on to maintain that "denying people the opportunity to participate in the process of government closes off opportunities to organize one's life autonomously."²⁵⁸

²⁵⁷ Scott Hershovitz, "Legitimacy, Democracy, and Razian Authority," *Legal Theory* 9, no. 3 (2003): 210.

²⁵⁸ *Ibid.*, 214. The roots of this model can be traced to Rousseau, who maintained that the social compact by which people unite in democratic society yields a system of law in which any citizen "obeys only himself and remains as free as before." Jean-Jacques Rousseau,

Nevertheless, it is unclear how the rhetoric of the Self-Rule Model can be squared with the political reality of reasonable disagreement and the very purpose of political authority, which is to resolve those disagreements. One way to understand the view is as a voluntarist account according to which individuals who participate in democratic processes autonomously choose, freely will, and/or consent to the binding outcomes of those processes. Or something along those lines.²⁵⁹ There are significant difficulties with that picture. For one, as Thomas Christiano correctly points out, the model seems “to require that the basic rule of decision making be consensus or unanimity. . . . Only when all agree to a decision are they freely adopting the decision.”²⁶⁰ Such a requirement undercuts the basic framework supporting the need for political authority in the first place.²⁶¹ Moreover, it is inconsistent with the commonplace rule of decision in democracies, namely majority rule. Second, even if there was unanimity, there is still only an attenuated sense in which

Basic Political Writings, ed. Donald A. Cress (Hackett Publishing Company, 1987), 147. As Joshua Cohen describes Rousseau’s view: Individuals “want to be able to regard those institutional ‘constraints’ as themselves conforming to their own judgments of what is right. Instead of taking the instrumental attitude that regards the social framework as constraining, the free person wants to affirm the framework of rules itself; they want to ‘have their own will as a rule’” Joshua Cohen, “Reflections on Rousseau: Autonomy and Democracy,” *Philosophy & Public Affairs* 15, no. 3 (1986): 286.

²⁵⁹ Carol Gould, for example, explicates the idea in terms of autonomous self-development and self-determination: “For if an individual were to take part in common activity without having any role in making decisions about it and under the direction of another, then this would not be an activity of self-development, since such self-development requires determining the course of one’s activity.” Carol C. Gould, *Rethinking Democracy: Freedom and Social Co-Operation in Politics, Economy, and Society* (Cambridge University Press, 1988), 85.

²⁶⁰ Thomas Christiano, “Democracy,” in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, Fall 2008, <http://plato.stanford.edu/archives/fall2008/entries/democracy/>.

²⁶¹ Finnis explicitly maintains that authority is an alternative to unanimity. See Finnis, *Natural Law and Natural Rights*, 232-33.

any outcome could be said to be the product of any individual member's exercise of autonomy or choice. In all but very narrow circumstances, any individual's input (e.g. vote) in the collective decision making process is not causally decisive with respect to bringing about their preferred outcome; they are dependent on a contingent majority of others voting for the same outcome. Such is hardly a paradigm instance of self-rule.

Some Self-Rule Model theorists are aware of such difficulties. As Hershovitz notes, following Raz, conceiving of the model along voluntarist lines is "one of the least persuasive arguments for democracy."²⁶² He, nonetheless, urges that we can accept the Self-Rule Model because there is "value [for] people participating in decisions that have an important impact on their lives."²⁶³

I imagine that most would not doubt that participating in democratic politics can have some sort of valuable impact on one's life. Any philosophical theory of democracy would presumably accept that. For example, such participation is a way of educating oneself and honing one's deliberative capacities. That claim is a component part of the Deliberative Model, which I will discuss next. In any case, it is not clear how one draws an inference from the more general moral values associated with democratic participation to autonomous rule through democratic legislation. We might specify the Self-Rule Model, or rule by the people, in an alternative non-voluntarist way, but then we lose the argumentative force of the rhetoric normally associated with that model. Accordingly, the

²⁶² Hershovitz, "Legitimacy, Democracy, and Razian Authority," 214 n.36.

²⁶³ *Ibid.*

Self-Rule Model cannot be reconciled with the basic purpose of political authority or the character of democracy as commonly understood.

Next, consider the Deliberative Model of democratic legitimacy. On the Deliberative Model, democratic procedures are legitimate and produce legitimate laws because such are the product of wide-scale deliberation between persons who equally participate in open and public debate about how to order our common world. Proposals are publicly disputed and argued over. Reasons are exchanged. Individuals learn from the process and often revise their views. Finally, a public decision is made, and the reasons for that decision are provided.

As an initial observation, the emphasis on the value of deliberation places the Deliberative Model in proximity to the value of intentionality condition for theories of authoritative decision making.²⁶⁴ The moral order is not left to be the outcome of brute forces, market forces, or social forces more generally. Instead, it is placed in the hands of a deliberative body of legal officials, or citizens more generally, with the capacity to reason about how society is to be intentionally ordered. The expectation is that in doing so, decisions will more often be sufficiently responsive to the requirements of equal freedom than not.

Theorists who work within the Deliberative Model differ widely on how to understand the internal requirements of that model, the types of value that the model is

²⁶⁴ Perry, "Political Authority and Political Obligation," 4-5 ("The essence of the value-of-intentionality condition is . . . the ability of one person *intentionally* to change the moral situation of another, where it is sufficiently valuable or desirable that the first person possess such an ability with respect to the second." (emphasis added)).

responsive to, the role of majority decision making, and how the model accounts for the legitimacy of democratic political decision making. I will not include an exhaustive presentation of those differences, except the following. Some deliberative democrats demand that any legal decision be justifiable according to reasons that all subject to it would reasonably accept. But, that sort of commitment brings us back to principles underpinning the Self-Rule Model. Instead of unanimous endorsement of the legal outcomes of democratic processes, the unanimity version of the Deliberative Model requires unanimous endorsement of the reasons that justify the legal outcomes. By contrast, other deliberative democrats, in my view correctly, maintain that such a requirement is too stringent. We reasonably disagree about what equal freedom demands, so we cannot expect such consensus on the reasons justifying any law. Moreover, some will just be mistaken about what reasons appropriately support the law. We should not require shared reasons in that case. In fact, that political authority and democratic principles of decision, specifically majority rule, do not require full consensus weighs against such a consensus requirement at any level. Although a theory of deliberation can play a role in a theory of democratic legitimacy, it must be premised on reasonable disagreement and the importance of deliberation in light of disagreement.

I want to note two final difficulties with the Deliberative Model. First, a number of deliberative theorists simply build into their model of deliberation that individuals will comply with the outcome of the deliberative process. For example, Joshua Cohen asserts that “in an ideal procedure of political deliberation . . . [participants] are prepared to cooperate in accordance with the results of such discussion, treating those results as

authoritative.”²⁶⁵ The difficulty then is to understand how the Deliberative Model itself would explain anything about the legitimacy of the outcome that is not already simply assumed. In assessing the legitimacy of an outcome, we are seeking to account for its authoritativeness even for the person who is not prepared to treat it as authoritative.

Second, it should be noted that the Deliberative Model on its face does not single out democracy as a requirement for political legitimacy. Say that a dictator rules over a great land as his family always has. Benevolent and professorial, the dictator always collects a significant amount of data on the public’s views on justice and public policy. Sampling is done. The dictator holds town halls at which he listens to the competing views and asks tough questions. Citizens attempt to convince him of their views but often change their views in response to his questions. The dictator respects the views of his citizens. But at the end of the day, the dictator is the decider. His publicly informed decisions become the rule. In that case there is extensive deliberation amongst the citizenry about what the law should be, people are treated equally in the deliberation, and a decision is made as a result. It is unclear what role the democratic principle of majority rule plays in the Deliberative Model, such that the dictatorial regime would be excluded as an option. Robust public deliberation in which all citizens participate equally can be had within a variety of institutional formats. At this point, we should not jettison the Deliberative Model. Aspects of that model can fit within the moral task account of democracy that I will offer below.

²⁶⁵ Cohen, “Procedure and Substance in Deliberative Democracy,” 21.

Finally, consider the *Arbitration Model* of democratic decision making.²⁶⁶ On this model, democratic procedures offer a mechanism to settle disputes between competing parties about how we are to order our common world. Democratic processes do that in a way that treats each party equally. The key idea here is that there are reasonable disputes, and those disputes need to be settled in a way that is consistent with treating each person equally. Democratic procedures are legitimate, binding, and enforceable because they effectively adjudicate those disputes consistent with equality.

Note that the comparison with standard cases of arbitration is not exact. In a standard arbitration, parties to a disagreement agree or consent in advance of the disagreement to come before a neutral arbiter, plead their case, and have the arbiter decide. Before resolving the dispute, the arbiter also attempts to persuade the parties to come to some form of agreement or compromise, as the process is only meant to resolve disputes that cannot be resolved otherwise. Most aspects of modern-day democratic procedures do not operate that way though. Instead, there are competing sides with no neutral arbiter. The sides may enter into agreements or compromises, but only in limited cases. There is also no pre-disagreement agreement to be bound by democratic law. Arbitration is therefore mandatory. And, a final decision is made through majority vote rather than through a neutral arbiter who makes a reasoned decision after considering each side's position.

²⁶⁶ Scott Shapiro sketches this model and distinguishes it from the mediation model, which describes the purpose of authority as mediating between person and the reasons that apply to them (i.e., Raz's view), in contrast with mediating between persons. Shapiro, "Authority," 432-33.

The Arbitration Model, however, provides an important insight into the moral purpose of authoritative democratic procedures and law more generally. The core purpose of arbitration is to resolve disputes in a way that treats each party to the dispute equally. Insofar as democratic procedures resolve disputes and do so by giving each person an equal vote, democratic procedures serve that purpose. Thus, the Arbitration Model captures a key part of the purpose of authoritative democratic political procedures.

The difficulty, however, is that the Arbitration Model also does not exclusively support democratic procedures. The Arbitration Model would support any political procedure or institution that resolved disputes in a manner that treated disputants equally. For example, return to the dictator example above. The professorial dictator is a paradigm case of mandatory arbitration and fits the Arbitration Model. That is not to say that the Arbitration Model does not have a role to play in any account of the political legitimacy of democratic procedures. Surely it does: it effectively captures the basic point of political authority as described to this point. The point is just that democracy as it is commonly understood is not the exclusive option under the Arbitration Model. Put differently, effective democratic institutions are but one reasonable specification of the more general moral principle that reasonable disputes about equal freedom have to be authoritatively resolved in a way that treats each person as an equal. Additional theoretical architecture is thus needed to account for democracy.

6.2 - Unilateral Authority and the Political Equality Constraint

At this point I want to introduce an alternative account of the legitimacy of democratic political institutions. This account makes sense of the role that political

equality plays in questions of legitimacy, while unifying the core elements of the Arbitration Model and the Deliberative Model. This account understands democracy as an institutional answer to the problem of unilateral authority and fits within the broader moral task account.

All of this talk about democracy might seem suspect in light of the discussions in the previous chapters. Earlier, I argued that the state and law are morally necessary to secure relations of equal freedom among citizens. I offered an account of why and when individuals living within reasonably just states can have fairly robust moral obligations to abide by the law. Those obligations arise from the coordinative capacities of the state in the face of reasonable disagreement. When there is a law in place that effectively resolves what would otherwise be a reasonable disagreement, not complying with that law amounts to one subjecting others to their own private view about what justice as equal freedom requires. In doing so, one is unilaterally dictating the terms of one's interactions with others according to one's own private judgment. Thus, one is violating the right of another to one's conformity with laws that specify the standard for relations of equality between citizens. Our actions are governed by public specifications of our rights and responsibilities rather than our own private view of such rights and responsibilities. Only by acting according to the law, where the law provides an effective and reasonable interpretation, can one avoid unilaterally subjecting another to one's own will. It is the state's responsibility to deploy the law to secure those relations amongst persons, and the law is morally binding insofar as it does that.

On its face, that suggests that morally binding law can exist without democracy. If there is a moral task for a state to do, and it does that task credibly and effectively, what else is there to say? Put differently, democracy concerns the process by which laws are created. If the outcome of a process, democratic or otherwise, functions as needed, why does it matter how it came about? To answer that question, we must first draw a distinction between the vertical and horizontal dimensions of legitimacy. Philip Pettit teases out a similar distinction along the following lines:

Given that a state is necessary for justice, there is an issue about how it ought to relate to its citizens, as distinct from the issue of how the citizens ought to relate to one another. And that, as I conceive of it, is the issue of legitimacy. Where the issue of social justice is a matter of the horizontal relations of citizens to one another, political legitimacy is a matter of their vertical relations to the state that rules over them.²⁶⁷

We should not agree that justice is distinct from legitimacy in the manner that Pettit describes. According to the view that I have described, politically legitimate laws are those that effectively specify the requirements of justice, conceived as equal freedom, between persons. Thus, legitimacy of the law has as much to do with the horizontal relations between persons subject to authority as the vertical legitimacy of the state has to do with the extent to which it effectively structures just relations between equal persons. We need

²⁶⁷ Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (Cambridge University Press, 2012), 135-36. Dworkin draws a comparable but different distinction between the vertical and horizontal "dimensions" of political power. Dworkin, *Sovereign Virtue*, 190-91.

not think that when we are talking about the justice of a law we are talking about something distinct from its legitimacy and *visa versa*.²⁶⁸ How the state relates to its citizens is surely an issue of justice.

The distinction between the horizontal relation between citizens subject to a law in contrast with their vertical relation with a *de facto* authority is instructive. The purpose of the state is to create and enforce laws that constitute certain horizontal relationships between subjects who are equally required to follow the law. Each person is equally bound by the law, and by following the law, we interact with one another through the law on horizontally equal terms. Doing so resolves the problems associated with the state of nature, the primary problem being situations in which individuals are subject to the private authority of others because of moral indeterminacy and disagreement. That problem concerns a morally problematic horizontal relationship that one might have with others in the absence of public legal standards to govern our behavior. The horizontal, then, serves to distinguish cases where the rule of law exists between subjects and those where it does not. By following the law, one is not horizontally subjecting their fellow citizens to their own private will. The law governs how we interact with others and articulates our enforceable rights and responsibilities with respect to each other. Non-democratic political institutions and actors can equally secure the rule of law.

We can also evaluate the vertical relationship between subject citizens, and the political actors or processes that have authority over them. Of that relationship, we can ask

²⁶⁸ As a matter of clarification, here I am not talking about legitimacy minimally conceived as a right to stay in the job.

whether and in what ways it is legitimate from the perspective of equal freedom. This inquiry will seek to draw a distinction between societies where an unelected dictator or ruling class rules citizens, and those societies where political authority is adequately democratic in character. For example, is the vertical relationship that a citizen has with an unelected dictator different from the vertical relationship that a citizen has with an elected leader in a democracy?

Another way to understand the vertical/horizontal distinction is in terms of the process/outcome distinction. A common, and I think correct, point in the democracy literature is that in some manner the process by which a law comes into existence is morally relevant aside from the independent merits of the law that is produced.²⁶⁹ Thus, there are two dimensions by which we can assess the legitimacy of a law: the process by which it came about and the substantive merits of the law. The former is the vertical dimension of legitimacy, which concerns the process by which the right to rule is exercised. Is legislation the product of a single professorial dictator, or a democratic process? With respect to the horizontal, insofar as we think of laws as structuring certain moral relationships between persons, then a moral assessment of the outcome of exercises of authority is a moral assessment of the moral relationships that the law constitutes between persons. Is the law a reasonable specification of the right to equal freedom or something beyond the scope of the state? That is the horizontal dimension noted above.

²⁶⁹ As Hershovitz puts the point, “[o]ur discourse about the legitimacy of governments indicates that we believe a government can fail to be legitimate on procedural grounds.” Hershovitz, “Legitimacy, Democracy, and Razian Authority,” 216.

Call the following the *Political Equality Constraint (PEC)*. The PEC demands that each individual in a society has an equal right to decision-making authority as each other individual in society. That is a constraint on the vertical, or process, dimension of legitimacy, as well as the horizontal relationships between citizens. On the common understanding of democracy, that constraint is satisfied in two ways. First, political offices with decision-making authority are open to all. What that means is that if one has the basic capabilities to do the job, then there is no constraint on them occupying the position, except that it might already be occupied or that the open process for choosing between capable candidates did not choose them. Second, insofar as any individuals have certain rights to participate, all have the same rights. The obvious consequence is that all reasonably capable citizens have an equal right to vote where elections are held. But, they are also to have equal access to the public deliberative process, including equal rights to speech and equal rights to communicate with those who have decision-making authority.

The PEC is derivative of three interrelated ideas that I discussed earlier in Chapters One through Four. The first is the prohibition against unilateral authority. Recall that one aspect of being independent is not being subject to the private will of another. What that means is that no individual is permitted unilaterally to determine the choices of others. Those with unilateral authority are able to impose their own private purposes on others.²⁷⁰ But the reverse is not the case. In order not to run afoul of the prohibition on unilateral

²⁷⁰ It does not matter that those with unilateral authority act in good faith to secure what they believe justice requires of the subordinate rather than for personal gain or something of the sort. What matters is that the unilateral authority is imposing what he take to be right despite what others reasonably take to be right.

authority, rights to decision-making authority must be equal. The second is the rule of law. Part of the idea of the rule of law is that laws are to be general, meaning that their application and scope does not depend on the proper identity of any particular individual. So, Abe cannot possess the right to rule in virtue of the fact that he belongs to a particular family. Instead, if anyone is to have a right to rule, everyone must have as much of a right as anyone else. Third, the constraint is a direct implication of the liberal commitment that all sufficiently capacitated persons are to be regarded as both free and equal, such that no individual could have a claim to political power that is any different from any other individual. A free and equal moral person has equal standing to make demands about how equal freedom is to be secured and what it means.

The PEC is described as a constraint because it places a limit on what would otherwise be a sufficient argument for the legitimacy of exercises of political authority, namely that such exercises are morally necessary to secure equal freedom and effectively do so. The moral necessity of political authority aside, the PEC governs both how political authority is to be distributed and the manner in which it is to be exercised. The latter point is that political authority can only be exercised through a process that at a fundamental level gives each individual an equal right to decision-making power. The upshot is that no potential political leader can make a claim to a position of authority on the ground that she has a right to assume that position that no one else possesses. The PEC therefore rules out theories that would permit claims to decision-making authority on the basis of family name, race, gender, or social class, among other things.

How does the PEC contrast or fit with the models of democracy described above? Recall that the Arbitration Model effectively captures the basic moral purpose or task of political authority as I have described it here. There are reasonable disagreements between citizens, and authority must be exercised to resolve those disagreements effectively so that we can live on reciprocal terms. The PEC can be understood as a constraint on how mandatory arbitration over law making should operate. Reasonable disagreements over what the law should be are to be resolved by a process that gives no one anymore authority than anyone else.

What about the Deliberative Model? The Deliberative Model captures an important aspect of why authority is valuable in the first place. It allows human beings to deliberate and reflect on how to order our lives rather than leaving that order to chance or social forces. That is of primary instrumental importance because it allows us to aim at laws that adequately respond to the requirements of equal freedom, laws that are within the domain of the reasonable.²⁷¹ The right to participate in deliberations can also be understood to flow from the PEC. If any right to decision-making authority must be equal, surely any right to participate in deliberations as to what decisions should be made must also be equal. Thus, not only is the PEC consistent with the Deliberative Model, the equal right to participate follows from the PEC. Finally, because participating in the process by speaking one's mind and contributing to the deliberation, within limits, does not violate the freedom

²⁷¹ Even though the PEC does not directly address such values, the PEC does not undermine or challenge the valuable participatory consequences of democracy. Dworkin explains "three kinds of participatory consequence: symbolic, agency, and communal." Dworkin, *Sovereign Virtue*, 187.

of others under any reasonable political theory, the right to speak one's mind will be secured on any account of democratic authority, including one that invokes the PEC.

The PEC, along with the vertical/horizontal distinction, can also be deployed to account for two reasonable views that are in tension with each other. First, a dictatorship, even a professorial one, in some sense lacks legitimacy, in contrast with a democracy. The PEC accounts for that because the dictator's claim to rule violates the PEC and a democracy does not. Second, in light of the more general argument that the law's purpose is to secure equal freedom between persons by specifying our rights and responsibilities, we should be able to account for why individuals can have obligations to obey the law notwithstanding that they happen to live in non-democratic states. Clearly, non-democratic states can actually do the job of creating laws that specifies the requirements of equal freedom. Insofar as the law does that, it is legitimate. But such an institutional arrangement would seem to violate the PEC.

It is important to note that the issue of the bindingness of non-democratic law is not just about distinguishing between dictatorships and democracies. That is because the issue arises even within democracies. Two instances are worthy of note. First, constitutional law, which identifies the basic structure of government, its powers, and its limits, is hardly democratic. Instead, such law secures the background structure in which democratic decisions can be made and enforced. Such law is not susceptible to change through normal democratic processes. Second, many of the laws that bind generations today were created during previous generations. In that sense, future generations are bound by legal decisions made by past generations participating in legal decision making without the participation

of future generations. Consequently, we cannot so easily deny the possibility that non-democratic law can still be binding.

To resolve that issue, return to the above distinction between the vertical and horizontal dimensions of legitimacy. The PEC is a constraint on each of those dimensions. Whether a state is democratic rather than a dictatorship is a vertical legitimacy issue. The PEC is only satisfied vertically if rights to political authority are held equally between those who are ruled and the state actors who rule. Democracy is therefore necessary for vertical legitimacy. But, democracy is not necessary for horizontal legitimacy. Instead, whether the rule of law is satisfied between those individuals is the relevant issue. The PEC is satisfied horizontally insofar as all of those subject to the state's rule have equal authority. In the case of a dictatorship, the PEC is satisfied horizontally because all subjects have the same authority—none. And, they are all subject to a set of laws that govern them equally.

Imagine a law that governs the terms of interaction between neighbors, Joe and Smo. Imagine that law is a noise ordinance that limits playing music that can be heard across property lines past 8:00 p.m. Everyone recognizes that to be the law, generally abides by it, legal officials effectively enforce it, and it is a reasonable candidate for such a law. Such a law can equally emanate from a democratic process as it can unilaterally from a dictator. Now, say that it was imposed by a dictator and say that neighbor Joe violates the law. On the view presented here, Joe has violated Smo's right to Joe's compliance with the law. In violating the law, Joe has unilaterally imposed his own will on Smo. When Smo asks for a justification, imagine that Joe says he refuses to abide by that law because it emanated from a non-democratic process that he was precluded from

participating in. Smo, nonetheless, has a legitimate grievance. His response can and should be that the law effectively set the terms of interaction between him and Joe such that he has a right to Joe's compliance. The fact that the vertical character of the law is not democratic is not Smo's problem. Joe's beef is not with Smo or *the law*; it is with the dictator.

The point of the example is to show that the horizontal legitimacy of the law can float independently of its vertical legitimacy. Legitimacy is not just about doing what the dictator tells you to do; it is also about doing what *the law* tells you to do. Horizontal legitimacy in this case is about whether a law effectively resolves moral disagreement and coordinates actions and expectations. Compliance with the law is fundamentally owed to our fellow citizens, not those who possess political authority. If the law effectively sets the terms of our interaction with others, they have a right to our compliance with the law. The law effectively resolves a moral disagreement that does or could exist between us. It does so in a way that binds us all equally and therefore satisfies the PEC between us.

The question then is how to understand the legitimacy, or lack thereof, in the vertical relationship that exists between the dictator and his citizens. This is where things get complicated and likely become heavily circumstance dependent. In some states, democracy is not possible in light of circumstances that exist in such states. For example, in some places, insisting on democracy would just result in turning government over to a majority coalition of religious zealots who seek to impose their religious views on everyone else. In such a case, we might remember the threshold model described earlier. A dictator in such a situation might insist that he has a right to stay in the job because he is credibly

doing the job of securing equal freedom. That right and any attendant enabling rights belong to him in virtue of his moral responsibility to secure equal freedom. He is the only one who can effectively do that. He might admit that his rule violates the PEC but explain that democratic institutions are not plausible in light of the circumstances. One way to understand what the dictator is saying is that his responsibility to secure horizontal legitimacy takes priority over his responsibility to secure vertical legitimacy.²⁷²

In summary, what I have described is a moral task account with a constraint, specifically the PEC. This model, I have argued, adequately captures how we think about the moral importance or necessity of democratic authority in contrast with non-democratic authority. Moreover, the PEC account described imports aspects of the Arbitration and Deliberative Models. Now I want to turn to several views that work within those two models that are explicitly moral task accounts but that rely on alternative components other than the PEC to account for the authority of democratic law.

6.3 - Moral Tasks and Equal Respect

I noted earlier that the literature on the authority of law often lacks much discussion of the relationship between democratic institutions and legitimate authority. In recent years, that has changed, as a number of democracy theorists have defended theories of

²⁷² That point seems to be what would explain the distinction that Christiano draws between “inherent authority” and “instrumental authority.” Christiano defines instrumental authority as “the capacity to impose duties on the subjects of the authority.” By contrast, inherent authority is a robust right to rule that includes a right against interference, a right to impose duties, and a right to obedience that is owed to the authority (specifically, the legislature). Christiano, *The Constitution of Equality*, 240-41.

democratic authority that fit within the moral task framework that I have been defending throughout this dissertation. Here I want to discuss such views with goal of explicating the overall moral-task account and the PEC. The goal is to explain why a moral task theory that attaches the PEC is superior to theories that append some other moral principle to account for the authority of democracy. I also want to begin to lay the groundwork for the claim in the final section of this chapter that democracy as we currently know it is just one of a number of plausible specifications of authoritative political institutions that satisfy the PEC.

A number of theorists have sought to explain the authority of democracy by reference to a principle of equal respect amongst citizens. Broadly, there are two components to such views. First, democratic institutions themselves express respect for individuals as equals in giving each individual an equal say. Second, when individuals abide by democratic laws they express respect for their fellow citizens. And, in not abiding by democratic laws, law breakers express disrespect for their fellow citizens.

Thomas Christiano is broadly correct to maintain that “[t]he reasonably just state is engaged in a morally necessary activity in the sense that someone who fails to comply with the reasonably just state’s publically promulgated rules is normally violating a duty of justice to his fellow citizens.”²⁷³ We should not treat that statement as an inference from the reasonable justice of a state to the reasonable justice of any of its laws. Rather, the reasonably just legal specifications of the state will be morally binding. According to

²⁷³ *Ibid.*, 239.

Christiano, however, the authority of democracy has an alternative basis that relies on the value of equal respect.

Christiano argues that “the *principle of public equality* grounds the authority of democracy.”²⁷⁴ According to the principle of public equality, “[e]ach human being has a fundamental and natural duty to treat other human beings as equals But this duty is only fully realized among persons when each person attempts to treat others publically as equals.”²⁷⁵ As part of that duty, “each person has a duty to each other citizen to afford them a right to an equal say and to respect that equal say.”²⁷⁶ The first part of that latter requirement comes close to stating the PEC: each citizen has a right to an equal say. The second part states the principle of equal respect for the judgment of others. It seems uncontroversial that the PEC would follow from the former premises. If political institutions are public, then denying any individuals an equal say would be to publically treat them as unequals or not to respect them as equals. At the very least, that means that in a society where there are not equal rights of participation and equal voting, political institutions and/or those in power in that society would be violating a right that individuals have to an equal say. Put differently, they would be violating the PEC. However, it is not obvious the extent to which that duty falls directly on individual citizens. If we both live under a despot, it is not clear how either of us could discharge a duty to the other to afford them a right to an equal say. Neither of us have any say, and there is unlikely to be anything either of us could do to otherwise change matters. What one can do, however, is not impose

²⁷⁴ *Ibid.*, 232 (emphasis added).

²⁷⁵ *Ibid.*, 249.

²⁷⁶ *Ibid.*, 250.

their will on their fellow citizens. In that limited sense they can sense, they can secure the equal say of their fellow citizens. By contrast, within a democracy, a duty not to interfere with the democratic process, including voting procedures, would follow easily from the right to an equal say. If I took your ballot out of a ballot box, then that would be a direct violation of your right to an equal say.

I want to focus, however, on what seem to be the connected duties to “treat others publically as equals” and “to respect th[e] equal say” of others. According to Christiano, those duties explain why we have a moral obligation to comply with democratically-produced laws. Christiano explains those duties along the following lines:

The basic idea then is that one owes it to others, by virtue of the principle of equality and the fundamental interests of each in *having her judgment about justice accorded respect*, to comply with the decision of the majority about how to establish justice.²⁷⁷

He explains that citizens who do not comply with democratic laws “affirm[] a superior right to that of others in determining how the shared aspects of social life ought to be arranged.”²⁷⁸ In doing so, “[o]ne is putting one’s judgment ahead of others’ and in the light of the facts about judgment and the interests in respect for judgment, one is in effect expressing the superiority of one’s interests over others.”²⁷⁹

Here I want to address two broad problems with such a view. The first is with the notion of a duty of respect. The second has to do with resting the authority of democracy

²⁷⁷ *Ibid.*, 254 (emphasis added).

²⁷⁸ *Ibid.*, 250.

²⁷⁹ *Ibid.*, 99.

on a basis other than the moral responsibility or task of the state. Resting a duty to obey the law on the duty to respect one's fellow citizens is problematic. That is because the duty of respect, like any attitude-centric duty, is inherently indeterminate. There are enumerable ways in which we can show respect for others. Here are several (not all) possibilities for how to interpret a duty of respect, not all of which would demand compliance with the law. First, a requirement of respect could be a requirement only that one has a certain type of attitude toward the object of respect. Such a duty does not require an individual to act in a particular manner; it simply requires them to have a certain type of mental state, specifically an attitude of respect. We might imagine a person faced with a legal decision emanating from a democratic procedure saying, "I respect the decision, the effort that went into it, and all of my fellow citizens, but I am going to do what I think is right for all, including myself." In which case, the person has the requisite mental attitude, and perhaps that he express that attitude in some way, but the requirement that he have that attitude does not give him reason one way or the other to follow the law.

There is a second, moderate possibility. The moderate duty of respect would require that one at least regard the object of respect as having some sort of practical relevance, as carrying some sort of deliberative weight, in one's deliberations about what to do in the face of democratic decision. This is commonly how we understand the normative import of requests between individuals in morally valuable relationships, for example, a friendship. Take a person making a request of their friend. In the normal case, a friend, as a matter of respect for his friend, is obligated to give some consideration to his friend's request to do something, perhaps even substantially weighty consideration. But

respect does not require that the friend ultimately act on the request to the exclusion of all other considerations. Nor is it the case that the friend automatically does anything wrong by not going along with what his friend requests. The request (even if communicated more like an order) does not automatically obligate. Along such lines, requiring respect for democratically created law could mean that one is required to consider a democratically generated law as carrying (significant) weight in one's deliberations. So we can imagine a person saying, "I see your point about the fact that this law was the majority decision of my fellow citizens, and that fact weighed heavily in my deliberations, but ultimately other moral considerations compel me to do otherwise." There likely will be cases in which that consideration tips the balance in favor of following the law. But that will not be true in all cases. All that is required is that the citizen takes the law into consideration in deciding what to do.²⁸⁰

Finally, we could interpret the duty of respect to require that a person abide by democratic law. Only if one follows the law does one show adequate respect. This last idea brings us to the claim that democratic procedures have the capacity to generate moral obligations. It is that version of respect that respect-based theories must satisfy if equal respect is supposed to ground a duty to comply with democratic laws. The difficulty is that if there are other existing avenues for respecting one's fellows as equals, then it is not obvious on what basis we would require this interpretation of the duty of respect. Exactly, why does the citizen need to show *that much* respect? Without more argument the duty of

²⁸⁰ Such a view need not even compel the individual to follow the law when it provides a sufficiently weighty reason. All that is required is that it be considered in one's deliberation, not that one deliberates correctly.

respect is indeterminate with respect to the different ways in which the duty can be discharged.

Before discussing one final difficulty with respect-based views, it will be helpful to look at another view that focuses on equal respect. In *Law and Disagreement*, Jeremy Waldron aims to present “a philosophy of law that pays something more than lip-service to the ideal of self-government; a philosophy of law which indeed puts that ideal to work . . . in its account of the nature of law, the basis of legitimacy, the task of interpretation, and the respective responsibilities of legislatures, citizens, and courts.”²⁸¹ Notwithstanding that goal, the view that Waldron goes on to present is perhaps more important for its attempt to apply the lessons of philosophy of law, especially lessons about the nature of legal authority, in the other direction, to thinking about the moral authority of democratic decision making. Under the heading of what, borrowing from Rawls and Hume,²⁸² he calls, “the circumstances of politics,” Waldron develops a number of points discussed in earlier chapters about the need for law in the face of reasonable disagreement: “[T]he felt need among members of a certain group for a common framework, decision, or course of action on some matter, even in the face of disagreement about what that framework, decision, or action should be, are *the circumstances of politics*.”²⁸³ As I argued earlier, that need is not

²⁸¹ Waldron, *Law and Disagreement*, 9.

²⁸² Within the circumstances of justice, Rawls includes inter alia: that individuals live in proximity in time and space, that individuals have similar physical and mental capacities, that there is moderate scarcity of resources, that individuals have different life plans, and that individuals have different philosophical, religious, political, and social doctrines. Thus, Waldron’s circumstances of politics are just a more narrow version of Rawls’s circumstances of justice. Rawls, *A Theory of Justice*, 126-30.

²⁸³ Waldron, *Law and Disagreement*, 102.

just felt; it is a real moral need to secure equal freedom. Democratic authority, according to Waldron, is justified in some manner by the fact that we live in the circumstances of politics, and there is a necessary moral task to complete.

Now, one might criticize the authority of democratic decision making in a manner comparable to how one might criticize the authority of law: That a law is a valid law or that a law garnered a majority of the votes are just social facts that seem to be arbitrary from the moral point of view. How can a social fact defeat one's considered judgment about, or the independent moral merits of, the required course of action? Earlier I urged that the fact of reasonable moral disagreement admonishes confidence in one's ability to determine the singular moral merit of any given action. Waldron shares that view and defends democratic law making, specifically majoritarian voting procedures, against the charge of arbitrariness by highlighting their ability to resolve moral disagreement in the circumstances of politics:

Society needs a mechanical procedure precisely because recourse to a substantive procedure would reproduce, not resolve, the decision-problem in front of us. What seems like the majoritarian obsession with statistics is . . . the tribute that politics plays to the reality that social problems and opportunities confront us in our millions, not in the twos and threes with which moral philosophers are comfortable. And what seems like its impersonality is really a commitment to equality—a determination that when we need to settle on a single course of action and we disagree about

what to do, there is no reasonable basis for our decision-procedures to accord greater weight to one side than to the other in the disagreement.²⁸⁴

There are two points to unpack here. The first deals with the positivity of democratic procedures, the second with the value of equality. First, democratic procedures are morally important because they channel moral disagreements through a process that results in a decisive majoritarian decision that does not reproduce the disagreements that it functioned to resolve. Waldron is emphasizing the moral importance of the *legal positivity* of majoritarian democratic procedures. Democratic processes cannot resolve moral disagreement about the substantive merits of a candidate course of action if after the democratic process takes its course, individuals simply could continue to act according to their own *ex ante* assessment of the substantive merits of a course of action. Resolution is achieved because we can ascertain the required course of action simply by tallying votes. It should be recalled that democratic procedures and democratically produced laws are not uniquely positive. As I explained earlier, all laws, by virtue of the fact that their validity is determined by social facts, have the capacity to resolve reasonable disagreement because the existence and content of a law is not determined by one's reasoned moral assessment.

Waldron's second point is that democratic majoritarian procedures also apparently express a commitment to equality. At this point, it is not clear exactly how *majoritarian* procedures are unique in that respect. If there is no reasonable basis to accord greater weight to one side of a debate rather than the other, then it is unclear why the side that carries a majority of votes should prevail. I will return to that point in the final section. In

²⁸⁴ *Ibid.*, 117 (footnote omitted).

any case, at this point Waldron's point about equality is consistent with the PEC described earlier. We can say that no matter what positive "mechanical" process is used to come to final decisions, no side within a reasonable debate within a democracy has any more than an equal right to decision-making power.

Nonetheless, Waldron goes on to develop his moral task account partially in terms of the moral importance of equal respect. He sums up the view as follows:

[A]n account of majority decision cannot itself explain the authority of legislation (in [a] constraining sense). That explanation must come primarily from our sense of the moral urgency and importance of the problems we must address—the things that ought to be done and must be done by us together, in our millions, if they are to be done at all. . . . The appeal of majority decision is that it not only solves the difficulty [the circumstances of politics] generate, but it does so in a respectful spirit. Thus, its constraining authority consists of the fact that it allows us to address in these circumstances those problems that are deemed important and compelling. The two, then—constraint and respectfulness—combine to make a particular demand on each citizen . . . that he should not insist unreasonably on what appears to him to be the *right* solution to the urgent problems we face, if the result of such insistence is likely to be that the problems we face do not get any sort of solution at all.²⁸⁵

²⁸⁵ *Ibid.*, 117-18 (emphasis added).

The view presented can broadly be described as an attempt to explain why laws that issue from democratic legislatures and/or majoritarian decision making are morally binding. It attempts to explain the moral authority of democratic legal procedures.

There are two components to Waldron's argument. The first has to do with the ability of democratic processes to resolve "important and compelling" moral problems. The second has to do with the virtue of "respectfulness."

Despite being on the right track in a number of respects, the view faces difficulties. First look at how Waldron presents the moral-task component of his argument. He says that no citizen should "insist unreasonably on what appears to him to be the *right* solution to the urgent problems we face, if the result of such insistence is likely to be that the problems we face do not get any sort of solution at all."²⁸⁶ Obviously, it would be unreasonable—even evil and against one's duty—for any individual citizen to insist on not complying with the law if the immediate and foreseeable result of that failure to comply would be a failure of a collective solution to an urgent moral problem. In such a circumstance, the citizen has a moral obligation to go along and not to insist on what he regards as the morally required course. The problem is that the individual citizen is rarely, if ever, in a circumstance where his individual compliance is marginally necessary to discharge any of our collective responsibilities. Recall an earlier discussion about Hume's instrumental defense of the general moral obligation to obey the law: "If the reason be

²⁸⁶ *Ibid.* Presumably the citizen cannot insist *reasonably* on what appears to be the right solution either. Waldron's account is supposed to show that the law is preemptive even in the face of reasonable disagreement. The reasonable citizen is the primary target, not the unreasonable citizen. An account of political authority must explain why the law is binding notwithstanding that the citizen has a view that is not unreasonable.

asked of that obedience, which we are bound to pay to government, I readily answer, *because society could not otherwise subsist . . .*”²⁸⁷ But, contra Hume, society never hangs in the balance like that and nor do most moral tasks that require collective action. It would be a highly unusual, even tragic, circumstance for the solution to an urgent and necessary moral problem, one that normally stems from the collective needs of millions of people, to hang on the compliance of any particular individual. In fact, it is the nature of collective action problems generally that they do not have that sort of structure, which is why such problems call out to be addressed in ways other than an appeal to the individual importance of the actions of any particular individual.²⁸⁸ Any moral task argument that rests on the instrumental necessity of any particular citizen’s conformity to law faces the same problem that Hume faces. This is especially problematic for Waldron because, by his own admission, what is paramount to explain the authoritativeness of majoritarian procedures is not that they are democratic but that they resolve urgent moral tasks. In Chapter Three I urged that the need to discharge our collective responsibilities in a fair manner can address the concern about inconsequential non-compliance.

Waldron does not say anything about equal distributions of responsibility, but he places heavy emphasis on the value of equal respect in democratic procedure. Perhaps

²⁸⁷ Hume, “Of the Original Contract,” 481. Similarly, Hume writes, “society cannot possibly be maintained without the authority of magistrates, and that this authority must soon fall into contempt where exact obedience is not paid to it. The observation of these general and obvious interests is the source of all allegiance, and of that moral obligation which we attribute to it.” *Ibid.*, 480.

²⁸⁸ In fact, it is the failure of this assumption that motivates defenses of political authority as a mechanism to solve coordination problems. It is in part because any given individual is not marginally necessary that the collective must be coordinated.

respect can bridge the gap in the argument. There are two objects of respect on Waldron's account. First, the achievement of the democratic process in resolving necessary moral tasks collectively is an object of respect.²⁸⁹ And second, the process respects the persons who are afforded an equal vote in the democratic process because they have an equal right to participate and their divergent views are not silenced.²⁹⁰ The upshot seems to be that by respecting the democratic process, one is satisfying a duty to respect one's fellow citizens. At this point, we are where we left off earlier. The difficulty is that a duty of respect is inherently indeterminate, as there is no straightforward inference from a duty to respect to a duty to obey the law.

I want to note a broader problem with respect-based views of political obligation. Even if the duty of equal respect could adequately explain why individuals have a moral obligation to follow democratically produced laws, the duty of respect cannot explain why democratically produced laws are coercively enforceable. Following Kant, I earlier argued that force is only permitted to secure equal freedom. However, duties of respect do not implicate the freedom of others. If I disrespect you, for example by insulting you, I have in no way hindered your freedom. Although individuals should respect others, they cannot be forced to do so or punished for failing to do so. The duty of respect therefore cannot account for the coercive nature of political institutions, democratic or otherwise. For that additional reason, the duty of respect fails.

²⁸⁹ Waldron, *Law and Disagreement*, 101.

²⁹⁰ *Ibid.*, 109.

None of this is to say that duties of respect are not violated when individuals do not abide by the law in democratic society. If democratic laws secure equal freedom, then we have obligations to follow those laws. If we break those laws, then we violate our obligations and the rights of others. Disobeying such laws expresses disrespect, but that is because lawbreakers are violating the moral rights of others. The problem is with deriving duties to obey from duties to respect. On respect-based views, the obligation to obey the law is in some way derivative of the duty of respect. Such views put the cart before the horse.

6.4 - Moral Tasks, Epistemic Value, and Normative Consent

For some, the authority of democracy is to be grounded in its special instrumental and epistemic capacity to bring about just outcomes. That may or may not be true as an empirical matter but instrumental concerns are completely relevant in the moral task framework. But we should not get carried away. A primary example is David Estlund's "epistemic proceduralist account of democratic authority."²⁹¹ Estlund argues that the need to resolve certain urgent moral tasks in ways that are epistemically respectable, fair, and entitled to consent can ground the authority of democracy and the obligation to obey.²⁹² He argues that democratic states "serve urgent collective tasks with institutions that can be publicly seen to have some decent tendency (better than or at least nearly as good as any

²⁹¹ Estlund, *Democratic Authority*, 136.

²⁹² Estlund describes moral task accounts along the following lines: "urgent task theory holds that some tasks are morally so important that there is a natural moral duty to obey the commands of a putative authority who is well positioned to achieve the task if only people will obey." *Ibid.*, 132.

other and also better than random) to produce good or correct decisions.”²⁹³ There are “great humanitarian problems” that must be addressed, and the duty to obey laws issuing from the democratic process is a species of duty “to contribute to the solution of great humanitarian problems.”²⁹⁴ Although those urgent collective tasks can generally be resolved without all citizens participating, each citizen nonetheless has a duty of fairness to participate.

Democratic processes are important to political legitimacy insofar as such processes are epistemically respectable and such processes do not draw “invidious comparisons” between possible participants in the process. The latter point is that citizens are not pre-judged as wiser or less wise in a way that affects their rights to participate.²⁹⁵

²⁹³ *Ibid.*, 137. I will leave to the side the objection that epistemic proceduralism confuses practical authority with theoretical authority. The former creates reasons for action, while the latter merely creates reasons for belief. Although it might be foolish to ignore the claims of a theoretical authority, say a scientist, one is not morally bound to believe a theoretical authority. On a theoretical model, a failure to comply with democratic law is not a moral failure but an epistemic failure that would open the individual up to the kinds of criticism that are appropriate for epistemic failures.

²⁹⁴ *Ibid.*, 145.

²⁹⁵ *Ibid.*, 12. There is an ambiguity in Estlund’s view when it comes to prohibition against invidious comparisons. Estlund rejects the authority of a counsel of learneds because “there are possible qualified objections to it.” *Ibid.*, 49. Specifically, such a counsel would be formed on the basis of invidious comparisons among people: some are wiser than others. The prohibition against invidious comparisons is supposed to defeat expertise-based accounts of authority, such as that provided by Raz. The problem is that Estlund is explicit that qualified acceptability is only relevant to the issue of the legitimate use of force; it is not relevant to whether someone has a moral power. *Ibid.*, 134. Raz’s account is about legitimate authority, not the use of force. So, we cannot reject Raz’s account on the ground that it makes invidious comparisons because the presence of such comparison is not supposed to be relevant to the authority issue. Moreover, while the PEC and the prohibition against invidious comparisons seem similar, it is unclear the extent to which they can be treated as similar because invidious comparisons are not relevant to the issue of authority in Estlund’s view.

The prohibition against invidious comparisons would equally follow from the PEC. No individual is to have anything but an equal right to decision-making power, regardless of any impression that some are morally smarter than others. Insofar as that constraint is in part derived from the fact that individuals reasonably disagree, there is no basis upon which to designate some as wiser than others.

On Estlund's account, the democratic process, where that includes majority voting procedures, has a better-than-random epistemic capacity to hone in on the correct solutions to our humanitarian problems. Thus, complying with a democratic law is a fair instrumental contribution toward an end that the democratic process identifies as morally compelling. This would contrast with a system of anarchy according to which individuals themselves choose what course of action to take aside from whether it is mandated by the democratic process. The democratic process will have the capacity to create binding moral obligations insofar as it is "more likely to promote substantive justice than the anarchic arrangement, and [is] also better than a random procedure for choosing decisions."²⁹⁶ The democratic process has the capacity to do that because it pools the wisdom of the citizenry through the voting process much like a market pools the wisdom of potential buyers to assign prices to goods in a market.²⁹⁷

An initial concern is that even if democratic processes are better than random and better than any alternative institutional arrangement, we cannot infer that democratic processes are morally binding in all cases. That would be what we need to ground anything

²⁹⁶ *Ibid.*, 139.

²⁹⁷ For the account of how democracy does this, see *ibid.*, 159-83.

that looks like a general moral authority to impose obligations. In addition, to say that democratic procedures are simply better than a number of bad alternatives is not a robust defense of democracy. Estlund admits as much.²⁹⁸ But according to him, it is not that democracy merely performs better than a decision process that chooses randomly (e.g., a coin flip).²⁹⁹ Rather, democratic processes are *much better* than a random procedure and very reliable when it comes to avoiding “primary bads”: “war, famine, economic collapse, political collapse, epidemic, and genocide.”³⁰⁰ Since democracy is *much better* than random at avoiding primary bads, Estlund continues, we can infer that it is also *at least* better than random at determining what justice requires more generally.³⁰¹

That argument is unconvincing. First, it seems only to have the potential to justify compliance with the law in cases where primary bads are at stake. One might just concede that if there is a risk of famine that is somehow dependent on certain political decisions, then those decisions should be made according to binding democratic processes. However, one might suggest that such high stakes cases are exactly the sort of cases where we do not want decisions to be democratically made. Second, in cases where primary bads are not at issue, Estlund has not provided an argument that would explain why a decision maker whose deliberative capacity is better than a coin flip has any reason to go along with the democratic decision rather than their own assessment of what course of action to take. It

²⁹⁸ *Ibid.*, 116.

²⁹⁹ *Ibid.*, 160.

³⁰⁰ *Ibid.*, 163.

³⁰¹ *Ibid.*, 160.

just seems completely contingent whether democratic institutions will outperform other arrangements and/or deliberative individual deliberative citizens faced with what to do.

Those more specific concerns are part of a more general concern about the epistemic proceduralist account of authority. This is a difficulty that we have seen faces any account that relies on the idea that one institutional arrangement is comparatively better than others. The account is simply an account of the justification of democratic procedures, not their legitimacy. Even if democratic procedures can bring about better results and/or solutions to our collective problems, we need a way to translate that into an account of the legitimacy of democratic law.

I think Estlund is sensitive to that broader concern. As he notes, even if we can have duties to contribute to the solution of humanitarian problems, “something more would be needed to explain why I would be obligated to *follow orders*, to do what I am told because I am told.”³⁰² That problem is resolved by what Estlund calls, “normative consent.” Democratic processes must and will he thinks garner normative consent. According to Estlund, “[n]ormative consent names a moral obligation, when there is one, to consent to proposed new authority. It is . . . morally equivalent to a promise to obey. In the context of [the state of nature] it would be a moral obligation to consent to the proposed new authority.”³⁰³ If an individual has an obligation to consent and does not do so, then their non-consent is void. The moral situation therefore is *as if* they had consented.

³⁰² *Ibid.*, 151.

³⁰³ *Ibid.*, 152.

Recall our discussion in Chapter Four of consent theories in the context of moral task accounts. One version of the moral task account of political authority (Murphy) argues that the authoritative state is necessary to resolve certain collective moral tasks and that in virtue of that need individuals reasonably can, should, or must consent to the state having authority over them. In such an account, actual consent is necessary for authority. Normative consent, however, does not require actual consent. One normatively consents insofar as one would have an obligation to do so. If one consents to democratic authority, then obedience is required. If an individual has an obligation to consent but fails to consent, their non-consent is nullified anyway and they have given *normative*, but not actual, consent to be bound. Thus, normative consent is normatively equivalent to a promise to obey.

The existence of an important moral task that must be resolved in a fair manner can ground the authority of epistemically respectable democratic processes if one would also be obligated to promise to obey such processes:

[n]ormative consent theory proposes that in the case of some urgent tasks, but not others, those who are commanded would, if asked, be wrong not to consent to the commander's authority for these purposes. The wrongness of refusing consent, rather than urgency itself, would be the explanation for why some urgent tasks ground authority and others do not.³⁰⁴

Estlund's account of normative consent is problematic. The problem is that normative consent is entirely superfluous, and Estlund offers no good reasons to conclude otherwise.

³⁰⁴ *Ibid.*, 132.

Estlund's account aside, I have already provided a general account of the conditions under which the state can possess legitimate political authority. In this chapter, I added the additional requirement of the PEC. With that in mind, we might ask what additional theoretical work could be done by adding the concept of normative consent. Put differently, if the fact that an individual does not consent has no normative consequences anyway, why would there be a superfluous obligation to consent in the first place?³⁰⁵ Given that the lack of consent is nullified because of the moral necessity of resolving moral tasks fairly, the latter argument should already directly establish the moral obligation to obey authority.

Estlund is aware of that problem too:

[A] formidable objection is that the duty to consent already depends on prior *moral* facts, which might as well be taken as the moral basis for the authority itself, as well as for the duty to consent. The direct authority objection claims that the consent-requiring facts are already authority-establishing facts. This objection . . . claims that the facts are already a sufficient *moral basis* for authority.³⁰⁶

So, why the detour?

³⁰⁵ One might argue that even if normative consent is doing no normative work, it might be doing dialectical work in a theoretical conversation with consent theorists. Perhaps, normative consent permits us to engage with consent theorists on their own terms without looking like we are begging the question. In the end, however, I doubt a consent theorist would be persuaded by the idea that non-consent can be voided.

³⁰⁶ *Ibid.*, 130.

Estlund offers two reasons, neither of which work. First, he maintains that “[m]oral agents possess a special kind of freedom from each other’s authority. It cannot simply befall us, but can only arise subject in some way to our own will.”³⁰⁷ However, normative consent countenances obligations that “simply befall us” insofar as it does not require actual consent to political authority. Such obligations would only be subject to our own will insofar as we actually choose them or consent to them. So, normative consent does not even address that supposed problem.

Second, Estlund argues that consenting, like promising, can have value independent of the value of the reason for which you consent.³⁰⁸ For example, doctors take an oath — they make a promise — never to do harm. They also have an independent moral obligation never to do harm. According to Estlund, there is moral value both in doctor’s taking an oath and in their abiding by the obligation not to do harm.³⁰⁹ The point is that oath taking has some moral value independent of the moral value of the obligation to do no harm. We need not be exact about what that independent moral value is. Perhaps there is intrinsic moral value in a public expression of one’s commitment to satisfy one’s obligations, or there might be instrumental value insofar as people are more likely to do things when they promise. In any case, the problem for Estlund is that normative consent does not generate that sort of moral value absent an *actual* promise or an *actual* act of consent. And, even if it could bring about some extra moral value, that fact would not address but would confirm

³⁰⁷ *Ibid.*, 151. This route is a bit perilous. The consent theorist is going to agree with Estlund here and say that the requisite connection to the will is actual consent.

³⁰⁸ Estlund calls this a “commitment task.” *Ibid.*, 152-56.

³⁰⁹ *Ibid.*, 151-54.

the fact that there is already a sufficient moral basis for political authority provided by the moral task argument.

6.5 - Specificationism and the Indeterminacy of Equality of Authority

I want to end this discussion of the relationship between authority and democracy by addressing the status of the principle of bare majority rule and bringing the discussion back to specificationism more generally. That the account I have offered can distinguish between the legitimacy of non-democratic rule and democratic rule is an important outcome. We might ask whether the account can also distinguish between different kinds of democratic arrangements, including those that do without the principle of majority rule. Does the PEC decisively choose among different specifications of democracy? One concern about egalitarian conceptions of equality-based conceptions of democracy is that such views are indeterminate with respect to what form democracy is to take.³¹⁰ Given what I have said thus far about specificationism, reasonable disagreement, and equality, such indeterminacy is a virtue of the account. It suggests yet another place in which effective legal institutions are necessary to specify relationships of equal freedom. What I want to argue here is that our folk understanding of democracy, which regards the principle of bare majority rule as sacrosanct, is just one specification of a system of political authority that satisfies the PEC.

³¹⁰ As Christiano explains, “[s]ome have wondered whether the kind of egalitarian argument . . . could not just as well some system in which decisions [are] made by lotteries wherein each person had an equal chance to affect the outcome.” Christiano, *The Constitution of Equality*, 108 (citing David Estlund, “Beyond Fairness and Deliberation: The Epistemic Dimension of Democratic Authority,” in *Philosophy & Democracy* (Oxford: Oxford University Press, 2003), 69-91.).

Theories of democratic equality in the literature tend to fall into one of three categories:

1. Equality in Influence
2. Equality in Opportunity for Influence
3. Equal Chance to Influence.

Equality of Influence requires not that one have an equal right to choose to have an equal influence but that one in fact have an equal influence.³¹¹ The most basic idea would be that legitimacy turns on whether everyone actually participates in the democratic process in an equal way (e.g., everyone must vote, everyone donates the same amount to campaigns).³¹²

Equality in Opportunity for Influence demands not equal actual influence of democratic decision making but an equal opportunity to choose to have influence. Such a view would include any of the variety of views that require equality in the resources individuals either possess or have the (formal) opportunity to procure, with which they can participate in the process (or not by choice). Theories might demand equality in any one or a number of resources. So, a theory might only demand equality in opportunity to influence with a vote, such that all have an equal right to vote. But there are other possible resource equality metrics: money permitted for political use, including personal or

³¹¹ We might include any account that requires unanimous agreement on the outcome too. But that would run afoul of the requirement that reasonable disagreement and that the need for authority be taken seriously.

³¹² Such a view would be more likely to emerge from a Self-Rule Model of democracy, but there could be other reasons to demand complete participation. Anyhow, it is not on its face inconsistent with the PEC or anything I have argued thus far.

campaign expenditures; information; time to participate in political discussion and deliberation; equal access to political officials; and so on.

Finally, *Equal Chance to Influence* would cover a variety of lottery-based democratic institutions. The most rudimentary form involves giving each citizen an equal chance to be the individual who decides on a common policy for a given period of time. For example, a democratic state might enter each citizen into a lottery with an equal chance of winning the position of king of the country and the exclusive power to legislate (perhaps within constitutional limits), for a given period of time. Or, such can be done to choose representative or government officials more generally.³¹³ Another form of lottery system, which is a hybrid with a equality in voting system, would be a point voting system. With this system, citizens vote and each alternative is assigned a chance of winning that is proportionate to the number of votes tallied for each alternative. For instance, if candidate A carried fifty-one percent of the vote, then candidate A would be given a fifty-one percent chance of winning in a subsequently held lottery to determine the winner. Thus, receiving the majority vote in the initial election does not mean that one wins; it just means the majority winner ends up with a better chance of winning the lottery.³¹⁴

³¹³ For a justification of lottery-based institutions over our current representative system, see Alexander A. Guerrero, "Against Elections: The Lottocratic Alternative," *Philosophy & Public Affairs* 42, no. 2 (2014): 135-78.

³¹⁴ Another way to think of it is in terms of placing votes in a hat. With *Bare Majority Rule*, all votes are placed into a hat and then counted. The majority wins. With *Point Voting*, instead of counting the votes, a single vote is chosen randomly from the hat and that vote decides the outcome. So the majority position still has a higher chance of being selected, but the majority is not necessarily decisive since the minority choice could be selected.

All of the options I just described are consistent with the PEC, meaning no one ends up subject to the private authority of another because any person has an equal right to authority as anyone else. Of course there may end up being differences in such views with respect to how effective they are over time and whether they sufficiently meet the substantive threshold for legitimacy in practice. Such issues are more for political science than political philosophy. My point here is to address the concern that any of these views in some sense violates the PEC or is otherwise less favorable in consideration of the PEC.

The primary criticism against views that demand fewer equalities in resources (e.g., equal votes but not equal political contributions) is that such views, in demanding only formal equality, permit individuals or coalitions of individuals to buy or otherwise manipulate political officials for their own private gain. That is obviously a problem, but it is not a problem because anything like the PEC is violated. Instead, we see that political officials and a certain subset of citizens are using their power for obvious personal gain and using others for personal gain. That would be prohibited by the fact that the state's task is to secure equal freedom, not the private interests of the rich. The real question is whether there is any problem with an individual investing unequal resources in advocating for a particular political decision because they reasonably believe that to be the best way to secure equal freedom *for all*. The PEC would not reject that possibility insofar as a commitment to equality in authority is a commitment to affirming the equal moral capacity and right of all individuals to make binding decisions.

With respect to lotteries, we can offer a similar response. Against lotteries, Christiano maintains that “the kind of equality realized by lotteries is thinner than the

equality realized by a system of ordinary voting.”³¹⁵ With respect to the ruler-for-x-days scenario, he urges that it “precludes a huge amount of negotiation and deliberation.”³¹⁶ It is unclear why that is the case, as any institutionalization of equal freedom would not prohibit negotiation and deliberation. Instead, we might see the lottery as specifying a robust commitment to equality: no matter who is picked, they have as much a right to do the job as I do. Christiano offers a similar complaint against point-voting lotteries, as he concludes that they offer a thinner version of equality because they take away the chance that any individual’s vote will be decisive in determining the outcome of the election.³¹⁷ It is unclear why the issue of whether an individual’s vote can be decisive is relevant from the standpoint of resolving moral disagreement consistent with equality. To be sure, there is little chance that any individual’s vote will be decisive in most any democratic arrangement. We clearly should not care that much about that. But more importantly, a commitment to equality in the face of reasonable moral disagreement amounts to refusing to insist that one’s say be decisive by contrast with that of any of one’s other fellow citizens. What is special about point-voting lotteries is that they give minority viewpoints an extra opportunity to carry the day, which surely cannot be inconsistent with a commitment to an equal right to an equal say.

The upshot of this discussion is that various theories of democratic equality are really various specifications of legitimate democratic arrangements. Insofar as such

³¹⁵ Christiano, *The Constitution of Equality*, 108-11.

³¹⁶ *Ibid.*, 110.

³¹⁷ *Ibid.*, 111.

arrangements are adequately effective at securing equal freedom and credibly seeking to do so, they are legitimate, and we must work within their reasonable terms.

CHAPTER 6 - PARTICULARITY PROBLEMS

It is a common position or assumption that there exists a special moral tie or bond between an individual and their own state, or an individual and their own political community. As Anna Stilz casts the position, “we think a citizen or resident ought to take her membership to have a kind of *moral salience*, one that marks this particular relationship as a source of special duties.”³¹⁸ Beyond being a substantive commitment, defensible or not, we might also think that the positing of a special moral relationship is a necessary condition for any adequate theory of political obligation or political authority.³¹⁹ For, as some theorist think, a political obligation, by its very nature, just is a special moral bond. As Simmons explains, “[P]olitical obligation *is* the moral bond which ties an individual to one particular political community or set of political institutions in a special way.”³²⁰ Thus, we might inquire into the extent to which a theory of legitimate political authority must posit a special moral relationship between an individual and their own state, or an individual and their political community of citizens. In the literature, all of those issues have been discussed under the heading of “particularity” or the “particularity problem.”

In this final chapter I want to discuss several issues related to particularity. First, I will discuss how discussion of how the idea of particularity evolved in the literature. Next,

³¹⁸ Stilz, *Liberal Loyalty*, 3.

³¹⁹ For this position, see Simmons, *Moral Principles and Political Obligations*, 30-31; Green, *The Authority of the State*, 227-28; Perry, “Political Authority and Political Obligation,” 29.

³²⁰ Simmons, *Moral Principles and Political Obligations*, 155. Green describes the issue in comparable language: “Political obligation is not just some general duty to humanity which requires compliance with governments, but rather a special moral relationship between a citizen and the state.” Green, *The Authority of the State*, 228.

I will explain that particularity is not a univocal concept but instead refers to several related but different kinds of special moral relationships a citizen may be said to have with their own state or their own fellow citizens. I will explain that particularity of political *authority* ought not be confused with particularity of *obligation*, political or otherwise. The larger point generated by that distinction is that being subject to the authority of a particular state does not imply that one's political obligations cannot or do not extend beyond state borders. Finally, I will end by discussing how my own moral task account addresses the particularity problem. I will argue that particularity arises primarily as a consequence of the limited effective control that states are capable of having over the lives of discrete groups of people. Because effectiveness is reasonably localized, as are a number of justice-related moral problems, it makes sense that political authority is localized and particular. Accordingly, considerations of effectiveness ought not be denigrated as merely practical or contingent considerations that are not morally relevant.³²¹

6.1 - The Origin and Nature of the Particularity Requirement

The “particularity requirement” was first articulated by Simmons in 1979 in the course of a wide-ranging and powerful critique of the most prominent theories of political obligation. Simmons articulate the issue in the following manner:

What precisely are the sorts of moral requirements in which a theory of political obligation is interested? . . . I do want to suggest that we are only

³²¹ Dworkin, for example, complains that such an argument “fails to capture the intimacy of the special duty. It fails to show how legitimacy flows from and defines citizenship.” Dworkin, *Law's Empire*, 193.

interested in those moral requirements which bind an individual to one *particular* political community, set of political institutions, etc. . . . [W]hile it may seem innocuous on the surface, this “particularity requirement,” as I shall call it, will exclude many traditional attempts to answer questions about political obligation.³²²

Since then, theorists have rightly assumed that any successful account of political legitimacy or political obligation must account for some sort of special normative relationship between individuals and their own political communities.³²³ For example, Green identifies “particularity” as a criterion for any successful account of a general obligation to obey the law, describing it as meaning that “[c]itizens are normally bound only to the laws of their *own* state.”³²⁴ The apparent consequences of that requirement for theories of political legitimacy and political obligation, according to Green, are “wide-ranging, for most ordinary moral reasons do not respect the boundaries of states in the appropriate way.”³²⁵ Thus, defenders of the state cannot just give up the particularity requirement because to do so would be to “assert that persons are, in the moral sense, stateless.”³²⁶ Later, I am going to focus on the conceptual dissimilarities in how particularity is described by theorists. For now, I want to focus on how Simmons

³²² Simmons, *Moral Principles and Political Obligations*, 30-31.

³²³ See, e.g., Perry, “Political Authority and Political Obligation,” 29; Wellman and Simmons, *Is There a Duty to Obey the Law?*, 34-46; Green, *The Authority of the State*, 227-28; Simmons, *Moral Principles and Political Obligations*, 31-35.

³²⁴ Green, *The Authority of the State*, 227.

³²⁵ *Ibid.*, 228.

³²⁶ *Ibid.*

articulated the idea in the context of his criticism of natural-duty accounts of the obligation to obey the law.

In articulating the particularity problem, Simmons's primary target was Rawls's natural duty of justice account of the obligation to obey the law. Recall that Rawls argued that the obligation to obey the law, and political obligation more generally, are derived from the natural duty to support just institutions. According to Rawls, individuals have a fundamental and non-voluntary natural duty of justice "to support and to comply with just institutions that exist and apply to [them]."³²⁷ That duty "also constrains us to further just arrangements not yet established, at least when this can be done without too much cost to ourselves."³²⁸ The primary virtue of the natural duty account is that it does not rest political obligation on any sort of voluntary (or even involuntary) act or transaction, including consent or receipt of benefits, on the part of an individual before they could be bound to follow the law. The state does not condition exercises of its authority or the enforcement of its demands on the existence of such transactions. As Rawls makes clear, "[e]ach is bound to these institutions independent of his voluntary acts, performative or otherwise."³²⁹

The particularity requirement, however, disqualifies the natural duty of justice as a sufficient account of the obligation to obey the law:

While it [might] follow[] that I have an obligation to support my government, it does not follow that there is anything *special* about this obligation. I am equally constrained by the same moral bond to support

³²⁷ Rawls, *A Theory of Justice*, 115.

³²⁸ *Ibid.*

³²⁹ *Ibid.*

every other just government. . . . If political obligation and citizenship are to be related . . . , we need a principle of political obligation which binds the citizen to one *particular* state above all others, namely that state in which he is a citizen.³³⁰

Rawls, of course, did not think that the natural duty of justice was particular in nature. That duty “hold[s] between persons *irrespective of their institutional relationships*; [it] obtain[s] between all as equal moral persons.”³³¹ So, the duty will require one to contribute in some way, within reason, to supporting just institutions that exist beyond the borders of one’s own state without regard to one’s institutional relationship with one’s own state or fellow citizens. But, there is the rub. The duty to obey the law *is* particular in nature, which means one is only required to obey the laws of one’s own state insofar as that is where one is located, and not the laws of some other state. Rawls offers no explanation of how we are to derive a particularized duty to obey the laws of one’s own state from a non-particularized duty to support just institutions wherever they might be located and wherever one might be located.

The concern can also be framed a different way. If the duty to obey the laws of a just state is how one is supposed to support just institutions, it should follow that one can and must follow the laws of all just states no matter where they are located and no matter where one is located.³³² It is not enough to simply state or assume that some institutions

³³⁰ Simmons, *Moral Principles and Political Obligations*, 31-32.

³³¹ *Ibid.* (emphasis added).

³³² One might object that we do in fact have obligations to follow the laws of other states insofar as we are located in those states. That is surely so, and that has to be accounted for by any theory of the legitimate authority of the state. Some laws are binding for anyone

apply to us and others do not, because the issue of which apply to us and which do not is the basic issue that needs to be explained.³³³

The basic point is that the natural duty of justice alone does not offer any account of why one's relationship with one's own state or one's own laws is special. That basic point also seems to extend to other accounts that rely on what seem like more generalized moral requirements or moral reasons: "More general moral duties . . . , such as duties to promote justice, justice, equality, or utility, cannot explain (or justify, or be) our political obligations, for such duties do not necessarily tie us either to one particular community or to our own community."³³⁴ The idea is that those values, insofar as they are to be promoted, are to be promoted wherever and for whomever they can be promoted.

Christiano therefore faces a similar difficulty in trying the rest particularity simply on the value of equality. As explained in the previous chapter, Christiano contends that "each has a duty to comply with their own democratic institutions since these institutions

within the state's border and some laws are binding only for residents or citizens of a state. The difficulty is that a theory needs to account for why states cannot issue directives across borders. For example, assume that New York State passes a law requiring all citizens of the U.S. to pay a tax to New York regardless of where they reside. Assume New York is just and is seeking support. A particularized theory of legitimate authority should be able to account for why that law is not binding for individuals outside of New York but could be binding for residents of New York.

³³³ Simmons, *Moral Principles and Political Obligations*, 147-48 ("[O]f course, it is easy enough to answer simply that the political and legal institutions of each country 'apply to' people residing permanently within that country; and this seems probably to be what Rawls had in mind. But perhaps our answer here is too easy. For one still feels inclined to ask why, if this is all 'application' amounts to, the mere application of a just institution should be thought to bind us to comply with it.").

³³⁴ Simmons, *Justification and Legitimacy*, 68.

are necessary to treating their fellows publicly as equals.”³³⁵ That presumably is also a kind of natural duty. With respect to the particularity requirement, Christiano maintains that one must abide by the law’s of one’s own state because “one would be treating one’s fellows publicly as inferiors” if one were “to support the construction of democracy in other parts of the world” in lieu of complying with one’s own institutions.³³⁶ That argument, however, is problematic for reasons similar to those noted earlier. First, it imports the notion of “one’s fellows,” the very notion that needs to be explained. Second, the response, following Simmons’s charge, is that equality should demand not just that one not treat one’s fellow citizens as inferiors but that one not treat one’s fellow *world* citizens as inferiors either. The problem is not to explain why one should not support justice or equality elsewhere in the world instead of complying with the law. The problem is first to explain why equality does not also demand that one’s comply with and support laws in other parts of the world in addition to those of one’s home state. And, second, to explain how the non-particular value of equality or the duty not to treat others as inferiors could generate particularized duties. The duty not to treat others as inferiors alone does not seem to be particular in nature. So, at best, Christiano’s argument must be supplemented.

Before delving deeper into the particularity requirement, it should be noted that natural-duty accounts surely get some things correct. For example, the natural duty of

³³⁵ Christiano, *The Constitution of Equality*, 250. There is one thing to note. It is unclear how this squares with Christiano’s contention that our political obligations, at least in the case of what he calls “inherent authority,” are owed to the legislative assembly and not directly to our fellow citizens, as would be the case with authority construed instrumentally on his account.

³³⁶ *Ibid.*

justice seems to capture the broad scope of our political obligations or reasons considered in the abstract regardless of how we might account for how it is that a state's laws can be morally binding. First, minimally, it is at least true that we have a duty not to undermine just institutions. If a state is not violating rights and doing its job according to the terms of our best moral theory of the state, justice as equal freedom for example, surely one has an obligation not to undermine such a state. That should hold true of any political entity whether or not it's one's own. And, it should hold true whether or not it turns out that a voluntary transaction is necessary to ground a state's legitimacy or authority over those subject to it. Such a duty is not special in any way. Therefore, as a U.S. citizen, I have a duty of non-interference in the administration of just institutions in the U.S. But Chinese citizens have the same duty of non-interference with respect to just political institutions in the U.S. That obligation is discharged by not interfering, for example, by not supporting jihadists seeking to undermine just political institutions at home or abroad.

Second, it is quite reasonable to think that we can have a natural duty to support just institutions abroad, at least insofar as that can be done through an effective and reasonable system of shared responsibility, and such support is needed. As a U.S citizen, I have a duty to support the just political institutions of the U.S. The nature of that support, whether through following the law or not, is a separate matter. Yet, it is reasonable to think that one can have a duty to support just institutions outside the U.S. where those institutions require support. If there are just political institutions outside the U.S. that require support, then I can have obligations to support those institutions. Of course, the nature of that support and the manner in which that requirement is to be discharged is debatable.

However, it is reasonable to think that one's political obligations do not end at the border of one's state. I will return to this point below.

Finally, although not explicit in Rawls's discussion of the natural duty of justice, we all have political obligations not to support governments that are unjust or illegitimate, wherever they may be. I cannot send money to North Korea to fund prison camps for political dissidents. In this way, the political institutions of other states are not distinct from those institutions in one's own state. One would equally have a duty not to support such institutions in one's own state.

All of these non-particular natural duties of justice bind in light of the moral necessity of political institutions that secure freedom wherever that task exist. As I have argued to this point, political institutions are morally necessary to specify and protect the equal freedom of human beings. Our political rights and responsibilities derive in part from that basic point. Regimes that discharge that mandate should not be interfered with. Regimes that require support in securing that mandate must be supported. Regimes that ignore that mandate must not be supported.

6.2 - The Particularity in Transactional and Associative Accounts

The difficulty that the particularity requirement creates for natural-duty accounts is generally recognized. By contrast, transactional and associativist accounts are often regarded as fairing better than natural-duty accounts when it comes to the particularity requirement.³³⁷ Transactional accounts contend that our political obligations arise from

³³⁷ E.g., Wellman and Simmons, *Is There a Duty to Obey the Law?*, 110.

certain sorts of voluntary undertakings or agreements, including consent and receipt of benefits. Whereas associativist accounts explain those obligations as arising from one's participation or membership in certain sorts of valuable social groups. However, it is not clear why those accounts fair any better than natural-duty accounts when it comes to particularity.

Begin with transactional theories. There are no principles internal to those theories that would limit the quantity or quality of one's transactions, and therefore obligations, with various states or political communities. Presumably one could consent or promise to be bound by the laws of any number of states absent some sort of antecedent moral requirement that one not do so. In which case, there need not be anything particular or special about one's relationship with any particular state.³³⁸ Similarly, as benefits and people can travel across borders, one can accept benefits from any number of states.

Likewise, with associativist accounts. One can associate or participate in social groups in any number of states. There are no principles internal to associative theories that would reasonably limit the quantity or quality of one's participation within, and therefore obligations within, various states. For example, on Dworkin's theory of associative obligation "the members of a group must by and large hold certain attitudes about the responsibilities they owe one another [and] . . . must regard the group's responsibilities as special, holding distinctly within the group, rather than as general duties its members owe equally to persons outside it."³³⁹ On its face, the primary difficulty with the view has to

³³⁸ Fair play accounts based on the idea of reciprocity and receipt of benefits have similar problems insofar as benefits travel across borders but authority and obligations do not.

³³⁹ Dworkin, *Law's Empire*, 199.

do with how an individual's (or a group's) attitudes with respect to one's obligations generate bona fide enforceable political obligations. Setting that worry aside, however, surely one could hold such attitudes toward and within a number of different political associations just like one could hold such attitudes within a number of different friendships.

Insofar as there are cases in which we legitimately do have special relationships within more than one state or political community, there is an additional worry that arises for some associativist accounts that use membership or participation as a constraint on more general moral values. The problem can be seen in the context of states nested within states, a common institutional arrangement. For the sake of explication, let's focus on Dworkin's account. Recall that Dworkin urges that such special responsibilities are grounded in moral obligations of equal concern for the well-being of those in the group, in contrast with those who do not share membership in the group.³⁴⁰ If those conditions are met in a political community, like friendships and families, special obligations will arise amongst and between members of the political community. Those obligations do not extend to outsiders. Thus, as a citizen of the U.S. with associative political obligations, on Dworkin's account, one's must credibly be part of a community that practices equal and special concern for other members of the U.S. That concern should extend to the citizens of New Jersey because those individuals are members of the U.S. The difficulty is that at the same time, the account should also explain the particularity of the obligations one has within one's own state of the U.S. For example, a Pennsylvania citizen would presumably have special responsibilities of equal concern with respect to Pennsylvania citizens and the

³⁴⁰ *Ibid.*, 199-200.

laws of Pennsylvania. A citizen of Pennsylvania therefore will be part of a Pennsylvania community that practices equal but special concern for Pennsylvanians. In light of that, surely one must also *not* have equal concern for the citizens of New Jersey. But, that conflicts with one's U.S. membership responsibilities and perhaps our basic intuitions about the actual scope of our political obligations. It is unclear how to resolve that inconsistency, which is problematic insofar as it is commonplace to be a part of political authority structures that are nested within each other. Particularity concerns not just one's special relationship with one's own nation but also one's own state or municipality.³⁴¹

The difficulty raised for Dworkin by the case of nested legal systems connects with a broader problem with how political theorists think about the issue of particularity. There is a tendency to think about particularity and political obligation more generally in nationalist terms. So the issue of particularity would be framed in terms of whether our political obligations, those connected with distributive justice for example, are limited by national borders rather than extending beyond those borders to global citizens generally. Those are obviously important issues. But when we are thinking about moral obligations to follow the law and the moral authority of law, we need to be sensitive to the more familiar features of modern legal systems. Hart maintained that the paradigm instance of a legal system was the "modern municipal legal system."³⁴² Surely, the same can be said for modern state and federal legal systems as well. The point is that individuals in modern

³⁴¹ Of course, practical concerns would limit the number of states that one could transact or associate with. Those concerns, however, limit the domain of one's political obligations no more than the personal-cost constraint in Rawls's natural-duty account and instrumental concerns more generally.

³⁴² Hart, *The Concept of Law*, 79.

societies are subject to a number of nested systems of law that are interrelated in complex ways. So a complete account of the particularity of political authority should address particularities wherever they exist. And, particularities do not exist just at the national level between a nation state and members of a nation. They also exist between an individual and their local municipality and their local state.

6.3 - Types of Particularity

Unfortunately, discussions of particularity in the literature have failed to make clear several conceptual distinctions. The core idea behind the particularity requirement is the idea of a special relationship or special bond. There is a special relationship insofar as the relationship described between an individual and “their own” legal system or fellow citizens, and not between an individual and citizens or legal systems more generally. That issue is not limited to the more familiar question of whether one has a special relationship with one’s country or nation. Particularity is a requirement wherever there are political structures that distinguish between insiders and outsiders. As noted, that distinction plays out at all levels of government.

What sort of moral relationship are we talking about? There are several candidates that could define the special relationship captured by the particularity requirement. Here I want to focus on two candidate relationships from the literature that might satisfy the particularity requirement. These particularities employ some of the basic Hohfeldian elements and relationships discussed in previous chapters.

The first species of particularity is *particularity of authority* and most directly addresses the scope of the state’s authority, and the scope of the state’s jurisdiction over

persons, actions, and property. In which case, a state's authority is particular insofar as it only has authority over a particular class of people and that class of people is subject to that state's authority. As was explained in Chapter One, built into that are a variety of relationships. At the very least, it means that the state has a power-liability relationship with a particular class of people within a particular territory. The point is that the state only has the moral power to change the moral situation of a particular class of individuals through its legal directives. Correlatively only individuals in that particular class are liable to have their moral situation changed by that state, and, therefore, only individuals in that class are morally obligated to comply with the laws of that state.

The particularity of authority is emphasized by Green and Perry. As Green explains the particularity requirement in this sense, he explains that “[c]itizens are normally bound only to the laws of their *own* state.”³⁴³ And, Stephen Perry, following Green, maintains that the particularity condition “states that an obligation to obey the law must arise only for the directives of a citizen’s (or subject’s) own state, and not for the directives of other states.”³⁴⁴ Accordingly, this understanding of the relevant special relationship focuses on the state’s political authority as exercised through the legal system.

The second species of particularity I will call *particularity of political obligation*. That notion most directly addresses the scope of the state and its subjects’ obligations and *to whom* those obligations are owed. To say that one’s political obligations are particular is to say that one only owes one’s political obligations to particular states or political

³⁴³ Green, *The Authority of the State*, 227.

³⁴⁴ Perry, “Political Authority and Political Obligation,” 21.

communities. To satisfy this particularity requirement there must be a basis for the conclusion that one's political obligations are *owed to* one's own state or one's fellow citizens rather than states or people more generally. What we are describing then is a correlative claim-obligation relationship rather than a power-liability relationship. Particularity of obligation imports the idea of *to* whom are one's political obligations owed, which is distinct from the question of who can impose an obligation *on* whom.

Some theorists seem to be exclusively focused on particularity of obligation when they discuss particularity. Simmons generally frames particularity in terms of a special bond, by which he means an obligation: “[P]olitical obligation is the moral bond which ties an individual to one particular political community or set of political institutions in a special way.”³⁴⁵ That notion is then leveraged, as we have seen, to challenge the particularity of natural duties to support just political institutions:

While it follows that I have an obligation to support my [just] government, it does not follow that there is anything *special* about this obligation. I am equally constrained by the same moral bond to support *every other* just government. . . . [W]e need a principle of political obligation which binds the citizen to one *particular* state above all others, namely the state in which he is a citizen.³⁴⁶

³⁴⁵ Simmons, *Moral Principles and Political Obligations*, 155.

³⁴⁶ *Ibid.*, 31-32. In later work, Simmons frames the issue in the same way: “We can understand why our government’s being just might establish a moral bond to support it, but not why this would establish a bond to support it *over* other just governments.” Simmons, *Justification and Legitimacy*, 47.

Anna Stilz follows Simmons in that regard. Stilz articulates particularity as the idea “that there is a special bond or obligation that ties the citizen or resident to her state, and to her compatriots, and not to others, and requires her to support *these* people and *these* institutions and not others.”³⁴⁷ She therefore also links particularity with the debate between cosmopolitans and nationalists about the scope of our political obligations: “Cosmopolitans have argued that . . . we ought to hold that special obligations of citizenship are fundamentally incompatible with a liberal theory of justice. On the cosmopolitan view, then, the particularity assumption *cannot* be justified”³⁴⁸ Thus, an moral theory of the particularity of one’s obligations would explain how one’s political obligations are only owed to the citizens of one’s own legal unit, whether that be a nation, a state, or a municipality.³⁴⁹

I have articulated the above distinction because at best it is often not clearly articulated in the literature and at worst it is often confused. For example, after Green states, “Citizens are normally bound only to the laws of their *own* state,” he explains:

This condition seeks to capture the directionality common to political obligation and other special obligations. Just as promising creates duties to

³⁴⁷ Stilz, *Liberal Loyalty*, 6.

³⁴⁸ *Ibid.*, 9. Dworkin also seems to understand the problem this way. Dworkin, *Law’s Empire*, 193.

³⁴⁹ A theory of political-obligation particularity could instead be articulated in terms of a particularized moral priority. So, one might argue that we do owe obligations to the citizens and states of the world more generally but that political obligations to one’s own state or fellow citizens take priority over any such worldly obligations.

particular persons only and not to the world at large, political obligations bind them to certain states only.³⁵⁰

That blends issues of authority and issues of obligation. Moral powers, while relational, are not directional like moral obligations. The existence of a moral power does not entail anything about to whom one's obligations are owed, whether those obligations are the product of an exercise of a moral power or not.

Simmons has also contributed to confusing the two issues. For example, in his earliest statement of "the problem of political obligation," he says that "a political obligation is a moral requirement to support and comply with the political institutions of one's country of residence."³⁵¹ Aside from focusing exclusively on countries rather than other legal units, combines both the issue of particularity of authority and particularity of obligation under the single heading of political obligation. In later work, he continues to blend the issue of obedience, which is connected to the moral power to impose duties, with the scope of our general political obligations:

Political obligations are felt to be obligations of obedience and support owed to one particular government or community (our own), above all others. Citizen's obligations are special ties, involving loyalty or commitment to the political community in which they were born or in which they reside. More general moral duties . . . , such as duties to promote justice, justice, equality, or utility, cannot explain (or justify, or be) our

³⁵⁰ Green, *The Authority of the State*, 227.

³⁵¹ Simmons, *Moral Principles and Political Obligations*, 29.

political obligations, for such duties do not necessarily tie us either to one particular community or to our own community.”³⁵²

Here is another example of shifting quickly between particularity of obligation and particularity of authority:

[E]ven if you had perfectly general duties to promote justice and happiness, . . . these duties would require of you that you support all such states, providing you with no necessary reason to show any special favoritism or unique allegiance to your own state, and providing none of those states with an special right to impose on you additional duties.³⁵³

Yet, the two kinds of particularities ought not be confused.

Drawing the distinction permits us to recognize examples where the scope or particularity of legitimate political authority ought not to be confused with the scope of our legitimate political obligations. First, as emphasized in our discussion of natural-duty accounts, some of our political obligations are not particular in that they are not only owed to those with whom we share a nation. Some of our political obligations — obligations that are within the state’s legitimate authority to enforce — are owed to individuals residing beyond the borders of one’s nation. For example, a federal tax to pay for aid to build schools in Niger is fundamentally owed to those individuals in Niger who require schools, not the U.S. government or one’s fellow citizens in the U.S.³⁵⁴ The Niger government does

³⁵² Simmons, *Justification and Legitimacy*, 68.

³⁵³ *Ibid.*, 137.

³⁵⁴ I say fundamentally because those the U.S. government’s responsibility to provide aid is fundamentally grounded in the need to secure freedom for the people of Niger. But,

not have the legitimate authority to impose a tax on citizens of the U.S. for that purpose. But, the U.S. government has that power. On the other hand, the U.S. government does not have the authority to impose similar obligations on individuals in Niger. Nonetheless, it may have the capacity and responsibility to support and secure a school-building program in Niger. The example shows that the particular class of people subject to a state's authority need not coincide with the class of people to whom our political obligations are owed. While a state's authority may be limited to its own citizen's, the same limit need not be placed on the class of people to whom our political obligations are owed.

Second, when we look at federalist systems that have nested authority structures, like the United States, we also see scope distinctions. Return to thinking about the relationship between the citizens of New Jersey and the citizens of Pennsylvania. In one sense, Pennsylvania citizens have a particular relationship with their own state. Pennsylvania has authority over Pennsylvania residents. At the same time, it is not as if Pennsylvania citizens do not have political obligations to New Jersey residents. In fact, those obligations are generally discharged through federal law as a result of exercises of federal authority. The point is that being a part of a particularized authority relationship does not preclude having political obligations that extend beyond the territorial borders of that authority.

6.4 - Task Efficacy, Justice, and Particularity

insofar as the U.S. government's responsibility is a collective responsibility of U.S. citizens, individual U.S. citizens will have duties of fairness to share in that responsibility.

Before discussing more about why it is important to draw the distinction just made, it will help to outline how my own view addresses the particularity requirement. I have argued that political authority is morally necessary to secure equal freedom. Accordingly, any entity or organization that has the effective capacity to secure equal freedom has a responsibility to do so. Along with that responsibility comes a host of enabling rights that constitute the state's authority, including the power to impose obligations. In turn, the state is tasked with specifying our political obligations in a way that is fair and consistent with the equal freedom of those subject to its authority. One's enforceable political obligations consist in whichever obligations emanate from the state's exercise of its authority.

The particularity of a state's political authority is limited by the state's effectiveness. The basic idea is that the state's authority is limited by its ability effectively to coordinate behavior to secure equal freedom. If a state cannot effectively exercise its coordinative capacities over a particular people in a particular territory to solve the moral problems discussed earlier, then it has no or limited authority to make and enforce its demands. But if a particular class of people in a particular territory will abide by its commands, then it both has the capacity and the right to exercise authority over those people in that territory.

Notwithstanding, the scope of the state's political authority, one's enforceable political obligations can extend beyond the state's borders. The state, however, has a right and responsibility to specify and mediate those obligations. Insofar as it can do so, it should. The view then is comparable to David Estlund's "think globally, act locally model

of political authority.”³⁵⁵ Global problems can be solved and global obligations can be discharged through localized and particular authority structures.

In claiming that Rawls’s natural duty to comply with just institutions only “side-step[s]” the particularity condition, Green says,

We normally regard political institutions as applying to us only if they either exert real control over our lives or if we stand in a relation of moral obligation to them. But the latter is the very problem at issue, and the former renders senseless the thought that there is some special, directional relationship involved.³⁵⁶

Green is surely correct about the latter prong. But in light of what I have argued, Green gives the former prong inadequate consideration.³⁵⁷ One of the core elements of legitimate political authority is the state’s capacity for effective control. Only if the state is able to discharge its tasks of coordinating action and securing equal freedom can it do so with any claim to legitimacy. And, if it does in fact possess effective control and discharges its obligation responsibly then this takes us pretty far toward a case for the legitimacy of its authority. The particularity analysis, then, should begin with the question of the extent to

³⁵⁵ Estlund, *Democratic Authority*, 150 (emphasis omitted). It should be noted that Estlund is not careful to distinguish between local authority and local obligation, but I take it that Estlund would accept the spirit of the view articulated here.

³⁵⁶ Green, *The Authority of the State*, 227-28.

³⁵⁷ This is not to suggest that Rawls made out his case or that defenders of Rawls have made their case. Waldron argues that some principles of justice are localized. My view is different. My view says that because de facto effective control is range-limited, political authority is likely range-limited. Theorists who emphasize effectiveness are Finnis and Perry. See Finnis, *Natural Law and Natural Rights*, 250; Perry, “Political Authority and Political Obligation,” 68-69.

which a given state has the capacity for effective control. The scope or the particularity of the state's authority is then measured by that effectiveness.

6.5 - Why the Distinction Matters

It will be helpful to look at some accounts in which failure to draw the above distinction leads us in the wrong direction. In "Special Ties and Natural Duties," and other work, Waldron defends a Kantian natural-duty account that shares elements similar to the account presented here.³⁵⁸ Waldron's natural-duty account aims to explain the idea that we owe a special allegiance to and have special ties with the particular state in which we reside.

The core of the account lies in Waldron's distinction between principles of justice that are "range-limited" and those that are not.³⁵⁹ A range-limited principle of justice distinguishes between "insiders" and "outsiders." That is just another way in which to say that a moral principle is particularized. Formally, a person is an insider with respect to a principle if she is a member of the set of persons whose conduct and interests the principle applies to.³⁶⁰ As a substantive matter, "an individual is within the range of a principle if it is part of the point and justification of the principle to deal with his conduct, claims, and interests along with those of any other persons it deals with."³⁶¹

³⁵⁸ Jeremy Waldron, "Special Ties and Natural Duties," *Philosophy & Public Affairs* 22, no. 1 (1993): 3-30. See also Waldron, *Law and Disagreement*; Waldron, "Kant's Legal Positivism."

³⁵⁹ Waldron, "Special Ties and Natural Duties," 13

³⁶⁰ *Ibid.*

³⁶¹ *Ibid.*

Waldron's overall point is that "a [citizen's] special relation to the legal institutions of [his country] is largely captured by the fact that he is an insider with regard to the set of range-limited principles administered by those institutions."³⁶² The distinction between insiders and outsiders is "a distinction in principle. . . . It is a difference in the content and structure of the natural duty, not a difference that depends on contingent facts and opportunities."³⁶³ Correctly, Waldron notes that principles of justice do not administer themselves; rather, principles must be administered by institutions.³⁶⁴ That is the heart of what I have argued here, namely that the law is necessary to specify what counts as acting consistent with the freedom of others. The state must administer and enforce those specifications.

Waldron offers two examples of range-limited principles. The first example is that a principle of distributive justice may be range-limited in that only insiders have a right to distributive goods whereas outsiders do not. That point captures the basic dispute between democratic egalitarians and cosmopolitan egalitarians. Democratic egalitarians argue that distributive goods ought to be distributed among citizens, rather than non-citizens, because the point of distributive justice is to establish just social relations amongst members of a democratic society. In contrast, cosmopolitan egalitarians believe that distributive goods ought to be distributed globally beyond the bounds of any given society.³⁶⁵ Waldron's

³⁶² *Ibid.*

³⁶³ *Ibid.*, 19. In this way, Waldron seems to follow Dworkin. See Dworkin, *Law's Empire*, 193.

³⁶⁴ Waldron, "Special Ties and Natural Duties," 15.

³⁶⁵ For a basic overview of versions of the dispute, see Stilz, *Liberal Loyalty*, 101-10; Tan, *Justice, Institutions, and Luck*, 87-99.

second example involves possible conflict that arises when individuals interact with their “near neighbors,” namely those who share a territory, which is “any area in which conflicts must be settled if *any* stable system of resource use is to be possible among inhabitants.”³⁶⁶ These include the issue of the nature of our private rights and the terms by which we interact with each other, as well as disputes that arise between interacting individuals.³⁶⁷ The scope of a territory can obviously change over time as the domain of expected human interaction expands. Nonetheless, there is necessary task of justly “settling those conflicts that are immediately unavoidable.”³⁶⁸

Beyond being basically just according to range-limited principles, Waldron adds two further requirements before a political institution administering range-limited principles of justice will have a “claim on our allegiance.”³⁶⁹ First, the organization must be “capable of doing justice in the territory.”³⁷⁰ That is a basic effectiveness requirement, which I have already explicated. Second, the organization must be “legitimate,” which for Waldron amounts to the claim that the organization is the “exclusive” organization administering justice.³⁷¹ Justice could not be effectively coordinated and secured if competing organizations are mutually undermining. In a sense, the latter requirement is redundant.

³⁶⁶ Waldron, “Special Ties and Natural Duties,” 15.

³⁶⁷ The subject of Waldron’s second example was discussed in Chapter Two.

³⁶⁸ *Ibid.*

³⁶⁹ *Ibid.*, 27.

³⁷⁰ *Ibid.*, 20.

³⁷¹ *Ibid.*, 22. It is unclear how the legitimacy requirement boils down to anything but the effectiveness requirement. If there are two organizations competing for effective control, with disorganization and conflict being the result, then there is not one organization that is legitimate because there is not one organization that is effective.

As noted above, the scope of legitimate political authority and the scope of political obligation are not synonymous. Although the state's political authority might extend only over those over whom it has effective control, that assumption does not entail that the state or its citizens' political obligations are owed only to such individuals. Put differently, although authority might be "range-limited," our principles of justice, or political obligations, need not be. Thus, in a sense, Waldron's view is the reverse of my own. Because effective control is range-limited, political authority is range-limited. Principles of justice need not distinguish between insiders and outsiders, even though political authority seemingly must be range-limited to be effective. Some problems of justice are local and some are global. Local effective political authority has the capacity to address both.

Note that the two examples Waldron offers are quite different in character. The scope of our distributive obligations, however conceived, are not necessarily territorially localized. And, disputes about distributive justice do not arise as an inevitable consequence of the interactions between individual's living in close proximity with each other. Such disputes are different than the disputes that arise from the interactions one has with the persons and property of those living in close proximity. One's rights concerning one's front yard can only generate local problems, while distributions of resources are not so localized. The distinction therefore is not really a distinction in principle but a distinction generated by geography. Political authority that is range-limited and tasked with administering truly range-limited principles of justice (e.g., principles requiring local

property rules) can equally be tasked with administering principles of justice that are not so limited (principles requiring foreign aid to build property regimes in other countries).³⁷²

For the same reason we should not link the dispute between cosmopolitans and liberal nationalists with the particularity requirement, as Stilz does.³⁷³ The dispute between cosmopolitans and liberal nationalists is a dispute about the scope of our political obligations and whether justice traverses state borders. A theory that explains why political authority is particular and localized need not demand that the scope of our political obligations also be localized. Therefore, there is no reason to think, following Stilz, that “the particularity assumption *cannot* be justified” on the cosmopolitan view.³⁷⁴

Before concluding I want to address some difficulties in Stilz’s own defense of particularity, as Stilz roughly makes the same Kantian argument that I have made with respect to legitimate political authority and the morally necessary role that it plays. Stilz offers a quite different account of why one’s relationship with their own state is special. Stilz specifically dismisses arguments that appeal to “to salience, natural boundaries, social ties, or considerations of administrative effectiveness.”³⁷⁵ My own view presumably relies

³⁷² Failure to grasp the distinction drawn here is comparable to the broader problem that Perry has identified as the “reverse-entailment” problem. Reverse-entailment problems arise because “the existence of legitimate authority logically entails an obligation to obey, but an obligation to obey does not logically entail the existence of legitimate authority.” Perry, “Political Authority and Political Obligation,” 10. We should distinguish between the obligations that are derived from our broader political ends and the nature of the role that political authority plays in serving those ends.

³⁷³ Stilz, *Liberal Loyalty*, 9.

³⁷⁴ *Ibid.* Dworkin also seems to understand the problem this way. Dworkin, *Law’s Empire*, 193.

³⁷⁵ Anna Stilz, “Why Does the State Matter Morally?,” in *Varieties of Sovereignty and Citizenship*, ed. Sigal R. Ben-Porath and Rogers M. Smith (University of Pennsylvania Press, 2012), 261.

on the first and last considerations, and would not reject the other considerations outright. Instead, she argues that particularity is explained by “[t]he mere fact of [an individual’s] political history.”³⁷⁶ Such a history

gives participants reasons to do their part in sustaining their particular state.

The difference between my state and another equally just state isn’t that I am especially biased in favor of it, feel especially patriotic about it, or share its national culture (necessarily), but simply that I have been part of this practice, which gives me special reason to value and contribute to it. This fact is enough to particularize my natural duty to a given scheme of political cooperation and gives me reason to do my part here rather than there. And I think this fact is sufficient to make my concern to do my part in this particular state not an act of arbitrary favoritism but rather a rational response to a valuable relationship in which I have been involved.³⁷⁷

Stilz is concerned to address several moral problems, including why one only has an obligation to obey the laws of one’s own state, why a U.S. citizen one should not set up a tax shelter in the Cayman islands, and why one should participate in the political process of one’s own state.³⁷⁸ The argument is reasonably interpreted as associative in character.

Dworkin’s associative account, for example, is premised on the idea that we are part of “a

³⁷⁶ *Ibid.*

³⁷⁷ *Ibid.*

³⁷⁸ *Ibid.*, 244-45.

history of events and acts that *attract* obligations.”³⁷⁹ It therefore may share some of the difficulties facing associative theories more generally.³⁸⁰

I will not rehearse those difficulties here but want to raise several concerns about Stilz particular account. The first difficulty is that what Stilz has described are not particularized political obligations but rather particularized permissions. The mere fact that some action is “a rational response to a valuable relationship” does not entail that that the action is obligatory or sufficiently valuable to obligatory.³⁸¹ Nor would it even be sufficient to permit criticism of the person for failing to act in a manner that supported the relationship. For example, take Stilz example of the person who domiciles himself in the Cayman islands to save money in taxes that can instead be paid to support just institutions in the Cayman islands. Now, if the person decided against the Cayman plan, on Stilz account, we could say that the decision was a rational response to a valuable shared history with citizens of the U.S. But, that does not mean that choosing the Cayman plan is *not* a rational response to something else of value. For example, the man may want to support just institutions in the Caymans or support communities in the Caymans where he has shared histories with other. All Stilz has accounted for is why the man would not be acting arbitrarily in choosing to domicile in the U.S. rather than the Caymans. Therefore, the

³⁷⁹ Dworkin, *Law's Empire*, 197.

³⁸⁰ For criticisms of associative accounts of political obligation, see Leslie Green, “Associative Obligations and the State,” in *Dworkin and his Critics*, ed. Justine Burley (Blackwell Publishing, 2004), 267-84, and Simmons, *Justification and Legitimacy*, 65-92.

³⁸¹ This objection can also be framed in terms of Darwall’s charge that only second-person reasons can form the basis of claims by other persons. See Darwall, *The Second-Person Standpoint*, 3-38.

value of shared history can be fairly easily outweighed by the value of some other personal pursuit.

In any event, it is unclear how the account does not yield odd results in more everyday cases. For example, say a lifelong and politically active resident of Pennsylvania decides to move to New Jersey. She simply wants a change. Are we to say that she is in some sense subject to moral criticism? That would seem to be absurd. Instead, we value and protect personal choice such that the mere fact of choice in this circumstance makes the choice beyond reproach. Moreover, where a person does make such a move across borders they immediately take on the legal obligations that apply to residents of the new state. Their legal obligations do not wait for shared histories to develop. Someone can live a long politically active life in Pennsylvania, but as soon as they become a resident of New Jersey, they incur New Jersey obligations. There is no time lag for shared histories or practices to develop.

In this Chapter, I have argued that it is important to be clear about the requisite relationship necessary to meet the particularity requirement. There should be no requirement on a theory of political authority or an account of the obligation to obey the law that our political obligations are specially owed to our own fellow citizens. However, it is a requirement that one be subject only to the laws of the state in which one is a citizen or in which one is physically located. The broader ends of freedom and justice, local or global, largely require the institution of localized authority.

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