LEGITIMACY AS SELF-DETERMINATION

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Abstract

The theory of political legitimacy seeks to identify the minimum conditions that must be met for a state to enjoy the right to rule over a given territory. This right, as I understand it, comprises two distinct entitlements: an internal right to enforce the law and demand compliance within a particular jurisdiction; and an external right to exclude outsiders and insist on the forbearance of the international community. I argue that both the internal and external aspects of a state’s legitimacy ultimately derive from its role in enabling the collective self-determination of its members.

The dissertation begins by developing a conception of internal or domestic legitimacy that departs from both the tradition of political voluntarism as well as the leading nonvoluntarist approaches. In contrast to the standard voluntarist account, I maintain that we have a natural duty – binding irrespective of our consent or other voluntary acts – to exit the state of nature and submit to a common system of legal authority. Unlike the prevailing nonvoluntarist theories, however, I reject the notion that our natural duties direct us to establish a highly determinate set of political institutions, as specified by a single, “prepolitical” account of justice or morality. Rather, I argue that we ought to assess a state’s right to rule in terms of the norms and values that are internal to its ongoing practices of public justification, in this way allowing significant scope for its members’ collective self-determination without collapsing into an a kind of uncritical conventionalism or moral relativism. Finally, although I suggest that modern states must protect their members’ human rights as a fundamental condition of their internal legitimacy, I conclude that considerations of self-determination nevertheless set
important limits to the permissibility of humanitarian intervention by outside agents in
the international community.
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Introduction

In an important if underappreciated passage from the *Social Contract*, Rousseau explicitly rejects the notion (occasionally attributed to him by unsympathetic interpreters) that the demands of justice or morality are to be defined with reference to the collective choices of particular political communities. To the contrary, he says, “What is good and comfortable to order is so by the nature of things and independently of human conventions.” He continues:

All justice comes from God, he alone is its source; but if we were capable of receiving it from so high, we would need neither government nor laws. No doubt there is a universal justice emanating from reason alone; but this justice, to be admitted among us, has to be reciprocal.¹

That a particular course of action may be right or just, Rousseau appears to be saying, is not sufficient – and may not be necessary – for it to be “admissible,” and thus binding or obligatory, for particular individuals or groups. Rather, there is something independently important about the requirements by which we are to be bound in some way emanating from our wills, aligning with our judgments, or resulting from processes we can ourselves view as fair or otherwise authoritative. In the terms I shall use to elaborate my own version of this ideal, the legitimacy of any system of political authority must ultimately derive from the collective *self-determination* of its members.

There are of course many ways of interpreting and extending the idea that the legitimacy of public power depends on the collective agreement, affirmation, or acceptance of those subject to it, although perhaps the most natural or intuitive way of

construing the demand for self-determination – and, of course, the one at least officially favored by Rousseau himself – is as a requirement of mutual consent. I will argue, however, that while our voluntary authorization may be necessary to legitimate many kinds of practical authority, systems of specifically political authority are distinctive in that they uniquely enable us to discharge certain “natural” or unchosen moral duties, which apply to us irrespective of our consent or other voluntary acts. If, as I maintain, we will prove unable to fulfill our natural duties, at least in cases of disagreement or indeterminacy about their content, without submitting to a public and impersonal legal authority, then we can be required to do so even in the absence of our voluntary agreement. Thus even as I deny that the legitimacy of the state depends on the literal consent of its subjects, I nevertheless share Rousseau’s underlying belief that any truly “reciprocal” specification of our fundamental rights and duties must ultimately translate the private wills of individual persons into a general and uniform set of laws.

Having established that our natural moral duties can require us to submit to at least certain forms of political rule, it might stand to reason that a conception of legitimacy as self-determination would proceed to assess the performance of particular states in terms of their ability to instantiate some distinct, nonvoluntarist conception of collective self-determination. It is commonly held, for instance, that individuals have a number of what we might call “first-order” interests in living under social and political arrangements that are governed in accordance with their own beliefs about value, whether or not these are fully rational or objectively correct. Views of this sort – several of which have been ably articulated by communitarian, multiculturalist, and democratic theorists in recent years – have the virtue of linking our assessments of particular states to their
ability to track or respond to the widespread commitments of their members, while at the same time furnishing an understanding of collective autonomy or self-rule that is capable (where political voluntarism was not) of critically distinguishing among existing systems of political authority. Despite their considerable appeal, however, such accounts have nevertheless come under fire from a number of what we might term radical proponents of collective self-determination, who maintain that public institutions ought to be assessed not in terms of a given first-order normative ideal of self-determination, but rather on the basis of a conception of legitimate authority that has itself been worked out and refined by those subject to political power, exercising what I describe as their “higher-order” interests in collective self-determination.

In view of this more radical strand of criticism, I develop an account of political legitimacy that is grounded in moral standards that, in Bernard Williams’s phrase, are “inherent in there being such a thing as politics,”² rather than in some antecedent or “prepolitical” conception of justice or morality – not even in one explicitly animated by a first-order concern with self-determination. This “realist” account of legitimacy begins from the Weberian observation that virtually all public officials and institutions attempt to stabilize their power not simply through the threat and use of physical force, but by offering their subjects reasons purporting to demonstrate that their authority is in fact rightful or legitimate. These efforts, in turn, expose public authorities to the possibility of criticism on the basis of standards that are internal to the practice of public justification itself, thereby obviating the need to ground a normative conception of legitimacy in an external or prepolitical theory of justice or morality. Because, moreover, as Weber again

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saw clearly, public institutions and officials must typically appeal to substantive commitments and self-understandings that are in fact widely shared among those subject to their power, the realist approach will tend to require states to govern in a manner that is highly responsive to the salient evaluative beliefs of their subjects – in this way, securing individuals’ first-order interests in self-determination (of the sort emphasized by theorists of democracy and ethical pluralism) without frustrating their higher-order interests (stressed by the so-called radical critics) in determining the requirements of legitimacy themselves through collective patterns of political contestation and compromise.

After setting out the abstract or “formal” realist account of legitimacy, I go on to explore the practical implications of this view for the legitimacy of contemporary states. I argue that, despite the many important differences among existing societies and cultures, nearly all contemporary states attempt to legitimate their power through appeals to at least certain minimally liberal individual rights and opportunities – in many cases, avowing an allegiance to their subjects’ “human rights” despite routinely disregarding these rights in practice. Even if many of these appeals are disingenuous, however, I suggest that their prevalence among contemporary practices of public justification allows us to identify a range of substantive conditions of legitimacy – over and above the formal requirements implicit in the practice of public justification itself – that apply to all or nearly all states seeking to legitimate their power in the world today. Thus without invoking an independent or prepolitical moral theory, the realist account is nevertheless able to provide a basis for the commonly held view that human rights (or at least some
core subset thereof) comprise universal (or near-universal) standards of internal
legitimacy under contemporary historical conditions.\(^3\)

Whatever the plausibility of this conception as an account of a state’s internal
legitimacy, however, it remains unclear whether a state’s ability to protect its subjects’
human rights can simultaneously provide a basis for its *external* legitimacy, conceived as
a right against outside intervention in its territorial jurisdiction. For there appears to be a
tension between the idea, on the one hand, that all human rights violations give outside
agents reasons to act (by coercive means, if necessary) so as to restore those rights and
prevent future violations, and the view, on the other, that some states have a strict right
against all forms of coercive intervention, at least once it is appreciated that no existing
state is capable of securing *perfect* human rights protection. In order to establish the right
of at least some existing states against external intervention in their territory, I argue that
individuals must be understood as having additional and potentially countervailing
interests in self-determination that go beyond their interests in achieving greater human
rights protection overall. These interests derive in part from the fact that human rights
are themselves abstract and partly indeterminate standards that must be particularized by
historically distinct political communities; as a result, individuals’ interests in securing
human rights must be understood at least in part as interests in preserving the particular
instantiations of those rights that have resulted from their past patterns of cooperative
interaction. Beyond this, however, individuals typically have a further set of interests in

\(^3\) See, for example, Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations of
Secession: The Case for Political Self-Determination* (Cambridge: Cambridge University Press, 2005),
Andrew Altman and Christopher Heath Wellman, *A Liberal Theory of International Justice* (Oxford:
Oxford University Press, 2009), and Anna Stilz, “Nations, States, and Territory,” *Ethics* 121, no. 3 (2011):
572-601; compare also Bernard Williams, “Human Rights and Relativism,” in *In the Beginning Was the
Deed*, pp. 62-74.
reforming or revising their political practices and arrangements through further cooperative interaction with their fellow members, even if external intervention could more efficiently promote even their particularized interests in greater human rights protection overall. In virtue of these additional sets of interests in collective self-determination, I conclude that at least some states can enjoy external legitimacy despite imperfectly protecting their subjects’ human rights.

The argument of the dissertation divides into four chapters. Chapter 1 pursues a largely internal critique of the theory of political voluntarism, and seeks to establish that a duty to submit to a system of political authority can be understood to follow from the very moral, practical, and conceptual commitments that the voluntarist account itself accepts. Chapter 2 then presents a series of “realist” criticisms of the leading nonvoluntarist account of legitimacy – what I call the justice-based view – and develops an alternative account that is responsive to these criticisms. Chapter 3 applies this alternative account to the contemporary political world, and explores the extent to which a realist approach is able to generate broadly liberal standards of legitimacy under current conditions. Finally, in Chapter 4, I turn to the problem of external legitimacy and argue that considerations of self-determination can provide a compelling account many of our considered judgments about the limits of permissible humanitarian intervention without denying the normative force of universal human rights. What emerges, I suggest, is a unified picture of legitimate political authority, the various parts of which can nevertheless stand on their own – neither entailing nor entailed by the truth of the others.
Voluntarism, Particularity, and the Possibility of Legitimate Authority

The problem of political legitimacy arises, as a practical matter, when public authorities issue directives that conflict with the conscientious moral commitments and self-understandings of their addressees. In these familiar circumstances, public officials must decide whether to enforce legal orders that they themselves find objectionable, or that they hesitate to impose upon others who do, and citizens generally must likewise determine whether to comply with laws that instruct them to act against their own considered judgments about central questions of value. In order to offer practical guidance to individuals faced with such apparently conflicting reasons for action, the theory of legitimacy seeks to identify those conditions in virtue of which individuals ought ultimately to accept the authority claimed by their public officials, despite there being some rational basis for preferring a distinct set of arrangements or legal rules. When the conditions of legitimacy are satisfied, public officials will enjoy a moral permission to apply the law with force, and citizens will fall under a moral requirement to comply even with legal requirements whose content they do not endorse.

Historically, theorists of legitimacy have held that the only way for a state to acquire such broad and imposing authority is for its subjects to have voluntarily agreed to submit to its rule. States may, of course, direct us to act in ways that morality independently requires, in which case we must understand ourselves as falling under a duty to do as the law commands. Yet unless we have personally agreed to relinquish our
private judgment to our local public authorities – and even then, on some accounts, only within certain moral limits – we cannot be bound to comply with those legal directives that conflict with our own views about the best course of action in a given case. Although the requirement of voluntary authorization is surely a demanding standard of political legitimacy, it is nevertheless one that many early social contract theorists thought might plausibly be satisfied in practice, given the well-known advantages of political coordination and the presumed ability of individuals to look after their own interests without the tutelage or interference of others. Ever since Hume’s well-known attack on the “original contract,” however, latter-day theorists of political legitimacy have been far less sanguine about the prospects of a state realistically achieving legitimacy on the basis of its members’ consent or voluntary agreement. To begin, they observe, few subjects of existing states can be said to have chosen – whether expressly or tacitly – to be bound by their political institutions under anything approximating the conditions typically thought necessary to render ordinary contracts and promises morally binding (such as the absence of coercion and the availability of acceptable alternatives). Indeed, in a world whose surface is exhaustively parceled into separate juridical states, even those with the means and desire to exit their current state of residence cannot escape nonvoluntary subjection to political rule altogether: they have no choice but to live under some state, yet no particular state is required to take them in.\(^4\) Given the practical barriers to forming a political association *founded on* individual consent, some theorists in the voluntarist tradition have sought instead to derive the legitimacy of states from the free choices of persons *acting within* the constraints that define their terms of political

membership. Yet even these comparatively sophisticated attempts, such as Hart’s theory of “fair play,” are now generally understood to ground political obligations for at most a small subset of those subject to political power. With no existing state satisfying the demanding requirements of genuinely voluntary authorization, political voluntarism today persists as a fundamentally skeptical thesis, widely thought to entail what has been dubbed “philosophical anarchism,” or the view that no existing state is legitimate.

In this chapter, I seek to turn back this sort of skepticism about the practical possibility of legitimate political authority without relying on the implausible notion that most citizens somehow voluntarily agree to be bound by their political institutions. Rather, I argue that individuals’ duty to support the state can be derived from the unchosen or “natural” moral duties that the voluntarist account itself accepts. Thus, unlike the leading natural duty theories of legitimacy, which seek to ground our duty to support (certain) public institutions in our natural duties of justice or of mutual aid, I show that we can be morally required to submit to political authority even if we have no natural duties beyond our negative duties to honor one another’s basic natural rights. In Section I, I argue that, because these rights are partly indeterminate and subject to disagreement among equally authoritative interpreters of the natural law, we will prove unable to define and enforce these rights in a reciprocally authoritative way without

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5 For an influential critique, see A. John Simmons, “The Principle of Fair Play,” in Justification and Legitimacy: Essays on Rights and Obligations (Cambridge: Cambridge University Press, 2001), pp. 1-26; compare also John Rawls, A Theory of Justice, rev. ed. (Cambridge, Mass.: The Belknap Press of Harvard University, 1999), pp. 97-100, where he revises his earlier account to conclude that fairness-based political obligations are largely a case of noblesse oblige, incumbent only upon those who have freely assumed public office, for example, or who, “being better situated, have advanced their aims within the system” (p. 100).

coordinating under a common and impersonal system of law. Since we cannot adequately specify these rights, much less successfully honor them in practice, without the mediating assistance of impersonal legal institutions, we can be morally required to commit to a common political authority irrespective of our voluntary acts.

In Section 2, I go on to address a further source of skepticism about the practical possibility of legitimate authority under the standard conditions of modern political life: namely, the charge that an account of legitimacy founded on our natural moral duties – even if it could succeed in establishing our duty to support some political authorities in some ways – cannot bind us to support the particular state in which we reside, much less to obey its directives in every case. I argue, first, that given the necessarily territorial aspect of effective political coordination, our general duty to support the state can in fact be concretized in terms of a more specific duty to support our own legitimate state (setting aside, what will be the subject of chapters to come, the question of what normative conditions a given state must satisfy to be legitimate in the relevant sense). Second, I maintain that this particularized duty to support the state in which we reside ought to be understood as a general duty to obey the law, so long as this duty is appropriately qualified to allow for the possibility of morally permissible civil disobedience against a legitimate state and to recognize the possibility that citizens may at times have overriding moral duties to break the law in some cases. I therefore modify the standard account of our duty to obey, arguing that it is best conceived as a disjunctive duty either to obey the law or to engage in civil disobedience, and that even this disjunctive duty is merely pro tanto, and so may be outweighed by stronger and conflicting considerations. In this way, even as I leave open the precise conditions that a
legitimate state must satisfy in practice, the present chapter puts us in a better position to understand both how legitimate authority is possible at all, and what follows for particular citizens and officials from the judgment that their public institutions are legitimate.

1. The Duty to Support the State

Political voluntarists hold that individuals cannot have obligations to their state without freely committing themselves to be bound by its authority. Since most members of any given state have not undertaken such voluntary commitments, all states are thus said to be illegitimate with respect to most of their members and thus to lack the sort of general authority that they characteristically claim for themselves. But while these thinkers deny that anything other than voluntary acts can successfully ground the authority of the state, few if any voluntarists would deny the existence of nonvoluntary or “natural” duties altogether. (Here and throughout, I distinguish between “obligations,” which arise from our voluntary acts and are typically owed to definite persons, and “duties,” which apply to us regardless of our voluntary undertakings and obtain among all moral persons generally.7 I shall say that a state is legitimate if its members have either obligations or duties to comply with its directives.) My objective in this section is to show that a duty to support the state can follow from general and unchosen duties that voluntarists themselves accept, and thus that those drawn to the moral and practical commitments underlying political voluntarism have reason to view at least some nonvoluntary states as enjoying genuinely legitimate authority (albeit with their subjects having duties, rather than obligations, to comply with their local authorities). Political

voluntarists, that is, ought to abandon voluntarism along with the anarchist implications that are thought to follow from their foundational normative and conceptual premises.

Given the assumption of natural moral freedom or self-government that underlies their conception of political authority, voluntarists are committed, at the least, to a minimal doctrine of natural rights, or rights that all individuals have independent of their institutional membership or affiliation. Rights of this sort define a sphere of personal sovereignty or dominion within which individuals have exclusive discretion: they can by definition do no wrong operating within this sphere, and others by definition wrong them if they interfere with right-holders within their domain of self-rule, at least in the absence of the right-holders’ voluntary authorization to do so. These natural rights correspond to negative natural duties on the part of other individuals, who are morally required to honor others’ rights regardless of whether they have consented to do so. A. John Simmons, perhaps the most influential contemporary proponent of political voluntarism, goes further to accept a range of positive natural duties, including perfect duties of easy rescue (which correlate with rights held by those in peril against nearby persons capable of assisting) as well as imperfect duties to advance others’ interests and to promote justice.

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8 Natural rights need not be decisive or conclusory in every case, and so may be permissibly violated in certain circumstances, even if such circumstances would not cancel or expunge the pro tanto wrong of the rights-violation in question. As Simmons puts it, “[i]t may well be that while a certain government does not have the right to command, its actions may nonetheless be morally justifiable; rights violated by its actions may not be as important as other considerations, such as the need for order” (Moral Principles and Political Obligations, p. 199, emphasis in original).

9 Thus while I shall go on to argue that natural rights in this sense should be understood to imply a duty to create or support public institutions capable of authoritatively specifying the content of these rights in cases of indeterminacy or disagreement, natural rights make demands in the first instance on individuals and on social and political institutions only (if at all) insofar as individuals cannot specify or enforce one another’s rights unilaterally. Compare Henry Shue’s definition of a moral right as providing “(1) the rational basis for a justified demand (2) that the actual enjoyment of a substance be (3) socially guaranteed against standard threats,” in Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy, (Princeton: Princeton University Press, 1980), p. 13, emphasis added.
(which do not correspond with rights held by others, and so may be discharged at the discretion of each duty-bound person).  

It is commonly supposed, as Simmons puts it, that duties to respect “purely negative rights,” requiring us to “refrain from aggression toward or breaking faith with others, … can plainly be discharged by individuals regardless of their social circumstances.”  

If I can honor others’ natural rights, such as rights to bodily integrity and personal property, simply by keeping to myself, then my natural duty to refrain from harming others cannot imply a further duty to submit to the authority of political institutions. Given this common assumption, it is not surprising that contemporary defenders of legitimate authority have frequently sought to ground our duty to support the state in one of our positive natural duties to improve the situation of others. Christopher Heath Wellman has developed an account of what he calls “samaritanism,” which holds that our duty to support the state follows from a basic natural duty to do our fair share in rescuing others from peril when we can do so without great personal cost or risk. And of course Rawls and several others have argued that our natural duty of justice “requires us to support and comply with just institutions that exist and apply to us.”

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11 Simmons, “The Duty to Obey and Our Natural Moral Duties,” in Wellman and Simmons, Is There a Duty to Obey the Law? p. 152.


The central difficulty with these accounts, according to Simmons and other critics, is that they derive particularized and often burdensome duties to comply with the laws of one’s own state from general positive duties that, in any other context, would leave a given person at liberty to determine how best to discharge her duties and would not require her to undertake action that was more than minimally costly to herself. Individual citizens, after all, are rarely if ever faced with a choice between obeying the law and single-handedly launching their society into a chaotic state of nature. If the benefits of a given person’s compliance are typically negligible, but the personal costs are at least sometimes substantial, then it may be difficult to see how her general positive duty of “easy rescue” can imply a more specific duty to obey the laws of her state.14 Likewise, Simmons argues, even if we assume (what he denies) that justice can only be achieved through political institutions, our duty to promote justice would then enjoin us to support just institutions wherever they exist, which we could do by speaking out against injustice, or by giving money to or volunteering in just causes, without having a general duty to obey the laws of our state.15 Compliance with just laws, like support for an upstanding charity or NGO, might be a particularly efficient or commendable way of discharging our general and positive duties of justice, but they fall short, on Simmons’s view, of grounding the legitimate authority of the state.

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14 See Simmons, “The Duty to Obey and Our Natural Moral Duties,” in Wellman and Simmons, Is There a Duty to Obey the Law? pp. 181-185. While, as we shall see below, I am sympathetic to Wellman’s argument that we can be required to do our fair share of a morally mandated collective task, rescues or emergencies are not collective tasks whose responsibilities can be fairly distributed; the moral burdens of easy rescues simply fall on those who happen to be in a position to help – which, in the political case, would only be those whose actions would happen to make the difference between the continuance of the state and a collapse into anarchy (see ibid., p. 184). None of this is to say that supporting the state is not a morally mandated collective task, but simply that the easy rescue model is not well-suited to handle such a case.

While I think these standard natural duty accounts have the resources to respond to much of Simmons’s critique – and, indeed, I shall draw on some of their replies in the pages to follow – I will nevertheless concede the inadequacy of these views for present purposes. For I believe we can establish general duties to support the state (and, further, to support the particular state in which we reside) on the basis of negative moral duties that an even more austere natural rights theorist than Simmons would be prepared to accept.16 Not only does this approach sidestep the aforementioned concerns about deriving a duty to support the state from a positive duty of charity or justice, it also has the virtue, as I will eventually suggest, of grounding our basic political duties in a thin or minimal conception of natural morality, so as not to frontload our account of political legitimacy by presupposing a view of the just or ideal society that might be subject to reasonable disagreement among citizens.

This minimal account of our natural duties holds that all persons have rights to bodily inviolability and to some modicum of personal property, which correspond to a duty on the part of all other persons to refrain from visiting harm to their persons or property. Such rights are “natural” in that they – unlike, say, a right to due process – would be intelligible to us outside the context of political institutions: in a hypothetical state of nature, for example. I do not mean to imply, as some early natural rights theorists believed, either that such rights would necessarily be intelligible to the particular persons living in a pre-institutional state of nature, since such persons might conceivably lack the requisite capacities to make and recognize moral claims on one another, or that such a

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16 See, for instance, Simmons, “Justification and Legitimacy,” in *Justification and Legitimacy*, p. 138, where he makes reference to a “stricter Lockean line” that denies that we have general duties to promote justice.
“natural” condition ever existed.\textsuperscript{17} We can simply imagine that, if all existing states were suddenly dissolved or if persons like ourselves were deposited in a stateless condition, we would (on this minimal natural rights account) continue to be bound by negative duties not to harm others or their property. Finally, this account assumes that all individuals are entitled to coercively enforce their natural rights against one another, at least in the absence of a legitimate central authority. Thus not only are others not at liberty to decide when to discharge their negative natural duties (as they are with respect to their duties of charity or justice); if others fail to respect my natural rights, I can force them to do so.\textsuperscript{18}

Simmons, as we have seen, argues that these negative natural duties “can plainly be discharged by individuals regardless of their social circumstances”:

Since these are duties I can discharge independent of institutional arrangements, I am permitted to do so while refraining from supporting or joining myself to even morally exemplary arrangements… Even in a relatively disorganized state of nature (as Locke emphasizes) it is perfectly possible – even if sometimes difficult – for persons to do their duty, obeying the natural law requirement for respecting others’ rights.\textsuperscript{19}

It is important to be clear about what Simmons is claiming. He is \textit{not} arguing that all or most individuals are \textit{likely} to honor others’ rights unilaterally (that is, without institutional coordination).\textsuperscript{20} Indeed, even as Simmons claims that there is “reasonably

\textsuperscript{17} My account of natural rights can therefore accept the central thrust of Hegel’s critique of social contract theory in \textit{Elements of the Philosophy of Right}, trans. Allen W. Wood (Cambridge: Cambridge University Press, 1991), §§75, 258.

\textsuperscript{18} The connection between natural rights and coercive enforcement is elaborated in H. L. A. Hart, “Are There Any Natural Rights?” \textit{Philosophical Review} 64, no. 2 (1955): 175-191, at p. 178; Simmons himself defends a natural right to punish in \textit{The Lockean Theory of Rights} (Cambridge: Cambridge University Press, 1992), ch. 3 and affirms the “natural right of all persons to enforce morality (by coercion, if necessary)” in “The Duty to Obey and Our Natural Moral Duties,” in Wellman and Simmons, \textit{Is There a Duty to Obey the Law?} p. 192. I further assume that violations of natural rights would license coercive enforcement by \textit{anyone}, not merely the right-bearer herself, in a hypothetical state of nature, although I will largely set aside the problem of (nonstate) third-party enforcement in the discussion that follows.

\textsuperscript{19} Simmons, “The Duty to Obey and Our Natural Moral Duties,” in Wellman and Simmons, \textit{Is There a Duty to Obey the Law?} p. 152 and “Justification and Legitimacy,” in \textit{Justification and Legitimacy}, p. 138.

\textsuperscript{20} Nevertheless, Simmons is clearly sympathetic to Locke’s view that “[m]an’s natural sociability, aversion to violence, and sensitivity to the demands of reason’s (God’s) law, while not always sufficient to
broad agreement” about the “core requirements” of natural law,\textsuperscript{21} his view can accommodate the possibility that some people might nevertheless remain ignorant of their natural duties in particular cases or prove incapable of reliably upholding them in the absence of a coercive legal authority. Given the limits of human reason and moral motivation, combined with our tendency to limit our exposure to future harm by posturing ourselves defensively and perhaps even taking preemptive action against would-be aggressors, it is entirely possible, on Simmons’s account, that the state of nature will turn out to be a Hobbesian \textit{bellum omnium contra omnes}. What he \textit{is} claiming, however, is that it is possible for at least some of us to apprehend and act on our true natural duties, even if we are surrounded by those who would violate our natural rights if they had the chance. In order to escape such a condition of insecurity, and to avoid the burden of coercively enforcing our rights unilaterally, we may choose to form private protective agencies or, of course, to join with like-minded persons to establish a coercive state. But so long as it is at least possible for us to discharge our natural duties without submitting to a common authority – even if joining the state would be an

\begin{footnotesize}
\textsuperscript{21} Simmons, “The Duty to Obey and Our Natural Moral Duties,” in Wellman and Simmons, \textit{Is There a Duty to Obey the Law?} p. 176. In this passage, Simmons is replying to the Kantian claim that individuals might disagree about the requirements of \textit{justice}, rather than the content of their natural rights, properly speaking. However, the context makes clear that the conception of justice he has in mind is what he earlier referred to as a “minimal conception of justice” that requires “only that we refrain from personally violating others’ rights (rather than also assisting in minimizing rights violations by anyone)” (pp. 151-152). In any case, even if there were “broad agreement among competing conceptions” of justice, considered as a more expansive ideal, there would surely be agreement on the minimal natural rights under consideration here as well.
\end{footnotesize}
exceptionally “good bargain,” from our own moral or prudential perspective – we are nevertheless permitted to remain in our natural condition.22

Some may, of course, contest Simmons’s view that we are permitted to opt out of the state even if it is the most efficient available mechanism for securing the protection of natural rights overall. But on the minimalist account of our natural duties presented here, which avoids relying on such positive duties to advance the situation of others (even to improve the likelihood of third parties’ respecting their rights), I have implicitly foreclosed that line of response. Rather, on the present account, if we have natural duties to support the state, it must be because doing so is the only way that we, individually, can honor the natural rights of others. Yet I believe we can establish a duty to support the state on just these grounds. A natural duty to support the state can be derived from our minimal duties to respect others’ rights, in light of three key features of rights in a stateless condition. First, our natural rights are highly indeterminate with respect to particular cases, and individuals will only be able to honor them in practice if they have on hand some interpretation or specification of these rights. Second, we are not indifferent as to how these rights are interpreted and applied in concrete cases, but rather disagree in good faith about how they should be specified. Third, and finally, given our reciprocal standing as equally authoritative interpreters of the natural law, we cannot enforce our own interpretation of our rights against others – much less expect others to defer to our interpretations – in the face of indeterminacy and reasonable disagreement about the content of our rights. Putting these three features together, I argue that we

22 Simmons, “Justification and Legitimacy,” in Justification and Legitimacy, p. 138; see also p. 154, where he rejects “the idea that the best way to understand the rights of others is as claims on whatever action by us will best promote their security and well-being. On the Lockean view, … the rights of others can be respected by us individually.”
cannot successfully discharge our duty to honor others’ rights without committing to a common political authority.

To see why this is so, consider the case of property. Even outside a common framework of rules governing the acquisition and transfer of rights to the external world, we may nevertheless be able to rely on a set of common intuitions about the general basis and nature of these rights. I have assumed, for instance, that any plausible rendering of the natural right to property would imply that all individuals must have at least some access to the earth’s land and resources; if all the earth’s surface could be owned by a single individual (to take a fanciful example), no one else would be naturally permitted (that is, permitted without the single owner’s permission) to occupy any space on earth or to consume or utilize any natural resources. Clearly, such an asserted property right would be untenable on the account of natural rights under consideration, since it is inconsistent with the very idea of a universal right to personally control at least some external resources. In light of such inherent limits to the scope of our natural property rights, we might expect, following the early contractarian tradition, that all or most individuals in a state of nature would converge on a modestly substantive “master principle” of property, such as the familiar principle of first occupancy, qualified perhaps by a requirement (such as Locke’s “proviso”) that there be “enough and as good left in common for others.” I do not by any means intend to suggest that this is the only way of understanding the natural right to property so as to ensure that each person is able to enjoy this right, for there are doubtless many such principles that could illuminate the

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question of rightful acquisition in a similar manner (a point to which I shall return shortly). I simply mean to grant that our natural rights are not necessarily radically indeterminate: that it is possible to exclude certain interpretations of these rights, at least at a sufficient level of abstraction, as fundamentally implausible and, further, that most or all conscientious individuals in a state of nature might converge in rejecting them.

Yet in any particular case, even such an agreed-upon master principle would have to be refined and specified in innumerable ways. Suppose that I am the unambiguous first occupant of some tract of land, that you are the unambiguous first occupant of a neighboring tract, and that our appropriation of these lands has clearly satisfied the proviso that we leave enough and as good in common for others. (We should pause here to note just how much the preceding statement assumes: that we can even agree on what the “proviso” means, for instance, and that we could be in a position to know that it has been satisfied.) Against the background of such relatively clear-cut natural property rights, suppose I pollute the stream that runs through both our properties, rendering your field (downstream from mine) unsuitable for farming. Have I violated your natural rights by creating a negative externality that adversely impacts the fertility of your land? While it seems to me that the master principle has run out even at this early stage in adjudicating our dispute, suppose further that the principle, on any plausible rendering, must hold that I have in fact violated your property rights. But then we must ask, at what point – at what level of pollution – did my actions begin to violate your rights? With a tiny drop of

pollutant in the stream? Or not until my actions had destroyed your entire crop?

Supposing further that even these questions admit of a non-stipulative response, there will still remain the further question of what form and degree of compensation you are entitled to extract from me in view of my rights-violating actions. It is difficult to see how these, or indefinitely other, questions about the precise content and concrete practical implications of our rights could be answered with reference to an abstract understanding of ourselves as naturally entitled to a modicum of personal property or even in terms of a comparatively substantive master principle of property rights on which we might plausibly converge.26

Matters become more complicated still once we acknowledge that reason alone will frequently fail to yield widespread moral agreement about the content of our natural rights. Individuals reasoning in good faith about the requirements of our natural duties will frequently arrive at a wide range of moral principles (such as the master principle of property noted above) capable of explaining and elaborating our natural rights, even when they recognize what appear, at a sufficient level of abstraction, to be the “same” minimal set of rights. Thus while Simmons may be trivially correct in holding that “there is in fact reasonably broad agreement among competing conceptions” of natural freedom “on at least its core requirements (concerning nonaggression towards innocents),” such

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26 To put the point from the opposite direction, those who deny the partial indeterminacy of property rights must insist that exactly one scheme of rules – down to the last detail specifying the precise quantity of pollutant that constitutes a rights-violating externality in the case above – can count as an acceptable interpretation of our natural right to property. Analogous points hold in the realm of rights to bodily inviolability, for even though the boundaries of our person are more naturally unambiguous than the boundaries of our property, we will still encounter a range of hard cases (involving unintentional injury, say) in which the mere fact of a bodily violation does not automatically suggest a rights violation, and where we must rely on more fine-grained rules (in this case, pertaining to negligence and due care) to resolve the problem at hand. For an incisive discussion of these problems in the context of bodily rights, see Japa Pallikkathayil, “Persons and Bodies,” in Freedom and Force: Essays on Kant’s Legal Philosophy, eds. Sari Kisilevsky and Martin Stone (Oxford: Hart Publishing, forthcoming).
abstract convergence is wholly inadequate to forestall conscientious disagreement about the appropriate moral justification of these requirements and thus of how they ought to be interpreted and applied in the face of indeterminacy. To return to our example from above, if our natural rights to property are best explained by our each having an interest in maintaining a private sphere of movement or action, for example, then it is unclear how your property rights could be construed to give you a claim against my polluting the stream from afar, which after all fails to constrict your plane or movement or to impair your ability to move about therein. On the other hand, if natural property rights are best justified in terms of their allowing individuals to securely extract vital resources from the natural world under conditions of scarcity, then perhaps my polluting the stream that waters your crops is in fact a paradigmatic violation of your rights. It may be, of course, that there is ultimately a right answer to these questions and that, with enough time and good will, we could resolve our disagreement through an exchange of reasons alone. Yet individuals confronted with disagreement about their natural rights – about their basic moral claims to their physical person and external resources – are rarely in a position to postpone action until an interpretive consensus on these matters can be achieved (which might typically involve waiting a long while indeed). Rather, we must often settle on some specification of our rights in real time, as it were, in the face of abiding and conscientious disagreement among moral persons.

Faced with moral disagreement about the content of partly indeterminate rights, as defenders of political authority since Hobbes have long recognized, individuals in the state of nature will not infrequently come to blows. Unless we all relinquish our right to

27 Simmons, “The Duty to Obey and Our Natural Moral Duties,” in Wellman and Simmons, Is There a Duty to Obey the Law? p. 176.
28 See the discussion in Waldron, The Dignity of Legislation, pp. 50-51.
unilaterally interpret and enforce our first-order natural rights, we will face a perilous cycle of violence and retaliation in which no one’s rights are secure. While, as we have seen, the standard voluntarist account has sought to soften this bleak picture by emphasizing the general clarity of our rights and the extent to which individuals will agree on their “core requirements,” it is nevertheless committed to denying that we have a duty to give up our rights of interpretation and enforcement to the state, even if the Hobbesian account of the state of nature turns out to be accurate. Voluntarism can concede, that is, that individuals might disagree about the content of their rights, and that, when they attempt to enforce opposing understandings against one another, violent conflict may well ensue. Yet in any given case of disagreement, on this view, there nevertheless remains a fact of the matter about the true content of our rights, and the person who seeks to unilaterally enforce the correct account of her rights does nothing impermissible, even if others will predictably reject her understanding and opt, impermissibly, to use violence in return. As Simmons puts it, if someone else’s conception of natural rights “is the correct conception, she cannot possibly wrong me by successfully acting on it (however little I may like what she does).”29 Thus even if I can be counted on to initiate a cycle of retaliatory violence by forcibly resisting your rightful actions, this merely impugns the quality of my moral judgment; it does not make it any less possible, in principle, for others to respect my rights and thus discharge their natural moral duties unilaterally, that is, without relinquishing their powers of interpretation and enforcement to the state.

29 Simmons, “The Duty to Obey and Our Natural Moral Duties,” in Wellman and Simmons, Is There a Duty to Obey the Law? p. 176, emphasis in original.
However, even conceding (what I sought to deny above) that there is a single correct way of resolving all indeterminacies in our natural rights, I believe the standard voluntarist response to the problem of moral disagreement nonetheless fails to appreciate the implications of voluntarism’s own conception of natural rights and of individual right-bearers as natural moral equals. We can begin to see this tension at work by recalling two essential properties of natural rights, as presently conceived. First, natural rights ground not only a moral permission on the part of the right-holder to utilize her body or some external space or object in nature, but entail, in addition, a correlative duty on the part of others to honor or respect those rights: in Wesley Holfeld’s terms, natural rights are moral claim-rights. At the same time, given both the moral urgency of the interests that underlie these rights, together with the absence of a naturally privileged or mutually salient authority capable of adjudicating disputes among rights-holders, each right-holder must be understood, second, as enjoying a moral permission or Hohfeldian privilege or liberty-right to coercively enforce her own natural rights should others fail to honor them in practice. In the face of disagreement about the content of the rights in question, however, there appears to be an inconsistency in a given agent’s asserting both that others fall under a correlative duty to honor her interpretation of her natural rights

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30 See Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions*, ed. Walter Wheeler Cook (New Haven: Yale University Press, 1919). Kant’s well-known formulation of the right to property nicely captures this logical feature of (external) rights more generally: “When I declare (by word or deed), I will that something external is to be mine, I thereby declare that everyone else is under obligation to refrain from using that object of my choice… This claim involves, however, acknowledging that I in turn am under obligation to every other to refrain from using what is externally his; for the obligation here arises from a universal rule having to do with external rightful relations” (*The Metaphysics of Morals*, in *Practical Philosophy*, ed. Mary J. Gregor [Cambridge: Cambridge University Press, 1996], 6:255-256, p. 409). Compare also Joseph Raz’s formal definition of a right in *The Morality of Freedom* (Oxford: Oxford University Press, 1986), p. 166: “X has a right’ if and only if X can have rights, and, other things being equal, an aspect of X’s well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty.”

31 See the sources cited in note 18 above. As rights encompassing more than one Hohfeldian incident, natural rights are thus “cluster-rights,” in Judith Jarvis Thomson’s sense; see her “Claims, Privileges, and Powers,” in *The Realm of Rights* (Cambridge, Mass.: Harvard University Press, 1990), pp. 54-56.
and that others retain a reciprocal privilege or liberty-right to coercively enforce their own interpretation of those rights against her. In cases of interpretive conflict about the content of natural rights, that is, to acknowledge others’ privilege to enforce their own interpretation of their rights just is to concede that they are under no duty to honor the particular claim-rights you assert against them: it is at once to relieve them of the very duties you purport to place them under.

Now, building on Simmons’s suggestion from above, we might be able to resolve this apparent inconsistency without revising the concept of a natural right by granting all rights-holders a reciprocal privilege to enforce their rights while denying them symmetrical standing to interpret their rights as they see fit. On the assumption that there exists a single, correct understanding of the rights in question, that is to say, we could consistently hold that all individuals have a reciprocal moral privilege or liberty-right to enforce that interpretation of their rights, but not to enforce some other, incorrect interpretation. Likewise, my assertion that you are under a correlative duty to honor my understanding of my natural rights would be valid, and thus binding for you, if – but only if – my understanding is the correct one. Thus, according to this line of response, the presence of interpretive conflict about our rights would suggest simply that (at least) one of us is in error, not that we are each necessarily committed to an inconsistent position about the content of our correlative rights and duties.

Yet even if this reply succeeds in carving out logical space for a given person to enjoy a right of unilateral enforcement without also enjoying a right of unilateral interpretation, it is nevertheless dissatisfying as a normative or action-guiding solution to the problem of interpretive conflict among moral equals. Consider the position of an
agent, Alice, who must decide how to go about securing her rights under the conditions we have described so far: that is, on the understanding that she is bound to respect others’ rights only insofar as she has on hand the correct interpretation of those rights, and that she enjoys a privilege to enforce her own rights only insofar as they, too, are correctly specified. Thus before taking any action whatsoever, our imagined agent must first make a good faith effort to grasp the proper content of her own rights and those of whoever she may come into contact with; she must, that is, arrive at her own independent judgment about the proper specification of her rights and duties.\(^{32}\) Suppose, however, that Alice encounters another agent, Barry, who holds a divergent and incompatible understanding of their rights (having undertaken the same process of good faith moral reasoning and judgment just described). On the further assumption that Alice will not opt simply to acquiesce to Barry’s interpretation straightaway – having no reason, after all, to view him as rationally or epistemically advantaged with respect to the case at hand – she must ultimately choose either: (a) to refrain from enforcing any understanding of their rights until mutual agreement has been reached; or (b) to enforce her own interpretive judgment over his objections. Neither choice, I submit, ought to be acceptable to proponents of political voluntarism in terms of their own practical, conceptual, and moral commitments.

Option (a) preserves the coherence of the voluntarist conception of natural rights but at the practical cost of according a potentially infinite number of persons veto power over a given individual’s rights to personal property and perhaps also to bodily integrity. Even setting aside the problems arising from the need for individuals to occupy a given

\(^{32}\) Indeed, given her inability to avoid occupying some physical space at any moment in time, she must rely on her own interpretive judgment if only to assure herself that her mere presence in the external world does not constitute an infringement of others’ property rights; she may in this sense become implicated in an interpretive controversy about natural rights, and thus be required to issue an independent judgment about the content of those rights, without our having undertaken any “action” at all.
portion of the earth amidst deliberation about their very right to do so, this option is both patently unsustainable in the face of all but the most fleeting or superficial forms of moral disagreement and seemingly unresponsive to the urgency of individuals’ underlying interests in achieving security in their physical person and their access to the spaces and resources of the external world. Since many voluntarists have themselves understood this outcome as a reductio of the view that uniform consent is a necessary condition of permissible rights-enforcement, I shall set aside proposal (a) in what follows and assume instead that an adequate account of natural rights must allow for them to be specified and enforced in the absence of perfect agreement about their content.

Option (b), however, returns us to the familiar territory of unilateral interpretation and enforcement, in which Alice must either: (i) purport to place Barry under a duty to respect her interpretation of their rights while simultaneously acknowledging his reciprocal privilege to enforce his own, divergent interpretation; or (ii) purport to place Barry under a duty to respect her interpretation of their rights without acknowledging his reciprocal prerogative to enforce his own interpretation of their rights. Whereas option (b)(i), as it stands, commits Alice to the logical inconsistency noted above, option (b)(ii) sits uncomfortably with voluntarism’s foundational commitment to the natural moral equality of persons: it asserts, in effect, that Alice enjoys a kind of privileged insight into the correct understanding of the rights in question, if not also superior standing or authority to decide matters or moral controversy more generally.

33 See, for example, Locke, The Second Treatise on Government in Two Treatises on Government, §28, p. 288: “And will any one say he had no right to those Acorns or Apples he thus appropriated, because he had not the consent of all Mankind to make them his? … If such a consent as that was necessary, Man had starved, notwithstanding the Plenty God had given him.”

34 Below I consider a modification of this strategy that incorporates an agent-relative permission to disregard one’s duty to respect others’ claim-rights, considered there as have merely pro tanto force.
Yet even if she *does* enjoy some epistemic or rational advantages vis-à-vis Barry, and indeed even if she her understanding of their rights happens to be *correct* in the case at hand, she is nevertheless not entitled to *act* under the presumption that her judgment is superior without extending a reciprocal entitlement to all other persons. To do so would be to deny the natural moral equality of persons that is said to underlie the conception of natural rights to which she is ostensibly committed.35

If neither option (a) nor (b) succeeds in vindicating the notion that our natural rights can be defined and enforced by individuals acting unilaterally in a hypothetical state of nature, perhaps we ought to consider revising the abstract concept of a natural right with which we began. Given the apparent conceptual difficulties involved in viewing individuals under conditions of moral disagreement as having both a duty to honor the (unilaterally-specified) claim-rights of others and a liberty-right to enforce their own (unilaterally-specified) claim-rights against them, we might opt to reconceive natural rights simply as reciprocal liberty-rights to enforce one’s own private judgment against others, without implying a correlative duty on the part of others to respect or honor one’s judgment in the event of moral disagreement. Because there is no logical inconsistency in two or more parties’ having liberty-rights to perform mutually unrealizable actions, this strategy would resolve the conceptual tension identified earlier without requiring individuals to abandon their unilateral rights of interpretation and enforcement. Yet by relieving all parties of a moral *duty* to honor the natural rights of others, this approach would render unintelligible the notion of a *natural rights violation*, at least insofar as the content of those rights were subject to dispute. Indeed, the conception of natural rights as

mere liberty-rights so radically revises the traditional view favored by the leading proponents of political voluntarism that it seems incapable of explaining how individuals could be wronged by being nonvoluntarily conscripted into the state, again provided that the state enforced “only” those aspects of natural law on which there was less than universal agreement. For this reason, we should at the very least hesitate to treat this conceptual maneuver as an interpretation of, rather than a departure from, the voluntarist account of natural rights.

A second and final strategy of reconceptualization, however, seems more promising in terms of voluntarism’s own moral and conceptual commitments, even if, as I shall soon suggest, it is still less successful than the statist alternative under conditions of moral disagreement. The strategy here begins from the model of unilateral interpretation without unilateral enforcement, described above as option (a), according to which individuals’ (unilaterally-specified) claim-rights were understood to preclude – on pain of logical inconsistency – any coercive enforcement of those rights in the face of disagreement about their content. But whereas that model construed individuals’ claim-rights as binding others to honor them without exception (hence the prohibition on enforcing divergently-specified rights), the present proposal conceives of individuals’ claim-rights as correlating merely to “powerful, yet defeasible” pro tanto duties on the part of others – duties that may be defeated or outweighed under certain conditions by each person’s special agent-relative permission to coercively enforce his or her own interpretive judgment.36 What is essential to note about the present model, however, is

36 Jonathan Quong, “Killing in Self-Defense,” *Ethics* 119, no. 3 (2009): 507-537, at p. 521. My remarks here follow Quong’s discussion and borrow his notion of an “agent-relative permission” to disregard other people’s valid claim-rights in certain circumstances. I add the modifier “special” throughout to emphasize that the permission, as Quong himself puts it, “would thus be no ordinary liberty-right. It would be much
that while all claim-rights would be action-guiding in the minimal sense that they would enjoin the forbearance of others under conditions of disagreement, only those claim-rights weighty enough to ground a special agent-relative permission of unilateral enforcement would count as natural rights, properly speaking, given the aforementioned voluntarist commitment to viewing natural rights as by definition unilaterally enforceable.

The notion that individuals might sometimes enjoy a special permission to coercively enforce their own claim-rights, even when doing so requires them to set aside their pro tanto duties to honor others’ claim-rights, helps make sense, among other things, of our judgment that I may be justified (and not merely excused) in killing a hypothetical “innocent aggressor” or “innocent threat” – that is, someone who threatens my life without being morally responsible for doing so – in self-defense: for it is not, on this view, that the innocent aggressor (or threat) has no claim-right against being killed, but simply that I have a special prerogative to preserve my own life that outweighs my duty to respect that right in these circumstances.\footnote{37} Applying this idea somewhat more generally, we might imagine that individuals’ interests in enforcing their own claim-rights might override their duties to respect others’ claim-rights not merely when their lives are significantly at risk, but also to protect themselves against certain kinds of nonfatal injury, say, or to secure their access to certain vital means of material subsistence. Nevertheless, the use of coercion against others who, by hypothesis, have a

strong *pro tanto* claim-right not to be coerced in that respect must satisfy a special justificatory burden in order to be morally permissible, and it is unlikely that this special burden can be met for the full range of bodily and property rights that voluntarists standardly assume to be valid objects of unilateral coercive enforcement – particularly if those selfsame rights are to do any work in preserving a sphere of individual sovereignty or dominion into which others may not justifiably trespass. Rather, it seems that at best a subset of the rights traditionally brought under the banner of natural rights will in fact enjoy that status on the present description, and even then only somewhat hazily, as the question of where to set the boundaries of the agent-relative permission of unilateral enforcement merely reintroduces the problems of indeterminacy and moral disagreement at a different level of practical reasoning.\(^\text{38}\)

Yet even if individuals cannot succeed in defining and enforcing more than a small and tenuous set of natural rights *unilaterally* – at least insofar as those rights are to be conceptually coherent and reciprocally authoritative – it does not follow that they would necessarily prove unable to do so with the mediating assistance of the state. Indeed, as I shall suggest, it is *only* by committing to a common and impersonal legal authority that individuals can successfully specify and honor one another’s natural rights in a manner that is consistent with the practical, moral, and conceptual constraints elaborated in the preceding pages. If this suggestion is sound, we can understand individuals’ most basic natural duties to respect one another’s natural rights to require them to submit to the state, regardless of their consent or other voluntary acts.

Having explored the various deficiencies of the model of unilateral interpretation and enforcement, the case for a duty to support the state can be stated rather simply: unlike individuals acting on their own judgment in an uncoordinated state of nature, the state is uniquely capable of defining and securing individuals’ rights to personal and property and bodily integrity without either directing them to act on contradictory moral requirements or denying them equal or symmetrical status as authoritative interpreters of the natural law. The first of these points is perhaps obvious enough: the subjects of a common legal authority are necessarily bound not by competing, private interpretations of their rights and duties, but rather by a uniform, public scheme of rules and by duly authorized institutions charged with applying and interpreting those rules in cases of indeterminacy and disagreement.³⁹ It is a constitutive feature of legal systems, we might say, that they not place their subjects under logically inconsistent or mutually unrealizable requirements, and thus that they incorporate formal mechanisms for preventing or correcting for self-contradictions in the law. At the same time, the uniform set of rules promulgated by public and impersonal institutions will not simply reflect the will or judgment of particular private persons or even factional groups thereof (although their content will inevitably be influenced by such persons), but will instead constitute the general or “omnilateral” will of the state or political community itself, considered as an abstract or “artificial” person or collective agent.⁴⁰ This is not to introduce the possibly mysterious notion that the will of the state, so conceived, in fact represents the true wills

³⁹ To say that such a scheme is “uniform” is not to say that it makes no distinctions among (classes of) citizens, but simply that it comprises a coherent or mutually consistent set of directives, such that no member is subject to incompatible injunctions simultaneously.

⁴⁰ For the notion of the state as exercising an “omnilateral” will, see Kant, *The Metaphysics of Morals*, in *Practical Philosophy*, 6:263, p. 415; on the conception of the state as an “artificial person,” see Hobbes, *Leviathan*, ch. 16.
of its subjects taken severally, nor is it to deny the obvious fact that the offices
comprising its institutions are necessarily staffed by particular individuals whose private
and partial ambitions can be only imperfectly constrained. Yet in requiring that matters
of moral controversy be settled initially, and future disputes subsequently adjudicated,
through procedures that disallow or disincentivize the exercise of individual discretion by
those occupying public roles, the impersonal institutions of the state at least allow for the
possibility that individuals’ rights might be defined and enforced without invidiously
privileging the interpretive standing of some over others.41 Because the state holds out
the possibility of defining and enforcing individuals’ natural rights in a consistent and
reciprocally authoritative manner, and because, as we have seen, individuals will prove
unable to do so in the face of indeterminacy or disagreement about their rights, their
natural duties to respect one another’s rights will go unfulfilled so long as they refuse to
relinquish their rights of unilateral interpretation and enforcement. Thus on the basis of
their minimal natural duties alone, individuals can be morally required to submit to the
state.

It is important to emphasize that I have sought here simply to demonstrate the
possibility that public political institutions can enjoy legitimate authority without the
consent or voluntary authorization of their subjects. It may turn out to be the case that
individuals’ submission to a system of impersonal legal authority, while a necessary
condition of their adequately specifying and respecting one another’s natural rights, is in
fact insufficient to achieve that morally urgent objective, and thus that their minimal

41 I adapt the idea that citizens’ mutual dependence on an abstract or impersonal system of authority is, at
least ceteris paribus, less threatening to their moral freedom or equality than their individual dependence
on other persons from Rousseau, *Emile, or On Education*, trans. Allan Bloom (New York: Basic Books,
natural duties will direct them to support only certain kinds of states. Indeed, even limiting ourselves to the terms we have set out thus far, it is essential that a particular system of political power not simply masquerade as an impersonal legal authority while in fact serving as a vehicle for the advancement of its officials’ personal or factional interests: that individuals not flee “what Mischief may be done them by Pole-Cats, or Foxes,” only to find themselves “devoured by Lions.” To this end, it seems to me incumbent on those holding the reins of public power to attempt, at the very least, to justify that power to each subject in terms of the very values and interests – such as the commitment to their subjects’ natural moral freedom and equality – said to underlie their authority in the first place. Happily, as I shall emphasize in the chapters to follow, this is something public officials typically have significant reasons of self-interest to do anyway, opening up the possibility that their right to rule might ultimately be assessed in terms of standards they invoke or appeal to themselves.

2. Particularity and Obedience

Before proceeding with the task of defining and elaborating the substantive conditions of legitimate rule, it is essential that we make clear what, concretely, is at stake in ascribing legitimacy to (or withholding it from) a particular state. For all we have said so far, individuals have a natural duty to “support the state.” Yet it might seem that this duty, owed to all moral persons equally, is too general to ground a more particularized duty to support our own state. Perhaps, as Simmons and other critics of

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43 This requirement approximates what Bernard Williams has termed the “Basic Legitimation Demand” in his “Realism and Moralism in Political Theory,” in In the Beginning Was the Deed: Realism and Moralism in Political Argument, ed. Geoffrey Hawthorn (Princeton: Princeton University Press, 2005), p. 4. I develop and extend Williams’s remarks on legitimacy in Chapters 2 and 3 below.
the natural duty account have maintained, it simply enjoins us to support legitimate states generally, and therefore cannot bind us to the specific institutions that claim authority over us. Likewise, we have yet to say what it means, in practice, to *support* the state at all: are we required to obey all the laws of our legitimate state, or do can we discharge our duty simply by bringing a legitimate state into existence and not coercively undermining its operations? Do acts of civil disobedience violate our duties to support legitimate states? In this section, I will argue that we have a duty to support the legitimate state in which we happen to have live, and that this duty takes the form of a *pro tanto* disjunctive requirement *either* to obey the law *or* to engage in public and non-violent acts of civil disobedience. In leaving unspecified, for the time being, the substantive standards of legitimate authority, we will be in a better position to discern, in the following chapters, what competing conceptions of legitimacy are arguing *about*, and thus what follows for particular citizens and public officials from their recognizing a given state as legitimate (or not). Only if the practical entailments of the theory are made plain at the outset can a particular account of legitimacy seek to guide action — to be genuinely normative, we might say, rather than merely evaluative — in practice. Thus, in the balance of this chapter, I use “legitimacy” and its cognates as a placeholder for the substantive conception that will be developed in the course of the dissertation.

In deriving our duty to support the state from a more basic natural duty to respect one another’s fundamental rights, I have not yet shown how my account of legitimacy might satisfy what Simmons has called the “particularity requirement”: that is, “how such a duty could account for one being bound to one particular set of political institutions in
any special way.\textsuperscript{44} Since my natural duties are owed to all persons generally, regardless of my transactions with them or in virtue of anything they have done, it seems to follow that they will bind me as strongly with respect to foreigners and foreign institutions as they will to the persons and institutions that are closest to me. As Simmons puts it in response to the Rawlsian argument from a natural duty of justice:

\begin{quote}
Just Swedish political institutions merit support as much as, and for the same reason as do, just political institutions in the United Kingdom. But because this is true, it is difficult to see how a natural duty could ever bind citizens specially to their own laws or domestic institutions.\textsuperscript{45}
\end{quote}

Thus even if we succeeded in establishing a general duty to support (legitimate) states – for Rawls, because they are just; on my account, because they uniquely enable us to discharge our negative natural duties – it does not follow that we have any special duty to support our particular legitimate state.

However, Simmons’s objection fails to appreciate the central implication of the natural duty account of political authority, which is that, in order to discharge our basic natural duties, we must relinquish our right to unilaterally interpret and enforce our first-order natural rights and to submit instead to a \textit{public} and \textit{uniform} system of legal authority. We must, that is, coordinate under a single scheme of law that provides both a common interpretation of our rights, so that everyone living in close proximity to one another can comport their actions to the same set of rules, and a common system of enforcement, so that everyone is reasonably assured of one another’s compliance. Now, it is certainly conceivable that the global division of political authority could have followed a different course – that present-day Canadians and Americans might be subject

\textsuperscript{44} Simmons, \textit{Moral Principles and Political Obligations}, p. 155; see also pp. 31-35.

\textsuperscript{45} Simmons, “The Duty to Obey and Our Natural Moral Duties,” in Wellman and Simmons, \textit{Is There a Duty to Obey the Law?} p. 166.
to a single set of national laws, rather than two, or that the entire world’s population might be bound by a unified global state; nothing about the current account holds that the present system of distinct sovereign states is itself necessitated by our natural moral duties to establish and uphold a system of political authority.46 Yet while the fact that our current political boundaries and the identities of our fellow citizens are largely the product of historical contingency may make it so that the content and scope of our natural duties will have to be specified anew in the face of changes in our state’s jurisdiction or membership, the fact remains that, at any given point in time, our duties will have to be particularized by some locally authoritative system of law capable of imposing a single scheme of rules on everyone who happens to reside in what happens to be its territorial jurisdiction.47 Because we would no less fail to respect one another’s rights by following different systems of law – with you obeying the Swedish national code, for example, while I obey the laws of the United Kingdom – than we would by acting on our own, private interpretations of our rights in the state of nature, our natural duties must inevitably direct us to support the particular (legitimate) state that enjoys exclusive jurisdiction over the part of the earth in which we presently find ourselves.48

But while the natural duty account can, I believe, explain our duty to support the particular legitimate state in which we happen to live, it does not, as Ronald Dworkin once complained of Rawls’s natural duty theory, “capture the intimacy of the special

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46 See Quong, Liberalism without Perfection, p. 130 n. 42.
47 Waldron likewise suggests that our natural duties require us (most urgently, at any rate) to form a state with those “immediately adjacent” to us (“Special Ties and Natural Duties,” p. 15).
48 Wellman, “Samaritanism and the Duty to Obey the Law,” in Wellman and Simmons, Is There a Duty to Obey the Law?, p. 14; see also p. 39: “A state could not perform its requisite functions merely by coercing a large number of randomly chosen physically discontiguous people (as it would if it coerced all of the world’s red-haired people or everyone whose last name begins with the letter W, for instance) because peace and stability require not just that people be coordinated but that those who regularly interact with one another (i.e., those who are spatially contiguous) all play by the same rules” (emphasis in original).
duty” we normally associate with our status as citizens. It does not account for the alleged wrongness, for example, of expatriate tax evasion, that is, of a citizen of one country moving abroad and refusing to contribute materially to the maintenance of her home country’s legal system. It also fails to explain why we might have stronger duties to donate to charities or volunteer for causes that benefit our co-nationals instead of to equally deserving organizations that serve foreign populations. Nor does it, on its own, provide a basis for sentiments of patriotism or collective pride in one’s political institutions and traditions. Yet these further dimensions of citizenship – which reflect many individuals’ sense that their state has intrinsic value to them that no other, even equally legitimate, state could provide – seem more than adequately captured by associative theories of political obligation (such as Dworkin’s own account) and by obligations of “fair play” incurred through one’s voluntary transactions with one’s fellow citizens. While the natural duty account remains silent on the force and scope of these further obligations, it does not deny that these further grounds might exist and obtain for many members of existing states, thereby supplementing their natural duty to support their state with “thicker” obligations, owed to those sharing the bonds of citizenship.

I have argued so far that our natural duty to support the state, given the necessarily territorial aspect of effective political coordination, translates into a more particularized duty to support the state in which we happen to reside (again, provided it

50 Wellman cautiously attempts to account for the additional dimensions of citizenship with reference solely to our natural duties in “Samaritanism and the Duty to Obey the Law,” in Wellman and Simmons, *Is There a Duty to Obey the Law?*, pp. 46-52. See also my discussion in Chapter 4, Section 2 below, where I argue that individuals’ associative interests in collective self-determination can help explain a people’s right against colonization, annexation, and other forms of coercive humanitarian intervention, even if such intervention would ultimately improve the capacity of the existing state to institutionally mediate its subjects’ natural moral duties.
satisfies as-yet-unspecified conditions of legitimacy). Even if this is correct, however, Simmons and other philosophical anarchists nevertheless insist that it is insufficient to establish the legitimate authority of states over their members, understood as the authority to impose on all members a general duty (or obligation) to obey the law. That is, even if we have a natural duty to exit the state of nature and submit to a political authority, and, further, to support the local authority governing the territory in which I reside, it does not necessarily follow that we each have a general duty to obey the law, once we are securely under a common state. Noting that “we do not live in an apolitical state of nature,” Simmons has suggested that it is implausible here and now to contend that each person who refuses legal institutions is a wrongful threat to others. Those who refuse such authorization will be held as fully accountable under domestic law as will those who cheerfully accept their duty to obey. They will be as fully deterred as anyone can be deterred by the threat of legal punishment and social sanctions.

The “problems of life without states,” he continues, “can be solved without unanimous participation,” and “if most participating in the collective solution can solve the moral problem, then some opting out … is not necessarily wrong.” Combining this view with our foregoing account of our natural duties, we might say that, simply in setting up political institutions and endowing them with coercive enforcement power, we have fully discharged our natural duties. And since successful political coordination overall does not depend on our individual compliance (much less on our obedience to each and every law), we have no additional duty to obey.

51 I focus here on the duties of members, rather than residents generally, because unlike tourists and immigrants, there is normally no sense in which they can be said to have voluntarily consented to be part of the state; if members can have general duties to obey the law, then presumably a fortiori so can any other subjects of the state.

52 Simmons, “The Duty to Obey and Our Natural Moral Duties,” in Wellman and Simmons, Is There a Duty to Obey the Law? p. 176.

53 Simmons, “Justification and Legitimacy,” in Justification and Legitimacy, p. 152 and accompanying n. 63.
Some contemporary statisticians, such as Allen Buchanan, have appeared untroubled by the idea that we have no general moral duty to comply with our local political institutions, and indeed have suggested that we “develop a theory of political legitimacy that does not rely upon the notion of a right to be obeyed” but focuses instead on whether a particular state “is morally justified in wielding political power.” 54 On this account, so long as most individuals are given some reason to comply with the law (including prudential reasons, such as the likelihood of punishment for disobedience), states will be able to accomplish their morally urgent objectives; no duty to obey the law need be established in order to bring about this result. Yet I think Buchanan’s strategy of defining legitimacy in terms of the mere justifiability of public coercion comes at too high a cost in terms of the account of legitimate authority we have developed thus far. For, according to the natural duty account I have defended, we are morally required not merely to establish coercive political institutions capable of overcoming our private, unilateral uses of coercion. Rather, I argued that we have a natural duty to relinquish our rights to unilateral enforcement altogether, and thus that we would violate this duty by competing with the power of the state to enforce our own understanding of our rights (even if the state would typically, if not invariably, be strong enough to win out). Thus the present account of legitimate authority must entail that the subjects of legitimate

54 Buchanan, Justice, Legitimacy, and Self-Determination, p. 247. Although Buchanan distinguishes sharply between “legitimacy” (as the moral justifiability to coerce) and “authority” (as entailing a correlative duty to obey the law) (pp. 239-240), and describes his project as one of establishing the possibility of “political legitimacy without political authority” (pp. 247-249), he also notes in passing that his argument can be understood, further, as “provid[ing] an account of the conditions under which citizens can have an obligation to one another to take compliance with the law seriously” (p. 253, emphasis in original). As I point out in the following note, Buchanan clarifies this apparent ambiguity in subsequent work by explicitly disavowing the conception of legitimacy as a mere liberty- or justification-right. For an earlier, “purer” account of legitimacy as a mere permission to exercise coercive power, see Robert Ladenson, “In Defense of a Hobbesian Conception of Law,” Philosophy and Public Affairs 9, no. 2 (1980): 134-159.
states have duties to obey in at least the minimal sense that they would be wrong to use private coercion against other citizens or against their public authorities.\textsuperscript{55}

Now, to return to Simmons’s objection from above, suppose I discharge my natural duty to give up my unilateral enforcement rights and thus comply with the demands of my state in this minimal sense. Do I have, in addition to this duty to forswear private coercion, a general duty to obey the law? After all, as Simmons rightly points out, my individual disobedience will typically make only a negligible difference to the status and security of anyone else’s rights: most people will be deterred from noncompliance by the threat of legal penalties, and, to the extent that my individual actions might actually pose a threat to others’ valid legal claims, the public authorities of my state will be in an unrivaled position (assuming, that is, that I have abandoned my unilateral enforcement rights) to coercively restrain me as necessary. If my individual participation is not necessary to solve the problems of indeterminacy, disagreement, and unilateralism that required us to exit the state of nature, how could I act impermissibly by (noncoercively) disobeying the law?

The wrongness of disobedience, even when it poses only a negligible threat to others’ rights, can be seen, I think, by making explicit the background conditions that prevent any given act of disobedience from having more than a minimal impact on one’s fellow citizens: specifically, the fact that (as Simmons acknowledges) “all or most people

\footnotesize{\textsuperscript{55} Simmons notes the inability of Buchanan’s view to account for the wrongness of competing with our public authorities in “The Duty to Obey and Our Natural Moral Duties,” in Wellman and Simmons, Is There a Duty to Obey the Law? p. 97 n. 2. Buchanan appears to concede the force of this critique in subsequent work, revising his account of legitimacy to entail at least certain minimal correlative duties of compliance, noting that “the mere liberty-right to govern omits the crucial idea that the rules of a legitimate institution have a privileged status vis à vis our reasons for acting and that their having this privileged status is not dependent on their content. At least in what might be called the focal sense of the term, legitimacy involves not only the liberty right to govern but also a content-independent requirement of practical support for (or at least non-interference with) the institution’s efforts to govern” (Buchanan, “The Legitimacy of International Law,” in The Philosophy of International Law, p. 83, emphasis in original).}
in a territory must … participate in [the state] so that the warfare will end.” My discrete act of disobedience has little if any effect on the rights of others, that is, only against a background of near-universal compliance, in which virtually all other subjects of the state have given up not only their rights of unilateral enforcement, but also their rights to follow their own interpretive judgment about the proper content of their rights (where doing so falls short of requiring coercion). For even if each person refused to back her own interpretations with force, a condition in which more than a small minority routinely acted on their own divergent judgments about their rights – not simply driving at their preferred speed, but also trespassing on others’ property or appropriating natural resources as their private conception of rights allows – would be a radically insecure condition indeed, and would quickly strain the enforcement capacities of the public authorities. Moreover, it is not as though most people are simply indifferent as to whether they act on their own judgments or comply with the public interpretation of their rights; rather, relinquishing one’s interpretive discretion comes at a significant cost to each person’s autonomy, even if it is a cost that they are morally required to bear. Yet my acts of disobedience, if they are not to precipitate a catastrophic return to the state of nature, must free ride on (nearly) everyone else’s abandonment of the moral discretion they would prefer (and are no less entitled) to retain. Thus when I refuse to comply with the law, I act wrongly, not because my actions will have adverse consequences taken individually, but rather because I fail to do my fair share in the joint task of achieving collective coordination under a uniform set of rules.57

56 Simmons, “Justification and Legitimacy,” in Justification and Legitimacy, p. 152 n. 63, quoting Jean Hampton, Political Philosophy (Boulder, Colo.: Westview, 1997), p. 73, Simmons’s emphasis.
57 My discussion here draws significantly on Wellman, “Samaritanism and the Duty to Obey the Law,” in Wellman and Simmons, Is There a Duty to Obey the Law?, pp. 41-43. Simmons appears to endorse the
While considerations of fairness in distributing the burdens of legal compliance
tell against the permissibility of common law-breaking, we must nevertheless add two
important qualifications to this general requirement of obedience. First, certain acts of
disobedience can provide a uniquely visible and effective avenue for members to express
their opposition to particular laws, and thus to pressure policy-makers and the public at
large to enact various legal reforms, without conveying a challenge to the legitimacy of
the state as a whole, on the one hand, or unduly undermining its capacity to achieve
widespread social coordination, on the other. Although collective deliberation and debate
must inevitably come to an end, so that a single interpretation of our rights and duties can
assume the force of law, such decisions – even in a fully legitimate state – must often be
made in the face of persisting disagreement about the acceptability of a given law or
policy. (Given the moral urgency, noted above, of deciding on a common scheme of
rules in lieu of a consensus on the content of our rights, I assume here that unanimous
agreement to or acceptance of the law is not a plausible substantive criterion of a state’s
legitimacy: states are necessary to settle disagreement, but they should not be expected to
eliminate it.58) Yet even if citizens enjoy an expansive range of legal opportunities to
publicly contest the laws and rulings of their state, legal channels of opposition are
sometimes too diffuse and formalized for aggrieved individuals to attract the broad
general principle that we can have duties of fairness to do our part in a morally mandated collective task
(see “The Duty to Obey and Our Natural Moral Duties,” in ibid., p. 186); he simply denies that supporting
the state is such a collective duty, or that it could be cashed out into a more particularized duty to support
our own state. Thus, if Simmons were to accept that we have a duty to support our own state, it is unclear
on what basis he could maintain that free riding on others’ compliance – which he refused to condemn in
the passages quoted above – is in fact morally permissible. It is unclear, that is, what further work his
observations about the possibility of coordination without universal participation are supposed to do in his
broader argument against the legitimacy of existing states.

58 My account thus follows Jeremy Waldron in holding that the problem of legitimate public authority
arises in the “circumstances of politics,” that is, in conditions in which it is morally necessary that we take
some collectively-binding course of action, yet where we disagree about which course of action is best.
attention of their fellow citizens and to express the intensity of their opposition to a particular law. Acts of civil disobedience, by contrast, in which individuals engage in public and nonviolent disobedience with the aim (and likely effect) of communicating a political message to their fellow citizens and public officials, can often effectively convey the unusual strength and urgency of their dissent, in some cases persuading official decision-makers to reconsider their views.59

However, even if the practitioners of civil disobedience, so understood, intend nothing more than to publicize their especial opposition to a particular law or policy, one might still worry that such acts of protest might have the unintended consequences of encouraging relatively undiscriminating opposition to the regime as such or of imperiling its effective ability to enforce a uniform interpretation of its subjects’ rights. Whether nonviolent protest will in fact be interpreted as a challenge to the broader legitimacy of a given state, or will turn out to interfere substantially with such a state’s ongoing efforts at legal enforcement, are of course empirical questions that cannot be settled conclusively at any level of philosophical abstraction; I cannot therefore rule out the possibility that civil disobedience should be understood, in certain contexts, as an unacceptable abrogation of one’s natural duties to support a system of uniform legal authority.60 Nevertheless, we have some reason to doubt that these unintended consequences would standardly result from acts of civil disobedience in virtue of the further fact that practitioners of civil

60 Compare Rawls, A Theory of Justice, p. 328, remarking that it is “conceivable,” if “unlikely,” that otherwise justifiable acts of civil disobedience might, considered in the aggregate, either bring about “a breakdown in the respect for law and the constitution, thereby setting in motion consequences unfortunate for all,” or else strain the “ability of the public forum to handle such forms of dissent,” such that their message could become “distorted” and their “intention to appeal to the sense of justice of the majority lost sight of.” For either or both of these reasons, Rawls concludes, the exercise of civil disobedience “may require a certain restraint” on the part of its practitioners.
disobedience, as it is commonly understood (and as I shall understand it here), not only refrain from actively obstructing legal enforcement through the use of private coercion but, in addition, willingly accept the legal penalties that attach to their unlawful actions.

This further fact has important expressive and practical consequences that, I believe, both lend support to a general right of civil disobedience against a legitimate state. Expressively, one’s decision to accept the legal consequences of one’s disobedience sends a clear message that the regime as a whole continues to merit the allegiance of its subjects and that its allegedly offending behavior or legislation is not so severe as to undermine its right to rule more generally (in which case one would have no content-independent duty to support or defer to the regime even to the limited extent of submitting to legal sanctions). In this way, as Rawls has put the point, civil disobedience expresses both “fidelity to law,” albeit “at the outer edge thereof,” as well as “a recognition of the legitimacy of the constitution” of the state as a whole.61 Practically, moreover, it seems fair to assume that, other things being equal, individuals will have a strong and typically overriding preference for avoiding legal sanctions (to say nothing of the social disapprobation that disobedient acts may provoke), even when they take issue with the specific actions enjoined by the commands of their state. On this assumption, individuals will thus normally seek to oppose disagreeable laws and institutions through formal legal channels (advocacy, protest, petition, lobbying, voting, and so on), rather than incur whatever legal penalties would be necessitated by acts of bona fide civil

61 Ibid., pp. 322, 323; on the idea of civil disobedience as “expressing the highest respect for law,” see also Martin Luther King, Jr., “Letter from a Birmingham Jail,” in I Have a Dream: Writings and Speeches That Changed the World, ed. James Melvin Washington (New York: HarperCollins, 1992), p. 90. Lefkowitz has usefully suggested that a legitimate state ought to acknowledge the expressive significance of acts of civil disobedience by working to ensure that “the general public understands its treatment of public disobedients as the imposition of a penalty rather than of a punishment,” where the latter alone is understood to convey such reactive attitudes as resentment or indignation; see his “On a Moral Right to Civil Disobedience,” pp. 218-223 (quoted passage at p. 222).
disobedience. We might further suppose – although I will not be able to fully defend the suggestion at this stage – that the presumption of a general aversion to legal sanction, and thus of a relatively rare incidence of civil disobedience overall, will fail to hold only under conditions that ought at least to generate skepticism about the legitimacy of the system of political authority in question. Individuals will routinely choose to bear the costs of legal penalty in order to fulfill their claims of conscience, that is, only when their state has failed to satisfy certain essential conditions of their right to rule: by failing to elicit a widespread belief in its legitimacy, for example, or by failing to provide a sufficient range of legal channels through which dissenting views can be registered and translated into political influence. If this is right, and civil disobedience will not, as a general matter, undermine the ability of a legitimate state to secure widespread conformity with the law, our moral interests in engaging in this mode of public protest seem sufficient to include a right of civil disobedience within the bounds of our natural duties. I shall therefore understand the duty to support the state not as a uniform requirement to comply with all laws, but rather as a complex disjunctive duty either to obey the law or to engage in civil disobedience, provided that one’s pursuing the latter course of action would not foreseeably contribute to condition in which the state’s overall enforcement capacities would be rendered ineffectual.62

The second way in which our duties of compliance must be qualified builds on the intuition that no plausible duty to obey the law, even when modified to allow for

62 In a recent essay, Arthur Applbaum has questioned the very idea of a disjunctive moral duty, noting, “We do not comply with our natural moral duties concerning murder and negligent injury by accepting punishment after the fact and by paying compensation after harming”; see “Legitimacy without the Duty to Obey,” Philosophy and Public Affairs 38, no. 3 (2010): 215-239, at p. 234. Yet what is distinctive about the “noncompliance” disjunct in the case of civil disobedience is its expressive significance as a public and conscientious means of contesting the moral force of the alternative (“compliance”) disjunct under conditions of reasonable disagreement about the proper specification of our moral rights and duties; these further qualities plainly do not apply to Applbaum’s counter-examples.
permissible civil disobedience, can be absolute or conclusory in every case. Rather, in a variety of cases, we may be morally permitted to break the law of a legitimate state without engaging in public and communicative acts of civil disobedience, in order to discharge some more urgent and competing moral duty. For example, it is widely recognized that we do not act wrongly, all things considered, if we break the speed limit when this is the only way to transport a gravely wounded person to a hospital in time to receive urgent medical attention. In such a case, we do not seek to contest the general validity of the speed limit regulation we violated, nor would we think it incumbent upon ourselves to show up to the local police precinct after the fact to be issued a summons to penalize our law-breaking; our violation is thus in no sense an act of civil disobedience. At the same time, however, I think it would be misguided to say that, in this example, we had no duty whatsoever not to violate the speed limit – that what appeared to be a duty did not in fact exist – but rather that our genuine duty to obey the law was simply overridden by a stronger and conflicting duty to rescue a person with serious injuries; the disjunctive duty of obedience has actual weight in all cases but may nevertheless be outweighed in a given case. We should therefore conceive of our duties of compliance as pro tanto duties – duties that go “only so far” – either to obey the law or engage in civil disobedience.

Following the discussion of a special agent-relative permission of self-defense or self-preservation, we may also be permitted to use force against others who pose an immediate threat to our lives, even if our state does not recognize a legal right to do so.

My account is thus similar in its conclusions, if not fully in its reasoning, to the conception of legitimacy recently proposed by Philip Pettit, who argues that legitimate institutions impose on their subjects “pro tanto obligations that may not apply in special, emergency circumstances, as when the life of an innocent party is at stake.” As Pettit adds, “consistently with having this pro tanto status, the reasons might function under normal conditions … in an exclusionary manner that precludes exercises in the weighing of pros and cons.” See his On the People's Terms: A Republican Theory and Model of Democracy (Cambridge: Cambridge University Press, 2012), p. 136 and accompanying n. 5.
I have argued up to this point that the view of individuals as naturally free and equal moral persons, and as the bearer of certain basic rights whose force does not depend on their institutional membership or past voluntary acts, implies a duty to support at least certain forms of political authority, for it is only with the mediating assistance of public and impersonal legal institutions that individuals will be able to specify and honor one another’s rights while respecting their mutual standing as natural moral equals. Because this duty requires that they support a system of law capable of defining and enforcing a uniform scheme of law in the territory of their residence, it can be understood, further, to enjoin them to coordinate under the particular (legitimate) state that controls the territorial jurisdiction in which they happen to live; deferring to some other system of legal authority would fail to solve the problems of unilateral interpretation and enforcement that gave rise to a duty to support in the first place. Finally, I argued that our duty to support the legitimate state in which we happen presently to reside must be understood not just in terms of a requirement to submit to a coercive scheme of legal enforcement but, further, as a duty to willingly obey the directives set forth by our locally authoritative public institutions, subject both to an allowance for public and nonviolent acts of civil disobedience under certain conditions and to the possibility that our duties of obedience may at times be overridden by competing and weightier duties of some other sort.

But while I have sought to establish that our minimal natural duties provide a compelling basis for the legitimacy of at least certain forms of political rule, I have yet to consider the outer limits of a given state’s legitimate authority, and thus of our duties to support the particular system of law in our territory of residence. Given the problems of
indeterminacy and disagreement highlighted in this chapter, however, one might harbor reasonable doubts about our ability to derive these further conditions of legitimate authority from the minimal account of natural rights and duties on which we have relied up to this point; one might suspect, on the contrary, that the grounds and limits of our duty to support the state must be defined with reference to different sets of moral and practical considerations. In view of these and other reservations about the capacity of the theory of natural rights to answer all relevant questions about the legitimacy of political power, I turn in the following chapters to see if we might locate reasonably clear and determinate standards of legitimate rule within particular systems of political authority, rather than on the basis of norms and values that would be fully intelligible outside of political society altogether.
Toward a Realist Theory of Legitimacy

In the last chapter, I sought to demonstrate that the voluntarist conception of legitimate authority rested upon an implausible understanding of its own moral, practical, and conceptual commitments. Granting the voluntarist premise that we have certain natural rights to bodily integrity and to some forms of personal property simply in virtue of our status as free and equal moral persons, I nevertheless maintained that these rights are substantially if not radically indeterminate, and are subject to an array of conflicting yet reasonable interpretations, with respect to a wide range of practical choices and controversies. In order to arrive at a single, determinate specification of our rights without calling into question one another’s natural standing as moral equals, we must establish and uphold an *impersonal* system of legal authority capable of representing the moral interests of all its subjects. If, as I argued, it is impossible to honor an uphold a reciprocally authoritative interpretation of one another’s natural moral rights without submitting to such a system of political rule, then our natural duty to respect each other’s rights must be understood to require us to support the state, regardless of our consent or voluntary authorization. In this way, the very values and interests said to underlie the voluntarist conception of political authority, and thus the “anarchistic” thesis that all existing states are illegitimate, can in fact be seen to ground a duty to submit to at least certain kinds of political rule.
At the conclusion of that chapter, I suggested that while our minimal natural rights and duties can be understood to ground a general requirement to establish and support a state in our territory of residence, these foundational moral commitments – given their indeterminacy and susceptibility to good faith disagreement among equals – might be of limited use in specifying the further conditions (if any) that a given state must satisfy in order to enjoy fully legitimate authority over its subjects. In view of this apparent shortcoming of the theory of natural rights, I suggested we might turn instead to locate the limits of political legitimacy in a wholly distinct set of moral considerations from those in which we located the initial grounds of our duty to support the state. Yet in accepting, *arguendo*, the voluntarist critique of the leading nonvoluntarist approaches – above all, of what I will here refer to as the *justice-based* theory of legitimacy – my account unavoidably neglected to consider the independent merits of that latter family of views, or to explore the possibility that something like the justice-based account might plausibly supplement the theory of natural rights and duties taken up in the previous chapter. Thus before constructing a normative theory of legitimate authority *de novo*, we ought at least to examine the structure, content, and persuasive force of the leading alternative to political voluntarism among contemporary theorists of political legitimacy.

The justice-based theory, as we have seen, holds that we each have a natural duty to treat others justly in our interpersonal relations and to promote just states of affairs more generally, at least where this can be done without undue cost to ourselves. Like other natural duties, such as our duty to assist others in need or to refrain from wanton cruelty or deception, our duty of justice does not rely for its normative force on any of our past choices or our ongoing membership in particular community or organization: it
is, we may say, both unchosen and preinstituitional. Yet whereas we can typically (if perhaps not categorically) discharge our other natural duties as uncoordinated individuals acting on the basis of our own private judgment, we cannot, according to the justice-based account, establish just relations with those around us without committing to a public and enforceable system of legal rules. Because justice itself depends on the mediating assistance of the state, we can therefore be required to support a common political authority even in the absence of our consent or voluntary authorization. At the same time, since our natural duties of justice offer no basis for our allegiance to manifestly unjust laws and institutions, the content of a given conception of justice will serve to place critical limits on the legitimate exercise of public power. Not only are we at liberty, on the justice-based view, to disregard legal directives that violate the (core) demands of social justice; we are under a positive requirement to work to replace unjust arrangements with ones that will promote and instantiate just aims and values. In deriving both the grounds and the limits of legitimate rule from our duty to secure justice over time, the justice-based account is thus able to avoid the uniformly anarchistic implications of the voluntarist approach without uncritically accepting the de facto authority of all existing states.65

So described, the justice-based approach to legitimacy encompasses a potentially vast range of substantive views about legitimate authority, with competing theories of social justice implying correspondingly distinct accounts of when public institutions enjoy the right to rule. In recent years, however, a number of so-called “realist” critics

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65 It is of course conceivable that a given justice-based account might view all existing states as falling short of the basic demands of justice, and thus join its voluntarist counterparts in the judgment that all existing states are illegitimate. Unlike voluntarist theories, however, even highly demanding justice-based accounts hold out the possibility that institutions of fully nonvoluntary provenance – which is to say, all existing states – may nevertheless be made legitimate (by being made just) over time.
have taken issue not merely with the particular injunctions of the leading justice-based theories, but also with the very effort (common to the justice-based and voluntarist enterprises) to derive standards of legitimate rule from principles of justice worked up “prepolitically,” without reference to the particular historical and cultural conditions under which political power is actually acquired and maintained.\footnote{Note that several of the critics I discuss below do not explicitly align themselves with one or another tradition of political “realism,” just as many self-described realists – such as those familiar to theorists of international relations – would not subscribe to “realism” as I describe it in the text. For representative uses of “realism,” in the present sense, see Bernard Williams, “Realism and Moralism in Political Theory,” in \textit{In the Beginning Was the Deed: Realism and Moralism in Political Argument}, ed. Geoffrey Hawthorn (Princeton: Princeton University Press, 2005), pp. 1-17, Raymond Geuss, \textit{Philosophy and Real Politics} (Princeton: Princeton University Press, 2008), and the contributions to the special issue of the \textit{European Journal of Political Theory} 9, no. 4 (2010), on “Realism and Political Theory.”} By ignoring the extent to which its abstract normative requirements actually align with the existing beliefs and commitments of those subject to political authority, the justice-based approach is compelled to count as illegitimate a range of public institutions and practices that are in fact widely accepted and affirmed by their participants – directing the citizens and public officials of such a system to disregard its directives and to work to install whatever laws and institutions are dictated by the favored prepolitical account. This strategy, the critics charge, not only has the effect of threatening individuals’ interests in collective \textit{self-determination}, or in organizing their public affairs in accordance with their own views about justice and political morality; it also threatens to undermine the \textit{stability} of particular states, which may not prove capable of securing widespread compliance with the laws and institutions demanded by an ideal conception of justice. Even if the justice-based approach could perhaps accommodate concerns about self-determination and stability once the theory is applied in practice – allowing that justice may be traded off against these other goods under various “non-ideal” conditions – the realist critics nevertheless insist that these emendations will necessarily be incomplete and ad hoc,
leaving unaffected its guiding commitment to realizing a single vision of the just society across all times and places.

In this chapter, I will develop and extend the realist critique of the justice-based approach in order to prepare the way for an alternative account of political legitimacy. The argument proceeds as follow. In Section 1, I provide a brief overview of the dominant justice-based views, according to which a state’s legitimacy ought to be judged in terms of its ability either to be “as just as is reasonable to expect in the circumstances” or to satisfy a “threshold approximation to” the full demands of social justice. Although the general approach or method employed by this account has its origins in Kant’s legal and political philosophy, I argue that the “neo-Kantian” theory of legitimacy in fact radically transforms Kant’s own account at the level of normative substance, arriving at a conception of legitimate authority that is at once more demanding and more universalistic than Kant would have recognized or endorsed. In Section 2, I then develop three interrelated objections to the dominant justice-based view – a general objection to the justice-based method as such, and what I call the arguments from self-determination and stability – that comprise the core of the realist critique. While these objections are not shared by all self-described “realist” critics, and although they have at times been leveled against mere caricatures of the leading justice-based views, I suggest that they nevertheless amount to a coherent and persuasive critique that ought to worry many theorists in the justice-based camp. In Section 3, I consider three apparent alternatives to the justice-based approach – the theories of proceduralism, minimalism, and constructive interpretation – and argue that each of these accounts either falls prey to the same objections that plagued the justice-based view or else fails to generate normative
standards that are determinate enough to be action-guiding under a standard range of conditions. In view of these shortcomings, I go on, in Section 4, to set out and defend a distinctive approach to the problem of legitimate authority: one grounded (to use Bernard Williams’s phrase) in the moral requirements “inherent in there being such a thing as politics,” rather than in “a morality which is prior to politics.” This “realist” account begins from the Weberian insight that public authorities can rarely rely solely on brute coercion to secure widespread compliance over time; rather, even the most cynical officials must typically work to establish and maintain a broadly shared belief in their right to rule by offering justifying explanations or “legitimations” of their assertions of authority. These practices of public justification, in turn, open public institutions to the possibility of internal criticism and thus suggest a basis for a conception of legitimacy that does not depend on an external or prepolitical theory of justice or morality. Finally, in Section 5, I return to the arguments first laid out in Section 2, and argue that the realist approach can withstand these objections without collapsing into a kind of uncritical conventionalism, on the one hand, or reverting to a form of voluntarism (with its skeptical implications), on the other.

1. The Justice-Based Approach

The notion that the legitimacy of public institutions ought to depend on their ability to satisfy the basic demands of justice first emerged as a challenge to the early modern understanding of legitimate authority as resting upon an “original contract,” or other voluntary agreement, between rulers and ruled. According to this traditional voluntarist account, we are each naturally equipped with the capacities to tend to our own

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67 Williams, “Realism and Moralism in Political Theory,” in In the Beginning Was the Deed, p. 5.
preservation and to grasp and abide by the natural laws that govern our relations with others. As free and equal in these respects, we enter the world under the command of no other individual or group (setting aside the temporary authority of our parents), and can come to be bound by another’s rule only insofar as we have voluntarily given up our antecedent right to rule ourselves. The requirement of voluntary authorization is thus, for the classical contractarians, a fully general principle of legitimate (practical) authority: it applies no less to putatively “public” institutions than to various “private” organizations or individuals, whose power over us we customarily consider to be legitimated only, if at all, by our consent or voluntary agreement. That a particular institution advances some morally estimable aim, or provides a range of benefits to its members, might give us reason to consider joining its ranks and to avoid interfering with its internal operations. Yet we remain free, on the voluntarist account, to turn down the advantages – and attendant responsibilities – of group membership and retain instead our natural independence, however imprudent or unwise that choice may ultimately prove to be.

In his celebrated essay “Of the Original Contract,” David Hume mocked the contractarian theory of legitimacy, observing (what Hobbes came close to conceding in the “Review and Conclusion” to *Leviathan*68) that no historical state has in fact been founded on a voluntary compact among stateless individuals, and arguing, further, that the idea of “tacit consent” upon which most contractarians ultimately relied offers an implausibly thin basis for legitimate authority. “We may well assert,” Hume wrote of the doctrine of implied consent, “that a man, by remaining in a vessel, freely consents to the dominion of the master; though he was carried on board while asleep, and must leap into

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the ocean, and perish, the moment he leaves her.” Hume’s simple critique had an
outsized impact on subsequent theories of legitimacy, arguably putting an end to the
social contract tradition in the English-speaking world and forcing important innovations
among continental contractarians, as we shall see in the case of Kant below. Indeed, it is
largely on the basis of Hume’s attack on the original contract that many latter-day
voluntarists have been led to the “anarchist” conclusion that all existing states are
illegitimate.70

Hume himself, however, took this apparently radical result as evidence of a
deeper flaw in the voluntarist theory of practical authority. He did not deny that consent
could, in principle, give rise to bona fide obligations, political or otherwise; but he
insisted that obligations borne of consent are binding only because the practice of giving
(and being made to keep) one’s word can itself be seen to serve the “general interests or
necessities of society.”71 The force of any “original contract,” in other words, must
derive from a more basic or fundamental principle – namely, the principle of general
advantage or “utility” – and it is to this more basic principle that we must look if we are
to account for the legitimacy of existing states, given their uniformly nonconsensual
origins. In practice, then, “the SOLE foundation of the duty of ALLEGIANCE is the
advantage, which [government] procures to society, by preserving peace and order
among mankind.”72

70 See especially A. John Simmons, Moral Principles and Political Obligations (Princeton: Princeton
71 Hume, “Of the Original Contract,” in Political Essays, p. 197; compare Hume, A Treatise of Human
sect. v, pp. 331-337.
72 Hume, An Enquiry Concerning the Principles of Morals, ed. J. B. Schneewind (Indianapolis: Hackett,
1983), sect. IV, p. 34, emphases in original.
Although Hume would not have characterized his own account as “justice-based,” we can make out the structure of a justice-based view in his remarks on political obligation. First, he specifies an overarching moral principle or aim (promote the general interests of society) that all individuals must work to satisfy, regardless of whether they have promised or contracted to do so; next, he applies the specified principle to the domain of social and political life to determine its practical implications for the conduct of individuals or the organization of public institutions; finally, observing that there are certain essential benefits that states alone can provide,\(^73\) he concludes that the principle of utility itself requires that individuals commit to a common political authority.\(^74\) Thus the duty to support the state is grounded, not in the voluntary choices of its subjects, but in a prior, and more fundamental, moral duty to contribute to the general benefit of mankind. At the same time, that basic principle sets the outer limits of our duties of allegiance, freeing us to disregard the commands of tyrannical (and hence generally disadvantageous) states: “As interest … is the immediate sanction of government, the one can have no longer being than the other; and whenever the civil magistrate carries his


\(^{74}\) Ibid., bk. III, pt. 2, sect. ix, pp. 352-354. The duty of allegiance being an “artificial” virtue, on Hume’s account, it is not inately accessible to individuals, but must be inferred from the observed effects of existing conventions or institutions; see ibid., bk. III, pt. 2, sect. i, pp. 307-311 and *An Enquiry Concerning the Principles of Morals*, appx. III, pp. 93-98. Nevertheless, duties reliant on empirical observation or experience in this way may nevertheless be “natural” in my (though not in Hume’s) sense: that is to say, they may nevertheless be *unchosen* (independent of our voluntary acts) and *preinstitutional* (independent of our membership in a given association or our subjection to a particular system of rules). It is thus not a necessary feature of preinstitutional duties, on my understanding, that they be intelligible to or discoverable by individuals lacking all knowledge of historical social institutions and practices; what matters is simply that they be binding regardless of one’s present institutional affiliation. This leaves open the possibility, without committing to the view, that (blameless) ignorance of relevant facts about the empirical world – owing, say, to one’s utter unfamiliarity with organized forms of social life – may excuse nonfulfillment of one’s natural duties. See also note 92 below contrasting Rawls’s reliance on certain general empirical facts to specify the content of our natural duties with Kant’s a priori account.
oppression so far as to render his authority perfectly intolerable, we are no longer bound
to submit to it. The cause ceases; the effect must cease also.”

Yet while Hume’s view of legitimacy as grounded in a duty to promote the
overall interests of society offered, or at least suggested, a genuine alternative to the
traditional voluntarist approach, it can nevertheless be fairly understood as speaking past
the animating concerns of the early contractarian theorists. For these thinkers were by no
means unaware of the advantages of life under (certain kinds of) political authority,
having by and large anticipated Hume’s own justification of the state; what worried them,
rather, was whether our being coerced into providing these benefits to one another could
be reconciled with our natural freedom or independence. It was to this concern that the
theory of political voluntarism was addressed – and to which the early voluntarists, at any
rate, thought an affirmative answer could be provided. Yet how, they may rightly
wonder, could the subjects of political rule continue to understand themselves to be free
if, as Hume saw to be the case, the constraints of civic membership were not in fact
voluntarily self-imposed?

It is only with Kant’s theory of the state that we first receive a direct response to
the voluntarists’ challenge. Like the classical contractarians, Kant conceived of
individuals as equipped with a natural capacity not simply to choose in accordance with
their immediate impulses or desires but to conform to the fundamental laws of morality:
indeed, for Kant, to give those laws to themselves. Yet while our inner freedom or
autonomy may be fully realizable apart from our participation in particular social or

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political institutions, political institutions, our external freedom, or independence from the control of other agents, will remain crucially incomplete, on Kant’s view, outside a system of binding legal rules. In order to achieve external freedom, Kant held (again, with much of the voluntarist tradition) that we must enjoy not only security in our physical person – what we would today call rights to bodily integrity – but also exclusive control over some spaces and objects in the natural world: in other words, rights to at least some forms of property, broadly understood. But whereas voluntarists believed that conclusive property rights could arise through unilateral appropriation in the state of nature, Kant argued that any property rights established outside a framework of law would be at best provisional arrangements, inevitably undefined in certain key respects and incapable of binding those allegedly subject to them. To begin, Kant suggested, we might reasonably disagree about what values or principles should govern the original acquisition of property and the status of duly acquired property in the face of damages, future appropriations, and transfers among original owners. Yet even if we did converge on a single account of just acquisition, transfer, and rectification – say, the familiar principle of first occupancy, coupled perhaps with a Lockean “proviso” that we leave “enough and as good” in common for others – there are bound to be any number of indeterminacies, and hence further controversies, when that principles is applied to particular cases. (Think only of contemporary philosophers’ inability to agree, even at a rather high level of abstraction,  

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76 An assumption that would itself be called into question by Hegel’s influential critique of the social contract tradition.  
77 See, for example, Kant, The Metaphysics of Morals, in Practical Philosophy, ed. Mary J. Gregor (Cambridge: Cambridge University Press, 1996), 6:265, pp. 416-417, on the question of whether original acquisition requires cultivation (à la Locke) or whether “other signs that cost less effort can be substituted” for this purpose.
on the proper rendering of the “proviso” just mentioned.\(^7\) Unless our shared normative standard “also contain[ed] the principle for choice by which a particular possession … could be determined” under a potentially infinite range of circumstances, individual property claims are bound to be the subject of moral, if not also material, conflict.\(^7\)

Still, why not leave private parties to resolve disputes borne of moral disagreement and indeterminacy for themselves? Kant gives two reasons. First, when I assert a right to some external object, “I thereby declare that everyone else is under obligation to refrain from using that object of my choice.”\(^8\) Yet, given our symmetrical standing as equally authoritative interpreters of our rights and duties, my unilateral will “cannot put others under an obligation they would not otherwise have.”\(^8\) My insistence that you comply with my private judgment asserts a kind of authority over you that I do not have. Second, a system of private or unilateral enforcement fails to ensure my genuine independence from the choices of others, since I must rely at all times on their willingness to respect the rights I have claimed for myself. If my security is not to depend on the good will and forbearance of some other person, I must be provided with


\(^8\) Kant, The Metaphysics of Morals, in Practical Philosophy, 6:267, p. 418, emphasis in original. In a recent essay, Japa Pallikkathayil has argued persuasively that bodily rights, which Kant thought of as fully conclusive even in the absence of public institutions, face the same problems that face property rights in the state of nature, and that these defects would be sufficient to establish a duty to enter the state notwithstanding Kant’s arguments about property; see her “Persons and Bodies,” in Freedom and Force: Essays on Kant’s Legal Philosophy, eds. Sari Kisilevsky and Martin Stone (Oxford: Hart Publishing, forthcoming).

\(^8\) Ibid., 6:255, p. 409.

\(^8\) Ibid., 6:264, p. 416.
an “assurance that he will behave in accordance with the same principle with regard to what is mine.”

Both of these problems, Kant suggests, can be solved by establishing a common political authority designed to issue and enforce a single understanding of its subjects’ rights and duties. Public institutions can solve the problem of unilateral interpretation, on the one hand, by lodging initial interpretive authority in an impersonal agency – an “omnilateral” legislative will – charged with speaking for the political community as a whole, and assigning the power to adjudicate subsequent disputes to an independent body capable of representing the interests of all parties to the controversy at hand. The state removes the problem of unilateral enforcement, on the other, by sanctioning violations of individuals’ (legally-determined) rights with force, thus providing all subjects with the assurance that their rights will not only be made clear to others but will also be respected in practice. Because individuals’ external freedom cannot be secured without submitting to legal institutions of this general character, there is no affront to our independence in our being nonvoluntarily conscripted into the state; forced subjection to political authority is, instead, merely a “hindering of the hindrances to freedom,” and thus requires no voluntary action on our part to be legitimate. More than this, since we would stand in the way of others’ external freedom by remaining outside political society, we have a natural duty “to leave the state of nature and proceed with them into a rightful

82 Ibid., 6:255, p. 409.
83 Ibid., 6:263, p. 415.
84 On the division of rightful power into three distinct “persons” or “authorities” – legislative, executive, and judicial – see ibid., 6:313-318, pp. 456-461.
85 Ibid., 6:396, p. 526; compare Kant, “Toward Perpetual Peace: A Philosophical Project,” in Practical Philosophy, 8:349, p. 322, arguing that, if I find myself merely in proximity to another in the state of nature, “I can coerce him … to enter with me into a condition of being under civil laws.”
To speak of this joint act as a “social contract” is thus, on Kant’s view, simply to describe a “union which is in itself an end (that each \textit{ought to have}) and which is therefore the unconditional and first duty in any external relation of people in general, who cannot help mutually affecting one another.”\textsuperscript{87} It is not, as on the voluntarist account, a practical prerequisite of legitimate rule, but simply an “idea of reason,” representing what individuals \textit{would} choose were they to grasp and act from their natural moral duties.\textsuperscript{88}

Although long overshadowed in the English-speaking world by utilitarian and quasi-voluntarist theories of political obligation, the justice-based approach would come to reclaim a central place among philosophical discussions of legitimacy with the publication of Rawls’s \textit{A Theory of Justice}.\textsuperscript{89} Rawls’s account of legitimacy follows Kant’s in three fundamental respects. (I focus here exclusively on the Rawls of \textit{A Theory of Justice}, postponing consideration of subsequent developments in his account of legitimacy until Section 3 below.) First, like Kant, Rawls argues that our duties of political allegiance must derive from a prior natural duty to establish a just or “rightful” condition with those living around us. As Rawls puts it, this natural duty requires us to support and comply with just institutions that exist and apply to us. It also constrains us to further just arrangements not yet established, at least when this can be done without too much cost to ourselves. Thus if the basic structure of society is just, or as just as is reasonable to expect in the circumstances, everyone has a natural duty to do his part in the existing scheme.\textsuperscript{90}

\textsuperscript{88} Ibid., 8:297, p. 296.
\textsuperscript{89} Rawls had earlier argued that the principle of fairness (or “fair play”) could ground political obligations for citizens generally, although he ultimately jettisoned this quasi-voluntarist view in favor of the natural duty account described below; see the discussion in \textit{A Theory of Justice}, rev. ed. (Cambridge, Mass.: The Belknap Press of Harvard University, 1999), pp. 93-101.
\textsuperscript{90} Ibid., p. 99.
Just as the force of our natural duty does not itself depend on our having consented to be bound by it or otherwise freely adopted it as one of our ends, the derivative demand that we support just institutions likewise holds “without regard to our voluntary acts.”

Second, for Rawls as for Kant, the content of the principles that determine the legitimacy of particular states is to be specified through an abstract or “prepolitical” process of philosophical reasoning, such as the device of the original position, rather than by consulting the existing norms or practices sustained by historically specific political communities. They are to be understood, that is, “as the outcome of a hypothetical agreement,” reached under conditions designed to shield deliberating participants from information that might jeopardize their impartiality, such as the particular evaluative commitments or self-understandings of those who would be bound by the outcomes of the decision procedure.

Third, and finally, Rawls shares Kant’s general view of justice as, at bottom, a matter of securing the equal freedom or liberty of all persons (as opposed to, say, satisfying their preferences or maximizing their average or aggregate utility). The project of adducing and interpreting the principles capable of grounding our allegiance to the state is thus, for both thinkers, one of reflecting on what it means – and what is required, institutionally – for us to be equally free in the world.

Yet for all these commonalities, Rawls does not simply revive Kant’s justice-based approach: he radicalizes it. For Kant held, as we have seen, that our external

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91 Ibid., p. 98.
92 Ibid., p. 99. Although Rawls would reject Kant’s view that principles of right are “conceivable a priori in the state of nature” (The Metaphysics of Morals, in Practical Philosophy, 6:291, pp. 438-439), he nevertheless thought they could be worked out through a deliberative process that made use of only very general facts about human history, psychology, and social regularities, such as the Humean “circumstances of justice” discussed in A Theory of Justice, pp. 109-112.
freedom could be secured simply by eliminating the problems of private interpretation and enforcement – which is to say, by establishing a public and uniform scheme of law, constrained only by highly formal (and thus substantively open-ended) principles of right. Given this minimal conception of a just or rightful condition, Kant held that our natural duties enjoined us simply to enter into and comply with some kind of impersonal legal order. Rawls, by contrast, takes a more expansive view of the potential role or function of public institutions – no doubt due, in large part, to the incredible growth in state capacity since Kant’s time – and accordingly conceives of the substance of justice in far more demanding and fine-grained terms.\[94] This comparatively robust view of social justice, in turn, implies a correspondingly exacting account legitimate public authority – enjoining us to establish and uphold the full panoply of laws and institutions required by Rawls’s two principles of justice, and to replace our current arrangements to the extent that they depart from that particular conception of the just society.

Yet even as Rawls goes further than Kant in using their shared abstract or “prepolitical” method to generate substantive principles of social justice (rather than merely formal criteria of right), I should note at least two ways in which Rawls thinks the precise content of our natural duties must rely either on empirical facts about the particular society in question or on concrete processes of positive law-making and legal discontinuities between Kant’s account of legitimate authority and that of contemporary (so-called) “neo-Kantian” theorists, and suggest that Kant’s own view may therefore be less susceptible to the realist criticisms I elaborate in the following section.

\[94\] One might be tempted to describe this as a shift in the conception of the subject of justice, from the coercive legal order or its constitution to the “basic structure” of society, taken to include a wider array of social and economic institutions. I think this would be a mistake, however, in view of the fact that (ostensibly) non-coercive institutions such as business firms or families are part of the basic structure, on Rawls’s view, only insofar as they are given legal definition by, and backed by the coercive enforcement powers of, the state. The thoroughly coercive nature of the basic structure of society has perhaps been obscured by recent debates about the rather distinct issue of whether Rawls’s focus on the basic structure as the primary subject of justice is due primarily or entirely to its being coercive.
interpretation. First, he acknowledges that even his relatively fine-grained principles of justice will nevertheless be indeterminate with respect to at least some questions of institutional design, public policy-making, and legal administration and adjudication. Even as we move to apply these general principles to particular situations and thus begin to make use of relevant facts about the specific societies in which the agreed-upon principles are to be realized – as through Rawls’s “four-stage sequence” of application\(^95\) – we will find that “it is not always clear which of several constitutions, or economic and social arrangements would be chosen,” since it is possible that several will be “compatible with all the constraints of the theory.”\(^96\) But while justice, taken abstractly, may be indifferent among a number of equally just laws and institutions, Rawls suggests that our natural duties will enjoin us to support only those just laws and institutions that have \textit{in fact} been enacted by our particular legislative authorities (following just and locally authoritative decision-procedures). Where justice is partly indeterminate, our natural duties will thus be dependent on what we might call a system of “quasi-pure procedural justice.”\(^97\)

Second, moreover, our natural duties may at times require us to comply with \textit{unjust} laws and policies – with those falling \textit{outside} the range of potentially just alternatives – insofar as these decisions are made following just constitutional rules and are not themselves gravely unjust. The thought here is that, prior to any actual moment


\(^{96}\) Ibid., p. 176.

\(^{97}\) Ibid. Rawls’s argument here is rather compressed, and a number of theorists have since questioned whether Rawls’s view can actually account for the “particularity” of our natural duties: that is, for our having duties to support the specific just arrangements under which we live, rather than simply just laws and institutions generally, wherever they may exist. For two recent contributions to a now substantial literature on this problem, see the essays that comprise Christopher Heath Wellman and A. John Simmons, \textit{Is There a Duty to Obey the Law?} (Cambridge: Cambridge University Press, 2005). I argue that duty-based theories can in fact satisfy the “particularity requirement” in Chapter 1, Section 2 above.
of positive legislation, we must have in place a public system of rules in virtue of which particular declarations will assume the status of law; in choosing among procedural systems of this sort, Rawls maintains, we must ensure, in the first instance, that such a system is itself just (as judged by the principle of equal liberty, Rawls’s first and lexically prior principle of justice) and, secondarily, that it is “most likely to lead to just and effective legislation in view of the general facts about the society in question.”98 But since, under a familiar range of “non-ideal” conditions, there exists no just and feasible constitutional system capable of producing perfectly just laws and policies, we must therefore adopt whatever procedural scheme is likely to produce the fewest (if still more than zero) unjust outcomes. Because such a system is as just as “it is reasonable to expect in the circumstances,” Rawls concludes that our natural duty of justice “binds us to comply with unjust laws and policies” that result from its procedures, at least “as long as they do not exceed certain limits of injustice” – such as by denying basic individual liberties or by systematically imposing unjust burdens on particular individuals or groups.99 When a society is in a state of “near justice,” so defined, our duties of justice will thus enjoin us to support certain unjust laws and policies as a matter of “imperfect procedural justice.”100

Bringing these ideas together, we can summarize Rawls’s natural duty account of legitimacy as holding, inter alia: that the legitimacy of a given state, and thus its subjects’ duties to comply with its directives, depend fundamentally on its ability to secure the

98 Rawls, A Theory of Justice, p. 311; for the argument that the first principle ought to govern the choice of a just constitution, while the second principle ought to govern the choice of legislation adopted within that framework, see pp. 174-175.
99 Ibid., pp. 309, 311. I set aside here the question of whether the model of the “four-stage sequence” should commit Rawls to the stronger view that individuals ought to comply with a constitution that is unjust (as per the first principle) – say, by denying equal political liberties – but which is arranged so as to best satisfy that principle under non-ideal conditions.
100 Ibid., p. 311.
demands of justice; that the best method for specifying the substantive requirements of justice, and thus of legitimacy, is through a process of abstract or “prepolitical” reasoning; that it is possible to select reasonably (though not perfectly) determinate and authoritative principles of justice, and hence of legitimacy, through this prepolitical method; and, finally, that legitimacy, while importantly derivative of justice, is nevertheless a weaker or less demanding ideal, such that individuals may have duties to comply with public institutions that are less than perfectly just.

Contemporary justice-based theorists have followed Rawls’s account in each of these fundamental respects, albeit with one small modification to his method of distinguishing justice from legitimacy. Rawls, as we just saw, sought to distinguish these two ideas through a complex series of quasi-empirical tests designed to determine whether a “near just” state is nonetheless “as just as it is reasonable to expect in the circumstances,” and thus whether our duties to comply with just institutions are triggered or activated by our current, imperfectly just arrangements. Subsequent justice-based theorists, by contrast, have tended to rely on the simpler notion that legitimacy is a matter of satisfying what Allen Buchanan calls a mere “threshold approximation to full or perfect justice,” understood to be identifiable without respect to local circumstances and thus to apply to all states universally.  

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101 Allen Buchanan, Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law (Oxford: Oxford University Press, 2003), p. 432. Although in many ways representative of contemporary threshold theories of legitimacy, Buchanan’s view is perhaps exceptional in the following respect. While he conceives of most conditions of legitimacy – such as the protection of basic human rights – as obtaining regardless of local circumstances or considerations of feasibility, he argues that legitimacy requires the protection of specifically democratic rights only where “democratic authorization is feasible (and is also likely to be achievable without excessive risks to persons’ basic rights)” (p. 258). But it remains unclear, given Buchanan’s contention that democracy is a component of justice and not simply an instrument for its realization (pp. 256-257), why he applies a feasibility condition to this, but not any other, requirements of legitimate authority.
Unlike Rawls’s account of our natural duties, the threshold conception of legitimacy has the virtue of recognizing not simply that it may be impossible to bring about a state of perfect justice under range of familiar circumstances, but also that individuals may reasonably disagree about the ideal demands of justice themselves. Given the possibility of reasonable disagreement about “exactly which system of rights would realize justice in the fullest sense,” as Anna Stilz puts the point, the conditions under which citizens can be required to support their state “cannot depend on their full-blown views about justice.” Indeed, as Thomas Christiano explains, to impose a single answer to questions of justice that fall “within the bounds of reasonable disagreement” would at least presumptively “constitute[] a form of inequality” or arrogance toward those with reasonable yet opposing views. What is needed instead, these theorists suggest, is a conception of legitimacy capable of ruling out “clear mistakes” about justice while allowing for matters lying within the bounds of disagreement to be decided through collective decision-making procedures that recognize individuals’ equal capacity for moral and political judgment. Although the leading accounts themselves disagree about precisely where to set the threshold of legitimate rule, most theorists hold both that justice clearly rules out violations of various basic human rights – viewed, for these purposes, simply as a “proper subset of the rights founded on justice” – and that justice

105 Joshua Cohen, “Is There a Human Right to Democracy?” in *The Egalitarian Conscience: Essays in Honour of G. A. Cohen*, ed. Christine Sypnowich (Oxford: Oxford University Press, 2006), p. 226. In citing Cohen’s dictum in this context, I do not mean to suggest that the threshold requirements of legitimacy would automatically have the sort of normative significance for outside agents in the international community that Cohen envisions for bona fide human rights. I do, however, explore some of the implications of treating them in this way in Chapter 4 below.
clearly demands that remaining questions of law and policy be decided through procedures that are inclusive and participatory, if not necessarily fully democratic. So long as our political institutions satisfy this threshold approximation to full or perfect justice, our duties of justice will instruct us to comply with their demands.106

Thus despite relying on an abstract or prepolitical method to specify the requirements of justice, each of the leading justice-based accounts ultimately resists employing this method to spell out the full content of our political rights and duties. On Rawls’s view, although the abstract principles of justice comprise a singular and perhaps transhistorical ideal – binding “sub specie aeternitatis,” as he says107 – doing justice in practice may require us to support a rather diverse array of concrete arrangements, including even manifestly unjust laws or policies, depending on the circumstances in which we find ourselves. Insofar as the practical demands of justice must rely on a range of contingent and predictably variable local factors in this way, so too must the requirements of legitimate rule. On what I have called the “threshold” account of legitimacy, by contrast, the distinction between justice and legitimacy is made not by viewing justice itself as dependent on the particular circumstances of application, but by drawing a distinction between the core or basic requirements of justice and certain hard cases on which reasonable people may disagree; provided that a given state satisfies the threshold specified by the former set of conditions, its subjects ought to recognize its authority as legitimate. Thus, far from the popular caricature of Rawls and his successors

106 Other prominent threshold accounts of political legitimacy include Andrew Altman and Christopher Heath Wellman, *A Liberal Theory of International Justice* (Oxford: Oxford University Press, 2009), ch. 1 and Jonathan Quong, *Liberalism without Perfection* (Oxford: Oxford University Press, 2011), ch. 4; as one commentator observes in a survey of recent literature, “it is now generally agreed that the moral duty to obey arises, if at all, only if a ‘threshold condition of justice is met’ by the legal system” (William A. Edmundon, “State of the Art: The Duty to Obey the Law,” *Legal Theory* 10, no. 4 [2004]: 215-259, at p. 224, internal citation omitted).

as proposing a context-insensitive, “one-size-fits-all” theory of politics, these theorists in fact view legitimacy as admitting of a variety of concrete institutional forms, many of which may fall short of their own conceptions of social justice.\textsuperscript{108}

2. The Realist Critique

The line of criticism I wish to develop in the balance of the chapter does not deny that the justice-based approach has the theoretical resources to adapt to local circumstances or to accommodate moral and political disagreement, even to a rather significant degree. What the realist critique maintains, instead, is that the prepolitical method on which the justice-based approach relies is nevertheless an improper means of responding to context-sensitive information and that, not accidentally, this method in fact tends to produce substantive normative demands that are insufficiently flexible or accommodating of local practices and structures of belief. In this section, I will develop an account of the realist critique in the form of three objections: first, an argument against the justice-based method as such, followed by two distinct objections – neither of which entails or presupposes the methodological challenge – which focus more narrowly on the first-order normative implications of that method, as it has been employed by the leading justice-based accounts.

The realist challenge to the justice-based method as such maintains that the members of a particular political community ought to play an active role in determining

\textsuperscript{108} Indeed, the charge of “fact-insensitivity” might seem especially puzzling to those of Rawls’s critics who have recently sought to “rescue” his account of justice from an overweening dependence on even highly general facts about human motivation and moral psychology, such as our limited propensity to act from altruistic motives. See especially G. A. Cohen, \textit{Rescuing Justice and Equality} (Cambridge, Mass.: Harvard University Press, 2008), and compare also David Estlund’s discussion of “utopophobia” in \textit{Democratic Authority: A Philosophical Framework} (Princeton: Princeton University Press, 2008), ch. 14 and “Human Nature and the Limits (If Any) of Political Philosophy,” \textit{Philosophy and Public Affairs} 39, no. 3 (2011): 207-237.
the normative standards by which their laws and institutions are ultimately assessed.

Note that these realist critics do not hold merely—and are indeed not necessarily committed to the view—that individuals ought to play an active role in shaping the content of their political arrangements, say, by exercising their rights to vote or serve in public office or protest official policy or participate in the various partial associations that comprise a healthy civil society. For we cannot consider these or any other first-order rights and opportunities to be locally binding conditions of legitimacy in the first place, on this view, unless they have been adopted in accordance with standards that have themselves been affirmed or adopted by the particular community in question, and so on up the chain of higher-order norms and values. Abstract theoretical reasoning may of course play an indirect role in formulating standards of political legitimacy, insofar as individual citizens must decide which political norms and values ultimately merit their support, and will likely arrive at these decisions by stepping back from their particular judgments and seeing if these can be made to cohere with their more general evaluative and empirical beliefs. But while such a process of “disengaged” or individualized reflection may yield an array of compelling candidate conceptions of legitimate rule, no one of these conceptions can be considered binding for a particular political community, on the realist account, without having been adopted or ratified by its members.¹⁰⁹

¹⁰⁹ A similar sentiment is sometimes expressed in terms of a distinction between “monological” and “dialogical” approaches to moral and political theory. See, for example, Jürgen Habermas, Moral Consciousness and Communicative Action, trans. Christian Lenhardt and Shierry Weber Nicholsen (Cambridge, Mass.: The MIT Press, 1990), pp. 68-70 and Charles Taylor, “The Politics of Recognition,” in Multiculturalism: Examining the Politics of Recognition, ed. Amy Gutmann (Princeton: Princeton University Press, 1994), pp. 32-34. Although Habermas has notably cast himself as an exemplar of “dialogical” reasoning, in apparent contrast to Rawls’s “monological” approach, Christopher McMahon has persuasively suggested that both thinkers share an understanding of the “moral point of view” as accessible to each individual, at least in principle, without the assistance of collective deliberation or decision-making. As McMahon writes, “there does not appear to be any way of viewing moral impartiality per se as constituted by an essentially interpersonal mechanism unless it is a mechanism of bargaining. If reasoning
Because the justice-based account denies that principles of legitimacy must themselves be accepted or endorsed by those subject to their demands, it is thus said to “depoliticize” ongoing controversies about the proper grounds and limits of political power, and to that extent to silence or marginalize important sources of dissent and disagreement.\(^{110}\)

In holding simply that the requirements of legitimacy must somehow be determined through locally prevailing patterns of contestation and compromise, these realist critics thus leave open the possibility that particular political communities could wind up holding their public institutions to norms of legitimacy that are in fact antithetical to the very values and commitments – such as openness, inclusivity, and responsiveness – that appear to motivate their opposition to the justice-based approach in the first place. Indeed, it is at times unclear whether, in rejecting the justice-based method, these accounts are capable of placing any normative limits on the institutions and practices of a legitimate state, or whether they are ultimately committed to accepting as legitimate the de facto authority of virtually any existing state.\(^{111}\)

Although I shall argue below that we can arrive at genuinely critical or normative standards of legitimate rule is rather involved, moral impartiality is grounded in the relevant reasons, and the parties become impartial, whether individually or collectively, by grasping the force of those reasons” (“Why There Is No Issue between Habermas and Rawls,” The Journal of Philosophy 99, no. 3 (2002): 111-129, at p. 129). The realist critics of the justice-based method as such can thus be understood, in McMahon’s terms, as viewing the conditions of legitimate authority as constituted by an interpersonal “mechanism of bargaining” or compromise.


\(^{111}\)Some critics of the justice-based method as such have hinted in passing, though have not fully developed the suggestion, that there may be certain normative constraints internal to even highly “agonistic” political encounters; see, for example, Connolly, Why I Am Not a Secularist, p. 155, Mouffe, The Democratic Paradox, p. 93, and Coles, Beyond Gated Politics, p. 37.
without relying on an abstract or prepolitical mode of reasoning, these concerns have nevertheless led many realist critics to shy away from rejecting the justice-based method as such, and to proceed instead to challenge the first-order normative conclusions of its leading practitioners straightaway.

These first-order critics argue that, in spite of their apparent efforts of adapt to local conditions and accommodate a modicum of disagreement about justice, the leading justice-based accounts nevertheless conceive of legitimacy as requiring a range of public institutions and practices that are incompatible with the widely shared commitments and self-understandings of many real-world political communities. In failing to bring the objective conditions of legitimacy into sufficient alignment with the subjective attitudes and attachments of those subject to political power, these accounts are thus led to instruct the members of many existing and historical states to withdraw support from public arrangements they may endorse or identify with, and to work to replace those arrangements with laws and institutions they may view as foreign or hostile to their own traditions and systems of belief. These injunctions, in turn, threaten to undermine at least two important sets of values or interests that many realists argue ought to figure into any adequate conception of legitimate authority.

First, many realists maintain, at least implicitly, that individuals have a fundamental interest in what I will call collective *self-determination*: that is, in living under public institutions that are governed in accordance with their own views about justice and political morality, even when these views are objectively mistaken or misguided. At first approach, we might understand this interest along the lines of our more general interest in satisfying whatever preferences, or fulfilling whatever aims or
values, we happen in fact to have: as a general matter, that is, our lives go better, and may indeed be more intrinsically rewarding, when we have the chance to realize our own goals and aspirations, as opposed to those that have been selected by some other person or agency. Yet the special or “fundamental” status of our interest in self-determination derives from the further fact that our determinate conceptions of justice tend to occupy an especially important place in our overall systems of belief, interlocking with our other values and attachments and providing us with reasons for action we may often view as authoritative or “non-negotiable.” Rawls himself describes the claims of conscience along these lines, observing that a person who “recogniz[es] religious and moral obligations regards them as binding absolutely in the sense that he cannot qualify his fulfillment of them for the sake of greater means for promoting his other interests.” Because fundamental commitments of this sort serve to define central features of one’s personal character and self-conception as a moral agent, those who are prevented or inhibited from pursuing these aims by the laws and policies of their state will often experience those laws as injurious if not humiliating, and may view the broader institutional order that sustains those felt harms as inhospitable and alienating. The suggestion here is that what holds for personal claims of conscience applies with equal force to claims deriving from one’s sense of justice or political duty.

Of course, the interest in self-determination, even if fundamental, cannot be absolute or unconditional. It is at least conceivable, for example, that certain conceptions of justice may be so lacking in value that their adherents (to say nothing of their fellow

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citizens) would be better off if those conceptions were to go unfulfilled, and thus that self-determination, for this limiting class of individuals, would in fact have no value.\footnote{See Patten, “Liberal Neutrality,” p. 253 n. 14.}

Yet even setting aside extreme cases of this sort, we can discern the limited or conditional nature of the interest in self-determination by observing the practical impossibility of realizing more than one conception of justice – or, perhaps in the case of federal or devolved systems of political authority, more than a small handful of such conceptions – in a given state at a given time. Thus unlike personal or “private” claims of conscience, in Rawls’s sense, many of which could be fulfilled alongside one another in the civil society of a single state, particular conceptions of justice necessarily make demands on the shape and substance of a given community’s public institutions, which by their nature cannot instantiate multiple schemes of rules and norms simultaneously. Since, in the face of even the slightest degree of political disagreement, at least some individuals will inevitably be subject to political arrangements that conflict with at least some aspects of their own conceptions of justice, any argument to the effect that a state’s legitimacy ought to depend on its \textit{completely} satisfying \textit{all} its members’ interests in self-determination would be unable to establish the legitimate authority of any existing (and perhaps historical and foreseeable) state. In order to play a discriminating and non-skeptical role in our practical reasoning about political rule, such an account must instead limit either the substantive conceptions of justice to which it assigns normative weight or else the overall extent to which a state must accommodate such conceptions in order to count as legitimate.

The leading justice-based approaches, insofar as they have sought to accommodate political disagreement at all, have pursued what we might think of as a
hybrid of these strategies: on the one hand, limiting the normatively relevant constituency to those holding “reasonable” conceptions of justice, understood to converge on such “core” requirements of justice as the protection of human rights and rights to some form of popular political participation; and, on the other, stipulating that any remaining disagreements about justice ought to be settled by the procedures outlined by the core requirements just mentioned. Thus political legitimacy, on these accounts, requires only that individuals holding “reasonable” conceptions, so defined, have their interests in self-determination satisfied, and then only insofar as their “core” commitments are concerned.

Unlike the methodological critics described above, the realists who oppose the leading justice-based views on grounds of self-determination do not take issue with the very idea of drawing prepolitical limits on the extent to which self-determination must be accommodated by a legitimate state; rather, they simply insist that the leading views have drawn these limits too narrowly, leaving insufficient room for “reasonable” disagreement about justice and ignoring the moral consequences of frustrating “unreasonable” citizens’ distinctive conceptions of justice. At one extreme, some realists maintain that all substantive conceptions of justice, and thus to that extent all individuals’ interests in self-determination, ought to be accorded equal weight for the purposes of determining a given state’s legitimacy. Faced with disagreement about which course of action would be best, a legitimate state must therefore “adopt procedures for settling political disagreements which do not themselves specify what the outcome should be,” and which “give each individuals’ view the greatest weight possible in this process compatible with an equal weight for the views of each of the others.”

Other realists, unwilling to leave the

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115 Jeremy Waldron, Law and Disagreement (Oxford: Oxford University Press, 1999), pp. 304, 114. I raise some doubts about the adequacy of this “proceduralist” alternative in Section 3 below.
substantive policy outcomes of a legitimate state “up for grabs” in this way, concede that some political viewpoints may be suppressed or ignored without counting against the legitimacy of a given state, yet maintain that the leading justice-based accounts nevertheless exclude too many substantive views about justice from the class of “reasonable” beliefs. Given the possibility of reasonable disagreement even on certain matters deemed to be “core” requirements of justice by the leading justice-based accounts, perhaps we ought to divide this set of core conditions even further, following Charles Taylor’s suggestion, so as to distinguish those ultraminimal or “fundamental liberties … that should never be infringed and ought therefore to be unassailably entrenched, on the one hand, from privileges and immunities that are important, but that can be revoked or restricted for reasons of public policy … on the other.”

Or perhaps, as still others have proposed, we should accept that principles of legitimacy designed to be respectful of ethical and cultural difference will be unlikely to entail any particular scheme of legal rights and duties, substantive or procedural, forcing us to rely instead on what Taylor elsewhere terms a process of “inspired ad hoccery” in determining the concrete demands of legitimate authority. Although these proposals vary in their

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116 Taylor, “The Politics of Recognition,” in *Multiculturalism*, p. 59. It is unclear from Taylor’s ensuing discussion whether the distinction he has in mind would differ in substance from the distinction between “core” and “peripheral” requirements of justice proposed by the leading justice-based accounts.

particulars, they share the common conviction that the leading justice-based accounts ultimately accord insufficient weight to individuals’ interests in organizing their common affairs under their own conceptions of justice.

The second first-order objection, and the final component of the overall realist critique, holds that the leading justice-based accounts neglect individuals’ additional interests in securing political *stability*, understood as a condition of widespread compliance with a single system of public rules and norms. Much like the objection just considered, the argument from stability seeks to narrow the gap between the normative requirements of legitimacy and the actual beliefs and attitudes of those subject to political power. But whereas the argument from self-determination held that a mismatch between a given society’s legitimating norms and its subjects’ widespread views about justice threatened to undermine those individuals’ basic interests *directly* – namely, by requiring political arrangements that would fail to realize their interests in self-determination – the argument from stability maintains that this same incongruity poses an *indirect* risk to individuals’ further interests in stability, insofar as the stability of a given state itself depends on its governing in accordance with its members’ widespread beliefs about justice.

The argument from stability begins from what Geuss terms the “basically Hobbesian insight” that the coordination of action of any kind – much less the realization of a complete vision of the just society – “is always a social achievement, and it is something attained and preserved, and generally achieved only at a certain price.”\(^{118}\) Any tractable and plausibly action-guiding theory of political authority must therefore pay

\(^{118}\) Geuss, *Philosophy and Real Politics*, p. 22.
“special attention to the variety of ways in which people can structure and organise their action so as to limit and control forms of disorder that they might find excessive or intolerable.”

Because disorder poses such a grave threat to individuals’ well-being and their capacity to pursue any number of private and collective objectives, some theorists have viewed its elimination as the sole objective of political society; yet surely even those who take a more aspirational view of politics, the realist critics suggest, can agree that the “first political question” any legitimate state must answer is that of securing “order, protection, safety, trust, and the conditions of cooperation.”

It is not clear that the justice-based theorists noted above would have any reason to deny that the creation of order or stability is a, or even the, primary aim of political institutions: Rawls, for one, devotes much of Part III of A Theory of Justice to the relative stability of justice as fairness, and begins his later “restatement” of that theory by emphasizing political philosophy’s “practical role arising from divisive political conflict and the need to settle the problem of order.”

What the realist critics maintain, however, is that the leading justice-based accounts are nevertheless blind to the central means by which order is secured in practice across a range of culturally and historically distinct societies. As sociologists since Weber have suggested, individuals are far more likely to comply with the demands of their state when they view its power as rightful or justified than when motivated by the prospect of coercive penalties alone – when, in Weber’s terms, the state elicits “inner justifications” or “legitimations” of its power, as

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120 Williams, “Realism and Moralism in Political Theory,” in In the Beginning Was the Deed, p. 3.
opposed to relying solely on the “external means” of violence.\textsuperscript{122} Yet if, as the argument from self-determination maintained, individuals in a range of real-world societies are apt to \textit{reject} the particular laws and institutions required by the leading justice-based accounts, their compliance with these arrangements must ultimately be secured (if at all) on other, less reliable bases. Absent special circumstances that would allow public officials to secure routine compliance in the face of widespread popular opposition,\textsuperscript{123} incongruities between a state’s public institutions and practices and the dominant values and attachments of its subjects would thus typically spell disaster for the project of securing political order or stability. To designate such a fragile if not ultimately unsustainable state “legitimate,” and in turn to deny legitimacy to institutions actually capable of eliciting widespread conformity with the law, seems to many realist critics to sever the once-commonplace connection between the legitimacy of a given state and the most vital human needs of its members.\textsuperscript{124}

The realist critique, as I have presented it, consists of a rather diverse series of objections to the justice-based theory of legitimacy, drawn from a number of distinct theoretical traditions and motivated by various and perhaps at times incompatible


\textsuperscript{123} Circumstances of this sort might include an unusual concentration of loyal supporters among the ranks of a large and particularly effective police and administrative force: for example, in states in which an ethnic minority has captured the major institutions of government and in which geographical size, level of infrastructure, and population distribution allow public officials to oversee a critical mass of the citizenry and subdue emerging pockets of resistance across the entire territory.

\textsuperscript{124} Hence the familiar and related charge that justice-based theories are practically \textit{irrelevant} insofar as they fail to engage the situated concerns and motivations of their addressees: as Bernard Williams writes, it is not that such abstract, idealizing injunctions “are, exactly, meaningless – one can imagine oneself as Kant at the court of King Arthur if one wants to – but they are useless” nonetheless as practical guides to action (“Realism and Moralism in Political Theory,” in \textit{In the Beginning Was the Deed}, p. 10).
concerns and commitments. Running across these varied lines of attack, however, is a common conviction that the leading accounts of legitimate authority are in some way insufficiently attentive to or accommodating of individuals’ actually-existing beliefs, self-understandings, and collective practices, and that, by implication, a better account of legitimacy would be more responsive to these particular concerns. It has not been my aim to defend these objections against all conceivable lines of response, or to affirm in full what their leading advocates take to be the normative implications of the realist critique. Rather, I have sought merely to sketch a facially plausible set of concerns, and to show that these concerns are shared by political theorists – including agonistic or radical democrats, democratic proceduralists, multiculturalists, and self-described “realists” descending from Hobbes and Weber – who share little in common beyond their opposition to what I have called the justice-based approach to legitimacy. Thus as I turn, in the balance of the chapter, to see if an alternative approach is available, I will do so in a largely exploratory spirit, neither presupposing nor denying the truth of the realist critique. If, as I shall eventually suggest, an alternative account can in fact meet each of the realist objections just outlined, partisans of the justice-based approach should nevertheless feel free to consider the merits of this account alongside their own conceptions of legitimacy, irrespective of the methodological critique or the arguments from self-determination or stability.

3. Illusory Alternatives

We can begin this exploratory project by considering whether other contemporary theories of political authority might offer a genuine alternative to the dominant justice-
based account. After all, if the leading justice-based views have attracted as many detractors as I have suggested, we might expect at least some of these critics (not all of whom are methodologically averse to “positive” normative theorizing), if not also various justice-based theorists themselves, to have put forth a conception of legitimacy specifically in response to the realist critique. As I hope to show in this section, however, the three most superficially promising alternatives to the justice-based theory of legitimacy ultimately remain subject to a range of realist criticisms under at least some historical and cultural circumstances, or else generate new difficulties that, I suggest, cannot be adequately addressed without drawing on altogether distinct theoretical resources.

Consider, first, the well-known proceduralist alternative to the leading justice-based accounts, briefly alluded to in the preceding discussion of the realist argument from self-determination. According to this approach, disagreements about what justice requires in a given case ought to be resolved through public procedures that accord equal decision-making authority to each person bound by the outcome of the procedure. Formally egalitarian procedures of this sort, such as the familiar method of majority voting under conditions of universal enfranchisement, are thus said to give each individual’s conception of justice – and thus their interests in self-determination – as much weight as is compatible with an equivalent weighting for all others.\(^{125}\) By ensuring, moreover, that a given collective decision within a democratic-proceduralist state will align roughly with the preferences of at least a majority of its citizens (allowing for

\(^{125}\) See, for example, Waldron, *Law and Disagreement*, pp. 101-118.
certain familiar pathologies of preference-aggregation), such a system will have what we might think of as a systematic tendency to generate at least some critical mass of popular support and, one may assume, widespread compliance from its subjects – all the more so if those individuals widely view the egalitarian decision-procedure as fair or even-handed.

Yet this final “if” draws attention to an important possibility that Waldron and other proceduralists consistently appear to overlook: namely, that the method of inclusive majority-decision voting, as well as the prior commitment to extending equal consideration to all conceptions of justice, might themselves be subject to good faith disagreement. For our conceptions of justice include beliefs not only about which outcome would be best in a given dispute, but also about which procedures should be employed to arrive at such a result, which higher-level norms should govern the choice of procedures (and of those norms themselves), and which views should be accorded weight at any given level of decision-making or procedural choice. The potential for controversy is even greater once we recognize that public institutions in any reasonably large or complex society will inevitably consist of multiple decision-making bodies governed by a range of discrete rules of deliberation and voting and staffed by representatives or specialized officials, who must themselves be selected in accordance with some public procedural standard by a citizenry enfranchised in accordance with

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126 Waldron attempts to allay some of the standard public-choice concerns about the arbitrariness and instability of majoritarian preference-aggregation in ibid., pp. 28-33.
127 In an early remark on Rawls’s natural duty account of legitimacy, Waldron suggests that, given the fact of reasonable disagreement about justice, we ought to supplement his account of “social justice as a substantive ideal” with a theory of “justice in the distribution of political power,” apparently failing to register either that Rawls’s own “substantive ideal” of justice includes a wide range of procedural requirements (including, indeed, a requirement that legislative decisions be made by majority-rule), or that any theory of “justice in the distribution of political power” is bound to be the subject of good faith controversy; see “Special Ties and Natural Duties,” *Philosophy and Public Affairs* 22, no. 1 (1993): 3-30, at p. 5 n. 9.
some prior standard still. Even if individuals could somehow converge on these and
countless other questions of procedural justice or fairness, it is by no means obvious that
they would agree to employ the method of majority-decision for each of the procedures
just listed (which, in any case, would leave unresolved crucial questions about powers of
agenda-setting and the boundaries of the franchise, since it is unclear what it would mean
for these to be settled by majority voting); nor is it especially likely that all societies,
regardless of historical or cultural circumstance, would ultimately converge on the same
complex scheme of decision-making rules and norms, even if agreement of this sort were
available in a given case.\textsuperscript{128} If individuals are no more likely to agree on matters of
procedural justice than on (so-called) substantive political decisions, a given procedural
conception of legitimacy will be subject to the very concerns about self-determination
and stability that were said to undermine the leading justice-based accounts.

A second apparent alternative to the justice-based approach holds out the promise
of universal convergence or agreement not on a collection of outcome-indeterminate
procedures but on a minimal set of substantive aims or goals that all individuals can
plausibly be thought to share, regardless of their further views about justice or political
morality. According to this \textit{minimalist} approach to legitimacy, we ought to begin, as
Judith Shklar famously suggested, not with a \textit{"summum bonum} toward which all political
agents should strive," but rather with a \textit{"summum malum,} which all of us know and
would avoid only if we could."\textsuperscript{129} Even if we might disagree about whether our state

\textsuperscript{128} Compare Thomas Christiano’s “regress argument” against Waldron’s brand of proceduralism in
\textsuperscript{129} Judith Shklar, “The Liberalism of Fear,” in \textit{Political Thought and Political Thinkers}, ed. Stanley
continuous with that of the early modern tradition of natural law, which sought to uncover a common basis
for political allegiance in spite of deepening religious and ethical fragmentation. In Grotius’s words, “there
are several Ways of Living, some better than others, and every one may chuse which he pleases of all those
should secure the full catalog of rights and opportunities considered by the leading
justice-based theorists to be conditions of legitimate rule, we might still share a more
basic aversion to certain extreme forms of suffering in virtue of our common
vulnerability to physical pain and our capacity to anticipate, and thus fear, future
occasions of cruelty. In virtue of our “similar physical and psychological structures,”
we might even discover what Michael Walzer has called a “moral minimum” – consisting
perhaps of various “negative injunctions … against murder, deceit, torture, oppression,
and tyranny” – in the legal and moral codes of otherwise diverse societies and cultures.\footnote{Shklar, “The Liberalism of Fear,” in Political Thought and Political Thinkers, p. 17.}

There are a number of things to be said about the prospects for a minimalist
conception of legitimacy, so conceived. To begin, while I do not doubt that there are
certain experiences or sensations that are (virtually) universally abhorred, or that we are
more likely to converge on such common aversions than on some loftier set of hopes or
aspirations, it is less clear that these particular commonalities offer a promising basis for
agreement on which interpersonal patterns of treatment – much less which forms of
political organization – ought to be avoided or deemed illegitimate. Simply observing
that an individual would suffer significant physical and psychic harms if subject to torture
or violent attack or forcible confinement, that is, does not on its own settle the moral and
political questions of whether these forms of treatment are categorically unacceptable or
whether they might instead be excused in various exigent circumstances or be justified as
part of a system of just warfare, criminal punishment, and the like. Particularly since, as

Sorts … [but] the Right which the Sovereign has over his Subjects [is not] to be measured by this or that
Form, of which divers Men have divers Opinions” (The Rights of War and Peace, ed. Richard Tuck
[Indianapolis: Liberty Fund, 2005], I.iii.8, p. 262).
\footnote{Michael Walzer, Thick and Thin: Moral Argument at Home and Abroad (Notre Dame: University of Notre Dame Press, 1994), p. 10.}
Shklar and others note, many of the harms to which we are jointly susceptible are not bodily injuries themselves but rather fears of such injuries occurring at future points in time, any institutional arrangements designed to alleviate our shared *summum malum* must not simply refrain from certain gross forms of physical mistreatment but must also provide us with a range of public assurances capable of establishing that our security against mistreatment will be robust across a range of future contingencies. Yet once our common desire to be assured against physical suffering is translated into particular mechanisms of governmental accountability or practices commonly associated with the “rule of law,” for example, I see no way of preventing the familiar controversies about institutional design and public policymaking from reemerging, even among citizens who are unified in their fear of cruelty. (Thus even if we grant Walzer’s hypothesis that most cultures and traditions would condemn “oppression” or “tyranny” in those terms, we should still not expect to find cross-cultural consensus on the merits of monarchy or presidentialism or systems of legislative supremacy, to say nothing of the rights and opportunities that individuals must enjoy as subjects of any such regime.)

There is perhaps a further weakness in the minimalist approach to legitimacy. Even if we could agree on the particular rights and opportunities we must enjoy in order for our most basic interests to be secured, we might still think that these universal guarantees are merely necessary but not sufficient conditions of legitimate authority.\(^{132}\) For, in addition to sharing a universal desire to be free from violence and terror, the members of particular political communities will typically develop a further range of

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\(^{132}\) See Williams, “Realism and Moralism in Political Theory,” in *In the Beginning Was the Deed*, p. 3; this paragraph elaborates Williams’s remark that Shklar’s liberalism of fear might lay the foundation for a “politics of hope” that “considers what other goods [beyond relief from the *summum malum*] can be furthered in more favourable circumstances” (“The Liberalism of Fear,” in *In the Beginning Was the Deed*, p. 61).
common values and norms that they come to expect their state to uphold and instantiate as conditions of its legitimacy. Many modern states, for example, have adopted various constitutional prohibitions limiting the authority of popular legislatures or constraining the discretion of administrative officials; while these norms may not always protect the most vital interests of their subjects, and are likely to be absent in their particularity from the constitutions of other states, their clear and systematic violation would seem nevertheless to undermine the legitimacy of the particular public authorities in question. Although the minimalist approach does not explicitly foreclose the possibility that its limited demands might be expanded to include further conditions of this sort on a case-by-case basis, it does not offer a clear basis on which such supplementary norms could be incorporated into the minimalist account, much less suggest a method or strategy for identifying these requirements in a given instance.

While the proceduralist and minimalist approaches sought to identify a set of normative standards that might attract the allegiance of individuals across range of historical and cultural circumstances, the final approach I will consider – what Ronald Dworkin has termed the method of constructive interpretation¹³³ – works up the conditions of legitimacy for a given state from an interpretation of its particular institutions and practices. By locating the relevant standards of legitimacy within ongoing political practices, rather than through abstract reflection on the universal interests or entitlements of individuals “as such,” this approach appears capable not simply of meeting the realists’ objections from self-determination and stability but also of providing a genuine alternative to the justice-based method itself. In Dworkin’s

influential description of the method, the theorist of constructive interpretation must proceed through three steps or “stages”: first, characterizing a particular set of institutions or practices in relatively uncontroversial terms; next, proposing a justification of the main elements of the practice described at the first stage; and, finally, identifying those aspects of the existing practice that fail to serve the proposed justification, and which therefore provide grounds for revising either the practice as it stands or our working explanation of its aims and purposes. As applied to the theory of political legitimacy, this method would thus direct us to identify norms or standards of legitimate or acceptable rule that are internal to the institutions and practices of a particular state (or to the “public political culture” thereof), and to see if there are aspects of the state’s performance or organization that might presently fail to serve those internal standards or purposes. Should a particular state’s conduct consistently run afoul of any plausible rendering of its internal legitimating norms (or perhaps fall below some threshold of conformity with those norms), it would no longer be understood to enjoy the right to rule.

Superficially at least, the method of constructive interpretation seems highly amenable to certain core realist concerns. Unlike the prepolitical theories considered up to this point, this approach begins, as Geuss says a realist theory must, “not with how people ought ideally (or ought ‘rationally’) to act, what they ought to desire, or value, the

134 Ibid., pp. 65-66.
135 Rawls describes his project of constructing a “political” conception of justice in similar terms: “We start, then, by looking to the public culture itself as the shared fund of implicitly recognized ideas and principles. We hope to formulate these ideas and principles clearly enough to be combined into a political conception of justice congenial to our most firmly held convictions. We express this by saying that a political conception of justice, to be acceptable, must accord with our considered convictions, at all levels of generality, on due reflection, or in what I have called elsewhere ‘reflective equilibrium’” (Political Liberalism, paperback ed. [New York: Columbia University Press, 1996], p. 8). For recent efforts to defend the use of constructive interpretation to arrive at what is sometimes called a “practice-dependent” conception of justice, see Aaron James, “Constructing Justice for Existing Practice: Rawls and the Status Quo,” Philosophy and Public Affairs 33, no. 3 (2005): 281-316 and Andrea Sangiovanni, “Justice and the Priority of Politics to Morality,” The Journal of Political Philosophy 16, no. 2 (2008): 137-164.
kind of people they ought to be, etc., but, rather, with the way the social, economic, political, etc., institutions operate in some society at some given time, and what really does move human beings to act in given circumstances.”136 Yet not only do the existing institutions and practices of particular political communities provide the primary subject matter for theorists of constructive interpretation; they also provide what we might think of as the exclusive “source material” for any resulting account of legitimate rule. Because a normative conception constructed on this method cannot rely solely on “the most abstract and elemental convictions of each interpreter,” but must instead “provide a good fit with the political or social practices of [a] particular community,”137 it might be less susceptible to the alleged tendency of “abstract methods in political philosophy” to end up “generalizing one’s own local prejudices and repackaging them as demands of reason” (or, at any rate, of political legitimacy).138 Indeed, to the extent that we can expect the norms internal to particular political practices to align with the substantive commitments of their participants, we might expect a theory of legitimacy constructed on this method to be more accommodating of individuals’ interests in self-determination and stability than any other theoretical alternative on offer.

But while I believe the method of constructive interpretation, or something closely akin to it, is in principle capable of meeting the challenges posed by the realist critique, it nevertheless remains too abstract or unfocused in its present form to generate results that are reliably hospitable to the full range of realist concerns set out above. Two features stand out as potentially problematic. First, the method on its own tells us nothing about the proper object of interpretation as far as the theory of legitimacy is

136 Geuss, Philosophy and Real Politics, p. 9.
137 Dworkin, Law’s Empire, p. 425 n. 20.
concerned. On some accounts, our interpretive energies ought to be focused exclusively on the formal institutions of a given state, such as the particular rules that define its institutional roles and offices, and the body of law and legal doctrine produced in accordance with those rules.\textsuperscript{139} For others, we ought to consider not merely the formal institutions of a particular regime but also “the public traditions of their interpretation (including [though presumably not limited to] those of the judiciary), as well as historic texts and documents that are common knowledge” to its citizens.\textsuperscript{140} Because certain norms and values may be expressed or embodied in only some but not all the public practices of a given state, decisions about where to set the boundaries of these practices for the purposes of a theory of legitimacy will no doubt have some effect on its normative content, or at the very least on the “source materials” formally available to it.\textsuperscript{141}

Yet resolving the first difficulty only points to a second, and potentially more troubling, problem with the method of constructive interpretation as it stands. For even if we were to agree on the appropriate interpretive object of a theory of legitimacy, the method would provide us with only very general guidance about how to make use of the normative “source materials” comprising our object of study. Assume, for the moment, that we are charged with interpreting the practice of constitutional democracy as it exists in the contemporary United States, and that the particular source materials we ought to consider toward this end include the central institutions of government (federal, state, and

\textsuperscript{139} See, for example, Sangiovanni, “Justice and the Priority of Politics to Morality,” p. 138 n. 2, using the highly formal notion of a “practice” first employed in Rawls’s early essay, “Two Concepts of Rules”: that is, “any form of activity specified by a system of rules which defines offices, roles, moves, penalties, defenses, and so on, and which gives the activity its structure” (reprinted in Collected Papers, ed. Samuel Freeman [Cambridge, Mass.: Harvard University Press, 1999], p. 20 n. 1).

\textsuperscript{140} Rawls, Political Liberalism, pp. 13-14, my brackets.

\textsuperscript{141} As Sangiovanni notes in this respect, the fact that Rawls’s “specific version of institutionalism makes much greater use of culturally contingent factors than other forms of institutionalism” leads him to view his principles of justice as having a narrow range of application across existing societies than do other practitioners of the same general method (“Justice and the Priority of Politics to Morality,” p. 150 n. 30).
local) and the core public documents and declarations familiar to the educated American citizen (the Declaration of Independence, the Constitution and its Amendments, landmark statutes and judicial decisions, and so on). Surely, limiting ourselves to these materials alone, we could identify an indefinite range of aims or purposes that might be said to “justify” the multitude of public rules and norms that constitute the practice at hand, many of which (e.g., “promote the general welfare”) may themselves be so abstract as to give the theorist of legitimacy essentially free rein to import his or her favored moral values or commitments under the guise of interpretation and internal critique. Once our source materials are understood even more generally as a “fund of implicitly shared ideas and principles,” it becomes unclear whether the requirement of “fit” or interpretive fidelity is doing any work beyond preventing the most radically alien or external norms from being passed off as internal to the practices of the community in question. Thus we find Rawls maintaining that all modern constitutional democracies (apparently without variation) to contain the fundamental ideas of a society as a fair system of cooperation, of citizens as free and equal, and of a well-ordered society as one regulated by a public conception of justice – and construing these ideas to imply, upon reflection, the very principles of justice he endorsed in his earlier work by way of a wholly prepolitical mode of reasoning and justification. Perhaps these claims could ultimately be vindicated through a detailed reconstruction of a given practice’s particular constituting norms or of the concrete determinations reached by its participants over time.

142 Rawls, Political Liberalism, p. 14, emphasis added.
143 Whereas Dworkin explicitly allows for the proposed justification of a given practice to draw on moral concepts and ideas that are not themselves internal to the practice at all, Rawls wishes to limit our interpretive resources in this respect to values “reasonably believed to be covered by [a given society’s public political conception of justice] or its variants, and not by a conception of morality as such, not even of political morality,” although he “doubt[s] that this view differs in substance from Dworkin’s,” given the latter’s requirement of “fit” (ibid., p. 236 n. 23).
144 Ibid., p. 14.
I do not wish to rule out this possibility. But such an argument has yet to be made by the leading theorists of constructive interpretation, and the method itself appears to encourage its practitioners to engage in a process of “wide-ranging and imaginative”\textsuperscript{145} moral interpolation that draws only nominally on the internal normative resources of a particular political community. Without some further reason to expect this method to remain tethered to the particular commitments and self-understandings of those subject to political power, the now-familiar realist concerns about self-determination and stability are bound to reemerge in this context as well.

4. Toward a Realist Theory of Legitimacy

I now turn to propose an alternative account of political legitimacy. Like the method of constructive interpretation just discussed, this account seeks to locate the norms by which a given state’s legitimacy is to be judged in (an interpretation of) its particular institutions and practices, rather than in an external or prepolitical theory of justice or morality. Yet whereas that account drew upon the full array of norms and values that could be understood to be at least implicit in the public practices of a particular state, my account focuses more narrowly on a particular kind of norm governed social practice — what I refer to as the practice of claiming authority — that can be found in political communities organized under a wide range of substantive ideals and institutional rules. In this regard, the approach I propose is both more specific and more general than the method of constructive interpretation: more specific in its primary object of interpretation, yet more general in that this focal practice can be found in societies that vary in other respects across changes in time, place, and culture. At the same time, and in

\textsuperscript{145}Dworkin, Law’s Empire, p. 220.
contrast to the minimalist approach described above, my account does not limit the
requirements of legitimacy to those (minimal) norms that are actually shared across
culturally and historically distinct societies, but rather suggests how these norms
comprise a general framework that can be applied and given further content in light of the
concrete circumstances under which particular states exercise political power.

Whereas the justice-based approach assessed a state’s legitimacy with reference to
external or prepolitical standards of rightness, the account I wish to develop here holds
that a state is legitimate to the extent that it lives up to its own internal claims to enjoy
legitimate authority, rather than mere power, over its subjects.146 In asserting authority in
this way, and attempting to mediate the application of public power with reasons or
explanations purporting to establish their entitlement to rule, states enter into a distinctive
kind of norm-governed relationship or practice with those allegedly bound by their
authority and open themselves up to internal criticism insofar as they deviate from the
norms that constitute that pattern of meaningful interaction. In particular, as I will
suggest, these internal constituting norms include the requirements that public
authorities’ justifying explanations of their power – their “legitimation stories” – be put
forth sincerely and non-ideologically, in that they not be known to be false or to depend

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146 There may at first glance appear to be some confusion involved in saying, as I do here and throughout,
that “states” claim authority over their subjects, at least if states are understood merely as impersonal
systems of rules, such as those specified by a written constitution, that define public offices and roles
within a given territorial jurisdiction. A collection of rules, on its own, cannot (we may suppose) make
assertions, much less substantiate those assertions with ostensibly legitimating reasons. Yet this conception
of the state as an abstract institutional scheme seems to me unduly narrow and fails to comport with a
standard range of references to states’ broadly “agential” qualities: as entities capable of acting, forming
intentions, offering justifications, and so forth. A better definition would view states as systems of offices
and roles together with the particular persons who occupy those offices and roles at a given point in time,
or as what David Copp has usefully termed “animated institutions” (“The Idea of a Legitimate State,”
Philosophy and Public Affairs 28, no. 1 [1999]: 3-45, at p. 6). To say that a state, in this sense, claims
authority over its subjects is thus simply to say that some persons, qua occupants of offices or roles defined
by a public set of rules, claim authority over other persons residing in the jurisdiction defined by that same
set of rules.
for their acceptance on the prior deception or manipulation of their addressees, and that
the norms and values governing basic social institutions in fact correspond to those cited
by public institutions and officials by way of justification. These norms provide
conditional internal grounds on which a state’s legitimacy can be assessed – conditional,
that is, on a state’s actually asserting authority over its subjects, rather than confronting
them solely with brute, unmediated coercion – and so provide an alternative to the
justice-based model of legitimacy that was the object of the realist critique set out above.

The realist approach to legitimate rule takes its orientation from a key feature of
Weber’s sociological analysis of legitimacy, mentioned briefly in Section 2 above.
According to Weber’s well-known account, states are better able to elicit unforced
compliance with the law, and are therefore far more stable over time, to the extent that
the subjects of political rule believe their public institutions and officials to be legitimate
authorities and thus treat their commands, or the overarching institutions that produce
them, as imposing bona fide moral duties or obligations upon them. The willing or
unforced conformity of at least a critical mass of subjects serves not only to limit the
overall need for coercive enforcement – thereby lessening the costs of policing and
punishment, and perhaps allowing for a greater sense of mutual trust and cooperation
among citizens – but also to increase its effectiveness in any remaining cases of
noncompliance, insofar as public officials themselves accept the justification of state
power and thus reliably carry out their official responsibilities. So while it is not
inconceivable that a state might at least temporarily secure compliance “from motives of
pure expediency” or “on a purely customary basis through the fact that the corresponding
behavior has become habitual,” regimes upheld on these bases, Weber maintained, are
“much less stable than an order which enjoys the prestige of being considered binding, or, as it may be expressed, the prestige of ‘legitimacy.’”147 Given the fundamental interest of states and their public officials in securing social stability, and the uniquely effective power of subjective legitimation as a means of producing such stability by instilling a robust and widespread disposition to willingly comply with the law, political elites across a wide range of historical and cultural contexts have unsurprisingly sought not only to make known their superior capacity for coercive enforcement and reprisal, but also “to establish and to cultivate a belief in [their] legitimacy,” and to encourage the unforced reproduction of such a belief over time.148

The exact manner in which public institutions and officials assert their moral entitlement to rule, and attempt to substantiate these assertions with justifying explanations or legitimation stories, depends in many ways on their level of institutional complexity, the locally available means of disseminating ideas and information, and the nature of the putatively legitimating reasons themselves. We should not imagine, to be clear, that all states will routinely assert their authority explicitly or that efforts at legitimation will necessarily proceed through formalized channels of reason-giving,

148 Ibid., p. 213. In his critique of the theory of ideology, Michael Rosen argues that states might conceivably secure widespread compliance without resorting either to Weberian strategies of legitimation or to outright warfare against their members, much in the way a gunman might successfully command a group of hostages simply by credibly threatening harsh punishment against early acts of insubordination and thus preventing his or her subjects “from engaging in the initially crucial phases of organization and communication necessary to realize their potentially overwhelming strength in practice” (On Voluntary Servitude: False Consciousness and the Theory of Ideology [Cambridge: Polity Press, 1996], p. 262). While there are important disanalogies between the case of the lone gunman and that of the state that I cannot explore here, suffice it to say that my account does not deny the possibility that a state might, in principle, be able to reproduce itself stably over time without attempting to justify its power through practices of legitimation. As I state in the text, I hold simply that legitimation is a uniquely effective means of stabilizing social and political institutions and that it is therefore no accident that stable patterns of political rule are nearly ubiquitously characterized by assertions of legitimate authority on the part of those in power. I consider the status of a hypothetical “naked tyrant” – akin to Rosen’s hostage-holding state – below.
although it will not be uncommon for public authorities even in societies with relatively informal systems of law-making and adjudication to give explicit rationales for their power at particularly salient official occasions (particularly when the given occasion – levying taxes or civic dues, delivering a criminal sentence, declaring war, and the like – imposes some burden on the state’s members). Rather, claims of authority will more often be implicit in the everyday actions of the state: in the reactive attitudes of public officials and other citizens who confer blame on or express resentment towards compatriots who break the law; in practices of punishment and accountability that frequently presuppose that violators should have known better and could have done otherwise; and, of course, in often elaborate official speeches, festivals, and practices of civic education and training designed to instill a belief in the regime’s noble provenance, heroic leaders, contributions to the public welfare, and otherwise exalted aims and purposes. Indeed, in some “traditional” societies (to use Weber’s terminology), the official rationale for the political order may be so pervasively internalized – so “obvious” – that rulers and subjects alike will rarely reflect on the question of whether their state is legitimate, rendering explicit, official justifications of political power largely superfluous. Yet, far from lacking a legitimating narrative altogether, these traditional societies are better understood as relying on practices of what we might call tacit legitimation, in which those subject to political power endorse the state in light of evaluative beliefs that, while consciously held and perfectly transparent to their adherents, are so widely shared and unquestioned that they are rarely if ever invoked as justifications of power – the very question to which they would provide an answer never being raised in the first place. Processes of “modernization,” as we shall see in the next chapter, tend to break down this
kind of pervasive and unquestioning acceptance of a common evaluative framework, forcing a change not merely in the moral substance of states’ legitimation stories but also in the extent to which efforts at legitimation must be made actively, explicitly, and repeatedly by public institutions and officials.

What unites these diverse modes of political rule, however, is the attempt on the part of the ruling elite to secure the allegiance and widespread compliance of their subjects through some sort of appeal to moral or religious authority, rather than through threats of suffering alone: to the heights, we might say, and not simply the depths, of human motivation. By asserting that, in Bernard Williams’s pithy formulation, those subject to the power of the state “would be wrong to fight back” and “can be rightfully coerce[d] under its laws and institutions,”149 public authorities appeal to their subjects’ sense of duty and their capacity to grasp and act from considerations that transcend their desire to preserve themselves. Unlike acts of “unmediated coercion,” which treat their targets as enemies to be defeated, objects to be manipulated for the ends of others, or perhaps simply beings unbefitting rational engagement, assertions of authority engage their addressees’ faculties of moral reasoning and deliberation directly, suggesting that they have some independent grounds (which they themselves could come to see and be motivated by) to comply with their public institutions, and holding them responsible (at least to some minimal extent) for their failures to comport themselves in that way. In mediating their ultimately coercive acts with reasons purporting to justify those acts, states distinguish themselves in kind, and not merely in degree, from slaveholders, conquerors, bandits, mob bosses, and the like, who treat those they threaten or attack as “nakedly the objects of coercion,” for whom no legitimating explanation is thought

149 Williams, “Realism and Moralism in Political Theory,” in *In the Beginning Was the Deed*, pp. 6, 4.
necessary. There are certainly historical examples of states that have confronted their own residents with unmediated coercion in this way: Williams notes the case of the helot slaves of ancient Sparta, who were regarded “openly as enemies” (and against whom Spartan officials periodically renewed a formal declaration of war), and we might think in our own time of the genocides prosecuted – often literally as “wars” – against internal minorities in the Ottoman Empire, Nazi Germany, Cambodia, Rwanda, and elsewhere.

What is perhaps most striking, however, is the extent to which such patterns of brute coercion are the exception rather than the norm, with even cruelly oppressive colonial and caste systems of rule not only insisting on the justness of their cause but also claiming that their subjects should see themselves as under a moral duty to comply with their commands and to uphold the political institutions that sustain their subjugation.

Yet it is precisely in cases of this latter sort – in which states claim to enjoy legitimate authority while simultaneously engaging in patterns of treatment that more closely approach the paradigm of unmediated coercion – that the realist conception of legitimacy gets its foothold. For there is a kind of internal tension at work whenever states engage the moral capacities of their subjects – asserting that they should comply with the law of their own volition, on the basis of principled considerations said to bind

150 Ibid., p. 95. This understanding of political authority thus diverges sharply from that of Charles Tilly, who describes states as “quintessential protection rackets … our largest examples of organized crime.” While Tilly grants that political institutions operate “with the advantage of legitimacy,” for him legitimacy – following Arthur Stinchcombe’s “agreeably cynical” definition – means only a relative increase in “the probability that other authorities will act to confirm the decisions of a given authority.” See “War Making and State Making as Organized Crime,” in Bringing the State Back In, eds. Peter B. Evans, Dietrich Rueschemeyer, and Theda Skocpol (Cambridge: Cambridge University Press, 1985), pp. 169, 171.

151 Williams, “Realism and Moralism in Political Theory,” in In the Beginning Was the Deed, p. 5; for further discussion of the Spartan helots, see also Williams’s Shame and Necessity (Berkeley: University of California Press, 1993), pp. 106, 210 n. 7.

152 Thomas Nagel likewise describes many “colonial or occupying power[s]” as purporting to “provid[e] and enforc[e] a system of law that those subject to it are expected to uphold as participants, and which is intended to serve their interests even if they are not its legislators” (“The Problem of Global Justice,” Philosophy and Public Affairs 33, no. 2 [2005]: 113-147, at p. 129 n. 14).
them as moral agents, and holding them responsible for failures to obey – while simultaneously subverting or circumventing those same deliberative faculties with practices of deception, manipulation, and coercive belief-formation. More specifically, there are three broad categories of treatment that, I propose, amount to “false” appeals to individuals’ capacities for moral reasoning and motivation, and which for that reason fail to mediate the application of political power in the manner presupposed by an assertion of legitimate authority. States that engage in one or another of these strategies of legitimation as a means of securing popular support and obedience undermine their own claims to authority and thus fail – on their own terms, as it were – to legitimate their power to their subjects.

The first kind of false legitimation – what I will call a failure of sincerity – occurs when public authorities advance justifications of their power that they themselves believe to be untrue, or that they at least do not take to be sufficient to justify the authority they claim. Like ordinary instances of lying, insincere efforts at legitimation clearly bypass their addressees’ critical faculties and seek to coopt their agency and use it as a means to others’ purposes. In advancing insincere rationales, public institutions and authorities suggest either that their subjects could not grasp and act from the true principled considerations that in fact ground their entitlement to rule – as if they were children or mere “moral patients” – or, perhaps more plausibly, that such justifying reasons for their power do not exist and that their claim to enjoy legitimate authority is ultimately

153 This last clause is meant to allow for the possibility that public officials may engage in practices of what Rawls has called “conjecture,” arguing from what they “believe, or conjecture, are other people’s basic doctrines … and try to show them that, in spite of what they think, they can still endorse” the justifications presented to them, provided (as Rawls adds) “that conjecture be sincere and not manipulative.” See “The Idea of Public Reason Revisited,” in Collected Papers, p. 594. For a distinct defense and elaboration of a Rawlsian “principle of sincerity” in public reason, see Micah Schwartzman, “The Sincerity of Public Reason,” The Journal of Political Philosophy 19, no. 4 (2011): 375-398.
unsustainable. In either case, the alleged authorities belie their implicit commitment to addressing their subjects as beings with the minimal capacities for moral agency.\textsuperscript{154}

A pattern of public justification can be false in a second sense if it is put forth against a set of background conditions that the state has itself knowingly shaped so as to make its subjects’ acceptance of the legitimating rationale more or less “automatic.” The requirement that a legitimation story not be \textit{ideological} in this sense closely approximates Bernard Williams’s “critical theory principle” (or “critical theory test”), which holds that “the acceptance of a justification does not count” towards the legitimacy of the state “if the acceptance itself is produced by the coercive power which is supposedly being justified.”\textsuperscript{155} Whereas the wrong perpetuated by insincere justifications inhere in the act of justification itself, the wrong of ideological justifications occurs one step prior, in the official, coercive inculcation of beliefs designed to “prime” their adherents to accept the legitimating narrative of the state. Such priming, in order to count as ideological in the present sense, must involve not simply the \textit{promotion} of particular legitimating (or proto-legitimating) beliefs, but also the active \textit{inhibition} of reflexive scrutiny and criticism of the professed beliefs or of the process of inculcation itself, as well the \textit{preclusion} of access to alternative viewpoints and sources of information. While examples of ideological legitimation will include the kinds of indoctrinating practices familiar from twentieth century totalitarianism (and the dystopian fiction it inspired) – ranging from

\textsuperscript{154} The requirement of sincerity thus rules out the possibility of a legitimate state that is “esoteric” in Derek Parfit’s sense, such as one organized in the fashion envisioned by Sidgwick’s utilitarianism or other so-called “Government House” moral theories. See Parfit, \textit{Reasons and Persons}, corrected ed. (Oxford: Oxford University Press, 1984), pp. 24, 41-42.

\textsuperscript{155} Williams, “Realism and Moralism in Political Theory,” in \textit{In the Beginning Was the Deed}, p. 6. I assume here that the principle also condemns as illegitimate states that engage in the relevant background practices of coercive belief-formation but do not in fact succeed in eliciting the “acceptance” of their justifying explanations; perhaps Williams simply assumes that a state that is sufficiently manipulative as to violate the critical theory principle will typically prove effective at securing acceptance.
mass conditioning and propaganda to the forcible administration of drugs or psychiatric "treatments" – the requirement of non-ideology will also rule out patterns of coercive instruction that do not rise to the level of an official stranglehold on all channels of communication. By deliberately attempting to stunt the development of their subjects’ critical faculties and to block access to information necessary for even modestly informed deliberation and choice, public authorities act so as to deny their subjects certain essential background preconditions of effective moral reasoning and judgment, and thus to deprive them of the capacities presumed by the public practice of claiming authority, even if the authorities in question are fully sincere in their adherence to the beliefs instilled through ideological instruction (and thus appealed to in subsequent efforts of legitimation). \(^\text{156}\)

Of course, as Williams recognizes in defending his critical theory principle, a belief is not discredited simply because it is the causal product of politically-sanctioned instruction or training; indeed, we tend to think it both unavoidable and benign that the state should influence a host of individual empirical and normative beliefs by coercive means: for instance, by compelling public school attendance for pupils in their most formative years. \(^\text{157}\) We should therefore construe the requirement invalidating ideological modes of legitimation as holding merely that justifications appealing to beliefs that have been instilled by state officials (or their proxies) through coercive

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\(^{156}\) To this extent, my account shares Marx’s view that those controlling the mental means of production need not have any malicious or deceptive intent in order for their actions to count as ideological; rather, those in a position to propagate ideological justifications of the social order – as Marx said of the post-Revolutionary purveyors of the doctrine of the "rights of man" – themselves typically suffer from an "optical illusion of their consciousness" ("On the Jewish Question," in The Marx-Engels Reader, ed. Robert C. Tucker [New York: W.W. Norton & Co., 1978], p. 44). My account, however, rules out only those practices of belief-formation that rely on direct, coercive instruction by state officials or their proxies, and so would admit as legitimating many processes of socialization that would be plainly ideological in Marx’s sense.

mechanisms are *presumptively* suspect, but may well be vindicated in light of independent evidence or analysis. In the absence of detailed case-by-case analysis, it will no doubt prove difficult to demonstrate whether a given belief has validity independent of the state officials’ say-so, particularly in light of citizens’ dependence on state-run education for much of their political and civic education. But state officials, by providing those receiving public instruction with basic skills in critical reasoning as well as access to non-state resources that could either challenge or corroborate the official teachings, can do a good deal to alleviate concerns that a given legitimation story is ideological in the sense picked out by this test; in Williams’s words, state-sponsored “teaching itself will have to suggest, at least in outline, ways in which people might come to know [particular] truths other than by being taught them by such instructors.” A state genuinely committed to providing a legitimating explanation of its authority, and thus of engaging with its subjects’ presumed capacities for moral reasoning and reflection, should have no trouble incorporating this sort of commitment to openness and self-criticism into its practices of civic education and training.

Third, and finally, public authorities might engage in a kind of false legitimation to the extent that their actual institutions and practices fail to *correspond* to the norms and values invoked in their efforts to legitimate their authority. Whereas the requirement of sincerity sought to rule out states whose processes of legitimation advance claims about

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158 See Williams’s reservations in “Realism and Moralism in Political Theory,” in *In the Beginning Was the Deed*, p. 6.

159 Williams, *Truth and Truthfulness*, p. 229. While subjects of a given regime will only be able to apply something like the critical theory test themselves if they enjoy *some* faculties of reflective agency, we need not suppose a background of “perfect freedom” for the test to be put into practice; as Geuss puts the point more generally, “although we do not live in that utopia, we may be free enough to recognize how we might act to abolish some of the coercion from which we suffer and move closer to ‘optimal conditions’ of freedom and knowledge. The task of a critical theory is to show us which way to move” (*The Idea of a Critical Theory* [Cambridge: Cambridge University Press, 1981], p. 54).
value that public authorities themselves took to be false or of insufficient justificatory weight, the requirement of correspondence targets states whose justifications advance false factual claims – specifically, about the extent to which public institutions fulfill the purposes or instantiate the values asserted to justify their existence in the first place. Since it will generally prove difficult for states to elicit the widespread acceptance of their authority on the basis of claims that are plainly belied by the political reality, failures of correspondence will tend to go hand-in-hand with one of two phenomena. Public authorities might, on the one hand, undertake more or less systematic efforts to deceive the population at large about the facts of the political status quo, engaging in public disinformation campaigns, tightly controlling news reports in the press (or suppressing independent media altogether), or otherwise propagating a belief that the state is realizing its official aims and principles to a greater extent that it actually is. On the other hand, in the absence of such official attempts at deception – or in the event that such efforts should fail – the evident discrepancy between a state’s public legitimating narrative and the observed social reality may well engender a widespread sense of alienation or social dislocation among its members, prompting public institutions and officials to rely increasingly on brute force (or on insincere or ideological means) to secure a popular belief in their legitimacy.160

160 Widespread alienation, or the failure of members to be “reconciled to” or “at home in” their social world, would thus count, on the view defended here, as a potential (and perhaps uniquely reliable) indicator of a state’s illegitimacy, rather than as its direct cause, since it is possible, in principle, for subjects to feel alienated from a political order that has in fact satisfied the requirement of correspondence (and that is therefore, ceteris paribus, legitimate); to use Michael Hardimon’s terms, a legitimate state must achieve objective, but not necessarily subjective, reconciliation. See Hegel’s Social Philosophy: The Project of Reconciliation (Cambridge: Cambridge University Press, 1994), pp. 95-119. For reasons I elaborate in Section 5, however, we can normally expect subjective and objective reconciliation (or alienation) to go hand-in-hand.
Grounded solely in considerations internal to the practice of claiming public authority over others, the standards of sincerity, non-ideology, and correspondence comprise a framework for assessing the legitimacy of political institutions that we might describe as formal or "generic," in that it makes no direct reference to the specific, substantive norms, values, and self-conceptions that a particular state might invoke in attempting to justify its power. Any complete realist theory of legitimacy must, of course, attend to the substantive content of a given state’s legitimating narrative, for these substantive claims provide further internal grounds of normative criticism, without which, indeed, we would lack a meaningful standard which particular political institutions and practices can be held to correspond to. Thus while the generic requirements of legitimacy apply to all states that claim authority over their subjects, more determinate demands will apply to particular states in virtue of the substantive reasons they offer, and the specific capacities they presuppose, in seeking to legitimate their alleged authority. To the extent that – as realists are fond of insisting – we can expect the substantive content of these legitimating appeals to vary across contingencies of time and place, the realist account will be an instance of what Michael Walzer has helpfully termed "reiterative universalism": imposing normative demands on self-proclaimed public authorities everywhere, yet varying the content of their requirements with the local practices of public justification (and therefore, by hypothesis, with the evaluative beliefs of those subject to political power) in contextually distinct political communities.\(^{161}\)

While I will go on, in the next chapter, to apply the generic account of legitimacy to contemporary states, and thus to identify the sorts of substantive demands to which

\(^{161}\) See Walzer, “Nation and Universe,” in Thinking Politically, pp. 185-189.
specifically modern polities have subjected themselves, I believe the generic account itself – even at its comparatively high level of historical abstraction – is not without significant practical implications for states that claim authority over their subjects. Perhaps most obviously, states that claim to enjoy legitimate authority must actually substantiate those claims with reasons. Yet since, as I noted above, not every state actor can be expected to justify the application of political power in each instance – much less continually account for “power-conferring” and otherwise constitutive public rules, which operate at all times to direct and coordinate individual behavior – there will inevitably be cases in which the state exercises power over some persons without offering a justifying explanation of that power. In such instances, subjects must be able to solicit and receive, through some more or less formalized process of legal appeal, an account of the state’s power in terms of its overarching legitimation story; while states can ensure their subjects’ access to such public justifications through a wide variety of procedural mechanisms, they must guarantee some right of what I will loosely term petition to their subjects if they are to succeed in mediating their power with purportedly legitimating reasons. Moreover, in order for subjects to be able to assess the sincerity and correspondence of a given legitimating account, and thus to determine both whether the state’s official rationale for its power does in fact govern its day-to-day decision-making and whether public authorities have accurately depicted the practical effects of their rule, states must ensure a modicum of openness or transparency in their public institutions and must not use state media or educational institutions to disseminate false information about official actions and institutions. Basic lawmaking and adjudicatory bodies, that is, ought in general to be open to view, and information concerning the internal workings of
government and the impact of the law on society at large must be made widely accessible and not suppressed with the power of the state.

In addition to demanding that states in fact offer reasons for their power and enable the public to access information that might corroborate or belie their official legitimating narratives, the generic account of legitimacy also implies that states must secure those background institutions and practices that are necessary for their subjects to effectively grasp and act from the kinds of principled considerations routinely invoked as justifications of public power. In demanding the willing compliance of their subjects, and holding subjects responsible when they fail to discharge their legal duties, states incur an obligation to ensure that all subjects of their authority in fact acquire the capacities, and have access to the social conditions and resources, that make “willing compliance” an intelligible possibility in the first place. Individuals who are in near-constant fear for their physical security, or who are faced with starvation or other forms of extreme material duress, will typically respond erratically and out of desperation to their social circumstances, and cannot plausibly be expected to reflect on and act from the sorts of reasons put forth to ground a duty of legal compliance; to offer legitimating explanations of public power to subjects in such conditions is to mock the ideas of volition and individual responsibility implicit in the very notion of legitimation. States must therefore make reasonable provisions for their members’ security and subsistence, where “reasonable” is understood to be relative to the institutional capacity of a given state (or to the institutional capacity that it could feasibly acquire under existing circumstances). Finally, in order to satisfy the requirement of non-ideology, states

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162 I here follow Henry Shue’s influential discussion of basic rights as claims on society to protect individuals against “serious but remediable” threats to their fundamental interests: “Precisely what those
must not use public institutions, such as schools or other forums of civic instruction, to compel their subjects to accept the official narrative put forth to legitimate public power, to forbid consideration of alternative and potentially challenging ideas, or to undermine their subjects’ acquisition of the basic skills of critical reasoning. Provided the state attempts in good faith to provide its subjects with the resources and opportunities necessary for independently forming evaluative beliefs and judgments, it may go on – consistent with the requirement of non-ideology – to use the power of the state to promote adherence to its central norms and values or to inhibit the expression and circulation of beliefs at odds with its legitimating narrative; this requirement does not, then, on the weak interpretation I have offered here, entail something like the full rights of free expression, conscience, and association familiar to modern liberal states.\footnote{163}

Together, I shall refer to the rights of security and subsistence, and to the prohibition on official indoctrination, as the social preconditions of \textit{limited agency}, or of the effective ability to grasp and act from the kinds of reasons put forth by a state’s claim to enjoy legitimate authority.

Thus whatever the substantive claims invoked or presupposed by a given state’s assertion of authority, the formal or generic requirements of legitimacy adduced above can be understood to entail concrete demands that the state secure rights of petition, a modicum of official transparency, and the social preconditions of what I have termed

\footnote{163 While a stronger interpretation of the non-ideology requirement could plausibly generate robustly liberal conditions of legitimacy, I wish to leave open the possibility that an illiberal state, despite imposing restrictions on free expression, association, and conscience, might nevertheless garner the free endorsement or acceptance of its members. As Donald Moon notes in a similar context, “What it means to freely accept something is itself a highly disputed and contentious issue, and much political theory in the past has foundered by dogmatically assuming a particular interpretation” (\textit{Constructing Community: Moral Pluralism and Tragic Conflicts} [Princeton: Princeton University Press, 1993], p. 17).}
limited agency. Provided they honor these normative constraints, states might in principle achieve legitimacy on the basis of any number of substantive views about human flourishing, justice, morality, and the highest good. That so many historical states have rather unambiguously flouted these internal norms makes vivid the theoretical distance separating the normative conception of legitimacy advanced here from Weber’s weaker and merely descriptive account of subjective legitimation, which counted as legitimate many “traditional” states in which widespread compliance was secured on the basis of systematic deception and manipulation and thus the denial of the rights and opportunities that I argued are implied by assertions of public authority. At the same time, however, the present account of legitimacy makes room for at least the conceptual possibility of a (normatively) legitimate state that is organized under a range of illiberal norms and values, such as those associated with what Charles Taylor has referred to as systems of “hierarchical complementarity.”\(^{164}\) I take no stance here on the further, empirical questions of whether any historical non-liberal states have in fact satisfied the generic requirements of legitimacy, or whether the satisfaction of even these minimal requirements would inevitably have the effect of undermining the traditional beliefs and self-understandings essential to the legitimation of illiberal institutions and practices (and thus of compelling states to attempt to legitimate themselves on explicitly liberal bases).

I should stress that the realist account I have been developing seeks simply to identify and make explicit the normative requirements implied by the practice of claiming public authority over others and thus to show what would follow from a given state’s decision to engage in such a practice. It does not, however, instruct individuals (or the

institutions whose roles they occupy) to *initiate* the practice of claiming authority in this sense, and so cannot on its own provide grounds either for enjoining individuals in a hypothetical state of nature to establish common political institutions in the first place or for condemning a hypothetical “naked tyrant” who rules by unmediated threats of violence alone.\textsuperscript{165} Thus while, as Williams puts it, “there are no doubt reasons for stopping warfare, these are not the same reasons, or related to politics in the same way, as reasons given by a claim to authority.”\textsuperscript{166} In order to direct individuals living in such a condition of warfare or lawlessness to enter into the practice of claiming authority in this sense, the realist account developed here must be conjoined with some separate theory of natural or prepolitical morality, such as the natural duty account I proposed in Chapter 1 or some variant thereof. Unlike the justice-based account of legitimacy, however, the account developed here ceases to rely on external or prepolitical standards of justice or morality once relationships of political authority have been established, seeking instead to discern norms of legitimacy that are internal to ongoing political practices. For these practices, as I hope to have shown, already invoke a sufficiently rich and demanding array of norms – norms that are quintessentially “related to politics” – that a fully critical and normative account of legitimacy can get by without recourse to any abstract or prepolitical moral theory.

\textsuperscript{165} I borrow this last example from A. J. Julius, “Nagel’s Atlas,” *Philosophy and Public Affairs* 34, no. 2 (2006): 176-192, at p. 183. \textsuperscript{166} Williams, *In the Beginning Was the Deed*, p. 6. An analogous defense is, I believe, open to Thomas Nagel in response to Julius’s charge that Nagel’s account “cannot find injustice” in the case of the naked tyrant, who coerces his subjects but does not rule “in their name” (see Julius, “Nagel’s Atlas,” p. 183). For while it is true that Nagel’s account implies that the tyrant’s subjects have no complaint of social or distributive injustice – just as, on the present view, they lack internal grounds on which to criticize his rule as illegitimate – these categories by no means exhaust our resources for normative criticism. Compare Nagel’s contrast between those rights that “set universal and prepolitical limits to the legitimate use of power, independent of special forms of association,” and those that depend on being “joined together with certain others in a political society” in “The Problem of Global Justice,” p. 127.
5. The Realist Critique Revisited

In developing a conception of legitimate authority on the basis of norms internal to the public practices of various real-world political communities, I hope to have shown that a methodological departure from the prepolitical model of normative reasoning – such as had been urged by the critics of the justice-based method as such – need not wind up uncritically accepting the de facto legitimacy of all existing states, or otherwise affirming or reifying morally arbitrary and thus potentially objectionable features of the status quo. What remains to be seen, however, is whether the formal or generic account of legitimacy worked up from the norms internal to political practice can be expected to withstand the further realist objections from self-determination and stability, which after all held not (or not simply) that the formal conditions of legitimacy be drawn from local political practices, but that the concrete norms and values by which a given community is governed be compatible with the widely shared beliefs of its members. Whatever the independent merits of the standards adduced up to this point, can the realist account developed here reliably ensure that the organizing principles of a legitimate state will in fact align with the salient evaluative commitments of its subjects?

Although there is not, to be sure, any logical or analytical connection between a state’s satisfying the formal standards of sincerity, non-ideology, and correspondence and its governing on the basis of its members’ widespread beliefs about value, there is nevertheless a compelling empirical or sociological reason to expect that formally sound claims to authority will also be compatible both with a society’s self-determination in this sense and with its stable functioning and self-reproduction over time. Specifically, we
can assume that public institutions and officials engaged in the practice of claiming authority (and of substantiating those claims with public justifications of some sort) typically intend to elicit the acceptance of its alleged authority by all or at least an overwhelming majority of its addressees. Given certain natural limits on a state’s capacity to monopolize the instruments of socialization and belief-formation (and thus to “manufacture” its subjects’ consent completely), any given state will have to defer, to some significant extent, to its members’ existing beliefs and commitments if it is to succeed in securing the widespread and unforced acceptance of its claim to legitimate authority – *a fortiori*, if it is to do so without violating the further prohibition on “ideological” modes of conditioning and instruction. (We can further appreciate the extent of deference required by observing that the particular subjects of a given state are inevitably the products of *past* processes of socialization, and thus that even radically transformative efforts at legitimation – including calls for cultural revolution or the refashioning of human nature – must be made, at least initially, in a justificatory vocabulary that is responsive to their addressees’ existing beliefs and commitments.) That no single legitimating narrative is capable of successfully stabilizing societies across all times and places was, of course, one of Weber’s key insights, illustrated perhaps most vividly by the need for a new kind of legitimation in the wake of a complex process of rationalization and “disenchantment” that was not itself the direct or deliberate product of any state’s attempt to influence its members’ beliefs.

In view of these political realities, public authorities’ self-interest in the stable self-reproduction of their institutions over time will typically suffice to impel them to justify their power in terms that their subjects already widely accept; once they are
required, further, to satisfy the internal demands of sincerity, non-ideology, and correspondence – which combine to foreclose the most blatant means by which states might actively mislead and manipulate popular opinion – their need to appeal to their members’ central evaluative commitments will be practically guaranteed. Thus in almost any conceivable practical context, the realist account of legitimacy will recommend substantive norms of legitimation that are largely compatible with the moral beliefs and judgments of the particular individuals subject to political power, effectively eliminating the possibility that a legitimate state (as judged by the formal requirements of justification set out above) would remain vulnerable to the arguments from self-determination or stability.
The last chapter began the project of articulating a realist theory of political legitimacy: one grounded in the norms and values internal to the ongoing practices of particular political communities, rather than in moral standards (such as those comprising a prepolitical conception of justice) worked up in abstraction from historically specific patterns of political rule. The realist approach I sought to defend begins from the Weberian insight that, even as public institutions assert a monopoly on the legitimate use of violence within a territory, politics cannot be understood simply in terms of the threat or use of force by agents of the state against their subjects – as if, in a reversal of Clausewitz’s dictum, it were the continuation of war by other means. Rather, given the inevitably limited enforcement capacities of particular states, together with the fact that coercive enforcement itself depends on the willing cooperation of at least a critical mass of those charged with applying the law, Weber observed that states must typically secure general compliance with their directives not simply through the “external means” of threats and sanctions but rather by eliciting a widespread belief among their subjects that their power is rightful or legitimate. Although states in some circumstances may find that such widespread acceptance comes more or less automatically, with their subjects complying out of habit or in unreflective deference to tradition, virtually all public officials and institutions must ultimately make at least periodic efforts to justify or
legitimate their power, and thus to demonstrate to their subjects that they are in fact entitled to the authority they claim for themselves.

These appeals, to be sure, may oftentimes be disingenuous or manipulative, or may rely for their plausibility on prior efforts at indoctrination or on gross mischaracterizations of the political facts on the ground. As I argued in the previous chapter, however, simply in asserting that their power ultimately rests on the balance of reasons whose force their subjects ought to grasp and to treat as decisive grounds for compliance, public institutions and officials implicitly commit themselves to the norms that govern and constitute the practice of reason-giving or rational address, including what I there termed the requirements of sincerity, non-ideology, and correspondence. Much like the rules defining acceptable moves within a game, these norms provide participants with legitimate expectations about one another’s conduct and may be invoked as valid grounds of criticism or complaint should they be violated in practice. And just as one cannot consistently claim to be playing chess while moving one’s rook on the diagonal, states engage in a kind of self-contradiction insofar as they present their power as deriving from the persuasive force of their public justifications or legitimations while simultaneously seeking to subvert or bypass the very capacities for rational reflection and agency presupposed by the practice of public justification itself. Faced with a discrepancy of this sort between the announced aims and actual conduct of their public institutions and officials, those subject to political power can rightly insist that their public authorities either correct their behavior so as to conform to the standards to which they are at least implicitly committed, or else own up to their inability to
successfully mediate their power with reasons and thus endure the potentially destabilizing consequences of abandoning the pretense of legitimation altogether.

Because the latter course of action is widely (and, it would seem, rightly) thought to involve a range of grave risks to those holding positions of political authority, we thus tend to observe public institutions and officials across a rather wide range of circumstances opting to justify or legitimate their power, rather than to confront their subjects with brute or unmediated coercion. Indeed, if we follow Weber in viewing the practice of legitimation as the standard or “canonical” mode by which public authorities seek to stabilize their power, we can go on to understand the norms constituting this practice as comprising a highly generalizable, if substantively minimal, framework for assessing the legitimacy of all (or nearly all) existing and historical states. In this way, the realist approach I set out allows that at least certain requirements of legitimate rule may have universal (or near-universal) applicability – not because they were deemed, by prepolitical fiat, to have the status of necessary conditions of legitimacy, but because public authorities in a variety of historical and cultural circumstances happen, contingently, to invoke or appeal to these norms as a means of securing widespread compliance with the law. Of course, in the process of actually engaging in the practice of public justification, and thus of subjecting themselves to the formal standards implicit therein, particular public institutions and officials will necessarily appeal to a range of substantive norms and values that will in turn provide their subjects with additional grounds for internal normative criticism and accountability; insofar as we can expect the content of a given state’s justificatory appeals to vary with the dominant beliefs and practices of its members, we can accordingly expect the substantive requirements of
legitimacy to vary with local circumstance as well, even as the more minimal, formal requirements remain the same in all contexts. Indeed, it is this “reiterative” feature of the realist approach that allows it to accommodate the objections from self-determination and stability that many realists took to be fatal to the leading justice-based theories of legitimacy. If, as some realists further insist, the dominant beliefs and practices of particular communities are understood to vary radically from one society to the next, we might reasonably wonder whether the realist approach set out in Chapter 2 is capable of yielding any further general or universal conditions of legitimate rule – or whether, instead, the substantive conditions of a given state’s legitimacy must be supplied entirely through ad hoc or case-by-case investigation of the particular norms and values it invokes in the course of attempting to justify its power to its subjects.

That particular political orders continue to be separated by deep and abiding differences in the beliefs and practices of their members – and must be viewed, on the realist account, as subject to a correspondingly diverse array of legitimating norms and values – is to my mind beyond dispute; indeed, as we have seen, the fact of international moral pluralism constituted a key source of motivation for the realist critique of the justice-based theory of legitimacy, whose strongly universalistic and at times transhistorical commitments made it the target of the objections we canvassed in the previous chapter. In this chapter, however, I wish to explore the possibility that, despite the persistence of ethical and religious diversity both within and across existing states, virtually all contemporary societies nevertheless share certain key cultural and organizational features that at the very least rule out certain historically dominant modes of legitimation and that may in fact require their public authorities to appeal to a common
stock of substantive norms and values in attempting to justify and stabilize their power. More specifically, I will tentatively pursue Bernard Williams’s suggestion – expressed in the admittedly “crude” formula, Legitimacy + Modernity = Liberalism\textsuperscript{167} – that contemporary states must legitimate themselves by invoking distinctively liberal ideals and self-conceptions, and can therefore be required (as a matter of internal consistency) to make good on these claims in the organization and conduct of their public institutions.\textsuperscript{168} This is the case not, Williams stresses, “because legitimate government, necessarily and everywhere, means liberal government,” but “because of distinctive features of the modern world” that make liberal strategies of justification essential to the Weberian goal of securing widespread compliance with the law.\textsuperscript{169} The task of this chapter is thus to characterize those features of “modernity” that typically compel public authorities to justify their power with reference to a broadly liberal conception of their subjects as rights-bearing agents, and to ask if at least some of these features are pervasive enough in the contemporary political world to allow us to identify a set of substantive conditions of legitimacy – over and above the formal requirements set out in


\textsuperscript{168} Because modernity, as both Williams and I use it, is defined not simply as a particular moment in time but rather in terms of certain temporally independent institutions and practices, one might naturally worry that Williams’s formula is viciously circular, at least insofar as the institutions and practices taken to be constitutive of modernity are themselves distinctively liberal in character. I address this concern explicitly in Section 3 below, where I consider what I refer to as the challenge of illiberal modernisms. Moreover, while I believe the concept of modernity is useful in illuminating the historical distinctiveness of our contemporary self-conceptions and forms of social organization, and indeed helps to provide liberalism with an account of “the cognitive status of its own history” (ibid., p. 9), my argument is that all or nearly all contemporary states, defined temporally, must be legitimated in terms of liberal norms and values, as defined below. As such, it does not ultimately depend on a particular conception of modernity, and so would remain immune to the charge of circularity even if my attempt to distinguish modernity from liberalism were thought to be unsuccessful.

\textsuperscript{169} Williams, “Toleration, a Political or Moral Question?” in \textit{In the Beginning Was the Deed}, p. 135.
Chapter 2 – that apply to all or nearly all states seeking to legitimate their power in the world today.

The argument of the chapter divides into three parts. In Section 1, I offer a brief, schematic account of the process of *disenchantment*, in Weber’s sense, by which the inhabitants of a number of “traditional” societies came to reject the alleged normative underpinnings of their political orders. No longer able to rely on a widespread belief in their natural or divine right to wield political power, those in command of traditional religious or feudal hierarchies were compelled, I suggest, to engage in increasingly *active* practices of public justification, to offer their subjects far more *inclusive* opportunities for at least some symbolic degree of popular participation in the public life of their state, and to legitimate their power not as an essential component of an intrinsically significant natural or cosmic order but rather chiefly in terms of its *instrumental* role in satisfying the worldly needs and interests of their subjects. At the same time, I note that, while these shifts effectively foreclosed certain historically dominant modes of legitimation, they did not on their own provide any clear indication as to which “post-traditional” norms and values (if any) could ultimately command the widespread allegiance of modern or modernizing societies – much less did they suggest that such societies would necessarily come to adopt the particular commitments and self-conceptions on which specifically *liberal* practices of legitimation characteristically rely. If modernity is understood to consist simply in the breakdown or “disenchantment” of various traditional worldviews, that is, liberalism seems at best to offer one available strategy by which modern states can legitimate their power, rather than to constitute the exclusive or paradigmatic mode of legitimation in the modern world.
In Section 2, however, I argue that this picture of modernity is crucially incomplete, for it neglects the concurrent and comparably powerful tendency of modern institutions and practices to enable or encourage ethical pluralization not only across but within particular societies, and thus fails to register the substantive implications of the fact of evaluative pluralism for the legitimating strategies of modern states. Here I take the experience of Western Europe in the eighteenth and nineteenth centuries to be illustrative: for, far from converging on a single set of post-traditional views about the human good, the inhabitants of these societies – taking advantage of their newfound freedom from the land and access to the institutions of a broadening civil society – came increasingly to develop a diverse range of interests, attachments, and subgroup affiliations, and in turn to demand that their public institutions protect and promote their opportunities to pursue these various personal and associational aims. The guarantees on which they insisted, I suggest, not only went well beyond the formal requirements implicit in the practice of justification or reason-giving itself, but also characteristically included a range of distinctively liberal rights and opportunities, including robust rights of conscience, various economic and welfare rights, and at least minimal opportunities for political participation. Thus while the process of pluralization saw the diversification of individuals’ religious and ethical attachments, it also provided a new basis for convergence on a number of key political values and commitments and thus for the possibility of public legitimation in the face of moral pluralism.

Finally, in Section 3, I consider the extent to which the phenomena of disenchantment and pluralization, which together standardly give rise to the demand for legitimation in terms of liberal norms and values, can now be seen to characterize all
contemporary systems of political authority, such that we may speak of at least some liberal rights or opportunities as constituting fully general or universal requirements of legitimate rule. Here I respond directly to the challenge of illiberal modernisms, which holds not only that modernity and liberalism are conceptually distinguishable, but that processes of modernization have a tendency to engender ethical and religious pluralism – and thus to necessitate the legitimation of public power in terms of liberal norms and values – only in the context of social and political institutions that are already substantially liberal in character, such as the capitalist market economy and “bourgeois public sphere” that provided the setting for Western European modernization. If particular societies were instead to develop distinctively modern forms of social organization under the control of a political regime that actively constrained the associational and economic freedoms of its members, such a state might successfully prevent at least the outward manifestations of moral pluralism and, with it, the demand for legitimation on broadly liberal terms; indeed, it is at least conceivable that an especially ruthless and powerful state might successfully eliminate all traces of ethical diversity even after it has taken hold, and thus proceed to instill a widespread commitment to substantially illiberal political values and practices. Although I concede the conceptual possibility of a modern state either preventing or rooting out ethical and religious pluralism, and thereby coming to legitimate itself on largely illiberal bases, I argue that modern institutions as such nevertheless have strong tendency to encourage a commitment to at least certain liberal values and institutions, and that this tendency can both help to explain the continuing emergence of liberal legitimating practices in a range of traditionally closed and illiberal societies, and give us some reason to expect these
practices to be robust in the face of ongoing attacks on liberal ideals and institutions by a number of authoritarian states and fundamentalist political movements in the world today.

1. Disenchantment and the Collapse of Traditional Authority

In his lecture on “Politics as a Vocation,” Max Weber famously described the power of “the patriarch and the patrimonial prince of yore” as resting upon little more than “the authority of the ‘eternal yesterday,’ i.e. of the mores sanctified through the unimaginably ancient recognition and habitual orientation to conform.” Such “traditional” authorities, that is, could typically expect their subjects to comply with the law out of an ingrained and indeed often reflexive disposition to treat the commands of the state as morally binding or authoritative. Yet to say that this disposition was thoroughly habituated or even automatic is not to say that it was rationally unintelligible, nor is it to imply that those in the grip of traditional “mores” would find themselves unable, if asked, to articulate the rational basis for their “orientation to conform.” Rather, the standing tendency to accept the authority of one’s public institutions and officials typically relied, as Weber himself helped bring to light, on a widely shared belief that these institutions – and thus one’s compliance with their directives – played an indispensable role not simply in procuring a variety of goods and opportunities for their subjects, but in carrying out the revealed commands of God or in realizing a condition of harmony or equilibrium in the broader natural or cosmic order.

Although this general view of the state as contributing to some plan or purpose that fully integrates or unifies its subjects while transcending their immediate concerns traces to the best-known classical accounts of political authority – as found in the Hebrew Bible, for example, and in the writings of Plato and Aristotle – it was perhaps most fully realized in practice in the feudal institutions of medieval Christendom. For whereas many ancient societies relied on the labor of slaves or helots who were expressly denied even nominal membership in the political communities to which they contributed, European feudalism was at least ostensibly underwritten by the idea that all subjects not only occupied socially necessary roles in the larger order but that, in performing their roles successfully, they could reach beyond their preassigned stations and achieve a kind of unity with God, whether on earth or in a redemptive afterlife. Because each role within this divinely orchestrated division of labor required its occupants to acquire certain specialized skills and virtues, the feudal order typically depended on a system of dispersed and highly personalized authority in which an array of quasi-public officers and titleholders watched closely over their immediate social inferiors: patriarchs as custodians of women and children, masters of servants, lords of masters, patrons of lords, and so on up the “great chain of being” that eventually connected all members to the king, saints, angels, and God.171 Thus while most individual members would perform their particular tasks with little knowledge of, much less contact with, the priests and nobles at the top of the feudal hierarchy, the dominant view of one’s earthly rulers as agents of an

otherworldly power (at however far a remove) served to secure an often unflinching disposition to adhere to their demands.\textsuperscript{172}

Beginning as early as the fifteen century, arguably with the transformation of the feudal nobility into an educated and disciplined class of civil servants, European society underwent a series of dramatic material and ideological changes that ultimately rendered untenable the traditional beliefs that one’s public institutions were organized, on the one hand, in accordance with a divine plan or natural “form” (rather than with the deliberate choices of human agents), and that they were essentially oriented, on the other, toward the maintenance of cosmic order or harmony (as opposed to the temporal freedom or well-being of their subjects). Dissidents within the Catholic Church, at first seeking simply to put an end to widespread corruption among ecclesiastical officials, came to challenge the very notion that individuals required authoritative intermediaries in order to worship and communicate with God, while at the same time the movement now known as the scientific revolution began to undermine many of the cosmological views on which traditional religious narratives had relied. Although personal religious belief, and indeed the Church hierarchy itself, largely survived the assault on papal authority and the ascendancy of modern science – contrary to the expectations (and hopes) of many secular \textit{philosophes} and “free thinkers” – individuals began to see their social and political institutions less as essential components of a morally unassailable order than as contingent products of human action and choice, and thus to decouple their pursuit of...

\textsuperscript{172} This cluster of beliefs also helps to explain the widely felt need for medieval subjects and officials to attempt to “restore” the cosmic order through public and often gruesome attacks on those who had disobeyed their sovereigns or had otherwise betrayed their position in the natural hierarchy; the mentality underlying this drive, and the distance that separates it from characteristically modern understandings of crime and punishment, is well illustrated in Foucault’s account of the torture and execution of Damiens, the would-be regicide of Louis XV, in \textit{Discipline and Punish}, trans. Alan Sheridan (New York: Vintage Books, 1977), ch. 1.
religious ideals from their allegiance to specific public institutions and practices. In this way, the “disenchantment of the world” that Weber took to be central to modern attitudes toward political authority was not exactly a condition of secularism or widespread disbelief, but simply one in which “the ultimate and most sublime values have retreated from public life,” into the realm of private associations and individual conscience.\textsuperscript{173}

The process of disenchantment, so understood, can be seen to entail at least three important transformations in the legitimating strategies of modern or modernizing states. First, the early theological and scientific challenges to the medieval Church and its magistrates, quite apart from their ultimate popular appeal, served to call into question the largely unreflective “orientation to conform” of those subject to traditional forms of authority and thus to raise at least the specter of a systemic “legitimation crisis” or popular rebellion against the state. No longer able to take the compliance of their subjects for granted, public officials and institutions were thus compelled to engage in increasingly explicit and routinized efforts to “establish and cultivate the belief in [their] legitimacy,”\textsuperscript{174} whether through large-scale public spectacles and the newly available media of mass communication, or in the comparatively formal and often localized courts and assemblies through which their subjects could lodge complaints and receive at least quasi-official explanations of state policy and conduct.

\textsuperscript{173} Weber, “Science as a Vocation,” in \textit{From Max Weber}, p. 155, emphasis added. The privatization of religious values in this sense need not be taken to imply a lessening in the intensity of religious commitment; indeed, as religion migrates from what Taylor has termed “the enchanted to the identity form of presence” in the lives of the faithful, the need for religious believers to actively affirm their commitments as deliberative agents may lead them to embrace their devotion to God with a kind of willful zealotry or enthusiasm unknowable to societies characterized by uniform yet unreflective religious adherence. See Taylor, \textit{Modern Social Imaginaries}, pp. 193-194.

Of course, the same movements that effectively placed the question of legitimacy on the public agenda in this way also largely succeeded in undermining the answers that that question that had been widely (if “tacitly”) accepted by those subject to traditional forms of political power. Thus in addition to forcing public authorities to engage in far more active and explicit practices of legitimation, the process of disenchantment can be seen, secondly, to have destabilized the inherited understandings of the proper role of political subjects in the public life of their state and thus of the organizational structure of the state itself. As individuals ceased to view their public roles or stations as assigned by God or built into the natural order of things, and came instead to see the allocation of their social responsibilities as subject to rational scrutiny and reconfiguration, those on the losing end of traditional religious and feudal hierarchies began to call for a greater degree of involvement in or at least recognition by their states. Although these demands for greater inclusiveness were often articulated in the vocabulary of popular sovereignty or national self-determination – and thus suggested the need for an active and perhaps even equal share of citizen involvement in the decision-making processes of the modern state – they did not necessarily rule out the possibility of a state’s successfully legitimating substantially hierarchical institutions or assigning its citizens a relatively passive role in the quotidian affairs of the state. What they did entail, however, was that public authorities had at least to justify any significant inequalities in access to or control over political power on the basis of criteria that all members could see as valid grounds for distinctions among citizens (such as technical expertise or other forms of epistemic advantage, as opposed to mere birthright).\textsuperscript{175}

\textsuperscript{175} An inclusive political community, in this sense, could thus be one in which those subject to political power largely understand themselves to be reliant on others – party leaders, say, or an enlightened dictator
Finally, the denaturalization of traditional religious or political roles did not leave untouched the predominant understanding of the unifying aims or objectives of the political order as a whole. For just as individuals came to question the necessity of their inherited modes of political organization, so, too, did they begin to reject the notion that their public institutions (however configured) could ultimately be justified in terms of their ability to contribute to some transcendental religious or cosmic end. Rather, with the retreat of such “ultimate” and “sublime” values from the central institutions of the modern state, individuals came to view their public institutions chiefly as a means of satisfying their worldly needs and interests, whether conceived in individual or collective terms. This instrumental conception of one’s public institutions combined easily with the demand for greater inclusiveness noted above, as increased popular participation, broadly conceived, could be understood to function both as an end in itself (giving political subjects a public role or recognized status in their state) and as a reliable means to an independent objective (namely, the satisfaction of the interests or desires of those subject to political power).

We can therefore understand the “disenchantment of the world,” in sum, as prompting public authorities to attempt to legitimate themselves through practices of public justification that are far more active and explicit, that acknowledge their subjects as having the status of full members in an inclusive political community, and that present their power as serving the particular interests or concerns of their subjects, rather than some external or transcendental purpose. Yet while these shifts clearly ruled out a variety of “traditional” strategies of legitimation, it remained unclear whether the process

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*to specify their central individual or collective ends for them; it does not, therefore, presuppose that members view themselves as self-directing agents in the sense elaborated in Section 2 below.*
of disenchantment on its own entailed any particular substantive reorientation in the legitimating practices of modern or modernizing states, which could at least in principle satisfy the three requirements just mentioned while appealing to a rather wide variety of (post-traditional) commitments or self-understandings.

The apparent spectrum of possibility for legitimation after disenchantment is well represented by the leading social and political theorists for whom the collapse of traditional norms and self-conceptions was seen as the defining ideological feature of European modernization. For a number of teleological theorists, for example, the breakdown of the traditional order marked an essential advance in the broader process of emancipation-through-demystification. As individuals cast off the “dogmas and formulas” that had been the “ball and chain of [their] permanent immaturity,”\textsuperscript{176} they could return to the task of discovering and then realizing in practice their true or highest natures – whether as rationally autonomous moral agents, as members of a self-directing community of producers, or as ethically self-expressive and self-questioning individuals (to sloganize the views of Kant, Marx, and Mill, respectively).\textsuperscript{177} For those we might call transformative theorists, by contrast, the stripping away of traditional values and self-conceptions – far from uncovering an inner essence or transhistorical nature shared by all – revealed instead the socially contingent and indeed highly malleable character of individual subjectivity, and thus unleashed the possibility that modern states might play a role in constructing or refashioning their protean subjects in accordance with their own


\textsuperscript{177} I exclude Hegel’s teleological account from this list because Hegel conceived of the individual self (which the modern state was said to be uniquely capable of realizing) not as a kind of rational kernel waiting to be laid bare by the processes of disenchantment and demystification, but as a product of modernization itself, including, crucially, the process of pluralization described in the following section.
aims and purposes.\textsuperscript{178} If individuals could eventually be led – whether by Jacobinist revolutionaries, vanguard party activists, or the functionaries of a larger “cultural revolution” – to converge on any number of post-traditional programs or ideologies, modern states might prove capable of successfully legitimating themselves under a potentially endless array of substantive political and ethical visions. Finally, for a number of skeptical observers, the collapse of the traditional normative order not only called into question the particular norms and values that underlay the medieval feudal and religious hierarchy, but undermined the authority of self-described moral experts and political visionaries more generally, including those who would seek to organize modern societies under one or another post-traditional moral theory or self-conception. If the process of disenchantment had in fact undermined any conceivable rational basis for the rule of some over others, modern institutions and officials would unavoidably find themselves unable to stabilize their power through processes of public justification or reason-giving at all, and would be compelled instead to shore up their power (to whatever extent possible) on the basis of deception, manipulation, and the “external means” of physical force.\textsuperscript{179}

These competing accounts at the very least underscore the point that, as Matt Sleat has recently emphasized, “modernity, as a historical epoch, is a highly contestable

\textsuperscript{178} Without attempting to saddle him with the legacy of his Jacobinist and totalitarian descendants, we can nevertheless find the transformative understanding of individual subjectivity neatly captured in the following passage from Rousseau: “I had come to see that everything was radically connected with politics, and that, however one proceeded, no people would be other than the nature of its government made it; thus this great question of the best government possible appeared to me to reduce itself to the following: What kind of government is best adapted to produce [former] the most virtuous, the most enlightened, the wisest, and, in short, the best people, taking the word ‘best’ in its widest signification?” (The Confessions, ed. Derek Matravers [London: Wordsworth, 1996], bk. IX, p. 393).

\textsuperscript{179} Tamsin Shaw reads Nietzsche as evincing this sort of skepticism about the possibility of legitimation in a disenchanted world in Nietzsche’s Political Skepticism (Princeton: Princeton University Press, 2007), esp. chs. 1, 6.
concept,” and that any attempt to derive liberal norms of legitimacy from an understanding of this epoch must at least acknowledge various “other aspects, characteristics, or interpretations of modernity which might not lead us so straightforwardly to liberalism.” Indeed, insofar as we conceive of modern self-understandings chiefly in terms of the phenomenon of disenchantment – and thus treat the process of modernization as a kind of “subtraction story,” whereby layers of traditional normativity were simply peeled away to reveal the modern subject in its “true” or “bare” form – we should perhaps not be surprised to find such deep disagreement about the prospects for successful legitimation or about the content of viable legitimating narratives in the wake of various attacks on the traditional order. For if the process of modernization cannot be understood to generate any “positive” normative content of its own, any judgments or predictions about the substantive attachments and self-understandings of modern subjects must inevitably rely (as did each of the views just discussed) on highly speculative and contestable philosophies of history or, what may or may not be worse, on simple guesses about which ideological program is likely to attract the favor of one’s local political elites or to emanate from the individual wills of those subject to political power. In the following section, however, I argue that modernization is not simply a story of subtraction and loss, and that the transition from traditional to modern self-understandings and values not only rules out the former as a viable basis for legitimation but places additional substantive constraints – indeed, broadly liberal ones – on the justificatory strategies of modern political authorities.

2. Pluralization and the Rise of Liberal Legitimation

As scientific and theological movements began to undercut popular confidence in the legitimating narratives of the medieval feudal hierarchy, European society underwent a series of dramatic transformations in the number, size, and practical significance of its various “substate” institutions and practices, both as a direct response to the collapse of the traditional political order and as a result of independent patterns of social change. No longer bound to their land, or beholden to their traditional authorities and overseers, large throngs of onetime peasants and serfs suddenly found themselves with at least the formal freedom to pursue an ever-widening range of personal projects and occupations and to relocate into growing urban centers, where their ethical and religious endeavors were even further shielded from the personal supervision of public or quasi-public officials. At the same time, as population growth threatened to outpace the productive capacities of a decentralized and largely agrarian and craft-based economy, technological innovation in the areas of cultivation and transport, and eventually in large-scale factory machinery and automation, vastly expanded the scope of commercial activity and made possible the accumulation of previously unimaginable levels of private, moveable wealth.

From the perspective of owners of capital, the collapse of the traditional political order and the onset of industrial revolution offered for the first time a sizeable non-landed, non-hereditary basis for acquiring social status and influence, and provided tremendous material incentives to market new goods and services to a small but widening consumer class. For the working masses, by contrast – free only in the “double sense” of having the liberty to sell their labor yet free of any resources or advantages that might
allow them to do otherwise\footnote{Marx, Capital: A Critique of Political Economy, Vol. I, trans. Ben Fowkes (London: Penguin Books, 1976), ch. 6, pp. 272-273.} – the rise of market capitalism was at best a mixed blessing, lifting the yoke of personalized dependency without offering much if anything in the way of protection from the impersonal forces of a volatile and unpredictable labor market, a cramped and squalid urban landscape, and a tiresome and often dangerous industrial workplace. Even at its dehumanizing depths, however, the processes of urbanization and industrialization nevertheless placed European proletarians into a vast and dense network of other individuals and innumerable “partial associations,” ranging from local guilds and unions to international revolutionary societies and burgeoning political parties. Relatively free from the active interference of an ever more remote and anonymous state – if still informally constrained by Mill’s “despotism of custom” – these substate organizations and enterprises quickly adapted and multiplied to meet the changing material and ideological tastes of their members and clients, offering even impoverished and overworked urban laborers an opportunity to develop and pursue a range of personal projects and attachments and to form and participate in the clubs and informal talking houses of an emergent “public sphere.”

What is most telling about these developments, for our purposes, is that increased exposure to ethical diversity and expanded freedom to choose among competing ways of life failed to produce widespread convergence on any particular understanding of the ultimate human good, contrary to the expectations of many of the teleological theorists noted above. It was not simply that, as Mill and others had predicted, modern individuals took up a wide range of post-traditional commitments and self-understandings and, seeing the value of distinct and irreconcilable “experiments in living,” failed to coalesce
around a single secular ideal. Rather, religious belief and worship persisted and indeed flourished in the civil society of many modern states, oftentimes providing religious adherents with a stronger sense of belonging and attachment than did the various causes and commitments of their secular peers. At the same time, whereas religious believers in traditional, ethically homogeneous societies had tended to treat their core values and commitments in a largely passive and unreflective manner – understanding them, after all, to be essentially unchallengeable and perhaps self-evident truths – both religious and secular members of modern, pluralistic societies increasingly felt the need to actively affirm or identify with their preferred systems of belief against a range of newly available and indeed “live” alternative options (conversion and apostasy, and their secular analogues, now appearing as intelligible and increasingly destigmatized possibilities). Moreover, while the members of traditional political communities could typically expect their states not simply to permit but to actively assist and mediate the performance of religious worship and ritual, growing numbers of modern individuals had to confront the possibility that at least some of their conscientious pursuits and activities might diverge from those of their neighbors and fellow citizens and thus could at least potentially invite active opposition and constraint by agents of the state or by private persons holding distinct and antagonistic evaluative beliefs.183

As modern individuals came to view their religious and ethical commitments as the products of deliberate affirmation or choice in this way, rather than as the

183 Traditional societies were of course neither morally uniform nor especially tolerant of religious and ethical minorities; yet religious nonconformists were typically either sufficiently small and powerless, or else physically separated from the dominant majority, that it was frequently possible for public authorities to stabilize their power without acknowledging these individuals as members of the political community at all, and thus to confront them solely with unmediated coercion rather than with justifications intended to elicit their willing compliance with the law. My argument here is that what is distinctive about the process of modernization is that it brought about a significant level of pluralism within that subsection of the population that public authorities felt the need to address with legitimating reasons.
unquestionable prescriptions of an external force or entity – and indeed to express their distinctive identities by self-consciously differentiating themselves from their neighbors and fellow citizens – it became increasingly natural for them to understand themselves as independent sources of practical authority and control: as *agents* or “doers,” we might say, capable of directing (at least some of) their actions in accordance with aims or purposes they have themselves selected or endorsed. Thus in contrast to the view of modernization as a process by which traditional commonalities were simply stripped away, contributing nothing determinate in the way of common values or self-understandings, the story just sketched suggests instead that the advent of modern institutions and practices – perhaps ironically, by creating or at least enabling a culture of ethical and religious pluralism – in fact served to produce a widely shared and novel form of practical identity, albeit one that significantly underdetermined the substantive ends of its adherents.

Considered abstractly, there is of course nothing to prevent self-conceived rational agents in this sense from coming to converge on a rather wide range of common ends or principles, indeed to the point of seeing the answers to certain key questions of value as so obvious or commonsensical as to treat them as “fixed points” for the purposes of private ethical deliberation and the organization of shared social institutions and practices. Insofar as these points of convergence specify some social or political aim that would be unachievable under an institutional scheme that permitted substantial opportunities for uncoordinated individual choice or the public expression of dissenting perspectives, a community of rational agents might well decide collectively to limit the scope for self-directed activity in some domain by imposing a range of illiberal
institutions and practices that would bind the community from that point forward. For this reason, it would be a mistake to infer from the fact that conditions of ethical and religious pluralism first gave rise to the widespread self-conception of modern subjects as agents that evaluative pluralism will therefore necessarily be a “permanent feature” of modern societies at all future points in time, as Rawls and others have maintained.¹⁸⁴ (In the following section, I will consider more fully the possibility that a society of agents might eventually coalesce around a “thick” or “comprehensive” ethical or religious worldview, and thus act in accordance with such a vision to constrain their own opportunities to pursue a diverse array of projects, values, and beliefs.)

Yet regardless of whether evaluative convergence in this sense is a realistic long-term possibility, the fact remains that, if individuals tend to develop a understanding of themselves as purposive agents only under conditions of moral pluralism, then for at least some nontrivial period of time those agents will have to accommodate themselves to the reality that many other members of their society have projects and commitments that diverge in important ways from their own. The ends in terms of which they will often seek to direct their own action, that is, will not be reliably shared – or at least not shared in every subjectively salient detail – by those with whom they must share a common set of public institutions and practices. If these differences are deep and abiding enough, and perhaps especially if multiple axes of disagreement cut across individual systems of

¹⁸⁴ See, for example, Political Liberalism, paperback ed. (New York: Columbia University Press, 1996), p. 36: “the diversity of reasonable comprehensive religious, philosophical, and moral doctrines found in modern democratic societies is not a mere historical condition that may soon pass away; it is a permanent feature of the public culture of democracy. Under the political and social conditions secured by the basic rights and liberties of free institutions, a diversity of conflicting and irreconcilable – and what’s more, reasonable – comprehensive doctrines will come about and persist if such diversity does not already obtain.” Thus while political liberalism is in many ways highly congenial to the historicized account of liberalism presented in the text, Rawls’s remarks here introduce an element of teleological necessity to his view that my account does without.
belief and those of well-established groups, it may oftentimes be possible for otherwise oppositional factions to agree at least to a provisional truce or “modus vivendi” – each side finding peaceful coexistence preferable to indefinite ideological conflict. And while any such settlement is bound to be fragile at first, the creation of even the rudiments of public order and mutual security can often lend a kind of inertia to the stability of newly consolidated pluralistic orders. The experience of living peacefully under any non-traditional political order will enable individuals, on the one hand, to become accustomed to pursuing a range of aims and projects that are no longer firmly embedded in a larger web of social meaning, and whose realization does not depend on the uniform participation of the entire political community, thus allowing them to feel increasingly at home in their newfound identities as self-directing agents. At the same time, even as ethical self-realization continues to recede into the realm of private and associational life, the members of modernizing states must increasingly rely for the satisfaction of their basic needs on the good will and cooperation of their pluralistic neighbors and compatriots, requiring not merely their ongoing toleration and forbearance from violence but also their active contributions to practices of material exchange and to the provision of various public goods and services. These occasions of reciprocity and mutual dependence – including while generalizing the phenomenon of le doux commerce observed by Montesquieu and Adam Smith – may in turn have a moderating or “softening” effect on the prejudices or insecurities of their participants, providing a more robust basis for common sentiments of trust and patterns of cooperative interaction going forward. What may therefore emerge from an initially precarious and provisional political standoff, as the experience of European societies after the Religious Wars
attests, is a shared commitment not only to laying down one’s arms (important though that is), but also to fostering a social and institutional environment in which all members can freely pursue their distinctive aims and purposes as rationally self-directing agents.\footnote{For a closely related account, albeit one that is said to result in convergence on a far more expansive set of political commitments than those described here, see Rawls’s discussion of how an “overlapping consensus” on a political conception of justice can emerge from a mere “modus vivendi” in ibid., lect. IV. See also Bernard Williams’s suggestive remarks in “The Liberalism of Fear,” in \textit{In the Beginning Was the Deed}, pp. 60-61 and my discussion in Chapter 2, Section 3 above.}

This shift in the dominant understanding of the basic legitimating functions of the state can be seen rather strikingly in the extent to which the rhetoric and conceptual vocabulary of individual rights and natural law came to displace the classical language of virtue in educated political and religious thought, as well as much popular political discourse, from the seventeenth century onward.\footnote{I have benefited here from the excellent discussion in J. B. Schneewind, “The Misfortunes of Virtue,” \textit{Ethics} 101, no. 1 (1990): 42-63.} In societies in which all members could be presumed to share a common commitment to a single, all-encompassing ethical or religious project or enterprise, and in which there existed some widely recognized class of superior citizens or natural authorities, there was a clear rationale for organizing one’s public institutions so that those with less knowledge or practical wisdom could acquire the skills and dispositions they needed to do their part in this overarching ethical scheme – and thus a clear need for a theory of virtues or excellences that could guide public authorities in their efforts to train and educate their subjects. In the morally pluralistic societies of modern and modernizing states, however, in which individuals shared only a comparatively “thin” identity and set of orienting aims, a comprehensive training in virtue would not only fail to serve some socially intelligible (much less necessary) purpose, but would often be received as flatly hostile to the dominant self-conception of its intended recipients, who viewed themselves as capable of setting or
affirming many of their own ends and commitments. Thus while we have already seen that the members of disenchanted societies tended to see their public institutions primarily as instruments of their own needs and purposes, we can now add, in view of the emergence of ethical pluralism, that they tended to conceive of these legitimating ends or purposes in terms of the basic or “ordinary” needs and interests that all members shared in virtue of their common self-conception as self-directing agents holding a plurality of ethical and religious beliefs. Rather than expecting the state to steer them toward a common goal or prepare them to live the best possible life, that is, modern subjects came to demand that their public institutions secure a range of individual rights, substantively open-ended opportunities, and largely fungible goods and services whose value or utility could be discerned without reference to a particular conception of human flourishing. Indeed, even where modern states and their officials were determined to impede the exercise of their subjects’ agency in practice, they could almost always be found at least professing allegiance to the broader ideal of ethical self-direction, and in many cases attempting to demonstrate that their existing laws and practices are in fact compatible with the widespread self-understanding of their subjects as what we might call rights-bearing agents.

With no pretense to completeness, I will briefly mention just three categories of rights and opportunities in terms of which modern, pluralistic states have typically felt compelled to legitimate their power. While each set of rights is surely subject to further refinement and particularization in the context of a given system of legal authority, my

187 Charles Taylor offers a meticulous account of the newfound “affirmation of ordinary life” among modern subjects and their public authorities in Sources of the Self: The Making of the Modern Identity (Cambridge, Mass.: Harvard University Press, 1989), pt. III; see also his A Secular Age, ch. 6, describing a concurrent “anthropocentric turn” in modern religious understandings, “where the purposes of God were narrowed to this one goal of sustaining human life” (p. 370).
hope is simply to convey a general sense that the protections standardly demanded by the subjects of modern, pluralistic states have a broadly though recognizably liberal character. First, and perhaps most obviously, individuals holding a variety of opposing ethical and religious views tended to converge in insisting on a robust rights of individual conscience, including rights to practice one’s religion and express one’s other conscientious beliefs and convictions, to join with others to form voluntary associations and other substate groups, and to form friendships and intimate relationships with other persons of one’s choosing. Second, and overlapping in part with certain rights of conscience, modern political subjects came to insist on a range of economic and welfare rights, including at least some rights to personal property (and often, though not always, at least qualified rights to own productive property as well), opportunities for occupational and consumer choice (typically, though again not always, as realized through market institutions), and some social protections against poverty, unemployment, and other agency-inhibiting pathologies predictably generated by the aforementioned arrangements (in many cases, consisting of a system of social insurance coupled with a minimum of universally provided goods and services). Modern subjects, to be sure, have often disagreed intensely over exactly which economic institutions and practices are best designed to satisfy their shared interests as rights-bearing agents. Nevertheless, in the face of the last two centuries of large-scale social experimentation, it seems fair to attribute to the subjects of an otherwise diverse array of advanced industrial states a growing sense that both of the so-called “pure” economic models – Soviet-style

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188 Although these demands can be understood to imply or include the further range of rights and opportunities I previously suggested are implicit in the practice of public justification itself, I mention here only those additional guarantees generated by the modern circumstances of widespread evaluative pluralism.
command systems, on the one hand, with their unavoidable restrictions on occupational and consumer choice, and the institutions of libertarian capitalism, on the other, with their inability to secure the material means of effective agency for all – are inadequate to safeguard their capacities for ethical self-realization. As a result, modern societies characterized by a significant degree of pluralism have in general tended to legitimate themselves in terms of the norms and values that underlie the institutions of one or another “mixed” economic system, standardly assuming the shape of a market-based welfare state.\textsuperscript{189} Finally, because the foregoing rights and opportunities depend for their reliable enforcement and application on the decisions of public officials who may face powerful incentives to undermine the agency interests of (some of) their subjects, the members of modern states have typically sought to establish various mechanisms of popular accountability as a means of providing their public authorities with institutionalized incentives to translate their justificatory commitments into political action. Since modern individuals can be assumed (as per the argument in Section 1 above) to have a further interest in receiving public recognition as full members of an inclusive political community, yet should not be understood (in view of the fact of evaluative pluralism) to share a commitment to participating actively in the public life of their state, this interest in popular accountability has standardly been understood to require the provision of individual political rights, such as the right to select political representatives, that are held by all but whose exercise is legally required by none.

Let us review what the argument so far has sought to show. As we saw in Section 1, various theological and scientific attacks on the traditional religious and feudal hierarchy fatally undermined the underlying values and self-conceptions that had

\textsuperscript{189} I briefly return to the challenge posed by modern command economies in Section 3 below.
provided their subjects with a widespread sense that their power was rightful or legitimate. No longer able to legitimate themselves on the basis of these traditional beliefs, European states were increasingly forced to justify their power through active practices of legitimation, on largely inclusive terms, and ultimately as a means to the satisfaction of their subjects’ earthly desires or interests (whatever these may turn out to be). Yet beyond these rather general shifts in the legitimating practices of modern or modernizing states, there remained a great deal of controversy as to exactly which, if any, desires or interests their subjects might turn out to hold in common, and thus which, if any, substantive norms and values might command the widespread allegiance of their subjects and thereby provide a basis for their legitimacy. For many teleological theorists, it seemed obvious that disenchanted societies would simply reconverge on a distinctively post-traditional conception of the good or worthwhile life that was no less complete than the traditional worldviews discredited by the process of disenchantment, and thus that modern states would be able to legitimate themselves on the basis of a similarly broad and deep ethical consensus; for many skeptical theorists, by contrast, the breakdown of traditional religious beliefs and self-understandings could be expected to produce a society that was deeply fragmented along ethical lines and ultimately incapable of finding a common basis on which their public institutions could successfully legitimate their authority at all.

In this section, I have offered a synoptic account of why both the teleological and skeptical theses were ultimately belied by the experience of Western European modernization, and suggested that an analysis of this experience might provide us with reasons for expecting the emergence of modern institutions and practices more generally
to generate (at least some of) the same the sorts of widely shared commitments and self-
conceptions that ultimately prevailed in the Western European case. Specifically, I
argued that the emergence of such distinctively modern forms of social organization as a
depersonalized or bureaucratic legal state and an industrial economy marked by a detailed
division of labor – by granting individuals access to other persons, goods, and ideas in a
densely populated social space relatively free from political supervision and constraint –
would tend to enable or encourage a pattern of ethical and religious pluralization,
whereby individuals would come to identify with their distinctive evaluative
commitments and increasingly view themselves as self-directed rational agents. Yet
rather than merely digging in their heels and hardening around their various ethical or
religious identities (though of course this did happen as well), modern individuals largely
came to recognize the political and economic advantages of such liberal (or proto-liberal)
ideals as reciprocity and toleration, and eventually to acknowledge one another’s mutual
interests in securing the prerogatives of evaluative self-realization, paradigmatically
given institutional form by a range of distinctively liberal rights and opportunities. Thus
the advent of modern institutions and practices, at least in Western Europe but perhaps
more generally, led neither to the complete realignment of individuals’ ethical and
religious views, as predicted by various teleological theories, nor to the full-blown
fragmentation of their moral beliefs and self-conceptions, as anticipated by skeptics about
legitimation in the modern age. Rather, so long as modern states sought to legitimate
their power in terms of their subjects’ common identity as rights-bearing agents, and thus
strove to secure a range of liberal rights and opportunities, they could typically secure a
widespread belief in their legitimacy despite – or perhaps, indeed, because of – the moral
diversity among their subjects. The following section goes on to gauge the
generalizability of this account by considering an alternative path by which modern states
might, at least in principle, secure a widespread belief in their right to rule without relying
on predominantly liberal legitimating norms and values – a path that, it is said, might
better represent the historical trajectories of various non-Western societies than does the
story of European modernization recounted above. After exploring this alternative
trajectory of institutional and ideological development, we will be in a better position to
assess what I have called the “transformative” argument that modernization as such tends
to foster no particular political identity or common self-understanding – much less a
distinctively liberal one – but rather clears the way for a potentially endless variety of
popular beliefs and attachments, and thus for a similarly broad array of legitimate
regimes.

3. Illiberal Modernisms and the Globalization of Liberal Legitimation

There is an obvious objection to the account presented up to this point, which I
have mentioned and set aside only passingly. Roughly put, this objection holds that, in
describing the emergence of modern institutions and self-understanding through the lens
of the Western European experience, my account has illicitly conflated the
process of modernization as such with the conceptually distinct and only contingently
concurrent process of liberalization. That these two processes overlapped substantially in
the context of Western Europe, it is claimed, was a mere accident of history, owing
perhaps to certain longstanding attitudes or proclivities that were peculiar to Western
European culture and tradition or to the epistemic disadvantages inherent in its being the
first civilization to experiment with modern institutions and social forms. Were other states to introduce the same set of modern institutions and practices under different cultural circumstances, or with the benefit of both moral and technical learning since the onset of European modernity, they might prove capable of preventing (or eliminating) ethical and religious diversity and, with it, the need to legitimate themselves in terms of the liberal rights and opportunities characteristically demanded by self-conceived rights-bearing agents. They might, in a phrase, undergo a process of *illiberal modernization* without foregoing their claim to enjoy political legitimacy by the lights of the realist account.

I have emphasized throughout, although it bears repeating here, that modernity as I understand it does not require liberal institutions or practices as a matter of conceptual definition. Rather, I have conceived of modernity as consisting, first, of the cultural phenomenon of disenchantment, whereby individuals abandoned the values and beliefs that had underpinned the traditional feudal-religious order, and, second, of two sets of institutional forms – the depersonalized and bureaucratic legal state and the urbanized, industrial economy – that emerged to take the place of the institutions fatally undermined by disenchantment. Thus while I argued above that the introduction of modern institutions and practices, so conceived, has a tendency to encourage moral pluralization and thus a widespread commitment to liberal values and ideals, this is a claim that must be established through argument and historical analysis; it is not entailed as a matter of conceptual necessity. Furthermore, although I argued in Chapter 2 that all states that attempt to mediate their power with reasons or justifications must conform to those norms that are internal to the practice of reason-giving or justification itself, these
standards do not on their own require states to secure the full range of liberal rights and opportunities that are standardly demanded by the subjects of modern, pluralistic states. It is therefore at least a live question, and not one begged by a circular definition of the key terms at issue, whether legitimacy under conditions of modernity in fact requires liberal practices of legitimation, as Williams’s formula, and my argument up to this point, would have it.

It might be noted in this context that the relationship between modernization and liberalization is in fact a well-traveled subject of empirical investigation among sociologists and political scientists, tracing at least to the early writings of Samuel Huntington and Seymour Martin Lipset, who sought to identify the social preconditions of stable democratic rule and to characterize more generally the relationship between economic and political development. Following this model of inquiry, we might proceed to survey the known attempts to introduce (or manage the introduction of) modern institutions through practices of deliberate political engineering and control, and see if at least some illiberal regimes have successfully overseen the transition to modernity without either facing an internal legitimation crisis or else relying ultimately on broadly liberal modes of public justification. Although it is difficult to imagine such a study being devised in way that would not invite accusations of tendentiousness, given the difficulties inherent in defining and measuring the success conditions of a given state’s efforts to legitimate its power, a cursory review of recent large-scale attempts at illiberal modernization hardly provides grounds for optimism about the long-term stability of that approach. Indeed, observing that prominent experiments in illiberal modernization have either collapsed, à la the Soviet bloc, under the weight of internal dysfunction and
widespread popular discontent, or else precipitated a shift, as in China after Mao, toward both genuine liberalization and increased reliance on (often plainly disingenuous) rhetorical appeals to liberal norms and values, some commentators have been led to declare that the model of authoritarian modernization characterizes at best a transitional phase in a larger and inherently liberalizing process of political development – or, more boldly still, that we have now arrived at the “end of history,” and that “there is no alternative” to the basic institutions of modern liberalism in the world today.

Without doubt, the process of liberalization that began in many single-party Communist states in the late 1970s and early 1980s, and that is often understood to have accelerated the implosion of the Soviet Union a decade later, had a number of far-reaching consequences for the legitimating practices of these regimes and their various satellites and client states, as I shall emphasize again in a moment. Yet the challenge I want to address first cannot be dismissed simply by pointing to the failure – even the uniform failure – of twentieth century experiments with illiberal modernization, for, absent some reason to expect modern institutions as such to generate moral pluralism and thus a demand for liberal legitimation, it remains open to advocates of illiberal modernization to claim that the observed relationship might not generalize to states that are just beginning (or have yet) to undergo processes of modernization but that can be expected to do so under dramatically different cultural and political circumstances than those faced by last century’s Communist regimes. We must therefore inquire more deeply, and necessarily more speculatively, into the character of modern institutions and practices to see if there is anything internal to these forms of social organization that would tend to undermine novel efforts to cultivate a widespread belief in the legitimacy
of political institutions that do not extend a significant range of individual and
associational freedoms.

As I argued in Section 2, individuals in the modernizing societies of Western
Europe came to understand themselves as rights-bearing agents, and thus to insist on an
array of liberal rights and opportunities, in large part as a result of their having access to
emergent markets in labor and consumption goods and to the talking houses and various
intermediate associations that comprised the “bourgeois public sphere” – institutions that
together allowed for an unprecedented degree of ethical and religious self-expression and
provided the occasion and opportunity for significant intellectual and material exchange.
Yet surely institutions of precisely this character – subject to routine policing, to be sure,
and dependent on the state for the creation and enforcement of background property and
contract rights, but nevertheless largely unregulated with respect to the evaluative
substance of individuals’ choices – were not a necessary concomitant of modernization as
such, for we could easily imagine a society developing a modern bureaucratic state and
industrial economy, for example, without its public authorities taking so permissive a
stance toward the institutions of its emerging civil society. Indeed, it is at least
conceivable that a modernizing state, viewing ethical pluralism as a destructive
expression of individual egoism or factional partiality, might succeed in preventing the
emergence of such evidently pluralizing institutions as markets and intermediate
associations altogether.

Yet while such a regime is undoubtedly a conceptually coherent possibility, it
remains difficult to see how the central institutions of modernity just mentioned could be
introduced in practice without giving rise to at least small-scale simulacra of the
pluralizing (and thus liberalizing) institutions that emerged in modernizing Western Europe. Consider, for example, the social and institutional changes inherent in the process of industrialization. Regardless of the particular political regime overseeing the transition from a predominantly agrarian to an industrial system of economic production, or the ownership structure of industrial firms in such a society, any shift of this sort will necessarily involve a significant increase in occupational specialization in virtually every sector of productive life. Even if these occupational opportunities are formally restricted to certain classes of workers or assigned to particular individuals by the state, and indeed even if the experience of the typical industrial laborer is one of severe monotony and creative frustration, the very existence of a vast and ever-changing array of productive roles – particularly against a cultural background in which social roles have largely been denaturalized or disenchanted – will serve to make intelligible the possibility that one might pursue and identify with a rather diverse set of meaningful goals and projects in the realm of working life. Because industrialization typically requires much of the working population to relocate to dense and often unavoidably heterogeneous urban centers, moreover, the members of modernizing societies are likely to be exposed to a variety of distinct tastes, opinions, and ways of life in their leisure-time encounters with their city-dwelling neighbors as well.

Of course, particular states might attempt to limit their subjects’ exposure to a variety of evaluative traditions and beliefs by placing legal prohibitions on the formation of substate groups that might solidify and give expression to existing patterns of diversity, by restricting the exchange of goods or services that might facilitate the realization of diverse ends, and by requiring broad participation in public rituals or
activities designed to encourage a common identity and unity of purpose among their members. Yet not only would such practices, in order to be effective, have to be so severely repressive as to violate even the most lax interpretation of the non-ideology requirement set forth in Chapter 2; they would appear to presuppose an essentially totalitarian system of political authority – distinguished, inter alia, by the presence of a large, well-trained, and resource-rich professional bureaucratic and military apparatus, equipped with advanced weaponry, surveillance and transport capabilities, communications infrastructure, educational institutions, and the like – that could itself only emerge from a necessarily extended process of industrial development. (Even then, of course, it may be impossible to root out all underground organizations, informal markets, and private opportunities for ethical and religious practice, as again many twentieth century experiences with totalitarian rule attest.) Yet if evaluative pluralism is bound to characterize modern societies at least in the earlier phases of industrialization and urbanization, it is hard to see how particular public authorities might prevent either the process of ethical self-identification by which individuals active affirm their particular beliefs and values as agents, rather than as occupants of preassigned social and religious roles, or the tendency of their subjects, so conceived, to demand that their public institutions legitimate their power not on the basis of an as-yet-unshared common end or aim but rather in terms of their ability to secure the rights and opportunities necessary for individual self-realization under conditions of moral pluralism.

This tendency of modern social and political institutions as such to encourage their participants to view themselves as rights-bearing agents helps to explain not only the inability of various “transformative” political movements in the Jacobinist/Leninist
mold to secure widespread acceptance of their right to rule on the basis of illiberal norms or values – much less to do so without violating the standards internal to the practice of justification itself – but also the increasing reliance of public authorities in a wide variety of contemporary societies on at least minimally liberal strategies of legitimation.

Virtually all current states, for example, are at least signatories to a number of human rights treaties and conventions, and many of these public authorities profess fidelity to such liberal ideals as freedom of conscience, religious toleration, individual choice, and popular accountability – not simply to appease powerful outside agents but as a means of legitimating their power internally – even as they actively undermine liberal rights and opportunities in practice. To some extent, to be sure, the rise of liberal discourses of legitimation can be traced to efforts by Western states and the international organizations under their influence to promote stable markets and friendly regimes in the developing world, and so may reflect in part the values and interests of foreign powers rather than simply an emerging liberal consensus among the subjects of modernizing states themselves. Yet to assimilate the spread of liberal legitimating norms entirely to Euro-American imperialism or cultural hegemony is to ignore the considerable extent to which opposition movements within non-Western modernizing regimes have not only taken up the language of human rights, democracy, individual dignity, and the like, but have expressed these ideals “in terms of [their] own symbols and premises,” and have indeed invoked liberal norms and values in criticizing the foreign policies of Western states and their proxies.  

At the same time, the continuation of economic and cultural integration through transnational trade and immigration, the spread of electronic communications

technology to the developing world, and the incorporation of many liberal rights and ideals into international humanitarian law and practice combine to make it even more difficult than it would otherwise have been for modernizing political elites to insulate their subjects from ethical and religious diversity or from the basic political commitments to which it standardly gives rise.

The globalization of liberal norms and values has by no means been complete or without significant adaptation and qualification at the level of particular societies. Many public authorities in fully modern and at least partly liberalized societies have explicitly repudiated aspects of “Western-style” liberalism that they see as promoting a culture of consumerism and instant pleasure, encouraging sexual licentiousness, and undermining the norms essential to their society’s traditional family structure or dominant religious beliefs. Thus we find public officials and institutions endorsing human rights or democracy yet insisting that their own variants of these ideals incorporate restrictions on personal choice or elements of political hierarchy that would be unacceptable to many Western audiences ostensibly committed to the same abstract norms and values. What is perhaps most striking, however, is the extent to which many regimes that resist endorsing the full range of liberal rights and opportunities described above, and indeed those whose conduct suggests a thoroughgoing hostility to liberal values more generally, nevertheless perceive the need to profess a commitment to certain abstract liberal ideals.

191 See, for example, the much-discussed remarks of Lee Kuan Yew in Fareed Zakaria, “Culture Is Destiny: A Conversation with Lee Kuan Yew,” Foreign Affairs 73, no. 2 (1994): 109-126. Similar sentiments have been aired by the former Malaysian Prime Minister Mahathir Mohamad, by the Party leadership in contemporary China, and by authoritarian rulers in much of the Middle East throughout the so-called Arab Spring uprisings. In this sense, the rights and opportunities I take to universal or near-universal conditions of legitimacy under conditions of modernity are less extensive than the full range of liberal rights and opportunities that must be secured in order for a society to qualify as “liberal,” as opposed to “decent but non-liberal,” in Rawls’s well-known use of those terms; see his The Law of Peoples (Cambridge, Mass.: Harvard University Press, 1999), pp. 59-62.
or to certain minimal human rights in the course of attempting to legitimate their power to their subjects. Insofar as we can locate the roots of this phenomenon, as I have attempted to do, in the tendency of modern institutions as such to encourage their subjects to see themselves as rights-bearing agents, we have reason to understand the practice of liberal legitimation not simply as the fleeting accomplishment of Western-led globalization but as a fixture of modern life as long as ethical and religious pluralism persists.

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In this chapter and the last, I have sought to articulate and defend a distinctive approach to the problem of legitimate authority, and to elaborate some of the key implications of that approach for contemporary political practice. With the essential contours of the realist account now before us, we can pause to reflect on both its central normative and methodological virtues as well as its limitations as a general theory of political legitimacy. As we have seen, one attraction of the realist approach is its ability to identify norms of acceptable conduct and institutional design that are internal to ongoing patterns of public justification and political rule, and that therefore do not depend for their force or content on a particular “prepolitical” theory of justice or morality. Not only does this approach avoid taking sides in various first-order controversies about the human good or the ideal form of social organization, allowing these questions to be settled instead through practices that tend (or so I argued) to be responsive to locally dominant values and beliefs; it is also able to accommodate the concerns of those who hold that higher-order standards of legitimacy – even those that ultimately affirm the importance of self-determination and stability – must themselves
emanate from the concrete political encounters of those subject to political power. Given the great extent to which real-world public authorities in fact rely on practices of public justification as a means of stabilizing their power, the norms picked out by the realist account of legitimacy can be understood to apply to public institutions and officials in a wide variety of practical contexts, without the need to invoke some further theory of our natural or prepolitical moral duties.

Yet this apparent asset is also the realist account’s greatest liability. For in locating its substantive requirements in the norms internal to specific and historically contingent (if nevertheless widespread) social practices, this approach is ultimately left without the normative resources to address the predicament of those inhabiting stateless societies, living under failed or strife-ridden states, or subject to the commands of those who rule without even the pretense of legitimation. Considered in isolation, that is, the realist account cannot direct individuals to establish political institutions where they do not presently exist (much less instruct them to create institutions of a particular kind), nor can it enjoin public institutions and officials to mediate their power with reasons, should they prove able to stabilize their positions of authority on the basis of coercive threats alone. In order to address individuals in circumstances of this sort – in conditions of warfare or anarchy, we might say, rather than of politics, properly speaking – the realist account must therefore be supplemented by a theory of prepolitical morality, such as the minimal theory of natural rights and duties introduced in Chapter 1. Such a hybrid account – instructing individuals to create and uphold institutions that mediate their power with reasons, yet locating its further normative content in the structure and substance of those justificatory appeals themselves – would no doubt invite a range of
first-order and methodological objections from several of the realist critics discussed in Chapter 2. Yet it is difficult to see how a truly general theory of legitimacy, covering not just the normal case of political rule but also the tyrannical and dysfunctional extremes, could be achieved but by relying at least in part on norms “external” to political practice in this sense. Given the morally minimal content of the prepolitical account on which I relied in Chapter 1 – together with the extent to which those moral commitments align with the distinctively modern attachments and self-understanding surveyed in the present chapter – we might expect at least some realists to forgive this partial reversion to a prepolitical mode of moral theorizing. As for the others, however, their ire may simply be the price to be paid for enlarging our constituency of normative concern beyond the boundaries of states that in fact claim legitimate authority over their subjects.
I have so far considered the problem of legitimate authority only insofar as it concerns the citizens and public officials of particular states, and then only insofar as their internal or domestic affairs are at issue; I have said almost nothing, that is, about the implications of a given state’s internal legitimacy (or lack thereof) for the conduct of those residing outside its domestic jurisdiction. Perhaps in some earlier epoch, in which state sovereignty was seen as absolute and the interests of foreign populations viewed as peripheral at best to one’s own affaires d’états, the question of a given state’s right to rule over its own subjects could be wholly disentangled from the question of its right against various kinds of interference by outsiders. Internal and external legitimacy, on such a view, would simply be functions of distinct and only contingently overlapping sets of moral and prudential considerations. Yet whatever appeal this picture of world politics once held – and we have reason to doubt that its influence extends back much further than the mid-seventeenth century\(^\text{192}\) – it is today rejected both by nearly all theorists of legitimacy and just war and, increasingly, by the canons of international law and practice. Rather, it is now widely believed that particular states must satisfy at least a threshold level of human rights protection in order to enjoy legitimate authority over their own.

\(^{\text{192}}\) See, for example, Richard Tuck’s discussion of Roman and Renaissance humanist writings on war in the interests of “human society” in The Rights of War and Peace: Political Thought and the International Order from Kant to Grotius (Oxford: Oxford University Press, 1999), pp. 34-47 and ch. 1 passim. Gary Bass argues that, even after advent of the Hobbesian understanding of states as fully sovereign and autonomous entities, what we would today call “[h]umanitarian intervention [remained] a relatively familiar European practice, and was understood as such – not just by the intervening countries but even sometimes by the government whose sovereignty was being violated in the name of humanity” (Freedom’s Battle: The Origins of Humanitarian Intervention [New York: Alfred A. Knopf, 2008], pp. 4-5).
members, and that their failure to do gives outside agents in the international community reason to undertake certain kinds of preventive or remedial humanitarian action. At the same time, even those in favor of strengthening the existing international human rights regime tend to maintain that at least some states nevertheless ought to enjoy many of the core perquisites of the traditional (that is to say, early modern) notion of sovereignty, including certain exclusive rights to control their own territorial jurisdiction.

This chapter seeks to resolve an apparent tension between two commonly held views often implicit in this now-predominant understanding of international political morality: first, that at least some existing states enjoy external legitimacy, or the moral right against outside intervention in their domestic affairs; and, second, that a state’s failure to protect its members’ basic human rights gives outsiders reasons to act, by coercive means as necessary, to help restore those rights and to prevent future abuses. The tension between these sets of commitments arises in virtue of (what I shall suppose to be) the fact that no state does or could provide perfect protection of its subjects’ human rights, and thus that all existing states engage in patterns of treatment that give outsiders reason to undertake humanitarian action of some sort.

Of course, it is widely accepted that violations of human rights do not on their own offer decisive moral grounds for coercive intervention by outsiders; rather, they provide outside agents with merely pro tanto reasons for various modes of action (not all of them coercive), which may therefore be outweighed by countervailing considerations in a given case. Indeed, we might think that these competing reasons for action – given not only by the intervening agent’s own self-interested estimation of intervention’s costs

193 I define intervention as the threat or use of force against a given state’s political jurisdiction without that state’s consent; humanitarian intervention refers to intervention aimed at preventing or remedying violations of human rights.
and benefits, but also by the traditional requirements of just war – are sufficiently strong
to caution against humanitarian intervention across a rather wide range of practical
circumstances. If “the prospects of reform intervention are normally uncertain whereas
the costs in blood and treasure are certainly extreme,” our intuition that intervention is
sometimes, or even generally, impermissible can perhaps be accommodated without
establishing any particular state’s right against external coercive action. Yet while cost-
benefit considerations must surely factor centrally into any account of permissible
humanitarian intervention, it is unclear that these reasons alone provide sufficient
grounds for thinking that any existing or readily foreseeable state ought to be entirely
immune from intervention by outsiders. For even if it would be absurdly
disproportionate (not to say imprudent) for an outside agent to invade and occupy a given
state with the aim of preventing or remedying human rights violations that are merely
isolated or insubstantial, it is far less obvious that comparatively targeted strikes – via
guided missiles or combat drones, for example – would necessarily be ruled out in these
circumstances by traditional considerations of prudence and just war. Rather, the
likelihood that outsiders’ humanitarian reasons for action will be undefeated by these
standard competing considerations seems only to increase as the technology of “surgical”
intervention continues to advance. Absent further reason to refrain from intervention
in these circumstances, outside agents may thus come to enjoy an increasingly expansive

194 Charles R. Beitz, “Nonintervention and Communal Integrity,” Philosophy and Public Affairs 9, no. 4
195 Even the widely criticized drone program of the US Central Intelligence Agency, for example, appears
to be rapidly improving its capacity to discriminate between civilians and combatants: “[T]he Bureau of
Investigative Journalism in London, which has done perhaps the most detailed and skeptical study of the
strikes … has documented a notable drop in the civilian proportion of drone casualties, to 16 percent of
those killed in 2011 from 28 percent in 2008. This year, by the bureau’s count, just three of the 152 people
killed in drone strikes through July 7 were civilians” (Scott Shane, “The Moral Case for Drones,” The New
permission to undertake coercive humanitarian action even against states with exemplary (though imperfect) human rights records.

Faced with this counterintuitive conclusion, contemporary theorists of human rights and international intervention have largely pursued one of two paths. Some have opted to bite the bullet and deny that any state enjoys external legitimacy in the present sense: if we “take human rights as seriously as we should,” writes Christopher Heath Wellman, then no state has a “principled objection to outsiders’ intervening in its internal affairs if this interference will prevent just a single human rights violation.” Many others, however, unwilling to accept this seemingly radical position, have been led simply to posit or stipulate that states satisfying a threshold of adequate human rights protection ought to enjoy a moral right against external intervention, leaving the rationale for such a right (or so I shall argue) largely obscure.

In this chapter, I hope to provide a clear moral basis for some states’ claim to external legitimacy without denying either the normative force of human rights or the view (sometimes called “value-individualism”) that individuals alone are the ultimate sources of value. What the prevailing accounts have neglected to consider, I submit, is individuals’ potentially competing interests in collective self-determination – interests which are not fully identical with or reducible to those protected by human rights. Once the nature and basis of these interests in self-determination are made explicit, I believe it

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will be possible to establish that some states have a moral right against external intervention in spite of their failure to perfectly protect their subjects’ human rights.

The argument of the chapter proceeds as follows. In Section 1, I examine the familiar thesis that all internally legitimate states, defined as those which adequately but not perfectly protect their subjects’ human rights, should be understood to enjoy external legitimacy; I refer to this claim, that internal legitimacy entails external legitimacy, as the entailment thesis. (In all cases, I shall employ the simplifying assumptions that the states under consideration are nonaggressive and that the effects of all human rights abuses committed by these states are localized entirely within their political jurisdiction.) While the entailment thesis is commonly asserted by contemporary theorists of external legitimacy,198 I show that its leading defenders have failed to provide sufficient grounds for endorsing it, opening the door to the charge that even a paradigmatically legitimate state has no moral right against external intervention.199 In Section 2, I consider two kinds of individual interests in collective self-determination that, I argue, give outside agents pro tanto reasons to forbear from intervening in a given state’s domestic affairs. Although, as I will emphasize below, human rights are themselves important requirements of self-determination – such that outside action to secure human rights will also serve to restore certain key conditions of self-determination in the target state – individuals nevertheless have additional interests in self-determination that are

198 In addition to those cited above, a version of the entailment thesis is also endorsed by both Joshua Cohen, “Is There a Human Right to Democracy?” in The Egalitarian Conscience: Essay in Honour of G. A. Cohen, ed. Christine Sympnich (Oxford: Oxford University Press, 2006) and John Rawls, The Law of Peoples (Cambridge, Mass.: Harvard University Press, 1999). Although Rawls does not explicitly describe human-rights-protecting states as internally legitimate, he does hold that a state’s internal protection of human rights entails its moral right of non-intervention. Indeed, Rawls and Cohen go further to hold that internal human rights protection grounds not simply a right against external coercive intervention but also rights against various forms of non-coercive interference and inducement by outsiders. I take no stand on whether internal legitimacy, in my sense, entails these broader rights against external influence.

unrealizable through, and are in fact endangered by, external coercive action aimed at protecting human rights. In Section 3, I show that these reasons of self-determination provide a plausible basis for accepting the entailment thesis. Finally, in Section 4, I draw again on my account of the value of self-determination to argue for the more controversial claim that outside agents should at times forbear from undertaking coercive humanitarian action against states that are internally illegitimate (i.e., those that fail to secure even a threshold of adequate human rights protection), even if such action could be accomplished at acceptable costs and in conformity with the traditional principles of just war. Some internally illegitimate states, that is to say, may nevertheless enjoy external legitimacy in the sense I have specified.

As it is beyond the scope of the present inquiry to specify and defend a complete catalog of human rights, I will simply presuppose throughout a substantive conception of human rights that is, in Joshua Cohen’s phrase, “neither maximal nor minimal.” Human rights, on this view, include protections against standard threats to one’s physical health and safety, whether these take the form of active assaults on one’s bodily integrity or of preventable deprivations of one’s essential means of subsistence. Moreover, in view of individuals’ interests not merely as sentient beings, capable of experiencing physical suffering and privation, but also as rational agents or persons, defined by their ability to form and pursue their own conceptions of a purposeful or flourishing life, I assume that human rights also include robust protections of one’s freedom of movement (including rights against slavery and arbitrary imprisonment) and at least minimal guarantees of the rights of expression, conscience, association, and personal property.

Finally, in addition to those protections needed to guard against direct assaults on one’s

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urgent individual interests, so defined, I assume that human rights must also encompass various second-order rights to whatever legal and political arrangements are “normally necessary and reliable” in protecting individuals’ directly urgent interests, including rights of petition, due process, freedom of speech and the press, and at least some opportunities for political participation. Although institutionally demanding and in many cases significantly aspirational, this list of human rights nevertheless falls well short of the demands of social justice, perhaps most notably in omitting various requirements to limit or eliminate socioeconomic and political inequalities within a particular society, except (if at all) where doing so is a necessary means of securing the urgent interests just mentioned.

1. The Entailment Thesis: False Starts

In this section, I consider several leading justifications for the claim that all internally legitimate states, defined as those that adequately protect their members’ human rights, ought to enjoy external legitimacy, or the moral right against external intervention in their jurisdiction. Although the claim that internal legitimacy entails external legitimacy – what I call the entailment thesis – is widely accepted among contemporary theorists of human rights and international intervention, the leading accounts of external legitimacy simply stipulate the entailment thesis as a matter of


202 I do not assume that there is a second-order human right to specifically democratic institutions, in view of what I take to be inconclusive evidence of their instrumental role in securing first-order human rights across a range of standard conditions; see, for example, the discussion in Charles R. Beitz, *The Idea of Human Rights* (Oxford: Oxford University Press, 2009), pp. 174-186. However, those convinced of the instrumental case for a human right to democracy can simply amend my account, without substantially affecting its conclusions, to include democratic rights among the list of universal human rights (provided that these rights are also understood as conditions of internal legitimacy).
conceptual definition. This strategy, I will suggest, fails to supply the sort of substantive argument for its adoption that would be needed to overcome the reasons for action given by human rights violations within internally legitimate states.

In what follows, I assume without argument the widely held view that a state’s adequate protection of its members’ human rights is a sufficient condition of its internal legitimacy, conceived as implying both a permission or liberty-right to coercively enforce its legal directives and a claim-right at least to its subjects’ non-interference with the state’s efforts at enforcement. A state “adequately” protects its members’ human rights, in this sense, when it codifies and publicly promulgates those rights as law, establishes enforcement mechanisms that are typically effective, and publicly accounts for gross or prolonged enforcement failures. Although human rights will normally be protected in a state that has satisfied this threshold of adequacy, it is unrealistic to expect any state to eliminate all instances of human rights violations, whether perpetrated by third-party actors or by agents of the state itself. A state may therefore achieve internal legitimacy despite maintaining an imperfect record of legal enforcement and permitting a modicum of misconduct and noncompliance among its public officials.

The entailment thesis is commonly invoked to resist an apparently unattractive implication of the threshold conception of internal legitimacy. To see this, suppose that, at a given moment in time, not just one but many different states (or potential states)

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203 I adapt this minimalist conception of internal legitimacy from Allen Buchanan, “The Legitimacy of International Law,” in The Philosophy of International Law, eds. Samantha Besson and John Tasioulas (Oxford: Oxford University Press, 2010), pp. 81-85; I thus take no position here on whether an internally legitimate state has a further claim-right to its subjects’ obedience.

204 To put the same point differently, we may say that a state’s satisfaction of this threshold of protection is adequate for the purposes of assigning it internal or domestic legitimacy; what the present chapter seeks to investigate is whether a state’s satisfaction of this threshold is also adequate for the purposes of establishing its external legitimacy. Although the ordinary meaning of the word “adequate” may invite this reading, I do not mean to suggest that the satisfaction of this threshold is adequate for all practical purposes, a supposition which would obviously beg the central question at issue.
could prove capable of satisfying a threshold of adequate human rights protection for the residents of a particular territory. The fact that, right now, State A happens to satisfy this threshold establishes, by definition, its right to rule over those within its jurisdiction. However, this fact alone seems insufficient to account for the wrongness of another state – State B – colonizing or forcibly annexing that territory, provided that State B could satisfy the same threshold of human rights protection for the residents of (what is now) State A. The standard account of a state’s internal legitimacy offers no principled basis for favoring the state that happens to be internally legitimate at the present moment over one that could do just as good a job at some future moment in time, and thus for establishing State A’s right to exclude State B from its territory. (Of course, in practice, the citizens of State A might actively resist their forcible incorporation into State B, such that State B’s decision to annex or colonize State A would in fact incite sufficient levels of noncompliance so as to decrease human rights protection overall. But the principled issue at stake can then be brought out by asking whether the (former) citizens of State A would be justified in resisting their forcible incorporation by State B, even if the latter entity formally codified and attempted to enforce their human rights.)

Moreover, if human rights violations give outsiders reasons for action in all cases, it is unclear why a given state’s satisfaction of a threshold of adequate protection ought to factor into outside agents’ practical reasoning about intervention at all. For while humanitarian considerations may lead outsiders to be indifferent between two states (A and B) that could protect human rights in a given territory to an equivalent extent, these same reasons would appear to compel them to support a third entity – State C – that could improve upon those states’ levels of human rights protection, or indeed whatever entity
could maximize human rights protection at a given point in time. Such an approach would not only render many internally legitimate states vulnerable, in principle, to outright colonization or annexation by benevolent outside agents with superior administrative capacities; it would make nearly all states morally liable to at least occasional coercive incursions into their territory, insofar as outsiders’ intervention could help prevent “just a single human rights violation.” Even if considerations of cost would, in practice, typically overwhelm a given outside agent’s humanitarian reasons for intervention, the view of internal legitimacy that grounds a state’s right to rule in its adequate protection of human rights offers no principled basis for according such a state a moral right against external intervention in its territory.

Although few theorists have been willing to accept these counterintuitive implications of the standard approach to legitimacy, the leading “value-individualist” accounts have struggled to identify the individual interests that would be served by according external legitimacy to all internally legitimate states, in the sense defined above. In his influential account of external or “recognitional” legitimacy, Allen Buchanan proposes that, in order to acquire rights of territorial integrity and noninterference, states must satisfy not only a threshold of adequate human rights protection within their jurisdiction but also what he calls the “Nonusurpation Requirement,” which holds that “an entity is not [externally] legitimate if it comes into being by displacing or destroying a legitimate state by a serious act of injustice.” Since, in this context, a “serious act of injustice” is simply a “violent or otherwise

206 Buchanan, Justice, Legitimacy, and Self-Determination, p. 264.
unlawful” act\textsuperscript{207} – as opposed to one premised, for example, upon the consent of the target state’s members – Buchanan’s requirement amounts to an injunction against violating an internally legitimate state’s right against external intervention. Yet the notion that internal legitimacy \textit{entails} a state’s right against external intervention is precisely what the foregoing analysis has called into question, and it is what any theory of external legitimacy must seek to explain. By simply assuming the truth of the entailment thesis, Buchanan begs the fundamental question concerning the basis for his Nonusurpation Requirement.

In his book on secession and self-determination, Christopher Wellman likewise seeks to avoid the “awkward implications” of denying what I have called the entailment thesis, although he worries that there is “no straightforward way to square it with [the] value-individualism” that is said to underlie a state’s internal right to rule.\textsuperscript{208} Without simply “posit[ing] the deontological value of group autonomy,” he writes, one cannot “satisfactorily explain why it is wrong to forcibly annex a perfectly legitimate state,” nor can one “object to colonizing people against their collective will whenever the colonial power would do no worse job of performing the political functions” that ground its internal legitimacy in the first place.\textsuperscript{209} In Wellman’s later book with Andrew Altman, they attempt to reconcile value-individualism with an internally legitimate state’s right against outside intervention by characterizing that group right as a right of individuals qua members of a group.\textsuperscript{210} More specifically, they argue that because the members of a legitimate state have proven that they are able and willing to maintain a state that

\textsuperscript{207} Ibid., p. 275.
\textsuperscript{208} Wellman, \textit{A Theory of Secession}, pp. 52, 55.
\textsuperscript{209} Ibid., p. 52.
\textsuperscript{210} Altman and Wellman, \textit{A Liberal Theory of International Justice}, pp. 37-41.
adequately protects human rights, they are owed a certain respect qua citizens that would be undermined by external intervention into their common affairs. Colonialism, imperialism, and forced annexation thus show disrespect to the citizens of a legitimate state, on this view, “not for something already achieved” – for presumably some other configuration of individuals, coordinating under distinct institutions, could achieve the same result (namely, the adequate protection of human rights) – “but for something within the capabilities of the group to achieve.”

Altman and Wellman’s characterization of the right against external intervention as a right held by individuals qua members of a group helps make sense, I think, of the otherwise puzzling notion that some rights are not fully reducible to the interests of individuals taken severally, while at the same time showing that this claim is consistent with the core “value-individualist” tenet that individuals alone are the ultimate source of value. And, as I will argue at greater length in the following section, I believe there is an important truth in their suggestive remark that groups may be entitled to respect on the basis not merely of their “achievements” but in virtue of the qualities of the group itself. However, Altman and Wellman’s argument that the members of an internally legitimate state have a collective right against outside intervention (or to “group autonomy,” in Wellman’s phrase) ultimately suffers from the same sort of circularity that plagued Buchanan’s Nonusurpation Requirement. To begin, even if the citizens of a legitimate state are entitled to a measure of “appraisal respect” (to use Stephen Darwall’s terms, on

212 In the concluding footnote of their chapter on self-determination, Altman and Wellman acknowledge that their argument may be open to the charge of circularity and clarify that their aim was simply to illustrate that “positing” a collective right of self-determination “is consistent with value individualism” (ibid., p. 198 n. 59). In that case, the question (to which I offer an affirmative answer below) simply becomes whether a noncircular argument can be advanced on behalf of such a right and thus whether we can adduce reasons to justify our pretheoretical intuitions about the relationship between internal and external legitimacy.
which Altman and Wellman rely) in virtue of having jointly created a valuable collective product, some further argument must be advanced to show that they are therefore entitled to “recognition respect,” conceived as a kind of deference on the part of others to their ongoing project or enterprise. Why should the first group to have proven able and willing to adequately secure its members’ human rights be entitled to exclude others from its territory, even if these others could create and maintain a distinct but equally legitimate (and hence appraisal-respect-worthy) state at some later date? Moreover, it is unclear in virtue of what “capabilities” the members of a legitimate state might be entitled to a collective right of non-intervention, for the only capability that individuals possess qua citizens of a legitimate state, on Altman and Wellman’s account, is the capability of maintaining a state that adequately protects its members’ human rights. Yet it is the normative force of this capability for outside agents that is precisely at issue here, and Altman and Wellman simply assume that it is this capability – rather than, say, the ability to secure maximum protection of one another’s rights – that entitle the members of a group to a collective right against intervention. Unless some independent argument can be given on behalf of the entailment thesis, it seems we must choose between simply “positing” an ad hoc collective right of non-intervention, on the one hand, or abandoning our pretheoretical intuitions about the international standing of internally legitimate states, on the other.

One final strategy for grounding the entailment thesis without appealing to individual interests beyond those protected by human rights derives from Joshua Cohen’s suggestion that no plausible theory of legitimacy could simultaneously hold that citizens of a particular state are required to comply with its laws and institutions while outside

213 Ibid., p. 39.
agents are at the same time permitted to subvert them with force. As he puts it, “Surely it is impermissible for outsiders to forcibly intervene to change arrangements with which members themselves are obliged to comply.”

This principle – “Cohen’s principle,” for short – seems to me intuitively correct, although (as with the views considered above) we might still wonder whether it has a plausible normative basis in some higher-level value or principle, or whether we must view it simply as a conceptual primitive about political obligation.

Even if we accept Cohen’s principle on face, however, it offers a sound basis for the entailment thesis only if we accept the further premise that the citizens of a legitimate state are “obliged to comply” with all official directives, even when they constitute or directly bring about violations of human rights. But this premise is at best controversial among contemporary theorists of political obligation, many of whom argue that a legitimate state’s authority runs out with respect to certain “clear mistakes” about justice, or indeed that citizens of a legitimate state have content-independent duties to obey only those laws, such as those resolving standard coordination problems, on which justice is silent. If, as these more moderate theories hold, the citizens of an internally legitimate state are in fact under no duty to obey directives that would give rise to human rights violations, then it is not possible for outsiders to run afoul of Cohen’s principle by intervening to subvert these selfsame human-rights-violating commands: they would

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216 See, for example, Christopher Heath Wellman, “Samaritanism and the Duty to Obey the Law,” in Wellman and A. John Simmons, Is There a Duty to Obey the Law? (Cambridge: Cambridge University Press, 2005). David Copp likewise argues that the citizens of a legitimate state have a pro tanto duty to obey only laws that are “morally innocent,” in that “enacting and enforcing them is within the sphere of privilege of the state and they are in no way unjust” (“The Idea of a Legitimate State,” Philosophy and Public Affairs 28, no. 1 [1999]: 3-45, at p. 20).
simply be disregarding the very directives that insiders are themselves permitted to disregard.\textsuperscript{217} Coupled with a more moderate account of political obligation, it is true, Cohen’s principle would provide some basis for a legitimate state’s right against outright annexation or colonization, since presumably these latter forms of intervention would displace some laws and institutions with which insiders would otherwise continue to have duties to uphold. Such a right, however, falls short of the full moral right against external intervention that the entailment thesis asserts, and would leave all internally legitimate states liable, in principle, to targeted humanitarian interventions in their political jurisdiction. If the entailment thesis is to be defended without relying on a controversial theory of political obligation, it will therefore be necessary to appeal to some further value that would be undermined by even selective intervention in the domestic affairs of an internally legitimate state.\textsuperscript{218} In the next section, I attempt to identify just such a value.

2. The Value of Collective Self-Determination

\textsuperscript{217} See Wellman, “Taking Human Rights Seriously,” pp. 125, 128-129.
\textsuperscript{218} External intervention into an internally legitimate might run afoul of a distinct variant of Cohen’s principle, according to which outsiders may not forcibly intervene so long as insiders are not permitted to forcibly resist official efforts at enforcement, which – given my minimal conception of individuals’ duties under an internally legitimate state – in fact states the entailment thesis more accurately than the principle Cohen himself puts forth. One might then wonder whether the commitment that truly needs explaining is not the thesis that internal legitimacy entails external legitimacy but rather the conceptually prior claim (which I have here taken for granted) that internal legitimacy requires the satisfaction of a mere threshold of adequate human rights protection. Although I believe it is possible to explain this assumption in terms of the value of collective self-determination (in which case the entailment thesis would be derivative of some prior account of internal legitimacy), it also seems possible to ground the threshold conception of internal legitimacy in more familiar considerations, such as the good of securing widespread coordination under a uniform system of law, which would not automatically imply that outsiders must forbear from humanitarian intervention. I therefore simply take the threshold conception of internal legitimacy as given (remaining agnostic about its grounds) and seek to explain why internal legitimacy in this sense ought to entail a state’s right of non-intervention.
Over and above the interests picked out by the theory of human rights, individuals typically acquire an additional range of interests qua members of various groups in which they participate or with which they identify. Those who form valuable attachments or relationships in virtue of their membership in a particular group generally have reason to preserve that group and to maintain their standing as members over time. In this section, I will outline two sets of interests that individuals may have as members of a political community or “people,” understood as a group whose members share an ongoing history of cooperative interaction oriented toward creating or maintaining a common state. I do not deny that patterns of mutual interaction of any kind may give rise to valuable relationships among cooperating members and to a proper sense of pride in the achievements if the group. Yet I focus here on individuals’ joint participation in specifically political communities because it is only through a shared history of political cooperation that individuals demonstrate their group’s willingness and ability to secure an independently urgent moral objective: the creation of a uniform system of law.219 So while ties of language, ethnicity, religion, family, and so on may give rise to important group-based interests – and potentially to group-based entitlements, such as rights to cultural accommodation or parental autonomy – these further commonalities are neither necessary nor sufficient for a group to develop a history of joint political activity, and thus for its members to develop an interest in collective self-determination in the present sense.

The first kind of interest that individuals have qua members of a people is what I shall describe as a *substantive* interest in preserving the particular public institutions and practices that they have created and maintained through their joint activity as members of a common state. For while individuals no doubt value their states in part because they perform a range of important public functions – securing the peace, protecting the rights of their members, providing various social services, and so on – states’ value to their members is typically not reducible to their instrumental role in procuring these generic goods. Rather, because states tend to be both partly *constitutive* of their members’ identities, on the one hand, and importantly *expressive* of members’ independent projects and commitments, on the other, individuals normally have reason to maintain the particular political institutions and practices of their current state, even if another state could do just as well or better across the relevant generic dimensions.

Those who grow up or live for any significant duration under a particular state frequently develop an attachment to its institutions and norms, drawing on aspects of their local political traditions and culture in forming their own evaluative beliefs and judgments, and viewing participation in the public life of their state as an expression of some important feature of their moral personality.\(^\text{220}\) While they could perhaps have become equally attached to a different set of political arrangements, had they been subject to distinct processes of socialization and mutual interaction, the fact that they have already invested themselves in shaping their own plans and projects around the opportunities made available by their particular state – achieving a distinctive balance

and series of interconnections between their private and public aims – gives them reason
to want to continue living under the laws and practices with which they are presently familiar. Even members who do not view public participation or service as central to their self-realization, and who tend instead to define themselves in terms of various religious, professional, or familial pursuits, may nevertheless place significant value on the continuity of the particular institutions and norms that define the social world in which they have made their home.

At the same time, however, the members of a given state are by no means merely passively constituted by the institutions and traditions that govern their common affairs. In all but the most brutally repressive regimes, individuals act in a variety of ways (though to varying degrees) to uphold and reproduce their system of law, to shape their public symbols and traditions, and to influence the decisions of their public officials. Members pay taxes and willingly conform to the law; they serve in the military and other public offices; they teach their children the values and customs that constitute their common life; they invoke public norms to hold their fellow members to account; and in many cases, even when they do not vote for their leaders, they combine together – in trade unions, political parties, civic associations, and informal talking houses – to discuss public affairs and, however indirectly, to shape the rules and principles by which they are governed. As Michael Walzer has put it, “the opinions of the people, and also their habits, feelings, religious convictions, political culture, and so on” are to this extent not only “bound up with,” but also “partly explanatory of, the form and character of their state.”²²¹ The laws of any public authority, to be sure, are ultimately backed by the threat

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of force, and no doubt some individuals participate in the aforementioned ways out of fear or habituated conformity and not because they view their public institutions and practices as meriting their mutual sacrifice. Yet as sociological theorists of legitimacy have long emphasized, public authorities can rarely rely solely on these motives to secure widespread compliance over time, and must seek instead to cultivate a broadly shared belief in their moral right to rule, not least among the very officials who are called upon to enforce the law in cases of noncompliance. Given the inability of most if not all states to fully determine their subjects’ background political attitudes and judgments, even the most cynical public authorities will thus generally be compelled to stabilize their power through appeals to the independent commitments and self-understandings of those they seek to govern and by drawing on such popular sentiments to inform public decision-making and institutional design. Insofar as the members of a given political community have participated, even in this indirect fashion, in shaping and sustaining their particular laws and institutions, they will frequently view these arrangements as expressions of their own choices and systems of belief, in many cases bearing the distinctive stamp or imprint of the local culture to which members are independently attached. When outsiders alter or displace these particularized features of a community’s shared institutions and practices, they destroy something of genuine value and deprive that group of an important good.

In addition to their substantive interest in preserving the particular laws and public norms they have established through their joint activity, individuals also have what I will describe as a *procedural* interest in revising the content of those institutions and practices (should they so choose) through further cooperative interaction with members of the same group. The thought here is that, even if some individuals feel no attachment to the particular substantive achievements of their group’s efforts, they might nevertheless come to develop significant bonds with the other members of the group itself and thus a strong sense of identification with *them*, if not with the products (or byproducts) of their patterns of interaction.\textsuperscript{223} Simply by being subject to a common set of formative pressures and jointly undertaking certain burdens or sacrifices in pursuit of a collective aim, members of a political community may acquire attitudes of mutual loyalty and respect that transcend their failure to accomplish the goals they set out to pursue.\textsuperscript{224} Indeed, as in the case of opposition groups operating underground or of failed revolutionary movements beaten back by the state, a group’s sense of solidarity and interconnectedness may be particularly strong precisely *because* its common aims have been thwarted but the group survives to fight another day. The members of such a group may, then, have an interest in sustaining the common enterprise they have forged with their fellow participants, and in striving to achieve their collective goals with those who have shared their history of struggle and reciprocal sacrifice, even when achieving their

\textsuperscript{223} Compare Mill’s conception of a “Nationality” as a group of individuals united by “common sympathies … which make them co-operate with each other more willingly than with other people, desire to be under the same government, and desire that it should be government by themselves or a portion of themselves, exclusively.” See *Considerations on Representative Government*, in *On Liberty and Other Essays*, ed. John Gray (Oxford: Oxford University Press, 1991), p. 427.

\textsuperscript{224} In his discussion of civic friendship, John Cooper likewise describes modern-day patriotism or “national pride” as “pride not just in [the particular] accomplishments of one’s compatriots, “but even more in the qualities of mind and character that (are presumed to have) made them possible.” See “Political Animals and Civic Friendship,” in *Aristotle’s Politics: Critical Essays*, eds. Richard Kraut and Steven Skultety (Lanham, Md.: Rowman & Littlefield Publishers, 2005), p. 74.
aims autonomously might take longer or impose greater hardships on the group than if it had solicited the assistance of nonmembers.

As the foregoing considerations suggest, the interests of individuals qua members of a people or political community are closely connected to, and in some cases identical with, their interests qua citizens of a given state. However, it is essential that we maintain a distinction between these two forms of membership and that we assign an interest in self-determination only to individuals qua members of the former kind of group; while I will have more to say about the conditions under which a people may come into being in the following section, we can briefly note three kinds of cases in which peoples and states may come apart. First, it is at least conceivable that a particularly oppressive or dysfunctional state might fail to give rise to a people at all. Such a state would prove to be so alienating, on the one hand, that its members acquire no substantive attachment to their political institutions and practices, and so atomizing, on the other, that they develop no attitudes of solidarity or affinity with their compatriots. In this limiting case, the members of a state may wish nothing more than for their bonds of citizenship to be dissolved, and to be reassigned to or taken over by a state capable of providing for their basic needs and, indeed, giving them the opportunity for membership in a bona fide political community. Second, peoples may in some cases take shape and persist over time without the direct mediation of their state’s formal political institutions. Such groups might include liberation movements or nationalist campaigns that have developed the requisite internal cohesiveness and organizational capacity to form and govern a state yet whose current state of residence serves as neither the site nor the public
manifestation of their cooperative activity.\footnote{Insofar as non-state peoples of this sort occupy some territorially contiguous subsection of an existing state, they may have interests in seceding from the larger political entity and constituting an independent state of their own. In cases involving multiple peoples living under the jurisdiction of a single state, considerations of self-determination may themselves supply outsiders with competing reasons for action, rather than militating solely against external intervention.} Third, a state may bring about a people and succeed in protecting its members’ interests in self-determination yet ultimately fall away at the hands of internal or external usurpers or as a result of sheer institutional decay or collapse. When such a state is dissolved, its members will frequently retain ongoing attachments to their prior political institutions as well as important patterns of interaction with one another, sometimes long outlasting the state that first gave rise to those bonds. As I will suggest below, considerations of self-determination can help explain why the members of such a group may retain the right to reconstitute themselves under a state of their own, even if the state that now governs their territory proves no worse (and may in fact do better) at protecting their human rights.

Finally, it is important to emphasize that it is not a necessary condition of someone’s having an interest in collective self-determination, in the present sense, that she in fact prefer the continuation of either her existing public institutions and norms or her ongoing patterns of political cooperation and membership. Rather, much like the interests singled out by the theory of human rights itself, the interests described above are ones that we have reason to regard as important for a wide range of individuals under objectively specifiable conditions.\footnote{I adapt the contrast between subjective preferences and objective interests from T.M. Scanlon, “Preference and Urgency,” in The Difficulty of Tolerance: Essays in Political Philosophy (Cambridge: Cambridge University Press, 2003). For an account of human rights grounded in an explicitly objective conception of individual interests, see, for example, Beitz, The Idea of Human Rights, pp. 110, 137-139.} Interests in collective self-determination are attributed to individuals, that is, on the basis of what it would be reasonable for them to prefer in their circumstances, not in virtue of their actually identifying with those interests.
or preferring that they be satisfied. At the same time, the objective or intersubjectively recognizable dimension of these interests implies that their importance can be grasped even by those who are not participants in a particular system of political cooperation and who may therefore have no attachment to its collective achievements or to the members of the group itself. Outside agents, that is, need not desire the preservation of the particular institutions and relationships currently sustained by a foreign people in order to see why they are of value to its members, and thus to treat those members’ interests in collective self-determination as pro tanto reasons to respect their political autonomy by refraining from intervention in the political jurisdiction of the state in which they reside.

3. The Entailment Thesis Revisited: An Argument from Self-Determination

I have argued that, in addition to those individual interests protected by human rights, the members of a people or political community have further, group-based interests in maintaining the collective achievements and patterns of mutual interaction they have created and sustained through their combined cooperative efforts. These interests in collective self-determination, I suggested, give outsiders reasons to respect the concrete achievements and internal political processes of particular political communities. To the extent that a given state functions as “the arena within which self-determination is worked out,”227 by instantiating a people’s joint achievements and enabling continued cooperative interaction among its members, considerations of self-determination, I further suggested, tell in favor of that state’s right against outside intervention in its political jurisdiction. It is therefore at least conceivable that outsiders might have competing reasons for action in a given case, with humanitarian reasons

impelling them to intervene so as to prevent or remedy abuses of human rights, on the one hand, and reasons of self-determination urging them to refrain from intervention so as to respect a people’s interests in political autonomy, on the other. That outsiders’ reasons for action could conflict in this way thus raises the possibility that a given state, when the balance of reasons comes in, might enjoy a moral right against external intervention despite imperfectly protecting its members’ human rights.

Before exploring this possibility, however, one might reasonably wonder whether considerations of self-determination and of human rights do in fact have the potential for normative conflict in the way I have just suggested. Recall that individuals develop interests in collective self-determination, on my account, not simply in virtue of sharing a common state – which may or may not give rise to a political community in the present sense and advance its members’ group-based interests over time – but rather only when they share an ongoing history of political cooperation. Following Rawls, we might contrast genuinely cooperative activity, conceived as activity that is “guided by publicly recognized rules and procedures which those cooperating accept as appropriate to regulate their conduct,” with “merely socially coordinated activity – for example, activity coordinated by orders issued by an absolute central authority.”228 Whereas simple coordination might be achieved through threats of force alone, or otherwise produced against a background of severe duress or privation, social cooperation must be understood to follow in at least some minimal sense from the unforced wills or affirmations of participating members. This is not, of course, to say that a cooperative association is (necessarily) a fully voluntary one, as indeed the major cooperative

institutions Rawls has in mind – those comprising and regulated by the “basic structure” of society – typically bind participating members irrespective of their consent or other voluntary acts.²²⁹ Yet even willing cooperation conceived more minimally as activity guided by public rules that participants affirm or endorse (without necessarily choosing them from a range of acceptable alternatives) nevertheless presupposes that individuals possess the capacities to reflect on the duties and burdens imposed by their social order, and enjoy the social resources and opportunities necessary to make their agency effective in practice. If, as seems plausible to suppose, human rights protect these basic capacities for effective agency, they may be viewed not only as securing vital individual interests but also as providing, in Rawls’s words, “necessary conditions of any system of social cooperation,” without which we have merely “command by force, a slave system, and no cooperation of any kind.”²³⁰

However, once human rights are seen as conditions of social or political cooperation in this way, it may appear as though the individual interests protected by human rights and the group-based interests in what I have called collective self-determination are simply two sides of the same coin, such that any gain (or loss) in human rights protection in a given state would translate directly into a gain (or loss) in its members’ capacity to participate cooperatively in their basic social institutions, and vice versa. Not only would the protection of human rights, on this understanding, be essential for a political community or people to come into existence in the first place, and thus for

²²⁹ See ibid., p. 40: “[T]he political relationship … is a relationship of persons within the basic structure of society, a structure we enter only by birth and exit only by death (or so we may assume for the moment). Political society is closed, as it were; and we do not, and indeed cannot, enter or leave it voluntarily.”

members to acquire what I termed *procedural* interests in sustaining genuinely cooperative patterns of interaction with the fellow members of their group. Human rights would also themselves be incorporated into the legal code and practices of any bona fide political community, such that individuals would acquire *substantive* interests in preserving those very rights and in restoring them should they be violated by their public authorities. Viewed in this light, outside intervention aimed at protecting human rights would thus appear to advance, rather than hinder, individuals’ interests in collective self-determination, reestablishing the conditions of their joint cooperation and securing legal guarantees that have already been affirmed by their past cooperative activity.

This analysis usefully highlights the extent to which individuals’ interests in self-determination presuppose an institutional background in which members can develop and exercise their basic capacities for agency, for it is only against such a background that their political relationships and attachments can be understood to follow from their own choices or affirmations, rather than from the coercive or manipulative actions of those wielding public power. Yet even if we grant that the doctrine of human rights appropriately specifies the background conditions of political cooperation, the appearance of convergence between individuals’ interests in human rights protection and in collective self-determination – and thus between outsiders’ individualistic and group-based reasons pertaining to intervention in a given case – disappears once the relationship between these interests is specified with sufficient precision. In the balance of the section I will argue, first, that individuals’ *substantive* interests in self-determination in fact provide compelling reasons for outsiders to refrain from most if not all modes of coercive intervention into internally legitimate states, which protect human rights to a merely
adequate degree; even though there is a sense in which humanitarian intervention would restore the same rights that the target state had already enacted as law, this description fails to appreciate the extent to which human rights, and thus individuals’ interests in preserving them, are *particularized* by historically distinct political communities. Second, I will attempt to show that individuals’ *procedural* interests in self-determination are likewise distinguishable from their interests in human rights protection; even if Rawls and others are right to view human rights as necessary conditions of social or political cooperation, it is implausible to suppose that perfect (or even maximal possible) protection of these rights is necessary to give rise to a bona fide political community and thus to individuals’ interests in maintaining that community over time. I conclude that these considerations, taken together, complete the case for the entailment thesis, grounding a strict right of non-intervention on the part of all internally legitimate states.

We can begin by recalling that a state “adequately” protects human rights, in the present sense, if it enacts those rights into law and provides enforcement mechanisms that are normally effective in protecting them in practice. These rights, however, are relatively abstract requirements that must be given determinate content by the citizens and officials of a given state. While states may ultimately adopt effectively identical variants of certain relatively unambiguous human rights requirements, such as laws against murder or rape, rights concerning individual subsistence, free speech, due process, political participation, and the like are open to a significant degree of interpretation, making it likely that the specification of these protections will vary nontrivially with the distinctive political traditions, practices, and preferences of particular societies. Two states may therefore protect human rights to an equivalent
extent while nevertheless codifying and enforcing legal guarantees that are in many ways substantively distinct. This is true not only of the content of particular human rights but also of their institutional role within a given state’s system of law: for instance, some states may opt to incorporate these protections into a written constitution, enforceable by way of judicial review, while others may give greater interpretive leeway to popular legislatures or specialized councils. Thus even in the unlikely event that two states should happen to specify the very same catalog of human rights, these guarantees would likely become integrated into highly distinct procedural schemes and entwined with a further range of substantive legal protections whose content is not dictated by the theory of human rights.  

If this is correct, however, and internally legitimate states will tend to codify substantively divergent specifications of human rights, then individuals’ substantive interests in self-determination – in preserving the particular institutions and norms they have created through their past cooperative activity – will caution against external action that would replace their particular public institutions with a distinct system of rules. That this replacement system could fairly be described (at a sufficient level of abstraction) as instantiating “the same” scheme of rights simply ignores the extent to which even individuals’ seemingly general interests in securing their basic human rights take on a highly particularized cast once those rights are concretized within their own system of positive law.  

When individuals’ personal identities and commitments are either

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232 Compare Habermas’s remark that “we can understand the catalogs of human and civil rights found in
constituted or given expression by such a particularized system of law, they have an interest in preserving that system not simply insofar as it instantiates some interpretation of human rights but rather in its historical particularity, as defined and reproduced through their combined willful activity. Moreover, it is not only those who strongly identify with the laws and institutions of their state who may have a substantive interest in maintaining them in their particularized form: even those who fail to affirm the particular achievements of their political order benefit from living under institutions that meet with the widespread acceptance of their subjects, since institutions of this sort will rely to a lesser extent on coercion as a means of enforcement and will therefore engender a greater sense of mutual trust among their members. \(^{233}\) Although the benefit that dissenting members derive from living under widely accepted institutions may, of course, be outweighed by the costs these institutions impose in terms of their basic interests, we may recall, further, that internally legitimate states are by definition normally effective in enforcing human rights in practice. Given the substantive interests of most members in maintaining their particular legitimate state, the derivative interests of dissenters in living under a state that enjoys widespread acceptance, and the relatively small costs of preserving such a state in terms of overall human rights protection, I would submit that the balance of reasons favors a legitimate state’s claim to preserve its own institutions and practices.

our historical constitutions as context-dependent readings of the same system of rights. This system of rights, however, is not given to the framers of a constitution in advance as natural law. Only in a particular constitutional interpretation do these rights enter into consciousness at all... If the talk of ‘the’ system of rights is to mean anything, then, it refers to the points where the various explications of the given self-understanding of such a practice converge” (Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy, trans. William Rehg [Cambridge, Mass.: The MIT Press, 1996], pp. 128-129, emphasis in original; see also pp. 151-152).

\(^{233}\) I have benefited here from the discussion in Anna Stilz, “On Colonialism and Self-Determination” (unpublished manuscript, on file with the author).
Yet even if my assessment is correct, it is important to note that this argument provides grounds only for a legitimate state’s right against the wholesale displacement or destruction of its existing political arrangements, but not for the sort of full-fledged right against all modes of external intervention supposed by the entailment thesis. It is unclear, in particular, whether substantive considerations of self-determination would give outsiders reasons to refrain from selectively intervening to forestall or remedy a particular human rights violation by implementing the target state’s own law in the face of local enforcement failures: for example, by forcibly apprehending (would-be) human rights violators inside their own territory but then turning them over to the local authorities for prosecution and punishment.234 Although an intervention of this sort would unavoidably violate the target state’s prohibition on unauthorized entry into its territory, outsiders would have to weigh this particular setback to individuals’ substantive interests in self-determination against the conjunction of both their abstract interests in securing greater human rights protection overall and their countervailing substantive interests in having their own, particularized specification of human rights upheld in the case at hand. Given the apparently offsetting force of individuals’ substantive interests in self-determination in such a case, and the residual force of their interests in preventing human rights abuse, it is difficult to see how substantive considerations alone could ground a categorical prohibition on humanitarian intervention even against a state that has satisfied a threshold of adequate protection.

Individuals’ procedural interests in self-determination, by contrast, seem to offer a more intuitively promising basis for a legitimate state’s strict right against external

234 Wellman imagines an analogous scenario in which outsiders might intervene to assist an individual who had been wrongly convicted – presumably by the lights of his own state’s legal code – in escaping from prison; see “Taking Human Rights Seriously,” pp. 124-126.
intervention. This procedural interest, after all, just is the interest in autonomously
reforming or revising one’s own political institutions and practices through further
cooperative activity with one’s compatriots. Again, though, we may wonder whether
these interests would in fact be furthered, over the long run, by outside intervention
aimed at improving human rights protection overall, particularly once human rights are
conceived as essential preconditions of political cooperation in the relevant sense. If a
state’s failure to protect its subjects’ human rights impairs their ability to maintain
meaningfully cooperative relationships, it may appear that even individuals’ procedural
interests in self-determination offer no true counterweight to outsiders’ humanitarian
reasons to intervene, at least when such intervention could be sufficiently surgical as to
leave the preexisting political community substantially intact.

Yet this objection, by construing each human rights abuse as a hindrance to
political cooperation, misunderstands the way in which human rights function as
conditions of genuinely cooperative relationships. As we have said, in order for a pattern
of joint activity to be understood as cooperative in the present sense, it must be governed
by public standards (broadly understood to include procedural norms such as membership
criteria) that participating members widely accept as appropriate to govern their conduct,
where “acceptance” is produced against a background conducive to reflective belief-
formation and choice and not simply coerced by a central authority or elicited through
systematic deception or manipulation. Although it is notoriously difficult to specify the
exact extent of individual freedom and opportunity necessary for members’ acceptance to
be genuine, or at the very least “unscripted” by power-holders apt to benefit from
widespread assent to their terms of rule, requirements of free or willing acceptance, participation, consent, and the like are most commonly interpreted (in moral and political philosophy as well as in modern legal practice) as presupposing a minimum threshold capacity on the part of the individuals whose wills are implicated. While freedom and volition can of course be described in scalar terms, with individuals enjoying greater or lesser capacities for agency along a broad spectrum of possibility, for many purposes what counts is simply the presence of a capacity, judged in terms of a binary division within the full range of possibility, rather than the degree to which that capacity is possessed. In determining whether I have freely entered into a contract, for example, what matters is that I have met a series of thresholds for free choice: that I am of sound mind and sufficient age, that I had an adequate range of acceptable alternatives available to me, and so on. That a second person may enter into the same contract while possessing far greater intelligence and education, more experience in contract negotiation, and a wider range of alternative options makes no difference to the freedom of her decision in this context; provided our capacities fall above the threshold of legal consent, our actions are equally free in the eyes of the law. It seems to me that the capacity for agency presupposed by the idea of free or willing acceptance is structurally analogous (if not identical in its particulars) to that presupposed by the notion of free consent, in each case conceived as a “range property” possessed in equal measure by

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235 See, for example, Bernard Williams’s remarks on what he terms the “critical theory principle,” which holds that “the acceptance of a justification does not count if the acceptance itself is produced by the coercive power which is supposedly being justified” (“Realism and Moralism in Political Theory,” in In the Beginning Was the Deed, ed. Geoffrey Hawthorn [Princeton: Princeton University Press, 2005], p. 6), as well as the discussion in Chapter 2, Section 4 above.

236 I further assume that individuals will tend to acquire the requisite level of volitional competence under roughly similar external conditions, such that the thresholds in question need not be tailored to each person’s particular psychological makeup but can instead be standardized across a wide range of “normal” cases.
those enjoying at least a minimal threshold of mental competence and whatever resources and opportunities are necessary for them to exercise those capacities in practice and to maintain them over time.\footnote{Compare Rawls’s discussion of the capacity for moral personality as a range property in \textit{A Theory of Justice}, rev. ed. (Cambridge, Mass.: The Belknap Press of Harvard University Press, 1999), pp. 442-445.}

The threshold conception of individual agency allows us to characterize with greater precision the exact way in which human rights can serve as preconditions of political cooperation, and thus of individuals’ developing what I have termed procedural interests in preserving the relationships they have forged through cooperative interaction with the members of their group. As we have seen, Rawls and others view human rights as preconditions of genuinely cooperative activity because they protect the underlying capacities of agency that individuals must possess in order for their participation in some institution or practice to count as genuinely free or willing. Yet if individuals need only achieve a \textit{threshold level} of rational capability in order to count as agents (and thus as potential social cooperators) in the relevant sense, then their public institutions need only secure a corresponding \textit{threshold level} of human rights protection in order to make possible a system of cooperative interaction. For wherever the threshold is set, there will come a point at which a particular level of human rights protection will succeed in giving rise to a community of agents, and thus beyond which any further improvements in human rights protection would by definition fail to register as improvements in the agential capacities of individual members. Once this threshold is reached, that is, any additional protections – while no doubt serving to secure a distinct range of interests or to enhance other moral and rational faculties that go beyond the basic demands of agency in the present sense – would be superfluous as contributions to individuals’ capacity to
participate freely in a system of social or political cooperation. The question that remains is whether the threshold of merely adequate human rights protection, as defined above, is sufficient to enable patterns of genuinely cooperative interaction, or whether that aim calls for a more demanding level of protection.\textsuperscript{238}

Consider, by way of contrast, a maximalist interpretation of the threshold, according to which a state must secure perfect protection of its subjects’ human rights in order to qualify as a truly cooperative enterprise. The worry here seems to be that even isolated, one-off violations of human rights, while perhaps not preventing individuals from acquiring the basic capacities for agency in the first place, would nevertheless render their agency ineffectual in practice – specifically, by restricting their opportunities for public dissent or opposition to such an extent that it would be impossible for their continued allegiance to the state to be construed as unforced or willing. Yet the maximalist position neglects the fact that, even under a regime of merely adequate human rights protection, multiple avenues for appeal and contestation necessarily remain open at any given point in time. Because adequate protection requires that a range of first- and second-order guarantees be both formally codified and regularly effective, the subjects of such a state will at all times retain access to at least some fully-functional public institutions through which they can redress whatever abuses have been permitted or perpetuated by the system as a whole. Faced with police misconduct, individuals can sue through the courts; encountering judicial malfeasance, they can lobby through the

\textsuperscript{238} In arguing, in what follows, that a background of merely adequate human rights protection is sufficient to give rise to genuinely cooperative relationships, I leave open the possibility that individuals might acquire the relevant capacities for agency, and hence for political cooperation, under conditions in which overall human rights protection is (in my terms) less than adequate. Such a view is perhaps implicit in Walzer’s account of “communal integrity” in \textit{Just and Unjust Wars: A Moral Argument with Historical Illustrations} (New York: Basic Books, 1977), pp. 54, 87-91 and “The Moral Standing of States.”
political process; rebuffed by unresponsive representatives, they can take to the press or the public square; and so on throughout the still-overwhelmingly-effective institutions and practices of a legitimate state. In those rare cases of acute abuse, in which an individual is killed or literally incapacitated through official misconduct or enforcement failures (and so cannot personally redress the grievance at hand), others will be able to ensure that violators are ultimately held to account and that the law of the political community is upheld in the end. Far from signaling the collapse of cooperative relations, human rights abuses – under conditions of adequate protection – will thus provide an occasion for members to *self-correct*, remedying discrete violations through instances of collective action that are guided by the distinctive internal norms and procedures of the political community. Finally, it is worth emphasizing that adequate protection, in my sense, demands that human rights violations, when they (inevitably) occur, will not fall disproportionately on any one constituency over time, but will instead be more akin to random errors or aberrations in enforcement. Should systematic biases in enforcement or official treatment arise, the state in question must take measures to identify patterns of sustained or targeted abuse and make remediation of such wrongdoing an official priority. As a result, violations occurring within an internally legitimate state will not only be *rare* but will be *fairly distributed* among the members of the group.239

By ensuring both that its members as a whole retain the collective capacity to correct internal abuses, and that no particular members are systematically subject to treatment that would undermine their standing as agents, such a state can be said to secure the essential conditions of political cooperation despite failing to protect its

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239 Thus as Rawls says, it is only when human rights “are *regularly violated*” that we have “command by force, a slave system, and no cooperation of any kind” (*The Law of Peoples*, p. 68, emphasis added).
subjects’ human rights to a perfect degree. As participants in a flawed but nevertheless fully cooperative political system, the members of a state that secures a merely adequate level of human rights protection thus retain a procedural interest in revising their public institutions and norms through continued cooperation with their fellow compatriots. Moreover, because the capacity for political cooperation is a function of its members’ enjoying a mere threshold level of effective agency, once this threshold is met, outside action aimed at preventing or remedying human rights abuses cannot be understood as advancing individuals’ procedural interests in self-determination. Rather, when the target state currently enables and protects a genuinely cooperative enterprise, humanitarian intervention will unavoidably set back these procedural interests by interfering with the autonomous decision-making processes of the group. Given the rare and unsystematic nature of human rights violations within an internally legitimate state, and the extant capacity of such a state to remedy abuses on its own, humanitarian intervention by outsiders would serve simply to accelerate the pace at which those limited violations are put to an end, and perhaps to temporarily reduce the overall incidence of enforcement failures. (A more enduring reduction in local enforcement failures would surely require the intervening agents to occupy the target state or otherwise reorder its public institutions, thereby undercutting its members’ substantive interests in maintaining their existing political arrangements.) These marginal gains in overall human rights protection seem to me insufficient to justify the substantial costs they would impose in terms of members’ procedural interests in collective self-determination.

Bringing both substantive and procedural considerations together, we can now summarize the case for the entailment thesis. As we have seen, individuals’ substantive
interests in collective self-determination can ground a legitimate state’s right against most of the historically dominant modes of coercive humanitarian action, including wholesale annexation, colonization, military occupation, and “regime change.” Because these forms of external intervention would destroy or disfigure the particular system of public rules and norms that the members of the target state have formed through their past cooperative interaction, they would gravely undermine individuals’ interests in sustaining their existing political arrangements without significantly enhancing human rights protection overall. At the same time, however, we also saw that the argument from individuals’ substantive interests in self-determination could not, on its own, ground the sort of strict or comprehensive right against all forms of coercive intervention posited by the entailment thesis; in particular, this argument was unable to rule out the permissibility of “surgical,” police-like operations that would secure individuals’ human rights without substantially altering their existing political institutions and norms. Rather, if we are to understand even these comparatively targeted modes of intervention as an affront to individuals’ interests in self-determination, it must be in virtue of their procedural interests in correcting ongoing abuses, and in otherwise reforming their political system over time, through continued cooperation with the other members of their group. Because, as I argued above, merely adequate human rights protection is sufficient to enable a group to autonomously self-correct in this way, and because improvements above this threshold of adequacy will not enhance its capacity for political cooperation going forward, any form of humanitarian intervention would necessarily set back individuals’ procedural interests in self-determination. The limited gains that such intervention would bring in terms of overall human rights protection – namely, a
somewhat more rapid and potentially more complete remediation of merely isolated and episodic enforcement failures – cannot justify these losses in terms of collective self-determination. Reasons of self-determination point, instead, to the familiar thesis that all internally legitimate states ought to enjoy external legitimacy, or the strict right against all forms of outside intervention in their jurisdiction.

4. The Status of Illegitimate States

It has been my central aim to argue that considerations of collective self-determination provide an attractive basis for the entailment thesis, or the claim that all internally legitimate states have a right against external intervention in their domestic affairs. To this extent, my argument can be understood as offering a distinctive moral basis for the so-called “legitimate state theory” of state sovereignty that predominates among contemporary theorists of international intervention, self-determination, and territorial rights. 240 Yet while I share their view that all legitimate states ought to enjoy a right against outside intervention, I am less convinced that only legitimate states have a moral right to exclude outsiders from their jurisdiction, even if external intervention would promote human rights protection at acceptable cost to the intervening agents and in consonance with the standard requirements of just war. 241 In this concluding section, I

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241 Altman and Wellman’s two-pronged account of international intervention is representative of “legitimate state theories” of state sovereignty: “First, [an adequate account of armed intervention] would have an ‘illegitimacy threshold’: Armed intervention is permissible only if the target state lacks legitimacy because it fails to adequately protect human rights. If the target state does an adequate job of protecting human rights, then intervention is ruled out as a matter of principle based on the state’s right to self-determination, and the potential benefits to be gained from an armed intervention should be regarded as beside the point. If the target state is illegitimate, on the other hand, then one must consider a second condition which involves a proportionality principle: Subject to certain conditions, an armed intervention is
will briefly illustrate the possibility that an illegitimate state might serve to protect its members’ interests in self-determination without securing their human rights even to an adequate degree. Although considerations of self-determination in such a case are less weighty than they would be in the case of an internally legitimate regime, and humanitarian reasons for intervention are accordingly stronger, I will try to show that a controversial but not implausible interpretation of members’ interests in self-determination can nevertheless provide a basis for some illegitimate states’ rights of non-intervention.

In the previous section, I followed Rawls and others in viewing human rights as necessary conditions of genuinely cooperative relationships; so long as these rights are protected to an adequate degree, individuals will normally be able to acquire the capacities of agency needed to participate willingly in a system of social cooperation. It follows from this analysis that when human rights are *not* protected to an adequate degree, individuals will prove unable to form the sorts of cooperative patterns of interaction that give rise to a people or political community and thus will lack interests qua members of a people in sustaining their group and its collective achievements.

Yet even if we continue to grant that full-fledged social cooperation is possible only against a background of adequate human rights protection, we should not be so quick to dismiss the possibility that the members of a common state might develop meaningful collective attachments and relationship even against a background of

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permissible if the risk to the safety and security of noncombatants is not disproportionate to the rights violations that one can reasonably expect to avert. The conditions include standard just war requirements – last resort, no targeting of combatants, reasonable chance of success, undertaken with the aim of correcting the injustice – as well as the illegitimacy threshold” (*A Liberal Theory of International Justice*, pp. 103-104). Note that considerations of self-determination, in my sense, do not figure among the conditions appended to the proportionality principle.
significant human rights abuse. While lacking the conditions in which to affirm or participate in their basic social institutions in the robust sense that renders that activity cooperative in the sense described above, it is implausible to suppose that the members of an oppressive state have no capacity for rational agency and thus that their acceptance of or contribution to any aspect of the social order must be construed as coerced or manufactured. Rather, assuming some human rights are protected by the state in question, members are likely to develop some capacity for reflection and choice and to rely on these faculties in a range of decisions concerning which of their political institutions and practices to actively support and reproduce as well as which public norms and values to affirm or reject in light of their various private and associational commitments. In circumstances of severe repression, of course, even this more limited degree of choice and opportunity for critical distance from one’s political institutions may be unavailable, in which case members’ acceptance of or participation in the public life of their state cannot be understood as in any sense willing or free; perhaps in these instances, individuals’ actions must be seen instead as the merely symptomatic behavior of victims or moral patients who lack the standing to have their choices and affirmations respected by others. But whatever we think of those subject to gross patterns of human rights abuse, surely there are more moderate cases in which individuals are denied the opportunity for a fully cooperative politics yet retain the capacities to undertake some willful action in conjunction with their fellow members.242 Despite significant (but not severe) human rights abuse, we may therefore think of groups of this sort as partly

242 Walzer usefully describes cases of this sort as instances of “self-determination under conditions of oppression,” going on to distinguish between “extreme” and (in perhaps a less felicitous choice of words) “ordinary” oppression (“The Moral Standing of States,” pp. 218-219).
cooperative and thus as having a perhaps weaker though analogous set of interests in collective self-determination.243

Like the more robust interests in self-determination considered above, these interests may include a substantive interest in maintaining whichever public institutions and practices participating members have upheld and reproduced through their own unforced activity. Although these interests may be rather easily outweighed to the extent that their substantive attachments are to features of their social order that perpetuate or condone violations of other members’ human rights, members may in many cases rationally affirm distinctive aspects of their state that are entirely extricable from the laws and practices implicated in human rights abuse. Substantive interests of this sort can help explain why it would be wrong for outside agents to colonize or annex even illegitimate states that have been the target of a fully permissible intervention or armed occupation. Indeed, even when a particular target state has engaged in substantial and systematic human rights abuse and perhaps even acts of foreign aggression, such that outsiders have particularly strong reasons to comprehensively overhaul its domestic institutions, substantive considerations of self-determination give the intervening agents reason to leave in place those features of its existing political arrangements that played no role in

243 I leave open here exactly where the boundary between merely significant and severe human rights violations should be drawn, although I believe we can identify clear cases on either side of this line: those, on the one hand, in which cooperative interaction is present to some extent despite inadequate protection, and those, on the other, in which human rights abuse is so extensive as to make it effectively impossible for members to freely or willfully accept or contribute to their public institutions. Unlike in the case of legitimate states, in which human rights are expressly enacted as law and enforcement mechanisms are in place, in illegitimate states it is far more difficult to delineate a bright line at the level of institutional design separating states that partly enable social cooperation from those that fail to do so; their moral standing must be assessed, instead, on the basis of their conduct alone, making generalization across cases a far messier endeavor.
supporting aggression or internal abuse.\textsuperscript{244} Like individuals’ substantive interests in self-determination under full conditions of political cooperation, however, these interests seem unable to ground a general right against all forms of external intervention, since targeted humanitarian intervention might simultaneously serve to protect members’ urgent individual interests \textit{and} further secure the conditions of cooperation without significantly undermining the substantive political achievements of the group.

But whereas I relied in the previous section on procedural considerations of self-determination to ground a legitimate state’s strict right of non-intervention, one might doubt that a properly analogous argument is available in the context of internally illegitimate states. For while those participating in a merely partly cooperative political community may have interests in continuing their (quasi-)cooperative activity with the current members of their group, they also — unlike in the case of internally legitimate states — have distinct group-based interests in securing fuller conditions of political cooperation and thus in improving human rights protection up to the threshold of adequacy discussed above. Yet because the subjects of at least some illegitimate states are nevertheless able to develop partial or limited capacities for effective agency (if not the more robust capacities secured by a threshold of adequate human rights protection), they may prove capable of improving the extent of human rights protection in their state though their own autonomous collective activity. As members of \textit{proto-peoples}, we might say, they have a procedural interest in bridging the gap between the status quo

\textsuperscript{244} For example, while Japanese aggression and human rights abuse during the Second World War made it permissible for the United States to insist on many of the terms of the postwar Constitution of Japan, the US would have been wrong to purge the new constitution of all traces of Japan’s distinctive political traditions and enactments. Thus, whether or not this was its aim, the US effectively respected the substantive interests of the Japanese in collective self-determination by allowing for legal continuity with the 1890 Meiji Constitution (e.g., adopting all new provisions through the latter’s formal amendment procedures and retaining a symbolic role for the Emperor).
threshold of human rights protection and the level required for full social or political cooperation without intervention by non-members.

Given that both the prospects for successful autonomous reform, as well as the extent of human rights abuse to be suffered by the population up until success is achieved, are highly uncertain, the mere presence of a proto-people in this sense cannot be sufficient to ground a general right against intervention on the part of the states in which they reside. Even if we could determine with certainty the relative weight of members’ procedural interests in improving human rights protection autonomously and their individual interests in securing such protection as quickly as possible, the permissibility of intervention in these cases would remain unusually sensitive to complex empirical predictions about the behavior of particular states and social movements. For this reason, I will not attempt to infer a general right on the part of (some) illegitimate states against intervention by outsiders. Rather, this brief discussion is meant simply to highlight the possibility that, in a given case, an illegitimate state – while failing to enjoy a moral right to rule internally – might nevertheless have a right against even targeted intervention in its affairs. While failing to secure the full conditions of its members’ collective cooperation, such a state would nevertheless protect against external disruption valuable and indeed promising processes of partly cooperative activity already under way within its jurisdiction.

Even in hindsight, all-things-considered judgments are difficult to make in cases of this kind, as Walzer’s much-discussed example of the Sandinista revolution in Nicaragua nicely illustrates. Whereas Walzer emphasizes that outsiders’ forbearance at the time of the first, unsuccessful campaign allowed insiders to broaden their political coalition and commit to more specific objectives free from the influence of outsiders’ vested interests in the outcome, and indeed ultimately to succeed (“The Moral Standing of States,” pp. 219-221), David Luban points instead to the severe moral costs of prolonging the revolution: “Fifty thousand people were killed in the second round of revolution, Nicaragua’s productive capacity was ravaged, and Somoza’s followers had an additional year to strip the country of everything they could crate” (“The Romance of the Nation-State,” Philosophy and Public Affairs 9, no. 4 [1980]: 392-397, at p. 396).
Conclusion

The question of whether a given agent’s authority is truly legitimate – and thus of whether others are required to accept that agent’s judgment in a given case – can be seen to arise wherever there is disagreement about the content of our moral rights and duties. Outside the context of organized political life, individuals must decide whether to defer to the practical authority of others who may attempt to assert or impose a divergent understanding of their rights, and must similarly assess the permissibility of their own efforts to enforce the determinations of their private moral judgment on others. Even if we were to agree – or if it could somehow be established independent of our agreement – that we ought to submit to a common political authority to adjudicate disputes about our rights and duties, we are nevertheless likely to persist in disagreeing about how our shared institutions ought to be constituted, which laws and policies they ought to adopt, and how we ought to respond (whether as subjects of political power or as officers of the state itself) when their directives conflict with our central moral and evaluative commitments. Indeed, as I emphasized in the previous chapter, we may frequently be confronted with difficult choices about whether to accept the authority claimed by other people’s public institutions – whether, for example, to respect their territorial sovereignty in the face of conduct that rightly troubles our consciences and gives us at least pro tanto reasons for action – even in the fanciful event that moral disagreement were to disappear within the context of our domestic political arrangements. All of these practical decisions call out for a theoretically informed response, and it has been my aim in the foregoing chapters to elaborate and defend a conception of legitimate authority capable of guiding
our individual conduct and the design of our collective institutions across these dimensions while at the same time avoiding or rectifying the shortcomings of the leading philosophical accounts.

Because many of the questions taken up in the present study pertain to such abstract matters as the conceptual structure of our rights and duties, the proper role and method of normative theorizing, and the moral foundations of many of our considered judgments about authority and political action, my arguments have often proceeded at a correspondingly high level of philosophical abstraction, yielding conclusions less about what we ought to do in highly specific real-world circumstances than about how we ought to reason about our moral and political responsibilities and how, as a general matter, these duties ought to adapt to various changes in local conditions. Yet despite this comparatively abstract orientation, I believe my account nevertheless has significant practical implications for individual and collective decision-making across a range of familiar or readily foreseeable political contexts. Thus in lieu of a summary of my central philosophical claims, I will conclude by reviewing several of the practical upshots of my conception of legitimacy as self-determination, as well as three key respects in which my account could usefully be extended to cover areas of practical concern that I have not addressed directly.

As I argued in Chapter 1, individuals living in a stateless or anarchic condition fall under an unchosen moral duty to commit to a common political authority and thus to relinquish their right to unilaterally impose their private moral judgment on others – a right that I argued is limited, in any event, only to certain exceptional cases of self-defense or self-preservation. Yet in the course of refining the idea of one’s duty to
“support the state,” my argument generated a number of important results not simply for those living in a hypothetical state of nature but for individuals currently subject to stable patterns of political rule. In particular, I maintained that individuals have a duty not just to support legitimate states generally but to do their part in upholding the particular system of law that happens to govern their current territory of residence, and that this particularized duty, moreover, must take the form not simply of a requirement to create and refrain from interfering with institutions equipped with a capacity for coercive enforcement, but rather of a duty to willingly comply with the law. In each of these respects, my argument counters a distinct source of skepticism about the legitimacy of nonvoluntary forms of political authority voiced by so-called “philosophical anarchists” in the voluntarist tradition. At the same time, I maintained that our duty to obey the law of a legitimate state must be qualified in two key respects: first, so as to allow for permissible civil disobedience (subject to the further condition that one’s disobedient action not contribute to the disabling of the state’s overall enforcement capacities); and, second, in recognition of the fact that individuals may, in certain extreme circumstances, have competing moral duties of sufficient weight as to override their normally decisive duties to obey the law. Although these qualifications introduce a small element of individual discretion and indeterminacy into my conception of political legitimacy, I believe these emendations are nevertheless not so expansive as to nullify the action-guiding potential of my account across a standard range of cases.

These arguments about our duties to support a legitimate state might ultimately be of little practical interest, however, if it turned out to difficult or impossible to determine whether a state has in fact achieved the status of legitimacy in a given case. In Chapter 2,
I argued that all states that attempt to legitimate their power with reasons – regardless of their historical or cultural circumstances – must satisfy certain formal standards of legitimacy, whereas in Chapter 3 I sought to show that all contemporary authorities that engage in practices of public legitimation can be understood as subject to certain minimally liberal normative requirements. Let us consider the practical tractability of each of these sets of standards in turn.

In Chapter 2, I maintained that the legitimacy of public institutions generally – simply in virtue of asserting legitimate authority, rather than mere power, over their subjects – can be assessed in terms of their willingness and ability to issue sincere and non-ideological justifications of their power and to govern in such a way as to correspond to the content of those justificatory claims in practice. Yet while these standards on their own may appear to radically underspecify the particular policies or institutional arrangements required for legitimacy in a given case, I argued, further, for an interpretation of these norms that would require legitimate states to provide formal opportunities for petition or legal appeal, to achieve a modicum of transparency in its governmental operations (and a corresponding degree of openness in the press and its central educational institutions), and to secure a range of individual rights to personal security and subsistence, understood as the social preconditions of what I there termed limited agency. Even if these requirements may yield uncertain results with respect to various hard or controversial cases, I believe they can nevertheless rule out many of the most egregious forms of oppressive or tyrannical treatment found in a range of existing and historical states.
I then went on, in Chapter 3, to apply this formal account of legitimate authority to contemporary political practice, and to argue that global patterns of economic and political modernization have put pressure on public authorities in nearly all contemporary societies to demonstrate that their power ultimately conduced to the flourishing of their subjects, no longer seen primarily as subservient to the aims of a larger organic social order but conceived instead as rights-bearing agents, characterized by a diverse array of preferences and attachments. The emergence of this distinctively modern understanding of political subjects as morally pluralistic agents, I suggested, has necessitated a shift in the legitimating practices of modern states that incorporates yet goes beyond the formal requirements of legitimate authority outlined in Chapter 2. Indeed, despite the significant extent of ethical and religious diversity both within and across existing societies, almost all contemporary states can now be found appealing (however disingenuously) to such minimally liberal guarantees as robust rights of individual conscience, various economic and welfare rights, and certain basic opportunities for political participation or popular accountability. Thus even where public authorities have no intention of making good on their professed commitments to these and other liberal norms and values, both domestic political movements and increasing international integration have made it virtually impossible for them to avoid at least proclaiming allegiance (however disingenuously) to such guarantees – often expressed in the conceptual vocabulary of universal human rights – in the course of legitimating their power to their subjects. Because many of these appeals to liberal values and institutions, moreover, have taken the form of concrete commitments to particular conventions or treaties obliging their signatories to honor the human rights of their subjects, those subject to highly illiberal forms of treatment often have available a
rather determinate and unambiguous public record of their state’s alleged liberal bona
fides, in terms of which they can thus proceed to criticize its conduct and hold its public
officials to account.

Finally, in Chapter 4, I argued that although contemporary states must protect
their subjects’ human rights as a necessary condition of their legitimacy, and while
indeed violations of human rights in all cases give outsiders reasons to undertake
humanitarian action of some sort, it would nevertheless be impermissible for members of
the international community to take specifically coercive action against a state that
adequately, though imperfectly, protects its subjects’ human rights. Particularly in an age
of increasingly targeted or “surgical” military technology, outside agents are likely to
face an ever-widening array of opportunities to forcibly prevent or remedy discrete
instances of human rights abuse without either posing significant risks to civilian
populations in the target state or incurring substantial costs to themselves. In view of this
reality, my account not only offers outside agents compelling reasons to refrain from
undertaking coercive action against a state that has met a threshold of adequate human
rights protection, but in fact insists that these reasons are decisive in the circumstances
just described: states that satisfy a threshold of adequate protection, that is, ought to be
accorded a strict right against external intervention into their domestic jurisdiction.
Beyond this, I argued that even certain states that fail to meet this minimum threshold of
human rights protection may nevertheless possess a moral right against outside
intervention in virtue of their ability to protect and instantiate their members’ genuine
(albeit weaker) interests in collective self-determination. At the very least, this latter
argument can serve to ground what Michael Walzer has called a “presumption of
legitimacy” on the part of outsiders in the event of uncertainty about whether the (would-be) target state has in fact satisfied the threshold of adequate human rights protection.\(^{246}\)

Regrettably but perhaps unavoidably, however, my account has raised a number of questions about the nature and practical implications of legitimate political authority that I have not been able to address in the preceding pages. Although I have noted several such matters in passing throughout the dissertation, let me close by briefly indicating three that seem to me of particular practical or theoretical importance.

First, although I maintained in Chapter 3 that nearly all contemporary states appeal to at least minimally liberal norms and values insofar as they seek to legitimate their power with reasons at all, I did not specify exactly which liberal rights and opportunities constitute truly universal conditions of internal legitimacy, by the lights of the realist account. As far as the internal or domestic conception of legitimacy is concerned in isolation, this omission is unproblematic; it simply suggests that the relatively general list of rights and opportunities I presented above may have to be refined and concretized on a case-by-case basis, at least if they are to provide those subject to political power with a practical guide to action. However, it is at least conceivable that the list of universal conditions of internal legitimacy, as conceived on the realist account, might fail to align in full with the catalog of universal human rights on which I relied in developing my conception of external or international legitimacy. If, for example, the rights comprising the conditions of internal legitimacy, so understood, turned out to be more minimal than the rights that I subsequently claimed provide outsiders with reasons for humanitarian action, it may prove more difficult to establish what in Chapter 4 I

termed the “entailment thesis,” or the claim that internal legitimacy entails external legitimacy. Given that both sets of conditions are elements of distinct and historically variable social practices, moreover – the internal justificatory practices of particular states, on the one hand, and the global practice of human rights, on the other – it may be necessary to periodically redefine their content and adjust our understanding of legitimate authority in light of whatever tensions may emerge between the two sets of norms over time.

Second, while the conception of external legitimacy defended in Chapter 4 focused exclusively on the permissibility of coercive humanitarian action by outsiders – coercion, after all, posing the most acute threat to individuals’ interests in collective self-determination – I failed to consider the permissibility of various non-coercive modes of external human rights promotion, at least some of which might potentially jeopardize individuals’ group-based interests as well. Even if the moral and prudential costs of coercive action are likely to continue to decline with the advancement of targeted weapons technology, armed humanitarian intervention will nevertheless remain prohibitively costly across a significant range of circumstances; in these cases, outside agents seeking to improve human rights protection overall will typically resort not to the use of force but to a number of non-coercive tactics, such as carefully conditioned offers of aid and credit and the provision of nonmilitary assistance to civil society movements around the world. Yet while these actions fall short of outright compulsion, offers of conditional assistance are often politically difficult for recipient governments to refuse, and support for domestic NGOs – as, indeed, is often the aim of outside parties – can frequently disrupt internal processes of political bargaining and institution-building, at
the limit helping to foment rebellion and internal strife. Although my sense is that at least some non-coercive forms of humanitarianism are inconsistent with a proper respect for the self-determination of peoples, any attempt to defend this intuition would require a far more detailed typology of the relevant outside agents, target regime-types, and precise modes of non-coercive interference and inducement than I have presented up to this point.247

Third, and finally, I have left aside a number of central questions concerning the standing or procedural authority of outside agents to undertake coercive (or, for that matter, non-coercive) action against human-rights-violating states. Although the framers of contemporary human rights doctrine largely envisioned a “juridical paradigm” of implementation, whereby human rights abuses would give only the legally constituted agents of the international community reasons for preventive or remedial action, in practice, as Charles Beitz notes, “human rights violations have come to supply reasons for action to other kinds of agents as well, frequently acting without specific legal authority.”248 For many observers, however, the prospect of individual states or ad hoc coalitions – to say nothing of private corporations or military contractors – intervening to protect human rights outside the formal legal channels established by the UN Charter or subsequent international treaties marks a troubling departure from the international

247 As I noted in Chapter 4, both John Rawls and Joshua Cohen have held that a given state’s compliance with the “Law of Peoples,” taken to include a requirement of adequate human rights protection, entitles it to be accepted as an “equal participating member[] in good standing of the Society of Peoples,” understood to require outsiders to forbear not just from coercion but also from certain non-coercive forms of interference (Rawls, The Law of Peoples [Cambridge, Mass.: Harvard University Press, 1999], pp. 59-60; see also Cohen, “Is There a Human Right to Democracy?” in The Egalitarian Conscience: Essays in Honour of G. A. Cohen, ed. Christine Sypnowich [Oxford: Oxford University Press, 2006], p. 228). The suggestion here is that a given state’s rights against coercive intervention and its rights against other forms of humanitarian interference might more usefully be considered separately, even if they both ultimately have a basis in individuals’ interests in collective self-determination, in my sense.

political order’s founding principles of legality and multilateralism, and should be permitted, if at all, only in cases of grave humanitarian emergency. Indeed, even those severely critical of the UN Security Council and other existing international legal bodies frequently insist that would-be interveners submit to some independent procedural mechanism, so as to ensure both the veracity of their assertions of ongoing or imminent human rights abuse, as well as their capacity and willingness to prevent such abuses effectively, proportionately, and in conformity with the requirements of jus post bellum.249 While my account can be understood simply to supply outside agents with yet another set of reasons – over and above the reasons provided by one’s favored procedural constraints – for refraining from humanitarian intervention across a range of cases, it might be desirable for considerations of self-determination to be brought to bear on the design of the relevant procedural constraints themselves, so that individuals’ interests in self-determination would be given robust and institutionalized protection at the level of international decision-making and not left subject to the discretion of individual actors.

As each of these lingering questions suggests, the most pressing practical concerns for a normative theory of legitimacy may reside increasingly in the realm of international politics and civil society. Indeed, some philosophers and political theorists have begun to treat the emergent network of global governance institutions as an object

of legitimation in its own right.\textsuperscript{250} What the argument of the preceding chapters has sought to establish, however, is that individuals are currently able to satisfy their natural moral duties only by organizing their collective affairs under a single, coercive legal authority, and, further, that their doing so tends to give rise to a range of compelling associational interests in collective self-determination. Short of a radical transformation in the institutional character of existing transnational organizations, that is, my account suggests that the legitimacy of those organizations ought to depend primarily not on their satisfying the same sorts of normative requirements facing territorial states or, alternatively, on their meeting some altogether distinct standards of legitimacy. Rather, the legitimacy of the international political order ought to be understood, on the present account, chiefly as a function of its ability to promote and protect the internal legitimacy of state-level political institutions and, in so doing, their members’ distinctive interests in determining the course of their own collective affairs.

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