

Kant

The Metaphysics of Morals

Sections 51 and 52

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§ 51.

The three authorities in a state, which arise from the concept of a *commonwealth* as such (*res publica latius dicta*), are only the three relations of the united will of the people, which is derived a priori from reason. They are a pure idea of a head of state, which has objective practical reality. But this head of state (the sovereign) is only a *thought-entity* (to represent the entire people) as long as there is no physical person to represent the supreme authority in the state and to make this idea effective on the people's will. Now, the relation of this physical person to the people's will can be thought of in three different ways: either that *one* in the state has command over all; or that *several*, equal among themselves, are united in command over all the others; or that *all* together have command over each and so over themselves as well. In other words, the *form of a state* is either *autocratic*, *aristocratic* or *democratic*. (The expression *monarchical*, in place of *autocratic*, is not suitable for the concept intended here; for a *monarch* is one who has the *highest* authority, whereas an *autocrat*, who *rules by himself*, has *all* the authority. The *autocrat* is the sovereign, whereas the *monarch* merely represents the sovereign.) – It is easy to see that the autocratic form of state is the *simplest*, namely the relation of one (the king) to the people, so that only one is legislator. The aristocratic form of state is already *composed* of two relations: the relation of the nobility (as legislator) to one another, to constitute the sovereign, and then the relation of this sovereign to the people. But the democratic form of state is the most composite of all, since it involves the following relations: first, it unites the will of all to form a people; then it unites the will of the citizens to form a commonwealth; then it sets this *sovereign*, which is itself the united will of the citizens, over the commonwealth.* It is true that, with regard to the administration of right within a state, the simplest form is also the best. With regard to right itself, however, this form of state is the most dangerous for a people, in view of how conducive it is to despotism. It is indeed the most reasonable maxim to simplify the mechanism of unifying a nation by coercive laws, that is, when all the members of the nation are passive and obey *one* who is over them; but in that case none who are subjects are also *citizens of the state*. As for the consolation with which the people is supposed to be content – that monarchy (strictly speaking here, autocracy) is the best constitution *when the monarch is good* (i.e., when he not only intends what is good but also has insight into it) – this is one of those wise remarks that are tautologous. It says nothing more than that the best constitution is the one by which the administrator of the state is made into the best ruler, that is, that the best constitution is that which is best.

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* I shall not mention the adulterations of these forms that arise from invasion by powerful unauthorized people (*oligarchy* and *ochlocracy*), or the so-called mixed constitutions, since this would take us too far afield.

§ 52.

It is *futile* to inquire into the *historical documentation*^e of the mechanism of government, that is, one cannot reach back to the time at which civil society began (for savages draw up no record of their submission to law; besides, we can already gather from the nature of uncivilized human beings that they were originally subjected to it by force). But it is *culpable* to undertake this inquiry with a view to possibly changing by force the constitution that now exists. For this transformation would have to take place by the people acting as a mob, not by legislation; but insurrection in a constitution that already exists overthrows all civil rightful relations and therefore all right, that is, it is not change in the civil constitution but dissolution of it. The transition to a better constitution is not then a metamorphosis but a palingenesis, which requires a new social contract on which the previous one (now annulled) has no effect. – But it must still be possible, if the existing constitution cannot well be reconciled with the idea of the original contract, for the sovereign to change it, so as to allow to continue in existence that form which is essentially required for a people to constitute a state. Now this change cannot consist in a state's reorganizing itself from one of the three forms into another, as, for example, aristocrats agreeing to submit to autocracy or deciding to merge into a democracy, or the reverse, as if it rested on the sovereign's free choice^f and discretion which kind of constitution it would subject the people to. For even if the sovereign decided to transform itself into a democracy, it could still do the people a wrong, since the people itself could abhor such a constitution and find one of the other forms more to its advantage.

The different forms of states are only the *letter (littera)* of the original legislation in the civil state, and they may therefore remain as long as they are taken, by old and long-standing custom (and so only subjectively), to belong necessarily to the machinery of the constitution. But the *spirit* of the original contract (*anima pacti originarii*) involves an obligation on the part of the constituting authority to make the *kind of government* suited to the idea of the original contract. Accordingly, even if this cannot be done all at once, it is under obligation to change the kind of government gradually and continually so that it harmonizes *in its effect* with the only constitution that accords with right, that of a pure republic, in such a way that the old (empirical) statutory forms, which served merely to bring about the *submission* of the people, are replaced by the original (rational) form, the only form which makes *freedom* the principle and indeed the condition for any exercise of *coercion*, as is required by a rightful constitution of a state in the strict sense of the word. Only it will finally lead to what is literally a state. – This is the only constitution of a state that lasts, the constitution in which

^e *Geschichtsurkunde*

^f *freien Wahl*

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law itself rules and depends on no particular person. It is the final end of all public right, the only condition in which each can be assigned *conclusively* what is his; on the other hand, so long as those other forms of state are supposed to represent literally just so many different moral persons invested with supreme authority, no absolutely rightful condition of civil society can be acknowledged, but only *provisional* right within it.

Any true republic is and can only be a *system representing* the people, in order to protect its rights in its name, by all the citizens united and acting through their delegates (deputies). But as soon as a person who is head of state (whether it be a king, nobility, or the whole of the population, the democratic union) also lets itself be represented, then the united people does not merely *represent* the sovereign: it *is* the sovereign itself. For in it (the people) is originally found the supreme authority from which all rights of individuals as mere subjects (and in any event as officials of the state) must be derived; and a republic, once established, no longer has to let the reins of government out of its hands and give them over again to those who previously held them and could again nullify all new institutions by their absolute choice.

A powerful ruler in our time³² therefore made a very serious error in judgment when, to extricate himself from the embarrassment of large state debts, he left it to the people to take this burden on itself and distribute it as it saw fit; for then the legislative authority naturally came into the people's hands, not only with regard to the taxation of subjects but also with regard to the government, namely to prevent it from incurring new debts by extravagance or war. The consequence was that the monarch's sovereignty^g wholly disappeared (it was not merely suspended) and passed to the people, to whose legislative will the belongings of every subject became subjected. Nor can it be said that in this case one must assume a tacit but still contractual promise of the National Assembly not to make itself the sovereign but only to administer this business of the sovereign and, having attended to it, return the reins of government into the monarch's hands; for such a contract is in itself null and void. The right of supreme legislation in a commonwealth is not an alienable right but the most personal of all rights. Whoever has it can control the people only through the collective will of the people; he cannot control the collective will itself, which is the ultimate basis of any public contract. A contract that would impose obligation on the people to give back its authority would not be incumbent upon the people as the legislative power, yet would still be binding upon it; and this is a contradiction, in accordance with the saying "No one can serve two masters."^h

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^g Herrscherwalt

^h Matthew 6:24

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Public right, section I, The right of a
state (review)

6:311-18

Public right

Section I.

The right of a state.

§ 43.

The sum of the laws which need to be promulgated generally in order to bring about a rightful condition is *public right*. – *Public right is therefore a system of laws for a people, that is, a multitude of human beings, or for a multitude of peoples, which, because they affect one another, need a rightful condition under a will uniting them, a constitution (constitutio), so that they may enjoy what is laid down as right.* – This condition of the individuals within a people in relation to one another is called a *civil condition* (*status civilis*), and the whole of individuals in a rightful condition, in relation to its own members is called a *state* (*civitas*). Because of its form, by which all are united through their common interest in being in a rightful condition, a state is called a *commonwealth* (*res publica latius sic dicta*).^b In relation to other peoples, however, a state is called simply a *power* (*potentia*) (hence the word *potentate*). Because the union of the members is (presumed to be) one they inherited, a state is also called a *nation* (*gens*). Hence, under the general concept of public right we are led to think not only of the right of a state but also of a *right of nations* (*ius gentium*).^c Since the earth's surface is not unlimited but closed, the concepts of the right of a state and of a right of nations lead inevitably to the idea of a *right for a state of nations* (*ius gentium*) or *cosmopolitan right* (*ius cosmopoliticum*). So if the principle of outer freedom limited by law is lacking in any one of these three possible forms of rightful condition, the framework of all the others is unavoidably undermined and must finally collapse.

§ 44.

It is not experience from which we learn of the maxim of violence in human beings and of their malevolent tendency to attack one another before external legislation^d endowed with power appears, thus it is not

^b republic in the broad sense

^c The English terms “municipal law” and “international law” might be used here, if it were kept in mind that Kant’s concern is only with a priori principles. However, given the meaning of *Recht* specified in AK 6: 229, it seems preferable to continue using this term throughout: *das öffentliche Recht* or “public right.”

^d Although Kant continues to use *Gesetzgebung* and *Gesetzgeber*, which were translated in Private Right as “lawgiving” and “lawgiver,” he is now discussing a condition in which there are positive laws. Hence “legislation” and “legislator” seem appropriate.

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some deed^e that makes coercion through public law necessary. On the contrary, however well disposed and law-abiding human beings might be, it still lies a priori in the rational idea of such a condition (one that is not rightful) that before a public lawful condition is established individual human beings, peoples and states can never be secure against violence from one another, since each has its own right to do *what seems right and good to it* and not to be dependent upon another's opinion about this. So, unless it wants to renounce any concepts of right, the first thing it has to resolve upon is the principle that it must leave the state of nature, in which each follows its own judgment, unite itself with all others (with which it cannot avoid interacting), subject itself to a public lawful external coercion, and so enter into a condition in which what is to be recognized as belonging to it is determined by *law* and is allotted to it by adequate *power* (not its own but an external power); that is, it ought above all else to enter a civil condition.

It is true that the state of nature need not, just because it is natural, be a state of *injustice* (*iniustus*), of dealing with one another only in terms of the degree of force each has. But it would still be a state *devoid of justice* (*status iustitia vacuus*), in which when rights are *in dispute* (*ius controversum*), there would be no judge competent to render a verdict having rightful force. Hence each may impel the other by force to leave this state and enter into a rightful condition; for although each can acquire something external by taking control of it or by contract in accordance with its *concepts of right*, this acquisition is still only *provisional* as long as it does not yet have the sanction of public law, since it is not determined by public (distributive) justice and secured by an authority putting this right into effect.

If no acquisition were cognized as rightful even in a provisional way prior to entering the civil condition, the civil condition itself would be impossible. For in terms of their form, laws concerning what is mine or yours in the state of nature contain the same thing that they prescribe in the civil condition, insofar as the civil condition is thought of by pure rational concepts alone. The difference is only that the civil condition provides the conditions under which these laws are put into effect (in keeping with distributive justice). – So if external objects were not even *provisionally* mine or yours in the state of nature, there would also be no duties of right with regard to them and therefore no command to leave the state of nature.

§ 45.

A *state* (*civitas*) is a union of a multitude of human beings under laws of right. Insofar as these are a priori necessary as laws, that is, insofar as they

^e *Factum*

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follow of themselves from concepts of external right as such (are not statutory), its form is the form of a state as such, that is, of *the state in idea*, as it ought to be in accordance with pure principles of right. This idea serves as a norm (*norma*) for every actual union into a commonwealth (hence serves as a norm for its internal constitution).^f

Every state contains three *authorities* within it,^g that is, the general united will consists of three persons (*triā politica*): the *sovereign authority* (sovereignty)^h in the person of the legislator; the *executive authority* in the person of the ruler (in conformity to law); and the *judicial authority* (to award to each what is his in accordance with the law) in the person of the judge (*potestas legislatoria, rectoria et iudicaria*). These are like the three propositions in a practical syllogism: the major premise, which contains the *law* of that will; the minor premise, which contains the *command* to behave in accordance with the law, that is, the principle of subsumption under the law; and the conclusion, which contains the *verdict* (sentence), what is laid down as right in the case at hand.

§ 46.

The legislative authority can belong only to the united will of the people. For since all right is to proceed from it, it *cannot* do anyone wrong by its law. Now when someone makes arrangements about *another*, it is always possible for him to do the other wrong; but he can never do wrong in what he decides upon with regard to himself (for *volenti non fit iniuria*).ⁱ Therefore only the concurring and united will of all, insofar as each decides the same thing for all and all for each, and so only the general united will of the people, can be legislative.

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The members of such a society who are united for giving law (*societas civilis*), that is, the members of a state, are called *citizens of a state* (*cives*). In terms of rights, the attributes of a citizen, inseparable from his essence (as a citizen), are: lawful *freedom*, the attribute of obeying no other law than that to which he has given his consent; civil *equality*, that of not recogniz-

^f (also *im Inneren*)

^g Or “powers” [*Gewalten*]. In §43 and §44 Kant used *Macht* (*potentia*), which was translated as “power.” He now begins to use *Gewalt* (*potestas*). But once he distinguishes the three “powers” or “authorities” within a state, it is only the executive authority that has “power” in one sense, i.e., it is the authority which exercises coercion.

^h *Herrschergewalt* (*Souveränität*). In this initial distinction of the three authorities within a state Kant specifies that “sovereignty” belongs to the legislative authority. Subsequently he introduces, without explanation, such a variety of terms that it is not always clear which of the three authorities is under discussion. I have used “sovereign,” without noting the word used, only when Kant specifies *Souverän*. When “sovereign” is used for *Herrscher* or *Beherrisher*, a note is provided. Otherwise I have used the more general “head of state,” except for passages that might indicate that one (physical) person has both legislative and executive authority.

ⁱ no wrong is done to someone who consents

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ing among the *people* any superior with the moral capacity^j to bind him as a matter of right in a way that he could not in turn bind the other; and third, the attribute of civil *independence*, of owing his existence and preservation to his own rights and powers as a member of the commonwealth, not to the choice of another among the people. From his independence follows his civil personality, his attribute of not needing to be represented by another where rights are concerned.

The only qualification for being a citizen is being fit to vote. But being fit to vote presupposes the independence of someone who, as one of the people, wants to be not just a part of the commonwealth but also a member of it, that is, a part of the commonwealth acting from his own choice in community with others. This quality of being independent, however, requires a distinction between *active* and *passive* citizens, though the concept of a passive citizen seems to contradict the concept of a citizen as such. – The following examples can serve to remove this difficulty: an apprentice in the service of a merchant or artisan; a domestic servant (as distinguished from a civil servant); a minor (*naturaliter vel civiliter*); all women and, in general, anyone whose preservation in existence (his being fed and protected) depends not on his management of his own business but on arrangements made by another (except the state). All these people lack civil personality and their existence is, as it were, only inherence. – The woodcutter I hire to work in my yard; the blacksmith in India, who goes into people's houses to work on iron with his hammer, anvil and bellows, as compared with the European carpenter or blacksmith who can put the products of his work up as goods for sale to the public; the private tutor, as compared with the school teacher; the tenant farmer as compared with the leasehold farmer, and so forth; these are mere underlings^k of the commonwealth because they have to be under the direction or protection of other individuals, and so do not possess civil independence.

This dependence upon the will of others and this inequality is, however, in no way opposed to their freedom and equality as *human beings*, who together make up a people; on the contrary, it is only in conformity with the conditions of freedom and equality that this people can become a state and enter into a civil constitution. But not all persons qualify with equal right to vote within this constitution, that is, to be citizens and not mere associates in the state. For from their being able to demand that all others treat them in accordance with the laws of natural freedom and equality as *passive* parts of the state it does not

^j *Vermögen*

^k *Handlanger*

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follow that they also have the right to manage the state itself as *active* members of it, the right to organize it or to cooperate for introducing certain laws. It follows only that, whatever sort of positive laws the citizens might vote for, these laws must still not be contrary to the natural laws of freedom and of the equality of everyone in the people corresponding to this freedom, namely that anyone can work his way up from this passive condition to an active one.

§ 47.

All those three authorities in a state are dignities,¹ and since they arise necessarily from the idea of a state as such, as essential for the establishment (constitution) of it, they are *civic dignities*. They comprise the relation of a *superior* over all (which, from the viewpoint of laws of freedom, can be none other than the united people itself) to the multitude of that people severally as *subjects*, that is, the relation of a *commander*^m (*imperans*) to *those who obey* (*subditus*). — The act by which a people forms itself into a state is the *original contract*. Properly speaking, the original contract is only the idea of this act, in terms of which alone we can think of the legitimacy of a state. In accordance with the original contract, everyone (*omnes et singuli*) within a *people* gives up his external freedom in order to take it up again immediately as a member of a commonwealth, that is, of a people considered as a state (*universi*). And one cannot say: the human being in a state has sacrificed a *part* of his innate outer freedom for the sake of an end, but rather, he has relinquished entirely his wild, lawless freedom in order to find his freedom as such undiminished, in a dependence upon laws, that is, in a rightful condition, since this dependence arises from his own lawgiving will.

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§ 48.

Accordingly, the three authorities in a state are, *first*, coordinate with one another (*potestates coordinatae*) as so many moral persons, that is, each complements the others to complete the constitution of a state (*complementum ad sufficientiam*).ⁿ But, *second*, they are also *subordinate* (*subordinatae*) to one another, so that one of them, in assisting another, cannot also usurp its function; instead, each has its own principle, that is, it indeed commands in its capacity^o as a particular person, but still under the condition of the will of a superior. *Third*, through the union of both each subject is apportioned his rights.²⁶

It can be said of these authorities, regarded in their dignity, that the will

¹ *Würden*

^m *Gebeitenden*

ⁿ complement to sufficiency

^o *Qualität*

of the *legislator* (*legislatoris*) with regard to what is externally mine or yours is *irreproachable* (*irreprehensibel*); that the executive power of the *supreme ruler* (*summi rectoris*) is *irresistible*; and that the verdict of the highest judge (*supremi iudicis*) is *irreversible* (cannot be appealed).

§ 49.

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The *ruler* of a state (*rex, princeps*) is that (moral or natural) person to whom the executive authority (*potestas executoria*) belongs. He is the *agent* of the state, who appoints the magistrates and prescribes to the people rules in accordance with which each of them can acquire something or preserve what is his in conformity with the law (through subsumption of a case under it). Regarded as a moral person, he is called the *directorate*, the government. His *directives* to the people, and to the magistrates and their superior (the minister) whom he charges with *administering the state* (*gubernatio*), are *ordinances* or *decrees* (not laws); for they are directed to decisions in particular cases and are given as subject to being changed. A *government* that was also legislative would have to be called a *despotic* as opposed to a *patriotic* government; but by a patriotic government is understood not a *paternalistic* one (*regimen paternale*), which is the most despotic of all (since it treats citizens as children), but one *serving the native land* (*regimen civitatis et patriae*). In it the state (*civitas*) does treat its subjects as members of one family but it also treats them as citizens of the state, that is, in accordance with laws of their own independence: each is in possession of himself and is not dependent upon the absolute will of another alongside him or above him.

So a people's sovereign⁸ (*legislator*) cannot also be its *ruler*, since the ruler is subject to the law and so is put under obligation through the law by *another*, namely the sovereign.⁹ The sovereign can also take the ruler's authority away from him, depose him, or reform his administration. But it cannot *punish* him (and the saying common in England, that the king, i.e., the supreme executive authority, can do no wrong, means no more than this); for punishment is, again, an act of the executive authority, which has the supreme capacity to *exercise coercion* in conformity with the law, and it would be self-contradictory for him to be subject to coercion.

Finally, neither the head of state nor its ruler can *judge*, but can only appoint judges as magistrates. A people judges itself through those of its fellow citizens whom it designates as its representatives for this by a free choice and, indeed, designates especially for each act. For a verdict (a sentence) is an individual act of public justice (*iustitiae distributivae*) performed by an administrator of the state (a judge or court) upon a subject, that is, upon someone belonging to the people; and so this act is

⁸ *Beherrsscher*

⁹ *Souverän*

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invested with no authority to assign (allot) to a subject what is his. Since each individual among a people is only passive in this relationship (to the authorities), if either the legislative or the executive authority were to decide in a controversial case what belongs to him, it might do him a wrong, since it would not be the people itself doing this and pronouncing a verdict of *guilty* or *not guilty* upon a fellow citizen. But once the facts in a lawsuit have been established, the court has judicial authority to apply the law, and to render to each what is his with the help of the executive authority. Hence only the *people* can give a judgment upon one of its members, although only indirectly, by means of representatives (the jury) whom it has delegated. — It would also be beneath the dignity of the head of state to play the judge, that is, to put himself in a position where he could do wrong and so have his decision appealed (*a rege male informato ad regem melius informandum*).^r

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There are thus three distinct authorities (*potestas legislatoria, executoria, iudicaria*) by which a state (*civitas*) has its autonomy, that is, by which it forms and preserves itself in accordance with laws of freedom. — A state's *well-being* consists in their being united (*salus rei publicae suprema lex est*).^s But the well-being of a state must not be understood as the *welfare* of its citizens and their *happiness*; for happiness can perhaps come to them more easily and as they would like it to in a state of nature (as Rousseau asserts) or even under a despotic government. By the well-being of a state is understood, instead, that condition in which its constitution conforms most fully to principles of right; it is that condition which reason, *by a categorical imperative*, makes it obligatory for us to strive after.

GENERAL REMARK

On the effects with regard to rights that follow from the nature of the civil union.

A.

A people should not *inquire* with any practical aim in view into the origin of the supreme authority to which it is subject, that is, a subject *ought not to reason subtly* for the sake of action^t about the origin of this authority, as a right that can still be called into question (*ius controversum*) with regard to the obedience he owes it. For, since a people must be regarded as already united under a general legislative will in order to judge with rightful force

^r from a king badly instructed to a king to be better instructed

^s The well-being of the commonwealth is the supreme law. The saying seems to stem from Cicero *De Legibus* 3.8, *Salus populi suprema lex esto*.

^t *werkätig vernünfteln*

Kant

On the Common Saying: That
May Be Correct in Theory, but
It Is of No Use in Practice

Section II, selections

8:289-97

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- 8:289 For all this experience does not help him at all to escape the precept of theory, but at most only helps him to learn how theory could be better and more generally put to work, after one has adopted it into one's principles; but we are not speaking here of such pragmatic skill but only of principles.

II.

ON THE RELATION OF THEORY TO PRACTICE
IN THE RIGHT OF A STATE

(Against Hobbes)

Among all the contracts by which a multitude of people unites into a society (*pactum sociale*), the contract establishing a *civil constitution* among them (*pactum unionis civilis*) is of such a distinctive kind that, although with respect to its *application*^w it has much in common with any other (which is likewise directed to some discretionary^x end to be promoted by common effort), it is essentially different from every other in the principle of its institution (*constitutionis civilis*). The union of many for some (common) end (that all of them *have*) is to be found in any social contract; but that union which is in itself an end (that each *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, is to be found in a society only insofar as it is in the civil condition,^y that is, constitutes a commonwealth. Now the end that, in such an external relation, is in itself duty and even the supreme formal condition^z (*conditio sine qua non*) of all other external duties is the *right* of human beings under *public coercive laws*, by which what belongs to each can be determined for him and secured against encroachment by any other.

- But the concept of an external right as such proceeds entirely from the concept of *freedom* in the external relation of people to one another and has nothing at all to do with the end that all of them naturally have (their aim of happiness) and with the prescribing of means for attaining it; hence too the latter absolutely must not intrude in the laws of the former as their determining ground. *Right* is the limitation of the freedom of each to the condition of its harmony with the freedom of everyone insofar as this is possible in accordance with a universal law; and *public right* is the sum of *external laws* which make such a thoroughgoing harmony possible. Now, since any limitation of freedom through another's choice^a is called coercion, it follows that a civil constitution is a relation of *free* human beings

^w *Ausführung*

^x *beliebigen*

^y *Zustand*

^z *Bedingung*

^a *Willkür*

ON THE COMMON SAYING: THAT MAY BE CORRECT IN THEORY

who (without prejudice to their freedom within the whole of their union with one another) are nevertheless subject to coercive laws; for reason itself wills it so, and indeed pure reason giving laws a priori, which has no regard for any empirical ends (all of which are comprehended under the general name happiness); for, since people differ in their thinking about happiness and how each would have it constituted, their wills with respect to it cannot be brought under any common principle and so under any external law harmonizing with everyone's freedom.

Thus the civil condition, regarded merely as a rightful condition, is based a priori on the following principles:

1. The *freedom* of every member of the society as a human being.
2. His *equality* with every other as a *subject*.
3. The *independence* of every member of a commonwealth as a *citizen*.

These principles are not so much laws given by a state already established as rather principles in accordance with which alone the establishment of a state is possible in conformity with pure rational principles of external human right. Accordingly,

1. As for the *freedom* [of every member of a state] as a human being I express its principle for the constitution of a commonwealth in the following formula: No one can coerce me to be happy in his way (as he thinks of the welfare^b of other human beings); instead, each may seek his happiness in the way that seems good to him, provided he does not infringe upon that freedom of others to strive for a like end which can coexist with the freedom of everyone in accordance with a possible universal law (i.e., does not infringe upon this right of another). A government established on the principle of benevolence toward the people like that of a *father* toward his children – that is, a *paternalistic government* (*imperium paternale*), in which the subjects, like minor children who cannot distinguish between what is truly useful or harmful to them, are constrained to behave only passively, so as to wait only upon the judgment of the head of state as to how they *should be happy* and, as for his also willing their happiness, only upon his kindness – is the greatest *despotism* thinkable (a constitution that abrogates all the freedom of the subjects, who in that case have no rights at all). Not a *paternalistic* but a *patriotic government* (*imperium non paternale, sed patrioticum*) is the only one that can be thought for human beings, who are capable^c of rights, and also with reference to the benevolence of the ruler. In a *patriotic* way of thinking everyone in a state (its head not excepted) regards the commonwealth as the maternal womb, or the country as the paternal land, from which and on which he has arisen and which he must also leave behind as a cherished pledge, only so as to consider himself

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^b Wohlsein

^cfähig

authorized to protect its rights by laws of the common will but not to subject the use of it to his unconditional discretion. This right of freedom belongs to him, a member of a commonwealth, as a human being namely insofar as he is a being that is, as such, capable of rights.

2. The *equality* [of each member of a state] as a subject, the formula of which can read: Each member of a commonwealth has coercive rights against every other, the only exception being the head of state (since he is not a member of the commonwealth but its creator or preserver), who alone is authorized to coerce without himself being subject to a coercive law. But whoever is *subject* to laws^d is a *subject*^e within a state and is thus subjected^f to coercive right equally with all the other members of the commonwealth; only one (physical or moral person), the head of state, by whom alone any rightful coercion can be exercised, is excepted. For if he could also be coerced he would not be the head of state and the sequence of subordination would ascend to infinity. But if there were two of them (uncoercible persons), neither would be subject to coercive laws and one could do the other no wrong; and that is impossible.

But this thoroughgoing equality of individuals within a state, as its subjects, is quite consistent with the greatest inequality in terms of the quantity and degree of their possessions, whether in physical or mental superiority over others or in external goods^g and in rights generally (of which there can be many) relatively to others; thus the welfare of one is very much dependent upon the will of another (that of the poor on the rich); thus one must obey (as a child its elders or a wife her husband) and the other directs; thus one serves (a day laborer) and the other pays him, and so forth. But *in terms of right* (which, as the expression of the general will, can be only one and which concerns the form of what is laid down as right^h not the matter or the object in which I have a right), they are nevertheless all equal to one another as subjects; for, no one of them can coerce any other except through public law (and its executor, the head of state), through which every other also resists him in like measure; but no one can lose this authorization to coerce (and so to have a right against others) except by his own crime, and he cannot give it away of his own accord, that is, by a contract, and so bring it about by a rightful actionⁱ that he has no rights but only duties; for he would thereby deprive himself of the right to make a contract and thus the contract would nullify itself.

From this idea of the equality of human beings as subjects within a

^d unter Gesetzen steht

^e Untertan

^f unterworfen

^g Glücksgütern

^h Rechtens

ⁱ rechtliche Handlung

ON THE COMMON SAYING: THAT MAY BE CORRECT IN THEORY

commonwealth there also issues the following formula: Every member of a commonwealth must be allowed to attain any level of rank within it (that can belong to a subject) to which his talent, his industry and his luck can take him; and his fellow subjects may not stand in his way by means of a *hereditary* prerogative (privileges [reserved] for a certain rank), so as to keep him and his descendants forever beneath the rank.

For all right consists merely in the limitation of the freedom of every other to the condition^j that it can coexist with my freedom in accordance with a universal law, and public right (within a commonwealth) is merely the condition^k of an actual legislation in conformity with this principle and joined with power, by virtue of which all those belonging to a people as subjects are in a rightful condition (*status iuridicus*) as such, namely a condition of equality of action and reaction of a choice limiting one another^l in conformity with a universal law of freedom (which is called the civil condition); hence the *innate right* of each in this condition (i.e., his right prior to any rightful deed) is altogether *equal* with respect to the authorization to coerce every other to remain always within the bounds of the consistency of the use of his freedom with mine. Now since birth is not a *deed* of the one who is born, he cannot incur by it any inequality of rightful condition and any other subjection to coercive laws than merely that which is common to him along with all others, as subjects of the sole supreme legislative power; hence there can be no innate prerogative of one member of a commonwealth over another as fellow subjects, and no one can bequeath to his descendants the prerogative of the *rank* which he has within a commonwealth and so also cannot, as if qualified by birth for the ruling rank, coercively prevent others from attaining by their own merit the higher levels of subordination (of *superior* and *inferior*, in which no one, however, is *imperans* and the other *subiectus*). He may bequeath anything else, whatever is a thing (not pertaining to personality) and can be acquired as property and also alienated by him, and so in a series of generations produce a considerable inequality of financial circumstances among the members of a commonwealth (of hireling and hirer, landowners^m and agricultural laborers, and so forth); but he may not prevent their being authorized to raise themselves to like circumstances if their talent, their industry, and their luck make this possible for them. For otherwise he could coerce without others in turn being able to coerce him by their reaction, and would rise above the level of a fellow subject. Again, no one living in a rightful condition of a commonwealth can fall from this equality otherwise than by his own crime, never by a contract or by military force

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^j Bedingung

^k Zustand

^l einer . . . einander einschränkenden Willkür

^m Gutseigentümers

(*occupatio bellica*); for he cannot, by means of any rightful deed (whether his own or another's) cease to be in rightful possession of himself^a and enter the class of domestic animals, which are used for any service as one wants and are kept in it without their consent as long as one wants, even though with the restriction (sometimes sanctioned by religion, as with the Indians) not to maim or kill them. He can be considered happy^b in that condition provided he is aware that, if he does not reach the same level as others, the fault lies only in himself ([his lack of] ability or earnest will) or in circumstances for which he cannot blame any other, but not in the irresistible will of others who, as his fellow subjects in this condition, have no advantage over him as far as right is concerned.*

3. The *independence* (*sibisufficientia*) of a member of a state as a *citizen*, that is, as a colegislator. As for legislation itself, it is not the case that all who are free and equal under already existing public laws are to be held equal with regard to the right to give these laws. Those who are not qualified^c for this right are still, as members of the commonwealth, subject to compliance with these laws and thereby enjoy protection in accordance with them, not, however, as *citizens* but as *cobeneficiaries of this protection*.^d All right, that is to say, depends upon laws. But a public law that determines for everyone what is to be rightfully permitted or forbidden him is

*If we want to connect with the word *gracious* a determinate concept (distinct from kind, beneficent, protective and the like), it can be assigned only to him against whom there is *no coercive* right. Hence only the head of *public administration*^e who brings about and bestows whatever good is possible in accordance with public laws (for the *sovereign*, which gives laws, is, as it were invisible; it is the personified law itself, not its agent) can be entitled *gracious lord*, as the only one against whom there is no coercive right. So even in an aristocracy, as in Venice, for example, the *Senate* is the only gracious lord; all the nobles who comprise it, not excluding the *Doge* himself, are subjects (for only the *Grand Council* is the sovereign) and, as far as the exercise of right^f is concerned, are equal to all others, that is a coercive right against each of them belongs to a subject. Princes (i.e., persons to whom there belongs a hereditary right to government) are, however, called gracious lords (by courtly etiquette, *par courtoisie*) only prospectively and because of that claim; but in terms of their status of possession^g they are still fellow subjects, and even the least of their servants must have a coercive right against them by means of the head of state. Thus there can be no more than a single gracious lord within a state. But as for gracious (strictly speaking, distinguished) ladies, they can be regarded as justified [in their claim to] this title by their rank together with their sex (thus only against the *male sex*), and this by virtue of a refinement of manners^h (called gallantry) by which the male sex believes that it honors itself in proportion as it grants the fair sex precedence over itself.

^a *Eigner seiner selbst zu sein*

^b *für glücklich*

^c *Staatsverwaltung*

^d *Rechtsausübung*

^e *Besitzstand*

^f *Sitten*

^g *fähig*

^h *Schutzenossen*

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the act of a public will, from which all right proceeds and which must therefore itself be incapable of doing wrong to anyone. But this is possible through no other will than that of the entire people (since all decide about all, hence each about himself); for it is only to oneself that one can never do wrong. But if it is another, then the mere will of one distinct from him can decide nothing about him that could not be wrong, and the law of this will would, accordingly, require yet another law that would limit its legislation; hence no particular will can be legislative for a commonwealth. (Strictly speaking, the concepts of external freedom, equality, and the *unity* of the will of *all* come together in order to constitute this concept, and if the first two are taken together, independence is the condition of the last where voting is required.)^v This basic law, which can arise only from the general (united) will of the people, is called the *original contract*.

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He who has the right to vote in this legislation is called a *citizen* (*citoyen*, i.e., *citizen of a state*, not of a town, *bourgeois*). The quality requisite to this, apart from the *natural* one (of not being a child or a woman), is only that of *being one's own master* (*sui iuris*), hence having some *property* (and any art, craft, fine art, or science can be counted as property) that supports him – that is, if he must acquire from others in order to live, he does so only by *alienating what is his** and not by giving others permission to make use of his powers – and hence [the requisite quality is] that, in the strict sense of the word, he *serves* no one other than the commonwealth. Here craftsmen and large (or small) landowners are all equal, namely each is entitled to only one vote. For in regard to the latter – without even raising the question, how it could with right have come about that someone received as his own more land than he could himself make use of with his own hands (for acquisition by military seizure is not first acquisition), and how it came about that many human beings who could otherwise have acquired a lasting status of possession were thereby reduced merely to serving him in order to be able to live? – it would already conflict with the above principle of equality if a law were to grant them such a privileged rank that either

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*Someone who makes an *opus* can convey it to someone else by *alienating* it, just as if it were his property. But *praestatio operaet* is not alienating something. A domestic servant, a shop clerk, a day laborer, or even a barber are merely *operarii*, not *artifices* (in the wider sense of the word) and not members of the state, and are thus also not qualified to be citizens. Although a man to whom I give my firewood to chop and a tailor to whom I give my cloth to make into clothes both seem to be in a quite similar relation to me, still the former differs from the latter, as a barber from a wigmaker (even if I have given him the hair for the wig) and hence as a day laborer from an artist or craftsman, who makes a work that belongs to him until he is paid for it). The latter, in pursuing his trade, thus exchanges his property with another (*opus*), the former, the use of his powers, which he grants^w to another (*operam*). It is, I admit, somewhat difficult to determine what is required in order to be able to claim the rank of a human being who is his own master.

^v zu welcher letzteren, da Stimmgebung erfordert wird . . . Selbstständigkeit die Bedingung ist

^w bewilligt

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their descendants should always remain large (feudal) landowners, whose estates could not be sold or divided by inheritance and thus be used by more of the people, or else that, if there were such a division, no one other than those belonging to a certain class of people decreed at will^x could acquire something of it. That is to say, a great landowner^y eliminates as many smaller owners and their votes as could take his place; thus he does not vote in their name and accordingly has only one vote. Since it must therefore be left dependent only upon the ability, industry, and good fortune of each member of a commonwealth for each at some time to acquire a part of it and all to acquire the whole, but this distinction cannot be taken into account in the universal legislation, the number of those qualified to vote in legislation must be appraised by the number of those in the status of possession, not by the size of their possessions.

But *all* who have this right to vote must agree to this law of public justice; for otherwise there would be a dispute about rights^z between those who do not agree to it and the first, and yet another higher principle of right would be needed to decide it. Thus if the first cannot be expected of an entire people, so that a majority of votes – and indeed not of those voting directly (in a large people) but only of those delegated to do so as representatives of the people – is all that can be foreseen as attainable, the very principle of letting such a majority be sufficient, adopted as with universal agreement and so by a contract, must be the ultimate basis on which a civil constitution is established.

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Conclusion

Now this is an *original contract*, on which alone a civil and hence thoroughly rightful constitution among human beings can be based and a commonwealth established. But it is by no means necessary that this contract (called *contractus originarius* or *pactum sociale*), as a coalition of every particular and private will within a people into a common and public will (for the sake of a merely rightful legislation), be presupposed as a *fact* (as a fact it is indeed not possible) – as if it would first have to be proved from history that a people, into whose rights and obligations we have entered as descendants, once actually carried out such an act, and that it must have left some sure record or instrument of it, orally or in writing, if one is to hold oneself bound to an already existing civil constitution. It is instead *only an idea* of reason, which, however, has its undoubtedly practical reality, namely to bind every legislator to give his laws in such a way that they *could* have arisen from the united will of a whole people and to regard

^x *willkürlich*

^y *Gutsbesitzer*

^z *Rechtstreit*

Kant
Toward Perpetual Peace

Section II, First definitive article

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which contains the definitive articles for perpetual peace among states.

8:349 A condition of peace among men living near one another is not a state of nature (*status naturalis*), which is much rather a condition of war, that is, it involves the constant threat of an outbreak of hostilities even if this does not always occur. A condition of peace must therefore be *established*; for suspension of hostilities is not yet assurance of peace, and unless such assurance is afforded one neighbor by another (as can happen only in a *lawful* condition), the former, who has called upon the latter for it, can treat him as an enemy.*

FIRST DEFINITIVE ARTICLE FOR
PERPETUAL PEACE

The civil constitution in every state shall be republican.

8:350 A constitution established, first on principles of the *freedom* of the members of a society (as individuals), second on principles of the *dependence* of all upon a single common legislation (as subjects), and third on the law of their *equality* (as *citizens of a state*) – the sole constitution that issues from the idea of the original contract, on which all rightful legislation of a people must be based – is a *republican* constitution.[†] The republican con-

8:349 * It is usually assumed that one may not behave with hostility toward another unless he has actively *wronged* me; and that is also quite correct if both are in a condition of *being under civil laws*. For by having entered into such a condition one affords the other the requisite assurance (by means of a superior having power over both). – But a human being (or a nation) in a mere state of nature denies me this assurance and already wrongs me just by being near me in this condition, even if not actively (*facto*) yet by the lawlessness of his condition (*status iniusto*), by which he constantly threatens me; and I can coerce him either to enter with me into a condition of being under civil laws or to leave my neighborhood. Hence the postulate on which all the following articles are based is that all men who can mutually affect one another must belong to some civil constitution.

But any rightful constitution is, with regard to the persons within it,

- (1) one in accord with the *right of citizens of a state*, of individuals within a people (*ius civitatis*),
- (2) one in accord with the *right of nations*, of states in relation to one another (*ius gentium*),
- (3) one in accord with the *right of citizens of the world*, insofar as individuals and states, standing in the relation of externally affecting one another, are to be regarded as citizens of a universal state of mankind (*ius cosmopolitanum*). This division is not made at will^h but is necessary with reference to the idea of perpetual peace. For if only one of these were in a relation of physically affecting another and were yet in a state of nature, the condition of war would be bound up with this, and the aim here is just to be freed from it.

8:350 [†]*Rightful* (hence external) *freedom* cannot be defined, as it usually is, by the warrant to do whatever one wants provided one does no wrong to anyone. For what does *warrant* mean? The possibility of an action insofar as one thereby does no wrong to anyone. So the ^h *willkürlich*

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stitution is thus, as far as right is concerned, in itself that which every kind of civil constitution has as its original basis; the question now is only whether it is also the sole constitution that can lead toward perpetual peace.

Now, in addition to the purity of its origin – its having arisen from the pure source of the concept of right – the republican constitution does offer the prospect of the result wished for, namely perpetual peace; the ground of this is as follows. When the consent of the citizens of a state is required in order to decide whether there shall be war or not (and it cannot be otherwise in this constitution), nothing is more natural than that they will be very hesitant to begin such a bad game, since they would have to decide to take upon themselves all the hardships of war (such as themselves doing the fighting and paying the costs of the war from their own belongings, painfully making good the devastation it leaves behind, and finally – to make the cup of troubles overflow – a burden of debt that embitters peace itself, and

definition would go as follows: freedom is the possibility of actions whereby one does no wrong to anyone. One does no wrong to anyone (one may do what one wants) provided one does no wrong to anyone; hence it is an empty tautology. My external (rightful) *freedom* is, instead, to be defined as follows: it is the warrant to obey no other external laws than those to which I could have given my consent. Similarly, external (rightful) *equality* within a state is that relation of its citizens in which no one can rightfully bind another to something without also being subject to a law by which he in turn *can* be bound in the same way by the other. (There is no need to define the principle of *rightful dependence*, since it is already present in the concept of a state constitution as such.) The validity of these innate and inalienable rights belonging necessarily to humanity is confirmed and enhanced by the principle of rightful relations of a human being even to higher beings (if he thinks of them), inasmuch as he represents himself, in accord with the very same principles, as also a citizen of a state in a supersensible world. For, as regards my freedom, I have no obligation even with respect to divine laws that I can cognize by reason alone except insofar as I could have given my consent to them (since it is by the law of freedom of my own reason that I first make for myself a concept of the divine will). As regards the principle of equality with respect to the most sublime being in the world, except for God, that I might happen to think of (a great *Aeon*): if I do my duty in my post as that *Aeon* does his duty in his, there is no basis for mere obedience to duty belonging to me and the right to command to him. That this principle of *equality* is not (like the principle of freedom) also appropriate to our relation to God has its ground in this: that he is the only being to whom the concept of duty is inapplicable.

But as regards the right of equality of all citizens of a state as subjects, the answer to the question, whether a *hereditary nobility* is allowable, turns only on whether the *rank* granted by a state (of one subject being above another) would have to precede *merit*, or whether the latter would have to precede the former. Now it is obvious that if rank is connected with birth, it is quite uncertain whether merit (skill and fidelity in one's office) will follow; hence it will be just as if rank (being in command) were granted to a favorite without any merit, and the general will of a people in the original contract (which is yet the principle of all rights) will never decide upon this. For a nobleman is not necessarily a *noble* man. As for *nobility of office* (as the rank of a higher magistracy could be called, which must be acquired for oneself by merit), there rank adheres to a post, not as property to a person, and equality is not violated by it; for, when he retires from his office, he also lays down his rank and goes back among the people.

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that can never be paid off because of new wars always impending); on the other hand, under a constitution in which subjects are not citizens of the state, which is therefore not republican, [deciding upon war] is the easiest thing in the world; because the head of state is not a member of the state but its proprietorⁱ and gives up nothing at all of his feasts, hunts, pleasure palaces, court festivals, and so forth, he can decide upon war, as upon a kind of pleasure party, for insignificant cause, and can with indifference leave the justification of the war, for the sake of propriety, to the diplomatic corps,

8:351 which is always ready to provide it.

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8:352 So that a republican constitution will not be confused with a democratic constitution (as usually happens), the following must be noted. The forms

of a state (*civitas*) can be divided either according to the different persons who have supreme power within a state or according to the way a people is governed by its head of state, whoever this may be; the first is called, strictly speaking, the form of *sovereignty* (*forma imperii*), and only three such forms are possible: namely, either only *one*, or *some* in association, or *all* those together who constitute the civil society possess sovereign power (*autocracy*, *aristocracy*, and *democracy*, the power of a prince, the power of a nobility, and the power of a people). The second is the form of government (*forma regiminis*) and has to do with the way a state, on the basis of its civil constitution (the act of the general will by which a multitude becomes a people), makes use of its plenary power; and with regard to this, the form of a state is either *republican* or *despotic*. *Republicanism* is the political principle of separation of the executive power (the government) from the legislative power; despotism is that of the high-handed management of the state by laws the regent has himself given, inasmuch as he handles the public will as his private will. Of the three forms of state, that of *democracy* in the strict sense of the word is necessarily a *despotism* because it establishes an executive power in which all decide for and, if need be, against one (who thus does not agree), so that all, who are nevertheless not all, decide; and this is a contradiction of the general will with itself and with freedom.

This is to say that any form of government which is not *representative* is, strictly speaking, *without form*, because the legislator cannot be in one and the same person also executor of its will (any more than the universal of the major premise in a syllogism can also be the subsumption of the particular under it in the minor premise); and even if the other two state constitutions are always defective insofar as they leave room for this kind of government, in their case it is at least possible for them to adopt a kind of government in conformity with the *spirit* of a representative system, as

ⁱ nicht Staatsgenoße, sondern Staatseigentümer

TOWARD PERPETUAL PEACE

Frederick II, for example, at least *said* that he was only the highest servant of the state,* whereas a democratic constitution makes this impossible because there everyone wants to be ruler. It can therefore be said that the smaller the number of persons exercising the power of a state (the number of rulers) and the greater their representation, so much the more does its constitution accord with the possibility of republicanism, and the constitution can hope by gradual reforms finally to raise itself to this. On this basis it is already harder in an aristocracy than in a monarchy to achieve this sole constitution that is perfectly rightful, but in a democracy it is impossible except by violent revolution. The kind of government,[†] however, is of incomparably greater concern to the people than is the form of state (though a good deal also depends on how adequate the latter is to the former's end). But if the kind of government is to be in conformity with the concept of right, it must have a representative system, in which alone a republican kind of government is possible and without which the government is despotic and violent (whatever the constitution may be). None of the ancient republics, so called, knew this system, and because of this they simply had to disintegrate into despotism, which under the rule of a single individual is still the most bearable of all.

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SECOND DEFINITIVE ARTICLE FOR PERPETUAL PEACE

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The right of nations shall be based on a *federalism* of free states.

Nations, as states, can be appraised as individuals, who in their natural condition (that is, in their independence from external laws) already

* The exalted epithets often bestowed on a ruler ("the divinely anointed," "the administrator of the divine will on earth and its representative") have often been censured as gross and dizzying flattery, but, it seems to me, without grounds. Far from making the ruler of a country arrogant, they would rather have to humble him in his soul if he is intelligent (as must be assumed) and make him reflect that he has taken on an office too great for a human being – namely the most sacred office that God has on earth, that of trustee of *the right of human beings* – and that he must always be concerned about having in some way offended against this "apple of God's eye."

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[†] Mallet du Pan boasts,⁴ in his pompous but hollow and empty language, of having at last, after many years of experience, become convinced of the truth of Pope's well-known saying: "For forms of government let fools contest; whate'er is best administered is best." If this means that the best administered government is best administered, he has, as Swift expressed it, cracked a nut that rewarded him with a worm; but if it means that the best administered government is also the best government, i.e., the best constitution of a state, then it is quite false; for examples of good governments prove nothing about kinds of government. Who governed better than a Titus or a Marcus Aurelius, and yet one left a Domitian as his successor and the other a Commodus; and this could not have happened if the state had had a good constitution, since their unsuitability for this post was well known early enough and the ruler's power was also sufficient to exclude them.

Ripstein
Force and Freedom
Chapter 7 (Skip Section VI)

Public Right I: Giving Laws to Ourselves

KANT'S CHARACTERIZATION of the three defects in the state of nature provides an account of why, in the absence of a “united and lawgiving will,” conclusive private rights are impossible, and even the innate right of humanity in your own person is insecure. The arguments also show that a fully rightful condition must contain a separation of powers between legislative, executive, and judicial branches, because the resolution of disputes and the enforcement of rights must be done in accordance with prior law. Kant characterizes the need for a rightful condition as the “postulate of public right.” Like the other postulates in the *Doctrine of Right*, it is both the conclusion of a normative argument and, at the same time, a postulate in Kant's technical sense of the term: an application of normative concepts to objects of experience,¹ in this case governments and their officials.

The arguments about the defects establish a negative claim: private

1. A postulate “does not augment the concept” to which it is “applied in the least” (Kant, *Critique of Pure Reason*, trans. Paul Guyer and Allen Wood [Cambridge: Cambridge University Press, 1998], A219/B266). Instead, it applies modal concepts to a concept already determined. I explain this point in more detail in the appendix.

interaction is morally incoherent without a public standpoint created through institutions. This chapter develops Kant's argument for the corresponding positive claim: a public standpoint, and so a rightful condition, is possible through institutions. Each of the defects in the state of nature requires an omnilateral authorization to solve it; solutions to the general problem of political authority and the problems of enforcement and classification of particulars are only consistent with the system of equal freedom provided that they are instances of an omnilateral will. Kant needs to explain how institutions can act omnilaterally. The first part of this chapter will provide Kant's solution to that problem, and show that the postulate of public right can be satisfied.

The second part of the chapter considers a further characterization Kant gives of a rightful condition in terms of the ideal version of it, which he calls "the idea of the original contract." Kant says that the state cannot make a law that the people could not impose on itself. What work is the idea of self-imposed law doing, and on what basis could the people decide between potential laws? This part also frames the general issue addressed in the next several chapters, each of which considers what Kant characterizes as the "effects with regards to rights" that follow from the nature of the civil union. Each of these reflects an institutional precondition of omnilateral lawgiving.

In the Preface to *The Metaphysics of Morals*, Kant concedes that "toward the end of the book I have worked less thoroughly over certain sections than might be expected in comparison with the earlier ones, partly because it seems to me that they can be easily inferred from the earlier ones and partly, too, because the later sections (dealing with public right) are currently subject to so much discussion, and still so important, but they can well justify postponing a decisive judgment for some time."² In developing Kant's position in the chapters on public right I draw on the earlier analyses in private right, from which the arguments might be "easily inferred." I have also taken account of more recent discussions of the same issues, both philosophical and juridical, which re-

2. 6:209.

main “subject to so much discussion, and still so important,” two centuries later.

I. The General Will

A. Three Private Law Models of Political Power

The idea of people giving laws to themselves has taken three general forms in the social contract tradition, each of which reflects one of the standard ways in which private parties acquire obligations to each other. The first of these, which gives the tradition its name, is the idea of a contract, understood as a voluntary undertaking of a commitment, normally undertaken in consideration of something to be gained. Hobbes and Locke both emphasize aspects of this first idea. The second is the idea of cooperative fairness: those who benefit from their participation in a joint venture must bear their share of the costs of sustaining it. The third is the idea of authorization, whereby one person accepts responsibility for deeds done by another person. Hobbes represents the relation between the state and its citizens this way.

Kant’s account of the reciprocal rights and obligations that private parties have in a state of nature makes each of these models inappropriate for an account of political authority. Any such model must presuppose the very thing that needs to be explained, that is, the transition from provisional to conclusive rights. You cannot transfer better title than you have. Outside of a rightful condition, all title is only provisional, so that any act of consent or transfer, implicit or explicit, will also be provisional. If private transactions do not give rise to enforceable rights, the contract to set up the state will not be enforceable either.

This difficulty is particularly clear if we focus on the idea of actual consent. As we saw in Chapter 5, consent is central to Kant’s analysis of rightful relations between private parties, but its role in that account makes it unsuitable for an understanding of political legitimacy. Consent makes interactions between private parties rightful by making them exercises of the purposiveness of both parties. That role in private relations makes it unsuitable as a basis for public order. If we don’t have conclusively right-

ful private claims without law, ordinary consent lacks its condition of application.

The same point applies to the idea that citizens authorize the state to act as their agent; you can only empower an agent to act on your behalf if you would be entitled to do those things. If people in a state of nature lack the authority to make, apply, or enforce laws, they cannot authorize the state to do so on their behalf. That does not mean that the state could not be entitled to do so; only that no datable act of authorization could be the basis of that entitlement.

Similar difficulties bedevil attempts to ground political obligation not in an actual transfer but in an idealized one, by appeal to a general moral obligation to contribute to a cooperative venture from which they benefit. On this view, the benefits of social cooperation, and the institution of a state, are such that everyone can be made to bear his or her fair share of the burden of providing them. The advantages of framing the issue in this way seem clear, because they require neither a specific occasion of agreement nor the private negotiation of the terms of that agreement.

This approach receives a particularly forceful statement in an early and still influential article by H. L. A. Hart called “Are There Any Natural Rights?” Hart later moved away from the paper’s main argument, which closely followed Kant’s claim that there is a natural right to freedom. The paper’s abiding legacy has been Hart’s introduction of what has come to be called “the principle of fair play,” according to which,

when a number of persons conduct any joint enterprise according to rules and thus restrict their liberty, those who have submitted to these restrictions when required have a right to a similar submission from those who have benefited by their submission. The rules may provide that officials should have authority to enforce obedience and make further rules, and this will create a structure of legal rights and duties, but the moral obligation to obey the rules in such circumstances is due to the co-operating members of the society, and they have the correlative moral right to obedience. In social situations of this sort (of which political society is the most complex example) the obligation to obey the rules is something distinct from whatever other moral

reasons there may be for obedience in terms of good consequences (e.g., the prevention of suffering); the obligation is due to the cooperating members of the society as such and not because they are human beings on whom it would be wrong to inflict suffering.³

Hart is right to treat enforceable principles of social cooperation as *sui generis*, and distinct from whatever principles prohibit the infliction of suffering. He is also right to argue that the obligation is owed to “the co-operating members of society” as members rather than to one or more of them considered severally. His formulation goes wrong at two crucial points, however: in his characterization of its scope (“when a number of persons conduct any joint enterprise”) and in his treatment of political society as a special case of a more general obligation (“the most complex example”). Hart’s formulation suggests that people can be compelled to abide by the rules of political societies as an instance of the more general moral principle according to which they can always be compelled to join joint enterprises from which they benefit. Hart does not explain how this principle can be reconciled with the right to freedom that forms the subject matter of the rest of his essay.

The difficulty with the broad principle according to which you can be made to pay for or otherwise contribute to the production of benefits you have received is not that it never applies. In some cases its morality seems intuitively plausible, even obvious. The person who refuses to do his or her fair share in some cooperative project is resented by the others, who are motivated by a sense that it is unfair that they should be contributing when someone else is unwilling to contribute. The person who always refuses to help clean up after the picnic, like the kid at the playground who refuses to take turns with the water pump or swing, is resented. Everyone else shows self-restraint, but this person does not.

A similar principle does seem to be at work in political life: the person who parks on the sidewalk, or regularly blocks it for his own convenience,

3. Hart, “Are There Any Natural Rights?” *Philosophical Review* 64, 2 (1955): 175–191. The same general idea may underlie Locke’s doctrine of “tacit consent,” according to which living in a state and accepting its benefits amount to consent. In a similar way, Locke’s theory of property can be read as generating the right to exclude from the right to prevent others from benefiting from my efforts.

is resented, as is the person who uses government services but evades taxes. So it is natural enough to suppose that the same principle is at work in both the informal case and the legal case.

Despite its plausibility, as Hart articulates the principle, it is poorly suited to underwriting mandatory cooperation.⁴ Robert Nozick's familiar counterexamples exploit this feature of the formulation: just because your neighbors make the streets more beautiful does not entitle them to compel you to join in their project. Nor do you need to refuse the benefit by closing your eyes as you walk past their houses.⁵ The example, like the others that Nozick develops, has seemed to defenders of the principle of fair play to be beside the point. John Simmons attempts to repair the principle by limiting its application to "participants" or "insiders" in the scheme, suggesting that "one becomes a participant in the scheme precisely by accepting the benefits it offers."⁶ Simmons illustrates the revised principle with the example of a person who refuses to join his neighbors in digging a well and then goes each evening to draw water from it. This person is a free rider, not because he has consented, but because he has taken benefits without doing his part to produce them. This revised principle is plausible, and makes sense of some of the informal examples—the kid at the playground gets a turn, taking advantage of the system of taking

4. In "Legal Obligation and the Duty of Fair Play," in his *Collected Papers* (Cambridge, Mass.: Harvard University Press, 1999), 117, Rawls endorses the principle of fair play and says that he "means to exclude the possibility that the obligation to obey the law is based on a special principle of its own." In *A Theory of Justice*, he restricts its use to participation in rule-governed activities. His disparate examples—marriage, promising, running for political office, playing a game—suggest that to have "voluntarily accepted the benefits" of an institution a person must have participated in it in accordance with its rules, rather than simply benefited from the participation of others. These examples suggest that Rawls does not suppose the principle to have as wide a scope as Hart suggests. Indeed, the case of officials, who choose to participate in government and so fall under the principle of fair play, is explicitly distinguished from that of ordinary citizens, who have what Rawls calls a "natural duty" to support just institutions. See *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971), 342–343. The duty to support just institutions is natural in the sense that it does not require voluntary participation or acceptance of benefits. I am grateful to Jon Mandle for discussion of this point.

5. Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), 93–94.

6. Simmons, "The Principle of Fair Play," *Philosophy and Public Affairs* 8 (1979): 323–324.

turns, but then refuses to give up the swing, and so on—but, as Simmons points out, it does nothing to underwrite mandatory forms of cooperation such as the state. It says only that *if* you voluntarily participate in the cooperative arrangement by choosing to accept its benefits, *then* you can be required to “do your part” in producing or paying for the benefits. If you cannot refuse the benefits, however, then you cannot be compelled to contribute to producing them.⁷

Simmons’s revision of the principle lends it some plausibility as a principle of private right, but dooms it as a principle of public right. As he formulates it, it is a social version of the familiar legal principle of unjust enrichment, according to which someone who freely accepts a benefit from another can be compelled to pay for it. As such, it is not specific to social cooperation. The relevant obligations hold, when they do, between any two private persons—if you dig a well and I draw water from it, I am required to pay you for it. The fact that a group produces the good is not essential to the analysis. As a principle of private right, however, the principle of free acceptance is even narrower than Simmons suggests. In particular, it does not apply to the case in which someone confers a benefit in the hope of extracting a contribution; I only need to pay for benefits I freely accept if those conferring the benefits *do not* do so in the hope of engaging in a transaction with me. If I do not honk my horn to signal my refusal of your services when you squeegee my windshield, you have conferred a benefit on me in the hope of reward; the fact that I am glad to have a clean windshield is irrelevant. I do not need enter into the arrangement you have proposed. As Baron Pollock famously asked in the nineteenth century, “One cleans another’s shoes; what can the other do but put them on?”⁸ We saw in our discussion of property that even if the Lockean premise that people own their labor is accepted, your efforts generate no right to the *fruits* of your labor unless you capture them successfully. For all of the same reasons, my willing acceptance of those fruits

7. Despite some initial plausibility, Simmons’s example manages to dodge some difficult questions. Where is the imagined well? If it is on private property, then the free rider is also a trespasser, unless it is on the free rider’s land, in which case the well diggers are trespassers, and he may claim their efforts as his own; if it is on public property, who authorized this particular use of it? Indeed, absent some *independent* principle of mandatory cooperation, how did the public property get established?

8. *Taylor v. Laird* (1856), 156 E. R. 1203.

gives you no claim against me in cases in which you direct them to me in the expectation of recompense.

As a principle of private transactions, Simmons's principle of accepted benefits cannot do the work that Hart wants it to, because it has precisely the difficulty that Hart sought to avoid, namely its requirement of voluntariness. Hart writes that the mistake of the classical contract theorists "was to identify *this* right creating situation of mutual restrictions with the paradigm case of promising; there are of course important similarities, and these are just the points which all special rights have in common, viz., that they arise out of special relationships between human beings and not out of the character of the action to be done or its effects."⁹ The principle of unjust enrichment differs from the principle of promise keeping, but they are alike in requiring a transaction between the parties. That likeness prevents *either* from explaining mandatory cooperation: both are principles of voluntary interaction.

I cannot hope to canvass the literature seeking to defend the principle of fair play from Nozick's criticisms and Simmons's restrictions. I need not do so, however, because the entire debate has taken place on the mistaken grounds on which Hart set it out, by seeking to find a general principle applicable both outside and within the "most complex example" of political society. Hart takes himself to be capturing the truth in social contract theories of government, but instead he simply reproduces their core difficulty by supposing that a model taken from private relationships applies to authorizing the state. Outside of political society, there is no principle mandating participation in beneficial cooperative activities; within political society, the principle requiring people to do their fair share only applies if participation in political society can be shown to be mandatory on other grounds.

The problem for the benefit/burden principle as a basis of political justification is not simply that people may not have freely accepted the goods and services provided by the state, given that they have no real opportunity to reject them. As Simmons points out, that only shows that actual states do not satisfy its requirements.¹⁰ The more significant problem is that it is the wrong test: others can only compel you to pay for or

9. Hart, "Are There Any Natural Rights?", 186.

10. Simmons, "The Principle of Fair Play," 336.

otherwise contribute to benefits you have freely accepted if we are *already* in a rightful condition in which people can be compelled to pay for or contribute to things, so any such obligation needs to be explained. In a private transaction, you can only make me pay for something from which you are entitled to exclude me. If the cooperators who create the benefit are not entitled to exclude me from the benefit, they cannot obligate me to contribute to it. The whole point of Kant's argument is to explain how provisional rights can only be conclusive in a rightful condition. The right to exclude is the core of that very problem.

Both the transfer and free acceptance models fail for another reason as well. Both seek to resolve the idea of a general will into a large series of bilateral relations between individuals and the state. Yet the question of how the state can have the power to enforce is really just the question of how there can be a state at all, how anything can count as an act performed or commitment undertaken by it. So we cannot presuppose the state as a party to it in explaining the contract.

More generally, the creation of a rightful condition cannot require a private transaction of any sort, because the rightful condition is the only context in which procedures can be valid, so that the legitimacy of an outcome depends upon how it came about. Thus the two clear problems with the idea that there is a contract to enter a rightful condition—first, that any such contract is merely “provisional” without a rightful condition, and second, that a contract by ancestors cannot bind their descendants—are manifestations of this broader problem. If procedures cannot be made authoritative, then the fact that people agree to something is not actually binding.

B. Persons and Offices

If people do not unite their wills through a series of private arrangements, in what sense can the actions of the state be said to be omnilateral, rather than just the unilateral acts of the particular officials making the decisions? The failure of the private law models of political authority raises a further issue as well. Both models aim to identify a bilateral relationship between each citizen and the state. In so doing they aspire to explain why a particular state has authority over a particular citizen, by showing that

that citizen has transferred some right to or received some benefit from that particular state. The failure of those accounts does not make that question go away; the fact that a state accomplishes something of great moral importance does not show who, in particular, it has authority over.

Kant's solution to these difficulties is not to find some other principle of private ordering, because no principle of private ordering can do the job. Instead, he works through the implications of the idea that "the best constitution is that in which power belongs not to human beings but to the laws."¹¹ His basic strategy is to show that a rightful condition can give authority to laws rather than human beings, so that the actions of particular human beings in making, enforcing, and applying laws can be exercises of public rather than private power, and so are instances of an omnilateral will. Institutions can do so because they incorporate a distinction between the offices they create and the officials carrying them out.

We have already seen part of the solution in Kant's claim, considered in the last chapter, that the incentive provided by a public authority is different from the incentive provided by another private person, and in his claim that the decision of the court is different from the decision of your neighbor. Neither of those arguments rests on any claim about the ability of officials to do anything more than act on their own best judgment, or to take the point of view of the universe.¹² Instead, both arguments focus on the way in which a publicly constituted role makes the provision of incentives or the exercise of judgment consistent with the rights of everyone. The legal rule solves the problem of assurance by providing each with the assurance that others have that incentive to respect everyone's acquired rights; a legally constituted court solves the problem of indeterminacy by interpreting objective standards from a standpoint that is not defined by the views of either party, not merely from the perspective of some other

11. 6:355.

12. Nor do they rest on the kind of claim made famous by Ronald Dworkin, according to which the positive law and morality taken together contain a single best answer to every legal question, and the task of the judge is to discover it through an interpretive exercise (*Law's Empire* [Cambridge, Mass.: Harvard University Press, 1986], 239). Dworkin's Hercules uses morality to render the application of positive law to particulars both determinate and morally appropriate. The Kantian judge, by contrast, applies positive law to particulars in order to make the relevant parts of morality apply to them.

private party. In so doing, the court acts consistently with the freedom of the parties, something that neither of them could do on his or her own.

The solutions to the problems of assurance and determinacy incorporate the idea of an official acting within his or her mandate. An official is permitted only to act for the purposes defined by that mandate. The concept of an official role thus introduces a distinction between the mandate created by the office and the private purposes of the officeholder. That distinction shows what it is for laws rather than people to rule, even though the actual ruling is done by people.

Focusing on the executive and judiciary might seem to simply push the same question back: the claim that lesser officials act for the state when they act within their legal mandates is only helpful if the legislature that confers those mandates is itself an omnilateral will. But the distinction between rule by laws and rule by human beings once more maps onto the distinction between an office and a person occupying it. All that is required for the legislative will to be omnilateral is for the distinction between public and private purposes to apply to it in the right way. As I shall now explain, the only public purpose that is relevant is the public purpose of creating and sustaining a rightful condition.

The clue to the application of the person/office distinction to the legislature is contained in the failure of the private law models of consent. As a principle of private right, actual agreement regulates interacting persons. However, in circumstances in which actual agreement is not possible, either because one person is incompetent to consent, as in the case of children or comatose patients, or because a person is unavailable to be consulted about particular matters, as in the case of a person who entrusts his affairs to another, one person can “make arrangements for another” consistent with right provided that the first does so subject to the formal constraints of relations of status. First, the person making arrangements must act so as to ensure the ongoing purposiveness of the one for whom the arrangements are being made, and second, the person making the arrangements is precluded from using the power to make those arrangements for his own private purposes. Even the power to ensure the ongoing purposiveness of another person can only be exercised on terms to which that person could consent; as we saw in Chapter 5, there are certain arrangements to which a person could not consent, as a matter of right, even if he

found them advantageous. You cannot sell yourself into slavery, even if the proceeds could be used to care for others whom you care about more than your own freedom; you could not consent to participate in a public gladiatorial contest even if you were confident you would win, or if the prospect of your heirs receiving a handsome fee was more important to you than life itself. You can only make arrangements for yourself that do not allow others to treat you as a mere means. If you cannot make such arrangements for yourself, no other person could act on your behalf to make them for you. If a person cannot sell herself into slavery even in the expectation of a benefit, then parents lack the rightful power to sell their children into slavery, even if circumstances are such that those children would have a better life or be more likely to survive as slaves than as free persons.¹³

The structure of an official role parallels the structure of a person in a private relationship of status: an official is legally empowered to make arrangements for others, and is thereby prohibited from using his or her office for private purposes. Thus officials may neither take bribes nor award government contracts to their friends or family members. While the details of these restrictions require legal specification, their broad structure is clear: offices are for public purposes, and any power of choice they confer on their holders is public, not private. The distinction between an official's acting within his or her mandate and outside it does not depend on the official's attitude: legal systems can operate effectively even if many of their officials do not care about the law or justice, but only about doing their jobs and collecting their pay. The contrast between official duty and private corruption applies to such alienated officials in the same way that it applies to committed ones. The possibility of people living together in a rightful condition depends on external conduct, includ-

13. The deplorable situation of desperately poor people sometimes leads them to sell their children, and many commentators hope to block such contracts on the grounds that neither parents nor children had a real choice in the matter. See, for example, Debra Satz, *Why Some Things Should Not Be for Sale: On the Limits of Markets* (Oxford: Oxford University Press, 2008). Kant has a different explanation of why such contracts are not binding: nobody could have such a rightful power over another, though he certainly agrees that preventing such situations is a fundamental duty of the state under public right.

ing external conduct within the three branches of government, rather than on any person's attitude toward that conduct.¹⁴

The broad structure of making arrangements for another is present in each of the branches of the Kantian state. Each of legislature, executive, and judiciary changes the normative situation of private persons, and through the exercise of their powers, legislature and judiciary render persons vulnerable to coercion. As we will see in later chapters, the sovereign (legislature) also has the power to tax and to spend tax monies on the creation of public spaces, health, and national defense, and to make judgments about how to do these things effectively. We will also see that the fact that the power so exercised is not subject to private consent provides the ideal against which any such arrangement must be judged.

The state is thus in one important respect in a position parallel to a parent in relation to his or her child.¹⁵ The state's entitlement to make arrangements for its citizens needs to be consistent with their freedom, even though that consistency cannot be secured by consent. Unlike the parental mandate to "manage and develop" a child, which covers whatever is required to enable the child to become a full member of adult society, capable of consenting to or refusing various private interactions, the state's mandate is much narrower. The parent guides a child to make it into its own master; the state creates a rightful condition in which each person can be his or her own master. Outside of a rightful condition citizens lack the conclusive rights required to create binding arrangements. So officials may take it upon themselves to act for them, but only in ways consistent with their freedom, that is, to create institutions capable of making law. It follows that the state's entitlement only extends to securing the rights of citizens, and never to advancing their private purposes.

When officials act within their roles, they act for the state; Kant also makes the stronger claim that they act for the people. This might appear to collapse back into a private law model by presupposing conclusive pri-

14. On alienated officials as a central topic for legal philosophy, See Scott Shapiro, *Legality* (forthcoming). Kant's remark that even a "race of devils" could solve the problem of right rests on the same idea (Kant, *Toward a Perpetual Peace*, 8:366).

15. For an analysis of the requirements this structure imposes on the state to be fair in addressing the competing claims of different citizens, see Evan Fox-Decent, "The Fiduciary Nature of State Legal Authority" *Queen's Law Journal* 31 (2005): 259—310.

vate rights as the basis for a civil condition. Kant's claim, however, is not that citizens actively entrust their affairs to the state, nor even that officials act for citizens considered separately. Instead, officials act for the citizens considered as a collective body. Kant introduces the term "people" as "a multitude of human beings";¹⁶ taken together, they create what he characterizes in the *Critique of Pure Reason* as a "totality," that is, a plurality considered as a unity.¹⁷ A multitude of human beings is a people just because institutions act for them; the institutions are the principle of their unity, and the acts of those institutions are the acts of the people. Kant's claim is thus not that each citizen has in fact consented to or transferred power to the state, nor even that the people have somehow united themselves and then transferred power to the state, but that the state, through its institutions, creates the people, because only through institutions can "a multitude of human beings" make itself into a people. So if a group of officials make, apply, and enforce law in a given region of the Earth's surface, in so doing they thereby unite the inhabitants of that region into a people. By becoming an agent for the people, the state creates that people as a moral subject to whom its acts can be imputed. The state's entitlement to rule does not depend on "whether a state began with an actual contract of submission (*pactum subiectionis civilis*) as a fact, or whether power came first and law arrived only afterward, or even whether they should have followed in this order."¹⁸ What matters is that officials create a rightful condition; if they do, it is a rightful condition for the people in it. Kant can thus agree with Hobbes that a people is created by the institutions that act for it.¹⁹ The existence of representative institutions—that is, institutions in which the officials act on behalf of the citizens considered as a collective body—makes it possible for the people to live together under laws *and so* to become a collective body.²⁰ Its status as a collective

16. 6:311.

17. *Critique of Pure Reason*, A80/B106.

18. 6:318.

19. Hobbes, *Leviathan* (Indianapolis: Hackett, 1994), 110 (chap. XVIII).

20. A representative acts on behalf of those he or she represents. Although election is the ideal way to select representatives, direct voting on all questions, or election of mere delegates who are not representatives, is a form of despotism. Kant thus concludes that a monarch could, in principle, represent the general will, as he says Frederick the Great at least claimed to

body is antecedent to any questions about its ability to rule itself through those institutions.

Powers exercised within a rightful condition provide the omnilateral will required to repair each of the three defects in a state of nature. Public acts are omnilateral because they are not any particular person's unilateral choice, but instead are exercised on behalf of the citizens considered as a collective body. They are also omnilateral in a further sense: a unilateral will always has some particular end, some matter of choice. The omnilateral will is different, because all that it provides is a form of choice, by providing procedures through which laws can be made, applied, and enforced. To return to Kant's initial example, when the state authorizes the acquisition of private property, it does not make the having of property, or the accumulation of wealth, its purpose. Its purpose is to enable individual human beings to have things as their own as against each other, in accordance with the postulate of private right. When the state acts to sustain a rightful condition, in the ways to be discussed in Chapters 8 and 9, it does not have the happiness of its citizens or the gross national product as its end; it only acts to preserve the formal conditions through which people can rule themselves. And when the state punishes criminals, the topic of Chapter 10, it does not do so to prevent harm or to see to it that wrongdoers get what they deserve. It simply upholds the supremacy of its own law.

Kant's account avoids the difficulties of the private law models because it does not suppose that creation of conclusive rights requires the exercise of conclusive rights. The creation of a rightful condition is *lege*, deemed by law, rather than the result of a particular affirmative act,²¹ and Kant concedes that it begins by a deed of "seizing supreme power."²² Once a state has established itself, nobody has standing to resist its creation or its claim to rule on the ground that he or she did not agree to it, because any such disagreement is the denial of an omnilateral will and so merely a unilateral act of refusal, and a unilateral will is never a law for

do, but that an Athenian democracy is necessarily a despotism because nonrepresentative. See *Toward a Perpetual Peace*, 8:352.

21. Kant identifies acquisition *lege* with omnilateral acquisition at 6:260.

22. 6:372.

others. So you are under an obligation, characterized in terms of the postulate of public right, which requires that “when you cannot avoid living side by side with all others, you ought to leave the state of nature and proceed with them into a rightful condition.”²³ The rightful condition you have entered is the one that has authority over you.

Kant’s solution to the problem of authority, then, is to show that official action, simply as such, is not an instance of one person’s unilaterally choosing for another. His solution does not depend on any claims about an authority’s ability to generate the correct result in every case, or even on the greater reliability of its chosen procedures, measured against some external criterion.²⁴ Whether you prevail in a particular civil trial may depend *in fact* on who the lawyers are, who the judge is, or who the jurors are. Whether the tax regime is the one that is most advantageous to you, or even to everyone, depends in part on particular decisions made by various officials, not all of which may be wise, fair, or prudent. So long as everyone acts in his or her official capacity, the result is authorized by law, and so is not arbitrary from the standpoint of freedom. Kant’s account also explains the “content independence” of authority that has drawn the attention of many recent writers: the fact that different laws, or different

23. 6:307.

24. Joseph Raz’s influential theory of political authority claims that an authority is legitimate if individuals normally do better at complying with reasons that apply to them independently by following it than by considering those reasons directly. See Raz, “Authority and Justification,” *Philosophy and Public Affairs* 14: 1 (Winter 1985): 3–29. Kant’s account is consistent with Raz’s analysis so long as the idea of “reasons applying” is understood in the right way. For Kant, the only relevant reasons are duties of right, and the state’s authority extends only to those duties, which cannot be coherently followed except in a rightful condition. All of the acts of a rightful condition, including the state’s entitlement to decide how to achieve various public purposes, can be described as enabling people to “do better” at conforming to their duties of right. It is crucial to Kant’s account that the authority is partly constitutive of the application of the underlying duties of right. Nothing in Raz’s formulation precludes this, although his appeal to an analogy between political authority and technical expertise might be taken to suggest that the relevant reasons must be determinate apart from the exercise of authority, and the authority’s role purely epistemic. The acknowledged role of authority in solving coordination problems by partially constituting their solution shows that Raz’s account is more accommodating. Raz’s political philosophy is opposed to Kant’s because based on two further claims: that rights are based on interests that can be specified nonrelationally, and that law is a tool for achieving purposes that can be fully specified without reference to law. See *The Morality of Freedom* (Oxford: Clarendon, 1986).

official decisions, with different outcomes could *also* have been authorized by law does nothing to make the actual decisions lack authority, because the rule of law constitutes its authority by creating reciprocal limits on freedom through common institutions. Those institutions empower officials to decide authoritatively by deciding for everyone. Again, many details of legislation will depend on all kinds of factors that are accidental from the standpoint of right. However, provided that the legislature acts within its powers, the result is not merely unilateral.

Kant's account also explains why legal authority attaches to positive law in particular. Within a legal system, whether a given norm counts as a legal norm depends upon facts about official acts of lawmaking;²⁵ positive law is the alternative to each doing “what seems good and right to it.” That is just to say that only positive law can solve the three defects in a state of nature.

II. The Idea of the Original Contract

Kant's account of the authority of public institutions shows how the postulate of public right can be satisfied by actual people filling humanly created offices. People “leave the state of nature and proceed” with others “into a rightful condition” simply by being subject to laws.²⁶ The postulate of public right lays out the minimal conditions for the existence of a rightful condition; it can be “explicated analytically from the concept of *right* in external relations as opposed to violence,”²⁷ because it contains only the requirement that institutions make, apply, and enforce laws. In a rightful condition, citizens know where they stand in relation to each other: each is secured in his or her rights because objects can be acquired and owned, and disputes resolved consistent with the freedom of all.

Kant also gives a further account of a rightful condition when he argues that every state must be understood, and assessed, in light of what he calls the “idea of the original contract.” The point of the contract argu-

25. For this minimal definition of law's positivity, and a contrast between it and many other related claims, see John Gardner, “Legal Positivism: 5½ Myths,” *American Journal of Jurisprudence* 46 (2001): 199–227.

26. 6:307.

27. Ibid.

ment is not to represent the state as the product of voluntary agreement between private wills, but to show the normative structure through which the exercise of public power is consistent with individual freedom. Although Kant introduces the term in his discussion of the unilateral nature of acquisition,²⁸ the full explanation appears in Public Right:

The act by which a people forms itself into a state is the original contract. Properly speaking, the original contract is only the idea of this act, in terms of which alone we can think of the legitimacy of the state. In accordance with the original contract, everyone (*omnes et singuli*) within a people gives up his external freedom in order to take it up again immediately as a member of the commonwealth, that is, of the people considered as a state (*universi*). And one cannot say: the human being in a state has sacrificed a part of his innate outer freedom for the sake of an end, but rather, he has relinquished entirely his wild, lawless freedom in order to find his freedom as such undiminished, in a dependence upon laws, that is, in a rightful condition, since this dependence arises from his own lawgiving will.²⁹

The ideal case for thinking about a rightful condition is the one in which the people, considered as a collective body, unite to rule themselves, considered severally. No actual state could be fully congruent with this idea, because it is both abstract and normative, and so not equivalent to any set of empirical particulars. Instead, it “serves as a norm (*norma*) for every actual union into a Commonwealth (hence serves as a norm for its internal constitution).”³⁰

In invoking the ideal case of a rightful condition as a model through which other, lesser cases are to be understood, Kant joins a long tradition of understanding the basic case of legality as the ideal one, and all lesser cases as defective versions of it.³¹ In the *Critique of Pure Reason* he en-

28. 6:266.

29. 6:315.

30. 6:314.

31. See, for example, Thomas Aquinas, *Summa Theologiae*, Ia IIa90, in Aquinas, *Political Writings*, ed. and trans. R. W. Dyson (Cambridge: Cambridge University Press, 2002), 76ff.; John Finnis, *Aquinas* (Oxford: Oxford University Press, 1998), 219.

dorses this general strategy not only for thinking about legal systems but also for thinking about the concept of a virtuous person, and even concepts of living things.³² In each instance, the parts are thought of as conditioned by the whole: virtuous acts are parts of a virtuous life, each of the branches of government has its function in relation to the whole that they together comprise, and the parts of a living thing are what they are in relation to the whole. In the case of living things, Kant's point in focusing on the ideal case is not to impute intentions to nature,³³ but rather to make sense of the ways in which living things are made out of inanimate matter, but subject to distinctive forms of generality. In the physical sciences, recalcitrant observations lead to revision of (some of) the generalizations they were supposed to test; in the case of living things, some failures to conform to expectations lead to the conclusion that the plant or animal in question is defective. The discovery of an injured or malformed horse with only three legs neither refutes nor qualifies the generality of the claim that horses have four legs, and the fact that almost all mayflies die before pupating neither refutes nor qualifies claims about the normal life cycle of the mayfly. Instead, such examples show that many living things are defective instances of their species.

In the same way, Kant follows the natural law tradition in treating the ideal case of a rightful condition law as analytically basic, and all actual cases as defective instances of it. He takes the general strategy of focusing on the ideal case to a higher level of abstraction because of a more general feature of normative concepts. To think of the way that something is supposed to be is always to compare it to an ideal of its kind. In the case of plants or animals, the ideal has both an *a priori* part—the idea of a prop-

32. *Critique of Pure Reason*, A318/B374.

33. Kant rejects the so-called design argument in the *Critique of Pure Reason*, A627/B655. The idea that teleology implies design is an instance of the same sort of reductive empiricist and utilitarian assumptions that lead Bentham and Austin to attempt to reduce rules to commands backed by threats. From Paley's example of the watchmaker, through Bentham and Austin's attempt to reduce rules to commands, to Mill's identification of the valuable with that which people are disposed to value, empiricist thought regards standards of correctness as in need of explanation, and psychological states as an unexplained explainer of them. Hume's readiness to invoke the concept of a rule places him in sharp contrast to the rest of the empiricist tradition. The Kantian tradition regards rational standards as basic and even psychological states as explicable only by reference to them.

erly organized living thing with a characteristic life form—and a part drawn from experience—the particular life form of a mayfly or horse. Without the *a priori* part, particular animals could not be thought of as alive,³⁴ but each individual plant or animal is understood in terms of the ideal realization of its own (empirically discovered) species. Investigation might reveal that the life form of some plant or animal has been misunderstood, and so requires revision.

Normative concepts are distinctive because their ideal case is entirely *a priori*. If a normative requirement fails to apply to what actually happens, that shows that something has gone wrong in the world. It does not reveal any defect in the requirement. The fact that experience has taught us that no actual human being has managed to meet all of the requirements of virtue is grounds for disappointment about human beings, not for revising the concept of virtue. In focusing on the ideal case, Kant is not suggesting that people should find fault with each other for every failure to meet it. The same purity that makes the ideal case of a norm regulative also makes it unattainable.

Principles of right have the same priority over actual conduct as other normative concepts: the fact that people often violate the rights of others is not a reason to revise the concepts of right, because they govern how people are entitled to treat each other, rather than describing how they actually or typically do. What actually happens can be relevant to what it is prudent to do, but not to normative requirements. That is why Lockean claims about the difficulties that human inclinations and limitations generate in a state of nature can at most show that it is advantageous to leave it, not that it is morally necessary to do so. Kant focuses on the pure case of a state of nature in identifying its three defects to show that a system of pure private right is normatively incoherent because it fails to meet its own internal criteria of adequacy.

The idea of the original contract extends the strategy of considering the pure case to public institutions charged with making arrangements for people, by articulating the structure through which the power to make

34. For a detailed defense of this claim, see Michael Thompson, *Life and Action: Elementary Structures of Practical Thought* (Cambridge, Mass.: Harvard University Press, 2008), Part One.

and enforce those arrangements can be consistent with freedom, and so fully legitimate. We saw in the previous section that institutions can create an omnilateral will because they incorporate the distinction between the mandate of an office and the purposes of the particular person filling it. An official acting within his or her mandate will often have room to exercise judgment in determining what it requires in a particular situation, or how best to carry out its purposes. In so doing, the official will both exercise judgment and take account of empirical and anthropological factors that might be relevant to those purposes. Any such judgment, discretion, or consideration of facts has to be exercised within the terms of the mandate; an official is not entitled to use public office to pursue private purposes, nor to make the world better in ways unrelated to his or her mandate. That is the sense in which officials are public servants: they act on behalf of the public. We also saw that the entitlement to make arrangements for others is limited to the arrangements that those others would have been entitled, as a matter of right, to make for themselves. The structure of making arrangements that others could have made for themselves includes not only the particular laws that the state makes, but also the “constitutional” law that creates the institutional structure through which some make arrangements for others. The postulate of public right entitles officials to make arrangements for citizens; the idea of the original contract represents citizens themselves as authors of the higher-order arrangement empowering those officials, so that all political power is exercised by the people themselves.

The ideal case serves as a standard because it provides the only consistent way of organizing the use of power to guarantee everyone’s freedom under law. Institutions and their officials have a duty of right to act in conformity with it because they have a duty of right to act in conformity with every human being’s right to freedom. Kant’s argument does not say that since officials are making law, they should do the ideal version of lawmaking, or that in making law they are already committing themselves to some aspirational ideal of law. Such an approach is foreign to the Kantian project. The suggestion that the duty to rule in conformity with the idea of the original contract is a special case of a more general principle that requires you to do whatever you are doing in accordance with the standard internal to whatever you happen to be doing—as someone might imagine that the problem with making bad arguments is that person’s failure to live up

to the proper standards internal to argumentation, and so to somehow ensnare herself in some form of performative contradiction—would fault the person who failed to live up to the ideal with some sort of nonrelational, self-regarding failure of rational consistency, rather than a wrong against others. A state that makes laws inconsistent with the idea of the original contract is defective because it creates a condition that is not rightful, not because it violates a norm of inner consistency.

Laws can be defective from the standpoint of the idea of the original contract in two distinct ways. First, particular laws can be inconsistent with each person's innate right to independence. The state must eliminate these in order to make its laws fully rightful. Second, the form in which laws are *given* can be defective; a system that had excellent laws but in which legislation was not self-imposed would be defective in this second way. In a fully republican system of government, the people give laws to themselves through their chosen representatives, whom they have elected to act on their behalf, and the legislature empowers officials and courts to implement those laws and apply them to particular cases. The branches of government that solve each of the three problems must be separate. If the legislature could apply laws to particulars (though bills of attainder, for example), some people would simply exercise power over others, instead of the citizens collectively ruling over themselves severally.

Each of the possible defects in a system of laws generates a respect in which the state is under a duty to improve itself. The first problem generates a duty to improve its laws, the second a duty on the part of the state to improve its form of lawgiving, to bring it more nearly into conformity with the idea of the original contract, making the fulfillment of that duty a properly public purpose for which the state can both collect taxes and regulate other activities.

Both of these duties are internal duties of the state. Like the duty of rightful honor, no other person or institution has the correlative right to enforce them.³⁵ Like all duties of right, the state's duty to improve its laws can only be carried out by using means consistent with the Universal Principle of Right. Political change cannot be imposed from above, but

35. Bernd Ludwig has argued that because duties on the part of the state do not generate correlative rights, the state is subject to duties of virtue rather than right ("Kants Verabschließung der Vertragstheorie—Konsequenzen für eine Theorie der sozialen Gerchtigkeit," *Jahrbuch für Recht und Ethik* 1 [1993]: 239–243). Ludwig's dichotomy between right and

must come from the people. The development of a more fully self-imposed form of lawgiving must ideally be self-imposed. In *Theory and Practice*, Kant characterizes freedom of speech as the “sole palladium” of the people’s rights.³⁶ Political speech is the only medium through which both the improving and the improvement of institutions are fully in conformity with right. The right to complain of injustices in “matters of taxation, recruiting and so forth”³⁷ enables citizens to improve particular laws; the right more generally to speak in one’s own name enables citizens to improve lawmaking institutions.³⁸

virtue overlooks the possibility of internal duties of right (most significantly, the duty of rightful honor). As we saw in Chapter 2, an internal duty of right restricts the range of choice in light of the Universal Principle of Right. Each of the state’s internal duties restricts its ability to act through its officials to those acts consistent with the rights of its citizens. Its only end, then, is to observe the restrictions presupposed by its basic mandate; its positive provision of, for example, public roads or support for the poor is just the restriction of its other activities to terms consistent with right. The only questions it faces are questions of how to give effect to a rightful condition. Its duty in answering those questions is to give effect to a rightful condition rightfully. Not only is the performance of these functions not assessed in terms of moral merit; the ends are not discretionary, and lack the “playroom” (*latitudo*) in relation to other ends characteristic of duties of virtue. See 6:233, and *Doctrine of Virtue*, 6:390; Barbara Herman, *Moral Literacy* (Cambridge, Mass.: Harvard University Press, 2007), 203–229; Hannes Unberath, “Freedom in the Kantian State,” *Jahrbuch für Recht und Ethik* 16 (2008): 321–367. Public officials must figure out how to maintain and perfect a rightful condition. A permissive law permits them to rule even if their success at realizing the idea of the original contract is incomplete (*Toward a Perpetual Peace*, 8:347). Integrating the mandatory ends of a rightful condition with other purposes is prohibited, because the state has no other purpose but to be a rightful condition.

36. Kant, *On the Common Saying: That May Be Correct in Theory but Is of No Use in Practice*, in Gregor, *Practical Philosophy*, 8:304.

37. 6:319.

38. The characterization of official speech as private subjects it to a further restriction: an official could never be entitled to lie in an official capacity. (Kant makes a parallel point in his discussion of international right, where he rejects “underhanded means that would destroy the trust requisite to a lasting peace” [*Doctrine of Right*, 6:347]. In the case of international right, the difficulty is that an agreement to conclude a peace must include the intention to be bound by it; a rule permitting deception deprives the parties of the power to bind themselves through agreement.) Kant says that the liar makes “all rights that depend on contracts come to nothing and lose their force” (“On a Supposed Right to Lie from Philanthropy,” 8:426). His point, as always, is transcendental rather than empirical; the destruction of trust is not a bad

III. Public Powers and Their Limits

Kant organizes his discussion of the powers of a state under the category of “effects with regard to rights that follow from the nature of the civil union.”³⁹ He mentions six such effects: the prohibition on revolution, the state’s status as “supreme proprietor of the land,” its duty to support the poor, its right to establish offices exclusively on the basis of merit, its right to punish, and its right to control immigration on nonethnic grounds.⁴⁰ Each consequence is introduced as both an explanation of the powers that the state must be entitled to exercise and, at the same time, an instance of the supremacy of law over anything that claims to compete with it. The state’s status as “supreme proprietor” and its consequent police power is the subject of the next chapter, the duty to support the poor and guarantee equality of opportunity of the following one, and punishment the one after that. In light of these powers I then turn to the question of

effect of lying; it is the fundamental presupposition of lying. Although deceit is not a wrong against the person deceived, it does “wrong in general,” that is, what Kant goes on to call a “formal” rather than “material” wrong, or wrong in the “highest degree” (8:429). Like all formal wrongs, it is contrary to what Kant calls “the right of human beings as such,” that is, the right to be in a rightful condition, one in which disputes are resolved by law rather than force (*Doctrine of Right*, 6:240; 6:308). The connection between a rightful condition and truth-telling follows from the more general requirement that the state can only make such arrangements for its citizens as the citizens could have made for themselves. The arrangements that people can make for themselves are limited by a requirement of truth-telling; as we saw in Chapter 5, you cannot unite your will with the will of someone who misrepresents the terms on which the wills are united. The fraud and his dupe do not share a united will. Truth-telling is the unconditional presupposition of possible agreement. That is the sense in which deceit makes rights founded on contract “come to nothing”: it lies beyond any person’s possible power of agreement. Applied to public right, the state’s power to make arrangements is limited by the possibility of agreement. Where agreement is impossible, no arrangements can be made, and so, in the limiting case, the state cannot make a law that is inconsistent with the possibility of agreement at all. So any use of deception by officials necessarily involves making arrangements for citizens that the citizens could not have made for themselves. See Jacob Weinrib, “The Juridical Significance of Kant’s ‘Supposed Right to Lie,’” *Kantian Review* 13 (2008): 148–158.

39. 6:318.

40. Bernd Ludwig, “‘The Right of a State’ in Immanuel Kant’s *Doctrine of Right*,” *Journal of the History of Philosophy* 28 (1990): 403–415, argues that the numbering and ordering of the sections of Public Right reflect printer’s errors which Kant was too preoccupied to correct. Among the changes is to have §50 become part F of the “General Remark” to Public Right.

revolution. The remainder of this chapter, however, is concerned with the general idea of the people giving laws to itself. Kant introduces this in hypothetical terms, and says that the state may not make laws that the people could not impose on itself.

As we have seen, it is a general principle that when one person makes an arrangement for another, the first cannot be entitled to make an arrangement to which the other could not consent. The Kantian sovereign makes arrangements for the people, that is, a “multitude of human beings” considered as a collective body. So the test of its lawmaking power must be the possible agreement of the citizens considered as a collective body.

As Onora O’Neill has argued, Kant’s focus on what the people “could” choose differs from more recent contractarian theories that focus on what people in specified circumstances “would” choose, in order to best secure their own prospective advantage.⁴¹ Although the distinction between what could and what would be chosen can be collapsed by insisting that people could only choose what is most advantageous for them, Kant’s emphasis on possible choice focuses on the grounds for the individuals accepting the authority of the state, that is, to guarantee the systematic enjoyment of the right to freedom. You could agree to restrict specific exercises of your freedom, in order to guarantee its systematic preconditions, but the prospect of advantage could not entitle you to “throw away your freedom” in ways inconsistent with your general right to be your own master. No such act could be an instance of protecting your own capacity for choice. The same point can, once again, be made in the vocabulary of the duty of rightful honor: you lack the power to create any binding arrangement that presupposes that others may treat you as a mere means for pursuing their private purposes.

IV. The Power of the People to Bind Itself

Kant introduces the idea of a people giving laws to itself in his essay “What Is Enlightenment?” The arguments of that essay at first appear to

⁴¹ O’Neill, “Kant and the Social Contract Tradition,” in François Duchesneau, Guy Lafrance, and Claude Piché, eds., *Kant Actuell: Hommage à Pierre Laberge* (Montréal: Bal-larmin, 2000), 185–200.

have a religious character, and to be focused on getting religious matters right: “one age cannot bind itself and conspire to put the following one into such a condition that it would be impossible for it to enlarge its cognitions (especially in such urgent matters) and to purify them of errors, and generally to make further progress and enlightenment.” This formulation appears to be focused on some basic interest in the doctrine of free faith. Kant reinforces this appearance when he goes on to say, “This would be a crime against human nature, whose original vocation lies precisely in such progress; and succeeding generations are therefore perfectly authorized to reject such decisions as unauthorized and made sacrilegiously.”⁴²

Kant’s final qualification suggests that a different principle is at work: “The touchstone of whatever can be decided upon as a law for a people lies in the question: whether a people could impose such a law upon itself.”⁴³ In the particular example, the difficulty with imposing a binding religious creed is not that each person would expect some disadvantage from it, nor that, taken in the aggregate, people would experience significant disadvantages. Such advantages or disadvantages could not be assessed *a priori*. Instead, a binding and enforceable religious doctrine would conflict with both the right of each person and the right of the people considered as a collective body. Each person is entitled to decide on his or her own what his or her purposes will be. That entitlement can be limited to reconcile each person’s purposiveness with that of the others, but it cannot be limited on material grounds, that is, on the basis of some particular purpose, such as social stability or religious salvation, that many, or even all, people happen to share. Material purposes are, in the requisite sense, merely private, no matter how common they are. Each person is entitled to make what he or she will of what others say about any matter; any restriction on that entitlement could not be consented to. There is also a problem for the people considered collectively, for they could not decide in advance to preclude the possibility of making their condition more rightful; the “vocation” of human nature “lies in such

⁴². Kant, “An Answer to the Question: What Is Enlightenment?” 8:39. See also Jonathan Peterson, “Enlightenment and Freedom,” *Journal of the History of Philosophy* 46, no. 2 (2008): 223–244.

⁴³. Ibid.

progress” in the ability of a people to give laws to itself. One generation could not “conspire” to render the next passive in relation to the laws that govern them.

Both of the uses of the idea of agreement in Kant’s discussion of enlightenment figure in public right more generally. A state is required to act for public purposes, but prohibited from acting for private ones, and individual rights constrain the means that the state may use in pursuit of public purposes. Cast in the vocabulary of agreement, the test of whether the state is entitled to exercise a class of powers is whether the people must give itself such a power, whether a public authority having such a power is a necessary condition of the people binding themselves through law. Each of Kant’s detailed arguments for specific powers follows this pattern.

Individual rights also constrain state power through the idea of possible agreement by restricting the means the state can use in pursuing public purposes to those consistent with each person’s innate right of humanity. Further limitations can be generated by the systematic realization of rights, so that the state is also precluded from using means inconsistent with the possibility of citizens ruling themselves. Cast in the vocabulary of possible agreement, citizens lack the power to bind themselves to arrangements inconsistent with their own rightful honor, that is, ones in which they are treated as mere means, and from binding themselves to conditions in which they are merely passive in relation to the laws that govern them. A citizen does not have a right against the state that he be in a certain situation, considered apart from how it came about, only a right that the state not do certain things to him through its official acts. This restriction parallels the distinction in Private Right between wronging a person and changing the context in which that person acts. Rather than focusing on the effects of action or inaction, considered as such, it focuses on the means that are used.

The question of whether agreement is possible thus makes no reference to any matters of advantage. In particular, the ease or difficulty of keeping a potential agreement is not relevant to whether it is possible; Kant does not offer a version of Rawls’s idea of the “strains of commitment.” Rawls argues that a person could not undertake an obligation if he believed he would be unable to bring himself to carry it out. He argues

that people choosing institutions from behind “a veil of ignorance” who did not know what social positions they would occupy would not agree to legally established slavery because they would foresee that if they turned out to be slaves, they would be unwilling to do the bidding of their masters.⁴⁴ Kant is concerned with the authorization to coerce, so it cannot matter whether someone would foreseeably lack an *internal* incentive to conformity with positive law. If something is wrongful, it can be prohibited, no matter how significant the contrary inclinations. As Kant observes in his discussion of the so-called right of necessity, the fact that in sufficiently dire circumstances wrongful conduct could not be prevented by externally given law does not make that conduct rightful or place it beyond the scope of legal regulation, even if it makes punishment pointless.⁴⁵ The foreseen ease or difficulty of compliance depends on the *matter* of choice. The argument against institutional slavery cannot be that rational persons would not take on a burden they expect to have difficulty in meeting, because questions of right are never questions about burdens at all. Instead, a rightful constitution could not institute slavery because it cannot make arrangements between private persons that those persons could not be entitled to make for themselves. If a person cannot bind him- or herself to a condition of slavery, neither can an official bind that person. No expected material advantage can override this.

Instead of advantage, possible agreement is limited by each person’s innate right of humanity. Many individual rights are grounded in the “authorizations” that are “already contained” in the innate right to freedom; political rights are derived from the idea of the original contract. Freedom of expression follows from the innate right of humanity authorizing a person “to do to others anything that does not in itself diminish what is theirs, so long as they do not want to accept it—such things as merely communicating his thoughts to them, telling or promising them something, whether what he says is true and sincere or untrue and insincere; for it is entirely up to them whether they want to believe him or not.”⁴⁶ The right to say what you think is a reflection of the more general point

44. Rawls, *A Theory of Justice*, 176ff.

45. 6:236.

46. 6:238.

that no person has a right that others conduct themselves in ways best suited to his or her preferred purposes. Short of depriving you of something you already have a right to, I can use my words as I see fit. Other aspects of right determine the ways in which one person can be wronged by another's words. Your right to a good reputation, which Kant argues extends even beyond your death, is one example. Others include the wrongfulness of fraud and even of speaking in another person's name by publishing a copyrighted book without the author's permission.

Innate right also governs the presumption of innocence and the burden of proof when someone is accused of wrongdoing. Each person's right to be "a human being beyond reproach" can be appealed to "when a dispute arises about an acquired right and the question comes up, on whom does the burden of proof fall, either about a controversial fact, or if this is settled, about a controversial right, someone who refuses to accept this obligation can appeal methodically to his innate right to freedom (which is now specified in its various relations), as if he were appealing to various bases for rights."⁴⁷

Most significantly, innate right includes "a human being's quality of being his own master (*sui juris*),"⁴⁸ that is, the right not to be used for the purposes of others. This aspect of innate right means that people could not rightfully give themselves a law that made some official their master, and so precludes the use of public power to achieve merely private purposes. It also guarantees freedom of association. Part of your entitlement to set and pursue your own purposes is the entitlement to choose those with whom you will make arrangements, subject only to their entitlement to decline to enter into arrangements with you.

The right to independence of the choice of others constrains public officials because the people could not give themselves a master, that is, someone with unlimited discretion, or even someone who was empowered to make arrangements for them in pursuit of his or her own private purposes.⁴⁹

The immediate basis of each of the right to freedom of expression, the

47. Ibid.

48. Ibid.

49. In *Roncarelli v. Duplessis*, [1959] S.C.R. 121, then Quebec premier Maurice Duplessis arranged the revocation of the liquor license of a restaurant owned by someone who had posted bail for Jehovah's Witnesses whom Duplessis had arrested for proselytizing.

right to be beyond reproach, and the right to be your own master in innate right guarantees that a people giving itself a law does not have the rightful capacity to alienate or repudiate any of them. As a private person, you cannot sell yourself into slavery; so, too, free persons cannot “throw away their freedom” by making themselves inherently subject to reproach, or have their right to communicate their thoughts curtailed by anything other than the rights of other persons. Nor could they make themselves inherently subject to a calculus of material advantage, available to be used or disposed of on the basis of the net balance of consequences. The status of these rights as aspects of innate right does not mean that they do not require clarification and codification through positive law. It means only that such clarification and codification must be focused on those rights, and not subject to balancing against other potentially competing interests.

Innate right has the further implication that a people could not give themselves laws that are so open-ended that they effectively confer an unrestricted power on officials. A rule that created a broad set of presidential or royal prerogatives, to be used for whatever purpose the president or monarch chose, would be inconsistent with self-rule; a provision entitling the majority to impose bills of attainder regulating the conduct only of specific individuals would face the same problem. So, too, would a rule that instructed officials to make determinations on the basis of facts that they were not in a position to ascertain.⁵⁰ The same analysis captures the

Duplessis argued that the relevant legislation gave the manager of the provincial Liquor Control Commission the right to revoke licenses “at his pleasure,” and so entitled him to do so on any grounds whatsoever, including political ones. Justice Rand, writing for the Supreme Court of Canada, held that as a matter of law, the legislature could not have conferred such a power on him, because “in public regulation of this sort there is no such thing as absolute and untrammeled ‘discretion,’ that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute” (141). Rand does not use the vocabulary of the laws a people could give itself, but the broad structure of the argument is exactly that: a legislature could not have given that power.

50. This is the issue raised in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, in which Justice Iacobucci held that the law governing obscenity lacked a rational connection to its declared purpose of protecting women against exploitation, because it empowered lower-level customs officials to prohibit the importation of any materials that they found distasteful.

difficulties of rules that grant discretion to juries to distribute punishments on the basis of extralegal factors. Persons concerned with their right of self-mastery could not find themselves under a law that made punishment depend on such factors, even if, in the abstract, they might expect a reasonable prospect of being advantaged by consideration of those factors.⁵¹

Other restrictions on the means that the state may use are imposed by the public structure of lawgiving, and the correlative requirement that citizens could not bind themselves to a condition of passivity. The defects of a binding religious creed provide one example. Restrictions on public political expression provide another. Free beings could not put themselves in a position in which they were prohibited from expressing their concerns about the rightfulness or even prudence of public laws.⁵² Conversely, public officials may not deceive citizens.⁵³ These restrictions on the exercise of state power are indirect requirements of rightful honor. To be passive because of disposition or even circumstances is consistent with rightful honor; you are under no obligation of right to exercise your

51. In *McCleskey v. Kemp*, the United States Supreme Court upheld a Georgia death penalty statute, despite accepting evidence that the likelihood of execution for a black person who murdered a white person was four times as high as for a white person who murdered a black one. Rejecting the relevance of these factors, Justice Stewart focused on the fact that “discretion in the criminal justice system offers substantial benefits to the criminal defendant. Not only can a jury decline to impose the death sentence, it can decline to convict or choose to convict of a lesser offense. Whereas decisions against a defendant’s interest may be reversed by the trial judge or on appeal, these discretionary exercises of leniency are final and unreviewable . . . a capital punishment system that did not allow for discretionary acts of leniency would be totally alien to our notions of criminal justice” (*McCleskey v. Kemp*, 481 U.S. 279 [1987]).

The application of this mode of reasoning to the particular case of racial discrimination in capital cases is appalling, but for present purposes less remarkable than the style of reasoning itself. Justice Stewart’s characterization of the role of discretion moves from the claim that *some* wrongdoers *benefit* from the existence of discretion to the conclusion that it is consistent with the rule of law to give out such benefits on whatever basis officials or jurors wish to. Petitioner in *McCleskey* was complaining of a having suffered a form of unfair discrimination. It is no answer to such a complaint to say that *other* people actually benefit from that form of discrimination. Indeed, the whole point of calling it discrimination is to say that this discrepancy is legally arbitrary.

52. *Theory and Practice*, 8:298.

53. “On a Supposed Right to Lie from Philanthropy,” 8:428.

rights, but rightful honor does not permit you to put yourself into an enforceable condition of passivity. A law prohibiting you from speaking your mind about public issues, or one that granted officials the right to deceive you, would make a condition of passivity enforceable against you.⁵⁴ Kant condemns a state in which “subjects . . . are constrained to behave only passively” as “the greatest *despotism* thinkable (a constitution that abrogates all the freedom of its subjects, who in that case have no rights at all).”⁵⁵

The idea that the people are the authors of the laws that bind them is thus a formal rather than material idea. A material principle would insist that people have a particularly strong or even overriding interest in their innate right, and so would never agree to something likely to compromise it. Kant’s formal principle focuses on the relation between innate right and legislation through the mediating idea of the authorization of coercion. The use of force is only rightful provided that it is consistent with the innate right of humanity; positive legislation is only legitimate if it could be a law that free persons could impose on themselves, where the test of the possible imposition is their rightful capacity to bind themselves, that is, consistency with their rightful honor.

V. Agreement

A familiar complaint against contractarian arguments is that all of the justificatory work is done by the premises from which the parties give themselves laws. Kant’s use of the idea of possible lawgiving is vulnerable to this charge in one respect, since the lawgiving powers of people are governed by their innate right. As we have seen, Kant’s point in introducing ideas of agreement is to explain how political authority can be consistent with the rights of those subject to it. Kant’s answer is that one person can be entitled to change the normative situation of others only if the power to

54. Kant’s notorious discussion of “passive citizenship” concedes that qualifications for voting can be consistent with a rightful condition, but require that each person be able to change from being a passive to an active citizen, precisely because such arrangements could not be made binding on individuals (6:314–315). See Jacob Weinrib, “Kant on Citizenship and Universal Independence,” *Australian Journal of Legal Philosophy* 33 (2008): 1–25.

55. *Theory and Practice*, 8:290–291.

do so itself has an omnilateral authorization. Political authority, whether by a legislature, executive, or judiciary, is only legitimate provided that it can be understood as an instance of an omnilateral authorization. Talk about whether the people could give themselves a particular law thus enters not as either an algorithm or a heuristic for generating particular laws, but rather as a test of whether a particular law could have an omnilateral authorization. If a validly enacted statute could be agreed to, citizens are required to regard it as having received one. If it could not, it lacks the force of law. However, we will see in Chapter 12 that citizens are limited in their remedies when legislation is defective in this way.

By conceiving of the people as the authors of the laws that bind them, Kant provides a principled account of both the basis and the limits of state power. Because there is only one innate right, the right to freedom, all of the other, more specific restraints on government must be understood as aspects of that right, and so be reconciled with each other as aspects of it. If freedom of expression appears to come into conflict with the fundamental entitlements of equal citizenship—as is sometimes argued in the context of hate speech—any restriction on the former right must be justified as an expression of the underlying and more basic innate right of humanity that gives rise to both. The particular “authorizations already contained in” the innate right of humanity are not competing members of a disparate list, and any attempt to reconcile them must presume them to be capable of mutual adjustment. The task of judgment and justification requires specification of the incidents of innate right through positive law and the exercise of judgment in their application to particulars. That specification can generate a distinction between core and peripheral instances of a right, or between “high value” and “low value” speech, but the core of a right is just its systematic place in an articulated system of rights. Unlike the sort of balancing of interests that properly goes on in determining speed limits or tax rates—the subject of Chapter 8—reconciling different aspects of innate right does not weigh one thing against another, but rather adjusts each so as to work the various aspects of innate right into a coherent doctrinal whole.⁵⁶ The ineliminable place of both

56. Thomas M. Scanlon, Jr., “Adjusting Rights and Balancing Values,” *Fordham Law Review* 72 (2004): 1477–1486.

judgment and doctrinal development reveals the affinity between legal reasoning in public right and private right: just as legal doctrines must be developed to bring general categories of right to bear on particular disputes, so, too, they must be developed to give effect to the basic right that provides the grounds of rights to be presumed innocent, freedom of expression, security of the person, and subjection to law rather than arbitrary choice. Like all rational concepts of right, both the innate right of humanity and the idea of the original contract require institutional realization to create a system of universal law that applies to particulars.

The difference between focusing on each person's capacity to bind him- or herself and focusing on each person's expectation of advantage generates a contrast between two very different ways of asking about hypothetical agreement. In a pair of recent articles, Thomas Pogge has argued that the social contract theory developed and defended by John Rawls ultimately collapses into a form of consequentialism, because it treats citizens selecting laws for themselves as recipients of those laws but not their authors in any robust sense. As Pogge puts it, "Understood as guides to the assessment of social institutions, contractarianism and consequentialism are for the most part not competitors but alternative presentations of a single idea: both tend to assess alternative institutional schemes exclusively by how each would affect its individual human participants."⁵⁷

Without assessing the success of Pogge's charge against Rawls in particular, I want to suggest that his point certainly applies to many recent uses of the idea of hypothetical agreement. As Pogge frames it, the difficulty arises because parties concerned to maximize their prospective advantage can only do so by balancing competing advantages against each other. The point is not just that the parties in Rawls's "original position" reason instrumentally. It is rather that the basis for their choice of principles is to find the most favorable balance of benefits and burdens. The problem is in the question they are asked no less than the manner in which they seek to answer it.

57. Thomas Pogge, "Three Problems with Contractarian-Consequentialist Ways of Assessing Social Institutions," *Social Philosophy & Policy* 12 (1995): 241–266, 246. See also Pogge's "Equal Liberty for All?" *Midwest Studies in Philosophy* 28 (2004): 266–281.

In laying his charge against Rawls, Pogge draws attention to Rawls's endorsement of strict criminal liability for possession of firearms in cases in which gun-related crimes are so serious as to pose a grave threat.⁵⁸ A contract-type argument is focused on the desirability of competing laws, framed exclusively in terms of their consequences. Liability without wrongdoing is defended on the grounds that "it might be accepted by the representative citizen as a lesser loss to liberty, at least if the penalties imposed are not too severe."⁵⁹ Pogge's point is that the use of the contract argument to assess this kind of situation reduces it to the sort of cost/benefit analysis characteristic of consequentialism.

Everything depends on how individual rights against the state are understood. In a footnote to the passage that Pogge discusses, Rawls, following Hart, identifies them in light of the general interest that persons have in being able to give effect to their choices. Thus Rawls suggests that the normal requirements of fault in criminal procedure are to be understood in just this way. The requirement that a person have the capacity and opportunity to avoid punishment makes the criminal law a system of choices, *because* citizens have an interest in being in control of their lives and so in being able to avoid punishment. Rawls later characterizes the priority of liberty in explicitly conditional terms: "The last point about the priority of liberty is that this priority is not required under all conditions. For our purposes here, however, I assume that it is required under what I shall call 'reasonably favorable conditions,' that is, under social circumstances which, provided the political will exists, permit the effective establishment and the full exercise of these liberties."⁶⁰ The conditions are ones that, as Rawls remarks, are met in normal conditions in advanced democracies. For Kant, how easily or frequently such conditions are met

58. Rawls's own treatment of this case uses it as an example of "nonideal" theory, and focuses in particular on the risk of social strife, perhaps even the breakdown of the social order. Thus in its particulars it may be closer to Lincoln's suspension of *habeas corpus* during the Civil War than to the cases to which Pogge assimilates it. If so, Rawls might wish to distinguish the question of what can be done to *sustain* a legal order from the question of what can be done in response to wrongful conduct within the legal order, and so avoid the generalization that Pogge wishes to draw from this example. If Rawls is able to do so, however, it does not follow that many who have sought to deploy similar modes of reasoning are also able to.

59. Rawls, *A Theory of Justice*, 242.

60. Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), 297.

is not the central issue. Once the criminal law's fault requirements are understood as applicable only in favorable conditions, their application depends on how favorable conditions are, and favorableness in turn can only be assessed in terms of the likelihood of the requirements advancing the relevant interests. The interest that each person has in having effective choices is an interest he or she has apart from the state, because it is an interest that each person has, regardless of which factors advance or impair it. People concerned to protect such an interest will be just as concerned about protecting themselves against other persons as against state action. If the facts turn out the right way, the familiar prohibition on punishment without fault becomes fully fungible against other social costs. Any procedure will lead to wrongful convictions, but a decision to *dispense* with requirements of guilt does not simply accept wrongful convictions, but embraces them. The only question is which arrangements are most likely to protect the interest. The gain outweighs the potential loss, particularly if the loss is thought to be largely within an individual's control.

The possibility of balancing one person's right to be beyond reproach against the interests of others is the consequence of regarding rights as protections of things that matter to people apart from right, that is, from the more general instrumentalism that supposes that what matters morally can be specified without reference to legal concepts or institutions. Contemporary debates between "interest" and "will" theories of rights exemplify this instrumental conception of legal concepts, because they disagree about what rights are supposed to protect, but agree that they are supposed to protect something the value of which can be identified without reference to the concept of a right. Will theories focus on the importance to a person's life of shaping that life; interest theories, on whatever interests are important enough to justify burdening others with obligations.

As we have seen, Kant has a fundamentally different conception of a right. A right is not a tool for advancing or even protecting the interests or effective choices of one person by restricting the conduct of others. Nor is it a power to decide about a particular matter. It is an entitlement to independence of the choice of others under universal law. Each person's entitlement to freedom is simply the entitlement to a constraint on the con-

duct of others. The principle that no person be subject to another person's choice allows each person to be his or her own master, that is, to have no *other* master.

Applied to the level of legislation, each person's rights generate a basic constraint on the ways in which the state may act. Their application is unconditional because rights are not tools for securing a result that can be described independently of them. If rights are conceived as instruments, it always makes sense, at least in principle, to ask, "Is this a situation in which constraining the conduct of others in this way advances the interests it is supposed to?" even if the answer will typically be positive. The possibility of asking that sort of question makes the application of rights, or rules protecting them, conditional, because it depends upon whether the rule in question actually brings about the result desired. This sort of conditional analysis is potentially available with respect to exercises of the police power, so that it makes sense to ask whether a traffic rule should be enforced in unusual circumstances that the legislature overlooked in drafting the provision. If the Highway Safety Act contains no provisions regarding private citizens responding to emergencies, a court might well exempt someone from a penalty in those circumstances, on the ground that the case falls outside the rule's purpose or range of application. The situation is different with rights that have their root in the innate right of humanity: freedom of expression and the presumption of innocence, as well as the more general right not to be subjected to the private purposes of another. The systematic realization of those rights provides the only basis for the state to make, enforce, or apply law at all; any use of force contrary to them subjects one person to the private purposes of another.

This Kantian conception of constitutional rights as expressions of the innate right of humanity, rather than tools for protecting important interests, conceives of those rights as *unconditional* because their grounds are not based on any claims about the conditions that normally hold. There is thus no space for asking whether the conditions fail to apply because so much is at stake for others. The state could not give itself a law that the people could not give themselves; the people can only give themselves laws that are within their rightful power. Fundamental human rights are constitutional, then, because they are the conditions of the state *constituting* itself as an omnilateral will.

Although the particulars of Rawls's example of strict criminal liability might seem artificial, exactly this sort of tradeoff between security and individual rights against the state has been proposed as a response to terrorism. The Kantian focus on the innate right of humanity has found expression in several recent decisions by some of the world's leading constitutional courts concerning the use of extraordinary means in fighting terrorism. Kant does not consider the possibility of judicial review of legislation, and my use of these examples neither presupposes nor purports to develop a Kantian argument for judicial review.⁶¹ I offer them only as illustrations of how the limits on the power of a people to give itself laws is to be understood, without considering here what body is competent to make such determinations.

A consequentialist interpretation of the idea of a social contract would have to find some common currency in which to balance each citizen's interest in being protected against terrorist attack with each citizen's interest in avoiding torture. It is often argued that torture should usually be prohibited, but would be appropriate where many lives are at stake because the state has a responsibility to prevent terrible things from happening, and that this responsibility overrides any limits on the acceptable means that may be used. If the government's choice is understood as a choice between torturing one person and permitting thousands or millions to die, it is hard to resist the suggestion that it must choose the former. Given the stakes, some have suggested that the use of torture is inevitable, and urged legal regulation and oversight of it.⁶²

From a Kantian perspective, the problem with this form of reasoning begins with the question it tries to answer. The question of whether torture could be authorized by law concerns the state's lawmaking authority, not the rational or probable or even morally best course of action by a legally unconstrained actor in a specific situation, or even the appropriate

61. Kant says that the three powers in a state "jointly comprise" the commander that has power over its subjects (6:315). We saw in Chapter 6 that each of the three powers is required, as is their separation. It follows from this that a court cannot legislate. It does not follow that a court must be empowered to review legislation to ensure its conformity with law, but such a possibility is not precluded either.

62. Alan M. Dershowitz, *Shouting Fire: Civil Liberties in a Turbulent Age* (Boston: Little, Brown, 2002), 470–477.

response, after the fact, of a court to someone who has saved lives through the use of torture. Considering the use of torture in confronting terrorism, President Aharon Barak, of the Supreme Court of Israel, remarked, “We are aware that this judgment of ours does not make confronting that reality any easier. That is the fate of democracy, in whose eyes not all means are permitted, and to whom not all the methods used by her enemies are open. At times democracy fights with one hand tied behind her back.”⁶³ In focusing on the question of whether such uses of force can be authorized by law, the only issue is whether the people over whom it is exercised could confer such a power on officials. People lack the authority to subject themselves to a power entitled to use a person for public purposes just because a lot else is at stake. And if they cannot rightfully subject themselves to such laws, they also cannot rightfully subject any dangerous noncitizens whom they have in their custody to them. Again, it might be thought that torture would only be used against someone who had been independently identified as a terrorist, so that anyone who would not reveal the location of a ticking bomb about to kill thousands is already a wrongdoer who has forfeited whatever rights he would otherwise have. Such a suggestion fails to constrain a contractarian/consequentialist argument for the legalization of torture because any wrongdoing on that person’s part is incidental to its core analysis. Torture to extract information from a suspect violates the right to be beyond reproach. Like punishment for absolute liability crimes, a person’s vulnerability to coercion would depend exclusively on the expected consequences of coercion, and not on what that person had done. Moreover, the dramatic example of a ticking bomb makes the use of torture seem pressing but at the same time drastically narrows the opportunities for investigating those consequences. Any legal license to torture would have to apply to someone suspected of involvement, even if, as it turned out, the person being tortured had not done anything wrong. Again, if the justification of torture turns on its expected results, it would extend to cases in which the terrorist is sufficiently strong-willed to be able to resist torture to himself but not to members of his family. The same point applies even if some

63. HCJ 5100/94 *The Public Committee against Torture in Israel v. The State of Israel*, 53(4) PD 817, 845.

way can be found to restrict the argument's application to those who have done wrong.⁶⁴ If the tradeoff between security and individual rights is quantitative, it does not matter whose rights are being sacrificed. Whether citizens concerned to protect themselves would in fact agree to such a thing would have to depend on how likely the various outcomes were (or on how likely they believed them to be), and so, it might be thought, torture could only be legitimate provided that the numbers were high enough.

The German Constitutional Court addressed a related question of whether the constitution could authorize the minister of the interior to order a hijacked airliner to be shot down if it was in danger of being used as a missile against a populated area.⁶⁵ The court held that such a law conflicted with the right of the passengers on the plane to human dignity, that legal system's correlate of the innate right of humanity.⁶⁶ The passengers cannot be used to save the people in the building. The court explicitly considered the possibility that they would consent to being killed in such circumstances, particularly if, since the plane is being used as a missile, their death is all but certain. They rejected that form of reasoning, even on the assumption that all of its premises are true. These premises may or may not be factually satisfied, and the minister of the interior may or may

64. In no case is the use of official force predicated on the idea that the wrongdoer has forfeited rights against force. The idea that wrongdoers forfeit their rights, like the related idea that rights have "thresholds," ultimately turns on the idea that rights are tools for protecting interests, whether in well-being or choice. Any attempt to connect such ideas to the model of a social contract will allow rights to be outweighed when enough other interests are at stake.

65. *Bundesverfassungsgericht* (BverfG), 1 BvR 357/05 vom 15.2.2006.

66. Strictly speaking, the right to dignity is not an enumerated right in the German Basic Law, but the organizing principle under which all enumerated rights—ranging from life and security of the person through freedom of expression, movement, association, and employment and the right to a fair trial to equality before the law—are organized. It appears as Art. I.1: "Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority." Art. I.3 explains that the enumerated rights follow: "The following basic rights shall bind the legislature, the executive, and the judiciary as directly applicable law." Other, enumerated rights are subject to proportionality analysis, through which they can be restricted in light of each other so as to give effect to a consistent system of rights. The right to dignity is the basis of the state's power to legislate and so is not subject to any limitation, even in light of the enumerated rights falling under it, because—to put it in explicitly Kantian terms—citizens could not give themselves a law that turned them into mere objects.

not be in a good position to assure himself that they are. The court's grounds for rejecting the reasoning do not depend on disputing the factual premises, however, but on the claim that the state is not entitled to make such a decision. The court is equally adamant in its rejection of the suggestion that the passengers would have agreed to it if they had been asked; the fact that it would be sensible for them to consent does not mean that they have consented. Their right to human dignity means that they cannot be conscripted into the project of the Ministry of the Interior any more than they can be conscripted into the project of the hijacker. The court concedes that matters might be different if the legal order itself were in danger. In cases of a defensive war, citizens can be conscripted into public purposes, the most familiar example of which is military service. Although death of civilians on a large scale is one of the familiar horrors of modern war, the mere possibility of such a death is not equivalent to the danger to rightful condition posed by war. As a result, even if war could justify conscription, including conscription to things with a significant risk of death, citizens could not consent to empower the state to use its citizens in this way to prevent a crime from happening.

The German Constitutional Court's reasoning reflects the underlying Kantian thought that the state's obligation to uphold a rightful condition and protect its citizens is unconditional, not simply because of some fondness for rules, but rather because the use of force is merely unilateral unless its authorization could proceed from an omnilateral will. People could only give themselves laws consistent with their innate right of humanity. As a result, the numbers cannot matter. If the state cannot order a person to stand in the path of a bullet that endangers an innocent person, it cannot order that person to stand in the path of a bullet that endangers many people. And if the state cannot order a person to do so, then it cannot exempt itself from such a prohibition in the case of a person who is likely to die anyway. The people give themselves laws not for their advantage, but for their independence, which they cannot trade against anything.

On the Kantian view, the fundamental test of any law is whether all could consent to it given their inner duty of rightful honor, or, what comes to the same thing, their obligation to take responsibility for their own lives. You couldn't agree to a law that suspended that obligation, even if

you expected material gain, *because the state is never a tool for pursuing private purposes.*

VI. Immanent Purposes, Discretionary Implementation

Kant's understanding of the basic range of public powers is austere in one sense, yet permissive in another. The only powers a state may exercise are ones that fall under various aspects of its duty to create, maintain, and improve a rightful condition, and it may only do so in ways consistent with each citizen's innate right of humanity. Yet the range of powers that can actually be exercised under that duty seems capacious and open-ended. The constraint that all powers be derived from the duty to create a rightful condition—parallel to the way that the power of a parent to “manage and develop” the child is derived from the duty to raise the child into a responsible being—is a real constraint, but it does not preclude most of the familiar activities of modern states. Even substantial changes can be understood as falling under the duty: fundamental land reforms that abolish forms of slavery or serfdom are the creation of a rightful condition. Even things that seem less directly related seem easy to accommodate to the Kantian account. We shall see in Chapter 9 that preventing private dependence underwrites a variety of public activities, and also that nothing in Kant's account precludes overinclusive implementation. Kant makes space for even more state activity when he includes the state's right to “administer the state's economy and finances,”⁶⁷ and still more when he suggests in *Theory and Practice* that when the supreme power “gives laws that are directed chiefly to happiness (the prosperity of the citizens, increased population and the like), this is not done as the end for which a civil Constitution is established but merely as a means for *securing a rightful condition*, especially against a people's external enemies.”⁶⁸ The only thing that is ruled out is organizing the state around private purposes. The only test imposed by the idea of the original contract is that it be possible to give public grounds of justification for such activities, that is, to relate them to the maintenance of a rightful condition.

67. 6:325.

68. Kant, *Theory and Practice*, 8:298.

The flexibility of the Kantian account on such issues reveals the underlying difference between it and both libertarian and utilitarian/egalitarian accounts. From Kant's perspective, the apparently intractable disagreement between the two extremes has the classic structure of an antinomy: the disagreements reflect a premise that both sides presuppose. The premise in question is that the purpose of political and legal institutions is to approximate a moral result that is perfectly determinate, even if imperfectly known, independently of them. A version of the same antinomy lurks in disputes between libertarian and utilitarian/egalitarian theories of the morality of property. The Lockean libertarian supposes property rights to be morally complete and fully determinate without reference to political institutions, and regards the state as a remedy to disagreements that, at least in principle, have complete answers. The utilitarian or egalitarian rejects the idea that anyone could have a morally basic right to property, and thinks that rules governing the dominion of particular persons over particular objects can only be designed so as to bring about a morally desirable result that can be described without any reference to anything like rules. As we saw in our discussion of private right, Kant conceives of private rights fundamentally differently. Their *structure* can be articulated without reference to legal institutions, but they do not apply to particulars outside of a rightful condition. Outside of legal institutions, property cannot be acquired conclusively, property rights cannot be enforced coercively, and disputes about them have no resolution consistent with the equal freedom of the parties. Again, although it can be shown as a general principle of private right that a person who is not party to a contract is not entitled to sue on it, or that a person who was deprived of the use of something to which he or she has no proprietary or possessory right has no claim against the person who damages the thing, in most cases concepts alone will not decide a particular case. Both the Lockean libertarian and a utilitarian/egalitarian see legal rules as trying to match something that is completely determinate without any reference to legal institutions. The Kantian sees legal rules as making determinate something that is morally binding but by itself partially indeterminate.

In the case of public right, the parallel antinomy concerns the use of public power. Although the libertarian insists that public power can only be used in the minimal ways that citizens have actively authorized, and

the utilitarian or egalitarian thinks that it can be used to bring about good results (perhaps subject to certain constraints), they share a premise according to which a public authority's moral role is to bring about specific results that can be specified without any reference to a public authority. For the Lockean libertarian, the result is the protection of private rights to person and property, which are supposed to be fully determinate without reference to institutions charged with enforcing them. For the utilitarian or egalitarian, the morally relevant results are characterized differently and more broadly, whether in terms of welfare, prosperity, or a certain pattern of distribution. The structure of the account, however, is exactly the same: institutions are justified only insofar as they bring about results that can be specified without any reference to them.

The Kantian approach rejects the common premise, and understands public right as requiring institutions in order to give effect to the structural features of a rightful condition. The public purposes are contained in the idea of a rightful condition, but so, too, is the requirement that properly constituted public authorities determine how to implement them. In so doing, public officials have no alternative but to exercise judgment about the significance to attach to competing considerations, subject only to the constraint that they make only laws that the people could impose upon themselves.

VII. A Note on Public Right and the Right of Nations

The argument of Public Right shows why a rightful condition is required, and why even a defective one must be understood as falling under the idea of the original contract. In the conclusion to the *Doctrine of Right*, Kant announces practical reason's "irresistible veto: there is to be no war," either between human beings or between states.⁶⁹ The contrast between right and violence is presented as equivalent to the contrast between peace and war. From this it might be thought to follow that Kant should treat the cases of human beings and of states as parallel, and argue in favor of some form of world government, or at least a state of states. In this section, I want to briefly indicate Kant's basis for distinguishing the solution

69. 6:354.

to the conflict between individual human beings from the solution to conflict between states. My aim is not to offer a full development of Kant's account of international right, but only to show how the issue of the right of nations must be framed in light of the distinctively public nature of a rightful condition.

Kant's opening discussion of relations between states parallels his discussion of those between individuals in a state of nature. States are in a nonrightful condition, which is a condition of war, in which each can only do what seems good and right to it. To remain in such a condition is "wrong in the highest degree," and so nations must exit from the state of nature and organize themselves in accordance with the idea of the original contract. Both the structure of the argument and the obvious potential similarities have led many readers to suppose that Kant ought to favor a sort of transnational superstate, and even to authorize the use of force to create such a state.⁷⁰ That Kant rejects these solutions is apparent, both from his brief remarks in the *Doctrine of Right* and from his longer ones in *Perpetual Peace*. His grounds for rejecting them, however, are less clear. In the *Doctrine of Right* he says that the world state would extend "too far over vast regions," so that governing it "would become impossible."⁷¹ In *Perpetual Peace* he appears to concede that a world government is rationally required before concluding that it would become a "soulless despotism."⁷²

Many commentators have taken Kant's hesitation about the worldwide state of states to be based only on empirical considerations.⁷³ The contingency of such factors leads naturally to the thought that in the changed circumstances of the contemporary world, Kantian arguments are avail-

70. See, for example, Otfried Höffe, *Kant's Cosmopolitan Theory of Law and Peace*, trans. Alexandra Newton (Cambridge: Cambridge University Press, 2006), 193; Byrd and Hruschka, "From the State of Nature to the Juridical State of States." Pauline Kleingeld argues that a voluntary league of nations is an interim stage in the development of a world state with coercive powers in "Approaching Perpetual Peace: Kant's Defense of a League of States and His Ideal of a World Federation," *European Journal of Philosophy* 12 (2004): 304–325.

71. 6:350.

72. *Toward a Perpetual Peace*, 8:367.

73. See, for example, Jürgen Habermas, "Kant's Idea of Perpetual Peace, with the Benefit of 200 Years' Hindsight," in James Bohman and Matthias Lutz-Bachmann, eds., *Perpetual Peace: Essays on Kant's Cosmopolitan Ideal* (Cambridge: MIT Press, 1997).

able to argue for the irrelevance of the nation-state and, in particular, for the irrelevance of borders. Kant's rejection of a superstate is not empirical, however. Instead, it turns on the public nature of a rightful condition. Both a state of nature between persons and one between nations are contrary to right, and to remain in either is wrongful in the highest degree. The solutions are fundamentally different. Both Kant's rejection of a world state in favor of a "pacific league" or "permanent congress" of states that can be renounced by its members and his celebrated claim that republican states do not go to war with each other are reflections of his distinctive understanding of a state as a condition of public right.

Kant's discussion of conflict between states turns entirely on the right to engage in defensive war. Like individuals outside of a rightful condition, each state is only entitled, as a matter of right, to use defensive force against what it takes to be an aggressor. If that entitlement is to be part of a system of entitlements that could in principle be enjoyed by everyone together, it must, like other cases of defensive force, be subject to an objective standard; the issue of whether a particular use of defensive force is reasonable cannot be set unilaterally by either of the parties to a dispute. Neither has any claim of right to engage in acts of aggression against another. Each has only the right to defend itself, and, in determining whether to exercise this right, can only do what seems good and right to it. Since different things might seem good and right to different states, two states might each be entitled to act on the assumption that the other threatens it.⁷⁴ The problem is not that states will engage in aggression and claim self-defense, but that even if they act in good faith, their respective rights to self-defense may not be consistent.

In discussing conflict between states, Kant thus focuses on only one of the three defects he identified in the state of nature between persons. He offers an analogue neither of the assurance argument nor of the argument from unilateral choice. He does not suggest that one state may seize another's territory unless it has assurance that the other state will not seize its territory. Nor does he say that a state's acquisition of its own territory is somehow problematic because dependent upon a unilateral act. The absence of these modes of argument deprives Kant of the resources to ar-

74. 6:346.

gue for either an executive or a legislative international body. In *Perpetual Peace* he says that states in a pacific league submit themselves neither to public laws nor to coercion under them:⁷⁵ war arises between nations, but the problems to which public law and coercion are solutions do not apply. Instead, only the problem of determinacy arises, so only an analogue of a court is required.

The absence of arguments from coercion and assurance, and the corresponding absence of public law and coercive enforcement, reflect two differences between states and private persons. The first difference is that as Kant understands states, they do not have external objects of choice. The state does not acquire its territory; its territory is just the spatial manifestation of the state. That is why Kant joins other eighteenth-century writers in supposing that the state's territory is more like its body than like its property. The state is always necessarily in possession of its territory, just as a person is always in possession of his or her own body. Any-one who enters its territory without its authorization enters the state itself; should such a person overstay his welcome, he commits a wrong analogous to battery, rather than one analogous to theft. Although an act is required to establish a state, no act of acquisition *by the state* is required, and so the state does not acquire its territory. In juridical terms, it simply has it. As a result, there is no need for an omnilateral authorization of a unilateral acquisition. No “mine or yours” structure applies to it, so no assurance argument can arise. Each state's right against other states is purely defensive: to continue being the rightful condition it is, on its own territory. The same point generates Kant's claim in *Perpetual Peace* that no state can rightfully acquire another.⁷⁶

The second difference is that a state is a public rightful condition. The public nature of the state limits the purposes for which it can act to those that are properly public, that is, sustaining its own character as a rightful condition. Because it is not entitled to set and pursue its own private purposes, but only public ones, it could never have grounds for going to war except to defend itself or to defend an ally whose defense was important

75. *Toward a Perpetual Peace*, 8:356.

76. *Ibid.*, 8:344.

to its own self-defense, or to unite against a state that poses a general threat to the condition of peace among nations.⁷⁷

The public nature of a rightful condition is most fully reflected in a republican system of government. Kant's famous claim in *Perpetual Peace* that republican states do not go to war against each other has been read as an empirical conjecture about how likely people who need to pay for wars are to vote in favor of them, and the ability of such states to engage in more productive forms of interaction.⁷⁸ It also has an *a priori* basis in concepts of public right, as a simple reflection of the fact that republican governments do not act for private purposes, and so have an internal limit on the ends they will pursue, and the means they will use in pursuit of them.⁷⁹

If the only source of conflict in a state of nature between states is generated by the indeterminacy of the right to self-defense, then the solution is a partial analogue of a civil condition, but not a civil condition as such. Instead, the ideal is “a permanent Congress of states” which realizes the idea of “a public right of nations” through which nations establish a procedure “for deciding their disputes in a civil way, as if by a lawsuit, rather than in a barbaric way (the way of savages), namely by war.”⁸⁰ Because each nation has neither private purposes nor external objects of choice, the analogue of a rightful condition among states has a court but neither

77. The distinctive moral status of states generates each of the three “definitive” articles for perpetual peace: it requires republican governments, in which the people act as a collective body rather than a mob; a federation of free states, which have “outgrown” the need to be under coercive law; and cosmopolitan right, which is limited to a right of hospitality (as opposed to colonialism) because it governs relations between an individual and a foreign state, rather than between the individual and the individual citizens of that state. See *Toward a Perpetual Peace*, 8:349–357. The same triad occurs in the *Doctrine of Right* at 6:311.

78. *Toward a Perpetual Peace*, 8:350. A prominent instance of this reading is Michael Doyle, “Kant, Liberal Legacies and Foreign Affairs,” Parts I and II, *Philosophy & Public Affairs* 12 (1983): 205–235, 323–353.

79. 6:345. See also *The Conflict of the Faculties*, 7:86, in Immanuel Kant, *Religion and Rational Theology*, trans. Allen Wood and George Di Giovanni (Cambridge: Cambridge University Press, 1996), where Kant says that those who do not want justice do not want peace. See also George Cavallar, *Kant and the Theory and Practice of International Right* (Cardiff: University of Wales Press, 1999), chap. 4.

80. 6:351.

legislature nor executive. Such a court can resolve disputes about boundaries peacefully, but its resolution of disputes is only “as if before a court,” because states can resolve their disputes peacefully by accepting the decision of a court as binding.

Kant writes that “this alliance must, however, involve no sovereign authority (as in a civil Constitution), but only an association (federation); it must be an alliance that can be renounced at any time and so must be renewed from time to time. This is a right *in subsidium* of another and original right, to avoid getting involved in a state of actual war among the other members.”⁸¹ Each has the right to defend itself, and to defend others, but no other state has an enforceable right that others put themselves in danger to defend it. The right to avoid getting involved in war is itself a reflection of the public nature of a rightful condition; the state can only enter into arrangements with other states that secure its status as a fully rightful condition, but no such arrangement could involve giving up the entitlement to do what seems good and right to it.

Perpetual peace is unattainable because the only rightful forum for establishing it is voluntary and can be dissolved. Its voluntary nature does not mean that it could not last a long time, even forever. It cannot, however, be perpetual, because it has no resources at its disposal to guarantee its own preservation. A rightful condition between persons may dissolve over the course of time, or even choose to dissolve itself,⁸² but so long as it exists it must regard itself as existing in perpetuity, because as a matter of right, it has an entitlement to perpetuate itself, both by enforcing its own laws and by securing the conditions of a united will. No member of a rightful condition between persons is entitled to dissolve it. A permanent congress of states has no resources to perpetuate itself, and any member is entitled to withdraw from it.

VIII. Conclusion

Institutions can solve the three problems with the state of nature by incorporating a distinction between an official rule and the person filling it.

81. 6:345.

82. 6:333.

Officials can be required by their offices to act for purely public purposes of making, implementing, and applying law. If they act within these mandates, they act for the people as a collective body. In so doing, they also constitute the people as a collective body, and so provide the omnilateral standpoint that can solve the three problems. Those mandates also give officials moral powers that no private person could have. Both the powers and the constitutional restrictions on their exercise have their basis in the general requirement that officials could not have the power to make arrangements for the citizens that the citizens could not make for themselves. Instead, they must exercise their mandates consistent with each person's innate right of humanity and each person's status as a member of the united will.

A rightful condition between private persons is required to reconcile the purposiveness of a plurality of separate persons, consistent with each person's right to be his or her own master. A rightful condition between states has a task that is more limited but no less important: to reconcile the public nature of a plurality of states, consistent with each state's entitlement to be a condition of public right.

Christina LaFont
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AGREEMENT AND CONSENT IN KANT AND HABERMAS: CAN KANTIAN CONSTRUCTIVISM BE FRUITFUL FOR DEMOCRATIC THEORY?¹

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One of the most fruitful legacies coming out of Kant's practical philosophy within the past century has been the development of so-called Kantian constructivist approaches in moral theory² such as those of Rawls and Habermas. What makes these approaches most attractive is their promise to illuminate the internal connection between the autonomy of agents and the validity of norms. The underlying idea behind this view is that the validity of norms depends on the reasonable agreement of those to whom the norms apply. This idea captures two correlative aspects of the notion of autonomy, namely that forcing anyone to act against her own reason is wrong and thus that the rightness of norms cannot lie beyond the possible reasonable agreement of those who are subject to them. The centrality of the notion of free and reasonable agreement makes Kantian constructivism seem particularly apt for an extension from moral into legal contexts, because one and the same notion appears to be able to account for two dimensions of the validity of legal norms: their justice (or substantive correctness), on the one hand, and the legitimacy of their enforcement, on the other. Moreover, regarding the latter, it seems natural to assume that a criterion of democratic legitimacy can be straightforwardly extracted from constructivism, since the distinctive feature of democracy is precisely that it is based on the "consent of the governed." In fact, in recent years several versions of a principle

¹ An earlier version of this essay was published in S. Berteau and G. Pavlakos, ed., *New Essays on the Normative Dimension of Law* (Oxford: Hart Publishing, 2011) 229–45.

² I use the expression "Kantian constructivism" to refer to the approaches of authors such as Rawls and Habermas, but I do not thereby endorse their antirealist interpretation of Kant's moral philosophy. In my view, the most plausible way to interpret Kantian constructivism is as a weak form of moral realism. On this issue see C. Lafont, "Moral Objectivity and Reasonable Agreement: Can Realism Be Reconciled with Kantian Constructivism?" *Ratio Juris* 17/1 (2004): 27–51.

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of democratic legitimacy along constructivist lines have been offered by authors like Rawls, Habermas, or Cohen.³

However, a closer look at the notion of agreement operative in Kantian constructivist approaches cast doubt on its ability to account for the legitimacy of democratic decision-making procedures. The main problem is that any appeal to agreement as the source of the validity of norms must include some normative constraints in order to be plausible. At the very least, agreements must be *voluntary* (i.e., not reached under coercion, deception, or duress) and *reasonable* (i.e., based on suitable reasons) in order to lend any validity to the norms agreed upon. Different constructivist approaches offer different accounts of the specific content of these constraints, but they all share the assumption that only agreements under suitably ideal conditions can confer validity on those norms that are agreed upon. This in turn suggests that the normative notion operative in constructivist approaches is merely a notion of *hypothetical agreement* and not a notion of *actual consent*.

It is often pointed out that traditional social contract theories like those of Hobbes, Locke, and Rousseau crucially relied on the notion of consent, whereas in Kant hypothetical agreement becomes the central notion. This remains the case for contemporary Kantian constructivist approaches (like those of Rawls or Scanlon).⁴ The key element to the notion of hypothetical agreement is, obviously, not the act of consenting but the soundness of reasons that could lead everyone to an *agreement in judgment* as to the correctness of any given norm. In that sense, to claim that a norm “could be agreed to” means that it has no features that would make it impossible for any reasonable person to endorse it. To the extent that this notion of hypothetical agreement is supposed to track the soundness of reasons that can lend validity to collective norms, it may indeed prove fruitful in terms of accounting for the justice or substantive correctness of such norms.⁵

³ Cf. J. Rawls, *Political Liberalism* (Cambridge, MA: Harvard UP, 1993) 137; J. Cohen, “Deliberation and Democratic Legitimacy,” *The Good Polity*, ed. A. Hamlin and P. Pettit (Oxford: Blackwell, 1989) 17–34, 22; J. Habermas, *Between Facts and Norms*, trans. W. Rehg (Cambridge, MA: MIT P, 1996) 110.

⁴ See J. Waldron, *Liberal Rights. Collected Papers 1981–1991* (Cambridge: Cambridge UP, 1993) 51ff, and F. D’Agostino and G. Gaus, “Contemporary Approaches to the Social Contract,” *The Stanford Encyclopedia of Philosophy*, ed. E. N. Zalta (2008) <<http://plato.stanford.edu/archives/fall2008/entries/contractarianism-contemporary/>>.

⁵ Since my focus in this paper is on the feasibility of following a constructivist strategy when trying to account for the legitimacy of the collective enforcement of legal norms in a political community, I leave aside the issue of whether a constructivist strategy can ultimately succeed in accounting for the substantive correctness of norms. I analyze some difficulties involved in both a constructivist interpretation of discourse ethics in C. Lafont, *The Linguistic Turn in Hermeneutic Philosophy* (Cambridge, MA: MIT P, 1999); C. Lafont, “Realismus und Konstruktivismus in der Kantianischen

However, appealing to a notion of hypothetical agreement in order to account for the legitimacy of the enforcement of legal norms can lead to problematic conclusions. On the one hand, such an appeal may suggest that to the extent that the suitably ideal conditions can never be met in real social contexts, the actual agreements reached by democratic procedures cannot confer genuine legitimacy on collective political decisions. Since asymmetries of power and information are bound to be ineliminable from actual democratic decision-making procedures and unanimous agreement among citizens can hardly be expected for most political decisions, the actual agreements that can realistically be obtained through democratic procedures can hardly be ideally reasonable and thus cannot lend genuine validity to the collective norms or the political decisions agreed upon, according to the constructivist's own standards.⁶ On the other hand, the appeal to hypothetical agreement may also suggest that nothing else is needed for the legitimate enforcement of collective norms. So long as legal norms track the interests and views of reasonable persons, such that they could in principle agree to them, the enforcement of such norms would be considered legitimate, even in lieu of asking citizens (or their representatives) for their actual agreement through democratic decision-making procedures such as elections or referenda. One way or the other, the appeal to hypothetical agreement does not seem to lend any support to a defense of democracy. In fact, it can have pretty disquieting implications. By challenging the assumption that the actual consent of citizens can be a genuine source of validity for collective political decisions, it may actually undermine our confidence in the superior legitimacy of democracy, that is, of the *actual* collective authorization of laws and policies by the people subject to them through democratic elections or referenda. Obviously, democracies as they actually exist involve numerous political decisions (often of great importance) that are (perhaps correctly) not determined by democratic means. But it also seems obvious that a system of government in which political decisions are *at no point* subject to the *actual* consent of citizens through a democratic procedure (such as voting) cannot count as a democratic political system. However, if a government makes decisions that could indeed be met with the reasonable agreement of citizens (because these decisions track the best reasons) without even needing to ask after their actual consent, then why should this not be enough to count as democratic? Why

Moralphilosophie—Das Beispiel der Diskursethik,” *Deutsche Zeitschrift für Philosophie* 50/1 (2002): 39–52; C. Lafont, “Procedural Justice? Implications of the Rawls-Habermas Debate for Discourse Ethics,” *Philosophy and Social Criticism* 29/2 (2003): 167–85; and other contemporary versions of moral constructivism in Lafont (2004).

⁶ For an argument along these lines, although as part of a different overall argumentative strategy, see D. Estlund, *Democratic Authority. A Philosophical Framework* (Princeton, NJ: Princeton UP, 2008) 241ff.

shouldn't hypothetical agreement be enough for a form of government to qualify as democratic and, by implication, as legitimate?

AGREEMENT AND CONSENT IN KANT

In some of his political writings, Kant indeed suggests that hypothetical agreement is a sufficient criterion for the legitimacy of law enforcement. In a famous passage of his essay “On the Common Saying: ‘This May Be True in Theory, but It Does Not Apply in Practice’”⁷ the non-democratic nature of the notion of hypothetical agreement becomes explicit. After emphasizing the fact that the notion of agreement operative in the idea of a social contract should not be understood as an act of consenting, but rather as an idea of reason, Kant explicitly argues that the lack of actual consent among citizens (even their actual dissent) by no means invalidates a government’s decision that meets the conditions of hypothetical consent: The original contract “is in fact merely an *idea* of reason, which nonetheless has undoubted practical reality; for it can obligate every legislator to frame his laws in such a way that they could have been produced by the united will of a whole nation, and to regard each subject, in so far as he can claim citizenship, as if he had consented within the general will. This is the test for the rightfulness of every public law. For if the law is such that a whole people could not *possibly* agree to it (for example, if it stated that a certain class of subjects must be privileged as a hereditary ruling class), it is unjust; but if it is at least *possible* that a people could agree to it, it is our duty to consider the law as just, even if the people is at present in such a position or attitude of mind that it would probably refuse its consent if it were consulted” (p. 79). With the last remark, Kant is pointing out something pretty obvious. Since the actual consent of citizens may be based on all kinds of unreasonable, unfair, uninformed, or otherwise defective considerations, it cannot offer a valid criterion for the justice or substantive correctness of laws. Thus, it is the hypothetical agreement in judgment among reasonable people (and not the actual consent of citizens) that can confer validity on collective norms and, in doing so, also serve as a guide to legislators.

Now, if one looks at some contemporary proposals of a principle of democratic legitimacy built along constructivist lines from this (Kantian) perspective, the hypothetical reading of the notion of agreement employed seems straightforward. For example, Joshua Cohen’s principle of democratic legitimacy states that “outcomes are democratically legitimate if and only if they *could* be the object of a free and reasoned agreement among equals” (p. 22). Interpreted in terms of

⁷ I. Kant, “On the Common Saying: ‘This May be True in Theory, but it does not Apply in Practice’” (1793), *Political Writings*, ed. H. S. Reiss (Cambridge: Cambridge UP, 1970) 61–92.

“hypothetical agreement,” this principle imposes an obligation to frame laws in such a way that reasonable people could endorse them. This is the necessary and sufficient condition for their legitimacy. As Kant argued, this obligation is not empty, since it imposes some constraints on the legislator, but this is certainly not the same as imposing a democratic obligation to win citizens’ consent to political decisions by submitting them to democratic procedures as a condition of legitimacy. Thus, as a criterion of democratic legitimacy in particular, the hypothetical interpretation of the principle should be alarming, since it would imply that a political system would count as democratic even without any actual participation of citizens in political decision making.

Cohen himself, however, does not seem to endorse a purely hypothetical interpretation of the principle, since he claims that the sense of this principle is captured by an ideal deliberative procedure that provides a model that actual democratic institutions should mirror. According to him, the ideal deliberative procedure aims at reaching a unanimous consensus among citizens, but “even under ideal conditions there is no promise that consensual reasons will be forthcoming. If they are not, then deliberations conclude with voting, subject to some form of majority rule” (p. 23). This clearly indicates that in order to mirror the ideal deliberative procedure, institutions must include actual democratic decision-making procedures such as voting so that their outcomes reflect the actual consent of citizens in particular and not just the hypothetical agreement of reasonable persons. But if, according to the hypothetical interpretation of Cohen’s principle, what makes outcomes legitimate is simply that reasonable persons could agree to them, it is unclear why democratic decisions reached by majority rule should be considered particularly apt (let alone required) to meet such a criterion of legitimacy.⁸

⁸ The very same difficulty can be found in the case of Rawls. On the one hand, his liberal principle of legitimacy seems open to a hypothetical reading of agreement: “[O]ur exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal *may reasonably be expected to endorse* in the light of principles and ideals acceptable to their common human reason” (Rawls [1993]: 137; my italics). On the other hand, it is hard to see how, when starting with a purely hypothetical reading of this principle, one could derive a specific principle of *democratic* legitimacy that requires actual consent to the outcome of majoritarian decisions (under the constraints of public reason) as Rawls (1999) unequivocally does when he claims that “when, on a constitutional essential or matter of basic justice, all appropriate government officials act from and follow public reason, and when all reasonable citizens think of themselves ideally as if they were legislators following public reason, the legal enactment expressing the opinion of the majority is *legitimate* law. It may not be thought the most reasonable, or the most appropriate, by each, but it is politically (morally) binding on him or her as a citizen and is to be accepted as such. Each thinks that all have spoken and voted at least reasonably, and therefore all have followed public reason and honored their duty of civility.” J. Rawls, “The Idea of Public Reason Revisited”, *Collected Papers* (Cambridge, MA: Harvard UP, 1999) 573–615, 578.

The widely shared assumption that democratic legitimacy requires obtaining citizens' actual consent to (some) political decisions through their votes can hardly be justified solely on the basis of a general requirement to reach reasonable outcomes (i.e., outcomes that track the hypothetical agreement of reasonable persons). At best, it seems an open, empirical question as to which decision procedures may be best equipped to reach that goal. At worst, it may seem doubtful that democratic, majoritarian decisions in particular could ever be singled out among all possible alternatives as the best equipped to reach substantively correct outcomes. The democratic requirement suggests that there is something independently valuable in the notion of actual consent that cannot be captured by the notion of hypothetical agreement. Unless a constructivist strategy can incorporate and give some plausible account of the former and not just the latter, its ability to account for the legitimacy of democracy seems highly dubious.

Interestingly enough, in the *Doctrine of Right*, the first part of *The Metaphysics of Morals*,⁹ Kant appeals to a notion of actual consent that seems clearly irreducible to the notion of hypothetical agreement. Precisely in the context of justifying "consent by the governed" as the only source of governmental legitimacy, he appeals to the Roman principle "*volenti non fit iniuria*" (no wrong is done to one who consents) in order to highlight the internal connection between justice and voluntary consent. He argues that whenever someone decides in the name of someone else it is always possible to wrong those for whom one decides, whereas this is not possible if they decide for themselves. Thus, consent by the governed simply wins by default as the only (guaranteed) legitimate option among its alternatives: "The legislative authority can belong only to the united will of the people. For since all right is to proceed from it, it cannot do anyone wrong by its law. Now when someone makes arrangements about another, it is always possible for him to do the other wrong; but he can never do wrong in what he decides upon with regard to himself (for *volenti non fit iniuria*). Therefore only the concurring and united will of all, insofar as each decides the same thing for all and all for each, and so only the general united will of the people can be legislative" (§46, 6:313–14).

Here it is important to notice that, according to Kant, "consenting" does not lend validity to a decision merely because or to the extent that it is consent to the right decision. Kant's claim is not that individuals infallibly know what is best for them and that therefore their consent has the epistemic virtue of tracking substantively correct decisions (i.e., those that would be agreed upon by ideally reasonable persons). Kant recognizes that "volenti" confers validity independently of whether the decision ends up being substantively correct or not.

⁹ I. Kant, *The Metaphysics of Morals*, trans. M. Gregor (Cambridge: Cambridge UP, 1991) 1–138.

This becomes clear in another passage of his essay “On the Common Saying . . .” where Kant appeals again to the argument from “volenti” in order to justify his requirement that the will of an entire people must be included when deciding public laws. In that context, Kant indicates that since disagreements are bound to occur among the people, all citizens must unanimously consent to making decisions by majority rule: “A public law which defines for everyone that which is permitted and prohibited by right, is the act of a public will, from which all right proceeds and which must not therefore itself be able to do an injustice to any one. And this requires no less than *the will of the entire people* (since all men decide for all men and each decides for himself). For only towards oneself can one never act unjustly . . . An entire people cannot, however, be expected to reach unanimity, but only to show a majority of votes . . . Thus the actual principle of being content with majority decisions must be accepted unanimously and embodied in a contract; and this itself must be the ultimate basis on which a constitution is established” (pp. 77–79, my emphasis).

Here Kant argues that a way in which a law may fail to be valid (i.e., it may be wrong or do injustice to some) is if any of those who are subject to it are excluded from the process of decision making. This is not an argument about any substantive characteristics that the law must have such that it could be acceptable to reasonable persons. In fact, it is not an argument about the content of the law at all, but about the scope of inclusion in decision making that can confer validity to its enforcement. If Kant’s argument is plausible, the requirement of consent expressed by the “volenti” principle implies that all citizens must have decision-making status, that is, all citizens must be included in the collective act of binding their will to a procedure for determining legislation, and thus, such a decision must be unanimous. It is this requirement of political *inclusion in decision making* that singles out majority rule as the appropriate procedure in cases of disagreement (instead of, say, letting a single ruler or a minority of experts decide). Now, in claiming that citizens must bind their will to the procedure of majority rule in particular the inevitability of disagreements among them regarding the substantive correctness of decided-upon laws is already recognized, and with it the inevitability that some legislative decisions will be considered substantively wrong by some citizens. This strongly indicates that the notion operative here is a genuine notion of voluntary consent. More specifically, *the act of consenting under the relevant, suitable conditions* authorizes and thus lends validity to the enforcement of the laws at issue, even if citizens disagree about their substantive correctness. The notion of consent expressed in the “volenti” principle that Kant uses here is thus not the notion of a (hypothetical) *agreement in judgments* among citizens, but the notion of a *voluntary authorization to be bound by the outcome of a collective decision*.

Kant's argument suggests that laws can acquire some kind of validity in virtue of the normative power citizens have to bind themselves when they consent to their enforcement (under specific conditions) regardless of whether or not they agree on their substantive correctness. *It is because this validity can only be guaranteed by inclusion in political decision making* that the foreseeable lack of agreement in judgments among them singles out democratic majority rule as the right procedure. Seen from this perspective, the interpretation of Kant's approach as relying on a purely rationalistic account of the notion of autonomy seems at least questionable.¹⁰

However, beyond an exegesis of Kant, the difficulties that we have seen so far suggest that constructivist approaches which exclusively rely on one element of the notion of autonomy force a choice between a purely rationalistic or a purely voluntaristic account of political legitimacy, and neither of these choices can plausibly account for the two dimensions of the validity of legal norms. A constructivist approach that appeals to a single notion of ideal rational agreement in order to account for both dimensions of the validity of legal norms is bound to give a distorted view of one or the other dimension. What is needed is a strategy that can accommodate both elements of the notion of political autonomy without reducing one to the other.

In my view, Habermas's discourse theory seems to be the best candidate, among contemporary constructivist approaches, for providing such a comprehensive account of political autonomy. The formal-pragmatic interpretation of the notion of rational agreement involved in the discourse approach means that it can account for the different senses in which the *reasonableness of an agreement* and the *voluntariness of consenting* to such an agreement matter for the validity of social norms. The set of formal-pragmatic conditions that the discourse approach singles out as necessary for rational agreement simultaneously meets the cognitive requirements for rational opinion-formation and the conative requirements for autonomous will-formation. In virtue of this lucky overlap, discourse theory does not need to face the highly problematic choice between reason and the will and can thus provide a unified account of the necessary conditions for forming a reasonable collective will. To that extent, the discourse approach to deliberative democracy provides a plausible model that institutions can mirror in order to meet the dual demands of substantive correctness and legitimate enforcement of laws. However, this interpretation of discourse theory requires recognition of the fact that the two dimensions of the validity of norms

¹⁰ J. Simmons, "Justification and Legitimacy," *Ethics* 109/4 (1999): 740–71, offers such a rationalistic interpretation of Kant's approach exclusively based on the notion of hypothetical agreement, although he does so in the quite different context of discussing the legitimacy of the state rather than the legitimacy of specific laws or policies.

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are logically independent of one another. As a result, such an interpretation is incompatible with a constructivist account that explains both dimensions of the validity of norms in terms of a single notion of discursive agreement. As I will try to show in what follows, the notion of discursive agreement that can be extracted from discourse theory can indeed provide a plausible account of democratic legitimacy and thus serve as an ideal that democratic institutions should mirror only if it is not overburdened with the task of providing a constructivist account of justice (i.e., moral rightness) at the same time.

AGREEMENT AND CONSENT IN DISCOURSE THEORY

According to the discourse approach, reasons and arguments are rationally justified if they could be accepted as convincing by everyone under the conditions of an ideal speech situation.¹¹ The latter term refers to pragmatic features of the process of argumentation such as symmetry among participants, equal opportunity of participation, lack of coercion and deception, openness to criticism, etc. The discursive interpretation of the notion of rational acceptability, when applied specifically to a discussion about the validity of norms, results in the discourse principle:

- (D) Just those action norms are valid to which all possibly affected persons could agree as participants in rational discourses (BFN: 107).

It is important to notice that the notion of validity contained in the discourse principle is purely procedural, since it does not refer to any conditions that action norms should satisfy other than that they be the outcome of a rational discourse, that is, of an argumentation process under discursively ideal conditions. Thus, the specific contribution of discourse conditions to the validity of outcomes is not itself clarified by the discourse principle. Merely on the basis of the discourse principle we do not yet know whether discourse conditions bear on the justice (or substantive correctness) of norms, on the legitimacy of their enforcement, or on both. In order to offer such a specification, Habermas introduces two further principles. He adds a requirement of impartiality to the discourse principle in order to provide a rule of argumentation for moral discourses which are specifically concerned with the justice (i.e., moral rightness) of norms. As Habermas explains in *Between Facts and Norms*, “The moral principle first results when one

¹¹ Habermas's articulation of the discourse approach to communicative rationality can be found in *The Theory of Communicative Action*, vol.1, trans. T. McCarthy (Boston: Beacon Press, 1984) 8–42, *On the Pragmatics of Communication*, (Cambridge, MA: MIT P, 1998) and *Truth and Justification*, trans. B. Fultner (Cambridge, MA: MIT P, 2003).