A BETTER FRAMEWORK FOR LEGITIMACY:
LEARNING FROM THE CHRISTIAN REFORMED TRADITION

by

Philip David Shadd

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Abstract

In recent years, political legitimacy as a concept distinct from full justice has received much attention. Yet in addition to querying the specific conditions legitimacy requires, there is a more general question: What is legitimacy even about? How ought we identify and conceptualize these conditions?

According to the regnant justificatory liberal (JL) approach, legitimate legal coercion is based on reasons all reasonable persons can accept and JL is explicated in terms of a hypothetical procedure. Alas, Part I explains why JL is inadequate. First, I argue that it de-legitimizes all coercion. Second, it undercuts the proposition that there are certain basic rights which must be protected for legitimacy. Third, I suggest that JL structurally involves paternalism.

Where should theorists turn? My perhaps surprising proposal is that they turn to the Christian Reformed (CR) tradition of social thought. As I take it, this tradition is composed of such figures as Augustine and Calvin, Abraham Kuyper and Herman Dooyeweerd, and, more recently, Francis Schaeffer. It has long theorized such issues as church-state separation and permissible coercion, and is replete with conceptual resources.

Thus, Part II reconstructs an alternative legitimacy framework out of these resources. The central CR insight is this: legitimacy is a function of preventing basic wrongs. Legal coercion is only necessary "by reason of sin". I develop this insight in terms of three ideas. First, those wrongs which must prevented as conditions of legitimacy are objective wrongs, obtaining universally regardless of consent. Second, they presuppose some view of basic teleology. A teleological view is needed to elaborate contentful basic rights non-arbitrarily, but only a basic teleological view insofar as legitimacy is distinct from full justice. Third, I suggest these wrongs are fruitfully understood as constituting an exogenous standard, one that is neither the product of actual nor hypothetical self-legislation.
Part III brings JL and CR legitimacy into dialogue. Understanding legitimacy in terms of objective, teleological, and exogenous wrongs, respectively, helps us avoid each of the unacceptable consequences of JL covered in Part I. Legitimacy is better conceptualized in CR terms; preventing such wrongs is what legitimacy is about.
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Second, I also want to thank Prof. Andrew Lister, who has offered an abundance of helpful comments and discussion concerning all parts of this project. I have benefited in particular from his expertise on justificatory liberalism (JL). I fear that objections I periodically develop will belie the tremendous amount I have learned from his extremely nuanced, insightful, and even-handed defence of JL.

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# Table of Contents

Abstract ........................................................................................................................................ ii
Acknowledgements ....................................................................................................................... iv
Chapter 1 Introduction .................................................................................................................. 1

*Part I - JL Legitimacy*

Chapter 2 Clarifying the Question & Surveying the JL Answer .................................................. 18
Chapter 3 A First Unacceptable Consequence of JL ................................................................ 61
Chapter 4 A Second Unacceptable Consequence of JL .............................................................. 96
Chapter 5 A Third Worry about JL ............................................................................................ 130

*Part II - The CR Alternative*

Chapter 6 An Outline of the CR Tradition .................................................................................. 157
Chapter 7 A CR Theory of Legitimacy ....................................................................................... 204

*Part III - JL and CR Legitimacy in Dialogue*

Chapter 8 Justifying Coercion: Is Consent Needed? ................................................................. 254
Chapter 9 The Difference Made by Basic Teleology ................................................................. 287
Chapter 10 How to Steer Clear of Paternalism ....................................................................... 328
Chapter 11 Conclusion .................................................................................................................. 349

Bibliography .................................................................................................................................. 368
Chapter 1

Introduction

The Familiar Facts of Political Legitimacy

Governments are imperfect. Speaking more generally, some degree of imperfection attends legal coercion whenever and wherever it is used. People will disagree about exactly where governments go wrong, and about how far short of perfection legal coercion falls. But surely we'll all agree that actual governments and legal coercion fall short of being perfectly just.

Yet this doesn't mean that governments are morally unjustified in coercively enforcing laws and criminal codes. We shouldn't expect quite as much agreement on this point as on the last, but here, too, I take it most of us will agree. Despite its imperfections, much legal coercion is justified and it seems we are normally under a moral obligation to respect it.

These are the familiar facts in view when political theorists engage the topic of political legitimacy. The question of political legitimacy asks, What makes legal coercion legitimate even if imperfectly exercised? Legitimacy is the characteristic possessed by legal coercion that, while being imperfect, seems nonetheless justified. In engaging this topic, then, political theorists try to illuminate such issues as the conditions legitimate legal coercion must satisfy, the uses of legal coercion that are and aren't legitimate, and the gap that is commonly recognized between legitimate and perfectly just governments.

My Guiding Question

The topic of political legitimacy raises another issue as well. It may escape our attention given its relatively high degree of abstraction, yet it inevitably factors into our deliberations about
legitimacy and warrants philosophical attention. Simply put, the issue is this: *What is legitimacy even about?* This is my guiding question.

The impetus for this question is my wondering how we ought go about developing answers to any of the more specific questions involved in the topic of legitimacy. How ought we go about formulating and justifying lists of the specific conditions that legitimate legal coercion must satisfy? How ought we go about evaluating the putative legitimacy of legal coercion in light of these conditions? How ought we go about setting the level of the threshold past which legitimacy obtains, and how to understand the relationship between this level and the level of full justice?

Given my question, it's been suggested that my particular concern isn't so much legitimacy as it is the *justification* of legitimacy. This is correct. My concern is not to elaborate a list of first-order conditions that legitimate legal coercion must meet. Instead, my concern is to develop a higher-order, philosophical framework that illuminates how these specific conditions should be generated and justified. Doing so, I take it, will be tantamount to elucidating what legitimacy is about. For understanding what legitimacy is about is a prerequisite for addressing first-order issues in the appropriate terms.

My project is a philosophical one. The objects under investigation are drawn from the real world of practical politics, but it is a *philosophical* explanation of these objects that I'm after. In other words, my project is not a call to any particular political actions. Rather, it is an endeavour to understand the philosophical presuppositions in terms of which we must understand legitimacy if we are to make sense of the convictions about real-world legitimacy that we hold. Those are the objects under investigation: certain common convictions about legitimate coercion, which have been forged by real-world political experience. What I seek is a philosophical
framework that would enable us to explain the content of these convictions in a consistent and unified way.

**The Justificatory Liberal (JL) Answer**

There is at least one such framework currently on offer, and it forms the dominant approach to legitimacy among contemporary, mainstream political theorists. I shall refer to this approach as *justificatory liberalism* (JL, for short\(^1\)). This approach was largely pioneered by John Rawls\(^2\), and has been refined by subsequent theorists into a variety of specific variants. But all JL theorists share a set of core ideas in terms of which they would have us understand, conceptualize, and evaluate legitimacy. These categories represent, according to JL, what legitimacy is about.

The central idea of JL is this: legitimate legal coercion is based on reasons that all reasonable persons can accept. This is a higher-order approach to legitimacy of the type I seek, as it sets out how, *ex hypothesi*, legitimate legal coercion must be justified. Hence, *justificatory liberalism*.

But who counts as reasonable? What reasons would they accept? In the end, what legal coercion is and isn't legitimate?\(^3\) To answer such questions, JLs explicate their central idea in terms of a hypothetical procedure. In doing so, they build upon the social contract tradition of

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\(^1\) Depending upon context, I will variously use the acronym "JL" to mean "justificatory liberalism", "justificatory liberal" (as an adjective), and "justificatory liberal" (as in a theorist of this view).  
\(^3\) One might also wonder, What does it mean for a coercive law to be "based on" reasons all can accept? Does it mean that laws themselves must be acceptable to all, such that failure to receive unanimous support results in no laws? Or does it instead mean that justifications for coercion must be shareable by all in some sense, such that justifying reasons that fail to receive unanimous support are simply excluded from deliberation? Gerald Gaus is the foremost exponent of the former view, and Rawls of the latter (though there are elements of both in Rawls' work). For the distinction between these two types of JLs and my focus on the latter, see "3-An Overview of JL" in Chapter 2. For critical discussion of the distinction
political philosophy. Broadly speaking, JLs answer these questions as follows. The envisaged procedure is carried out in idealized circumstances that correct for deficits of character, rationality, and political equality such as are faced by real-world persons. Reasonable persons are persons as represented by the parties to the hypothetical procedure. The reasons on which legitimate coercion is based are those which the idealized parties would find acceptable. Legitimate legal coercion is coercion all would support as part of a social agreement.

In sum, JL theorists would have us ask, What reasons and forms of legal coercion based on these reasons would all agree to in such a procedure? This is what legitimacy is about; such are the terms JL proposes for debating the various first-order issues at stake concerning legitimacy.

The Problems JL Faces

Alas, the JL understanding of legitimacy is not without its difficulties. Among the well-known objections to JL is that it places unfair burdens on religious citizens. Another is that the set of reasons that all can accept is empty. According to yet another, even if the set isn't empty, what reasons it does contain are too meager to settle any substantive political disagreement. In fact, such are the difficulties JL faces that even JL theorists such as James Bohman and Henry Richardson are rejecting the very idea of "reasons that all can accept" and are salvaging JL only by taking it in a decisively different direction.⁴

In addition to these well-known objections, I will present three additional concerns with JL as a framework for legitimacy. First, I argue that, in fact, JL would de-legitimize all legal coercion. Second, I argue that the JL framework undercuts the proposition that there are certain between JL as applied to decisions (with a default of state inaction) and JL as applied to reasons (with a default of exclusion from deliberation), see the objections and replies at the end of Chapter 3.
basic rights which must be protected as a condition of legitimacy; in other words, JL undercuts legitimacy-conditional basic rights.\textsuperscript{5} I present a third concern as well, though more cautiously. That is, I suggest that the JL framework structurally involves us in an objectionable form of paternalism. What exactly this third critique amounts to is unclear. But it is cause enough for concern that I present it here as yet one more reason for seriously doubting the JL approach.

In light of the problems raised both by myself and others, there is evident need for an alternative approach to legitimacy. On my analysis of the JL framework, JL would have us conceptualize legitimacy in terms of consent, procedures, and self-legislation: consent, in that legitimate coercion must be supported by all; procedures, not only in that JLs explicate their central idea in terms of proceduralism, but also in that the content of JL legitimacy is said to be delivered by procedures; and self-legislation, in that JL aims to respect persons' free-and-equal status by representing legitimate coercion as norms that citizens legislate for themselves. However, the problems besetting JL suggest that legitimacy ought be understood in terms of a different set of categories.

**Turning to the Christian Reformed (CR) Tradition**

To develop an alternative, where should political theorists turn? My proposal, which I suspect will come as a surprise, is that they turn to the Christian Reformed (CR, for short) tradition of social thought. As I present it, figures such as Augustine and Calvin, Abraham Kuyper and Herman Dooyeweerd, and, more recently, Francis Schaeffer compose this tradition.


\textsuperscript{5} To clarify, here and throughout, I use the phrase "legitimacy-conditional rights" to refer to rights that must be protected if the exercise of legal coercion is to be legitimate. It is not the rights that are conditional, as the phrase might seem to suggest. Instead, what is conditional is the legitimacy of legal coercion - conditional, that is, upon the protection of certain basic rights.
It is a tradition replete with conceptual resources that can be brought to bear on any number of issues within political theory, including that of political legitimacy.

It is for fairly obvious reasons that I suspect my suggestion will come as a surprise. Mainstream political theory largely proceeds on a secular basis, in secular terms. Not only so, but specifically in regards to the topic of legitimacy, religious argument is often thought to be part of the problem rather than the solution. The need for a legitimacy standard, as influentially conceived by Rawls, arises in pluralistic contexts where citizens who hold otherwise conflicting worldviews nonetheless seek a fair basis for joint social institutions. And religions are paradigmatic of these worldviews that conflict.

Actually, though, my suggestion shouldn't be altogether surprising. For the CR tradition, having largely been forged amidst the European Wars of Religion and political tumult of the Reformation, has long been keenly interested in the proper limits of coercive state power. It has long theorized freedom of religion and church-state separation, and wrestled with the gap that exists between perfect justice and what's politically appropriate in the real world.

I propose, then, that political theorists - even secular ones - mine the CR tradition of social thought for conceptual insights that might help us develop an alternative to the failed JL framework for legitimacy.

**The Alternative CR Framework for Legitimacy**

This is exactly what I set out to do: out of the resources offered by the CR tradition, I reconstruct an alternative theory of legitimacy. It is not the only such theory that could be built up out of the CR background. But it is one which, I believe, represents some of the best insights of the tradition, and which succeeds at those very points where I show JL to be inadequate.
The central CR insight on which I base my framework is this: legitimacy is a function of preventing basic wrongs. As Kuyper says, the coercive state is only necessary "by reason of sin". What is legitimacy fundamentally about? Not proposals that all might agree to (as JL would have it), but about basic wrongs that must be prevented and basic rights that must be protected.

I explicate this central insight in terms of three big ideas, placing special emphasis on the first two. First, legitimacy-conditional wrongs are objective wrongs. That is, the duties corresponding to basic rights and wrongs apply to all persons and societies whether or not these duties are recognized as such. Second, legitimacy-conditional rights and wrongs presuppose some or another view of basic teleology. Both parts of this second idea are crucial. Some or another teleological view is needed to generate a list of contentful, legitimacy-conditional basic rights in a non-arbitrary way. But we need to understand these rights in terms of only a basic teleological view because, for one, it is the basic-ness of the interests and dignity protected by these rights which distinguishes them as demanding legal enforcement. Also, we restrict ourselves only to basic teleology since it is certainly illegitimate to legally impose a full-blown comprehensive view on others. As I say, CR social thought has long been concerned to uphold religious freedom and church-state separation. It is no part either of CR thought nor of my CR account that political institutions be religiously or ideologically partial.

In addition to these first two ideas, the third, which I advance more provisionally, is that we ought understand the moral standard constituted by legitimacy-conditional wrongs as being exogenous. Such a standard is one we understand as originating from outside of humans, as being not the product of self-legislation either actual or hypothetical. My discussion of this third idea raises certain philosophical puzzles that I admittedly leave rather incomplete. But I present this third idea nonetheless believing that it makes at least some headway in redressing the problems caused by JL's emphasis on self-legislation.
The CR approach to legitimacy can be summarized as follows. Legitimacy is a function of preventing basic wrongs: that is, preventing wrongs that are a) objective, and b) determined according to a teleological account of basic human well-being, and which also c) are fruitfully understood as constituting an exogenous moral standard. Pace JL, legitimacy isn't about consent, procedures, and self-legislation. Rather, it is about preventing basic wrongs - wrongs that are objective, teleological, and exogenous. Moreover, my CR account will not elaborate a list of specific legitimacy conditions. As per the level of abstraction at which my guiding question is pitched - What is legitimacy about? - the CR alternative outlined here instead sets out the general conceptual categories we need if we are to make philosophical sense of the first-order convictions we hold concerning legitimacy.

Clarifying My Aims

Let me emphasize that CR legitimacy as I present it is a philosophical account, not a call to political action. What it seeks to do is make philosophical sense of the convictions we hold about real-world legitimacy, to illuminate the philosophical presuppositions they involve if they are to be integrated in a unified, consistent, transparent way. My argument is that however we might fill out first-order legitimacy conditions, we should understand them in terms of basic rights and wrongs that are objective and based on teleology. Presumably we'll differ from one another in how we fill out the more specific conditions, yet - in light of certain convictions widely shared - it seems we're committed to the categories identified by the CR framework.

\[6\] At first blush, it might seem there is nothing distinctly CR about these three ideas. Aren't they common property to any number of theistic religious approaches? Wouldn't, for instance, a Roman Catholic natural law approach also embrace these ideas? In short, my answer to this question will be that while certain ideas I discuss will certainly be shared by theists more broadly, a CR political theology is distinctively able to account for such convictions as our convictions in religious liberty and in church-state separation. For further discussion, see the introduction to Chapter 6; also, especially see discussion of the second objection considered in the objections and replies of Chapter 11.
I worry that the conclusions I advance are at once too familiar and too uncommon. On the one hand, JL has already been thoroughly critiqued, and claims such as that basic rights are objective and that basic rights require some account of human interests may seem uncontroversial. On the other hand, my appeal to a religious tradition of thought may seem exotic, idiosyncratic, alienating, or misplaced in a field that, as I say, proceeds on a thoroughly secular basis. So I see myself running both these risks, both in the ways I've mentioned as well as others.

Nonetheless, I count them worth running inasmuch as they're needed to accomplish the most general of my goals, namely, helping us think about legitimacy in terms other than those proffered by JL. My broad complaint against JL is that the way it conceptualizes legitimacy - making categories such as consent and procedures of central importance - just doesn't seem to fit with what legitimacy is about in the real world, as reflected by common legitimacy-related convictions. It is not that JL is without its attractions; consent, procedures, and self-legislation all have important roles to play both in political theory and practice. But they are relatively unimportant when it comes to the issue of legitimacy, or so it seems to me. For in our actual political experience, we're quite unwilling to yield on what we take to be justice's most basic demands; and when such demands are at stake - as when human rights are violated - we also seem quite willing to coerce others whether or not they agree with us. Moreover, these are just the sort of basic demands we seem most inclined to view as legitimacy-conditional. Such realities suggest that JL conceptualizes legitimacy in altogether the wrong terms. And so each of the ideas that I advance - both the familiar and the uncommon - are part of my best attempt to generally move us away from the JL framework and onto different philosophical terrain. If, taken together, the package of ideas I present makes any progress in this general direction, I shall consider
myself successful despite the weaknesses that surely remain concerning various parts of this package.

If not already clear, my primary goal is progress on a substantive normative question of political theory. That is, the question of political legitimacy. To this end, I develop my account of CR legitimacy and defend it against its JL counterpart. I do have a secondary goal as well, though, one which is rather distinct from the first. It concerns comparative political theory more than normative political theory. This secondary goal is to advance the CR tradition of social thought as a reservoir of conceptual insights and resources from which political theorists can, and should, draw. Here’s the relationship between the two goals: CR thought - as represented by my CR account - helps us make progress toward understanding legitimacy, progress which also, I take it, vindicates the CR tradition as one worthy of further investigation. The main goal, then, is to advance discussion of an important normative question. In the process of doing so, I also hope to suggest, and make plausible my suggestion, that political theorists should consider the CR tradition more generally.

An Overview Chapter-by-Chapter

a) Part I

The following is a summary of the contents of each chapter.

The project is broken into three parts. Broadly speaking, the first exclusively engages JL legitimacy; the second exclusively engages CR legitimacy; while the third brings the two into dialogue with one another.

In Chapter 2, I begin by setting up my guiding question, and by laying out what I take to be the criteria for a successful answer. As to the latter, our best framework for legitimacy will be one that enables us to make sense of the considered convictions (CCs) we hold concerning
legitimate and illegitimate real-world uses of legal coercion. In particular, I highlight three such convictions:

- the conviction that much actual legal coercion is legitimate, even amidst disagreement between seemingly reasonable persons
- the conviction that there exist certain basic rights which must be protected as a condition of legitimacy
- the conviction that it is illegitimate to coerce free-and-equal persons on paternalistic grounds

While there are certainly other convictions we hold as well, these three are hardly peripheral to our views on legitimacy. Quite the contrary, I think these are among our most important legitimacy-related CCs, and any framework that doesn't make good sense of them is inadequate as a framework for legitimacy.

Chapter 2 also includes an introductory exegesis of JL. I isolate what I mean by "justificatory liberalism" - a term theorists put to various uses - and I explain my focus on Rawlsian variants of JL. Acknowledging that JL accounts differ from one another along various dimensions, I nonetheless identify, and characterize JL in terms of, certain core concepts widely shared by JL theorists. These include the concept of a "public" reason and that of a "reasonable" person.

Chapters 3-5 are then devoted to an internal critique of JL. This critique is internal to JL insofar as each chapter proceeds by arguing that JL leads to some or another consequence that is unacceptable by JLs' own lights. I take it that JLs themselves share the three aforementioned CCs on which I focus. So each of Chapters 3-5 proceeds by arguing that JL leads to consequences that conflict with one of these CCs.
Chapter 3 argues that JL would de-legitimize all legal coercion. It would do so by combining a unanimity condition with its permissive criteria for "reasonable" persons. In light of the latter, there are persons who would reject all legal coercion who nonetheless qualify as reasonable. Chapter 4 argues that JL undercuts legitimacy-conditional basic rights. This it does in virtue of three asymmetries that exist between the sort of rights JL can deliver and characteristics we experience real-world basic rights as having. We view legitimacy-conditional rights as procedure-independent, substantive, and objective. But the rights JL affords are presented as procedure-dependent, the product of a contentless proceduralism, and a function of group consensus. Thus, these first two consequences to which JL leads are unacceptable by conflicting, respectively, with our CC that much actual legal coercion is legitimate and our CC that legitimacy is conditional upon protecting certain basic rights.

Chapter 5 offers up another unacceptable consequence to which JL seems to lead, namely, to paternalistic justifications of legal coercion. If guilty, JL would thereby conflict with the third aforementioned CC as well. I mean to present this third critique more cautiously, though. For one, the motivation for this argument is the important difference that seems to exist between coercion for someone's good and coercion for the sake of justice - but it is difficult to articulate exactly what this distinction consists in. And two, while JL seems implicated in paternalism of a certain sort, it is admittedly an unusual sort, and perhaps not one of great concern even if JL is guilty of it. However, given how firmly we hold the CC that paternalistic coercion is illegitimate, even the mere possibility that JL involves paternalism is cause for concern. Moreover, I believe a compelling case can be made that JL does, in fact, realize this possibility, and this is the case I try to set forth as clearly as I can in Chapter 5 for the reader's consideration.
I switch gears in Chapter 6. I leave behind the largely secular background of JL, and enter the very different conceptual world of the CR tradition of social thought. In this chapter, I do not specifically broach the topic of political legitimacy. Rather, I set forth the CR tradition by way of nine tenets that outline the tradition as a whole. That every person is made in God's image, and that society properly divides into separate spheres of activity, are among these tenets. Such is the general nature of these tenets that they can be brought to bear on any number of issues within political theory, not just legitimacy. This chapter, then, more than any other, serves my secondary goal of advancing the CR tradition of social thought as a general resource on which political theorists can, and should, draw. For the most part, here the CR tradition is presented in its own terms.

In Chapter 7, I then bring CR insights to bear on the topic of political legitimacy. Given my guiding question, I specifically try and develop a higher-order framework for philosophically understanding what legitimacy is about; the reader should not expect a list of specific legitimacy conditions, but rather a framework for making good philosophical sense of such lists. It is in this chapter that I explain the central CR insight as being that legitimacy is about the prevention of basic wrongs. As per tenet 4 presented in the previous chapter, the coercive state is only needed "by reason of sin". It is also here that I introduce the three big ideas I use in explicating this central insight. First, legitimacy-conditional wrongs are objective. Second, we need to understand these wrongs as based upon teleological views of basic human well-being. In addition to these two, I also touch upon the idea of an exogenous moral standard, though discussion of its relevance to legitimacy is largely left till later.

Chapter 7 proceeds without reference to JL, yet compared to Chapter 6 its ideas should be more readily accessible to secular readers. For in addition to explaining the key ideas involved in
CR legitimacy and citing their CR pedigree, I also seek to corroborate these ideas with some argumentation not based on CR grounds. This argumentation is intended as only a first attempt at illustrating the plausibility of CR legitimacy.

c) Part III

JL re-enters the discussion in Chapter 8. The purpose of this chapter, and the two that follow it, is to explicitly compare-and-contrast JL and CR legitimacy. It is ultimately on these arguments that I rest my case, for in each of these three chapters I try to show that CR legitimacy succeeds at a specific point where JL fails. I ultimately conclude that since CR legitimacy makes better sense of the three key CCs under consideration, it is, therefore, a superior framework for legitimacy.

In Chapter 8, I explain how CR legitimacy avoids the de-legitimization of all legal coercion and restores the legitimacy of much coercion that exists amidst disagreement. It does so by replacing consent with objectivity as a concept of central importance to legitimacy. Borrowing David Estlund's notion of null non-consent, I highlight the inescapability of justice's basic demands and explain how CR legitimacy saves coercion amidst disagreement by preventing withheld consent from relieving parties of basic legitimacy-conditional duties. Objectivity helps make sense of such coercion, but consent does not.

Chapter 9 explains how basic teleology redresses the problems caused by JL's proceduralism. By virtue of its contentless proceduralism, JL undercuts basic rights we experience as having certain, definite content. Thinking in terms of teleology, however, makes available just this sort of content. Moreover, thinking in terms of basic teleology ensures that we understand legitimacy-conditional rights and wrongs only in terms of the basic elements of
human well-being. Thus, basic teleology provides content of the substantive, definite, basic sort appropriate to our CC in the existence of certain legitimacy-conditional basic rights.

Then in Chapter 10, I explore how the CR idea of an exogenous standard might avoid the sort of paternalism that lurks within JL. The suggestion is as follows: being exogenous, the standard constituted by CR legitimacy-conditional rights does not prompt us to ask a question of self-interest in justifying these rights; absent a question of self-interest, the threat of paternalism is averted. For the reasons adduced above, though, I advance this third idea more cautiously. In particular, Chapter 10 takes up at greater length the apparent distinction between coercion for people's good and coercion for the sake of justice. Though my reflections on how interests factor differently into these two types of justifications are admittedly incomplete, I do think they make at least some progress. And whereas JL would seem to fall on the wrong side of this divide, my tentative proposal here is that CR legitimacy does not.

In sum, the conclusion of Part III is that CR legitimacy provides a framework that makes better sense of political legitimacy than its JL counterpart. I think the first two weaknesses of JL, and the first two corresponding strengths of CR legitimacy, go far in showing this. I also suggest that the third weakness of JL, and the third strength of CR legitimacy that corresponds to it, reinforce this conclusion.

I end Part III by responding to some lingering objections and by sketching out directions in which further work on CR legitimacy might go. Among the former is the question of why, if CR insights can seemingly be translated into secular terms, we should hold onto the broader CR tradition at all.
Toward Clearer Thinking about Legitimacy

We all know that governments are imperfect. Yet we usually don't have a clear sense of why these imperfect governments are nonetheless justified in their use of legal coercion, nor a clear framework in our minds for evaluating when governments might become so flawed as to be unjustified in their use of legal coercion. In a word, we lack clear thinking on what legitimacy is about. I don't think JL helps much in this regard. But I hope that CR legitimacy does.
Part I - JL Legitimacy
Chapter 2
A First Unacceptable Consequence of JL

Introduction

I intend the present chapter to set up all the discussion that is to follow it. I will do this by, first, clarifying the issue at hand. To clarify the operative issue, I will distinguish between the general question of legitimacy and the subsidiary question with which I'm more specifically concerned. Moreover, in the contemporary political philosophical literature, the term "legitimacy" is invoked in various ways and I will situate my discussion in reference to at least some of these alternative ways. How does my project relate to discussions of "internal" and "external" legitimacy? How do I understand the issue of legitimacy to be related to its cousin concepts of political obligation and authority? And how does it relate to the sort of religion-friendly criticisms of JL lodged by theorists such as Nicholas Wolterstorff and Christopher Eberle? As well, I hope to clarify the question by laying out the criterion for the best answer. These methodological comments will explain what "considered convictions" are, and will identify some such convictions relevant to the issue of legitimacy.

Second, I will set up the discussion to follow with an overview of JL. Of course, in an overview of this sort, it is not possible to survey every version of JL nor every important topic they raise. However, I do hope to isolate the Rawlsian strain of JL on which I will primarily focus, and to examine at least some aspects of JL pertinent to the arguments I will make later. Among the latter are the criteria and idealizations which characterize JL’s "reasonable" persons.

This exegesis will also lead into an argument I make towards the end of this chapter, an argument that plays a critical role in setting the stage for the remainder of the dissertation.
Having expounded JL’s conception of political actors as free-and-equal, the claim I will defend is
this: the legitimacy of which JL theorists speak cannot be restricted to liberal democratic
contexts. It applies wherever persons, morally speaking, should be regarded as free-and-equal.
Or so I will argue. The need for arguing this point arises from the misleading way in which JLs
present themselves as merely explicating legitimacy of a certain kind - namely, "democratic"
legitimacy - while at the same time beginning with a conception of persons that has universal
implications. Given their starting point of persons as free-and-equal, what JLs give us - and what
JLs are ultimately committed to - is a general theory of legitimacy where legitimacy is understood
in terms of consent, procedures, and self-legislation. As such, JL does, indeed, provide one
candidate answer to the legitimacy-related question I wish to address, and it can profitably and
appropriately be contrasted with the CR alternative I wish to present.

By the end of this chapter, then, I hope both that the issue at hand, and the relevance of
JL to this issue, will be clear.

1-Clearing My Question

a) What the Question Is

To clarify the issue addressed by this dissertation, I must begin by distinguishing between
two questions. The first is this: What makes the use of coercive political power legitimate even if
imperfectly exercised? This is the general question of political legitimacy. Before distinguishing
it from a second question, let me briefly comment on the general question. For although it is the
second question with which I am more specifically concerned, I suspect readers will be more
familiar with the first. Starting with certain touch-points may help orient the reader in regards to
the less familiar question.
It is widely acknowledged that it is Rawls' shift from his early work to his later work that has made legitimacy a topic of considerable interest in contemporary political philosophy. In his early work, Rawls provides a robust defense of liberal egalitarian justice. *A Theory of Justice* (TJ)\(^7\) represents a full-blooded theory of justice, and it responds to what had long been the primary question of Western political philosophy, namely, "What is justice and the ideally just society?" However, prompted by the phenomenon of reasonable pluralism\(^8\), in his later work Rawls comes to defend liberal institutions not as ideally just, but as legitimate.\(^9\) Though citizens will reasonably disagree over what justice ideally demands, it was Rawls' belief that legitimate institutions could nonetheless command the support of all citizens on moral grounds despite citizens' philosophical, religious, and ethical disagreements. Thus Rawls shifts focus from justice to legitimacy, and I suspect most contemporary political theorists will understand the general issue of legitimacy in these terms.

The general meaning of legitimacy is reflected in the ordinary language locution, "It wasn't just, but I suppose it was legitimate." Such a statement reflects that the concept of legitimacy picks out a different standard than that of justice, one that is lower than ideal justice but that is nonetheless morally credentialed in some minimal sense. In broad strokes, this matches Rawls' own use of the term. "To focus on legitimacy rather than justice may seem like a minor point, as we may think ‘legitimate’ and ‘just’ the same. A little reflection shows they are


\(^8\) "A main aim of Political Liberalism is to say how the well-ordered society of justice as fairness (set out in *A Theory of Justice*) is to be understood once it is adjusted to the fact of reasonable pluralism and regulated by a political conception of justice." Also, "Now the serious problem is this. A modern democratic society is characterized not simply by a pluralism of comprehensive religious, philosophical, and moral doctrines but by a pluralism of incompatible yet reasonable comprehensive doctrines." See John Rawls, *Political Liberalism*, 2005, xxv–xxvi, xvi.

\(^9\) We will come to Rawls' well-known “Liberal Principle of Legitimacy” in due time. To look ahead see *Ibid.*, 137, 217.
not.\textsuperscript{10} They differ in that, “Legitimacy allows an undetermined range of injustice that justice might not permit.”\textsuperscript{11} Without mentioning the label, JL Stephen Macedo refers to the concept of legitimacy when he asks, “What guiding principles and limits might suffice to make a system of political power morally acceptable or even worthy of our support?”\textsuperscript{12} Macedo's question draws out what I take to be another feature of legitimacy, namely, that it functions as a threshold concept. (What "suffice[s]" to make political power morally acceptable?) Given the standard legitimacy picks out, its general usage discriminates between legitimate legal coercion that satisfies the standard and illegitimate legal coercion that falls short. Again, I expect this sketch of the general issue of legitimacy to be familiar, and I take it to cast a tent big enough to cover competing theories of legitimacy.

A quick sweep of the history of Western political thought reveals the wide variety of ways we might answer the general question of legitimacy so conceived. What makes the use of coercive political power legitimate even if imperfectly exercised? It was long believed that political power was legitimate so long as those exercising it were "divinely or naturally fitted for the task".\textsuperscript{13} Following Hobbes, it might be argued that legitimacy is simply a function of the state serving one's self-interest.\textsuperscript{14} Other answers might appeal to an independent criterion of rightness.

\textsuperscript{10} Ibid., 427.
\textsuperscript{11} Ibid., 428.
\textsuperscript{13} Flathman, Richard E., “Legitimacy,” ed. Goodin, Robert E., Pettit, Philip, and Pogge, Thomas, A Companion to Contemporary Political Philosophy, 2007, Blackwell Reference Online. Think here of Aristotle's infamous contention that some people are born natural slaves, or of Sir Robert Filmer notoriously arguing that monarchs have a "divine right" to rule in virtue of their genealogical link with a primordial Adam.
\textsuperscript{14} As with fellow early social contract theorists Locke, Rousseau, and Kant, it is an open question whether Hobbes' theory is best explicated as one of legitimacy as defined above, or rather as a theory of obligation or authority or something else. Shortly I will explain how I understand all three of these issues as inextricably linked, such that I don't regard this question of Hobbes scholarship as of great consequence. Nonetheless, I acknowledge that many commentators do distinguish between these issues and, as such, the question is important as well as open. At the very least, even if it is convincingly shown that Hobbes
- for instance, Thomist or utilitarian answers. Another broad stream of thought - stemming from Locke, extending through Kant, continuing to the present and now encompassing JL - makes legitimacy a function of consent to a social agreement premised upon the equal moral status of all. Many of these approaches are, of course, nowadays disregarded as marginal. Nonetheless, they illustrate that the “minimal sense” in which legitimate legal coercion is morally credentialled can be understood in widely varying ways. In light of this variety, we also should not presume that legitimacy is necessarily a procedural concept. Sometimes contemporary treatments of legitimacy appear to simply stipulate that legitimacy is a procedural matter. But such a presumption is unwarranted. At least provisionally, we must say that the general question of legitimacy admits of both procedural (e.g., Hobbes, Locke, JLS at present) and substantive answers (e.g., Thomists, utilitarians, basic rights approaches at present).

Now these last few paragraphs have been intended to give the reader a sense of what the general issue of legitimacy is. But as mentioned above, I must distinguish this first question from a second question in order to clarify the issue I wish to address. For I intend to address a more specific, subsidiary question that arises from the general issue. The answer for which I argue, reconstructed out of CR insights, may be misinterpreted if the reader has only the first question in mind.

himself was not actually concerned with the issue of legitimacy as we now generally understand it, we can easily imagine how a Hobbes-inspired answer might be reconstructed so as to address the contemporary issue of legitimacy. I believe the same can be said of the other early social contract theorists also.

Notice, for instance, that Allen Buchanan characterizes legitimacy in largely the same way as Rawls does - a threshold concept, morally credentialled, yet short of justice - even though Buchanan offers a substantive account in contrast to Rawls’ procedural account. Buchanan “leaves open the possibility that entities wielding political power can be legitimate even if they do not achieve an ideal of democratic governance or are less than morally optimal in some other respect”; he warns against “conflating legitimacy with perfect justice”. [Buchanan, Allen, “Political Legitimacy and Democracy,” Ethics 112 (July 2002): 691.]

The more specific question I hope to answer is this: What is the right framework for thinking about legitimacy? Put another way, what are the most apt categories for thinking about legitimacy - for conceptualizing and ultimately evaluating the legitimacy, or illegitimacy, of uses of legal coercion? In answering the general question of legitimacy, some idea of how to go about formulating an answer is needed. Thus, a somewhat more specific, and subsidiary, question arises as we pursue an answer to the general question: In what terms should we formulate our answer? This dissertation will not try to answer the more general, practical issue of legitimacy; rather, its focus is the more specific, strictly philosophical issue of what our legitimacy judgments are about and, consequently, how we should go about making them. I do believe my conclusions bear on the general issue, but only indirectly, and it is not my intention to explain in any length how they do.

Given what my question is, my discussion of legitimacy will proceed at a higher level of abstraction than one might expect. I take it there exists a distinction between first-order judgments of legitimacy and the higher-order justifications of those first-order judgments. In other words, there are answers to the general question of legitimacy and then there are justifications of those answers. At issue in this dissertation is what form these justifications should take. Examples of first-order judgments might be: that it is illegitimate to violate freedom of religion; that legitimacy requires protection of basic rights as laid out in the Universal Declaration of Human Rights (UDHR); that un-democratic regimes are illegitimate; that legislation issuing from real-world democratic procedures is legitimate; that failure to optimize the public good, in terms of such things as healthcare, education, and job creation, jeopardizes legitimacy; that taxes are illegitimate; that it is legitimate for members of bloodline \( x \) but not bloodline \( y \) to rule; governments that contravene the precepts of sacred text \( z \) are illegitimate; and so on. These judgments vary somewhat in their degree of specificity, but all directly address the
general question of legitimacy, enabling us to readily discriminate between legitimate and illegitimate uses of legal coercion. But why are these answers either good or bad? In contrast to these first-order judgments, we must evaluate the higher-order grounds on which these answers are putatively justified. For this latter task, we need to know the appropriate terms for formulating and justifying these answers.\textsuperscript{17} It may be helpful to think of my project not as concerned with legitimacy itself, but as concerned with the \textit{justification} of legitimacy.

It may be helpful here to understand my question in light of a distinction drawn by T. M. Scanlon. Scanlon distinguishes between a \textit{normative} theory of morality and a \textit{philosophical} theory of morality.\textsuperscript{18} A normative theory proposes a particular decision-procedure to follow in making moral choices in particular contexts; in terms of their level of abstraction, first-order legitimacy judgments approximately correspond to normative moral theories. By contrast, a philosophical theory addresses the nature of the very subject matter of morality. In Scanlon's sense of these terms, my intention is to develop a philosophical theory of legitimacy rather than a normative one; the CR legitimacy I defend is of this philosophical (in Scanlon's sense) order. In drawing his distinction, Scanlon characterizes a philosophical theory in a variety of complementary ways. A philosophical theory concerns what moral judgments "can be about"; it concerns the "nature" and "subject matter" of morality; it explores "the kind of property" that moral rightness is; and it informs what "the best forms of moral argument amount to".\textsuperscript{19} I find all of these helpful ways of conceiving the level at which my discussion of legitimacy is pitched. Given my question, candidate answers will illuminate what our legitimacy judgments are about.

\textsuperscript{17} We can move in the opposite direction as well: if we know what our legitimacy judgments are generally about (at a more abstract level), then we'll know more clearly what legitimacy requires in real-world contexts and better discriminate between legitimate and illegitimate legal coercion (at a less abstract level).


\textsuperscript{19} Ibid., 104, 107, 108, 110, 107.
what their subject matter is, what the property of legitimacy (and illegitimacy) consists in, and what the terms of debate should be in evaluating the legitimacy of legal coercion.

Granted the line between the general question of legitimacy and my more specific question is somewhat fuzzy. Nonetheless, it is certainly true that discussions of legitimacy can operate at varying levels of abstraction. With this latter point in mind, I hope to have made clear that my discussion of legitimacy will be pitched at a higher level of abstraction than many more familiar discussions. My question again: What is the right framework for thinking about legitimacy? In what terms should we conceptualize and evaluate the legitimacy of coercive political power?

b) What the Question Is Not

If it is not already clear, let me first emphasize that I am concerned with legitimacy in the normative sense. My concern is not with what coercive institutions people actually do accept as legitimate, but with what coercive institutions people ought to recognize as legitimate. As such, normative legitimacy contrasts with "the positivist or Weberian account of legitimacy typically used in the social sciences - according to which general acceptance de facto by the majority of people of social and political institutions and officials' actions is sufficient for the legitimate exercise of political power". My JL interlocutors' concern, as is Rawls', is with normative rather than merely descriptive legitimacy. So is mine.

Similarly, I do not understand legitimacy in terms of a distinction between "external" and "internal" legitimacy. It seems to me that such a distinction presupposes a descriptive or positivist account of the sort rejected in the previous paragraph. That, on this model, it is possible

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for a regime to be legitimate in one way while illegitimate in the other reflects this presupposition; for instance, an internally legitimate regime may be externally illegitimate as when a population comes to accept (perhaps for ideological or religious reasons) severely unjust social arrangements, and an internally illegitimate regime may be externally legitimate as when the costs of international intervention against an unjust regime pragmatically outweigh the possible benefits. But I reject these possibilities, given that I reject the real-world contingencies on which they are predicated - such as what a population is willing to accept as legitimate - as being relevant to the topic of normative legitimacy. I take it that, from a moral point of view, the moral conditions that make for legitimacy retain their normative force apart from such contingencies. Legal coercion that is normatively legitimate ought to be recognized as legitimate both domestically and internationally.

It should also be clear that I do not understand legitimacy to be merely a context-relative phenomenon. Rather, I understand normative legitimacy to have universal implications; it applies in all socio-historical contexts not just some, and I deny that different standards apply to different contexts. Why should we believe such a context-transcendent standard exists, or at least might exist? I don't mean to simply presume its existence, and in due course I will provide further explanation in defense of its existence. However, initially at least, there is good reason to suppose that such a standard does, indeed, exist. The best reason I know of for this initial supposition is that we do, in fact, make legitimacy judgments across different times and places, and regard ourselves as morally justified in doing so. Certain well-known cases are obvious: the Nazi regime was illegitimate, as was the regime of South African apartheid. Moving further back in history it may seem we become somewhat less sure in our judgments. But surely we are

21 Cf. Buchanan, Allen, “Political Legitimacy,” 689. “Sometimes it is unclear whether ‘legitimacy’ is being used in a descriptive or a normative sense. In this article I am concerned exclusively with legitimacy in the normative sense, not with the conditions under which an entity is believed to be legitimate.”
willing to make such judgments nonetheless, aren't we? Weren't the intolerant regimes driving the European Wars of Religion illegitimate? And so, too, the execution of Servetus? I shall assume we are right in denouncing all such regimes as illegitimate. Moreover, our aim to make sense of these judgments in a unified way warrants the assumption that normative legitimacy involves universality. Given what my question is, then, part of my task will be to vindicate this idea that the best framework for thinking about legitimacy incorporates a universal legitimacy standard.

Now to preempt a different sort of issue. As I understand it, there is no important asymmetry between the concept of legitimacy and those of obligation and authority. I will now briefly explain and defend this symmetry view, to make clear that in answering my question I do not intend to treat legitimacy as though it were a separate issue from obligation and authority.

On my view, legitimacy is primary among these three concepts. The legitimacy threshold has at least three significant implications, appreciation of which explains the relationship between legitimacy and the subsidiary concepts of political authority and obligation. First, the legitimacy threshold informs the question of the in principle permissibility of legal coercion. What justifies the very existence of legally coercive institutions? For any set of laws that falls below the threshold, that set of laws is illegitimate and ought not be coercively enforced. This also means that if no set of laws meets the threshold, then no set of laws can be legitimately enforced. Therefore, below the threshold, no state is justified; above, at least some coercive state is justified. Second, insofar as we are subject to legal coercion, legitimacy identifies a threshold above which we have a moral obligation to support the extant regime and below which no such

22 Rawls, for one, regards Servetus' execution by Calvin as illegitimate; other JLs would surely agree, and so do I. See John Rawls, Political Liberalism, 2005, xlix.
23 I especially take up this part of the task where I discuss the CR postulates of objectivity and an exogenous moral standard, as in Chapter 7.
obligation exists. Here the question is, What minimal moral criteria make laws legitimate such that citizens have an obligation to respect them? Third, insofar as we exercise legal coercion, the legitimacy threshold helps clarify when we are and are not justified in legally coercing our fellow citizens. Below the threshold, legal coercion is a morally impermissible way of discouraging a behaviour with which I disagree or think destructive. But above the threshold, it is not. So the concept of legitimacy also informs the question, When are some citizens justified in using legal coercion against other citizens even if they do so imperfectly? Conceptionally, these three issues are distinct; however, practically I regard them as equivalent. For in each case it is the same moral considerations that trigger a change regarding the morality of coercive political power - whether legitimating its existence, obligating those under it, or authorizing its use. The latter two implications speak to the issues of obligation and authority respectively. I hope it is clear, then, how on my view all three concepts are interrelated, with the latter two depending upon the legitimacy threshold.

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24 In a survey article on the topic of legitimacy, Flathman aptly refers to these three concepts as "kissing cousins". See Flathman, Richard E., “Legitimacy.”

25 I generally follow the common Razian understanding of authority as the moral power to require action on behalf of others (cf. Estlund). As such, laws legislated by institutions with authority constitute "exclusionary reasons": they cancel out the significance of further, otherwise relevant considerations. The special normative role of authority-issued commands is often characterized in terms of the irrelevance of the commands' content to their normative force (as in Flathman and Lister, for instance). However, I do only generally follow this Razian picture. For I take it as very salient that we only often feel authority-issued commands work in this way; no-one sensibly regards themselves as under an absolute obligation to obey another's authority. We seem only to regard such commands as constituting exclusionary reasons above a basic level of justice or morality. To presumptively construe legitimacy (or authority) as the power to issue exclusionary reasons, then, is to beg the question in favour of procedural accounts of legitimacy, over and against their substantive counterparts. The power to issue exclusionary reasons may not prove to be fundamental to the concept of legitimacy. So at the outset we ought only provisionally take on this Razian picture. In order see Raz, Joseph, “Authority and Reason,” in The Morality of Freedom, by Raz, Joseph (New York: Oxford University Press, 1986), 23–37; Estlund, David M., Democratic Authority: A Philosophical Framework (Princeton, NJ: Princeton University Press, 2008), 118ff; Raz, Joseph, Practical Reason and Norms (London: Hutchinson & Co. Ltd., 1975); Flathman, Richard E., “Legitimacy”; Lister, Andrew, “Public Reason in Practice and Theory,” n.d., 40.

[N.B. The manuscript by Lister cited here, "Public Reason in Practice and Theory" - and which I shall cite often throughout - is due to be published as part of a forthcoming book, Public Reason and Political Community, Bloomsbury 2013.]
But theorists not uncommonly believe that these concepts should be separated. For instance, in his essay “Political Legitimacy and Democracy”, Buchanan distinguishes legitimacy from authority and obligation, such that – although he takes legitimacy to be primary as do I – the legitimacy of a regime neither necessarily entails its having authority nor its citizens having a obligation to obey.\(^{26}\) On this view, authority entails a right to be obeyed (that is, obligation), but not legitimacy.

However, these distinctions are so fine-grained as to be unhelpful. Buchanan insufficiently explains why the same considerations that legitimate a given regime would not also give extra weight to its commands and obligate its citizens to obey. It is not clear to me how this can be: how can the same moral considerations that legitimate the use of legal coercion not also generate a duty to submit to that legal coercion?\(^{27}\) Buchanan distinguishes obligation from legitimacy by pointing to instances where citizens have reason to submit to laws even when the laws are implemented by an illegitimate regime. He notes instances where “we may have prudential reasons (we are likely to be punished for noncompliance) or religious reasons (we believe the scriptures and the scriptures say to render unto Caesar what is Caesar’s) or we may have general moral reasons (the law codifies sound moral principles that prohibit killing, theft, etc.) to comply with the laws the government imposes”\(^{28}\). But these examples seem off-target, as they give agent- or context-relative reasons for selective compliance rather than explicating political obligation as a general phenomenon. Neither do these examples show it is possible for

\(^{26}\) In fact, Buchanan also introduces a fourth concept, “authoritativeness”, but I will not address that concept here.

\(^{27}\) Estlund also separates these issues, saying of his normative consent theory that, "Normative consent (without actual consent) can establish authority even if it cannot establish legitimacy." However, given the example of despicable Joe with which he illustrates normative consent theory, I don't see practically how legitimacy \textit{qua} permission to coerce isn't established at the same time as authority. For, in the example, the same considerations that establish the authority relation even absent consent - the exigencies of the situation, the flight attendant's capacity for meeting them - would also seem to make it legitimate for the flight attendant to issue directives. [Estlund, David M., \textit{Democratic Authority}, 123–127.]
legitimacy to exist without a corresponding duty to obey. Rather, they simply show that oftentimes the moral obligation to submit to imperfect laws is over-determined; often we have reason to obey laws both because the regime is legitimate and also because, for instance, sanctions accompany disobedience. Indeed, so far as I can see, legitimacy does always entail that commands carry special weight and that citizens should obey. To reiterate, how can the same moral considerations that legitimate legal coercion not also require submission to this coercion?

The CR framework for legitimacy that I will defend, then, doesn't operate normatively in isolation from the issues of obligation and authority. In addition to the foregoing reasons for equating them, my view of their interrelatedness is also appropriate from a CR viewpoint since the passages of Christian Scripture most relevant to the issue of legitimacy assume the perspective of those under power, struggling to reconcile themselves to unjust laws.

At this point let me try to head off just one more potential source of misunderstanding. My question is not that of the role of religion in liberal democracies. This clarification is needed since for many of the authors and texts I'll draw upon, this is their question. May laws permissibly be enacted on religious grounds? Is it morally appropriate for citizens to invoke their religious beliefs in the public square and in their voting? These questions are of prime importance in much JL work as well as in that of JL's critics, yet not mine. I suspect it will

28 Buchanan, Allen, “Political Legitimacy,” 695.
29 It's worth noting that in more recent work Buchanan does, in fact, recognize a duty-to-support that corresponds to legitimacy: “in what might be called the focal sense of the term, legitimacy involves not only the liberty-right to govern but also a content-independent requirement of practical support for (or at least non-interference with) the institution’s effort to govern.” (I am wary of Buchanan's "content-independent" qualification, but the point of agreement I am presently emphasizing is simply that legitimacy entails obligation.) As Buchanan notes, there is a "distinctive relational aspect to legitimacy". This "relational aspect" is that one's right-to-legislate involves another's duty-to-submit. (Buchanan, Allen, Human Rights, 137.)
be important to bear this clarification in mind also in light of my suggestion that we turn to a religious tradition of political theory, namely, the CR tradition. Readers might take my invocation of religious premises in political theorizing to mean that I endorse the invocation of religious premises in the public square. Not necessarily, and, in any case, the propriety of the latter is not my question.

Rather, my issue is that of legitimacy - what the right framework is for thinking about the conditions that make coercive political power legitimate even if imperfect. JL is an appropriate interlocutor in this discussion as the debate over JL involves not only the issue of religion's place in politics but also that of legitimacy. Thus, even though Eberle is chiefly interested in the "role of citizen in a liberal democracy" and whether religious citizens ought exercise restraint, he recognizes that his discussion "bears on the topic of political legitimacy". Given his interest, Eberle has "no intention of committing [himself] to a general theory of political legitimacy"; conversely, the topic of political legitimacy is exactly my interest. Now in my discussion of legitimacy, I may find it necessary to invoke religious premises - say, premises involving God, a divine design, or a supernatural moral standard. But if I do, I do so to the end of giving a philosophical account of legitimacy. Philosophically, religious premises may be required to

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34 Ibid., 22.
account for our legitimacy-related convictions, even while - on a practical level - we may remain convinced that it is improper to base laws on sectarian religious beliefs.

This will not be the last time I emphasize the more philosophical than practical orientation of my project. I hope this orientation will also be made clearer by the methodological points to which I now turn.

2-What will Settle the Issue?

How will we know which framework for legitimacy is best, whether JL, CR, or otherwise?

According to the desideratum I will use, the best account will be that which makes best sense of the considered convictions (CCs)\(^{35}\) we hold concerning legitimacy in the real world. While I will disagree with Rawls on many points, I largely follow him here. According to Rawls, the role of the political philosopher is to order our CCs in a way that explains their consistency and integrity and that helps illuminate how the principles underlying our CCs ought be applied in new contexts.\(^ {36}\) My desideratum is essentially an adaptation of this approach applied to the issue of legitimacy.

Rawls’ methodology assumes, as does mine, that we must start by taking certain bedrock moral convictions as given. This does not mean they may not be altered in due course; but they form our starting point and at least the initial parameters within which we assess the propriety of a conception of justice (or of legitimacy in the present case). These bedrock convictions are

\(^{35}\) Or simply “CC” – meaning “considered conviction” in the singular – depending on context.

\(^{36}\) “If [a conception of justice] as a whole seems on reflection to clarify and to order our thoughts, and if it tends to reduce disagreements and to bring divergent convictions more in line, then it has done all that one may reasonably ask”; “A conception of justice...is a matter of the mutual support of many considerations, of everything fitting together into one coherent view”; a conception of justice ought to ”match our considered convictions of justice or extend them in an acceptable way.” (Rawls, John, *Theory of Justice*, 46, 19, 17.)
primarily given us through experience, not philosophy. The role of philosophical reflection is then to harmonize, systematize, clarify, and draw out the implications of these starting points.

These bedrock moral convictions Rawls refers to as “considered convictions”. These convictions concern issues "which we feel sure must be answered in a certain way". These convictions are provisional fixed points that it seems any reasonable conception must account for. The wrongness of slavery is a paradigm CC, as is the justness of religious toleration. These two exemplify, but by no means exhaust, the set of CCs with which political theorists must reckon.

Circularity seems afoot when elsewhere Rawls unhelpfully describes CCs as those judgments "rendered under conditions favorable to the exercise of the sense of justice". Generally, though, Rawls describes CCs as those convictions of which we feel most sure, and I think that is the best that we can do - at least as a starting point.

Given my question, it is our CCs concerning legitimacy in which I am specifically interested. Just as legitimacy is conceptually distinct from justice, so we should be careful to distinguish between our justice-related CCs and our specifically legitimacy-related CCs. We operate in the real world with certain CCs about legitimate and illegitimate legal coercion. Rawls

37 “In any case, it is obviously impossible to develop a substantive theory of justice founded solely on truths of logic and definition. The analysis of moral concepts and the a priori, however traditionally understood, is too slender a basis.” (Ibid., 44.)
38 As at John Rawls, Political Liberalism, 2005, 8.
39 Alternatively, he sometimes refers to them as "considered judgments", as at Rawls, John, Theory of Justice, 42.
40 Ibid., 17.
41 John Rawls, Political Liberalism, 2005, 8.
43 More expansively, Rawls at one point also includes the following among "our considered judgments with their fixed points": "the condemned institutions of...the subjection of the working classes, the oppression of women, and the unlimited accumulation of vast fortunes, together with the hideousness of cruelty and torture, and the evil of the pleasures of exercising domination.” (John Rawls, Political Liberalism, 2005, 431.)
has already pointed out a couple such convictions - that is, in the illegitimacy of regimes that tolerate slavery or that involve religious persecution. Like these, the CCs on which I will especially focus are ones that I expect all of us - as citizens and partisans of modern liberal democracies - will share, including both JL and CR theorists.

The additional legitimacy-related CCs on which I focus are these:

- the conviction that many real-world uses of legal coercion are, indeed, legitimate, even when they occur in the midst of disagreement between epistemic peers
- the conviction that real-world legitimacy is conditional upon protecting certain basic rights, such as those which are commonly constitutionally entrenched in contemporary liberal democracies
- the conviction that it is illegitimate to legally coerce others on paternalistic grounds

Other legitimacy-related CCs will come up in the course of our discussion - for instance, that laws aren't necessarily legitimate simply because they might be popular. I especially focus, though, on these three.

In short, the account of legitimacy I seek is the one that makes best sense of our CCs. And what does it mean to "make sense" of our CCs? It means philosophically explaining them in a way that achieves what Rawls calls "reflective equilibrium". In such equilibrium, "our principles and judgments coincide".45 In the present case, the relevant "judgments" are our legitimacy-related CCs and the relevant "principles" are those key ideas that constitute either the JL or CR framework for understanding legitimacy. Remember my question: What is the right higher-order framework for thinking about legitimacy? The two main options I will consider are

44 Rawls, John, *Theory of Justice*, 42. But what conditions are these? Rawls seems committed to identifying favorable conditions on the basis of the correct judgments they yield, while also basing the correctness of said judgments on their being produced under favorable conditions.
the JL and CR approaches. To settle the issue, then, we must ask, Which set of "principles" - which framework - best matches with and explains the relevant CCs?

While not without practical import, answering this question is first and foremost a philosophical task. My project does not primarily aim to troubleshoot a problem "out there", as it were, in real-world politics. Instead, it aims to conceptually reconcile our first-order beliefs with the higher-order philosophical presuppositions of these beliefs. The best account will illuminate those presuppositions that best fit these beliefs. Hence, why I say my project has more a philosophical than practical orientation.

3-An Overview of JL

JL explains legitimate legal coercion in terms of reasons that all reasonable persons can accept. To explicate this core principle, they represent legitimate coercion as issuing from a hypothetical procedure in which coercion is justified by reasons that idealized citizens all find acceptable. First, points about nomenclature, and then we shall return to this core principle.

The term "justificatory liberalism" was coined by Gerald Gaus in his book by that same name. In that book, Gaus distinguishes between "justificatory liberalism" and "political liberalism" - identifying himself as the former and Rawls as paradigmatic of the latter - but I follow Eberle in regarding the commonalities between the two as more important than their differences. From where I stand, it is most helpful to understand Rawlsian political liberalism as one version of JL. Thus, although my main JL interlocutors will be JLS of the Rawlsian version, I will persist in referring to them as "JL" theorists.

47 Eberle, Christopher J., Religious Conviction, 339 n34.
48 So used, "JL" is comparable to "public justification" as an umbrella term. See Vallier, Kevin and D’Agostino, Fred, “Public Justification,” ed. Zalta, Edward N., Stanford Encyclopedia of Philosophy, 2012,
Why focus on Rawlsian JL rather than some other type? For one, Rawlsian JL is the most influential and widely held version. As I interpret it, Rawlsian JL clearly exemplifies the "consensus approach"\textsuperscript{49}, an approach which Vallier and D'Agostino note is "by far the dominant conception of public justification".\textsuperscript{50} Another reason for focusing on a Rawlsian version is that \textit{qua} version of JL or public justification, it seems a more faithful expression of both than its non-Rawlsian counterparts. Indeed, it strikes me that Gaus' convergence type of JL - which can be seen as Rawls' main rival within JL\textsuperscript{51} - with its disregard for the reasons for which citizens might severally support a law, might be more aptly named "acceptance liberalism" rather than
Similarly, Vallier and D'Agostino again rightly note that, "One reason for adopting a consensus conception of reasons might be that it aids the public recognition of what is publicly justified because public justification appeals primarily to reasons that are shared." It is in this vein we may say that Rawlsian JL is a more faithful expression of public justification. Moreover, though not every critique I make of Rawlsian JL applies equally to other versions of JL - such as Gaus' - most of them will. So while focusing on Rawlsian JL, much of what I will say will, in fact, bear also on non-Rawlsian JLs in any case.

Rawls is the archetype of Rawlsian JL, but many other JL theorists hold similar views and my interlocutors will be several. I count Thomas Nagel, Andrew Lister, Jonathan Quong, and Stephen Macedo among these Rawlsian JLs. Among them I also include Joshua Cohen, whose deliberative democratic theory gives institutional expression to Rawls' idea of public reasoning. Henceforth, then, let me be clear that references to "JL" - including my overview

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53 Beginning here, then, my understanding of what it means for a coercive law to be "based on" universally acceptable reasons should be getting clearer. (Cf. n3 in the Introduction.) It means that JL's demand for universal acceptability applies primarily to the reasons on which proposals are based, and to the balances of these reasons which are said to justify one or another coercive policy. The demand does not primarily apply to proposals themselves. For further clarification of this understanding of JL, see below in-text where I discuss the issue of JL's default when the demand for universal acceptability goes unmet.

54 See section 4.1 in Vallier, Kevin and D’Agostino, Fred, “Public Justification.”

55 Consider the three critiques of JL I develop in Chapters 3-5. I believe my argument in Chapter 3 - that JL de-legitimizes all uses of legal coercion - applies equally to Rawlsian and non-Rawlsian variants, due to the reasonable (if wrong) views of anarchists. My argument in Chapter 4 that JL undermines basic rights would apply to both, given that all variants emphasize proceduralism. As for my Chapter 5 argument that JL involves us in paternalism, it is more obviously an indictment of Rawlsian JL than of, say, Gaus' JL. But since Gaus' JL still involves idealizations, it threatens us with paternalism even if it requires only convergence of reasons for coercion rather than consensus on reasons. How any version of JL stands up to these objections - whether Rawlsian or otherwise - the reader will have to assess in due time.

of "JL" - are references to Rawls-style JL. It is Rawlsian JL that I will have in mind throughout my project, except where context indicates otherwise.

JL distinguishes itself from other liberal political philosophies by its distinctive view concerning the appropriate mode of justifying coercive political power. According to this view, coercive political power is legitimately exercised only when it is exercised on the basis of reasons that all reasonable persons can accept. Or, alternatively, it can be stated as the view that political power is legitimately exercised only when it is exercised on the basis of reasons that no-one can reasonably reject. Either way, JL involves a unanimity requirement: either universal


58 Egs., from the liberalisms of John Stuart Mill, Ronald Dworkin, Will Kymlicka, or Joseph Raz. Cf. the JL mode of justification explained in-text with justifications of liberal polities based on perfectionist values such as individuality or autonomy. Mill, Dworkin, Kymlicka, and Raz offer the latter form of justification for liberal institutions. As such, JLs and these liberals offer contrasting answers to the question, "Must liberal political philosophy be based in some particular ideal of what constitutes a valuable or worthwhile human life, or other metaphysical beliefs?" JLs answer no, these other liberals yes.

In fact, even within the camp of JL, we can similarly divide between versions of JL that do and do not present their theories as relying on broader "comprehensive views" (in the Rawlsian sense of that term) - that is, on views that touch more broadly on questions of value, truth, and epistemology. On the one hand, theorists such as Rawls and Nagel believe JL stands apart from these broader questions. On the other, we have a theorist such as Jürgen Habermas, whose brand of JL as it is worked out in Between Facts and Norms clearly and consciously depends upon the theory of communicative rationality developed in Habermas' earlier work. The inability of any version of JL to escape comprehensive commitments is certainly an issue in which I'm interested; I take it up in Chapter 7 in particular, in conjunction with the idea of basic teleology. More important to me than the difference between Rawls and other JLs in this respect, though, is the difference between consensus-emphasizing JLs and convergence-emphasizing JLs.


59 Like Lister, I think nothing of substance turns on whether JL is formulated in terms of unanimous "acceptability" or unanimous "non-rejectability". In Lister's estimation, it "turns out to be merely a matter of presentation". Rawls formulates JL in terms of acceptability, while the rejectability variant stems from the contractualism of T. M. Scanlon. See Lister, Andrew, "Public Reason," 32; Scanlon, T. M., "Contractualism and Utilitarianism." The issue of supererogation is meant to highlight a relevant difference between the two. However, were I party to a hypothetical social agreement, while I might
acceptability, or universal non-rejectability. Either way, JL is the view that legitimate legal coercion is based on reasons that all reasonable persons can agree to. That is the basic idea. It represents this idea in terms of a hypothetical procedure, in which idealized participants exchange reasons, and which culminates with unanimous agreement on social arrangements that are justifiable to all. 60

Here are a few representative statements of the basic JL view. Rawls’ Liberal Principle of Legitimacy (LPL) is the most well-known capsule statement of JL:

To this political liberalism says: our 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. This is the liberal principle of legitimacy. 61

A slightly later and slightly modified statement of the LPL is worth noting, though scrutiny of possible differences between the two is unnecessary at the moment when our task is simply to put the basic JL view before us. Like the earlier one, this later formulation of the LPL is also a clear expression of JL’s core principle:

Hence the idea of political legitimacy based on the criterion of reciprocity says: our exercise of political power is proper only when we sincerely believe that the reasons we would offer for our political actions – were we to state them as government officials – are sufficient, and we also reasonably think that other citizens might also reasonably accept those reasons. 62

reasonably accept a policy requiring supererogatory social behaviour, mightn't I also simply not accept such a policy? It seems the language of “acceptability” and “unacceptability” can perform the same work as “rejectability”, though perhaps less eloquently. 60 It will be evident that, so described, a rather wide variety of theorists will qualify as JLs. However, as stated earlier in-text, I am primarily interested in Rawls and those theorists who follow closely after him - such as Nagel, Lister, Quong, Macedo, and Joshua Cohen. These particular characteristics - a hypothetical procedure, exchanging reasons, culminating with a unanimity requirement - may not especially distinguish JLs from other views; but they are essential to the view, nonetheless. 61 John Rawls, Political Liberalism, 2005, 137.
62 Rawls, John, “The Idea of Public Reason,” 446–447. At least one difference is that, in applying the LPL, the latter requires us to be reasonable in our expectations of what others can reasonably think. The earlier LPL isn't so explicit in requiring us to be reasonable in our expectations of others.
Likewise, as Gutmann and Thompson would put it, JL "aspires to a politics in which citizens and their accountable representatives, along with other public officials, are committed to making decisions *that they can justify to everyone bound by them*"\(^{63}\).

To get a sense of JL’s core principle and animating spirit, we should understand JL as a concerted response to “the traditional liberal demand to justify the social world in a manner acceptable ‘at the tribunal of each person’s understanding’".\(^{64}\) JL essentially attempts to meet this demand by identifying legitimate legal coercion only as that based on reasons to which all reasonable persons can agree; the unanimity requirement of JL is that legal coercion pass "at the tribunal of *each* person's understanding" (emphasis mine). Thus Lister summarizes JL as follows:

The exercise of political power is justified only if it is justifiable *to* all those subject to it, that is, only if it is acceptable to all suitably rational and moral individuals without them having to give up the religious or philosophical doctrine they reasonably espouse.\(^{65}\)

Having set forth the core tenet of JL, let us now sample a few of the dimensions along which it needs to be specified.\(^{66}\) In considering these questions, we will survey JL’s general answers to them, as well as some - though not a great deal of - the nuanced variety that exists among particular JL accounts. We can draw a more useful sketch of JL as a whole by focusing on broad areas of agreement rather than on more fine-grained points of disagreement.

To what uses of political power does JL apply?

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\(^{63}\) Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Cambridge, MA: The Belknap Press of Harvard University Press, 1996), 50 [emphasis mine]. I regard Gutmann and Thompson’s deliberative democratic theory as a way of giving institutional expression to JL.

\(^{64}\) Quoting a memorable and apt phrase from Jeremy Waldron, Rawls characterizes his own theory of JL in this way, as an attempt to meet this demand. See John Rawls, *Political Liberalism*, 2005, 391 n28.

\(^{65}\) Lister, Andrew, “Public Justification and the Limits of State Action,” 151.

\(^{66}\) To be sure, my overview will not exhaust the dimensions along which particular JL accounts vary. For instance, *to whom* do the requirements of public reason apply? At one point Rawls states that public reason does "not apply to our personal deliberations and reflections about political questions". But should it, as Audi argues, apply more expansively so as to require “self-examination” whereby citizens bring their private ruminations over coercive measures in line with the demands of public reason? (John Rawls, *Political Liberalism*, 2005, 215; Audi, Robert and Wolterstorff, Nicholas, *Religion in the Public Square*, 47–53.) I do not discuss these and other aspects of JL in-text. Rather, I try to focus my exegesis particularly on aspects of JL that are relevant to later stages of my argument.
I hope I can dispatch this issue rather briefly. The Rawlsian answer to this is “constitutional essentials and matters of basic justice”. Or perhaps, as Quong argues, every piece of legislation ought to satisfy JL’s unanimity requirement, not only those that pertain to constitutional essentials. For the purposes of my analysis, I don't think this dispute matters much. For if JL’s unanimity requirement proves problematic when applied to basic issues, there is little reason to think it will be any more helpful in dealing with further issues. I shall simply take JL to apply, then, to legal coercion. JL requires that legal coercion be justified by reasons all reasonable persons can accept.

What count as reasons all can accept? In other words, as per JL’s principle of public justification, what count as suitably "public" reasons on which legitimate uses of legal coercion are based?

This is a vexing question to which JLs have given varying answers. While JLs deploy certain standard examples of non-public reasons, various attempts have been made at capturing the general nature of public reasons. These attempts proceed by identifying a public reason with a particular characteristic or bundle of characteristics that all such reasons supposedly share. Rawls’ conception of a public reason comes in a bundle: being “reasons that are responsive to the

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67 “The first point is that the limits imposed by public reason do not apply to all political questions but only to those involving what we may call ‘constitutional essentials’ and questions of basic justice.” Rawls goes on to exemplify such “fundamental questions” as, “who has the right to vote, or what religions are to be tolerated, or who is to be assured fair equality of opportunity, or to hold property.” Issues that do not fall into this category include “for example, much tax legislation and many laws regulating property; statutes protecting the environment and controlling pollution; establishing national parks and preserving wilderness areas and animal and plant species; and laying aside funds for museums and the arts”. (John Rawls, *Political Liberalism*, 2005, 214.)


69 Freeman is exactly right that, “It is, however, very hard to give a general characterization of what permissible political reasons ought to be.” (Freeman, Samuel, *Rawls*, 382.)

70 For instance, x should be legally prohibited because my favoured infallible religious text says that x is wrong. The "salvation of souls" and "religious truth" are prototypical non-public reasons. See Ibid., 389.
fundamental interests of democratic citizens, in their capacity as free and equal moral persons, a public reason does not presuppose the acceptance of any one particular comprehensive view, but is one already implicit in publicly accepted liberal democratic institutions; it accords with the well-established findings of the sciences; it does not rest on overly technical or controversial economic theories; and it must be responsive to normal, commonly accepted rules of logic and inference. Others try to capture the nature of public reasons by highlighting one or another particular feature of such reasons, such as intelligibility, replicability, or fallibility. Eberle provides a very helpful survey and critique of these approaches.

I believe it to be beyond dispute that JLs have failed to give a successful specification of public reasons. For Eberle provides a compelling critique applicable to all attempts at characterizing public reasons. In such attempts, the clear motivation of JL theorists is to distance themselves from religious ways of thinking – from what William Alston would refer to as a religious “doxastic practice” – that seem to be ultimately founded on nothing more than an adherent’s personal faith. Eberle’s devastating conclusion, though, is that there is no doxastic practice that isn’t ultimately self-referential. This can be illustrated by considering that epistemic source which JL theorists themselves would regard as most “public” of all, namely, sense

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71 Ibid., 479.
72 “…Rawls says that it is against public reason for political officials to rely on complicated and disputed theories of probability, such as Bayesian assumptions, particularly in addressing constitutional issues and matters of basic justice.” (Ibid., 387.)
73 “We add to this that in making these justifications we are to appeal only to presently accepted general beliefs and forms of reasoning found in common sense, and the methods and conclusions of science when these are not controversial.” (John Rawls, Political Liberalism, 2005, 224.)
74 Eberle, Christopher J., Religious Conviction, 252–287.
75 As Wolterstorff has put the point, there is "no adequate independent source" of public reasons to which JLs have pointed us, or can point us. (Audi, Robert and Wolterstorff, Nicholas, Religion in the Public Square, 113.)
77 In Nagel’s words, what JLs want is a way of mediating political disputes wherein participants can “legitimately claim to be appealing not merely to their personal, subjective beliefs but to a common reason
perception: the only way to check questionable sense perceptions is by relying, paradoxically and
dependently, on other sense perceptions.\textsuperscript{78}

Despite this failure, though, even as a critic of JL I am not quite ready to dismiss as
irrelevant the distinction between public and non-public reasons. I hesitate to do so because the
difficulty in distinguishing the two seems mainly to exist at the level of theory, while in practice I
admit we can readily categorize many reasons either as public or non-public in an intuitive sense.
This intuitiveness makes it difficult to weigh the significance of JL’s philosophical failure at this
point. But this much is clear: in contemporary real-world democracies, there are certain kinds of
reasons that enjoy widespread, virtually unanimous, acceptance among citizens who disagree on
much else. Such reasons include many scientific findings, empirical observations, much
sociological data, as well as many basic moral considerations and moral prohibitions. What is
unclear is whether any one, or all, of these reasons emerge from epistemic sources that are really
different \textit{in kind} from those that particular traditions of religious belief rely on.

So in our discussion, I will not be interpreting "public" reasons in any particular sense.
But I do take the general JL description of "public" reasons to be this: public reasons are those
basic empirical and moral premises that virtually everyone seems to recognize no matter how
much we may disagree on other issues of philosophy, religion, and morality. This is roughly the
category that JLS seem to be shooting for.\textsuperscript{79}

\begin{flushright}
which is available to everyone and which can be invoked on behalf of everyone even though not everyone
interprets its results in the same way.” (Nagel, Thomas, “Moral Conflict,” 235.)
\end{flushright}
\textsuperscript{78} There is a long history of objecting to religious doxastic practices such as CMP [Christian Mystical
Practice] on the grounds that its members can’t provide a noncircular justification for those practices. But
we find ourselves in the same predicament with respect to sense perception, memory, introspection,
inference, and morality. Hence it would be arbitrary to object to a doxastic practice such as CMP on the
grounds that it isn’t amenable to noncircular justification.” (Eberle, Christopher J., Religious Conviction,
245.) In this quote, CMP simply is representative of any well-developed tradition of religious inquiry that
has internal standards by which mystical perceptions can be evaluated.
\textsuperscript{79} In light of this discussion of “public” reasons, a definition of “public reason” - a related idea that will
come up periodically throughout this dissertation - is in order. The idea of public reason is a cousin to that

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JL theorists are clear that the reasons they have in mind must not be acceptable to just anyone. Rather, they are reasons that must be acceptable to reasonable persons. Now we ask: who counts as reasonable?

In coming to grips with JL, one runs up against a recurrent tension between substance and procedure, and the tension arises here as well. In an illuminating essay, Martha Nussbaum shows how Rawls equivocates between what are essentially procedural and substantive conceptions of the reasonable person - which correspond nicely to Nussbaum's contrast between "ethical" and "epistemic" conceptions, respectively. According to the procedural (or ethical) conception, the reasonable person is simply the citizen who is willing to cooperate with others on the basis of fair terms of cooperation. According to the substantive (or epistemic) conception, the reasonable person is the citizen who lives according to a comprehensive view that meets certain theoretical criteria. Nussbaum summarizes Rawls' criteria,

His definition includes three features, all of them theoretical rather than ethical. First, a reasonable doctrine is "an exercise of theoretical reason" that "covers the major religious, philosophical, and moral aspects of human life in a more or less consistent and coherent manner. It organizes and characterizes recognized values so that they are compatible with one another and express an intelligible view of the world." Second, the doctrine is also an "exercise of practical reason" that gives instruction on how to weigh values and what to do when they conflict. Third, such a doctrine, while not necessarily fixed and unchanging, "normally belongs to, or draws upon, a tradition of thought and doctrine" and therefore tends to evolve "slowly in the light of what from its point of view, it sees as good and sufficient reasons."
It seems, substantively (or epistemically), the reasonable person deliberates with consistency and coherence, eliminating contradictions within their view and systematically ordering potentially conflicting elements within the view. As Bohman and Richardson might say, the reasonable person is simply the person who meets the "constitutive commitments of reasonableness" and the "substantive norms of reasonableness". I believe that Nussbaum's critique of Rawls is on target, that there is slippage between these two conceptions of the reasonable person in Rawls' work.

Rawls' official stance favours the procedural conception. Reasonable citizens share two characteristics. First, they are willing to "propose and honour fair terms of cooperation". Second, they recognize the burdens of judgment and "accept their consequences" for the regulation of public life. Neither of these conditions says much about the substance of reasonable persons' beliefs.

84 See John Rawls, Political Liberalism, 2005, 49 n1, 48–58. Recognizing the burdens of judgment means the following. When others reach differing conclusions on contentious philosophical, religious, and morally issues, reasonable citizens do not attribute these differences to others having moral or cognitive shortcomings. Rather, they assume goodwill and competence on others' behalf and attribute the differences instead to the normal intellectual difficulties that attend weighing complex evidence, screening out biases, precisifying vague concepts, and so on. It is due to the burdens of judgment that the fact of reasonable pluralism arises - the fact that people will inevitably and reasonably come to different conclusions on philosophical, religious, and moral issues when they are permitted freedom of thought.
85 Unofficially, at various points Rawls also characterizes "reasonable" persons in ways that do give more content to their beliefs. At one point he stipulates that the reasonable person accept a constitutional liberal democratic regime. At another, it is essential that the reasonable person endorse the basic liberties and their priority, as well as a social minimum, since these items are needed to maintain one's dignity as a free-and-equal collaborator in a cooperative scheme that does not take unfair advantage of oneself.

However, Rawls' more contentful characterizations of the reasonable citizen are quite clearly more than just a restatement of his two official criteria: rather, they are particular interpretations of what "fairness", "freedom", and "equality" require. Consequently, throughout I will simply take the conditions of reasonable citizenship to be twofold - fairly cooperating with free-and-equal others, and recognizing reasonable pluralism. Moreover, I will try to take these conditions in their bare form, knowing the diversity of interpretations given to such terms as "fairness", "freedom", and "equality" by political philosophers of good faith.
I also agree with Nussbaum that the procedural (or ethical) conception is more in keeping with the general aims of Rawlsian JL. Identifying reasonable citizens in as procedural a way as possible is part-and-parcel of the broader JL ambition to respect citizens' free-and-equal status by representing political norms in procedural rather than substantive terms. Any substantive conception of a reasonable citizen, even a relatively modest one, will likely disqualify many real-world citizens of liberal democracies as unreasonable. Unsurprisingly, there is a trend in the public justification literature since the time of Rawls towards ever-more procedural, ever-less substantive, conceptions of the reasonable citizen.

In light of these considerations and taking Rawls as representative of JL, then, the basic JL answer to the question of who counts as a “reasonable” citizen consists of two procedurally-oriented conditions. First, the reasonable citizen is willing to fairly cooperate with others, recognizing them as free-and-equal. Second, the reasonable citizen acknowledges the burdens of judgment and the fact of reasonable pluralism, and accepts their implications for social life. So long as they are willing to fairly cooperate with others and recognize that others are epistemically...

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86 Nussbaum, Martha C., “Perfectionist Liberalism and Political Liberalism,” 33. Urging an ethical reading of Rawls' reasonable persons, Nussbaum writes, “We must, then, avoid defining 'reasonable' in a way that denigrates the grounds of some people's doctrines: to do otherwise is to violate the very abstemiousness toward controversial epistemological and metaphysical doctrines that political liberalism rightly asks us to insist upon.” I don't quite share Nussbaum's view that JL “rightly” insists upon this, but I do agree with her judgment that an ethical construal of reasonable persons is more in keeping with this insistence.

87 In a recent survey article on public justification, Chambers alludes to this trend by noting that "out of a response to Rawls" there has been "a move away from neutrality, sharability, and the exclusion of comprehensive world views as guidelines for achieving reciprocity." This shift has especially meant more space for religious reasons within JL paradigms. This shift is now to the point where JL theorists such as Bohman and Richardson are emphasizing the manner of reason-exchanging to the complete exclusion of focusing on the content of reasons. See Chambers, Simone, “Theories of Political Justification,” Philosophy Compass 5, no. 11 (2010): 899; Rawls, John, “The Idea of Public Reason”; Chambers, Simone, “Secularism Minus Exclusion: Developing a Religious-Friendly Idea of Public Reason,” The Good Society 19, no. 2 (2010): 16–21; Gaus, Gerald and Vallier, Kevin, “The Roles of Religious Conviction”; Bohman, James and Richardson, Henry S., “Liberalism, Deliberative Democracy, and ‘Reasons’.”

88 Rawls' elaboration of these ideas is surely the most influential, but they are common in JL writings more broadly. For another extended treatment of these ideas, see Joshua Cohen, “Democracy and Liberty,” 187–193.
Concerning who counts as a reasonable citizen, there is another dimension of this matter we should consider. Are the persons JLs have in mind actual or idealized? If the latter, idealized how?

The short answer is both, but it is also a complicated answer. For it is idealized persons that definitely occupy the foreground in JL, while actual persons remain in the background.

On the one hand, it is the phenomenon of real-world pluralism that is largely the impetus for the development of JL. As well, as I’ve just explained, from Rawls to the present, JLs have shifted more and more towards taking real-world citizens - religious or not - just as they actually are. It’s also noteworthy that JLs would have us draw upon norms they believe are implicit in the liberal democratic institutions upheld by real-world people, and in the actual political discourse in which such real-world people engage. So there is a definite sense in which JLs at least have in mind real-world people when formulating their accounts.

On the other hand, no JL theorist is prepared to make their account actually depend on what real-world citizens, at a given time or place, believe. The reason for this caveat is obvious: real-world citizens can be given to all sorts of irrational and morally repugnant ideas, individually and collectively. Regrettably history bears witness to this fact all too often. (For starters, consider the widespread acceptance which chattel slavery, apartheid, the oppression of women,

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89 “A main aim of Political Liberalism is to say how the well-ordered society of justice as fairness (set out in A Theory of Justice) is to be understood once it is adjusted to the fact of reasonable pluralism and regulated by a political conception of justice.” (John Rawls, Political Liberalism, 2005, xxxv–xxxvi [bold emphasis mine].) What's more, even the switch to a political - as opposed to comprehensive - conception of justice is part of the "adjust[ment] to the fact of reasonable pluralism".

90 The second of Rawls' three characteristics of a political conception of justice is that it be built up from ideas "seen as implicit in the public political culture of a democratic society". And by way of illustrating that 'public reason is...an articulation of norms that exist in contemporary political culture", Lister provides
and India's caste system have each enjoyed at times, sometimes even being accepted by the very persons victimized under these systems).

Therefore, to avoid making their theories captive to the prejudices and otherwise misguided views of real-world people, JL accounts abstract away from the profiles of real-world persons to one degree or another. This process of abstraction is most vivid and memorable in Rawls, who places hypothetical contractors behind the Veil of Ignorance in the Original Position.\(^91\) Brian Barry permits his hypothetical contractors to retain their conceptions of the good, but imputes other idealizations to them in the contracting situation he calls the “circumstances of impartiality”. These idealized persons are able to successfully “weigh all reasons in the same balance”, having a "willingness to accept reasonable objections to a proposal regardless of the quarter from which they come"; they are also well informed.\(^92\) The way in which the contracting scenario is conceived differs somewhat from JL account to JL account, but the basic objective behind all such scenarios is similar: they idealize real-world citizens in various ways in order to compensate for the limitations that jeopardize real-world people's ability to adequately evaluate what social agreements are reasonable to accept or reject.

The adjustments made to real-world persons are basically threefold. They are idealized morally – to compensate for prejudices. They are idealized cognitively – to overcome lack of information and lack of ability to properly process the information that is available. They are also idealized materially – since sufficiently unequal economic positions will contaminate the fairness of any negotiating and contracting scenario. To the question of whether JLs have actual or hypothetical persons in mind, the answer is the latter much more than the former.

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91 John Rawls, *Political Liberalism*, 2005, 22–28. Rawls' contractors are stripped of their conceptions of the good, and ignorant of other such features as their class position, race, gender, and natural aptitudes.
Consider a fourth dimension along which JL accounts may vary one from another: We've seen that JL involves a unanimity criterion, but what does JL presume is the default should this criterion not be met?

This is a question to which Lister draws our attention, distinguishing as he does between two “frames” in which JL can be understood. These competing frames offer differing answers to the question of JL’s default position. Within one of these frames, the JL criterion applies to reasons and the default is said to be exclusion (that is, exclusion of the reason as a possible basis for legal coercion). Within the other, the JL criterion applies to decisions - discrete laws or uses of political power - and the default is said to be state inaction. The default presumed by the second frame would seem to have rather libertarian implications, and it is largely for this reason that Lister ostensibly prefers interpreting JL within the first.

I shall engage Lister's treatment of these issues at greater length in the following chapter. For now, I raise the question of JL's default position simply to help clarify JL as I understand it.

I think Lister is right that we should resist the decisions/inaction framing, as though JL cared only about universal acceptance of legal coercion with no regard for the quality or type of reasons for which citizens severally accepted it. Ever since and including Rawls, JL is very clearly concerned with the reasons for which legal coercion is enacted. Mere unanimity on decisions appears perilously close to a modus vivendi, a type of solution Rawls explicitly rejects. The hallmark of Cohen's deliberative democracy is that it does not treat citizens as equals simply by "giving equal consideration to interests", but by "offering them justifications for

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94 “When presented as a constraint on reasons, the principle of public reason is not necessarily a libertarian principle, because non-public reasons for state inaction are excluded from decision-making along with non-public reasons for state action.” (Ibid., 50–51.)
95 See the subsection, "3-Objections and Replies", in Chapter 3.
the exercise of collective power framed in terms of considerations that can, roughly speaking, be acknowledged by all as *reasons*.97 (Conversely, applied only to decisions, JL appears concerned with interests rather than reasons.) At the core of Audi’s JL is his "principle of secular *rationale*", a principle that illuminates what reasons and rationales for laws are consonant with the ideals of liberal democracy.98 Macedo is also explicitly concerned with reasons, not merely decisions: "Among the core features of liberalism as I understand it, is a concern not simply with political outcomes..." - as per JL in the decisions/inaction frame - "...but also with the way that public officials and citizens go about justifying the use of political power."99 "Liberal, democratic politics is not only about individual rights and limited government...it is also about public justification: *reason*-giving and *reason*-demanding, and the insistence that power be backed by *reasons*."100

My focus on Rawlsian JLs reflects this JL concern with reasons and not only decisions. In developing his distinction between the reasons/exclusion and decisions/inaction frames, Lister appears to principally be targeting Gaus as the latter’s spokesperson. So both Lister and I prefer a "reasons" framing of JL. For as I’ve already said, my focus will be Rawlsian rather than Gaus-style JL.

That said, I think Lister is mistaken in his contrast between "exclusion" and "state inaction" defaults. This contrast under-appreciates how reasons are always reasons-for-actions, with the result that Lister misrepresents JL’s default when the unanimity criterion is applied with

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98 "The first principle I want to discuss - which, in earlier work, I have called the *principle of secular rationale* - says that one has a prima facie obligation not to advocate or support any law or public policy that restricts human conduct, unless one has, and is willing to offer, adequate secular reason for this advocacy or support (say for one’s vote)." (Audi, Robert and Wolterstorff, Nicholas, *Religion in the Public Square*, 25.)
100 Ibid (emphases mine).
reasons in mind. Again, I shall elaborate this argument in Chapter 3. For now, let us simply consider the issue of JL's default in light of JL's core principle: legal coercion is legitimate when based on reasons that all reasonable persons can accept. We see here that both decisions and reasons are involved. Consequently, in general we should say the following of JL: when JL's unanimity criterion is satisfied, what is sanctioned is appropriately justified legal coercion; when it isn't, our default position is simply one without appropriately justified legal coercion. JL's default prohibits inappropriately justified - hence, illegitimate - coercion.

Let me summarize what we've reviewed of JL so far. According to JL, coercive political power is legitimate if it is based on reasons with which no reasonable person can disagree. This is JL at its core; this is JL's principle of public justification. We've reviewed the kind of reasons the criterion calls for: basic moral and empirical premises that are suitably general so as to command virtually universal assent amongst persons who otherwise disagree. We reviewed the kind of reasonable persons to whom these reasons must be acceptable: hypothetical persons who are both willing to honour fair terms of social cooperation and who recognize the fact of reasonable pluralism as having implications for social arrangements. Finally, we considered the default assumed by JL should its unanimity criterion go unmet: JL is certainly concerned with reasons, not just decisions; but its default position would seem to involve both exclusion of certain reasons as well as prohibition of certain state actions.

There are further dimensions of JL we might consider, but the foregoing are especially important for the purposes of my project. Remember my question: What are the most apt categories for conceptualizing and understanding legitimacy? As will become apparent over the course of our discussion, JL gives us the categories of consent, procedures, and self-legislation as a framework. The foregoing dimensions of JL will prove pertinent to my critique of these categories. For instance, both our discussion of JL's conception of reasonable persons and our
discussion of JL's default will be relevant to my critique of the category of consent, while the
discussion of JL's idealized contractors bears on my critique of the notion of self-legislation. As
it becomes necessary to exposit aspects of JL other than those reviewed so far - such as consent
and self-legislation - I plan to do so along the way.

For now, I will consider one more aspect and make one argument before concluding this
chapter.

4-An Argument about JL

I now want to raise this question: in light of their foundational premise of free-and-equal
citizens, can JL theorists be committed to anything less than a general, universal account of
legitimacy? I already said above that I do not understand legitimacy to be merely context-
relative, but that legitimacy *qua* normative concept has universal implications. It was suggested
that our practice of denouncing certain regimes of times and places not our own gives us reason,
at least provisionally, to regard legitimacy as context-transcendent. The account of CR
legitimacy I'll develop purports to give us a framework for making sense of legitimacy
understood in this general, universal way.

But does JL approach legitimacy understood in this general way? Even if I am right to
portray JL as operating at the higher level of abstraction with which my question is concerned -
that is, what JL gives us isn't a set of first-order legitimacy conditions but a higher-order
framework for formulating and debating first-order conditions - doesn't it only provide a
framework that is appropriate to a particular political context?101

101 By way of clarification, it may also be helpful to note that JL has been put to various uses, not only as a
standard of legitimacy (whether context-specific or otherwise). JL is commonly discussed as an ethic of
citizenship, as in the exchange between Audi and Wolterstorff. JL can also be deployed in democratic
theory, where both Joshua Cohen as well as Gutmann and Thompson make the JL principle of public
justification central to their respective conceptions of deliberative democracy. Moreover, JL may be used
At first blush, we might think so, for JL theorists explicitly take themselves to be expounding specifically democratic legitimacy. Audi says that he has "liberal democracy in mind as the context" for his JL theory, just as Rawls is explicit in PL that he is concerned with two fundamental questions concerning "democratic society." Freeman is right to comment that, "for Rawls the idea of public reason is essentially a feature of a democratic society." Likewise, Cohen takes his JL-inspired deliberative democracy to elaborate the idea of "democratic, political legitimacy," according to which "the authorization to exercise state power must arise from the collective decisions of the equal members of a society who are governed by that power." JLs start from a democratic conception of political power, as the joint possession of every member of a polity; this is manifestly inconsistent with autocratic, aristocratic, theocratic, and otherwise hierarchically organized polities. Furthermore, JLs take themselves to be developing ideas already "implicit" in liberal democratic institutions. JL theorists are clear that their focus is to address meta-ethical issues surrounding moral contractarianism, as Freeman does, or to develop a full-blown theory of justice, as Barry does. See Audi, Robert and Wolterstorff, Nicholas, Religion in the Public Square, 10; John Rawls, Political Liberalism, 2005, 3–4. Freeman, Samuel, Rawls, 383. Joshua Cohen, “Democracy and Liberty,” 185.

Eg., “For public power belongs to us all as fellow citizens, and we should exercise it together based on reasons and arguments we can share in spite of our differences.” (Macedo, Stephen, “In Defense of Liberal Public Reason,” 25.)

The third feature of a “political” conception of justice as Rawls defines it is that “its content is expressed in terms of certain fundamental ideas seen as implicit in the public political culture of a democratic society.” On Audi’s account, “A liberal democracy by its very nature” contains those moral principles which lead to JL. Lister sees JL embedded in the "contemporary political culture" of liberal democracies in similar fashion, and Cohen also expresses these same sentiments. See John Rawls, Political Liberalism,
democratic societies. More specifically, their focus is liberal democracies, wherein individuals enjoy many standard basic rights both negative and positive.  

Within these JL accounts of legitimacy, then, how ought we interpret judgments of “legitimacy” or “illegitimacy”? JL theorists seemingly want only to say that, in light of JL's principle of public justification, the legal coercion at issue is legitimate or illegitimate in a certain way; it lacks or possesses certain democratic credentials. Their evaluations speak to the democratic pedigree of legal coercion. On this basis, they pronounce laws to be legitimate or illegitimate. Now it is true that no JL theorist is suggesting that the norms of public reason be legally enforced in actual liberal democracies; failure to respect these norms are only morally criticizable. Similarly, it might be thought that laws lacking JL's democratic legitimacy aren't intended to trigger anything like a right to resistance, but only a right to moral censure. Practically speaking, JLs are unclear on exactly how a citizen's set of duties and rights is changed by the enactment of democratically illegitimate laws. What is clear, though, is that a) JL discriminates between legal coercion that is legitimate and illegitimate, b) these discriminations are supposed to be made on the basis of the coercion's democratic credentials, and c) this criterion of legitimacy is most readily applicable to polities already governed by liberal democratic norms.  

So it is apparent that JL theorists want to restrict the scope of what they say about legitimacy to democratic contexts. Can do they do so? Presently I will argue they cannot, or can only do so with inconsistency.  

For consider one of their foundational premises for believing that JL applies at least within a democratic context. The premise I have in mind, and on which JL theorists build their
case, is that of free-and-equal citizens. In Rawls' account, the idea of free-and-equal citizens - along with those of a well-ordered society and society as a fair system of cooperation - is foundational to everything else\textsuperscript{109} - everything including his JL principle of public justification. Rawls is not alone in founding JL on the premise of free-and-equal citizens. Audi says that JL "best accords with treating citizens as free and equal".\textsuperscript{110} And Cohen suggests that the need for democratic institutions embodying JL arises from differences between "members of a political society" who are "free and equal"\textsuperscript{111} - were these members not regarded as such, the implication is that JL may be unnecessary even if members disagreed as they do now. Along with a "commitment to a practice of public reasonableness", Macedo begins his essay by announcing his commitment to "broad guarantees of liberty and equality"; as the essay goes on, the link between these two commitments is clear.\textsuperscript{112}

What is the sense in which JLs regard people as free and equal? And how does this moral principle serve as an essential premise in the argument for JL?

Rawls is very clear on the first of these questions and I will take his view to be representative of JLs. (I can hardly imagine JLs disputing it.) He says citizens are free in three ways, which I unify and summarize as follows: citizens are responsible moral agents with a capacity and right to lead their lives as they see fit. The first of Rawls' three senses on which I draw is that, “…citizens are free in that they conceive of themselves and of one another as having the moral power to have a conception of the good.”\textsuperscript{113} This means that citizens are recognized as

\begin{footnotes}
\footnote{Audi, Robert and Wolterstorff, Nicholas, \textit{Religion in the Public Square}, 134.}
\footnote{Joshua Cohen, “Democracy and Liberty,” 188.}
\footnote{Macedo, Stephen, “In Defense of Liberal Public Reason,” 11.}
\footnote{Rawls, John, \textit{Justice as Fairness}, 21.}
\end{footnotes}
having the capacity to form, revise, and pursue a conception of the good.\textsuperscript{114} Next, “A second respect in which citizens view themselves as free is that they regard themselves as self-authenticating sources of valid claims.”\textsuperscript{115} It is not the case that the moral weight of one's claims on society - including claiming freedom of conscience for oneself, or the right to autonomously lead one's own life - depends upon membership in a certain social class, ethnic group, or religious community or upon these claims being certified by some particular comprehensive view.\textsuperscript{116} Just by being a member of society, one's claims have moral weight; one is a "self-authenticating source" of valid claims in this sense. Third, citizens are free in that "they are viewed as capable of taking responsibility for their ends".\textsuperscript{117} Viewing them as responsible in this way is part of recognizing their power for a sense of justice\textsuperscript{118}, which in turn is needed to view them as collaborators in a joint scheme of social cooperation. Thus, in affirming citizens as free, JLs recognize persons as responsible cooperators with a capacity and right to lead their lives autonomously.

As for the sense in which citizens are equal, I take it the main claim in view is the Lockean one that no-one has a natural right to exercise authority over another. This can be seen not so much as a distinct claim, but simply as a corollary of the view just stated that all have an equal right to autonomy.

As for the second question, a brief explanation of how free-and-equal personhood leads to JL will suffice. As Rousseau clearly saw, affirming both the freedom and equality of real-

\textsuperscript{114} One of the two fundamental moral powers Rawls ascribes to citizens.
\textsuperscript{115} Rawls, John, \textit{Justice as Fairness}, 23.
\textsuperscript{116} Cf. Cohen’s construal of freedom, “To say that citizens are free is to say, inter alia, that no comprehensive moral or religious view provides a defining condition of membership or the foundation of the authorization to exercise political power…But politically speaking, citizens are free in that it is open to them to accept or reject such views without loss of status.” See Joshua Cohen, “Democracy and Liberty,” 192; John Rawls, \textit{Political Liberalism}, 2005, 32–33.
\textsuperscript{118} The second of the two fundamental moral powers Rawls ascribes to citizens.
world citizens produces a problem for democratic theory. How can people who are coerced against their wills be regarded as free? By giving equal weight to every citizen’s view, the liberty of those in the minority is jeopardized. Rousseau’s solution was his concept of the “general will”: when citizens act for what is truly the common good, they align their wills with those of their fellow citizens and laws can simultaneously express both citizens’ equality and freedom.

JL’s principle of public justification is addressed to essentially the same problem, still generated by citizens’ twin characteristics of freedom and equality, and now also adjusted to the fact of reasonable pluralism. How can diverse real-world citizens who are coerced against their wills be genuinely respected as free and equal? In short, the JL answer is: by basing laws upon reasons that all persons, including the coerced themselves, could accept when represented as idealized parties to a fair hypothetical agreement.

But now the question becomes: from a moral point of view, wouldn't JLs recognize all persons as free and equal in the requisite senses, regardless of the political culture in which they live? After all, JLs are clear that the conception of persons with which they begin is a moral conception. And their scope cannot be restricted by discriminating between democratic societies wherein citizens are inculturated to view themselves as autonomous and non-democratic societies where citizens do not so view themselves. For JLs are also clear that citizens within liberal democracies who might not view themselves as autonomous - perhaps certain kinds of religious citizens - are nonetheless to be regarded as free in the above senses. From the moral point of view, all persons equally possess the status of potential cooperators who have the capacity and right to lead their lives autonomously.

And if so, then wouldn’t, morally speaking, the same standard of legitimacy JLs derive from free-and-equal personhood apply equally to both democratic and non-democratic contexts? If JLs are right that free-and-equal personhood requires the JL standard of legitimacy in
democratic contexts, it follows that legitimate legal coercion is a function of JL public justification wherever free-and-equal persons form societies. Rousseau's problem will surely arise wherever free-and-equal persons form societies, and it is altogether unclear to me why JLs would not be committed to their same solution as when the issue arises specifically in liberal democratic contexts.

In short, that's my argument: given their foundational premise of free-and-equal citizens, JLs are committed to JL qua general, universal, context-transcendent theory of legitimacy. This is because, from a moral point of view, people in all political contexts are free-and-equal in the requisite senses. And for both me and JLs, legitimacy is a normative concept. In appraising JL legitimacy, we shouldn't be misled by talk of "democratic legitimacy" and of ideas implicit in democratic institutions and discourse.¹¹⁹

¹¹⁹ I think it helpful to keep in mind that for Rawls, the appeal to implicit ideas is largely a pragmatic move, primarily designed to address the stability question rather than the normative justice question. We should view the suggestion to begin with liberal democratic institutions as largely a practical one, since the real normative weight of JL arguments rests on the normative principles that JLs want us to find in those institutions once we turn to them. I suspect that JLs would be much less inclined to suggest we turn to the democratic institutions of, say, the Weimar Republic or to those of ancient Athens; we likely wouldn't find the right normative principles. But once we do find the right principles with which to begin, the institutions can effectively fall out of our practical reasoning. The operative question isn't, "What is the theory of legitimacy appropriate for people who live with ideal liberal democratic institutions?" (After all, we need a more fundamental question to help us identify what these ideal institutions would be.) Rather the question becomes: What is the theory of legitimacy appropriate for people whom we regard as free-and-equal? Extant institutions are simply a convenient source of the moral principle with which JLs want us to begin; but these institutions themselves play no significant role in the execution of the argument that concludes with JL legitimacy.

One more point on this issue of stability. Rawls may be right that applying JL in democratic contexts will promote stability - where people of diverse comprehensive views nonetheless share liberal democratic values - whereas applying it in non-democratic contexts may have adverse effects. But from a moral point of view, so what? As G. A. Cohen argues, it may be that Rawls is overly preoccupied with the issue of stability. We well might recognize certain social arrangements as just - or legitimate - yet lament
Conclusion

I believe the stage is now set for the rest of my project. I've set out the question: What is the best philosophical framework for understanding political legitimacy? In other words, what is the best framework for understanding the phenomenon of legal coercion that is legitimate even if imperfectly exercised? I've also laid out the criteria for our best answer. We hold certain CCs concerning legitimacy in the real world, and our best approach to legitimacy will best fit and philosophically illuminate these convictions. Of particular interest are our convictions that much real-world coercion is legitimate even amidst disagreement, that legitimacy is conditional on protecting certain basic rights, and that coercion on paternalistic grounds is illegitimate.

I hope it is also now clear how JL is an appropriate interlocutor in this investigation. While JLs and I share many legitimacy-related CCs that constitute first-order legitimacy conditions, JL is not primarily about pruning or expanding such a list. Instead, JL gives us a philosophically rich proposal for making sense of our convictions, for understanding their presuppositions and seeing how they fit together. It does so with ideas such as public reasons, reasonable persons, and idealized agreement situations - all of which we've overviewed in this chapter - as well as with categories of consent, proceduralism, and self-legislation that we'll explore later in depth. Furthermore, JL calls us to a moral point of view - lest JL be reduced to a mere *modus vivendi* - and, as such, we've seen that JL constitutes a universal theory of legitimacy given its foundational premise of free-and-equal persons. JL is thus an appropriate counterpart to the CR account of legitimacy I'll develop, which also seeks to make sense of legitimacy understood to be a context-transcendent normative reality.

More pointedly, then, the question I will pursue is this: Which of these two approaches - JL or CR legitimacy - provides a better framework for understanding political legitimacy as reflected in our CCs?

In the following chapter, I begin to examine how JL fares on its own terms (Chapters 3-5), only later to assess it in relation to its CR counterpart (Part III).
Chapter 3

A First Unacceptable Consequence of JL

Introduction

Surely the first test of any piece of philosophy is internal consistency. If a theory cannot pass this test, it is standing on shaky ground indeed. With this mind, I will now embark on an internal examination of JL. This examination will occupy us for the rest of Part I.

This internal critique will take the form of pointing out three unacceptable consequences to which JL leads us. Pointing these out constitutes an internal critique since these are consequences which JL theorists themselves would repudiate; that is, they conflict with legitimacy-related CCs JLs themselves hold. In the rest of the present chapter, I will explain the first unacceptable consequence to which JL leads – the de-legitimization of any uses of coercive political power.

This is the strong claim that I presently wish to defend, *that JL would make all uses of state power illegitimate*. This implication would conflict with our CC that many real-world uses of legal coercion are indeed legitimate even in the midst of disagreement. We can fairly assume that JLs themselves share this CC; they are not anarchists. They are ostensibly convinced that at least many real-world liberal democratic governments are legitimate, even if far from perfect. Yet JL would de-legitimize all such regimes, along with all legal coercion. Why do I make this strong claim? Why would JL lead to this conclusion when applied to the real world?

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120 Eg., “Rawls thinks the capitalist welfare state is unjust, but it is still politically legitimate since it provides an adequate social minimum.” (Freeman, Samuel, *Rawls*, 398.)
I begin with the heart of the argument, assisted by the example of an objector inspired by Michael Bakunin. My argument is that the full breadth of political thought includes persons who, according to JL’s own criteria of reasonable personhood, qualify as "reasonable" and yet who would reject the very existence of a political coercive state. I put forward a reconstructed Bakuninist as one such example. There is no use of legal coercion, therefore, that would pass JL’s standard of legitimacy, involving as it does a unanimity condition. Having laid out the heart of the argument, I then unpack three factors that conspire to produce this result: first, JL’s criteria for reasonable persons; second, the reasonable multi-interpretability of key political concepts, and; third, JL’s unanimity condition. I consider a couple of objections before concluding.

By way of introduction, I think it worth noting anecdotally that, in my experience, often the layperson's response to JL is akin to this first unacceptable consequence. The unanimity condition of JL is puzzling to laypeople since their experience of politics in the real world gives them repeated confirmation of the impossibility of reaching consensus on virtually any significant political issue. This common reaction of laypeople to JL’s basic idea is a first, albeit very raw, piece of evidence weighing against the plausibility of any political principle whose justification rests upon meeting a unanimity condition.

Professional philosophers have raised similar concerns about JL as well. For instance, Wolterstorff points out that a counterintuitive yet inevitable result of implementing Audi’s standard of public reason is that people simply won’t be able to say anything at all in public political debates. Still more telling, that JLs themselves have tinkered with their theory so as to avoid libertarian conclusions reflects the very real possibility of JL having an undesirable

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121 If the virtuous citizen is only permitted to make contributions that he can expect all other reasonable citizens to accept, then the virtuous citizen will be able to contribute nothing at all; he will end up contributing nothing since it is unreasonable to expect of any political judgment that it will be acceptable to all reasonable citizens in a liberal democracy. That it is more reasonable to expect disagreement rather
consequence of the sort I'm going to press. What's more, JLs have recognized that not only egalitarian redistribution but even something as basic as a joint system of national defence might be compromised by application of JL’s unanimity condition as well.

JLs are right to be concerned; the problems for JL portended by the redistribution objection are even more extensive than reducing legitimate government to the night watchman state. As I shall now argue, given JL’s characterization of "reasonable" persons, the reasonable multi-interpretability of key political concepts, and JL’s unanimity condition, we should not expect even the night watchman state to pass muster.

1-The Heart of the Argument

My claim in this chapter is that JL actually legitimizes no uses of coercive political power, a result that is clearly at odds with our convictions. The main reason for the claim is this: the real world furnishes us with examples of persons who meet JL’s twofold criteria of reasonable persons and yet who would reject the very existence of coercive states on the basis of public reasons. Given JL’s unanimity condition, such persons’ reasonable rejection of proposed uses of coercive political power would render all such uses impermissible.

In other words, for even the night watchman state to meet the unanimity criterion, there would have to be no reasonable objections to the effect that a stateless society is preferable to a...
society governed by a minimal state. But aren’t there such objections in the offing? Let us consider one such line of objection, reconstructed from Michael Bakunin’s compelling and influential anarchist writings.123

According to Bakunin, recognizing the freedom and equality of all prohibits the existence of a centralized coercive political state and requires instead "a free federation of communes".124 In the state, Bakunin saw a grave threat to freedom and equality given that "social life could easily take on an authoritarian character through the concentration of power in a minority of specialists, scientists, officials, and administrators".125 His solution was, "A vast network of free associations, federated at every level and preserving the maximum degree of local autonomy...."126 Rather than dealing with the fact of reasonable pluralism by means of a JL-style centralized state, Bakunin argued that "a free society must be a pluralistic society in which the infinite needs of Man will be reflected in an adequate variety of organizations".127 He puts the point with a flourish, "Every command slaps liberty in the face."128

The crucial point is that the Bakuninist objector should qualify as "reasonable" according to JL’s own twofold criteria of reasonable persons. As mentioned last chapter - and as I discuss further below - these two criteria are that one is prepared to cooperate with others on fair terms of cooperation, recognizing others as free-and-equal, and also that one is prepared to recognize the

123 Neither is this the only such line of objection that might compromise even the night watchman state. For another example, I suspect that a reasonable case for anarchism, couched in "public" terms, might also be reconstructed out of Henry David Thoreau's work. See Thoreau, Henry David, Civil Disobedience and Other Essays (Mineola, NY: Dover Publications, Inc., 1993).
125 Ibid., 8.
126 Ibid., 7.
127 Ibid., 20.
fact of reasonable pluralism and its implications. When these criteria are stated generally, the Bakuninist meets them both. He recognizes others as free-and-equal persons with whom he is willing to cooperate; his position is also fully compatible with recognizing that others will inevitably come to diverse conceptions of the good.

The real difference between the Bakuninist, on the one hand, and the type of hypothetical contractors that J.L.s envisage, on the other, is not that the former is "unreasonable" according to J.L.s own criteria of reasonable persons while the latter are not. As I say, both possess the requisite qualifications. Rather, the difference is that the Bakuninist simply holds conceptions of freedom, equality, and fairness that are strikingly different from what J.L theorists themselves believe to be reasonable. The Bakuninist and the J.L theorist agree on the importance of these general concepts; but they signal disagree on the conditions for experiencing these values and the operative threats to them.

For instance, consider how the Bakuninist's conceptions of freedom and equality differ from those of the typical J.L. For the Bakuninist, freedom is

...the absolute right of every adult man and woman to seek no other sanction for their acts than their own conscience and their own reason, being responsible first to themselves and then to the society which they have voluntarily accepted.

128 Ibid., 3.
129 To clarify, I believe we ought interpret the more substantive characteristics Rawls sometimes associates with reasonable personhood as being the product of reasonableness rather than as a prerequisite of reasonableness. For instance, it seems Rawls sometimes stipulatively equates reasonable personhood with acceptance of a liberal conception of justice. However, it is not as though Rawls is saying that in addition to meeting the abovementioned twofold criteria one must also antecedently accept a liberal conception of justice in order to qualify as reasonable. Rather, as the logic of Rawls' argument goes, when just social norms are understood to result from a fair procedure in which persons meeting the twofold criteria participate, it is the case that reasonable persons will conclude that only a liberal conception is just. Or so Rawls believes would be the conclusion of such a procedure, involving persons so described. What I am disputing is exactly that: what it is that we should expect reasonable persons, meeting Rawls' official twofold criteria of reasonable persons, would agree to (or not agree to) in the hypothetical procedure.

130 Bakunin, Michael, Bakunin on Anarchy, 76.
At first glance, this conception may appear palatable to JL. In some sense, the JL and Bakuninist alike affirm the value of individual autonomy; we've seen that, for their part, JLs regard people as free in having the capacity and right to lead their lives by their own lights. But the differences between the Bakuninist's and JL's conception of autonomy are actually very significant. For one, the Bakuninist gives primacy to one's conscience in a way JLs seem not to. Freedom is primarily a response to one's conscience, the living out the dictates of conscience unimpeded by others. By contrast, JL freedom is much more a response to social order. Given that one's life will be lived out in a social context governed by political coercion - a starting premise, by the way, which the Bakuninist seems not to share - individual autonomy is adjusted to the demands one places on others and has placed on him by others. As such, JL freedom sometimes seems reduced to little more than a way of reconciling oneself to the political order under which one lives, as opposed to the Bakuninist's more radical freedom which requires following one's conscience whether within society or not. So, for example, in a conflict between a religious community's conscientious beliefs and a social expectation of non-discriminatory hiring practices, the Bakuninist much more than the JL would uphold the religious community's freedom of conscience and prescribe withdrawal from wider social and political structures if conscience requires. Two, Bakuninist freedom can only be limited by social arrangements to which one actually and voluntarily consents in the real world. The JL simply does not see this as a

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131 See "4-An Argument about JL" in Chapter 2 for the basic JL sense of freedom.
132 “The government's authority cannot, then, be freely accepted in the sense that the bonds of society and culture, of history and social place of origin, begin so early to shape our life and are normally so strong that the right of emigration (suitably qualified) does not suffice to make accepting its authority free, politically speaking, in the way that liberty of conscience suffices to make accepting ecclesiastical authority free, politically speaking. Nevertheless, we may over the course of life come freely to accept, as the outcome of reflective thought and reasoned judgment, the ideals, principles, and standards that specify our basic rights and liberties, and effectively guide and moderate the political power to which we are subject. This is the outer limit of our freedom.” Cf. Macedo. See John Rawls, Political Liberalism, 2005, 222; Macedo, Stephen, “In Defense of Liberal Public Reason,” 17.
practicable possibility\textsuperscript{133}; the existence of political coercion is presumed, the question becomes how to appropriately justify this coercion, and for that purpose counterfactual consent in idealized circumstances suffices. And three, "freedom for all" - which is the aim of the social revolution Bakunin envisages - requires "the radical dissolution of the centralized, aggressive, authoritarian State, including its military, bureaucratic, governmental, administrative, judicial, and legislative institutions."\textsuperscript{134} By contrast, JLs see in a modern, centralized state no threat to their conception of individual autonomy. To put the difference still more starkly, the JL sees the state as enabling citizens to lead their own lives, where doing so is understood to require social goods such as political standing and the "social bases of self-respect"\textsuperscript{135} that can be provided by the state. Conversely, the Bakuninist sees the state as threatening autonomy, given how the state's overwhelming power and society's expectations can impede individuals from living according to their own conscience.

As for Bakuninist equality,

This is not the removal of natural individual differences, but equality in the social rights of every individual from birth; in particular, equal means of subsistence, support, education, and opportunity for every child, boy or girl, until maturity, and equal resources and facilities in adulthood to create his own well-being by his own labor.\textsuperscript{136}

While again here there is much with which JLs would agree, there is also much that is controversial - and reasonably so. Bakunin's conception of equality clearly requires a rich list of positive rights. The Bakuninist and JL will find common ground on that point, albeit ground not shared by those toward the right end of the political spectrum. But Bakunin's conception of equality also regards these positive rights as oriented towards a particular goal, namely, each individual engaging in labour that is productive and dignifying - dignifying not in the sense of

\textsuperscript{133} So much is suggested by the text quoted in n133 above.
\textsuperscript{134} Bakunin, Michael, Bakunin on Anarchy, 96.
\textsuperscript{135} The most important of Rawls' primary goods, goods which serve as the currency for Rawlsian distributive justice.
dignity-respecting, but dignity-bestowing. For all their differences, Bakunin shared with Marx Marx's thoroughly secular, materialist perspective in which the dignity of humanity consists in humans' capacity for free, productive, self-expressive labour. It is here the JL and Bakuninist part ways in their respective understandings of equality, the JL taking people as equal in the Lockeian sense and the Bakuninist taking people as equal in their right to the conditions for dignifying labour. Now is the Bakuninist unreasonable in holding this more particular view or in deploying it while negotiating social arrangements? I think not, for the Bakuninist - not unreasonably, I think - believes that cooperative labour lies at the very basis of society and is the source of "dignity" and "rights". So the Bakuninist may argue even when bracketing his wider and reasonably contestable atheistic, materialistic beliefs - bracketing which Rawlsian JL requires. It is a claim perfectly expressible in public terms, and, as such, should be available to the Bakuninist within a JL framework as he interprets the political value of equality.

137 See subsection 4 of Chapter 2. In the Lockeian sense of equality, no-one has a natural right to exercise political power over others.
138 Bakunin, Michael, *Bakunin on Anarchy*, 92. The Bakuninist may also go further than this to claim, as Bakunin himself does, that labour is the "glory of mankind" - but he need not. My point is that the Bakuninist has resources for articulating a labour-based conception of equality that is entirely within the "public" realm, even if he may choose to venture beyond into the comprehensive.
139 In this dissertation, I don't make much of the distinction between versions of JL (broadly construed) presented as part of a wider liberal view (egs., Habermas, Barry) and versions presented as independent from any wider view (egs., Rawls, Nagel). As explained earlier, much more relevant is the distinction between consensus and convergence versions of JL, since my focus is specifically on the former.

That said, I do proceed on the assumption that JL (in the more narrow, consensus version in which I'm taking it) requires we trade in reasons that don't depend upon any particular comprehensive view, as far as possible. This requirement is the upshot of a consensus (as opposed to convergence) interpretation of JL, given that reasons peculiar to one or another comprehensive view are obviously not reasons that all can recognize as being reasonable grounds for accepting or rejecting a proposal. So while I don't regard it as essential to JL that the theory exist independent of all comprehensive views - in fact, in due course (eg., see Chapter 7) I will indirectly challenge the notion that JL can so exist - I do strongly associate JL with the related idea that we're required to bracket our comprehensive views, as best we can, when justifying legal coercion. I will periodically engage this latter idea, including here in-text.

A final thought: if JL would de-legitimize all legal coercion even when citizens generally try to abstract from their comprehensive views, how much more would JL jeopardize all legal coercion if citizens could appeal to them!
Moreover, a serious case can also be made that the Bakuninist respects the Rawlsian requirement of reciprocity. For Rawls, fair cooperation not only involves respecting others as free and equal, but also reciprocity; this requires "that citizens believe in good faith that the fair terms of social cooperation that they propose and expect all to abide by are reasonably acceptable to everyone in their capacity as free and equal citizens, without their being dominated or manipulated, or under pressure because of an inferior social or political position".\textsuperscript{140} It is true that the Bakuninist's anarchist objections would deprive the least well-off of social programs which, as JLs see it, make only the redistributive state "reasonably acceptable to everyone". However, for the Bakuninist, it is not the lack of such redistribution that poses the greatest threat to the least well-off. Rather, it is the \textit{state} that threatens to dominate, to manipulate, and politically marginalize some. Thus, given how he sees the operative threats to the sort of freedom he values, the Bakuninist can "in good faith" reject the state while fulfilling Rawls' reciprocity requirement.

Likewise, the Bakuninist offers a different interpretation of what the fact of reasonable pluralism means for social cooperation. Both the Bakuninist and JL accept it as a fact, and accept that it has implications for social cooperation; but they disagree on the meaning of the fact, and subsequently on its political implications. JLs believe reasonable pluralism implies that social cooperation ought to be regulated by JL's principle of public justification. Conversely, the Bakuninist believes it means that society ought to be hospitable to diverse grassroots organizations that give expression to the full variety of comprehensive views that exist in a pluralistic society. To reiterate, "a free society must be a pluralistic society in which the infinite needs of Man will be reflected in \textit{an adequate variety of organizations}" (emphasis mine). This diversification itself is facilitated by rejecting a centralized state that would tend towards monopolizing intellectual and material resources. For the JL, reasonable pluralism means that

\textsuperscript{140} Freeman, Samuel, \textit{Rawls}, 375.
power of the state - especially because of its gravity\textsuperscript{141} - must be publicly justified; for the Bakuninist, this fact instead requires extensive devolution of this power. Reasonable diversity isn't expressed in the public justification of state power, but in the "variety of organizations" that devolving state power allows.

Whether or not there are any actual advocates for these Bakuninist positions in a given time or place is immaterial to the present point.\textsuperscript{142} Simply the fact that one \textit{could} - not unreasonably, I think - interpret freedom, equality, fairness and the implications of reasonable pluralism in these diverse ways should qualify the Bakuninist as "reasonable" under JL's criteria twofold criteria.

Of course, when these general criteria are specified in more particular ways, then the Bakuninist may fall beyond the pale of the reasonable. This may happen, for instance, if free-and-equal citizenship is stipulated so as to require the provision of social minimum, or if it is stipulated (rather than argued) that the fact of reasonable pluralism implicitly requires following JL's principle of public justification.

But there are at least three strong reasons why JLS cannot, and would not want to, load the deck in such ways.\textsuperscript{143} To see these reasons, remember that JL understands "reasons all can

\textsuperscript{141} Eg., "...when we force people to serve an end that they cannot share, and that we cannot justify to them in objective terms, it is a particularly serious violation of the Kantian requirement that we treat humanity not merely as a means, but also as an end. The justification of coercion must meet especially stringent standards." (Nagel, Thomas, “Moral Conflict,” 238 [emphasis mine].)

\textsuperscript{142} One might think here of Edmund Burke's controversial suggestion that what a diverse legislature requires is not diversity in actual representatives but simply diversity in ideas. Though I suspect liberals would object to this point, it is ironic that JL - given its dependence on \textit{hypothetical} contractors - essentially follows this Burkean line. JL does not require us to consult the full range of \textit{actual} persons who meet their criteria of reasonableness, but the full range of those views that might be held by suitably reasonable persons - whether or not anyone actually does hold these views in the real world. The views of the Bakuninist fall under the latter range, even if not under the former.

\textsuperscript{143} In addition to the three reasons I here give in-text for why, \textit{philosophically}, JLs should not make reasonable personhood conditional on accepting certain substantive arrangements, see n129 above. There I explain why, \textit{exegetically}, I think it is a mistake to interpret Rawls as adding certain substantive requirements to his official twofold criteria for reasonable personhood.

70
accept” in terms of reasons that all reasonable persons, suitably idealized, would accept as bases for legal coercion in a hypothetical procedure. The core principle of JL - that legitimate laws are based on reasons all reasonable persons accept - and the hypothetical procedure JLs propose for explicating this principle - legitimate laws being those that would result from such a procedure - go hand-in-hand.

First, then, JLs cannot specify reasonable personhood in a more particular way since doing so would seem to beg the question in favour of the substantive conclusions at which JL theorists hope to arrive. A hypothetical procedure simply involving persons who already hold the substantive conclusions at which the theorist wants to arrive has no genuine heuristic, constructivist, or argumentative value. Second, doing so would also render JL a much less apt tool for dealing with the diversity that exists in real-world liberal democracies. No longer would the hypothetical contractors represent anything closely approximating the diversity that exists among real-world persons holding various comprehensive views. Instead, it would represent only a much more narrow range of diversity, tailored to achieve unanimity only on the conclusions that JL theorists prefer. Third, the more procedure-independent content with

144 As Bohman and Richardson put it, "reasons that all can accept" (or "RACAs") is the watchword of JL. See Bohman, James and Richardson, Henry S., “Liberalism, Deliberative Democracy, and ‘Reasons’.”
145 “Constructivism” refers to the procedural method of justification used by JLs. A constructivist approach explains moral principles - in this case, conditions of political legitimacy - as the product of a fair procedure in which participants unanimously agree on the norms that will govern them. Crucially, as it is intended to be a method for justifying norms - and not merely reasserting them - the parties to a constructivist procedure must not antecedently hold the moral views the procedure seeks to justify. That is, their input to the procedure must be something other than blithe affirmation of the norms in question; typically, therefore, this input is something like participants’ advocacy for their own interests.
146 And JLs’ intention clearly is to reflect the real world as much as possible notwithstanding certain idealizations required to mitigate elements of the real world that tend us toward injustice. For example, Rawls writes, “This reasonable society is neither a society of saints nor a society of the self-centred. It is very much a part of our ordinary human world...” (John Rawls, Political Liberalism, 54 [emphasis mine].)
147 In developing his own account of public justification, Gaus recognizes this danger - and rightly criticizes those who succumb to it. "According to Gaus, many defenses of liberal neutrality tailor their conception of public justification so as to justify contemporary ‘liberal-like’ states. The task of political philosophy is not
which JLs fix these concepts, the less can JL plausibly claim to instantiate a higher-order impartiality.\footnote{148} JL aspires to be an arbiter between comprehensive views, not an expression of one. Presuming, then, that JL theorists neither want to beg the question nor fail to address real-world pluralism nor become just one comprehensive view among others, their criteria of "reasonable" persons will have to rest on general concepts of freedom, equality, fairness, and reasonable pluralism as opposed to specific conceptions thereof.

In short, all this means that it seems perfectly possible for a reasonable person to believe that the benefits of living in a stateless society would outweigh the costs - as our reconstructed Bakuninist does. This may not be how I would judge the relevant factors; by my lights, it may appear wrongheaded for anyone to reject the coercive state altogether. And yet do I fail to see \emph{any} reasonable grounds for rejecting the night watchman state, and grounds that are perfectly expressible in terms of public reasons? I do not, and the existence of such objections would mean that even the minimal state would fail at the bar of JL’s unanimity condition.\footnote{149}

to legitimize current political regimes, but to examine the conditions under which political coercion can be justified." (Andrew Lister, “Public Justification and the Limits of State Action,” 154.)\footnote{148} The idea of "higher-order impartiality" is from Thomas Nagel, “Moral Conflict", as is the contention that liberalism instantiates it.\footnote{149} Given how my present argument proceeds, it should be apparent that I do not regard what Gaus and Vallier call the "error of symmetry" as an error at all. Gaus and Vallier maintain that, "There is a fundamental asymmetry between reasons to justify to another a law and reasons to reject that law." Thus, their convergence type of public justification allows citizens to reject, but not enact, laws on the basis of religious reasons.

Conversely, as I interpret JL, there is indeed symmetry between the reasons for accepting and rejecting legal coercion. Legitimate laws must be based on grounds which can be seen to be reasonably acceptable to all; in other words, legitimate laws must be based on public reasons. In parallel fashion, if rejecting a proposal is to be viewed as reasonable, rejection must also be for public reasons. Such symmetry aids publicit, explaining both the permissibility of legitimate coercion and the impermissibility of illegitimate coercion in terms that all can recognize as justificationally appropriate. The symmetry view also seems entailed by how Rawls and Rawlsian JLs see public reason as functioning within democratic deliberations. Regulated by public reasons norms (morally regulated, not legally), such deliberations ought trade in public reasons, with both justifications for laws and objections to laws being formulated in terms of reasons with which all can identify.

Gaus objects to the symmetry view, alleging that "a strict interpretation of symmetry" implies holding that "a rejection of \(L\) (i.e. that \(L\) is not permissible) also requires a unanimity condition". However, I don't think there's actually a problem here. For Rawlsian, consensus-emphasizing JL does not require that
So the broader problem for JL raised by the redistribution objection is the following. JL would not just make many uses of political power illegitimate that our CCs tell us are legitimate. It would not simply de-legitimize certain policies such as redistribution while leaving other, more basic, government functions intact. Taking into account the full range of political views held by suitably reasonable persons, JL would make all uses of political power illegitimate. If JLs have failed to see this, it is because they have failed to appreciate how wide a diversity of views can be held by persons who should qualify as "reasonable" according to their own twofold criteria of reasonableness.

2-Factors in the Argument

Let me now break down this argument into three of its constituent elements. These are factors that conspire together to yield JL's unacceptable consequence of de-legitimizing all legal coercion. The first of these elements has already figured quite prominently in my presentation of the argument, but it is worth examining in a little more detail as I believe it (and also the third element) affords us a window into the internal logic of JL reasoning.

a) Reasonable Persons: Who's In? Who's Out?

To begin with, one must try and disambiguate who or what JL means to describe with the slippery term “reasonable”. The term is used in what I'm taking to be the canonical formulation of JL's principle of public justification: legitimate laws are those based on reasons every reasonable person can accept. Here it is persons who are reasonable or not.
“(Un)reasonableness” is predicated of persons. Sometimes it is an act that is counted “reasonable” or "unreasonable", as when JLs speak of reasons all can reasonably accept or reasons no-one can reasonably reject. In a later statement of his LPL that we have already seen, Rawls doubly invokes the “reasonable”. According to this later statement, legitimate laws are those justified on grounds that citizens can reasonably expect one another to reasonably accept. In this locution, it is one’s belief concerning the acceptability of a proposal to others that stands to be judged “reasonable” or “unreasonable”. Finally, in addition to citizens being (un)reasonable and acts of accepting, rejecting, and believing being (un)reasonable, JL also seemingly predicates (un)reasonableness of reasons. With reference to Eberle's analysis, we have already noted some of the many ways in which JLs try to capture the nature of “public” - or we might say "reasonable" - reasons. For instance, "reasonable" grounds for political decisions might be those that are intersubjective, replicable, or fallible in nature.150

This multiplicity of uses raises the question of the relationship between them. To my knowledge, this is not an issue that JLs tend to clarify. But while JLs tend not to clarify this issue, I will assume that a certain order of priority exists among their judgments of "reasonableness", with its application to citizens being primary. I explain.

Given their proceduralist aspirations151, JLs are committed to predicking (un)reasonableness of citizens primarily and of substantive reasons or policies only secondarily.

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150 See Samuel Freeman, Rawls, 296 for a comparable list of the many items of which Rawls predicates "reasonableness".
151 I speak of JLs as having "proceduralist aspirations" chiefly because of the internal logic of their constructivism, and only secondarily because of explicit statements they sometimes make to this effect. For explanation of this internal logic, see the present in-text paragraph. Given their desire to respect free-and-equal personhood, and their presumption that doing so requires that norms be represented as the self-legislation of such persons, they are committed to as thoroughgoing a proceduralism as possible.

It is true that JLs sometimes explicitly say they do not intend to be thoroughgoing proceduralists; Rawls' response to Habermas' criticism that PL is insufficiently procedural is one such example. [See
Since JLs would ultimately, in the name of maximal popular sovereignty, aspire to place both the identification of “reasonable” reasons and of "reasonably" acceptable or rejectable social agreements in the hands of the citizens themselves, a conception of “reasonableness” should be applied only to citizens and not to other phenomena downstream. If nothing but the citizens themselves are antecedently judged by a criterion of (un)reasonableness, then the maximum amount of further considerations are left open to be decided by mere procedures in which those qualified citizens will participate.

Moreover, in addition to the logic of their constructivism, JL should primarily evaluate citizens in terms of (un)reasonableness insofar as they aim to meet the liberal demand that "the social order should in principle be capable of explaining itself at the tribunal of each person's understanding". In light of this quote, I've suggested we identify the animating spirit of JL as the desire to make social arrangements justifiable to citizens who would be subject to them. Hence, this order of priority - predicing "(un)reasonableness" primarily of persons - best reflects the spirit of JL, as well as preserving its proceduralist designs.

Similar considerations favour interpreting JL as emphasizing an ethical over an epistemic conception of "reasonable" citizenship. The former is more procedural, requiring only that a "reasonable" citizen meet Rawls' official twofold criteria. The latter is more substantive,

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Habermas, Jürgen, “Reconciliation Through the Public Use of Reason: Remarks on John Rawls’s Political Liberalism,” *The Journal of Philosophy* 92, no. 3 (March 1995): 109–131; John Rawls, *Political Liberalism*, 2005, 421ff.] However, even if JLs acknowledge that there are certain substantively just outcomes they seek to justify - as Rawls does in his response to Habermas - their constructivism commits them to representing these outcomes as the result of an unconstrained proceduralism. That is, the procedure they use to justify the substantive outcomes they prefer must not simply presuppose these outcomes by imposing them on the contractors as a procedure-independent criterion of rightness. In short, JLs may have substantive commitments, but they're also committed to justifying these in proceduralist terms. As such, they have proceduralist aspirations.

152 As we've already seen (in Chapter 2), this is how Waldron articulates this liberal demand. [Waldron, Jeremy, “Theoretical Foundations of Liberalism,” *Philosophical Quarterly* 37 (1987): 149.]
requiring that the comprehensive view held by a “reasonable” citizen exhibit certain constitutive requirements of a particular conception of rationality.

As we’ve already seen\textsuperscript{153}, according to the ethical conception JL gives basically two criteria citizens must meet to qualify as "reasonable". First, reasonable persons are those who are willing to cooperate with others on fair terms. They recognize others as free-and-equal, being entitled to lead their lives by their own lights, and are ready to meet the demands of reciprocity. Reciprocity requires that we offer to others terms that we expect they can reasonably accept, that will not impose unreasonable burdens on them no matter their place in the social order. Second, reasonable persons are those who recognize the burdens of judgment and the fact of reasonable pluralism and their implications for social cooperation. Crucially, this recognition means that they do not chalk up disagreements to their fellows having malicious ulterior motives or their fellows being cognitively defective; there is room for reasonable disagreement, especially concerning morals and religion. So long as a citizen is willing to cooperate fairly and recognize reasonable pluralism, they are JL-certified “reasonable”. These qualifications may seem sparse, but it is their very sparseness that makes them suitable for a constructivist, proceduralist account. Moreover, in addition to the ethical conception’s superior compatibility with proceduralism - in comparison to the epistemic conception's incompatibility - remember that the ethical conception is also Rawls' official stance\textsuperscript{154}, despite the equivocations Nussbaum points out.

Who, then, counts as reasonable according to JL's own reasoning? This determination is not made with reference to particular reasons or social arrangements that such persons must

\textsuperscript{153} See "3-An Overview of JL" in Chapter 2. Revisit this earlier discussion as well for the substantive criteria to which Rawls sometimes appeals, and for Nussbaum's distinction between Rawls' ethical and epistemic conceptions of reasonable citizens.

\textsuperscript{154} “The first basic aspect of the reasonable, then, is the willingness to propose fair terms of cooperation and to abide by them provided others do. The second basic aspect...is the willingness to recognize the burdens of judgment and to accept their consequences for the use of public reason in directing the legitimate
accept in order to qualify as "reasonable"\footnote{To repeat, Rawls does sometimes seem to equate "reasonable" persons with certain substantive social arrangements such persons will accept. However, as I explained there, I believe we should not interpret these substantive views as being \textit{prerequisites} of reasonable personhood in addition to the official twofold criteria. Rather, we should interpret them as being the \textit{product} of drawing out the implications of a fair procedure involving persons characterized only in the official twofold way.}, nor to any ethical ideal more expansive than is laid out by JL's twofold criteria. Rather, according to JL, reasonable citizens are simply those who meet two basic ethical criteria. If JL is to stay true to its proceduralist aspirations, we should then look to the views held by such certifiably "reasonable" citizens to give content to the \textit{reasons} and \textit{acts} that JLs will accept as reasonable as well.

\textit{b) Multi-Interpretable Concepts: Why Disagreement Persists even in the Ideal}

JLs evidently believe that the idealizations of the hypothetical contracting situation will substantially decrease the extent of political disagreement that exists among citizens of diverse viewpoints when compared with the real world. I am arguing, however, that even with such idealizations - moral, epistemic, material - we still should not expect the range of disagreement to so narrow that full unanimity could be reached on any political measure, including the very existence of a coercive state. Why shouldn't we expect this?

My presentation of the argument implicitly depended upon and illustrated one reason why, but I should now draw this reason out and set it forth more clearly: we can't expect unanimity because of the reasonable multi-interpretability of general concepts that are centrally important to political debate. It is mainly in terms of such general concepts that JL formulates its criteria of reasonable persons (along with requiring acceptance of reasonable pluralism, the implications of which can also reasonably be inferred in differing ways). As a result, both the range of who qualifies as reasonable may be broader than is typically conveyed by JL accounts;
and so, too, will the range of reasonable grounds for rejecting proposed uses of coercive political power be broader than is typically conveyed by JLs.

For example, take the concept of "freedom". What does it mean that citizens are free? Does it mean that real-world governments legitimately rule only by the consent of the governed? So says America's Declaration of Independence, and yet political philosophers of various stripes deny it. Even if we accept this construal of freedom, does it mean actual consent or only tacit consent? And what might constitute tacit consent? Perhaps “freedom” speaks rather to certain basic negative liberties that everyone ought to enjoy. Or does it also include a basic right to certain material goods? Does our freedom consist in the political liberties, as the ancients thought? Or in basic civil liberties, as moderns are more inclined to think? Are we free in some more abstract sense, such as the Kantian understanding of ourselves as self-legislators responsible for fashioning the ethical and political norms that govern us? Is freedom an essentially relational term, where free persons are those who stand in a relationship of non-domination to others? Nor should we forget the Bakuninist's conception of freedom seen earlier which accords primacy to one's conscience. Moreover, so far as I can see, all of these

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156 For example, consider Estlund's "normative consent" approach. See Estlund, David M., Democratic Authority, 117–135.
159 In requiring that citizens enjoy fair equality of opportunity, not merely formal equality, basic freedom for Rawls includes such a right. See John Rawls, Political Liberalism, 2005, 6, 356–363.
161 This ideal permeates, for instance, Habermas' discourse theory of law and democracy, and other constructivist approaches besides. See Jürgen Habermas, Between Facts and Norms.
conceptions of freedom are compatible with the basic sense of the concept that JLs start with: that
individuals are free in that they each have a capacity and right to lead their lives by their own
lights. There is, to be sure, some shared meaning between all of these more specific conceptions -
some basic idea such as living according to one's own lights or having the ability to do what one
wants. But such vague concepts are hardly sufficient for adjudicating any substantive political
disputes.

Now consider equality in this same light. At the beginning of his book, Contemporary
Political Philosophy: An Introduction, Will Kymlicka posits that political theorists of our time
have come to occupy in common an “egalitarian plateau”. The book then goes on to discuss
each of several leading schools of contemporary political philosophy: utilitarianism, liberal
equality, libertarianism, Marxism, communitarianism, and feminism. He suggests that each of
these can be fruitfully understood as a different interpretation of the political value of equality!
(And so, too, can anarchism, the Bakuninist will hasten to add.) For example,

This more basic notion of equality is found in Nozick's libertarianism as much as in
Marx's communism. While leftists believe that equality of income or wealth is a
precondition for treating people as equals, those on the right believe that equal rights
over one's labour and property are a precondition for treating people as equals.

It is evident, then, that even citizens who view one another as free-and-equal will experience
great difficulty coming to unanimity on any political decisions given their differing
interpretations of what it means to "treat people as equals".

And just as there are widely varying ways of interpreting the important political values of
equality and freedom, there will also be a comparable breadth of reasonable interpretations of the
value of fairness. Do fair terms of cooperation require rendering to each according to desert,
where desert is a function of one's virtue or vice? For much of the history of the West, justice and

79
fairness were understood primarily in these terms, though now this understanding has been mostly - though not entirely\textsuperscript{166} - abandoned by professional philosophers. Does fairness demand “from each according to ability, to each according to need”? This was Marx’s suggestion, and it still resonates deeply. Does fairness demand rendering to each according to his actual contribution to the joint social product? An ethic of personal responsibility - an extreme version of which is used to defend laissez-faire capitalism - points in this direction. This dimension of fairness finds expression, though, not only in the writings of libertarians, but also in those of Rawls\textsuperscript{167} and of luck egalitarians\textsuperscript{168}, albeit in more modest form; either way, it is an ethic that is operative in an at least some of our CCs. Or does fairness demand distribution according to a system of natural rights, equally and inalienably held by all?\textsuperscript{169} Or perhaps fairness demands distribution according to a hypothetical procedure of some sort, procedures which themselves try to embody one or more of the foregoing ideals of fairness in combination with each other.\textsuperscript{170}

\textsuperscript{165} Ibid., 4.
\textsuperscript{167} “The third respect in which citizens are viewed as free is that they are viewed as capable of taking responsibility for their ends and this affects how their various claims are assessed...The idea of responsibility for ends is implicit in the public political culture and discernible in its practices.” (John Rawls, \textit{Political Liberalism}, 2005, 33–34.)
\textsuperscript{168} According to luck egalitarian \textit{par excellence} G. A. Cohen, the "right reading of egalitarianism" aims "to eliminate \textit{involuntary disadvantage}, by which I (stipulatively) mean disadvantage for which the sufferer cannot be held responsible, since it does not appropriately reflect choices that he has made or is making or would make.” [Cohen, G. A., “On the Currency of Egalitarian Justice,” \textit{Ethics} 99 (July 1989): 906–944.] Correlatively, this implies that it is fitting to hold people responsible for the suffering they might experience as a result of suitably free choices.
\textsuperscript{170} JL is the natural example to cite, which can be seen as incorporating (perhaps among still others) both luck egalitarian elements - trying as it does to mitigate the effects of one's social condition that are “arbitrary from the moral point of view” - and natural rights elements - taking each person as it does to be a "self-authenticating source of valid moral claims".
Reflect upon this fact. The contemporary political philosophical world is characterized by the full gamut of theorists who knowledgably and sympathetically articulate utilitarian, libertarian, Marxist, communitarian, and feminist views, as well as theories such as justice-as-fairness, justice-as-luck-egalitarian-equality, justice-as-rights, justice-as-entitlement, justice-as-desert, justice-as-impartiality, and so on. What makes possible their disagreement? In large part, their disagreement turns on the multi-interpretablility of the key concepts under discussion. They agree that people are free-and-equal and should be treated fairly; they just disagree on the meaning and implications of these general ideas.

Their disagreement reinforces my argument in this chapter. In light of the extant disagreement among political philosophers with which we are eminently familiar, is it reasonable to expect that contractors - burdened by the same multi-interpretable concepts - will fare any better in reaching unanimity about any issue? As Waldron emphasizes with respect to Rawls’ PL, political disagreement exists “all the way down”171, and we should not expect the situation to be significantly different even if we transpose real-world persons to the hypothetical conditions that JL theorists suggest.

c) JL's Unanimity Condition: The Cause of the First Unacceptable Consequence

The reasonable multi-interpretablability of key political concepts contributes to an explanation of why JL leads to this first unacceptable consequence - de-legitimizing all uses of coercive political power. The vagueness of these concepts, though, is a fact that must be reckoned with by all political philosophers. More specifically, why is it that, in the context of JL,

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171 This phrase is from later in Waldron's book, but is wholly applicable to Waldron's earlier discussion and critique of PL. In the earlier discussion, while chiding Rawls for wrongly supposing that diverse persons would unanimously support adopting Rawlsian public reason as a framework for resolving disputes about justice, Waldron comments, "We also have to deal with justice-pluralism and disagreement about rights." See Waldron, Jeremy, Law and Disagreement (New York: Oxford University Press, 1999), 295, 159.
these vague concepts lead to the unacceptable consequence of de-legitimizing all uses of legal coercion?

The culprit is the unanimity condition that is part of the JL thesis. JL does not simply require that laws be based on secular reasons. JL requires that laws be based on public reasons that all can accept; alternatively, it requires justifications that none can reasonably reject. JLs try to make the possibility of hypothetical unanimity seem plausible by appealing to certain general concepts - freedom and equality, for instance - that are endorsed and interpreted in similar ways by wide swathes of contemporary liberal democratic citizens. However, JLs fail to appreciate the full breadth of viewpoints that should qualify as "reasonable" by JL's own twofold criteria (including the Bakuninist's), a failure I suspect is due to certain beliefs and assumptions being so widespread within contemporary Western culture - that is, certain ways of interpreting values like freedom and equality - that they have become virtually transparent to us. Hence, the tendency to marginalize a view such as the Bakuninist's, despite the fact that it is actually consistent with the general premises of free-and-equal personhood and fair social cooperation. But it is the surprisingly wide range of positions that qualified persons might, in fact, assume that problematizes the JL standard, since any proposed use of coercive political power must be non-rejectable by all of them.

To solve this problem, the unanimity condition cannot simply be removed from JL. It cannot since it is an essential part of JL given the problem to which JL is a response. In the previous chapter, I called this Rousseau's problem, in light of Rousseau’s influential formulation of the problem and famous (or infamous?) proposal of the “general will” as a potential solution. The problem is how to vindicate the freedom and equality of real-world democratic citizens who, on the basis of political views they do not share, are often coerced against their will. How can a person be free who is coerced by their fellows, having had his vote outweighed by the majority
view? This problem is only generated if it is believed that every citizen is free-and-equal. If every citizen is not, then it isn't necessarily problematic that certain citizens are coerced by others or that their views are defeated by the majority's; for it might be perfectly legitimate and explicable that those who have less status or are less free should be subject to coercion when it is exercised by those who have more status or are more free. But that is obviously not the premise from which JL begins nor the situation to which JL addresses itself. JL assumes that everyone is free-and-equal, and so long as even a single person stands to be coerced against her will Rousseau's conundrum remains as problematic as ever. The larger moral framework presumed by JL is certainly individualistic and Kantian, not aggregative and utilitarian. To remove the unanimity condition from JL, therefore, would be to gut JL of a key conceptual advantage over aggregative approaches as well as render it only a partial solution to the problem it is meant to solve.

Eberle inspires this point while reviewing JL theories that attempt to temper a unanimity condition with a more populist, majoritarian approach. Inspired by Eberle, we may rightly conclude that such theories do not merely modify the JL position; they decisively depart from it. Stripped of a unanimity condition, a “JL” theory becomes something other than JL.

In making these observations, it should also be apparent that consent is a category of central importance to a JL framework. Unanimity is required because it is a way of securing the consent of each individual. To remove the unanimity condition from JL would be to deny the need for each person's consent. We are talking here of hypothetical, not actual, consent. Still, the category of consent is centrally important insofar as JLS demand that legitimacy conditions be representable as securing individuals' unanimous consent in idealized circumstances. In the

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present chapter, I speak in terms of JL's unanimity condition. Later, though (in Chapter 8), when explaining how CR legitimacy avoids this first unacceptable consequence to which JL leads, I shall interact with the category of consent. As I say, consent is implicated in JL's unanimity condition.

Now the JL theorist might readily grant that JL cannot be gutted of its unanimity condition. But, he will insist, JLs are not proposing to give every real-world person a veto. They are simply giving every person a veto insofar as their cognitive, economic, and moral deficiencies are corrected for. And then they may put to me the following question: among that idealized group of people, don’t I think there would be many uses of coercive political power that no-one would veto?

To reiterate, no I do not. Certainly there are reasons offered in the real-world for rejecting a given policy that would not be offered by persons construed in this way. For instance, no person would object to climate change legislation on the basis of disreputable environmental science. Our contractors also would not have the kind of lapses in moral judgment that sometimes seem to afflict otherwise egalitarian real-world citizens. Nor would anyone be found leveraging their wealth for political advantage. So the cognitive, moral, and economic idealizations would, I expect, have the effect of narrowing the range of reasons that are offered for or against a given social agreement.

However, I also expect that these idealizations - unless they are taken to extreme degrees\(^\text{173}\) - would not narrow the range of laws that satisfy JL's principle of public justification. That is because, even within the space of public reasons, there are still several ways in which

\(^{173}\) What I mean is that we reasonably might expect unanimity if: our hypothetical contractors not only had improved knowledge, but perfect knowledge; had not only improved moral character, but were perfect saints; were not only committed to fairness, but had their moral sensibilities perfectly attuned to how far it was reasonable to press their claims against others. JL involves substantial idealizations, but certainly not idealizations of that order.
citizens may conscientiously disagree with one another.\textsuperscript{174} As I have so far emphasized, they may disagree on the \textit{interpretation} of general concepts. As well, they may disagree on how various public reasons and values ought to be \textit{weighted}.\textsuperscript{175} They may also disagree vociferously on the correct \textit{analysis} of empirical data - such as the disagreement that exists over the environmental impact of Alberta's oil sands. And isn't it plausible to suppose that there are still other significant ways in which people may reasonably disagree even within the space of public reasons?

Even if JL's idealizations narrow the range of reasons being offered, there are plenty of public reasons left over with which citizens can voice reasonable objections to every use of coercive political power. Climate change legislation may not be rejected on the basis of bad science, but it may be rejected on the moral grounds that some other state priority is of greater moral urgency; or on the philosophical grounds that we cannot have obligations to future generations; or on the basis of the belief that soon-to-be-developed technological advancements will be able to address the environmental challenges of the future. Group-differentiated legislation may not be supported on the basis of irrational prejudice, but may be defended in the name of rectifying historic or systemically entrenched injustices. Egalitarian schemes of property rights may be reasonably rejected on efficiency grounds; or in the name of certain perfectionistic

\textsuperscript{174} Here I take my cue from Lister who notes, "Nagel's solution (and Rawls's) was to claim that it is sufficient that the basic moral grounds for state action be reasonably non-rejectable, even if the precise weights attached to these reasons and the details of the factual context are a matter of reasonable disagreement." (Andrew Lister, "Public Justification and the Limits of State Action," 154.) Below in the "Objections and Replies" section, I further discuss this matter of the types of disagreement left open by JL.

\textsuperscript{175} For instance, "...given that a laundry list of the platitudes implicated in the abortion issue requires supplementation by some ranking of those values, given that each of the premises of a putative public justification must be acceptable to rational and reasonable citizens, and given, more particularly, that the premise that \textit{ranks} the values implicated in the abortion issue must be acceptable to rational and reasonable citizens, it's clear that Rawls can't articulate a public justification for the claim that the state ought to grant each woman a right to have an abortion in the first trimester. Any supplementary ranking of the implicated political values that gets the desired result will be anything but platitudeous: claims about platiitudes are not \textit{typically} platitude themselves, and claims that rank the platitudes implicated in the abortion issue will \textit{invariably} be controverted by fully rational and reasonable citizens. Nearly any ranking of the platitudes implicated in the abortion controversy, including Rawls's claim that 'at this early stage of pregnancy the
pursuits, the accomplishment of which requires concentrations of wealth in particular sectors of
society; or in the name of certain inalienable rights which – at least by my lights – it is not crazy
to suppose that people possess.\textsuperscript{176}

In short, people would come into schemes of social cooperation with widely differing
views of public reasons and public values even when citizens do their best to leave aside their
comprehensive views and even when their moral, epistemic, and material shortcomings are
corrected for in the hypothetical scenario envisaged by JL. There is no reason to suppose that
widely differing political views - and political temperaments - would not come into play in the
making of the hypothetical agreement. We should expect that these differing views would deeply
affect the social agreements that even JL-idealized persons would judge to be reasonable or
unreasonable to accept. As a result, although certain kinds of particularly divisive reasons may
be out of bounds, there are no uses of coercive political power that we should expect \textit{all}
reasonable persons would agree with. Thus, applying JL's unanimity condition de-legitimizes all
uses of legal coercion, even in JL's idealized circumstances. JLs have insufficiently explained
why we should expect otherwise.

\textbf{3-Objections and Replies}

\textit{Objection: JL can avoid libertarian (or anarchist) implications by appealing to the
notion of higher-order unanimity. There may be extensive reasonable disagreement concerning
specific lower-order policies, as my argument so far has pointed out. But there is no room for
reasonable disagreement concerning general higher-order purposes of the state, and JL is meant
to apply at this higher level.}

\footnotesize{\textsuperscript{3}}

\footnotesize{political value of the equality of women is overriding' will be contested by reasonable citizens.'}
\footnotesize{(Christopher J. Eberle, \textit{Religious Conviction}, 218–219.)}
Reply: As Lister helps us see, this response doesn't work because there is reasonable disagreement over how to characterize these higher-order purposes as well as reasonable disagreement over the non-coercive baseline against which putative uses of legal coercion are evaluated. Lister refers to these two problems as the "aggregation problem" and the "measurement problem". I agree that these pose formidable challenges to the present objection, and I largely take after Lister in the following comments.

Gaus has developed this "argument from higher-order unanimity"\textsuperscript{177}, and would thus make the present objection to my argument. Lister summarizes:

> The argument from higher-order unanimity provides a democratic escape clause for liberals who would also be egalitarians. Although state action must be conclusively justified (that is, not reasonably rejectable), we may choose democratically between actions inconclusively justified against each other, but conclusively justified against inaction.\textsuperscript{178}

Consider just one example of how this argument is supposed to work. There are reasonable grounds both for accepting and rejecting nuclear armament. At a higher-order level of generality, there are no reasonable grounds for rejecting a common policy of collective defense. Since, according to the argument from higher-order unanimity, JL’\textquotesingle s unanimity condition applies only to the latter issue rather than the former, a state may legitimately enforce a policy of collective defense so long as it resolves reasonably contestable issues such as nuclear armament democratically.\textsuperscript{179}

\textsuperscript{176} I have in mind here the interrelated claims that people have inalienable rights to their own bodies, to their own labour, and to the fruits of their own labour.


\textsuperscript{178} Andrew Lister, “Public Justification and the Limits of State Action,” 152.

\textsuperscript{179} The example is taken from Lister, who in turn borrows it from Nagel. (Ibid., 154–155; Nagel, Thomas, “Moral Conflict,” 233.)
However, Lister identifies two problems that I judge to be fatal to this strategy. The first of these - the aggregation problem - arises from the fact that, for any pair of options both of which are reasonably rejectable, there are varying ways of characterizing the noncoercive baseline to which we default should neither of the options be enacted. Consequently, the higher-order unanimity strategy may have undesirable results depending on how this noncoercive baseline is characterized. For instance, as Lister says, "If the inactive or noncoercive baseline is no state at all, then some fairly strong forms of perfectionism would be legitimate, if chosen democratically." Assuming, then, that perfectionist states are illegitimate - even if democratically chosen - the higher-order unanimity strategy cannot salvage JL as a suitable means of discriminating between legitimate and illegitimate laws.

Lister himself doesn't quite conclude that the higher-order unanimity strategy is flawed beyond reclamation, though he does pursue an alternative strategy for saving JL from libertarian implications (what I will call the "reframing strategy" in discussing a second objection in-text). Rather, after laying out the formidable challenges posed by the aggregation and measurement problems, he points out two areas where further work needs to be done should the obstacles to the higher-order unanimity strategy be surmounted. See Andrew Lister, “Public Justification and the Limits of State Action,” 161. I should note that Gaus has responded to this objection of Lister's (and that Lister, in turn, has addressed the issue further in a forthcoming book!). Gaus' response seeks to disaggregate issues, or sets of issues, with reference to the idea of "justificatory dependency": roughly, if our judgment about one issue affects our judgment about another, the two ought be considered together; but if our judgment about one leaves our judgment about the other unaffected, they ought be treated separately in regards to a public justification requirement.

But aren't there reasonable disagreements here, too? People reasonably dispute the relatedness of various issues and laws. Is poverty related to violence? Is pornography related to freedom of speech? Is the right to home-school one's children related to freedom of religion? What about gender-differentiated hiring practices? And aren't all policies and laws related to one another in terms of the cost of their implementation to the public purse? So I doubt that Gaus' response here will be fully satisfactory, though I take his point that - while still seeking to be philosophically precise - we shouldn't "lose sight of the fact that we do argue about the merits of specific laws". In regards to the difficulty of characterizing the nature of "public" reasons, I granted in Chapter 2 the intuitive way in which we seem to be able to categorize many reasons as either "public" or not. Similarly, I'm willing to grant here that it does, by-and-large, seem intuitive to disaggregate issues along the lines suggested by Gaus. Yet I question whether we can do so in a philosophically precise way that is beyond reasonable disagreement (especially when public justification takes into account not only how reasonable real-world people actually do judge the interrelatedness of issues but the full extent of how reasonable people could judge their interrelatedness). I suspect we cannot, and am unsure where that leaves Gaus' proposal.
The second challenge faced by the higher-order unanimity strategy is the measurement problem. This is the problem of measuring the coerciveness of the baseline set of laws that is unanimously preferable to having no laws at all. The higher-order unanimity strategy assumes that identifying such a baseline is a way of satisfying JL’s unanimity condition even when a more specific democratically chosen policy is reasonably rejectable; that is, even though the more specific policy may be reasonably rejectable in comparison to an equally coercive alternative, it is unanimously preferable to the less coercive baseline. However, what happens when people reasonably object to how the coerciveness of the baseline itself is being measured? Is a society "with no traffic lights and no freedom of conscience" less coercive than a society "with freedom of conscience and heavily regulated traffic"\(^{183}\)? More generally, is a state of nature less coercive than a night-watchman state or welfare state? As Lister rightly notes, answering these questions requires us "to assess the value of the liberties or opportunities that laws deny people, or create".\(^{184}\) Put another way, measuring the coerciveness of any of these societies requires \textit{qualitative}, not just \textit{quantitative}, judgments about the freedoms that matter. But those judgments are sure to be the object of reasonable disagreement. If the higher-order unanimity strategy, then, aims to preserve a place for a unanimity condition, and aims to do so by assuming we can identify a minimally coercive baseline in a way that is beyond reasonable disagreement, it will fall short of its target.

In sum, appealing to the notion of higher-order unanimity cannot keep JL from having libertarian (or anarchist) implications. Given the aggregation problem, such an appeal could avoid libertarian implications but only at the cost of permitting perfectionist states. Given the

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\(^{183}\) Andrew Lister, “Public Justification and the Limits of State Action,” 160.

\(^{184}\) Ibid.
measurement problem, such an appeal could avoid libertarian implications only if there were a way of making qualitative judgments about morally significant freedoms that was beyond reasonable rejection. Thus, the argument from higher-order unanimity does not disprove my contention that JL would effectively de-legitimize all uses of legal coercion. The objection fails.

*Objection:* JL can avoid libertarian (or anarchist) implications by applying JL only within a "reasons frame". We need to distinguish between applying JL's unanimity condition to decisions as opposed to reasons-for-decisions. JLs only intend to apply the theory to reasons-for-decisions rather than to decisions; as such, libertarian (or anarchist) implications are avoidable given that reasons for non-coercion may be just as reasonably rejectable as reasons for coercion.

*Reply:* Lister believes JL is invulnerable to the charge of having libertarian implications. Rather than defending JL via higher-order unanimity, however, Lister pursues what I call the "reframing strategy". 

The reframing strategy distinguishes between two ways JL can be "framed". First, JL can be framed so as to apply the unanimity condition to decisions. Within this frame, the default is presumed to be inaction. That is, should no decision meet with universal reasonable acceptability, the state is barred from acting. Second, JL can be framed to apply to reasons. Framed this way, even a reasonably rejectable final decision may satisfy the unanimity condition so long as the reasons on which it is based are of a sort that all can reasonably accept. When applied to reasons, Lister says, the default is not state inaction but simply exclusion of inadmissible reasons. Besides the more specific goal of reconciling JL with redistribution, the general motivation for distinguishing between these two frames is to sideline reasonable disagreements of a certain sort. Namely, Lister recognizes that even if we succeed in delineating a pool of suitably "public" reasons, reasonable disagreements will remain over the weighting of
these reasons, over the correct interpretation of vague concepts, as well as over the empirical assessment of such reasons. On Lister's account, JLs do not intend disagreements of this sort to veto otherwise legitimate uses of legal coercion. Such disagreements are disagreements over decisions, but JL, rightly framed, requires only that the reasons-for-decisions be of a type that no-one can reasonably reject.

How is this strategy supposed to save JL from libertarian implications? It does so since reasons for state inaction are just as open to reasonable rejection as reasons for state action. Since the default within the reasons frame is exclusion of reasons rather than state inaction, JL rightly framed is not prejudiced toward libertarian results. Indeed, assuming redistribution can be justified on the basis of the appropriate kind of reasons - that is, suitably "public" reasons that are acceptable to all reasonable persons - the reframing strategy provides a way out for would-be egalitarian JLs.

But does the reframing strategy really save JL from libertarian implications? For the following three reasons I don't think it does.

First, this reply doesn't work because rejecting reasons-for-decisions is tantamount to rejecting the decisions themselves. Within the reasons frame Lister may not say that the default is state inaction, but for all-intents-and-purposes I fail to see how it cannot be. For if there are no reasons that meet with unanimous reasonable acceptability, then how can any state action be justified? So far as I can see, no state action can be justified, assuming that the only state actions which are justified are those based on unanimously reasonably acceptable reasons. In believing the reframing strategy to save JL from libertarian implications, Lister ostensibly believes that there really are reasons on which reasonable persons can unanimously agree.\textsuperscript{186} But as I have

\textsuperscript{185} He develops this approach at length in Lister, Andrew, “Public Reason.”
\textsuperscript{186} For instance, the need for some scheme of legally enforceable property rights, as against a default of having no scheme at all. (Andrew Lister, “Public Justification and the Limits of State Action,” 155–162.)
argued in this chapter, that is an untenable belief, as evidenced by the inevitable disagreement that exists among reasonable persons in the real world.

Second, the reframing strategy should be rejected because it seems based on an *ad hoc* distinction between the types of disagreements that are and aren't relevant to JL's unanimity condition. JL provides no sufficient account of why disagreements over the interpretation, empirical assessment, and weighting of reasons can't be just as serious or important as disagreements over the metaphysical, religious, philosophical, or moral dimensions of political issues. Indeed, it seems eminently plausible that deep disagreement might exist over the empirical assessment of, say, environmental data pertinent to the controversial development Alberta's oil sands; or it might exist over whether freedom is a formal notion requiring only negative rights, or a more substantive notion requiring positive rights as well; or it might exist over the relative importance of the public good as opposed to personal property rights when a question of state expropriation arises. Lister's reframing strategy says that JL's unanimity condition is met so long as uses of legal coercion are based on certain very general sorts of reasons, which in turn means that disagreements about those reasons - about their interpretation, weighting, or empirical analysis - are irrelevant. But why should they be regarded as such? If cases such as the examples I've just given suggest that these types of disagreements also constitute grounds for reasonably rejecting uses of legal coercion, then once again JL is liable to have libertarian (or anarchist) implications.

Third, the reframing strategy cannot save JL because the means by which it forestalls libertarian implications simultaneously strips JL of its most distinctive characteristic, namely, the liberal-cum-JL aspiration of making uses of coercive power justifiable to those who are subject to

But doesn't the case of the Bakuninist illustrate that there can, in fact, be reasonable objections to having any such scheme? On such a view, any scheme that would require a centralized legal system for its
them. As we have already seen from Waldron, JL builds from the characteristic liberal aspiration to justify social arrangements "at the tribunal of each person's understanding". However, by tolerating a high degree of reasonable disagreement over matters such as the correct interpretation, empirical assessment, and weighting of reasons, JL within the reasons frame cannot sincerely claim to uphold this liberal ideal. It seems clear that reframed JL would be willing to legitimize various social arrangements even while these arrangements remained unjustified at the tribunal of many people's understanding. Consequently, the reframing strategy would have the ironical consequence of preventing libertarian implications but at the expense of JL itself.

In the face of either of the first two problems I have raised here for the reframing strategy, JL is preserved but egalitarian redistribution is not. Faced with the third, egalitarian redistribution is preserved but JL is not. All three reinforce my conclusion that JL cannot be saved from libertarianism (or anarchism) by following the suggestion of this second objection.

Conclusion

In conclusion, let me sum up this first internal critique of JL. According to the core tenet of JL, coercive political power is legitimate only when it is exercised for reasons that no-one can reasonably reject. That is, laws are legitimate only if they satisfy JL’s unanimity condition. This means that if no law can meet the unanimity condition, then no law is legitimate. Given the diversity of persons who meet JL's twofold criteria of "reasonableness" - a diversity that encompasses such marginal views as that of the Bakuninist - no law would be supported by all implementation is objectionable - and, I think, reasonably so. Hence, this is not an example of a reason on which all can agree, nor should we expect any others to be forthcoming.
reasonable persons even in the JL's thought experiment, let alone in the real world. Therefore, JL would prohibit any use of coercive political power.

We considered a few ways that JLs might respond to this issue. Among them, they might try and replace the unanimity condition with a more populist conception of JL. This response is unavailable to them, however, since such a version of JL would at best be a partial response to Rousseau's problem. They might retort that their theory does not purport to give every real-world reasonable person a veto, but only hypothetical persons who are freed of relevant cognitive, economic, and moral defects. However, I argued that while such a move would narrow the range of qualified reasons for which one could reject a proposed use of legal coercion, it would not necessarily open up a range of laws that could meet with no reasonable rejection.

I began this argument by noting that the layperson’s initial reaction to JL is commonly incredulity at the prospect of meeting JL’s unanimity condition. This reaction is a function of their experience with real-world politics and of the deep disagreement among diverse persons that it engenders. After noting that both professional critics of JL as well as JLs themselves have shown concern for essentially the same issue, I explained why JL leads to the unacceptable consequence of de-legitimizing all uses of legal coercion. Pre-philosophical opinions are routinely demolished by philosophical scrutiny. In this case, though, the layperson’s incredulity towards JL has been vindicated. This first unacceptable consequence of JL gives us - including JLs themselves, who share the CC that much actual legal coercion is legitimate amidst disagreement - a first reason for rejecting JL qua framework for understanding legitimacy. That JL leads to this consequence at the level of our first-order judgments should cause us to question the higher-order framework from which this consequence emerges.
Chapter 4

A Second Unacceptable Consequence of JL

Introduction

We come now to a second internal critique of JL.

The CC on which I focus in this chapter is our belief that real-world legitimacy is conditional upon protecting certain basic rights. That is, we believe there are certain rights, such as those to bodily integrity and freedom of religion, that are necessary for legitimacy. Although I am not concerned with exactly which rights these are – for instance, would a right to a democratic say be among them? I do take it that we all regard certain, specific basic rights as especially important. So the conviction here isn’t simply that rights exist in the abstract. Nor is it even that certain specific rights exist. Rather, it is that basic rights exist and that protection of at least certain of these rights is necessary for legitimacy. Thus, my focus in this chapter is on what I will call "legitimacy-conditional rights": these are basic rights which must be protected as a condition of legitimacy. In other words, the CC on which I focus may simply be rephrased as our CC in legitimacy-conditional rights. To reiterate, this is our conviction that there are certain basic rights which must be protected as a condition of legitimacy.

I think it is clear that Jls evaluate the legitimacy of real-world regimes in terms of certain basic rights, as a large part of the JL project is to philosophically justify the priority accorded rights. Rawls evidently agrees with Habermas that democratic "autonomy - however great -

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187 To engage this question see Arneson, Richard J., “The Supposed Right to a Democratic Say,” in Contemporary Debates in Political Philosophy, ed. Christiano, Thomas and Christman, John (Blackwell Publishing Ltd., 2009), 197–212.
cannot *legitimately* violate those rights by its laws.* Likewise, Amy Gutmann and Dennis Thompson believe that, "A majority vote cannot *legitimately* an outcome when the basic liberties or opportunities of an individual are at stake." Furthermore, the wide currency of this CC is seen in our political practices, both domestic and abroad, and in the rights-culture that has come to dominate the public square.

However, in this chapter I shall argue that, far from making such rights more secure, the justificatory strategy JLs pursue actually undermines them. My main argument will be that JL undercuts legitimacy-conditional basic rights by conflicting with three characteristics we experience such rights as having. I will develop this argument by explaining three asymmetries that exist between the rights JL makes possible and the rights we regard as necessary for legitimacy in the real world. One asymmetry exists between JL's representing rights as being procedure-dependent and our experience of basic rights as obtaining independent of procedures. A second asymmetry exists between JL's contentless proceduralism and our belief in legitimacy-conditional rights\(^\text{191}\) that are substantive. By "substantive", I mean rights having determinate content. We don't simply claim to have rights, but to have rights to certain definite goods (egs., to bodily integrity, association with others, etc.). But JL rights lack content until it is provided by JL's hypothetical contractors. A third asymmetry exists between JL's representing rights as

\(^{188}\) Presently I will not consider whether legitimacy has further, perhaps procedural, requirements as well. For present purposes, I'm simply assuming that protection of certain basic rights is *necessary* for legitimacy, even if it might not also be sufficient.


\(^{190}\) Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Cambridge, MA: The Belknap Press of Harvard University Press, 1996), 30 [emphasis mine]. As I noted in Chapter 2, Gutmann and Thompson's deliberative democratic theory, like Joshua Cohen's, is seemingly a way of giving institutional expression to Rawlsian public reason.

\(^{191}\) Throughout this chapter, to try and minimize repetition, I shall use the terms "basic rights" and "legitimacy-conditional rights" interchangeably (unless context implies otherwise). I hope the reader finds this convention sensible. If there are any rights that are truly legitimacy-conditional, surely it is basic ones. And given my focus on the issue of political legitimacy, I am chiefly interested in basic rights *qua* putative conditions of legitimacy.
resulting from group consensus and basic rights which, if truly necessary for legitimacy, would seem to be objective. By "objective", I mean rights that apply universally whether or not political actors recognize them as such in a given real-world context. In short, we experience legitimacy-conditional rights as procedure-independent, substantive, and objective; but the rights JL affords are essentially procedure-dependent, contentless, and the product of group consensus.

I claim that JL undercut basic rights. I use this term semi-technically. To appreciate what my argument amounts to in this chapter, it may be helpful to borrow the distinction from epistemology between rebutting defeaters and undercutting defeaters. Evidence of the former type constitutes a direct reason for affirming not-x. Evidence of the latter type is not so strong. It merely deprives us of any good reason for positively affirming x. I intend to run the latter sort of argument in this chapter. The asymmetries I highlight do not show that, given a JL framework, basic rights definitely don't exist or definitely aren't necessary for legitimacy. Rather, I marshal them so as to suggest that, given a JL framework, we simply have no good reason for affirming the existence of legitimacy-conditional basic rights. Even if basic rights do exist, JL gives us no reason for thinking certain ones are categorically necessary for legitimacy. Put another way, JL's characterization of rights calls into question our conviction that certain procedure-independent, substantive, objective rights are prerequisites of legitimacy, suggesting instead that what is truly essential to legitimacy is a certain sort of procedure. I am only loosely appropriating this language of "undercutting" basic rights, though; I am not using it in a strictly technical sense as it may be deployed in epistemology. I appropriate it only to try and convey an approximate sense of what I take my argument to show; the reader is welcome to disregard this brief mention of the rebutting/undercutting distinction if it is unhelpful.

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Let me be clear: I proceed on the assumption that we experience legitimacy-conditional basic rights as 1) obtaining independent of procedures, 2) being substantive (in the aforementioned sense), and 3) being objective (in the aforementioned sense). Rather than being a matter of stipulation, though, I submit that characterizing basic rights in these ways is simply the result of observation. Simply observing how we - including JLs - talk about and apply basic rights leads us to characterize them in these ways. I shall elaborate this point as we go.

The most important of these asymmetries is the first, as JL's proceduralism ultimately causes the other two asymmetries as well. It is fitting, then, that I begin by exploring the distinction between procedural and substantive accounts of legitimacy, which also will give us another window into the internal logic of the proceduralism to which JL is committed. I then move on to examine the three tensions that exist between JL and the characteristics that legitimacy-conditional rights would seem to have. These tensions undercut the proposition that certain basic rights are, in fact, necessary for legitimacy. This result is unacceptable. I conclude by briefly considering a further way (unrelated to these three asymmetries) that JL undermines legitimacy-conditional basic rights: that is, JL especially compromises basic rights that are positive rather than negative.

1-On the Substance/Procedure Distinction

Multiple times I have already explained the connection between JL's principle of public justification and JL's hypothetical proceduralism.\(^{193}\) It is important to remember it here, too, and throughout. While the core principle of JL makes coercion's legitimacy a function of its being based on reasons that all reasonable persons can accept, JLs elaborate this principle in terms of a

\(^{193}\) As at the beginning of “3-An Overview of JL” in Chapter 2, and in “1-The Heart of the Argument” in Chapter 3.
hypothetical procedure in which persons exchange appropriate reasons and that culminates in a unanimity condition. Who are the "reasonable persons" of whom the core principle speaks? The idealized parties to the hypothetical procedure. What are "reasons" such persons can accept? The sort of reasons that would be exchanged in the procedure and found acceptable by the parties therein. What are legitimate uses of legal coercion? Those that would receive unanimous support at the conclusion of the procedure. Counterfactual agreements made in Habermas' ideal speech situation or Barry's "circumstances of impartiality" exemplify these procedures, as does - albeit indirectly - Rawls' agreement made in the Original Position behind the Veil of Ignorance. Given their presumption that free-and-equal persons ought understand themselves as the authors of the norms (legitimacy-related and otherwise) that govern them, JLs are driven to constructivism and the proceduralism it involves.

JLs, then, are committed to proceduralism, and this commitment can be better understood if we contrast procedure with substance. So let us further clarify the substance/procedure distinction. Doing so will also pay dividends later on when examining the three asymmetries that exist between JL and basic rights, especially the second.

“Substance” in this discussion refers to determinate items that legitimacy or justice demands, just as above I defined "substantive" rights as those having determinate content. These

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195 Barry, Brian, Justice as Impartiality, 99–111.
197 As presented in PL, specific uses of legal coercion aren't among the objects of agreement in the Original Position. Rather, what parties agree upon are a general conception of justice and a principle of legitimacy. (By Rawls' reasoning, they would agree upon a liberal conception of justice and the LPL, respectively.) Rawls intends his account of public reason to then aid parties in satisfying the LPL once they enter society and the Veil is lifted. However, given that public reason requires an appreciation of a liberal conception of justice, and that it is in the Original Position where we're given the justification for such a conception, deliberation guided by public reason itself requires us to reenter the Original Position. Or so it seems to me. Rawlsian public reason applies, in the first instance, to real-world persons and not to parties in the Original Position. As we apply public reason, though - you and I, as real-world persons - it seems a
items may take the form of enumerated rights, goods, opportunities, or powers that each person is owed, or should enjoy. For instance, the UDHR is a list of “substantive” rights; so, too, is the Canadian Charter of Rights and Freedoms, the American Bill of Rights, and the other bills of rights now typically entrenched in the constitutions of liberal democracies. Among the standard rights such lists ascribe to individuals are rights to security of the person, equal standing under the law, freedom of religion, and freedom of speech. In developing her capabilities approach to justice, Nussbaum has elaborated ten specific capabilities that each person should enjoy: life; bodily health; bodily integrity; sense, imagination, and thought; emotions; practical reason; affiliation; other species; play; and; control over one’s environment, both political and material control. In a rather different way, the Hebrew Bible’s Ten Commandments provide a list of substantive conditions for regulating just social interactions: “You shall not murder. You shall not commit adultery. You shall not steal. You shall not bear false witness against your neighbor,” and so on. Each of these lists is “substantive” in the requisite sense, specifying what justice demands in terms of certain definite goods.

The foils for procedural views may not always be labeled “substantive”, but may be given some other moniker that amounts to essentially the same idea. For example, Fabienne Peter contrasts her view with David Estlund’s, whose theory she labels "rational" because it includes a procedure-independent account of (at least some of) the decisions that legitimate democratic regimes will make. What Peter may have in mind is the list of “primary bads” that Estlund elaborates in explaining the objective epistemic merits of democratic procedures.

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Estlund includes on this list "war, famine, economic collapse, political collapse, epidemic, and genocide." We may say that these disasters constitute a “substantive” list of problems that any legitimate regime will tend to avoid.

Whereas substantive views identify specific goods or rights, “procedural” views emphasize the processes that should be followed in identifying such items. Starting with Kant, and subsequently with Rawls and contemporary procedural theorists, the procedures in question are conceived hypothetically. Procedural theories may draw certain substantive conclusions—such as the basic liberties protected by Rawls’ first principle of justice—but procedural theories purport to justify such conclusions merely by inferring the expected outcome of a hypothetical procedure; it is procedures that are more foundational than specific goods or rights. Prior to drawing any such inferences, then, the first task of any procedural theory is to specify those conditions that constitute a fair procedure. It is to this end that Rawls develops his Original Position and Veil of Ignorance, Barry his “circumstances of impartiality”, and Habermas his ideal speech situation; and other procedural views characterize fair proceedings in their own unique ways.

I think most proceduralists are content to admit that this construction of fair hypothetical procedures requires reliance on at least a thin conception of the good. Proceduralists cannot wholly avoid making certain substantive judgments antecedent to the procedures they prescribe;

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200 She refers to her own approach as an instance of “pure epistemic proceduralism”, in contrast to the "rational epistemic proceduralist” alternative offered by Estlund. [Peter, Fabienne, Democratic Legitimacy (New York, NY: Routledge, 2009), 114–117, 133ff.]


203 For instance, Rawls writes, “While pluralism means that there can be no agreement on a complete conception of the good grounded in a comprehensive doctrine, some conceptions of the good are indispensable for any account of justice, political or other....” (Rawls, John, Justice as Fairness, 60.)
for instance, most proceduralists antecedently make the substantive judgments that all citizens are equal and should, ideally, exercise equal power in crafting social rules.\textsuperscript{204}

But proceduralists generally try to minimize their reliance on such substantive judgments, since the point of a hypothetical procedure is to generate morally appropriate social rules without reference to a procedure-independent criterion - in other words, \textit{substantive} criterion - of what is just or legitimate. Hence Peter faults Estlund for his use of such a criterion to evaluate the outcomes of democratic procedures\textsuperscript{205}, and we see Habermas, in his response to \textit{PL}, criticizing Rawls for being insufficiently procedural.\textsuperscript{206} In the previous chapter I adduced three reasons why Jls cannot supplement their twofold criteria of reasonable personhood with additional substantive requirements, two of which apply here also.\textsuperscript{207} Proceduralists must minimize reliance on procedure-independent substantive judgments, first, to avoid begging the question - such judgments are to be the \textit{outcome} of the procedure, not \textit{inputs} to the procedure or \textit{constraints} upon it. Second, they must do so if their proceduralism is to attain to a position of higher-order impartiality for adjudicating competing claims. Attaining such impartiality is an express JL aim.\textsuperscript{208}

\textsuperscript{204} "So for Rawls, as for liberals generally, only a partial conception of the good can be justifiably enforced. This permits the adoption of any complete or comprehensive conception of the good that is compatible with the substantive, yet partial, conception of the good that liberals endorse. And it is only in this limited respect that liberals can be said to be neutral with respect to conceptions of the good." [Sterba, James P., "Liberalism, Community, and Culture," \textit{Ethics} 103, no. 1 (October 1992): 153.] What Sterba says here of liberals can be said, \textit{mutatis mutandis}, of proceduralists as well. It is not coincidental that many liberals are proceduralists and vice versa.

\textsuperscript{205} Peter, Fabienne, \textit{Democratic Legitimacy}, 132ff.

\textsuperscript{206} Eg., "...I believe that Rawls could avoid the difficulties associated with the design of an original position if he operationalized the moral point of view in a different way, namely, if he kept the procedural conception of practical reason free of substantive connotations by developing it in a strictly procedural manner." (Habermas, Jürgen, "Reconciliation Through the Public Use of Reason," 116.)

\textsuperscript{207} See “1-The Heart of the Argument”.

\textsuperscript{208} Again, the idea that JL instantiates a "higher-order impartiality" is drawn from Nagel, Thomas, “Moral Conflict.”
Why proceduralist logic demands that substantive criteria be avoided is nicely captured by what Peter calls the "political egalitarian's dilemma". On the one hand, the more the substantive requirements a theorist stipulates for a fair procedure, the smaller the number of matters left open to be settled by democratic decision. On the other, the fewer the substantive requirements for a fair procedure, the greater the likelihood that a substantively unjust or illegitimate outcome will result. Such is the general dilemma that proceduralists face: guarantee justice at the expense of a thoroughgoing proceduralism, or uphold a thoroughgoing proceduralism at the risk of substantive injustice. Of course, when the procedures in question are simply hypothetical in nature, the risk of real-world substantive injustice is greatly diminished. But still Peter's "political egalitarian's dilemma" illuminates why the internal logic of proceduralism demands that substantive criteria be avoided, namely, lest matters be settled apart from the democratic decision of the procedure's idealized participants.

There can be mixing between the two. We have not only a simple opposition between procedural and substantive approaches. We also have, for instance, “perfect procedural” approaches or “rational procedural” approaches that attempt to combine them. Estlund’s is an example.

In general, though, approaches to legitimacy typically emphasize either one or the other and there is an important difference between the two. A substantive approach explains legitimacy conditions in terms of a sufficient distribution of specific rights or goods. By contrast, a procedural theory of legitimacy attempts to explain legitimacy without reference to a procedure-independent criterion - that is, without reference to substantive conditions external to the procedure.

209 See Chapter 5, "Political Equality", in Peter, Fabienne, Democratic Legitimacy.
Moving forward, it will be helpful to keep these considerations in mind as we evaluate JL *qua* procedural framework for understanding legitimacy. No JL account is an unadulterated, unqualified token of proceduralism (can there be such a thing?). But I believe these considerations faithfully pertain to the main argumentative thrust and internal logic of any proceduralist account, such as JL. As such, they are relevant both to the immediate chapter and to our broader investigation.

2-JL and Three Characteristics of Legitimacy-Conditional Basic Rights

One thing that is clear is that JL is, in large part, designed to justify the basic rights we cherish in the real world. While JL is broadly concerned with the justification of legal coercion, JL theorists take their standard to be especially important when coercion threatens basic rights. As Stephen Macedo writes, "The demand for public reasonableness is especially important where fundamental rights and liberties are at stake..."211 Similarly, for Rawls it is constitutional essentials that principally must satisfy JL legitimacy.212 This special concern for "fundamental rights and liberties" is one evidence that JLS share the CC that legitimacy is conditional on protecting certain basic rights.

However, despite their intention to secure basic rights, JLS' justificatory strategy actually undercuts them by being at cross-purposes with characteristics we experience such rights as having. Consider three asymmetries that exist between the rights JL affords us and those we regard as legitimacy-conditional in our actual political practice.

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210 Rawls refers to procedural approaches that can be judged according to an independent standard as “perfect” procedural approaches; those that cannot are “pure” procedural approaches. For explanation, see Freeman, Samuel, *Rawls*, 480.
a) Asymmetry #1: Procedure-Independent vs. Procedure-Dependent Rights

First, an asymmetry exists between JL's representation of basic rights as procedure-dependent and rights which seem procedure-independent so long as they are truly necessary for legitimacy. I elaborate.

Being constructivists, Rawls and other JLs represent basic rights as resulting from a particular procedure. That is, the basic rights that result from such a procedure are procedure-dependent, as are any other social arrangements that would be agreed upon. Granted, the envisaged procedure is hypothetical, not actual. Nonetheless, whatever demands legitimacy (or justice) might make are determined by a procedure of the suitably idealized sort. If we do possess basic rights, such rights must be among the procedure's expected outcomes. To reiterate, the JL supposition is not that everything about morality or justice is procedure-dependent in this way.²¹³ Principally, the notion of a fair procedure is one such idea. But while the very notion of a fair procedure isn't itself represented as being procedure-dependent, basic rights are.

However, a first asymmetry arises because in the real world we look to basic rights as checks on, rather than as outcomes of, procedures. We regard protecting certain basic rights as a prerequisite of, rather than as a product of, acceptable political procedures. Where JL theorists attempt to minimize reliance on procedure-independent substantive conditions, the real-world trend has long been to strengthen and expand constitutionally protected rights. We evidently feel that the fundamental rights of free-and-equal others should be made invulnerable to procedures. Moreover, we hold such convictions even when the participants involved in these real-world

²¹³ Remember, "...not everything, then, is constructed; we must have some material, as it were, from which to begin. In a more literal sense, only the substantive principles specifying content of political right and justice are constructed. The procedure itself is simply laid out using as starting points the basic conceptions of society and person, the principles of practical reason, and the public role of a political conception of justice." (Ibid., 104.)
procedures demonstrably meet JL’s twofold criteria of "reasonable" persons! Meanwhile, JL portrays these fundamental rights as the product of procedures while our political experience tells us procedures actually threaten these rights.

This conviction in the procedure-independent character of basic rights is mirrored, I suggest, in what JLs themselves say about their methodology. JLs themselves admit to holding certain definite justice- and legitimacy-related views prior to their proceduralist philosophizing. In this regard, Rawls stands out for his exemplary frankness. Near the beginning of PL, he lays out his methodology as follows:

We collect such settled convictions as the belief in religious toleration and the rejection of slavery and try to organize the basic ideas and principles implicit in these convictions into a coherent political conception of justice. These convictions are provisional fixed points that it seems any reasonable conception must account for.

Rawls starts with certain "settled convictions"; he does not start with proceduralism. And he exemplifies these "settled convictions" with basic rights such as those to religious freedom and to freedom from slavery. In fact, Rawls goes so far to say that he adjusts the "parameters" of the theory (that is, the hypothetical procedure) to bring it "in line with our intuitive judgments" (such as our CC in legitimacy-conditional basic rights). Nor is Rawls alone among JLs in making clear his assumption that certain convictions are justified quite apart from, and prior to, proceduralist philosophizing. Whether the language is that of "settled convictions", "intuitive

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214 I take it that JLs do think that many real-world citizens of contemporary liberal democracies satisfy their twofold criteria. However, I doubt that JL theorists would be willing to subject their basic rights even to the judgment of that circumscribed group.


216 Rawls, John, Theory of Justice, 262. This quote is from Rawls' early work, not his later work. But for all the changes that occur between the two, a change in his basic methodology - that of making sense of considered convictions in reflective equilibrium - is not one of them.

217 Speaking of his proceduralist moral contractarianism, which is a close cousin to JL, Freeman acknowledges,

"Moreover, appeals to what is often called (misleadingly) 'moral intuitions' are not peculiar to moral contractarianism. All moral conceptions - utilitarianism, Kantianism, perfectionism, Hobbesian contract doctrine, and so on - rely on considered moral convictions at some level of
judgments", or "independent moral assumptions", the basic point is the same: when the rubber meets the road in the real world, JLs evidently affirm definite basic rights - such as those to religious freedom and freedom from slavery - in a procedure-independent way. They do so even if the sort of justification they try to give for such legitimacy-conditional rights is procedurally in nature.

In passing, I take JLs' methodology so described as further evidence that JLs share the CC that legitimacy is conditional upon protecting certain basic rights. It is true there is a difference between affirming basic rights and tying legitimacy to basic rights protection; but their affirmation of the former implies, I think, support for the latter. Moreover, the fact that, as I've just explained, JLs admit to basic rights actually being procedure-independent suggests that basic rights protection is necessary for legitimacy, while procedures may not be.

We've already seen Macedo assert that JL-style, procedural justification "is especially important where fundamental rights and liberties are at stake" but this statement misleads in a crucial sense. It intimates that the more important the issue, the more willing we should be to subject our judgment to that of others; it implies that the more important the putative right in question, the more willing we should be to make this right conditional upon everyone's acceptance of it. However, this is precisely the opposite of how we actually operate. We constitutionally entrench certain rights in the real world because they are of such great importance that we are unwilling to make them vulnerable to legislative procedures, and because we're convinced they ought to be protected even if other seemingly reasonable citizens disagree with us. The reason why Macedo's statement has an air of plausibility is that the public justification he has in mind is simply a hypothetical one (and this is a crucial qualification on which I will comment.

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generality...But none pretends that rational choice theory alone can be used in moral philosophy without supplement from independent moral assumptions."

(Freeman, Samuel, “Moral Contractarianism,” 72 [emphasis mine].)
toward the end of the present subsection). But Macedo's - and other JLs' - hypothetical proceduralist argumentation under-appreciates the decidedly *anti*-procedural role played by actual basic rights.

It is in light of similar considerations that we must be cautious when Rawls says of his theory that "only the substantive principles specifying content of political right and justice are constructed" - "constructed", that is, procedurally justified. This is hardly the modest claim that Rawls presents it to be. For such a statement flies in the face of our moral and political experience, in which we feel it is principles such as basic rights that are least in need of a procedural justification and most in need of protection from procedures. We experience these principles of basic justice not as being socially constructed, but as the procedure-independent criteria against which socially-constructed institutions and laws in the real world can be evaluated. *Pace* Macedo and Rawls, it seems the more important the substantive issue in question, the less important we take anything like JL's principle of public justification to be.

In sum, our real-world experience presents us with basic rights that exist *in spite of* procedures, not *because of* procedures. But the way in which JL characterizes the normativity of basic rights exactly reverses this relationship. Insofar as we tie legitimacy to the protection of basic rights - which, in practice, we do often enough - JL reverses that relationship as well: if certain basic rights really are necessary for legitimacy, then legal coercion would not be legitimate as a result of procedures but regardless of procedures. That is, legitimacy would

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220 One might think this a counterexample: "A little reflection shows [that 'legitimate' and 'just'] are not [the same]. A legitimate king or queen may rule by just and effective government, but then they may not; and certainly not necessarily justly even though legitimately. Their being legitimate says something about their pedigree: how they came to their office. It refers to whether they were the legitimate heir to the throne in accordance with the established rules and traditions of, for example, the English or the French crown.” (Ibid., 427.) To the contrary: while once legitimacy may have been thought of this way, no longer is this so. We no longer believe that it is possible for people to legitimately exercise political power over others
result so long as legitimacy-conditional rights were protected. Thus, I argue that JL is at odds with the characteristic of procedure-independence we experience legitimacy-conditional rights as having, and that JL thereby undercuts such rights.

And what of the fact that the JL procedure is hypothetical, not actual? Doesn't this fact blunt the force of my present point? I don't think so. For when we affirm real-world basic rights, it seems more correct to characterize the claim as being that such rights are immune to any procedures, not just to extant procedures. But JL undermines basic rights of this sort, for while the sort of rights securable by JL may be immune to extant procedures, they are not immune to the sort of procedures posited by JL theorists themselves.

\[b) \textit{Asymmetry \#2: Substantive Rights vs. Contentless Proceduralism}\]

I now wish to explore a second tension between the rights JL affords us and legitimacy-conditional rights as we experience them, which also arises from JL's proceduralism. The tension simply because of their lineage. Such a conception of legitimacy flies in the face of the view of citizens as free-and-equal, a view that underpins the political judgments in which we now feel most confident. It is no coincidence that it is this same view of persons as free-and-equal that underpins our belief in universal human rights.

Far from undermining my assumption that we view legitimacy as a matter of substantive rights, then, Rawls' putative counterexamples actually reinforces it. It does so insofar as it represents a conception of legitimacy that we now have rebuffed, given that conception's signal inconsistency with our belief in free-and-equal persons and in the basic substantive rights that such persons possess.

In this sentence and the last, I'm assuming for the sake of argument that there are no legitimacy requirements in addition to the protection of legitimacy-conditional rights. I do so for the sake of simplifying my presentation of the present point. But even if there were additional, perhaps procedural, requirements, they would not alter my present point that at least insofar as legitimacy truly is a function of legitimacy-conditional rights, it does not to that extent seem to be procedure-dependent.

It is worth noting that at least for a JL such as Barry, it doesn't seem inconceivable that a real-world procedure might actually instantiate the hypothetical procedure that Barry recommends (that is, the legitimating procedure that, at least for now, remains hypothetical until such time as when a real-world procedure sufficiently approximates it). I say this because of the way Barry evaluates various real-world polities in terms of the extent to which they reflect his "circumstances of impartiality" - the conditions for his fair hypothetical procedure. Scandinavian societies score particularly well. (Barry, Brian, \textit{Justice as Impartiality}, 106.)
is this: we experience basic rights as having certain determinate content, yet JL presents rights as being essentially contentless. That is, JL presents basic rights as lacking content until such is supplied by the claims hypothetical contractors press against one another. Moreover, while JL characterizes appropriate claims in terms of their being "reasonable", it goes no further: it absconds from telling us, substantively, what demands it is reasonable for us to make of one another. But all this runs contrary to another characteristic legitimacy-conditional rights seem to have, which is that such rights have definite substance given the sorts of beings we are with the interests and values that we have. Such are the grounds on which we claim basic rights to such definite goods as bodily integrity, material subsistence, and equal standing under law. Again, our CC in legitimacy-conditional doesn't merely claim the necessity of rights in the abstract, but the necessity of certain particular rights to legitimacy.

To appreciate the contentless nature of the basic rights JL affords us, consider a feature of JL I will call the "vacuity of the 'reasonable'".

As discussed in the previous chapter, JLs predicate (un)reasonableness of various entities, including persons, acts of acceptance and rejection, expectations, and reasons. In regards to the vacuity of the "reasonable", at issue is the (un)reasonableness of the objects of agreement themselves. What reasons ought the idealized parties accept as "reasonable"? And on the basis of such reasons, what social arrangements ought the idealized parties accept as "reasonable" as well? The vagueness of the "reasonable" predicate as applied to reasons and social arrangements is related to vagueness as it's applied to other entities within the JL framework also. But our

Yet would we think basic rights should be subject to the democratic decisions of such a polity, one that actually did instantiate Barry's fair procedure? Surely not. So I say that we experience basic rights as invulnerable to any procedures, not just extant ones.

223 See Chapters 7 and 9, where I discuss the CR postulate of basic teleology, for expansion on this last point.

focus here is the vacuity of the "reasonable" in relation to specific reasons and social arrangements, such as what - if any - basic rights individuals possess.

When I say that the "reasonable" is vacuous, what I mean is that the JL approach does not tell us which substantive social arrangements are reasonable or not. Neither does it tell us what reasons are substantively reasonable or not. The framework beckons us to justify legitimate social arrangements in terms of these arrangements being "reasonable" from every qualified vantage point. Yet it does not illuminate why this or that arrangement is reasonable - that is, it fails to give us a definite account of the human interests that are served, or of the human dignity that is respected, in virtue of which a reason or arrangement is substantively "reasonable". JL leaves us in the lurch: telling us to accept "reasonable" social arrangements, without telling us what such arrangements are or even giving us the substantive tools to determine them. For content it directs us to the claims pressed by hypothetical contractors, but it cannot tell us which of these substantive claims are reasonable and which are not.

It seems to me JL is unable, even in principle, to provide substance to the "reasonable". Substance of the requisite kind - determinate and decisive\textsuperscript{225} - simply is not one of the categories in which JL legitimacy trades. Instead, it frames the issue of legitimacy in terms of multiple, conflicting viewpoints\textsuperscript{226}, categorically denying the valid application of any one substantive

\textsuperscript{225} Here I say substance needs to be decisive since one of substance's roles will be to adjudicate between conflicting claims of what's reasonable. JL certainly admits of such disagreements, at least so long as the conflicting claims are each presented in terms of public reasons. But it seems to provide no decisive way for resolving these disagreements. Nor can we simply invoke a majority vote to settle the issue, as some public justification theorists have suggested. For this merely pushes the issue back one step: Which options should even be on the menu such that citizens might vote for them? It seems to me that neither does JL provide us the substance required to settle disagreements over what options should and shouldn't be on such a voting menu.

\textsuperscript{226} Of course, JLs themselves don't believe their framework admits of interminable or problematic disagreement. In response to the charge that justifying legal coercion with public reasons will be \textit{inconclusive}, JLs may either straightforwardly deny the charge or they may deny that such inconclusiveness is problematic even if it did exist. The latter is a common response. See Schwartzman, Micah, “The Completeness of Public Reason”; Quong, Jonathan, “Public Reason,” ed. Zalta, Edward N., \textit{Stanford Encyclopedia of Philosophy}, 2013, http://plato.stanford.edu/entries/public-reason/#Inc.
account that might define what's "reasonable" as far as social arrangements and reasons. Put another way, JL *structurally* leaves no conceptual space for substance of the requisite kind.

The vacuity of the "reasonable" is not an incidental feature of JL. It logically follows from JL's proceduralist aspirations. JL aspires to understand legitimacy in proceduralist terms, and emptying the "reasonable" of content is instrumentally necessary to making legitimacy conditional upon procedures only. How so? If the legitimacy of social arrangements is to be a function of procedure only, and not of correspondence to procedure-independent criteria, then neither can the content of what's "reasonable" be fixed by an independent criteria. In much the same way that JLs are debarred from saddling their reasonable personhood criteria and proceduralism with additional substantive requirements, so, too, does the internal logic of their framework prevent them from giving content to the "reasonable". Doing so would both beg the question (if the idealized parties are antecedently presumed to regard \( x \) as "reasonable", then of course the procedure will output \( x \) as legitimate) and rob the JL procedure of its heuristic value (if \( x \) is "reasonable" on independent grounds, who needs the procedure to figure out what's "reasonable" anyways?).

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Lest I attack a straw man, an excursus is in order. All this is not to say that JL theories are wholly devoid of substance. Minimally, they include at least the substance required for a fair procedure (ie., the free-and-equal status of all citizens, the requirement to cooperate on fair terms). They may include more as well. For instance, Rawls doesn't only characterize citizens as free-and-equal. He also characterizes them as having two moral powers, including the power to pursue a conception of final ends, and as requiring primary goods in order to properly exercise

However, a recurring line of my critique is that given the internal logic of JL's proceduralism - with its emptying of the "reasonable", its spartan twofold criteria of "reasonable" personhood, and other
these powers. These affirmations of two moral powers and of the necessity of primary goods, and also the identification of certain discrete primary goods, are additional substantive elements of Rawls' proceduralism.

Moreover, still taking Rawls' account as an example, these aren't the only elements of his theory that give some substance to the category of the "reasonable". Take his account of public reason. He certainly doesn't simply say, "Deliberate in public terms. Now have at it!" In addition to general guidelines for public reasoning, Rawls explicitly discusses the "content of public reason". The content of Rawlsian public reason - the content of the "reasonable", we might say - is given by a liberal conception of justice. This is the sort of conception of justice to which parties in the Original Position would agree, and it contains both substantive principles of justice (such as the Liberty Principle which accords priority to individuals' basic liberties) and guidelines for public deliberation in applying the principles and exercising political power. The considerations drawn from such a conception appropriate for use as public reasons Rawls calls the "political values of public reason". Drawn from such a conception, a general way of characterizing these considerations is as considerations relevant to free-and-equal citizens given their higher-order interest in developing their two moral powers (those are, to pursue a conception of the good and to exercise their sense of justice).

With this as background, consider the plethora of "political values" Freeman gleans from his survey of the Rawlsian corpus:

...equal political and civil liberty, equality of opportunity, social equality and economic reciprocity, the common good, the social bases of self-respect, and the necessary conditions for these values (PL, 139)...reasonableness, fair-mindedness, and a readiness to honor the duty of civility (PL, 224)...a more perfect union, justice, domestic tranquility, the common defense, the general welfare, and the blessings of liberty for ourselves and our posterity, all of which include more specific values under them, such

such features - the disagreement in JL's hypothetical scenario would actually run much deeper than JLs acknowledge. Hence, we need a place for substance that is determinate and decisive.

as the fair distribution of income and wealth (Collected Papers, 584). Efficiency and effectiveness are political values, which would include economic productivity and maintaining free and efficient markets, and controlling economic, environmental, and other kinds of social loss or waste (CP, 584)...preserving the natural order to further the good of ourselves and future generations; promoting biological and medical knowledge by fostering species of animals and plants; and protecting the beauties of nature for purposes of public recreation and the 'pleasures of a deeper understanding of the world' (PL, 245)...appropriate respect for human life, the full equality of women, the reproduction of liberal society over time, and respect for requirements of public reason itself in political discussion of controversial issues, such as abortion (JF, 117)...the freedom and equality of women, the equality of children as future citizens, the freedom of religion, and the value of the family in securing the orderly production and reproduction of society and its culture from one generation to the next (CP, 601). 228

Nor is this list exhaustive. Freeman goes on to add, "Rawls's listing of the substantive political values of public reason should not be taken as exhaustive. There are others, some of which may not even be apparent to us just yet." 229

In sum, there is a certain sense in which JLs do not leave the "reasonable" wholly devoid of substance. It may take the form of relatively thicker or thinner conditions for a fair procedure, or, as we've just seen, it may take the form of substantive considerations that qualify as public reasons - or as "political values of public reason" in Rawls' idiolect.

How, then, can I maintain that JL's category of the "reasonable" is vacuous? In light of the extensive list delivered by Freeman, as well as such elements as citizens' two moral powers and primary goods as preconditions for their exercise, how can I maintain this? I think there are two important points here to make.

First, while an account such as Rawls' may provide us with a bevy of considerations suitable for use as public reasons, it largely does not specify what ways of prioritizing and integrating these considerations are "reasonable" or not in evaluating substantive proposals. In other words, such "content" gives us a rich vocabulary in terms of which we can express our

228 Freeman, Samuel, Rawls, 388–389.
229 Ibid., 478.
acceptance or rejection of a proposal. But such an account still lacks content in the way of telling us which substantive proposals it is reasonable to accept or reject. This is not true of all proposals - for instance, protection of the basic liberties is, for Rawls, one of the substantive principles of justice which itself can ostensibly serve as a public reason. This is true, though, of very nearly all substantive proposals. Thus, notwithstanding the foregoing list of "content", JL remains contentless in a crucial sense.

Second, it is important that we appreciate the level of the theory at which this content comes into play. To wit, this content is the fruit - not the foundation - of a deeper logic and of deeper premises in Rawls' account. Rawls' "political values of public reason" emerge from a liberal conception of justice, which, still more fundamentally, emerges from parties' deliberating and forming an agreement in the Original Position. There is, therefore, at a more fundamental level both a conception of reasonable persons and of fair proceduralism that underpin these public reasons. Now the question becomes: in specifying those persons and that procedure at that more conceptually fundamental level, should we understand JL as having or lacking substantive content? At that level, it seems evident that the only substance which JL can admit is of the exceptionally thin sort mentioned above (ie., people as free-and-equal, a fairness requirement). In the justificatory structure of his reasoning, the "political values of public reason" are conceptually dependent upon thinner conceptions of persons and procedure. Thus, at a conceptually fundamental level, JL remains contentless.

I think these will be two features of any JL account which seems to provide "content" in a way that would undermine my characterization of JL as content-free. Any such account will, at most, provide ways of reasonably expressing our disagreements without specifying which substantive arrangements are, in fact, "reasonable". Moreover, what content does seem present will conceptually depend upon a more fundamental proceduralist framework which itself is
necessarily contentless. Thus, I maintain my claim that JL is essentially contentless. As I hope to show throughout - as in these comments as well - the internal logic of JL's proceduralist framework leaves JLs fundamentally committed to a denial of substance.

So I don't want to attack a straw man. JL does afford substance of a certain sort. But neither should we assume that JL has more substance, or substance of a different sort, than it does.

* * *

The vacuity of the “reasonable” stands out in my mind as perhaps the single most obvious reason for objecting to JL at a philosophical level. As I've explained, philosophically it leaves unanswered the gaping question, What counts as “reasonable”? When is and isn’t it “reasonable” for our hypothetical contractors to make an agreement, and - crucially - why? When a theorist does infer an outcome from a JL procedure, he implicitly relies on an answer to these questions. Yet such answers as he uses are not given by JL itself. Moreover, the JL framework occludes from sight the substantive answers on which the theorist implicitly relies, presenting the justification of social arrangement in question as though it were merely a function of agreement itself and not of the reasons for the agreement. The vacuity of the "reasonable" is deeply implicated in this philosophical obscurity. Though it doesn’t provide substance, JL requires substance to be operationalized. As Estlund might say, the “flight from substance” must end in

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230 Historically, it was Hume who first pressed against social contract theorists the related objection that the appeal to the metaphor of contract involved an unnecessary shuffle. If persons would agree to a contract because it promotes social utility, then is it not social utility that truly justifies the contract? In our day, both Pettit and Kymlicka have reiterated this critique of contractarian approaches. See Hume, David, “Of the Original Contract,” in David Hume: Political Writings, ed. Warner, S. D. and Livingston, D. W. (Indianapolis: Hackett, 1994), 164–181; Pettit, Philip, The Common Mind: An Essay on Psychology, Society and Politics (New York: Oxford University Press, 1993), 297–302; Kymlicka, Will, Contemporary Political Philosophy: An Introduction (New York: Oxford University Press, 1990), 67–70. It is this objection of Hume, Pettit, and Kymlicka that inspires the present question.
substance. And so, requiring content from somewhere, applying JL involves importing substantive premises from outside of JL which remain obscured behind JL's contractual framework.

So much for a brief critique of JL's lack of philosophical clarity. Now back to my main line of argument, that the rights JL affords run contrary to the sort of rights we regard as legitimacy-conditional. How does all that I've said here about JL - the vacuity of the "reasonable", its failing to distinguish for us between "reasonable" and "unreasonable" claims, its disavowal of content necessary for identifying substantively legitimate social arrangements, including disavowal of content necessary for specifying basic rights - how does all this correspond to our experience of actual legitimacy-conditional basic rights?

Put simply, I don't think it does. To reiterate, the basic rights we claim are substantive; we claim rights having determinate content. We need only look at standard bills of rights, and the guarantees they typically make, for the determinate content we understand basic rights to possess. Such rights entitle rights-holders to freedoms of certain definite kinds (of religion, of conscience, of association, of speech, etc.); they give rights-holders access to certain definite goods (bodily integrity, material subsistence, private property, perhaps education and healthcare); they also entitle rights-holders to a certain standing in society (and to the political and legal rights that come with this equal standing under law). We understand basic rights as having the determinate content they do, I suggest, in light of the kind of beings humans are, having the interests and value that we do. Nothing could be clearer than that human beings have physical and mental

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232 Due to the unnecessary philosophical shuffle involved in contractarian approaches such as JL, I submit that JL signally fails to give us a "clear and uncluttered view" of what's philosophically at issue in norms of legitimacy and justice. Achieving just such a view of justice's demands is what Rawls aims for in developing justice as fairness. (Rawls, John, Justice as Fairness, 176.) It's also what I'm aiming for in regards to legitimacy, a "clear and uncluttered view" of the philosophical underpinnings of our legitimacy-related CCs.
needs which must be met if they are to flourish, and so, too, it has now become manifestly clear that all persons are of equal and inviolable dignity. These are substantive claims, which seem to fit with the character of actual basic rights in a way that JL's contentless proceduralism does not.

Moreover, I take it that JLs also experience basic rights as substantive in the way I've described. Commenting on the liberalness of JLs, Eberle writes,

Justificatory liberals are committed to liberal principles and practices. For example, they believe that the power of the state over citizens should be severely constrained; that each citizen should enjoy certain familiar rights: freedom of religion, freedom of conscience, freedom of association, the right to own private property, and so on; that laws should be publicly promulgated prior to the state's enforcing those laws; that citizens should be tried in independent courts and accorded due process when defending themselves; that each citizen may participate in selecting his political representatives and thus have some modicum of influence over the laws to which he is subject; and so on.

This list is a cardinal example of substantive conditions - a list of discrete items justice requires. Eberle is surely correct to assume that all liberals hold these views, including JLs. So here, too, is evidence that JLs affirm basic rights in the just the sense I'm characterizing such rights. Going a

233 Christopher J. Eberle, Religious Conviction, 11.
234 Cf. the following list of substantive liberal commitments, provided by Dworkin. Dworkin himself is not a JL; rather, he is a perfectionist liberal given his challenge model of value. But while JLs diverge from Dworkin insofar as they are justificatory liberals, insofar as they are justificatory liberals they surely converge with Dworkin on the following list.

"I must therefore repeat the list of what I take to be the political positions of the last liberal settlement, and I shall, for convenience, speak of 'liberals' as those who support these positions. In economic policy, liberals demand that inequalities of wealth be reduced through welfare and other forms of redistribution financed by progressive taxes. They believe that government should intervene in the economy to promote economic stability, to control inflation, to reduce unemployment, and to provide services that would not otherwise be provided, but they favour a pragmatic and selective intervention over a dramatic change from free enterprise to wholly collective decisions about investment, production, prices, and wages. They support racial equality and approve government intervention to secure it, through constraints on both public and private discrimination in education, housing, and employment. But they oppose other forms of collective regulation of individual decision; they oppose regulation of the content of political speech, even when such regulation might secure greater social order, and they oppose regulation of sexual literature and conduct, even when such regulation has considerable majoritarian support. They are suspicious of the criminal law and anxious to reduce the extension of its provisions to behaviour whose morality is controversial, and they support procedural constraints and devices, like rules against the admissibility of confessions, that makes it more difficult to secure criminal convictions."

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step further, we can also conclude, then, that such are the substantive views which JLs seek to underwrite using their proceduralist theoretical apparatus.

Alas, though JLs experience basic rights as being characteristically substantive, their justificatory strategy of a contentless proceduralism stands in tension with this substantiveness. Hence, I argue that JL undercuts basic rights by conflicting with a second characteristic we experience such rights as having.

c) Asymmetry #3: Objective Rights vs. Rights-by-Consensus

I shall now explain a third way in which the rights justified by JL are asymmetrical to actual legitimacy-conditional rights. This third asymmetry also stems from JL's proceduralism.

We hold basic rights to exist objectively. To repeat a definition given above, "objective" rights are rights that apply universally, whether or not political actors recognize them as such in a given context. The correlative duties generated by such rights are binding on individuals and societies whether or not individuals and societies are willing to fulfill them.235 As such, holding rights to be "objective" is a necessary precondition for rational criticism of unjust regimes in varied contexts. Without this grounding beneath us, we could not - with philosophical consistency - judge cultures of different times and places to be illegitimate on account of their failure to protect individuals' basic rights.236 The alternative to objective rights are rights whose

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235 This is how I shall define "objectivity" throughout. In defining "objectivity" in this way given my narrow purposes, I think I can sidestep tangential meta-ethical questions about moral realism, anti-realism, and so on. My purposes are not to engage, let alone settle, such meta-ethical questions. More narrowly, my purposes in this dissertation are simply to make sense of our legitimacy-related CCs and to put forth a philosophical theory of legitimacy that illuminates the presuppositions necessary to make sense of them.

236 As Wil Waluchow explains, there would be no philosophically coherent space in which the moral reformer could operate. For an introductory discussion of this basic objection, see Waluchow, Wilfrid J., The Dimensions of Ethics: An Introduction to Ethical Theory (Peterborough, ON: Broadview Press, Ltd., 2003), 72–74.
normative application is restricted to particular contexts and whose content is fixed by the prevailing norms of the relevant contexts. To speak roughly - but not inaccurately, I think - the alternative to objective rights is popular opinion.

I've just now asserted, as though it were an obvious and uncontroversial fact, that we believe basic rights to exist objectively. But why should I be entitled to do so?

It is because philosophical disagreement about the objectivity of basic rights positively belies what we really believe about their objectivity as reflected in our actual political practice and experience. We manifestly do not take current popular opinion as a reliable indicator of what is just, nor the popular opinion of any particular time or place.\(^{237}\) In other words, we are sure that a regime or law isn't legitimate simply because it enjoys populist support. Presumably this simple maxim bears the considerable force that it does in our current moral imagination in light of the numerous historical examples that can be pointed to as confirmation of its truth: slavery wasn't just, even when many people thought it was; the same goes for racist bigotry and religious intolerance; Europeans' imperialistic endeavors were reprehensible in hindsight; and so on. The likes of Samuel Wilberforce, Martin Luther King, Jr., and Nelson Mandela have iconically stood in the face of entrenched, systemic injustice, and their examples put pay to the notion that popular opinion is equivalent to true justice and morality. In the sense in which I am using the term, we manifestly do believe that basic rights exist "objectively".

Now does JL maintain that legitimacy conditions depend on popular opinion? Obviously not. So where exactly does this third asymmetry lie?

It lies in JL's representation of basic rights as depending upon group consensus. As discussed earlier, the procedure envisaged by JL culminates in an agreement that is acceptable to

\(^{237}\)Nor do JLs. As Nagel emphasizes, "Note that the standard is not what principles or institutions people will actually accept, but what it would be unreasonable for them not to accept, given a certain common
all parties. So while we seem sure that legal coercion isn't legitimate simply because it enjoys populist support in a given time or place, JL presents us with an exception to this rule. For there is, in fact - according to JL - one group of people whose populist support *is* sufficient to render legal coercion legitimate, namely, that group who is party to JL's hypothetical procedure. Now given our belief in the objectivity of real-world basic rights, it seems more correct to characterize our belief as the conviction that basic rights obtain regardless of what *any* group thinks, not just regardless of what extant groups think. But given JL's unanimity condition, basic rights are not characterized as such. Instead, they obtain regardless of what extant groups think, but not regardless of what any group thinks - this because basic rights *do* depend upon the populist support of the parties to JL's hypothetical agreement.

Moreover, on reflection, perhaps it isn't so obvious that JL rejects popular opinion as the basis for basic rights. After all, Joseph Raz levels essentially just this charge against Rawls in his critique of *PL*, the charge that *PL* makes justice subject to nothing more than contingent, popular opinion.²³⁸ There are certainly some aspects of *PL* that give one the impression that Rawls is succumbing to a kind of crude populism. One is Rawls' concept of an "overlapping consensus."²³⁹ In invoking this concept, Rawls requires of an acceptably "political" conception of justice²⁴⁰ that it be compatible with all of the reasonable²⁴¹ comprehensive views held by diverse citizens in a liberal society. A second suspicious aspect of Rawls' account is his requirement that

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²⁴⁰ In contrast to a conception of justice rooted in a particular conception of the good, a "political" conception of justice is built upon reasonable citizens' points of agreement and is thereby compatible with diverse conceptions of the good. Only such a conception of justice, Rawls maintains, is suitable in the context of reasonable pluralism.
²⁴¹ There's that term again.
any acceptable conception of justice must be built up from ideas already "implicit" in extant liberal democratic institutions.242 Here Rawls appears to be saying that we ought take current political mores as the basis for our liberal conception of justice. Raz sees in such aspects of PL an appeal to crude populism. Furthermore, Rawls is not alone among JLs in presenting his theory as being built up out of norms implicitly present in current democratic institutions and discourse.243

In effect, Raz argues, contra Rawls, that something isn't right just because it is popular.244 The mere facts that real-world liberal democratic citizens do hold certain values and that these values might be embedded in real-world institutions does not establish that citizens ought to hold these values or embed them in their institutions. Simply because an overlapping consensus of seemingly reasonable comprehensive views might exist on a given conception of justice, that hardly justifies the conception in question. What would justify such a conception is not the mere fact of consensus but the reasons which exist in its favour.245

It is an open question whether or not Raz's exegesis of PL is entirely fair.246 In raising this objection against Rawls, though, Raz has indeed put his finger on something amiss in PL. PL

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243 Previously we've seen Lister assert that "public reason...is an articulation of norms that exist in contemporary political culture". As well, according to Audi, “A liberal democracy by its very nature” contains those moral principles which imply and justify JL. And in a similar vein Cohen urges us, “Take the idea of citizens as equal moral persons. This idea is, in several ways, manifest in the norms and traditions of interpretation associated with citizenship in a democracy (though practice often fails to conform to those norms)....” In turn, see Lister, Andrew, “Public Reason,” 11–20; Audi, Robert and Wolterstorff, Nicholas, Religion in the Public Square, 16; Joshua Cohen, “Democracy and Liberty,” 189–190.
244 "But while acceptability may indeed be an important condition for any satisfactory theory of justice, it cannot be its main virtue." (Raz, Joseph, “Facing Diversity,” 18.)
245 "It would seem therefore that if the desirability of a fair system of cooperation should count in favour of Rawls's principles of justice, then it is the validity of this ideal, and not its popularity, which is required to support the argument." (Ibid., 20.)
246 Although Rawls does not try in PL to provide objective normative justification for the basic ideas he takes to be implicit in liberal democratic institutions, he clearly assumes that they are so justified. As I read Raz's critique, it seems Raz misses this point. If the charge that Raz wants to pin on Rawls is that Rawls supports populism whatever receives populist support, Raz is definitely mischaracterizing PL. Rawls
stands in an awkward relationship to our conviction that something isn't right just because it is popular. So too does JL generally, given that it represents rights as issuing forth from the public opinion of its hypothetical contractors.

But our experience of basic rights as being characteristically objective suggests otherwise. According to our CC, legitimacy is conditional upon basic rights that obtain objectively - rights that individuals possess regardless of what their compatriots (or even they themselves) think. And so I argue: JL's representation of rights as dependent on group consensus conflicts with how it seems we must characterize basic rights if, in fact, they are truly necessary for legitimacy. For if they were a product of group consensus - if, that is, they didn't obtain objectively - then it stands to reason that a group could unanimously deny basic rights instead of protect them. Group consensus would be truly necessary for legitimacy, not basic rights. Consequently, the JL framework undercuts legitimacy-conditional basic rights, by conflicting with these rights' characteristic objectivity, and should be rejected.


d) An Objection and Reply

Here it might be objected that far from undermining our conviction in basic rights, JL's hypothetical scenario actually expresses their great importance. JL reinforces, rather than undermines, our conviction. The objector agrees with my assessment that JL theorists hold real-world legitimacy to be conditional on the protection of certain basic rights, but disagrees that there is any tension between this conviction and the proceduralist justifications of these rights offered by JLs. Haven't I said that the very point of the hypothetical procedures envisaged by JLs would consider appealing to implicit ideas as an option for stabilizing democratic institutions only because he believes the ideas that are, in fact, implicit - such as free-and-equal citizens and society as a fair system of cooperation - to be antecedently justified.
is the justification and protection of real-world basic rights? Then why think there is any tension between this CC and JL's proceduralism?

In response to this objection, we say the following: even if in positing a proceduralist explanation the JL theorist's intention aligns with our CC in legitimacy-conditional basic rights, this is no guarantee that the explanatory strategy pursued by the JL will equally align with this CC. In the case of JL, the method by which they pursue the goal of justifying basic rights - namely, a proceduralist method - actually conflicts with the goal itself. How? As I've explained, it so conflicts by representing rights as having characteristics that actual basic rights seem to lack. It represents them as being procedure-dependent, essentially contentless, and the product of group consensus, misaligning with real-world rights which we experience as being procedure-independent, substantive, and objective.

A comparison here between JL and rule-utilitarianism is instructive. Rule-utilitarians might also share the goal of protecting basic rights, but key features of their utilitarian explanatory framework are distinctly out of step with rights themselves. Rule-utilitarians seek to underwrite individual rights, but they ultimately justify them in the name of aggregate utility. They seek to capture the strong deontic constraints rights seemingly place on others, yet one wonders why a rule-utilitarian is unwilling to permit rights-violations when such violations can promote overall utility while going unnoticed by the public. The tensions that exist between rule-utilitarianism and basic rights are different from those that exist between JL and basic rights. However, the comparison is illustrative in showing how there may be features inherent to an explanatory framework - a utility-maximizing framework in the case of rule-utilitarianism, a proceduralist framework in the case of JL - that run contrary to our experience of basic rights' 

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247 Think here of J. J. C. Smart's objection that rule-utilitarianism reduces to inexplicable "rule worship" by prohibiting rule violations - including rights violations - in such cases.
normativity. And these are features that cannot be undone simply by the sort of modifications that rule-utilitarians and JLs respectively propose. (In the case of the former, the utilitarian framework is modified as rule-utilitarianism. In the case of the latter, an unadorned proceduralist framework can be modified in various ways, including stipulating the kinds of persons permitted or for the kinds of reasons permitted.)

Although JL does not conflict with basic rights in the way of a logical contradiction, my general point here is that the JL framework seems ill-fit for explaining basic rights given the characteristics legitimacy-conditional rights seemingly must have. My argument is not to say that it is impossible to give a procedural justification of basic rights. But, given actual basic rights as we experience them - as procedure-independent, substantive, objective - surely the more natural explanation of these real-world legitimacy conditions is one that trades in terms of substance rather than procedure.

And don't forget the level of abstraction at which my investigation is pitched. My question is not about our first-order judgments of legitimacy, but about the higher-order framework within which we strive to make sense of our first-order judgments. The upshot of my observing these three characteristics is that JL gives us a framework that is ill-suited for this task. For now, we should conclude that even though there is a definite sense in which JLs champion basic rights, the explanatory strategy they pursue nonetheless undermines these very rights. They offer a framework that opposes, rather than fits with, legitimacy-conditional rights as we experience them.

Such has been the main thrust of my argument in this chapter - that by conflicting with three characteristics we experience legitimacy-conditional basic rights as having, JL undercuts these rights. For those who remain unconvinced of JL's threat to such rights, however, I now briefly offer one further critique.
3-JL and the Threat to Positive Rights

It is worth briefly noting a special subclass of substantive basic rights that are threatened by JL's proceduralism: so far I have explained how the JL framework undermines basic rights generally, but it especially poses a threat to any positive rights we may take as basic.

If we assume that basic negative rights are rights held against the state (and undue state interference), then on a purely practical level JL actually would not compromise at least many of the specific basic rights that our CC tells us are conditions of real-world legitimacy. For it would certainly be impossible, by JL lights, to legitimize any state action that would infringe upon the individual freedom protected by canonical negative rights (e.g., rights to freedom of religion, speech, and association). Any proposals to that effect would certainly founder on JL's unanimity condition. And at least so far as the protection of basic negative rights goes, that is precisely how the scenario is supposed to work. Any proposal that would compromise an individual's basic freedoms - in the name of the collective good, say, or of efficiency - is denounced by JL as unjustified because it would reasonably be vetoed by an affected individual in the hypothetical scenario. Thus, for all-intents-and-purposes, JL would protect the individual from undue state interference of various kinds; it would have the effect of protecting basic rights such as those to freedom of religion, freedom of movement, freedom from arbitrary arrest, and freedom of assembly, among other basic negative rights.

248 For the classic, though oft-disputed, distinction between positive and negative rights, see Berlin, Isaiah, Two Concepts.
250 As Lister suggests, concerning certain issues - such as abortion - JL serves liberals' purposes very well. (Lister, Andrew, “Public Justification and the Limits of State Action,” 156.) The protection of negative rights is also well-served by JL.
If we also view certain basic positive rights as a matter of legitimacy, though, JL does not fare so well. For instance, since a right to a social minimum might well be the object of reasonable disagreement among suitably reasonable persons, such a proposal would fail at the bar of JL's unanimity condition and thereby be illegitimate.\textsuperscript{251} Other possible positive rights - such as to public education or healthcare - would suffer the same fate.\textsuperscript{252}

In sum, not only does JL undermine basic rights by generally standing in tension with certain characteristics these rights seem to have. It also especially threatens any positive rights that we may well regard as necessary for legitimacy.

**Conclusion**

In concluding, I return to what has been my main line of argument in this chapter.

JL portrays basic rights as if they are a procedural matter. This is unacceptable. What we actually believe is that certain basic rights obtain independent of procedures, and that protecting them is a prerequisite of legitimacy that cannot be overridden by procedures of any sort.

My claim in this chapter has been that JL undercuts legitimacy-conditional basic rights. It does so, I have argued, in virtue of three asymmetries that exist between JL's proceduralist portrayal of basic rights and characteristics that actual basic rights seem to possess. First, we experience rights as procedure-independent, not procedure-dependent; as checks on procedures, not as outcomes. Second, we experience rights as being substantive, that is, as having certain definite content given the sort of beings we are with the interests and dignity we have. Conversely, JL portrays rights as essentially contentless. JL leaves basic rights contentless by

\textsuperscript{251} Think here of the redistribution objection to which JL is vulnerable. See the introduction to Chapter 3. 
\textsuperscript{252} Indeed, as I argued in Chapter 3, JL would have the effect of de-legitimizing all uses of legal coercion - including legal coercion directed towards the provision of positive rights.
making their content subject to the "reasonable" input of the contractors, and makes them doubly contentless by leaving substantive "reasonableness" unspecified. Third, we're sure that basic rights aren't the product of consensus; neither rights, nor any other social arrangement, is justified simply in virtue of popular support. But JL rights do depend on group consensus, namely, unanimity among parties to the hypothetical agreement. JL affords rights of a certain sort. But these seem not to be the kind of specific basic rights that we experience as necessary for legitimacy.

I've tried to be careful in articulating exactly what my argument amounts to. It doesn't show JL to logically contradict basic rights, nor is it intended to. But I hope to have convinced the reader of the weaker claim that JL undercuts basic rights, given the asymmetries that exist between JL's proceduralist framework and the characteristics these rights seem to possess. I refrain from the stronger claim that JL makes no sense of basic rights, but I do maintain that JL doesn't make good sense of them. And providing a framework that makes sense of our legitimacy-related CCs is really what my whole project is about: what are the most apt categories for understanding and integrating CCs, and for extrapolating them to new contexts? The conclusion of my argument in this chapter is that proceduralism is not an apt category, given the ill-fit that exists between proceduralism and the procedure-independent basic rights that we regard as necessary for legitimacy.

JLs themselves evidently hold this CC, that legitimacy depends upon protection of certain basic rights as I've characterized them. That they share this CC is a point I've periodically developed throughout this chapter. That they share this CC is also why examining this unacceptable consequence - JL's undercutting of legitimacy-conditional basic rights - constitutes a second internal critique of JL.
Chapter 5
A Third Worry about JL

Introduction

At the outset, I explained that the data with which our best account of legitimacy must reckon are the CCs we hold concerning legitimacy. I have focused on two such CCs so far, focusing on one in each of Chapters 3 and 4. We are sure that much actual legal coercion is indeed legitimate, even where disagreement amongst seemingly reasonable people persists. We are also sure that real-world legitimacy is conditional upon protecting certain basic rights – such as the right to bodily integrity, to equal treatment by the law, and to freedom of conscience. But I have argued that JL struggles to make sense of these CCs. For one, JL would de-legitimize all legal coercion. And two, while JL affords us rights of a certain sort, they seem not to be legitimacy-conditional rights of the sort we claim in actual political experience. These consequences conflict with our CCs. As such, they are unacceptable and give us good reason to question JL as a framework for understanding legitimacy.

We now come to a third worry I have about JL - a third unacceptable consequence to which it might lead. The worry is this: JL would seem to justify coercion in paternalistic terms. I am more cautious, though, in advancing this argument than in my previous two critiques of JL. For one, the worry rests on a distinction which, while intuitively compelling, I find difficult to make clear philosophical sense of. And for two, even if JL does involve the sort of paternalism that I allege, the reader may simply regard it as a benign and normatively insignificant sort. Nonetheless, given our CC that it is illegitimate to coerce free-and-equal others on paternalistic grounds, my worry is worth considering to see whether or not JL conflicts with this CC as well.
Given the more tentative nature of my present suggestion, I do not intend for it to bear much weight in my overall argument. Instead, I mean for my first two critiques to bear that weight, along with the two arguments I advance in Chapters 8 and 9 that correspond to these. Consequently, here I will only sketch this third worry about JL.

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How might JL involve paternalism? By restricting real-world persons' freedom based on what idealized persons think is good for them. The crux of the problem is JL's directive to consult hypothetical persons rather than their real-world counterparts. Paternalism is not a problem if affected parties *themselves* endorse coercive measures as good for them; but it arises if the coercion's justification is based on a substitution of what *others* think is good for them.

Moreover, constraining liberty *for people's good* is different from constraining liberty *because it is just*. My suggestion that JL involves paternalism largely turns on this distinction. Since paternalistic justifications are of the former sort, appreciating JL's paternalism will require us to examine how claims about people's interests figure into JL justifications. Moreover, I shall argue that it is not simply appeals to people's interests that are problematic, but appeals to people's interests *as these are represented by hypothetical counterparts* that yields JL's paternalism.

Note that this paternalism is a structural element of the JL framework. It is not, even if it sometimes appears this way, implicated simply in the application of JL to real-world institutions (though it would be, too253). It is a feature of JL's conceptual structure itself.

This paternalism would conflict with our CC that it is illegitimate to coerce others on paternalistic grounds. Such treatment is unbefitting of relations between persons regarded as free-and-equal peers. This CC is certainly shared by JLs themselves.

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253 For brief discussion of the additional paternalism that would be involved in the application of JL to real-world institutions, see the discussion near the end of "2-JL and Paternalism" below.
My sketch in this chapter is broken down into two parts. First, I discuss what constitutes paternalism in general. With this background I, second, explain how the JL framework seems to instantiate paternalism. My argument shall consider both the question of self-interest involved in the JL structure as well as the hypothetical persons to whom this question is put. Both contribute to JL’s possible paternalism.

1-The Meaning of Paternalism

Let us begin by briefly considering what paternalism is. I hope this first subsection will set a backdrop against which we can see and evaluate the possible paternalism JL involves.

In general, "...paternalism involves constraints on liberty intended to benefit the person whose liberty is constrained...." In light of this definition, there are three elements of paternalism to consider further as backdrop to my suggestion. Paternalism involves a restriction on liberty. Paternalism also involves a particular kind of justification for the restriction, namely, a justification that appeals to the interests of the individuals whose liberty is being restricted. A third element - though one that isn't so readily apparent from Lister's statement just quoted - is a substitution of judgment: though affected parties are coerced for their good, it is not the affected parties themselves who say what this good is. I shall comment on these elements in order.

As to the first, we must begin by appreciating that restrictions of liberty are what is at stake in the legitimacy debate. Whether on a JL or CR approach, we're interested in the legitimacy of laws, and laws restrict liberty. These restrictions can be quantitatively greater or

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254 Lister, Andrew, “Public Justification and the Limits of State Action,” 156.
255 Not only in debates over first-order legitimacy conditions. But also in debates, such as the one at hand, over the appropriate higher-order framework within which to understand and evaluate these first-order conditions.
lesser, and also qualitatively so - that is, more or less morally significant\textsuperscript{256}. Still, I take it that every law represents a restriction on liberty.\textsuperscript{257} All laws are coercive.\textsuperscript{258}

Why is it important we recognize that liberty restrictions are at stake in the legitimacy debate? It is because every liberty restriction is a possible site of paternalism. Since all measures deemed legitimate (whether by JL or CR lights) restrict liberty, they always run the risk of being paternalistic if inappropriately justified.

Now the paternalism involved in JL is, I grant, unusual in the following sense: the JL framework doesn't demand we replace real-world persons' view of their good with the views of other real-world persons, but it demands we replace them with the views of hypothetical persons. However, we need to be clear that it is, indeed, real-world coercion that is at stake.

Now this is a point which I must emphasize if the nature of JL's possible paternalism is to be appreciated: it is real-world coercion that is at stake when philosophers use and discuss JL. This point will likely appear counterintuitive. After all, aren't the hypothetical procedures envisaged by JLs just that, mere thought experiments impotent to effect actual coercion? It may seem that such procedures tell us nothing about the actual forms of coercion real-world persons face. If paternalism is something that only occurs between real-world states and real-world

\textsuperscript{256} For instance, a law might restrict a normatively significant freedom - such as the freedom to choose one's occupation - or a normatively insignificant one - such as the freedom to drive on whichever side of the road one might like. This example is inspired by Charles Taylor, whose recognition of the differential moral importance of various freedoms will later be revisited in both Chapters 7 and 9.

\textsuperscript{257} Of course, not all will agree here. Although I largely take this view to be intuitive and commonsensical, it is admittedly controversial among political philosophers. For instance, following Pettit's neo-republican, non-domination account of freedom, it might be objected that certain laws are a necessary precondition of enjoying meaningful liberty at all; laws don't restrict freedom, but enable freedom. See Pettit, Philip, \textit{Republicanism}.

\textsuperscript{258} I take the claims that all laws are coercive and that all laws restrict liberty to be equivalent. If we follow G. A. Cohen's distinction between "moralized" and "non-moralized" liberty - and distinguish "moralized" from "non-moralized" coercion along similar lines - then I should be understood as operating with "moralized" versions of both liberty and coercion. [See Cohen, G. A., "Capitalism, Freedom and the Proletariat," in \textit{The Idea of Freedom: Essays in Honor of Isaiah Berlin}, ed. Ryan, A. (Oxford: Oxford University Press, 1979).]
persons, the charge of paternalism may seem irrelevant - even incomprehensible - given JL's focus on hypothetical contractors rather than real-world states.

By saying that actual coercion is at stake, though, what I mean is that JLs' analysis is clearly directed towards the real-world. The JL framework is used to evaluate the putative legitimacy of coercive social arrangements under which people actually do, or actually might, live. In this sense, then, we have a perfectly ordinary context in which paternalism might arise - actual persons experiencing coercion that may or may not be legitimate. While hypothetical persons can't directly coerce anyone, they might do so indirectly if they play a role in justifying actual coercion - enacted by actual persons - on paternalistic grounds. And again, JLs are, indeed, talking about actual coercion. Their concern is whether particular uses of legal coercion - such as restrictions on abortion or same-sex marriage, or tax-funded social programs - are legitimate.

Consequently, we do need to recognize the coercion of which JL speaks as a possible site of paternalism - for it is speaking of actual coercion of actual persons. JL raises at least the possibility of paternalism, and whether or not it is actualized will depend upon JL's method of justifying this coercion.

The second of paternalism's elements is the particular kind of justification paternalism involves. To wit, paternalistic restrictions are justified in the name of the interests of those whose liberty is being restricted. As Gutmann and Thompson write, "The paternalist claim is not that the conduct is morally wrong but that it is harmful to the citizen herself...Legal paternalism is the restriction by law of an individual's liberty for his or her own good." I follow Gutmann and Thompson in affirming the importance of this difference, between the claim that a given conduct

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259 Consider how Rawls at one point characterizes the purpose of public reason: that "we may over the course of life come freely to accept...the ideals, principles, and standards that specify our basic rights and liberties, and effectively guide and moderate the political power to which we are subject". Macedo cites this passage from Rawls approvingly. (John Rawls, Political Liberalism, 2005, 222 [emphasis mine]; Macedo, Stephen, “In Defense of Liberal Public Reason,” 16–17.)
is "morally wrong" and the claim that it is "harmful to the citizen herself". Or as I shall say, there is an important difference between liberty restrictions for the sake of justice and restrictions for people's good. Of the two, paternalistic justifications are of the latter type.

A third element of paternalism is bound up with its interest-based type of justification. Who is to represent affected parties' interests? The presence or absence of paternalism turns on this question. For notice that paternalism doesn't merely consist in restricting someone's liberty for their good. After all, if affected parties, representing their own interests, endorse or authorize the coercion as being in their own interests, we would hardly categorize the coercion as paternalism.

Rather, paternalistic laws are justified in the name of affected parties' interests as these interests are judged by someone other than the affected parties themselves. Crucially, paternalism involves a substitution of judgments: it is not the coerced parties' own view of their good that matters, but someone else's whose view is substituted for that of the coerced parties. Paternalism runs counter to an influential Millian line of thought which presumes that individuals are the most effective advocates of their own interests.  

Can we see this third element at work within the JL framework, replacing affected parties' own views of their interests with views drawn from elsewhere? I believe we can - at least potentially. There, indeed, seems to be a substitution involved, namely, swapping how actual persons view their interests for how their hypothetical counterparts view them. If the hypothetical persons would agree on \( x \), then JLs deem \( x \) legitimate in spite of objections actual persons might raise.

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260 Gutmann & Thompson, 261.
I take myself to have so far simply set the context; I have not yet argued that JL does, in fact, involve paternalism. I have established that JL, with its hypothetical proceduralist framework for assessing the legitimacy of actual legal coercion, is a site of potential paternalism. I concede that this potential paternalism is unusual in the sense that hypothetical persons are among the principals involved. Yet, viewed in light of this general characterization of paternalism, the question of whether or not JL involves paternalism seems, I hope, at least pertinent.

Now whether or not JL does, in fact, involve paternalism will depend upon two main factors. The first is the type of justification for coercion that JL provides. Is it one based on people's self-interest? The second pertains to who represents affected parties' interests. Is it the affected parties themselves? If not, then who does, and what of their relationship to the actual persons who stand to be coerced?

I shall now make my argument - that JL involves paternalism - largely by examining these two factors.

2-JL and Paternalism

  a) A Crucial Premise in the Argument: The Questions JLS Ask

What I first want to consider is the type of justification for coercion JL offers. If I am right that JL involves paternalism, what I need to do is show that JL's justification is fundamentally one of self-interest.

So what does the JL thought experiment require of us? It requires us to consider a proposal from diverse vantage points occupied by society's various members. We're to ask whether or not, from the perspective of each, a proposal will be acceptable. More specifically, we're to judge the acceptability of an agreement from each perspective primarily in regard to the
effect that a proposal will have on someone's reasonable self-interest. Let's look first at Rawls and then at Scanlon.

Rawls identifies his hypothetical contractors as having two fundamental powers. While one is a sense of justice, the other is the capacity for forming, revising, and pursuing a conception of the good. As part of their motivation to pursue their respective conceptions of the good, citizens desire to acquire as large a bundle of social primary goods as they can. Rawls describes primary goods as those goods that it is only rational for every person to want, whatever else they might want.

When these contractors enter the agreement scenario, note carefully the general question Rawls puts to them. Essentially they are to ask themselves, What social arrangements are most prudent for me to choose as I seek to protect and further my interests as a free-and-equal citizen? The contractors' sense of justice is operative in the construction of the conditions under which the agreement is made, and in their willingness to comply with the agreement once made. In the negotiation of the agreement, though, it is their sense of self-interest that is primary. It is with reference to self-benefit that they evaluate proposals.

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263 These goods include such things as income and wealth; rights, powers, and opportunities; and the social bases of self-respect. (Ibid., 178–187; Freeman, Samuel, Rawls, 152, 478.)
264 I qualify this as the "general" question posed by Rawls in the Original Position because he eventually comes to defend his favoured conception of justice - justice as fairness - simply as the best choice from among a restricted set of available conceptions of justice. The question eventually becomes whether Rawls' favoured two principles of justice are preferable to both the principle of average utility and the principle of restricted average utility. Note, too, that choosing a conception of justice is just one of two items selected in the Original Position, the other being a principle of legitimacy. But in making all of these choices, the general question remains the same. For whether the choice is between justice as fairness and an unlimited set of alternative conceptions of justice, or between justice as fairness and a restricted set of alternatives, or between the LPL and alternative principles of legitimacy, the contractors are to make all these choices on the basis of which arrangement will best serve their own interests. See Rawls, John, Justice as Fairness, 94–97.
265 Estlund summarizes the question put to Rawlsian contractors as, "Which of the proposals before me will maximize my bundle of primary goods?" Estlund, David M., Democratic Authority, 246.
What Rawls’ contractors are not called to do is seek others’ well-being or equality of condition. Asking them to do so would, on Rawls’ view, be asking for too much altruism. Instead, sufficient concern for others’ equal value and well-being is built into the conditions of the Original Position - in such features as the Veil of Ignorance and the veto given to each individual. As a Christian, Timothy Jackson may object to Rawlsian justice on the grounds that it does not direct people to interact with one another on the basis of agapistic love. But it is the demands of fairness in which Rawls is interested, not those of self-sacrificial love. In parallel fashion, G. A. Cohen chides Rawls for bypassing the egalitarian ethos that Cohen believes ought to regulate our individual choices and not just society's basic structure. But Rawls thinks that ensuring the justness of the basic structure is all we can reasonably ask; in drawing up fair terms of cooperation for a diverse society, we could not reasonably require people to go as far as Cohen does.

In Scanlon's construction of the hypothetical scenario, the question put to the parties is somewhat different from that put to Rawls' contractors. As Estlund summarizes it, Scanlon's participants ask themselves the question, "Do I find this proposal acceptable in light of my interests (reasonably weighted) and in light of my aim of coming to agreement with others similarly motivated?" There is not a maximization injunction here, as there is for Rawls' contractors.

But what is importantly the same between the questions Rawls and Scanlon put to their respective contractors is that both questions focus on contractors' self-interest. For Scanlon's part,
the hypothetical contractors are, as Estlund puts it, "reasonably self-serving". As with Rawls' account, it isn't that Scanlon's contractors care not whether others are fairly treated. But their concern is channeled into the construction of the hypothetical scenario itself. In part, this concern is addressed by imputing to each contractor "perfect information, communication, and motivation" - idealizations that mitigate sources of possible unfairness. Chiefly, it finds expression in the veto given to every participant and in the unanimity condition any proposal must meet. Within this framework, then, the question put to Scanlon's participants becomes basically a straightforward question of self-interest. "Do I find this proposal acceptable in light of my interests...?"

Moreover, Scanlon's participants are expressly instructed not to consider whether a proposal places undue burdens on others. They need only consider whether or not, from their own perspective, they would bear unreasonable burdens under the proposal. They are "motivated only by what [Scanlon] calls 'personal reasons'"; "they reject proposals only if they themselves have personal reasons against them." Since they are not being asked the "primary question" of what they owe to one another, Scanlon's participants answer the question put to them neither with reference to "impersonal reasons" nor "on the ground that they are reasonably rejectable by someone or other"; they reject proposals "only for their own personal reasons." Scanlon is

\[269\] Ibid., 245.
\[270\] Ibid., 250.
\[271\] Ibid., 248.
\[272\] "In Scanlon the primary question is, 'What do we owe to each other?'" (Ibid., 246.) The specific question put to the participants in the hypothetical scenario is what Estlund calls the "subsidiary question". This distinction between what Estlund calls a theory's "primary" question and its "subsidiary" question is important. The primary question is just that: it identifies the central issue under philosophical examination. The subsidiary question, on the other hand, is used to adduce the philosophical considerations relevant to explaining the central issue. The subsidiary question is necessarily different from the primary question - else it beg the question - and it helps distinguish between good and bad answers to the primary question. In other words, it delimits the type of justification required for good answers to the primary question.
\[273\] Ibid., 248.
clear, then, that the question put to his contractors is one of self-interest - not of, say, human interests generally, nor or the common good, nor of morality. It is a question of how a proposal will affect contractors' own interests, as they themselves perceive them.

We can generalize these points to all JLs. All JL accounts put to their hypothetical contractors an essentially self-interested question. Central to contractualism - and JL - "is rejectability from the point of view of an agent's own interests and concerns." Does a proposal maximize an individual's bundle of primary goods? Is it acceptable given an individual's appropriately weighted interests? Put generally, does it serve an individual's reasonable self-interest? These are the questions JLs ask.

At this juncture, let me try and head off another possible misunderstanding. Given the way I'm stressing the self-interested nature of the question put to JL's hypothetical contractors, it might seem that my concern is with Rawls' characterization - or other JLs' similar characterizations - of persons as having a fundamental interest in the moral power to form, revise, and pursue a conception of the good. It is not. Similarly, it might seem that I'm charging JL with paternalism of the following sort: JL is paternalistic, so the claim would go, by covertly imposing on others a comprehensive view based on individual autonomy. But many people would not think it in their self-interest to give such priority to the moral power to form and revise a conception of the good - perhaps believing that such a power should be subordinated to, say, religious orthodoxy. So prioritizing this power represents a preference for one comprehensive view over another, and, as such, engenders paternalism. Now this would be an argument which, I suspect, the reader could make sense of easily enough - even if they ultimately judged it off the mark. However, neither is this my objection.

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274 Not one of justice, morality, or the common good.
275 Which is a kissing cousin to contractualism; the two are similar in all relevant respects.
276 Estlund, David M., _Democratic Authority_, 250.
Rather, my concern is that, in virtue of the question JLs put to their hypothetical contractors, JLs end up restricting liberty for people's good rather than doing so because it is just. The operative contrast is not between a comprehensive view that prioritizes individual autonomy and ones that seemingly do not (perhaps religious views or nationalist ideologies). Instead - borrowing the aforementioned distinction from Gutmann and Thompson - it is the contrast between restricting an individual's liberty "for his or her own good" and restricting conduct because it "is morally wrong". Or as I say, the distinction between coercion in the name of people's interests and coercion in the name of justice. I take it there is, indeed, a real and important difference between restricting liberty for people's good and doing so because it is just. My suggestion is that JL falls on the wrong side of this divide, and it does so by putting to its hypothetical contractors a question of self-interest.

JLs themselves wouldn't see matters this way. I fully expect they'd also recognize a difference between interest-based and justice-based justifications of coercion. But they would dispute my suggestion that theirs are interest-based justifications. They might also accuse me of misinterpreting their theories. Take Rawls. It is clear both what he officially says and what he wants to say in this regard. The Original Position is a device for identifying principles of justice, and the outcomes of this procedure are fit candidates for legal coercion only because of their status as principles of justice. This is just what "justice as fairness" means: it is justice that is delivered by the expected outcome of a fair hypothetical procedure. In response to the question of what justifies some coercive measure against real-world persons, Rawls would not say that the measure is legitimately enforceable because it advances the self-interest of actual persons. Rather, he would say they are enforceable insofar as they advance justice as fairness (or at least some other suitably liberal conception of justice). It might be paternalistic were Rawls to say,

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277 For related discussion, see my reply to the first objection I formally consider below.
"Since hypothetical parties would represent \( x \) as being in your reasonable self-interest, the state can legitimately enforce \( x \) in the name of your reasonable self-interest." But what Rawls would say instead is, "\( X \) may not be in your self-interest, but \( x \) is a requirement of treating others as free-and-equal citizens with two moral powers, and hence is a requirement of justice."

However, what I'm suggesting is that although this is what JLs would say and would want to say, this sort of response is not what their reasoning amounts to. To the contrary, given the structure of their reasoning, their arguments do reduce to the very sort of interest-based justifications that they would disavow. Here's what they want to say: \( x \) is a legitimate form of coercion because \( x \) is a requirement of justice. But why is \( x \) a requirement of justice? Because \( x \) serves everyone's reasonable self-interest, goes the JL answer. So here's what JLs ultimately must say: \( x \) is legitimate because \( x \) serves everyone's reasonable self-interest. Now the qualifying adjective "reasonable" is important here. It represents the limits placed on how individuals may permissibly pursue their self-interest, as it accounts for the free-and-equal status of all and for the demands of procedural fairness. Nevertheless, while it qualifies the appeal to self-interest at the heart of JL, it does not eradicate it. JL reasoning may force us to prune our claims to self-interest, yet it also relies on self-interest to explicate what justice requires.

I believe these points can be generalized to all JLs. No JL - Rawls, Scanlon, nor any other - would say of their account that legitimate coercion is a function of self-interest. All would say that legitimate coercion is instead a function of some other normative concept (eg., justice), with self-interest simply being part of an explication of the operative concept. Yet my response to Rawls would seem to be an applicable response to other JLs as well. So long as JLs understand legitimacy in terms of a normative concept which is, in turn, understood in terms of reasonable self-interest, self-interest is explanatorily foundational in the structure of their reasoning. The fundamental role played by self-interest in their justification of coercion raises
the possibility of paternalism. As far as paternalism is concerned, things might be different were these human interests considered in a universal and objective sense; but JLs instead conceive of self-interest severally and subjectively, given their backdrop assumption of reasonable pluralism.\(^{278}\)

Admittedly, it is tricky business distinguishing how human interests factor into an interest-based justification from how they factor into a justice-based one. But I take it that Gutmann and Thompson have laid their finger on an important distinction, and that there is a real difference between restricting liberty for people's interests and doing so for the sake of justice. What I ask the reader to consider is whether JLs, despite what they say, ultimately end up restricting liberty for people's interests. They run the risk of paternalism if they do, and I believe they do.

And why do JLs put a question of self-interest to their hypothetical contractors? Let us just briefly consider the internal logic of the JL position.

In explicating legitimacy's demands, JL theories must pose this kind of question to avoid begging the question.\(^{279}\) Keep in mind JLs' commitment to understanding the demands of legitimacy in procedural terms.\(^{280}\) To do so, they must tell a plausible story about how procedures of the right kind – under certain conditions, involving certain participants – will generate the demands of justice they seek to explain and justify. Consequently, the procedure...
cannot be framed so as to presuppose that these demands have independent moral validity. After all, their moral validity is supposed to be a result of the procedure. So far as possible, then, the procedure must be constructed without reference to these demands, and this involves asking the contractors a question merely about self-interest rather than about justice (or legitimacy); it would be illicit for the hypothetical contractors to "employ a concept of, specifically, right or justice or whichever primary question the contractualist account is addressing". Simply by thinking reasonably about the pursuit of their own self-interest, taken together with others’ reasonable pursuit of their self-interest, JLs believe it is possible to justify our legitimacy-related convictions in non-circular, procedural terms. That is their hope and rationale in putting to the hypothetical contractors a question about self-interest.

It is clear that JLs aspire to conceive of and treat citizens non-paternalistically. Alas, the spectre of paternalism is raised by the fact that they justify coercion with reference to affected parties' self-interest. Even so, the analysis so far only raises the possibility of paternalism. Does the JL framework actualize this possibility?

participants. "That is what Rawls means by describing the theory as a form of constructivism." (Nagel, Thomas, “Moral Conflict,” 220–221.)

Concerning this point, it is worth quoting Estlund at greater length:

"There is a good reason for having the parties address a subsidiary question rather than the primary question. If they were to address the primary question, then the whole theoretical apparatus would fail to have any heuristic value in explicating the nature of justice or right. The primary question would remain for the contractors themselves to fathom, and their own choices would be philosophically moot. Thus, it is an important feature of contractualism that the parties in the initial situation address a subsidiary question and not the primary question of justice or morality.

The conclusion to draw is that the contractors we posit cannot themselves be applying the standard of right or justice at all, contractualist or noncontractualist.” (Estlund, David M., Democratic Authority, 247–248.)
b) The Heart of the Argument: Who Answers JLs' Questions?

As I have explained, whether or not it does depends upon who represents the interests of affected parties. If it is the affected parties themselves, paternalism is not an issue. But if it is someone else, paternalism will result.

Thus we must face squarely the hypothetical nature of the participants to the JL procedure. JL is paternalistic, and it is so precisely because it requires us to consult hypothetical contractors instead of real-world persons themselves. It is the real-world persons who stand to be coerced, but it is their hypothetical counterparts who represent their interests. Admittedly, JL's paternalism is unusual in that affected parties' views are replaced by those of hypothetical persons - not by views of other real persons. But this much is crystal clear: real-world persons are not allowed to speak for themselves. They are structurally barred from representing their own interests, yet they stand to be coerced in the name of their own interests. If not paternalistic, how else to describe coercion so justified?

At least in principle, JL theorists do intend to respect each real-world person's right to represent their own interests. Actual persons, of course, view their own interests in diverse views; accordingly, JLs understand legitimacy in terms of multi-perspectival acceptability. Along these lines, even though Rawls believe that each and every citizen in the Original Position has conclusive reason to select justice as fairness for a conception of justice, the argument must be that this is the selection that would be made from each of several viewpoints - else the metaphor of contract is otiose. The purpose of giving each party a veto is to acknowledge that each party is entitled to judge whether a proposed social agreement is reasonably acceptable to them given the bundle of primary goods the proposal would provide them. Rawls' scenario
resists the perspective of an "impartial spectator" or "Herculean judge"; he resists the perspective of a single, omni-competent epistemic position. "Utilitarianism does not take seriously the distinction between persons" - but Rawls' Original Position supposedly does.

The same can be said of Scanlon's and other JL accounts, that they, too, intend to respect the right of diverse real-world persons to represent their own interests. This is the point of Scanlon et al., like Rawls, giving each party a veto and requiring unanimity. All JL accounts also presuppose that hypothetical contractors will judge their self-interest in varying ways at least insofar as these accounts purport to reckon with modern pluralism. And these accounts are expressly designed to do just that.

However, realization of JLs' intention to let diverse real-world citizens speak for themselves is thwarted by the appeal to hypothetical contractors. It is true these contractors are meant to correspond to real-world persons, to serve as real-world persons' counterparts, to be like diverse real-world persons save certain of real-world persons' less savory characteristics. JLs' intention must be to retain a meaningful link between real and hypothetical persons if the latter

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282 This is Adam Smith's famous, not to mention proto-utilitarian, idea. [Smith, Adam, Theory of Moral Sentiments (Clifton, NJ: Kelley, 1976).]  
284 In relatively early critiques of TJ, both Sidney Alexander and Jean Hampton argued that the Original Position essentially represents the reasoning of only one citizen, not of many citizens making an agreement together. This is a suggestion that Rawls rejected even then; how much more would he do so concerning his later work in which he takes the fact of reasonable pluralism as the background for his political theorizing! For these critiques and a Rawlsian response, see Sidney S. Alexander, “Social Evaluation Through Notional Choice,” The Quarterly Journal of Economics 88, no. 4 (November 1974): 597–624; Hampton, Jean, “Contracts and Choices: Does Rawls Have a Social Contract Theory?,” The Journal of Philosophy 77, no. 6 (June 1980): 315–338; Rawls, John, “Reply to Alexander and Musgrave,” The Quarterly Journal of Economics 88, no. 4 (November 1974): 643–646.  
286 See John Rawls, Political Liberalism, 2005, xxv–xxvi; Joshua Cohen, “Democracy and Liberty,” 187–193; Macedo, Stephen, “In Defense of Liberal Public Reason,” 18–21. Remember, though, that JL theorists do not intend to account for the full range of views present in actual pluralistic societies; there are principled limits to the range they are prepared to tolerate. Yet clearly they intend to accommodate a wide range of real-world views, even if not the full range.
are to plausibly provide a way in which the former can see themselves as the authors of the norms that govern them. If, in other words, JL is to successfully solve Rousseau's problem\textsuperscript{287}, then real-world persons' must be able to identify their own freedom with the freedom possessed by the participants in the hypothetical procedure.\textsuperscript{288}

But conspicuously the representatives of real-world persons' interests are not the real-world persons themselves. Rather, they are idealized persons who diverge from their real-world counterparts in significant ways. In general, they are different cognitively (having information and rationality they lack in the actual world), materially (having resources and political status they lack in the actual world), and morally (having character they lack in the actual world). As desirable as it would be for you and I, here and now, to actually possess these characteristics, the fact is that we don't, with the result that the views of JLs' idealized persons cannot meaningfully be said to be the views of you and I who stand to be coerced by the proposals deemed legitimate by JL. Tellingly, we find reasonable real-world persons holding a far wider range of views on issues such as redistribution and abortion than the range of views JLs seemingly impute to their idealized contractors.\textsuperscript{289}

By asking us to apply JL and its unanimity condition \textit{via} hypothetical scenario rather than directly to the real world, JL systematically silences those real-world persons whose views the hypothetical scenario is meant to represent. Even if JLs have good reason to desist from asking actual persons - motivated by the concern that real-world persons not infrequently accept substantively unjust social arrangements as "reasonable" - that in no wise diminishes the fact that the JL framework does prevent real-world persons from representing their own interests. Meanwhile, actual coercion is at stake.

\textsuperscript{287} For explanation of this problem, see "4-An Argument about JL" in Chapter 2.
Note carefully that, as far as paternalism is concerned, it doesn't matter that the judgments of JL's idealized persons really would be far superior to those of flesh-and-blood persons. For citizens' right to speak for themselves in political affairs is one they retain even when they exercise it imperfectly. I take it that such a right is bedrock to liberal political theorists (including JLs). Indeed, as both JL and CR theorists would understand individuals' right to lead their own lives, this is a right that survives all sorts of mistakes in individuals' judgment - whether these judgments are due to epistemic, character-based, economic, or other causes. We can be sure that JLs do not intend to establish an epistocracy. But it is just such a right - a right to speak for oneself that survives errors in judgment - that the JL framework denies real-world persons.

Let me stress that this paternalism is a structural problem within the JL framework. It does not merely arise as we try and apply JL. There are, to be sure, epistemic problems we face in applying JL as biased, fallible, imperfect persons ourselves. It is a monumental, perhaps impossible, task to truly appreciate how others view their beliefs "from the inside". Thus, applying JL - given the question of self-interest we'd be forced to answer on behalf of others - would be an additional site of paternalism.

289 Cf. my argument of Chapter 2, where I explain that even Bakunin-style anarchists should qualify as reasonable by JL lights.
290 This is the view that the "wise ought to rule". Yet while this might be "natural to think", Estlund is surely right that this view is "now universally denied" among political philosophers. (Estlund, David M., *Democratic Authority*, 206.) Similarly, just as we can be sure that JLs do not intend to establish actual epistocratic institutions, neither is their intention a hypothetical epistocracy - where the wise who ought to rule are conceived of as hypothetical persons.
291 For instance, can I - a flesh-and-blood philosopher trying to apply JL - do an adequate job of representing what others actually think who occupy a viewpoint not my own?
292 Eberle rightfully observes that philosophers' judgments about how reasonable hypothetical contractors would evaluate their self-interest are themselves judgments "formed in less than ideal conditions". See Christopher J. Eberle, *Religious Conviction*, 232–233.
294 For instance, in Rawls' scenario, it would be left for me - the flesh-and-blood philosopher applying JL - to decide what is "reasonable" from all qualified points of view. In Scanlon's, it would be left for me to decide on others' behalf when a proposal is, in light of others' unique viewpoints, reasonably rejectable.
Rather, the paternalism to which I'm drawing our attention arises as part of the framework itself, not simply as we apply the framework. The very categories in terms of which JL would have us understand legitimacy necessitate that legitimate coercion be justified on paternalistic grounds. This framework crucially involves a question of self-interest, the result of JL's democratic desire to represent norms as the product of popular sovereignty. It involves a distinction between one group of persons - who stand to be coerced - and another group - whose views are taken to be relevant to the legitimation of coercion. And it also involves justifying coercion in the name of how the former ought to perceive their own self-interest, as these interests are represented by the latter. These are all structural elements of the JL framework.

Putting the point another way, even if all the epistemic challenges that attend applying JL were overcome - that is, even if we as actual philosophers could perfectly predict the outcome of JL's hypothetical procedure - JL would still engender paternalism by framing legitimate coercion in terms of these categories.

Denied the right to speak, coerced nonetheless, and coerced in the name of their own interests: surely this smacks of paternalism. Doesn't it?

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Since I only mean to give a sketch of this third worry, I will do little more here than simply identify a few of the more important objections provoked by my charge of paternalism.

*Objection: Far from being paternalistic, JL operates with a very thin theory of the good - as thin a theory as possible, and certainly thinner than those of its rivals in political theory.*

*Reply: My concern is not that JLs are imposing a conception of the good on the rest of us. Rather, it is that JL structurally deprives real-world persons of the right to represent their own interests when legitimacy is, *ex hypothesi*, said to be a function of what's in real-world persons' reasonable self-interest. It is not an implicit substitution of a JL comprehensive view for other*
such views that is my concern; it is the explicit substitution of hypothetical contractors' views for those of real-world persons themselves.

Objection: While JL's hypothetical contractors may be asked a question of self-interest, they are denied access to their conceptions of the good as a way of answering it. If paternalism involves imposing one's conception of the good on others, then how can an agreement made under such constraints possibly have paternalistic implications?

Reply: It is true that Rawlsian JL (though not other JLs) deny contractors access to their comprehensive views. However, there are different forms of paternalism, and while JL might prevent one kind, it nonetheless involves another more general kind. On the one hand, it prohibits as illegitimate the legal imposition of religious, or otherwise ideological, regimes. On the other hand, for any forms of legal coercion that are legitimate, the JL framework would seem to offer paternalistic grounds for this coercion given the very terms in which it conceptualizes legitimacy.

Objection: JL may require a certain amount of paternalism, but any theory of legitimacy will be paternalistic to some degree. To its credit, JL is least paternalistic of all.

Reply: Since talk of human interests will play a role in any account of basic rights, it may appear that any theory of legitimacy will be paternalistic. But this appearance is misleading, for it conceals the different ways that human interests factor into interest-based as opposed to justice-based justifications of coercion. For instance, in a justice-based justification, human interests are viewed in a universal and objective sense, whereas in an interest-based justification they are viewed severally and subjectively. But it is just this sort of difference which the present objection conceals.

295 Eg., while sectarian regimes and seat-belt laws are both paternalistic, they certainly represent distinct forms of paternalism. Nor should we assume that paternalism can only take these two forms.

296 See my discussions in Chapters 7 and 9, especially as I draw on Taylor.
Throughout, I have assumed that there is an intuitive and significant difference between coercion for people's good and coercion for the sake of justice. My suggestion that JL involves paternalism turns on this distinction. It may be, then, that JL should only be considered guilty of paternalism insofar as we can make principled, philosophical sense of the distinction between interest-based and others forms of justification. This is a difficult task which I admittedly leave incomplete, even after speaking further to this issue in Chapter 10. But so long as there is a significant difference between interest-based and justice-based justifications - however we spell this difference out - JL would seem to fall on the wrong side of this divide. Or, at least, this is a prospect I believe we must seriously consider.

Conclusion and Transition

We may now draw both the present chapter and Part I to a close.

I began Part I by setting up the particular question related to political legitimacy in which I am interested. This question is: What is the right framework for thinking about real-world legitimacy conditions? In other words, what are the most apt categories for philosophically conceptualizing, understanding, and evaluating the legitimacy of legal coercion? In response, I am seeking a way of understanding legitimacy as a context-transcendent, rather than context-dependent, normative standard. In Chapter 2, I argued that while JL advertises itself as merely a context-specific account of legitimacy - an explanation of so-called "democratic legitimacy" - it cannot help but offer instead a context-transcendent account given that the characterization of persons as free-and-equal on which it is based applies to all human beings, not only to those living in democracies. Thus, JL represents one candidate answer to my guiding question, as a higher-order framework for making sense of legitimacy qua context-transcendent standard.
Also in Chapter 2, we introduced and examined key aspects of JL. According to the core principle of JL, legitimate legal coercion is based on reasons that no reasonable person can reject. This is JL’s principle of public justification. I explained that I am taking JL in its consensus, Rawlsian version, rather than in its convergence version as defended by Gaus. Taking JL so understood, we reviewed the difficulty in delineating the nature of “public” reasons, JL’s twofold criteria of “reasonable” persons, and - pace Lister - JL’s default of state inaction when its unanimity condition goes unmet. At various points thus far, I have also highlighted the relationship between JL’s core principle and its hypothetical proceduralism. The latter is postulated to explicate the former. The hypothetical nature of JL’s idealized contractors has been among the features of the procedure we’ve considered, idealized contractors who represent the “reasonable” persons implicated in JL’s principle of public justification.

Then in each of Chapters 3 to 5, I have focused on a different CC we hold concerning real-world legitimacy. In Chapter 3, it was our CC that much real-world legal coercion is indeed legitimate, even in the midst of disagreement amongst epistemic peers. In Chapter 4, it was our CC that real-world legitimacy depends upon protecting certain basic rights. In Chapter 5, it has been our CC that it is illegitimate to coerce free-and-equal others on paternalistic grounds. These are CCs that JLs themselves hold, and, as such, my arguments have leveraged them for an internal critique of JL. This internal critique is a function of JL leading to consequences that are unacceptable given the way they conflict with these CCs.

My argument in Chapter 3 was that JL would de-legitimize all uses of coercive legal power. It would lead to this consequence because we cannot expect JL’s unanimity condition to be satisfied, given the breadth of views held by persons who would qualify as "reasonable" according to JL’s own twofold criteria of "reasonable" citizens. This consequence conflicts with
our CC that much real-world legal coercion is indeed legitimate. As such, this consequence is unacceptable.

My argument in Chapter 4 took issue principally with JL's proceduralism. I explained how, in virtue of its proceduralism, JL conflicts with three characteristics we experience basic rights as having and thereby undercuts our CC that there are certain basic rights which are necessary for legitimacy. JL undercuts legitimacy-conditional rights where such rights are the *prerequisites* rather than the *products* of procedures. Proceduralist aspirations also motivate JL's vacuity of the "reasonable", which stands in tension with the substantiveness of legitimacy-conditional rights. Third, although these rights surely don't depend on group consensus, this is how JL's proceduralism depicts them. Due to these conflicts, JL calls into question our CC that certain procedure-independent, substantive, and objective rights are necessary for legitimacy. That is, it undercuts legitimacy-conditional basic rights. This, too, is an unacceptable consequence.

Most recently, my suggestion in Chapter 5 has been that JL leads to paternalistic justifications of legal coercion. It would seem to have this effect because JL substitutes in the judgment of hypothetical persons for that of their real-world counterparts when it is the coercion of real-world persons that is at stake. Pivotal, it does so in response to a question of what is in the interests of these coerced, real-world persons. As I've stressed, the question put to JL's hypothetical contractors is one of self-interest - not one of justice. Since JL justifies legal coercion on such grounds - based on a judgment that legitimate legal coercion is in the reasonable self-interest of actual persons even if they see their self-interest otherwise - JL leads us into paternalism. And this would be an implication that conflicts with our CC that it is illegitimate to coerce free-and-equal persons on paternalistic grounds.
Also as I’ve tried to make clear, this is a paternalism which is structurally involved in JL, not one that threatens merely as we try and apply the JL framework.\textsuperscript{297} I say it is structurally involved because it is a paternalism implicated in the very conceptual categories in terms of which the JL framework would have us understand legitimate coercion. These are categories such as reasonable self-interest and idealized persons. Another - which I will discuss at length in Chapter 10 - is that of self-legislation: though I’ve not focused on the conceptual category of self-legislation so far, we nonetheless noted that the self-interested type of question JLs ask is a function of their constructivist aspiration to represent social norms as the product of popular sovereignty.\textsuperscript{298}

I present this third critique provisionally. But if the paternalism I suspect is actual - not just possible - and if we don’t write it off as simply normatively insignificant, then JL leads to yet one more unacceptable consequence.

My goal in this dissertation is to provide a better philosophical framework for understanding the conditions that make for political legitimacy, and I am taking the desideratum for such a framework to be the ability to make sense of our real-world CCs concerning legitimacy. In Part I, I have tried to show that JL runs afoul of three of these CCs. Not only do these arguments undermine JL by exposing tensions internal to the theory. They also show JL struggling to meet our desideratum for legitimacy's best philosophical framework. Consequently, we have good reason to turn away from JL in search of an alternative way of understanding the conditions that make for legitimacy in the actual world. My suggestion is that we look to the

\textsuperscript{297} Thus, the paternalism in JL to which I’m drawing our attention is not, as one reviewer thought, "simply a feature of theorizing itself". Given that it results from certain idiosyncratic features of JL’s method of theorizing, I believe this kind of paternalism is avoidable if we pursue a different way of theorizing legitimacy. The CR theory I shall develop is meant to serve as such an alternative.

\textsuperscript{298} See the end of "2.a) A Crucial Premise in the Argument: The Questions JLs Ask" above.
Christian Reformed tradition of social thought for an alternative. It is to this framework of thought that I now turn.
Part II - The CR Alternative
Chapter 6

An Outline of the CR Tradition

Introduction

Having examined three unacceptable consequences to which JL leads, let us now turn our attention to what I'm calling the "Christian Reformed" tradition of social thought for a potentially superior approach to the issue of legitimacy. The present chapter will not yet lay out exactly what this alternative CR theory of legitimacy is; that more specific task shall wait until the second chapter of Part II. Rather, the present chapter is meant simply to introduce the CR tradition as a distinct, intellectually and historically significant, tradition of social thought. This chapter especially targets secular readers who may well be unfamiliar with the theorists and ideas of the CR tradition, and perhaps also unfamiliar with Christian social thought more generally.

To this end, I begin with some preliminary remarks - who constitutes the tradition as I'm taking it and what broadly distinguishes it from other schools of Christian social thought. For historically-minded readers, it may seem that certain distinctions I draw within the history of Christian social thought are too crude. I confess my guilt in this regard, but justify such

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299 Note that by “CR” I am not referring to the relatively specific present-day (and North American) denomination that now bears this name. As I go on to explain in-text, I am referring to a much broader stream of historic Christianity, of which the official present-day “Christian Reformed” church is but one specific variant.

300 Throughout, unless otherwise specified by context, references to the "CR tradition" should be taken as references to the CR tradition of social thought. CR social thought is, to be sure, part of a broader CR intellectual tradition that encompasses views on theology (obviously), epistemology (e.g., Thomas Reid in the past, Alvin Plantinga at present), and much else besides. Some of the interconnections between CR social thought and these other CR fields may become evident in the present survey, but predominantly the "CR tradition" in which I'm interested is a tradition of social philosophy.

301 Readers interested in more rigorous examinations of the history of Christian political thought should consult the works of O'Donovan and O'Donovan, of Skinner, and of Tierney. VanDrunen provides a detailed historical sketch of Reformed political thought in particular. See O’Donovan, Oliver and O’Donovan, Joan Lockwood, eds., *From Irenaeus to Grotius: A Sourcebook in Christian Political Thought*
generalizations by the fact that this dissertation is not primarily a work in the history of ideas. I am endeavoring to improve our understanding of a primary normative issue within political philosophy - the issue of political legitimacy. Therefore, I am drawing on the CR tradition somewhat selectively, with a certain normative purpose in mind. In other words, the account I offer of the CR tradition is my reconstruction of that tradition for the specific purposes of the argument of this thesis. It is not simply a description of that tradition.

The bulk of this chapter then introduces the CR tradition with a list of tenets that frame CR social thought in general way. These are convictions that would frame a CR analysis of any issue within political philosophy - whether distributive justice, just war theory, multicultural politics, or otherwise. They will also frame a CR approach to legitimacy, as will become explicit in the chapter to follow.

I suspect that the following tenets will prompt a torrent of questions from secular readers straightaway. Certainly not the least of these will be such broad questions as those of God's existence or the divine inspiration of Christian Scripture. Questions specific to particular tenets will also surely arise. For instance, in what precisely does the Imago Dei of tenet 1 consist? Is it a physical substance? Can it be reconciled with contemporary evolutionary theory?

In this chapter (and dissertation), I will be setting aside such questions - both broad and narrow.302 This chapter's purpose is not to deal with all such philosophical objections that might

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302 The questions and objections to which I do respond at various points in this dissertation are ones that pertain more specifically to my CR theory of legitimacy. They tend not to pertain to broader CR thinking or to CR political theory's general tenets. For instance, see the subsection dedicated to objections and replies in Chapter 11. Discussion of other objections and replies is sprinkled throughout.
be brought against the CR tradition and the tenets that frame it. There certainly is not room to do so, nor is doing so the focus of my project.

Instead, in what follows, the CR tradition as I reconstruct it will be presented in its own terms. In doing so, the reader hitherto unfamiliar with the tradition will be presented with an array of conceptual resources that can, at a later stage, be brought to bear on the issue of political legitimacy. That is my present goal: to lay out a conceptual repertoire altogether different from that of the larger liberal background out of which JL develops, in the hope of developing an approach to legitimacy that will succeed where JL fails. The CR conceptual repertoire is presented in this chapter, while its reconstruction into a theory of legitimacy awaits us in the next chapter.

*          *          *

For starters, how is the CR tradition to be distinguished from other schools of Christian social thought?

The CR tradition refers to one of three streams of Christianity that broke away from the Roman Catholic Church during the Protestant Reformation. Reformers of Lutheran, Anabaptist, as well as Reformed persuasions agreed that the institution and theology of the Roman Catholic Church had become corrupt and needed to change. Beyond this, however, these three Protestant groups differed on many issues - such as ecclesiology, soteriology, and sacramental theology. Pertinent to my concerns, they also differed significantly in their political theologies; they differed in their views on the relationship between church and state, and also on the Christian citizen’s obligations (or lack thereof) to the civil authority.

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Broadly speaking\textsuperscript{304}, CR social thought diverges from that of Catholics, Lutherans, and Anabaptists as follows.

There is an influential strand of Roman Catholic political theology that would make the state subject to the church.\textsuperscript{305} This view of church-state relations was brazenly asserted by Pope Gregory VII (ca. 1030-1085) in his power struggles with King Philip I of France and King Henry

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\textsuperscript{304} I do want to emphasize that I shall only be speaking in broad terms. Thus, if it seems that sometimes I represent one or another view in terms that are too harsh, too stark, or too simplistic, please keep in mind that I am primarily interested in a question of normative political philosophy - not the history of ideas. Thus, for the sake of staking out a range of relevant normative viewpoints, I may sometimes oversimplify the views under consideration as they are actually held by their real-world advocates. (For instance, one reviewer particularly expressed this worry concerning views I attribute to Roman Catholicism.)

This will not be the last time that I qualify something I say in this chapter along these lines.

\textsuperscript{305} I don't mean to suggest that Roman Catholic thinkers have been univocal in their affirmation of this position throughout history, but many influential ones have. Among them are Pope Boniface VIII (ca. 1235-1303), papal apologists such as Honorius Augustodunensis (ca. 1080/90-ca.1156), Giles of Rome (ca. 1243-1316), and James of Viterbo (d. 1308), as well as the influential founder of the "Salamanca School", Francisco de Vitoria (ca. 1483-1546).

Nor does the view stated in-text take account of more recent developments in Roman Catholic social thought. A major change wrought by Vatican II (1962-1965) was official acceptance of a separation between church and state. This change, of course, makes the current Roman Catholic position much more like the CR one, and certainly different from the view I associate with Roman Catholicism in-text.

Nonetheless, this acceptance of church-state separation has, indeed, been only a relatively recent development. "Union of church and state had been the common pattern since the era of Constantine, and all pontifical declarations of the 19th century rejected separation of church and state as pernicious." Until, and as recent as, Vatican II, "This position was steadfastly maintained despite the fact that the union of church and state had been accepted by the Protestant countries of Europe...." See "Roman Catholicism," Britannica, accessed June 22, 2013, http://www.britannica.com/EBchecked/topic/507284/Roman-Catholicism.

Thus, it is entirely appropriate to characterize this view - the state subject to the church - as an "influential strand" of Roman Catholic thought. Although many might characterize it as an aberration, it has been historically influential nonetheless. Moreover, since, as I say above, I'm primarily interested in a question of normative political philosophy as opposed to the history of ideas, this view is worth noting insofar as it helps us isolate the normative distinctiveness of the CR alternative. It is worth noting even if care must be taken to dissociate this view from current Roman Catholic social thought.

And I add one more note. I’ve said here that since Vatican II Roman Catholics have officially accepted “a separation between church and state”, and I will routinely attribute the principle of church-state separation to the CR tradition as well. That said, it would be anachronistic to attribute a modern sense of church-state separation to many thinkers, both within and without the CR tradition. The sense in which many endorse church-state separation is in terms of a clear jurisdical demarcation between church and state that still allows for much strong and positive cooperation between the two. But many would nonetheless reject the stronger, modern sense of church-state separation which looks askance at such cooperation and which often discourages religious beliefs as well as religious institutions from entering the public square. Throughout my account, one should read references to “church-state separation” with care, bearing in mind its various senses. I hope that context, and the overall thrust of my argument, will make the meaning of such references sufficiently clear.
IV of Germany. Gregory claimed for the pope the exclusive right to have his feet “kissed by all princes”, the right to “depose Emperors”, and the right to “absolve subjects of unjust men from their fealty.”  

This view of church-state relations assumes that the church possesses a "plenitude of power" over matters both spiritual and temporal.

Conversely, in Lutheran political theology there has been a tendency to make the church subject to the state. Where the head of state subscribed to orthodox Lutheran theology, Luther allowed the head of state to simultaneously serve as head of the church. In a view of church-state relations that shifted over time, Luther increasingly turned "to the civil magistrate to reform and oversee external church order...". This was Luther's "Erastian turn".

The Anabaptist tradition takes a third approach to political theology: the church withdrawn from the state. Anabaptists believed that Christians should have no involvement in the politics of the state whatsoever. According to the early Anabaptist leader Peter Ridemann, “…no Christian is a ruler and no ruler is a Christian.” On the Anabaptist view, the church ought to withdraw both from political affairs and civil society; the Anabaptists of the Reformation are the forerunners of modern-day Mennonite, Amish, and Hutterite communities. In sum, their political theology consisted in these twin convictions of “separation and apolitical pacifism”.

According to the CR alternative, church and state are both rightful authorities within their respective domains. Unlike Anabaptists, CR theorists have a positive view of civil

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306 See Gregory's *Dictatus Papae* (1075) at O’Donovan, Oliver and O’Donovan, Joan Lockwood, *From Irenaeus to Grotius*, 242–243.
307 Ibid., 555 (emphasis mine).
308 Ibid. "Erastianism" is the name historically given to the view that the church's authority is subject to that of the state. The name derives from Thomas Erastus (1524-1583), a professor at the University of Heidelberg who, in the midst of Reformation debates over church-state relations, argued that the church did not have the right to excommunicate members.
310 This is O’Donovan and O’Donovan’s summary of the Anabaptist stance. (O’Donovan, Oliver and O’Donovan, Joan Lockwood, *From Irenaeus to Grotius*, 632.)
government, regarding it as an institution divinely ordained for certain tasks. And unlike the
Roman Catholic and Lutheran views noted above, CR theorists subordinate neither the church nor
the state to the authority of the other. Now simply saying that church and state are rightful
authorities within their respective domains leaves unanswered the crucial questions of what these
respective domains are and of how they are related. The CR answers to these questions will
become clearer as I develop my account. A point of first importance, though, is that the
enforcement of any particular religious belief is not among the tasks for which God has ordained
the state’s coercive force.311 This even includes enforcement of Christian beliefs.

Who composes the CR tradition as I am taking it?

St. Augustine (354-430) is the earliest theorist I consider, since some of Augustine’s
ideas proved influential on later CR thinkers. It would be clearly anachronistic to categorize
Augustine as a CR theorist. Yet VanDrunen goes so far as identifying him as a proto-CR
theorist.312 Augustine chiefly serves as a forerunner to the CR tradition by famously
distinguishing between two cities, the City of God and the City of Man. This distinction laid the
groundwork for the “two kingdoms” doctrine that later generations of CR theorists would
elaborate. As we shall see over the course of this survey, there is much else as well in

311 Calvin would disagree here. Some religious beliefs certainly were legally enforceable in Calvin’s
Geneva. Nonetheless, my statement here is part of my reconstruction of the tradition taken as a whole,
which includes but goes well beyond Calvin. While Calvin himself would have disagreed, I agree with
Kuyper that Calvin laid the foundation for later CR thought which would indeed prohibit the legal
enforcement of sectarian beliefs. As Kuyper writes,

“For here lies the solution of the problem: with Rome the system of persecution issued from the
identification of the visible with the invisible church, and from this dangerous line Calvin
departed. But what he still persevered in defending was the identification of his confession of the
truth with the absolute truth itself, and it only wanted fuller experience to realize that also this
proposition, true as it must ever remain in our personal conviction, may never be imposed by force
upon other people.”

312 VanDrunen, David, Natural Law and the Two Kingdoms, 6.
Augustine’s *City of God* that influenced later CR thinkers and that helps demarcate a distinctive CR tradition.\textsuperscript{313}

The next key figure in the tradition is John Calvin (1509-1564). His social thought is most clearly on display in the 20\textsuperscript{th} chapter of the 4\textsuperscript{th} book of his magnum opus *Institutes of the Christian Religion*.\textsuperscript{314} In drawing on Calvin, I will focus primarily on this chapter. It also needs to be said that I have no interest here in Calvin's political *practice* – including his support of the notoriorous decision, made by Geneva city council, to execute Servetus for heresy. My concern is not to evaluate, much less defend, his political record, nor to evaluate its compatibility with what we find of his political theory in the *Institutes*. Instead, my interest in Calvin – as with the other CR theorists – is simply to explore his political theory for resources that might help us develop a better understanding of political legitimacy.

The next theorist in the CR tradition on whom I will focus is Abraham Kuyper (1837-1920), who I expect will be less familiar to readers. This Dutch polymath was a major religious, political, and intellectual figure in the Netherlands around the turn of the twentieth century. Among other achievements, Kuyper founded the Free University of Amsterdam in 1880, where he worked as a theology professor, and served as Prime Minister of the Netherlands from 1901 to 1905. In 1898 he gave an important series of lectures at Princeton University on the relationship between Christianity and politics. When drawing from Kuyper in my discussion, I will focus on this series of lectures.\textsuperscript{315}

After Kuyper, Herman Dooyeweerd (1894-1977) is the next CR theorist I will consider. Dooyeweerd followed in Kuyper’s footsteps, serving as a long-time professor of law at the Free


\textsuperscript{314} Calvin, John, *Institutes*.

\textsuperscript{315} Kuyper, Abraham, *Lectures on Calvinism*. These lectures were originally delivered as the Stone Foundation Lectures at Princeton University.
University of Amsterdam while developing Kuyper’s political theory in a way that, as VanDrunen observes, has had “considerable impact not only in the Netherlands but also in North America.”

For Dooyeweerd’s political thought, we will focus on his essay *The Christian Idea of the State*.317

A last CR figure of interest is Francis Schaeffer (1912-1984). The American-born Schaeffer was both a Presbyterian-trained minister and public intellectual. His political thought most clearly falls within the CR tradition insofar as it is part-and-parcel of Schaeffer's attempt to develop a Christian "worldview", a project he inherits from earlier CR theorists such as Cornelius Van Til. Though more a popular apologist than scholar, I shall draw upon Schaeffer's political theory as it is laid out in *A Christian Manifesto*.318

These, then, are the theorists who comprise the CR tradition as I am taking it: Calvin, Kuyper, Dooyeweerd, and Schaeffer, all preceeded by certain Augustinian ideas. It may be objected that other theorists should be included. Undoubtedly there are other CR theorists worthy of inclusion.319 But even taking only these figures, a discernible tradition emerges. I now turn to the tenets that outline my reconstruction of this tradition.320

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316 VanDrunen, David, *Natural Law and the Two Kingdoms*, 351.
320 Some of these tenets will not be embraced by all CR theorists—hence, why my account is simply one reconstruction of the tradition.
Tenet 1-Every person is made in the image of God.

Foundational to CR social thought is the conviction that every human being is made in the image of God. This is the doctrine of the Imago Dei.

So God created man in his own image, in the image of God he created him; male and female he created them.\(^{121}\)

The intended scope of the divine image concept is significant. The CR conviction is that all people have been created in God’s image. All possess the Imago Dei regardless of gender or any other marker that may be used to draw artificial social distinctions. Humans are also believed to possess the Imago Dei no matter their stage of development or decline. So pre-adult human beings fully possess the Imago Dei, as do older human beings who suffer from dementia and disabled persons whose faculties never develop to standard levels.

At the same time, the scope of the Imago Dei does not extend to include any non-human animals. Denying them this status hardly means that non-human animals are deserving of no respect whatsoever. However, the CR tradition maintains that human beings occupy higher moral standing than non-human animals, and, as such, are worthy of a distinctive degree of respect. For the CR theorist, the widely held conviction that infants, those with dementia, and the severely disabled are worthy of basically the same respect that is due other human beings is an important explanandum; another is the widely held conviction that all humans, including those with non-standard faculties, are worthy of more respect than is due all other non-human animals. CR theorists hold the Imago Dei to be the best explanans of these explananda.

Given its universal scope CR theorists also take the Imago Dei to be the foundation of human equality, moral and political. As Kuyper writes, the CR worldview involves “…the recognition in each person of human worth, which is his by virtue of his creation after the divine
likeness, and therefore of the equality of all men before God and his magistrate.” As no person bears God’s image any more or less than another, the *Imago Dei* is the basis of “the equality of all men before God”. To emphasize, this is not only a spiritual equality before God, but also a political equality before the “magistrate”.

CR thinkers frequently associate the *Imago Dei* with certain faculties they take to be unique to human beings. Schaeffer points us toward several such putatively unique human faculties:

…human beings are different from all other things in the world. Think, for example, of creativity…People also fear death, and they have the aspiration to truly choose…Human beings are also unique in that they verbalize. That is, people put concrete and abstract concepts into words which communicate these concepts to other people. People also have an inner life of the mind; they remember the past and make projections into the future.

Also, CR theorists have often seen human reason as an expression of the divine image.

Additionally, the *Imago Dei* is credited with giving human beings their religious impulse. Kuyper reaches back to Calvin, and identifies the divine image with the depositing of the *semen religionis* – the “seed of religion” that, according to Calvin, God has sown in the heart of every human being. This *semen religionis* is an intuitive awareness of God said to be present in every person. In Dooyeweerd’s idiolect, when “God created man in His image” God made the

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321 Genesis 1:27. (*The Holy Bible*, 1.)
323 As with certain other ideas in this reconstruction, this notion of political equality before the magistrate only comes full flower in more recent CR writings. It is not clearly present, for instance, in Calvin’s thought, nor in Augustine’s.
325 Augustine, *City of God*, 1161; VanDrunen, David, *Natural Law and the Two Kingdoms*, 112.
human heart humanity’s “religious root, the center of his being”; and by placing such a religious root in the heart of human beings “God concentrated all of creation toward (God’s) service.”

But doesn’t this identification of the Imago Dei with particular faculties stand in prima facie tension with the tradition’s attribution of the Imago Dei to human beings universally? What about those human beings who lack them? A charitable and plausible CR answer might be along the following lines. The Imago Dei is a non-physical constituent of human beings that is nonetheless divinely designed to function in cooperation with the normal physical development of adult human beings. When coupled with normal adult human biology, the Imago Dei enables certain capacities (e.g., reason, spiritual reflection). When decoupled from this normal biological platform, a human being retains the Imago Dei - along with the equal worth the divine image bestows on its possessor - and yet remains unable to exercise the faculties that the Imago Dei standardly enables. This is a provisional answer to be sure, but all that can, or need, be said for present purposes.

The Imago Dei is key to CR social thought. It is the basis for ascribing inherent and equal worth to every human being. It is the basis of an equality that has both religious and political dimensions. The Imago Dei doctrine is not unique to the CR tradition. Roman Catholic, Lutheran, and Anabaptist social theorists would also, I expect, affirm the Imago Dei as characterized here. While not unique to the CR tradition, though, the general background of CR


328 To clarify, it must, therefore, be the case that the divine image is not identical with any one or more of the aforementioned faculties, but that such faculties are merely evidence of the divine image's presence. That said, absence of evidence is not evidence of absence. Even human beings who lack these faculties yet possess the Imago Dei.

329 While it is not my task to work out this Christian apologia in detail, one Christian philosopher who has explicated and defended at length the Imago Dei against reductive metaphysical naturalism is J. P. Moreland. See Moreland, J. P., The Recalcitrant Imago Dei: Human Persons and the Failure of Naturalism (London, UK: SCM Press, 2009). Also, see Wolterstorff, Justice: Rights and Wrongs.
social thought cannot be understood without it. In sum, it is the CR basis for human equality and universal human dignity, and, in turn, for all that these values imply for political philosophy.

2-God has written the moral law on the conscience of every person.

There is a further implication of being made in God’s image to now consider.

It is this: by stamping human beings with his divine image, God also places knowledge of the moral law within the conscience of every person. In contrast to non-human animals, humans are aware of the basic moral standards they should follow and can choose to follow them or not.

According to the Westminster Confession of Faith (WCF) article 2.1,

After God had made all other creatures, He created man, male and female, with reasonable and immortal souls, endued with knowledge, righteousness, and true holiness, after His own image; having the law of God written in their hearts, and power to fulfil it; and yet under a possibility of transgressing, being left to the liberty of their own will, which was subject unto change.  

The Scriptural passage standardly cited by CR theorists in support of this concept of the universal conscience is Romans 2:14-15,

For when Gentiles, who do not have the law, by nature do what the law requires, they are a law to themselves, even though they do not have the law. They show that the work of the law is written on their hearts, while their conscience also bears witness, and their conflicting thoughts accuse or even excuse them….  

CR theorists associate this divine act of “writing on the hearts” with the act of imprinting humans with the Imago Dei.

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330 For similar statements from historic Reformed documents, also see the Westminster Larger Catechism (WLC) 17, 92, and 93, and the Westminster Shorter Catechism (WSC) 40.
331 Speaking of the Reformed resistance writers – George Buchanan, Samuel Rutherford, John Knox, Christopher Goodman, Theodore Beza, Jean Ponet, and Francois Hotman, amongst others – VanDrunen states, “Like Calvin and other theological predecessors, most of them explicitly associated natural law with the testimony of conscience and the law of God written on the heart, appealing to Romans 2:14-15.” See The Holy Bible, 940; VanDrunen, David, Natural Law and the Two Kingdoms, 133; Calvin, John, Institutes, 848.
CR theorists characterize the content of this moral law in various ways. For one, they equate this moral law with basic moral prohibitions and imperatives that are generally recognized across diverse cultures and times - such as prohibitions against murder, theft, and lying. CR theorists also equate the moral law with the Golden Rule given by Jesus: that humans ought to love their neighbours as they love themselves.\(^{332}\) Alternatively, the content of the moral law can be described simply as the demands of “equity” – a concept of the Early Modern period that refers generally to conduct in accord with fairness and probity.\(^{333}\) However it is characterized, CR theorists aim at describing one and the same object, namely, the moral law. Ex hypothesi, there is only one such law, and its basic demands are evident to the consciences of all people.

This moral law is common to all peoples in all times, but CR theorists readily grant that the specifics of its implementation will vary among different historical circumstances. Provided that a country’s laws follow the basic, general principles of the moral law, Calvin says that it “does not matter” what more specific shape a constitution might take.\(^{334}\) The mainstream of CR

\(^{332}\) WSC 42.

\(^{333}\) See Calvin, John, Institutes, 1504; O’Donovan, Oliver and O’Donovan, Joan Lockwood, From Irenaeus to Grotius, 684.

\(^{334}\) Calvin, John, Institutes, 1504. We can understand "constitution" here as referring simply to a polity's positive laws. Calvin's point is that, within the relatively broad parameters set by the general principles of the moral law, there can be variation in the specifics of particular legal codes.

To be sure, this premise by itself - that there exists a single, authoritative moral law to which humans universally have access - doesn't settle what the contents of this law are, nor, in turn, what the parameters are within which specific legal codes must fall. As one reviewer probed me on this point, does the moral law say anything about euthanasia or homosexuality? This, of course, is an eminently practical question. But it is not one which I think we need to resolve in order to appreciate the philosophical relevance of the present tenet. Even if disagreements remain over certain aspects of this law, positing the existence of such a law helps to explain both why so much agreement does obtain concerning basic moral principles, and also why people are justified in holding others morally responsible for violations of these principles; for, ex hypothesi, violators have immediate access to these principles via their conscience. In fact, even if there wasn't broad-based agreement on much of the moral law's contents, this tenet might yet be philosophically relevant insofar as one holds there to be universal moral values and duties, and insofar as one holds oneself to be justified in praising and blaming others on this basis. Whether disagreement existed over only specific issues or over most of the putative law's contents, it seems - assuming the hypothesis is being framed in terms of CR concepts - that either type of disagreement could be equally explained as the result of sin and sin's distorting effects.
social thought has never regarded the Mosaic Law of the Hebrew Bible as an appropriate set of laws for governing other polities, much less present ones. The Mosaic Law is of enduring application only insofar as it embodies the general principles of the moral law.

By directing polities to follow the dictates of conscience while giving them latitude in the specifics of their laws, however, the CR theorist is emphatically not portraying humans as Kantian self-legislators. Humans do not create the basic norms, moral or political, that ought to govern the conduct of societies. Humans are subject to a higher law, based on God’s character and written on their hearts, and it is theirs only to follow or observe these laws as the basic guidelines for their conduct. “The Calvinist is led to submit himself to the conscience, not as to an individual lawgiver, which every person carries about in himself, but as to a direct sensus divinitatis, through which God himself stirs up the inner man, and subjects him to his judgment.”

Now a CR theorist might point to the ubiquity of the Golden Rule – some version of which is evidently present in every religious tradition from Judaism to Shintoism, from Aboriginal spirituality to Islam – as empirical confirmation of this claim that God has written the moral law on human hearts universally. But what about the many disagreements over moral issues that exist? How are they to be explained, and how are we to deal with them politically?

As for their explanation, the answer is sin. Since humanity is in a state of rebellion against God,

Concerning the issue of disagreement over the moral law's contents, and also for the issue of sin's distorting effects, see what I say a little further on in-text as well.

335 Christian Reconstructions such as Rousas John Rushdoony would have us directly apply much of the Mosaic Law to our present circumstances, but they stand at the very fringes of - or perhaps even altogether outside of - the CR tradition.

336 WCF 19.4, “To [ancient Israel] also, as a body politic, [God] gave sundry judicial laws, which expired together with the State of that people; not obliging under any now, further than the general equity thereof may require.”

337 Kuyper, Abraham, Lectures on Calvinism, 59. In Kuyper’s terminology, “Calvinist” is often used to refer to a member of the CR tradition. That said, Kuyper did affirm a positive role for human agency in
humans' reason has been impaired, they lack the resolve to do what they know they ought, and their apprehension of the moral law is clouded.

As for dealing politically with disagreements, the CR point to emphasize is that the conscience remains a generally reliable guide to the basic moral obligations people have toward one another. It is true the CR tradition has distinctively claimed that both human conscience and reason need to be anchored in and checked by Christian Scripture in order to function correctly. So Calvin says that Scripture “removes the obscurity of the law of nature”\textsuperscript{338}; and Kuyper speaks of the “necessitas S. Scripturae” that results from our “sinful condition”.\textsuperscript{339} In contrast to soteriological matters, though - where the specific revelation of Christian Scripture is of absolute primary importance - in basic moral matters the general revelation of conscience is normally sufficient and the role of Scripture is meant only to be remedial. CR theorists frequently maintain that the primary, normal, and generally reliable way for people to ascertain their basic moral obligations is their immediate awareness of them through the universal human conscience.

3-People are naturally free and equal, naturally subject to no other human being and ultimately accountable only to God.\textsuperscript{340}

Kuyper issues the CR clarion call to freedom: “No man has the right to rule over another man…As man I stand free and bold, over against the most powerful of my fellowmen.”\textsuperscript{341} In initially distinguishing between the Reformed and Anabaptist traditions, we have already seen, though, that the CR tradition staunchly accepts subjection to a civil authority as a normal,

\begin{footnotesize}
\begin{enumerate}
\item VanDrunen, David, \textit{Natural Law and the Two Kingdoms}, 106.
\item Kuyper, Abraham, \textit{Lectures on Calvinism}, 47.
\item Unlike the early social contract theorists, though, CR theorists do not presuppose a state of nature in affirming people’s natural freedom and equality.
\item Ibid., 69.
\end{enumerate}
\end{footnotesize}
justifiable feature of societies under current circumstances. What, then, is the import of CR theorists’ insistence that people are naturally free?

There are three relevant senses in which we should understand this CR premise that people are naturally free. The first will appear alien to secular readers, and I will only briefly mention it. The second and third should be familiar, though. Moreover, only the latter two are necessary for the later stages of my argument in Part III.

The first sense of humans' natural freedom points back to a putative prior historical period in which human interactions did not require the mediation of civil authorities. In this first sense, the “natural” condition of human beings is a prelapsarian one, and in this condition human beings were free from regulation by civil authorities. It is to this sense of natural freedom that Augustine appeals when he writes, “By nature, then, in the condition in which God first created man, no man is the slave either of another man or of sin.”

However, humans now live in postlapsarian world. As such, they should now accept coercive legal institutions as a fixture of human societies. The following two senses of freedom are more directly relevant to structuring such institutions in ways that are just by CR lights.

People are naturally free in that no-one has a right to politically rule over others in virtue of some natural characteristic they possess. This is a point famously shared and forcefully articulated by Locke. There are no "natural slaves", as Aristotle notoriously held. Nor can anyone claim a right to kingship based on a certain patriarchal lineage. This was Sir Robert Filmer's contention in defending the "divine right of kings" against Locke's egalitarianism, but it is certainly not a CR contention. Neither does superior intelligence or aptitude endow anyone with a right to greater political power. The likes of Plato and Mill may be inclined toward this view, but it is rebuffed by CR freedom. As Kuyper puts the CR view, all persons “stand as equals
before God, and consequently equal as man to man”, and whether citizens are “men or women, rich or poor, weak or strong, dull or talented” is politically irrelevant.\(^{343}\)

The second sense of CR freedom leads to a third. This third point is not explicitly made by my CR interlocutors, but it is implied by them, and especially so by their stated conviction that no-one has a natural right to rule over others. Moreover, drawing out this third sense is necessary for putting the tradition's best foot forward and for extending the tradition's insights into new contexts - such as our own.

Third, then, to say that people are naturally free entails that where instances of coercion occur in the real world, these cannot be taken as brute facts, beyond the pale of critical scrutiny. Rather, it entails that instances of coercion must be appropriately normatively justified. Given that CR theorists ostensibly share Gaus' presumption against coercion\(^{344}\), the burden of justification falls on those who would impose legal coercion. Freedom *qua* the absence of unjustified coercion is the default. “[God] did not intend that His rational creature, made in His own image, should have lordship over any but irrational creatures: not man over man, but man over the beasts.”\(^{345}\) Wherever a lordship of “man over man” obtains, then, a special explanation is required.

As was said previously, viewing God as sovereign, the CR tradition positively repudiates the Kantian ideal of the self-legislating agent. That point is relevant here, too. As much as CR theorists exalt individual freedom, it is a freedom circumscribed by God's moral law. It is a freedom not *from* God but *under* God; similarly, it is a freedom not *from* the moral law, but *under*
the moral law. It is also a freedom to which all have equal right, irrespective of sundry natural and social differences, as all stand in common before God's sovereign law.

4-There is something unnatural about coercive political power. It is only necessary “by reason of sin”.

It follows from the previous tenet that the existence of coercive legal institutions is unnatural. Among the CR writings under consideration, statements to the effect that political power is unnatural are legion. Kuyper provides a representative statement,

For, indeed, without sin there would have been neither magistrate nor state-order…Neither bar of justice nor police nor army nor navy is conceivable in a world without sin; and thus every rule and ordinance and law would drop away, even as all control and assertion of the power of the magistrate would disappear, were life to develop itself, normally and without hindrance, from its own organic impulse.  

On the CR view, coercive legal institutions are necessary under present circumstances, but are clearly suboptimal. They are suboptimal since they deviate from a situation in which no human is subject to the coercive authority of another.

The important points here are that the existence of coercive legal authorities is indicative of a problem besetting human interactions, and that these legal authorities are a response to that problem. What is the problem to which political institutions are a response? In a word, sin. In humanity's sinful state, human beings not only corporately rebel against God; they also fail to meet the obligations they have under the moral law towards other human beings. Civil authority serves to punish instances of the latter, and preserves order within society by upholding laws that facilitate the fulfillment of these interpersonal obligations. Within CR political thought,

346 Kuyper goes on to further describe coercive legal power as a “mechanical means of compelling order and of guaranteeing a safe course of life” and as “something against which the deeper aspirations of our nature rebel”. Also, see Dyson's introduction to Augustine. Cf. Kuyper, Abraham, Lectures on Calvinism, 67–68; Augustine, City of God, xvii–xviii; Schaeffer, Francis A., “A Christian Manifesto,” 468.
political authorities are divinely established for the purpose of dealing with the harmful effects of sin and they derive their legitimacy from performing this remedial function.

In other words, coercive institutions are required “by reason of sin”. This phrase is specifically Kuyper’s, but it is echoed throughout the CR tradition.

The first cause of servitude, therefore, is sin, by which man was placed under man in a condition of bondage…servitude itself is ordained as a punishment by that law which enjoins the preservation of the order of nature, and forbids its disruption. For if nothing had been done in violation of that law, there would have been no need for the discipline of servitude as a punishment.

This typical founding-function of the state reveals immediately that it is a divine institution for the sake of sin.

In a fallen world, force in some form will always be necessary.

In line with the state’s remedial raison d’être, CR theorists tend to view the state as essentially coercive. It is only on the aberrant “Roman Catholic view” that “the power of the sword is…not an essential part of the structure of the state”.

Conversely, Schaeffer
exhorts his audience to “not forget that every presently existing government uses and must use force in order to exist.” Conflicts between citizens necessitate the institution of coercive, authoritative states; and, once instituted, conflict remains an ineradicable component of the state’s underlying logic. In this aspect of their political theory, CR theorists find common ground with secular philosophers such as Waldron and theorists of agonistic democracy. Meanwhile their emphasis upon conflict distances the CR tradition from the likes of contemporary contractualists, deliberative democrats, and public reason theorists, all of whom tend to emphasize cooperation instead.

It should also be noted that the CR tradition, as I am reconstructing it, posits the state as an agent of preservation, not punishment. These two alternatives are not mutually exclusive.

Rather, what CR theorists would be objecting to is the suggestion that humans might have reason to erect coercive political institutions whether or not sin were present. This is what Aristotle’s characterization of humans as political animals does, at least, seem to suggest: for, even in the absence of sin, humans would have reason to erect such institutions since it is only in the context of such institutions that humans can supposedly fully develop. Whether Aristotle believes that political institutions contribute to human flourishing by essentially being venues for conflict resolution or cooperation, I am not sure. But I suspect it is in the latter. And if it is the Aristotelian-cum-Thomist view that humans can express their political nature in institutions oriented towards cooperation rather than conflict resolution, then the CR objection is, indeed, pertinent.

It should be said that, of course, all of these theorists – contractualist, deliberative democrat, and public reason theorist alike – countenance conflicts and political disagreements of a certain kind. In large part, the motivation for the development of such theories is precisely the handling of disagreements between citizens within the political realm. However, all of these approaches portray politics as essentially cooperative in that all portray the coercive authority of the state as applying, in the first instance, to disagreements that arise in the context of citizens who are already engaged in cooperative schemes. By contrast, according to CR theorists, the coercive authority of the state has application, in the first instance, in a context of individuals offending against the natural rights of one another. Neither do CR theorists...
However, I take the preserving quality of the state to be the more dominant theme in the CR tradition taken as a whole.\footnote{To wit, the CR tradition consistently contrasts Jesus’ mediatorialship as Redeemer of the world with Jesus’ mediatorialship as Creator and \textit{Sustainer} of the world. The CR theological doctrine of the two mediatorialships is given much attention in VanDrunen, David, \textit{Natural Law and the Two Kingdoms}.} The state \textit{qua} response to sin is a divinely ordained tool for \textit{preserving} society in the midst of circumstances that compromise human comity and well-being.

Although human beings are not naturally political on a CR view, they are still naturally \textit{social}.\footnote{Eg., “The philosophers also consider that the life of the wise man is a social one; and this is a view of which we much more readily approve. For we now have in hand the nineteenth book of this work on the City of God; and how could that City have first arisen and progressed along its way, and how could it achieve its proper end, if the life of the saints were not social?” (Augustine, \textit{City of God}, 925.)} Take the family for instance, or religious communities or commerce.\footnote{Cf. below Kuyper's idea of “sphere sovereignty”.} CR theorists suggest that, were it not for sin, human beings would naturally cooperate with one another in such spheres of activity without recourse to coercive state authority.

In the world as it presently exists, though, CR theorists maintain with equally clear conviction the \textit{im}possibility of such society-wide cooperation without the state.

\noindent 5-Natural law (ie., the moral law) ought to be the standard for civil law.

Having recognized the need for the state, what do CR theorists say should be the basis for the state’s laws? The historic CR answer is that the natural law should serve as the basis for the laws of the civil government. Recall that this natural law is the basic moral law written on the conscience of every person. This historic CR answer is given with particular clarity by Calvin.\footnote{A notable exception to the rule here is Dooyeweerd, who develops an extensive critique of both pre-modern and modern natural law theories. For Dooyeweerd on natural law, see Appendix 2 in Chaplin, Jonathan, \textit{Herman Dooyeweerd: Christian Philosopher of State and Civil Society} (Notre Dame, IN:}
believed that the proper basis of civil law was the natural law. This was the case as much for a voluntarist as for a rationalist – for “Ockham as well as for Thomas”\textsuperscript{364} and it had become a “commonplace of Christian theology at the time of the Reformation.”\textsuperscript{365} By rooting “the justice of human civil law in the law of nature”, Calvin followed “figures such as Thomas, Scotus, Ockham, and Luther before him.”\textsuperscript{366} Despite the deep differences between Calvin and Catholics, we should not allow them to obfuscate an important line of continuity between Calvin and his predecessors, “Though distinctive in regard to certain matters, such as conscience and the effects of sin, Calvin’s natural law theology placed him comfortably within the broader Christian tradition of natural law.”\textsuperscript{367}

Secular readers should find the present point at least somewhat reassuring. The CR tradition maintains that it is natural law, a law evident to human consciences generally, that should be the basis for civil laws. It is not Christian Scripture or sectarian confessions.\textsuperscript{368} Whatever worries secular and otherwise non-Christian readers might have about my dissertation's suggestion that we consult a religious tradition of social thought, we should keep at the forefront of our minds the blueprint for a polity governed by CR principles: a polity governed by positive laws the justification of which is immediately accessible to every citizen \textit{via} their consciences - regardless of their comprehensive view, level of education, or expertise in moral reasoning. Practically speaking, citizens will disagree over the contents of the natural law. What secularists should find reassuring is that, \textit{ex hypothesi}, it is inappropriate for the state to resolve such

\textsuperscript{364} VanDrunen, David, \textit{Natural Law and the Two Kingdoms}, 42.
\textsuperscript{365} Ibid., 47.
\textsuperscript{366} Ibid., 108.
\textsuperscript{367} Ibid., 118.
\textsuperscript{368} Ibid., 113.
disagreements with reference to Christian Scripture or Christian confessions given that the civil law should be based on natural law.\textsuperscript{369,370}

For a fuller picture of the backdrop against which CR theorists hold the present tenet, two related points are worth noting. One of these points is that most CR theorists see a large area of commonality between the interests of believers and those of non-believers.\textsuperscript{371} A prominent example of this viewpoint is the present peace that Augustine takes both citizens of the earthly city and citizens of the heavenly city to value.\textsuperscript{372} In turn, these common interests may serve as the basis for a civil law that embodies the moral law. Note here the sharp difference between CR and Anabaptist viewpoints. Starting with Augustine, CR theorists not only recognize common interests between believers and unbelievers, but also positively encourage co-operation between them. This stance contrasts with the Anabaptist principle of separation.

The other point is that CR theorists have distinguished between two types of divine grace that humans enjoy. One is soteriological; the other is “common”. The former is the grace extended to human beings who place their trust in Jesus, resulting in their eternal salvation. The latter is the grace enjoyed by all human beings, both believers and unbelievers, as they carry on

\textsuperscript{369} CR theorists may uphold Christian Scripture as a way of correcting for our distorted apprehension of the natural law. If and when they do, though, we should interpret this point as having application to individuals in their spiritual practice and not to the state in the public square. Applying it to the latter would clearly stand in tension with the present tenet which puts forth the natural law as an alternative to Scripture as a basis for civil law.

\textsuperscript{370} Here, too, the views of Calvin’s contemporary CR successors have importantly moved beyond Calvin’s own views. Calvin himself clearly asserted that the magistrate has a duty to enforce true religion. This meant the Reformed religion, which in turn meant the version defined by the Genevan Church consistory.\textsuperscript{371} I say most CR theorists because this is a point at which a Neo-Calvinist such as Cornelius Van Til (1895–1987) diverges from historic CR social thought. For instance, one conclusion Van Til draws from his appropriation and reworking of CR social thought is that even the mathematics taught by Christians and non-Christians to their respective children are fundamentally distinct intellectual endeavors. For discussion of Van Til on this point, see VanDrunen, David, \textit{Natural Law and the Two Kingdoms}, 393–396.

Neo-Calvinism is regarded as a movement that began with Kuyper, that was developed by theorists such as Dooyeweerd and Van Til, and that currently finds expression in the writings of Reformed thinkers such as Cornelius Plantinga and Albert Wolters. "Worldview" is a watchword for those working within this movement.

\textsuperscript{372} Augustine, \textit{City of God}, 639, 933–934.
their daily lives. It is a grace manifest in such relatively mundane matters as God’s causing the sun to rise daily and causing crops to grow.\textsuperscript{373} It is also manifest in God’s preservation of present human societies through his sanctioning of civil governments. With these two types of grace in mind, Kuyper says that “the church has to retire to the domain of particular grace, and that exempted from her rule lies the wide and free domain of ‘common grace.”\textsuperscript{374} For CR theorists, then, differentiating the realm of soteriological grace from that of common grace is a way of explaining why Christian Scripture and Christian confessions are inappropriate standards for the civil law. Instead, in the realm of common grace, that standard should be the natural law (ie., the moral law).

6-The true church is not isomorphic with the visible, institutional church.

Actually there is much more to be said as to why CR theorists uphold the natural law as the standard for civil law, rather than something more sectarian. For further understanding of the CR position, a brief foray into ecclesiology is needed. For the CR view of church-state relations cannot be properly appreciated without an appreciation, in the first place, of the CR understanding of the church.

\textsuperscript{373} The editor’s preface to Kuyper’s Stone Lectures summarizes the doctrine of common grace as, “that God, in his longsuffering mercy, not only restrains the destructive effects of sin on creation as a whole but also showers on both Christians and nonbelievers the undeserved blessings that lead to development of science, art, and culture.” (Kuyper, Abraham, \textit{Lectures on Calvinism,} xii.)

\textsuperscript{374} Ibid., 115. So Kuyper says in regards to the church \textit{qua} institute. \textit{Qua} organism, however, the church may indeed allow the fruits of special grace to permeate their activities, in every sphere. The church as organism refers to no institution, but to Christians wherever and whenever they might exist. (See discussion of tenet 6.) So understood, Kuyper maintains a clear jurisdictional demarcation between the institutional church and the state.
According to Roman Catholicism, the church is a “visible, palpable, and tangible institution.” Conversely, it was Augustine who, in the context of the Donatist controversy, argued that the true church was not identical with the visible, institutional church. Of Augustine’s ecclesiology, Dyson writes,

It is important to be clear at this point, however, that Augustine’s City of God, ‘a fellowship of godly men’, is not simply coextensive with, or a synonym for, the institutional or earthly Church…The City of God is, as it were, a community which transcends space and time. The elect who are at present alive on earth form only a small part of its citizen body.”

The Augustinian church, then, is not to be identified with any one ecclesiastical institution. Fundamentally it transcends the space-time of world history, manifesting itself in world history in diverse ways. Similarly, Kuyper characterizes Calvin’s church as a “mystic organism” rather than as a “visible, palpable, and tangible institution”.

According to Kuyper, it is Roman Catholic ecclesiology that leads to political repression. On his assessment, “…with Rome the system of persecution issued from the identification of the visible with the invisible church…. The idea seems to be that this identification leads to persecution because it consequently places a premium on maintaining the unity of the tangible, institutional church. But this unity can only be preserved at the price of religious freedom. Speaking of the problem of religious intolerance, Kuyper concludes, “For here lies the solution of the problem: with Rome the system of persecution issued from the identification of the visible with the invisible church, and from this dangerous line Calvin departed.”

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375 Ibid., 12; Dooyeweerd, Herman, *The Christian Idea*, 12–13. Or, at least, such is how the likes of Kuyper and Dooyeweerd perceive Roman Catholic ecclesiology such that they want to distance themselves from it.
376 Augustine, *City of God*, xx.
378 Ibid., 89.
379 Ibid (emphasis mine).
Furthermore, the Roman Catholic church perceives itself as mediator between people and God. Kuyper writes that, on the Roman Catholic view, “the church stands between God and the world”, between “the soul and God.”\textsuperscript{380} *Extra ecclesiam nulla salus.* On this view, participation in the visible, institutional church is the individual’s *means* of eternal salvation.

By contrast, the more modest Reformed view sees participation in the visible, institutional church only as the *fruit* of salvation. The principle that lies at the heart of Calvinist thought is every individual’s “immediate fellowship with God”\textsuperscript{381}, unmediated by priest or church. The principle is “the exalted thought that, although standing in high majesty above the creature, God enters into immediate fellowship with the creature, as God the Holy Spirit.”\textsuperscript{382} Every individual may enjoy “an immediate fellowship of man with the Eternal, independently of priest or church.”\textsuperscript{383} On the CR view, tangible churches are venues in which true believers participate for mutual encouragement; participation in these churches is not regarded as a prerequisite for *being* a true believer, however.\textsuperscript{384}

Thus an important step in understanding why CR theorists defend religious freedom and uphold the moral law as the standard for the civil law is this: there is no one institutional church or confessional standard through which God speaks and saves people in world history. It is no part of God’s design that any visible, institutional church play such a role.

On the other hand, the following tenet brings into sharper focus the complementary parts of the divine design that does exist.

\textsuperscript{380} Ibid., 12.
\textsuperscript{381} Ibid., 15.
\textsuperscript{382} Ibid., 12.
\textsuperscript{383} Ibid., 22; ibid., 47.
\textsuperscript{384} There is certainly a danger here of oversimplifying both Calvin’s and Kuyper’s view of the church, and of presenting these views as more individualistic than they actually were. Immediate fellowship between God and the individual believer, yes, but the church and other believers remain irreplaceable. Cf. Bratt, James D., *Abraham Kuyper: Modern Calvinist, Christian Democrat* (Grand Rapids, MI: William B. Eerdmans Publishing Co., 2013).
7-God governs through two distinct modes. There are “two kingdoms”, not one.

The Roman Catholic ecclesiology just discussed is not only a view of the church; it is, more broadly, a view on how God governs human affairs. According to this view, God's full authority is exercised through the visible, institutional church. But CR theorists reject such a view. In its place, they hold the concept of “two kingdoms”, a concept that echoes the historically prior concept of “two swords”. The political implications of the “two kingdoms” concept will be made clear in discussion of this tenet and the next.

The “two swords” idea is first explicitly used by the fifth-century pope, Gelasius I. The civil government is understood to possess one “sword”; the Christian church possesses another. Under Pope Boniface VIII's later articulation of the two swords concept, both of these swords are originally given to the church; the church then entrusts one of them to the state, making the state’s authority dependent upon that of the church. But in Gelasius’ original formulation, this was not the case. Instead, it is God who directly gives to each institution its own respective sword. This means that each of the civil government and the church have different areas of jurisdiction. For Gelasius, it also means that each should submit to the judgment of the other when one enters into the other’s jurisdiction. However, as a contemporary political theorist - even a Christian one - there are three major reasons why Gelasius' two swords concept is an unacceptable model for church-state relations. One is that Gelasius envisioned his concept as being applied to a basically Christian society. The state and church are not seen as competing, but as cooperating forms of authority, who share the common goal of a flourishing Christian society. The model is, therefore, ill-suited for contemporary liberal democracies marked by religious pluralism. Secondly, secular

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385 Here, too, I court misrepresenting Roman Catholic social thought. But I still have in mind the view stated above that makes the state subject to the church – a view I associated with Roman Catholicism, albeit with qualifications. Those qualifications apply here as well.
and CR theorists alike have come to agree that *even if* a society is predominantly of one religious persuasion, it is nonetheless unjust to give undue preference to that religion in the eyes of the law. I have no idea how the two swords model would apply to, say, a predominantly Muslim society - or whether it would have anything at all to say about how religious and civil institutions ought to relate in such a society. A third reason is simply that it remains quite unclear how the mutual submission of church and state is supposed to work. For instance, how can a state submit to the church in any meaningful sense without compromising the religious freedom of those outside the church? Likewise, how can the religious freedom of those inside the church be preserved if the church is forced to submit to a secular state? Gelasius’ picture of mutual submission does not appear to be quite right if a robust freedom of conscience is to be maintained.

In the history of Christian political thought, the “two swords” concept was followed by that of the “two kingdoms”. The two kingdoms concept is not unique to the CR tradition. In the Reformation period, it was developed by Luther and held by Lutheran and CR theorists alike. However, I’ve noted that Luther took an "Erastian turn" later in life. Consequently, while the two kingdoms concept did not originate within the CR tradition, my account distinguishes the tradition from other streams of Christian social thought in terms of it.

So what does it mean to say that there are “two kingdoms”? It means that God exercises his authority over human beings in two distinct ways. As VanDrunen writes, “According to this doctrine, God rules the church (the spiritual kingdom) as redeemer in Jesus Christ and rules the state and all other social institutions (the civil kingdom) as creator and sustainer, and thus these two kingdoms have significantly different, functions, and modes of operation.”

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387 It was not held by Anabaptists, though.
388 VanDrunen, David, *Natural Law and the Two Kingdoms*, 1; ibid., 13.
One of these kingdoms speaks to the way in which God rules over all people, believers and unbelievers alike, at the present time. In this first kingdom, all human beings are inhabitants. All are aware of and subject to the moral law which is this kingdom's standard. As king, God's law and activities are primarily aimed at preservation. All are subject to the coercive force of legal regimes who have been delegated authority by God to restrain the harmful effects of sin and to sustain human societies.

God rules over the first kingdom as creator and sustainer; he rules over the second as redeemer. The inhabitants of this second kingdom are not all human beings whatsoever; they are only the redeemed who are saved through faith in Jesus Christ. Whereas the law of the first kingdom is the moral law, the authoritative standard for faith and practice in the second kingdom is Christian Scripture. The goal of this second kingdom is hardly mere preservation. Rather, it is no less than the eternal glorification of God and the redeemed being fully satisfied in him. As the opening lines of the WSC state, "Man’s chief end is to glorify God, and to enjoy him forever."

Augustine’s City-of-God/City-of-Man dialectic is a clear forerunner of the two kingdoms model.

Two cities, then, have been created by two loves: that is, the earthly by love of self extending even to contempt of God, and the heavenly by love of God extending to contempt of self. The one, therefore, glories in itself, the other in the Lord; the one seeks glory from men, the other finds its highest glory in God, the Witness of our conscience.

Augustine's two cities model, though, is really only a precursor to the two kingdoms concept - not a token of it - since, as VanDrunen points out, the difference between Augustine's two cities is mainly eschatological, not institutional.

Conversely, in Calvin’s hands the two kingdoms concept was developed with specific institutional functions in mind.

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389 Augustine, City of God, 632.
There are in man, so to speak, two worlds, over which different kings and different laws have authority. Through this distinction it comes about that we are not to misapply to the political order the gospel teaching on spiritual freedom, as if Christians were less subject, as concerns outward government, to human laws, because their consciences have been set free in God’s sight; as if they were released from all bodily servitude because they are free according to the spirit.  

At present, believers are subject to two distinct orders of law - the coercive civil law, and the "law of liberty" that applies to them spiritually. So different are these regimes that one can be free in one while shackled in the other. Regrettably, at the time, Calvin’s political conservatism - his indifference towards democracy and his near-total prohibition of civil disobedience in the face of unjust rulers - was evidently fed by his application of the two kingdoms concept. If Kuyper is right, though, Calvin's institutionally-focused two kingdoms concept nonetheless laid the groundwork for a robust freedom of conscience that would only later be realized.

In regards to Kuyper’s and Dooyeweerd's appropriation of the two kingdoms concept, the situation is somewhat more complicated. This is because when distinguishing between the roles of various social institutions, both speak of several spheres of society – not just two. Hence, political affairs are one sphere and ecclesiastical affairs another, but Kuyper makes clear that family, science, and the arts form their own separate spheres among still others. Similarly Dooyeweerd writes, “For every societal relationship (family, state, church, etc.) God has posited

390 VanDrunen, David, *Natural Law and the Two Kingdoms*, 33.
391 Calvin, John, *Institutes*, 847.
392 James 2:12. (*The Holy Bible*, 1012.)
393 In fact, in Dooyeweerd’s hands, the two kingdoms concept is not only complicated; it is rejected in an important way. VanDrunen insightfully notes that while CR theorists prior to Dooyeweerd posited two kingdoms and denied the need for a specifically Christian approach to matters in the civil kingdom, Dooyeweerd and subsequent Neo-Calvinist theorists have spoken only of one kingdom and affirmed the need for a specifically Christian approach to all aspects of society. Still, this Neo-Calvinist shift certainly does not mean that Dooyeweerd and his followers reject the separation of church and state or reject the right to freedom of conscience. For discussion, see VanDrunen, David, *Natural Law and the Two Kingdoms*, 348–385. This is yet one more reason why I say that some of these tenets are not accepted by all CR theorists.
its own law of life; He created in each of them an inner structure, in its own sphere sovereign."

The spirit of the two kingdoms concept, though, is certainly present in both Kuyper’s and Dooyeweerd's account at least insofar as the political and ecclesiastical are among those spheres whose respective jurisdictions are distinct. While both Kuyper and Dooyeweerd held that religious beliefs should shape Christians’ activity in politics in some sense, they maintained a jurisdictional divide between political and ecclesiastical institutions – between political and ecclesiastical spheres. We shall say more about this notion of “sphere sovereignty” in discussing the next tenet.

The distinction drawn by the two kingdoms concept is one that Schaeffer urges contemporary Christians to continue to make. In the early 1980s, Schaeffer sounds this warning.

The whole ‘Constantine mentality’ from the fourth century up to our day was a mistake…We must not confuse the Kingdom of God with our country.

The “Constantine mentality” confuses the “Kingdom of God” with one or another earthly polity of the present day. In other words, the “Constantine mentality” fails to lay hold of the two kingdoms model. Writing to a predominantly American audience, Schaeffer’s specific target is presumably Christians of a fundamentalist bent who would favor imposing on all Americans the moral dictates of the Bible as the rule of law.

So I conclude that CR theorists have often taken the two kingdoms model (or something akin to it) as a cornerstone of their political theologies.

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395 Chaplin explains, "[Dooyeweerd] holds that social structures (a broad term including institutions, associations, communities, even 'relationships' of many kinds) are conditioned by enduring normative designs ('structural principles') that substantially condition their existence and behaviour. While only appearing at particular points in history, they are nevertheless 'invariant' in the specific ways they contribute to human flourishing.” See Dooyeweerd, Herman, The Christian Idea, 24; Chaplin, Jonathan, Herman Dooyeweerd, 34.

396 For both Kuyper and Dooyeweerd, the operative distinction isn’t so much between the political and religious as it is between the political and ecclesiastical.

Moreover, I believe secular theorists have good reason to consider the concept as well. Although this is not an argument I will presently make at any length, let me briefly sketch a few ways such an argument might go. I recognize that secular theorists will likely regard themselves as having good reason to reject the concept insofar as it is embedded in a religious background. Ultimately, though, I take it that whether or not secular theorists have reason to consider a CR approach - including its two kingdoms concept or some variation thereof - will depend on the overall argument of my dissertation. If a CR framework overall makes better sense of our legitimacy-related CCs than its JL counterpart, then secular theorists will have reason to revisit the two kingdoms concept despite their reservations.

So why might secular theorists have reason to consider the two kingdoms concept? For one, it may be used to underwrite a robust freedom of conscience. This is a goal clearly shared by both CR and JL theorists. Yet, as I shall argue later, it is not clear that leading secular political theories can secure a freedom of conscience of sufficient strength. Rather, it seems that a secular approach would be much more likely to subordinate religiously-based claims to universal law than to grant exemptions in the name of religious freedom. Secular theorists may find this result perfectly unproblematic. But, historically, freedom of conscience has been a basic right of first importance, and insofar as secular theorists continue to accord it this importance they have at least provisional reason to adopt whatever philosophical framework best secures it - even if a CR framework.

As well, it has become axiomatic that justice demands the separation of church and state. Therefore, secular theorists also have reason to consider the two kingdoms concept inasmuch as the concept can underwrite a model of church-state relations that satisfies this demand. To be

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398 Cf. discussion near the end of “3-The Basic-ness of Basic Teleology” in Chapter 9.
399 Such would seem to be the upshot of recent egalitarian defences of religious freedom, such as those proffered by Ronald Dworkin and Cécile Laborde, in contrast to more traditional liberty-based defences.
sure, this, too, is only a provisional reason for considering it. As with the previous one, how strong a reason it is will largely depend upon whether alternative and equally adequate ways of explaining church-state separation can be found. Religious citizens may wonder, for instance - and plausibly, I think - whether secular explanations that successfully separate the state from traditional religions can also separate the state from the "religion" of secular humanism. If not, a CR explanation waits in the wings.

Relatively, there is a specific argument to be made that Rawls' JL, in particular, threatens this church-state separation. Briefly, this argument says that Rawls, in formulating his account of public reason, asks too much of politics. He is not content merely with a liberal politics that prevents sectarian regimes. More ambitiously, he aims at a "loftier politics, one in which citizens are joined in agreement on a vision of justice and achieve some measure of genuine fulfillment from the pursuit thereof". To this end, he looks upon a political conception of justice as an "educator", he describes the relationship among citizens expressed by public reason as one of "civic friendship", and he equates public reason with Rousseau's concept of the general will. However, it is these higher aims that lead Rawls to ask too much of politics, which, in turn, prompts him to be too dismissive of religious views. An alternative approach, such as one inspired by Augustine - or a CR approach, I might add - that is content with lower ambitions for politics may actually better preserve church-state separation.

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401 Ibid., 183.
405 This is Meilaender's suggestion, as the particular contrast he develops is between the politics of PL and the politics of Augustine's The City of God. To be sure, neither the approach of Augustine himself nor that of, say, Calvin himself would preserve our modern sense of church-state separation; both might provide for jurisdictional demarcation between church and state, but not for the exclusion of religious beliefs from
Such are the reasons secular theorists might have for seriously considering the two kingdoms concept. These reasons also reflect the close connection between the two kingdoms concept and the CR model of church-state relations. We now move to that model.

8-The state OUGHT to be separate from the church (and other religious institutions), and each ought to be sovereign within its own domain.

Simply stated, the CR model of church-state relations is this:

The sovereignty of the state and the sovereignty of the church exist side by side, and they mutually limit each other. 406

What distinguishes the CR model of church-state relations from others within the history of Christian social thought is that the CR model strenuously attempts to make neither church nor state subordinate to the other. As Kuyper says, their respective jurisdictions do, indeed, “limit” one another. However, what the model expressly forbids is that either should come under the jurisdiction of the other. 407 They exist “side by side” – on equal footing. As we shall see, it isn't that they never have anything to do with one another; they are not hermetically sealed off from one another. But it does mean that any interchanges between them will be regulated by the jurisdictions that are appropriate to each. On the CR view, there are certain activities over which the civil government properly has authority, and others over which the church properly has authority. Thus, the CR model of church-state relations is not a modus vivendi which CR theorists support only when it is in the interests of Christendom to do so. Rather, they uphold this model on principle. As a result, they are committed to separating church and state even in

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406 Kuyper, Abraham, Lectures on Calvinism, 92.
407 In fact, Dooyeweerd would allow that the church might “come under” the authority of the state. However, it is “under” its authority only when the state acts within its own proper sphere – for instance,
Christian majority societies. The jurisdictional authority of neither arises from popular sovereignty, but from God. Consequently, CR theorists are committed to this model even where popular opinion might direct otherwise.

This is the model of church-state relations enshrined in the historic standards of CR thought. According to WCF 23.3, “The civil magistrate may not assume to himself the administration of the Word and sacraments, or the power of the keys of the kingdom of heaven….“ Heidelberg Catechism 83 explicates the “keys of the kingdom” as “The preaching of the holy gospel” and “Christian discipline toward repentance.” These keys “open the kingdom of heaven to believers and close it to unbelievers”. The civil magistrate tempted to establish a particular religion, then, is prohibited from doing so by these historic standards. From the other direction, WCF 31.5 states,

Synods and councils are to handle, or conclude nothing, but that which is ecclesiastical: and are not to intermeddle with civil affairs which concern the commonwealth, unless by way of humble petition in cases extraordinary; or, by way of advice, for satisfaction of conscience, if they be thereunto required by the civil magistrate.

In parallel fashion, the church official tempted to “intermeddle with civil affairs” is prohibited from doing so.

A well-known account of this CR view on church-state relations is Kuyper's aforementioned notion of "sphere sovereignty". According to this doctrine, society is divided into various spheres each of which is said to be “sovereign” within its own appropriate limits. The autonomy of each sphere is not derived from that of any other, and, as a result, should not be subjected to the authority of any other. “In a Calvinistic sense we understand hereby, that the family, the business, science, art, and so forth are all social spheres, which do not owe their existence to the state, and which do not derive the law of their life from the superiority of the

when the state is enforcing rules of natural justice, or enforcing individual civil rights, or ensuring the
state, but obey a high authority within their own bosom…” These spheres cannot be ranked hierarchically, but are equally autonomous.

It is important to understand the sense in which each of these spheres is taken to be self-governing. It is not in the sense in which the political sphere is self-governing. That is, the rules that govern any of these non-political spheres are not to be legally enforced; such enforcement is reserved for the political sphere. Rather, they are self-governing in that each is properly regulated by principles internal to itself. These principles are a “high authority” – higher certainly than the authority of the state – and they are to be found “within [the] bosom” of each respective sphere. Kuyper characterizes these internal principles as “organic”, as ones that naturally direct human activities within a given sphere. To each sphere belongs a certain “dominion”, a dominion “which works organically; not by virtue of a state investiture, but from life’s sovereignty itself.” Each sphere derives its life from a “vital principle”, and the “liberty” of a given sphere consists in “its being freed from all unnatural bonds, unnatural because they are not rooted in its vital principle.”

Also crucial to Kuyper’s doctrine of sphere sovereignty is the point that none of these spheres is absolutely sovereign. They are autonomous from one another, yes. But all are accountable to God. Kuyper strongly rejects the idolatrous political philosophies of Revolutionary France and of the German Idealists, whom he sees as idolizing popular sovereignty and the state qua embodiment of rationality, respectively.

Kuyper is concerned about the threat that the state, in particular, poses to the autonomy of other spheres. He cautions,

408 Ibid., 77.
409 Ibid.
410 Ibid., 81. This kind of authority contrasts with the “mechanical sphere of state authority”.
411 Ibid., 82.
Neither the life of science nor of art, nor of agriculture, nor of industry, nor of commerce, nor of navigation, nor of the family, nor of human relationship may be coerced to suit itself to the grace of the government. The state may never become an octopus, which stifles the whole of life.413,414

Kuyper insists that churches possess freedom of conscience “not by virtue of state investiture” nor by “the grace of the government”. The state neither gives freedom of religion, nor can it justly compromise it.415

At this point, it is important to note that while the doctrine of sphere sovereignty is principally designed to place limitations on power exercised by the state, it is not that legal force ought never interfere in other spheres. Kuyper identifies three situations in which this legal power might be called upon to intervene. The first is when different spheres conflict with one another; the second is when vulnerable individuals need protection within a given sphere; the third is when intervention is required to maintain the overall unity of the state.416 So we should not caricature the doctrine of sphere sovereignty as somehow making, say, husbands immune from charges of spousal abuse in the context of the family.

However, Kuyper would be at pains to maintain that such legal interventions do not mean that the state is ultimately sovereign over all other spheres. There are specific tasks at which the state is effective, given the state’s modus operandi. Sometimes these tasks will require the state to temporarily intervene in another sphere.417 But the state is hardly responsible for there being

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412 Ibid., 112.
413 Ibid., 83 (emphasis mine).
414 Similarly, Chaplin notes Dooyeweerd's "characteristic insistence that as the state pursues public justice it must honor the unique sphere sovereignty of other structures and not trample upon it". (Chaplin, Jonathan, Herman Dooyeweerd, 37, 219–229.)
415 On this view, legal authorities can protect basic rights, but they are not responsible for citizens' having these rights in the first place. They are akin to Lockean natural rights: rights held naturally and inalienably by persons, which persons hold even prior to the negotiation of Locke's social contract.
416 Kuyper, Abraham, Lectures on Calvinism, 83.
417 This isn’t quite right; I speak loosely when I speak of “temporary” interventions. More precisely, both Kuyper and Dooyeweerd do hold that the state may never interfere in another sphere. That does not mean, however, that the state cannot intervene in the activities of another institution when the latter has exceeded
other spheres. Moreover, there are many more ways in which a state *cannot* permissibly intervene in other spheres than ways in which it can. Although the state’s mandate places certain limitations on what can transpire in other spheres – for instance, as in the aforementioned case of spousal abuse – the sovereignty of other spheres simultaneously places restrictions on what the state can legitimately do.

Such restrictions go both ways. The state cannot swallow up the rest of society. But nor can the church. “However holy religion may be, it must keep within its own bounds, lest, in crossing its lines, it degenerate into superstition, insanity, or fanaticism.”

Doooyeweerd’s justification of church-state separation is similar to Kuyper’s. Doooyeweerd explains that each sphere has its own “typical goal” or “end-function”. These goals or functions are guiding principles, internal to any given sphere, that determine a sphere's purpose and also delineate the legitimate scope of its authority. Reasoning in this way leads Doooyeweerd to separate church and state: “That is to say, neither the state, nor any other non-ecclesiastical societal relationship has as its typical goal the area of faith and confession...For that reason the state may not be tied to a certain ecclesiastical creed, as was long the rule.”

Doooyeweerd, like Kuyper, identifies each sphere as sovereign in the sense that each is properly regulated by an internal logic unique to that sphere according to a divine design.

In other words, the picture painted by both Kuyper and Doooyeweerd is irreducibly *teleological*.

Moreover, the conditions that *justify* the existence of an institution also *limit* the appropriate scope of an institution’s legitimate authority. The church is justified by - its purpose and shape is determined by - the pursuit of spirituality. Consequently, it exceeds its legitimate

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418 Ibid., 137.
scope of authority when it attempts to regulate the pursuit of, say, science or the arts.

Comparably, science is justified by the pursuit of knowledge. It would exceed its legitimate scope if, for instance, it monopolized public resources for the sake of perfectionistic, grandiose experiments. For then science will have indirectly trammeled on other spheres. Such diversion of public funds may inhibit the state's ability to prevent and prosecute injustice, and may inhibit other spheres, too - say, the arts - insofar as a certain amount of public funding is necessary for their flourishing.

How the doctrine of sphere sovereignty justifies church-state separation should now be clear. The state has a particular mandate, a particular founding logic: it is necessary only "by reason of sin". On a CR view, the coercive force of law is, at bottom, needed to restrain sinful human beings from wronging one another. We have grown accustomed in contemporary liberal democracies to the state performing many more roles than this. But from a CR view, whatever other roles a government may play in society, its basic end-goal is protecting citizens from, and prosecuting instances of, injustice and violence. The state’s power ought not be used for purposes beyond this so as to unduly intrude in the affairs of the church (or of other spheres). Likewise, the church ought not compromise the state’s justice mission by co-opting it for a church’s own sectarian purposes.

We have considered the CR model of church-state relations, especially as it has been developed by Kuyper. I now add that everything that has been said about church-state relations may also be said, mutatis mutandis, about the relationship between the state and religious institutions more generally. Within a CR framework, this model of religion-state relations has its roots in an explicitly Christo-theological two kingdoms concept. But Kuyper’s appropriation and

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reworking of this concept illustrate how this concept might be made applicable to the pluralistic conditions of modern liberal democracies. I elaborate.

This model of church-state relations may be generalized once we see that the CR rationale for separating the two, focusing as it does on the intensely personal nature of spirituality, also gives principled reason for separating the state from all religious institutions. I believe this is what Kuyper saw. If, ex hypothesi, spirituality requires individuals' personal, genuine commitment, such that the coercive imposition of any institutional church is spiritually ineffective (and unnecessary besides), it stands to reason that the coercive imposition of any other religious institution is also spiritually ineffective. And, thus, if the internal logic of the spiritual sphere excludes the coercive imposition of all religious institutions, all religious institutions should be separate from the state given the state's coercive modus operandi. As Kuyper might say, wedding the state to any religious institution - not just a Christian one - stifles spirituality insofar as genuine spirituality requires an uncoerced, voluntary, personal response.

Hence, my suggestion that the CR model of church-state relations can speak to our current conditions of pluralism, as not only a model of church-state relations but as a model of religion-state relations.

There is one more general tenet of CR social thought that we should briefly consider. I have tried to present all of the preceding tenets in as logical a flow as possible. The final tenet somewhat breaks with this flow. Nonetheless, it seems a fitting place to end for it serves as an umbrella tenet that extends over all the others. In fact, one might reasonably think it ought be presented as the first tenet, not the last. However, for the sake of presenting the CR tradition in a way that not only is faithful to the tradition's own terms, but that also (I hope) makes it as

420 Readers may want to compare Kuyper's doctrine of sphere sovereignty explained here with Walzer's idea of "complex equality" [Michael Walzer, Spheres of Justice: A Defense of Pluralism and Equality (New York: Basic Books, Inc., 1983)], though I shall not take the time to do so.
9-God is ultimately responsible for establishing human governments. The ultimate reason for obeying civil authorities is that God has established them.

The classic Scriptural statement of this conviction is found in the opening verses of Romans 13. There, the apostle Paul writes,

Let every person be subject to the governing authorities. For there is no authority except from God, and those that exist have been instituted by God. Therefore whoever resists the authorities resists what God has appointed, and those who resist will incur judgment.²²

It is clear this view is widely adopted by theorists working within the CR tradition.²² God ultimately lies behind human governments.

In what sense?

Paul, Augustine, Calvin, and the theorists of the CR tradition are obviously all aware of the various mechanisms by which real-world rulers have come to power in human history. Some have come to power through military conquest; some through royal birthright; some through democratic elections; others in yet other ways. Whatever the claim is taken to mean, it is clearly not a denial of these brute historical facts. The objector will ask why noting these historical facts is not sufficient for explaining the rising and falling of human governments. What explanatory gains are made by positing a divine hand operating in the background of these historical events? I certainly feel the force of the reductionist impulse that drives this question; I find myself asking the same question.

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²² Romans 13:1-2. (*The Holy Bible*, 948.)
Various answers may be given, but let me present just one that I personally find plausible and that is traceable to the CR tradition. We again turn to Kuyper.

According to this answer, it is God's establishment of governments that makes it morally permissible for those in power and those under power - rulers and subjects, office-holders and average citizens - who are otherwise free and equal, to occupy social positions that give them unequal amounts of political power. Without God establishing governments in this way, Kuyper believes it would never be morally permissible for some humans to exercise coercive authority over others.

The reality of coercive legal regimes, in which people are inevitably forced to comply with social arrangements at the behest of others, is prima facie incompatible with the conviction that people are free and equal. The question then becomes how to reconcile individuals’ freedom and equality with the reality of the restrictions and unequal political power they experience under coercive legal regimes. Explaining the foundations of political power in terms of a hypothetical contract is one attempt at such a reconciliation. But Kuyper strongly rejects contractarian proposals, saying that they are no solution at all. Echoing a Humean line of objection, he essentially asks, How can present persons be under an obligation in virtue of a contract made by past persons?

Kuyper sees the divine establishment of the state as the needed replacement for the fiction of the social contract. If it is God that subjects some humans to the political rule of others, then the freedom and equality of all can be respected while civil government is preserved. As Kuyper explains it, this is because in submitting to a civil government, a subject or citizen is ultimately submitting themselves to God’s will, and not merely to the will of another human being. While it may be an affront to human equality and freedom to be coercively subjected to
the authority of another with whom one is equal, it is no disrespect to an individual’s dignity and freedom to submit to a divine authority that represents a higher order of being. In saying all this, Kuyper is not prescribing servile acquiescence in the face of whatever cruel or unjust edicts a human ruler might issue. Rather, he is saying that, in principle, the office of political ruler - with its unequal political power - can be reconciled with the real moral equality of the human in power and the human under power.

However the claim that God establishes governments is understood, a corollary of this claim is that every person is obligated to generally obey governments. Exactly what this corollary amounts to is also marked by a degree of ambiguity. It is certainly not an unqualified obligation to obey the laws of the land - that is, not an obligation to obey no matter what the laws might be. For instance, Augustine directs his audience to generally comply with the civil government’s laws unless doing so compromises the ability of Christians to worship God rightly. Even Calvin – who comes as close as any CR theorist to prescribing a truly unqualified political obligation – includes a similar qualification. So in exactly what sense are people under a general obligation to “be subject to the governing authorities”, according to CR theorists? Is it possible to submit to the government while engaging in peaceful civil disobedience? If there are conditions that justify civil disobedience - or even the taking of more extreme measures - what are they? As with a more precise explanation of the sense in which civil governments are established by God, so more precise answers to these questions will vary among CR theorists. Again, though, the CR tradition is marked by consensus on the general point:

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423 Kuyper, Abraham, Lectures on Calvinism, 69.
424 Quite to the contrary, Kuyper is a great champion of constitutionalism, with the legal checks against abuses of political power that constitutions provide. He agrees with Groen van Prinsterer’s assessment that, “In Calvinism lies the origin and guarantee of our constitutional liberties.” See Ibid., 66; ibid., 29, 80, 155.
425 Augustine, City of God, 947.
426 Calvin, John, Institutes, 1520–1521.
citizens are generally obligated to submit themselves to the governments under which they live. They are obliged to do so because these governments have been ultimately established by God himself.427

Once again, it is worth distinguishing the CR position from that of Filmer and his "divine right of kings" view. According to this view, monarchs, such as those who reigned over Europe for the millennium stretching from the Middle Ages to the Early Modern period, were believed to uniquely represent God on earth such that their power was virtually unlimited. Challenging the rule of monarchs, even despotic ones, was immoral, and anti-monarchist democratizing movements were contrary to the divine will. By contrast, while CR thinkers accepted that monarchs ruled by divine mandate in some sense (as they’d say of all regimes), they took issue with the scope of that mandate and with the circumstances in which that mandate could be challenged. On these matters, CR thinkers decisively broke with “divine right” theorists.

However, CR theorists do not interpret Romans 13 as applying to any one form of government. Whether monarchist, democratic, aristocratic or otherwise, the passage implies that all governments are instituted by God. Moreover, they do not interpret it as saying that any particular person is entitled to rule as a matter of birthright.

The pressing question remains: if God is ultimately responsible for the rising and falling of all regimes, what about evil and unjust regimes? With this last tenet, are CR theorists saying that God is ultimately responsible for raising up even wicked political rulers - the Adolf Hitlers and Pol Pots of the world?

It may come as a surprise that CR theorists down through the ages have tended to answer affirmatively. God's sovereignty is such that, in some sense, he is ultimately responsible for the

427 Neither the question of how far the obligation to comply extends, nor the question of what action is permitted or required when the obligation ends, are questions that I address at length in this dissertation.
rise of all human governments, good and bad alike. I presume this point will be utterly repugnant and inscrutable to secular readers. It may also be the aspect of CR social thought that CR theorists themselves most struggle to make sense of. Perhaps Augustine says all that can be said by a CR theorist:

God, therefore, the author and giver of happiness, because He is the only true God, Himself gives earthly kingdoms to both good men and bad. He does not do this rashly, or as it were at random; for He is God, not Fortune. Rather, He acts in accordance with an order of things and times which is hidden from us, but entirely known to Him.428

Ultimately CR theorists' foundational commitment is to the sovereignty of God - a commitment they maintain even when it leaves them the challenge of reconciling unjust regimes with Romans 13.

The foundational commitment of CR theorists is to the sovereignty of God. Though I've left it to the end to emphasize this point, the whole of the CR tradition cannot be understood without it. Tenets such as the two kingdoms concept and sphere sovereignty lead CR social theorists to carefully distinguish between the institutional roles of churches (and other religious institutions) and states in the real world. Yet they maintain that a divine design is the ultimate normative justification for this separation, and the question is raised whether or not philosophically we can adequately account for this separation any other way.

Conclusion

This may be an unsatisfactory place to conclude our survey of the general tenets of CR social thought, given the unanswered questions raised by this last tenet. Both the proposition that God has instituted governments and the proposition that citizens consequently have a general obligation to obey governments stand in need of clarification. Exactly how does God institute

But these are certainly relevant questions, worthy of further investigation. For what attention I do give to these issues, see “1.b) What the Question Is Not” in Chapter 2.
governments? Our modern, philosophical reductionist impulses rebel against this seemingly superfluous suggestion. And how far does the general obligation to obey governments extend? Our contemporary liberal, individualist political sensibilities cast the very notion of such a general obligation into doubt.

In conclusion, however, these questions left open by the last tenet raise an important point. That is, the foregoing tenets merely represent a general background, and any more specific theory built up out of them will need to take up more idiosyncratic positions on a range of relevant issues. As such, particular CR theories will differ from one another on many issues. They will do so even while they agree generally on all, or at least most, of the foregoing tenets. Just as various more specific liberal theories can be built up from the general background of secular liberal political philosophy, so various CR theories can be built up from the CR tradition’s more general background.

More particular theories may address themselves to one of any number of topics in political philosophy, whether multiculturalism, environmental justice, immigration – or legitimacy. In the chapters to follow, that will be my task: to address the issue of legitimacy with the conceptual resources from the CR tradition. In particular, I shall attend to my guiding question by using these resources to develop a higher-order approach to understanding what legitimacy is about. By working up such an approach, I hope to partially vindicate the suggestion that political theorists ought turn to the CR tradition to develop an alternative to JL. I will then more fully make the case for CR legitimacy in Part III, wherein I will argue that CR legitimacy can succeed at precisely those points where JL leads to the unacceptable consequences canvassed

428 Augustine, *City of God*, 184.
429 To reiterate this question, *What is legitimacy about?* What is the right framework for thinking about legitimacy - for conceptualizing, integrating, and appraising specific legitimacy conditions?
in Part I. In sum, I have hereby sketched the outlines of a tradition that I believe can help us toward a better understanding of real-world legitimacy.
Chapter 7

A CR Theory of Legitimacy

Introduction

So what might a CR framework for legitimacy look like?

As I say, there is no one answer to this question. A variety of theories of legitimacy may be reconstructed out of the general tenets outlined in the previous chapter. Depending upon which concepts are emphasized, and how more specific questions are answered, CR accounts of legitimacy will vary from one another. The account I outline in the present chapter, then, is not intended to be the definitive account of CR legitimacy. But it is one which, I believe, represents some of the best insights of the CR tradition and helps us make sense of our convictions about real-world legitimacy.

The core insight of CR legitimacy is that legitimacy is about preventing basic wrongs. As per tenet 4, legal coercion is necessary "by reason of sin". If the core principle of JL is its principle of public justification, this is its CR counterpart.

In explicating this central insight, my CR theory of legitimacy advances three ideas. Of the three, the first two are of especial importance. I assign less importance to my third critique of JL (Chapter 5), and here I also give less attention to the corresponding third idea of CR legitimacy.

430 Especially see my discussion of tenet 9 for illustrations of how the general CR background leaves open various questions that stand in need of more specific answers.
431 Despite what I say here, for simplicity's sake I will henceforth speak of my CR account as if it were the CR account; I won't perpetually qualify my account as merely one possibility among others. That said, the reader should remember that, in fact, my account is only one possibility among others. One of my dissertation's goals is to invite further consideration of how drawing upon the CR tradition might yield other, and hopefully still better, understandings of political legitimacy.
First, legitimacy-conditional wrongs are *objective* wrongs. That is to say, the wrongs prevention of which is necessary for legitimacy are understood to be universal wrongs, even if their wrongness is unevenly recognized. Second, legitimacy-conditional wrongs are determined in light of a *teleological* account of basic human well-being. The idea here is that we cannot give an adequate philosophical account of the interests that correspond to basic rights without a relatively clear picture of what full well-being consists in. Third, these basic wrongs constitute an "*exogenous*" moral standard - a standard based outside of humans' choices.

Preventing basic wrongs that are objective, teleological, and exogenous. Other CR theories of legitimacy may have different points of emphasis, but these three - and especially the first two - are key to my approach. In time, I hope to show that they lend themselves to a more "clear and uncluttered" understanding of what makes for legitimate real-world legal coercion.\(^{432}\)

Putting them together, the approach I will reconstruct from CR premises may be summarized as follows. Legitimacy is a function of preventing basic wrongs: that is, preventing wrongs that are a) objective and b) determined in light of a teleological account of basic human well-being, and which also c) are fruitfully understood as constituting an exogenous moral standard.

What will I do in the chapter at hand? Largely three things. One task is to simply explain the account. A second is to show how this account of legitimacy can be built up out of the premises outlined in the previous chapter. What makes this theory of legitimacy a CR theory of legitimacy? Third, I will provide some initial argumentation to help motivate the plausibility of the account. If I can at least provisionally show an account reconstructed from the CR tradition to be philosophically defensible, then I will have made some headway toward my goal -

\(^{432}\) As previously mentioned, obtaining such a view of political legitimacy is a goal I share with Rawls. (Rawls, John, *Justice as Fairness*, 176.)
albeit secondary goal - of advancing the CR tradition as a source of conceptual insights to be mined by political theorists. While CR theorists might endorse the major ideas I highlight on religious grounds, the effect of my initial argumentation is to provide secular corroboration of these CR findings. Note also that this argumentation will proceed without reference to JL. While the considerations I adduce are admittedly under-developed, I will be content so long as they lend *prima facie* plausibility to the CR account. Ultimately, I will attempt to vindicate the CR account by arguing that CR legitimacy succeeds precisely at those points where JL fails. Making that argument, however, is the mission of Part III.

So in regards to the key concepts of CR legitimacy, I hope to perform each of these three tasks: explanation, citation, and initial argumentation. This is *explanation* of the concepts; *citation* of the CR premises that source the concepts; and *argumentation* intended to give the concepts at least initial plausibility. I shall begin with the central CR insight, then move to discuss the three ideas that help unpack it.

What do I *not* intend to do in this chapter? For now, I shall not emphasize points of difference between CR and JL legitimacy. Differences will undoubtedly become evident to the reader, but my present purpose is simply to present a CR account; it is not to systematically compare-and-contrast it with JL or any other alternative. Also, I will not be producing a checklist of legitimacy conditions that can be used mechanically for categorizing legal coercion as legitimate or illegitimate in the actual world. This lack of such a checklist is in keeping with the higher level of abstraction at which my guiding question is pitched. A CR account of this higher-order sort will, I believe, shed much philosophical light on our first-order convictions about real-

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433 As explained earlier, my primary goal is progress on the substantive normative question of political legitimacy. My secondary goal, which I state here, pertains more to comparative political theory. See the subsection “Clarifying My Aims” in the Introduction.
world legitimacy. But this hardly means that it will readily settle all disputes about putatively legitimate legal coercion in particular real-world contexts.435

Now, then, how might the CR tradition illuminate the issue of political legitimacy?

1-The Central Insight: Legitimacy is about Preventing Basic Wrongs

So as to appreciate the distinctiveness of the CR approach, let me begin by briefly rehearsing some introductory discussion. The concept of legitimacy is one regularly deployed by moral agents, and yet it is not one that is well understood. The history of Western political philosophy is replete with theories that either theorize legitimacy in ways we now patently reject and or that fail even to distinguish legitimacy from justice. For instance, Aristotle infamously held that some people are born natural slaves; freedmen who rule over them do so legitimately as a kind of natural right.436 For much of Western history, legitimacy was viewed as a matter of royal birthright. On Sir Robert Filmer's particularly notorious account, those who share in this royal bloodline enjoy a "divine right" to rule in virtue of their genealogical link with a primordial Adam. Meanwhile a view such as utilitarianism seems not to distinguish between justice and legitimacy at all. Utilitarianism directs us to maximize utility. Doing so may require a coercive state - though not necessarily depending on how one performs the hedonic calculus - and, if so, there is no principled limit to the legally coercive measures that may be taken in the pursuit of utility maximization.437 Tying legitimacy to actual consent was radically egalitarian for its time, but is roundly rejected by contemporary theorists given its utter impracticality. Various other

434 And why retain the broader CR tradition at all if its insights can seemingly be articulated and defended in secular terms? I take up this question at some length in Chapter 11, "The CR Approach: Lingering Anxieties and Future Directions".
435 And nor does JL, it should be noted. As I say, both JL and CR legitimacy are pitched at this higher level of abstraction.
436 See Aristotle's Politics, Book I, Chapter V.
approaches would have us explain legitimacy in terms of promoting one or another perfectionist state of affairs - whether Marxist, Thomist, or otherwise. However, we are now sure that it is unjust - and illegitimate - to impose any one comprehensive view, secular or religious, on others. Neither do I know how, say, a Marxist or Thomist would countenance the distinction between justice and legitimacy in any case.

JL has stepped into this foray as a possible framework for better understanding political legitimacy. However, as we saw in Part I, the JL framework leads to various unacceptable consequences. I believe these unacceptable consequences reflect that JL, too, has failed to capture the underlying logic of our legitimacy-related CCs. So, as I say, the concept of legitimacy remains poorly understood.

Where, then, are we to start?

According to the CR tradition, we should begin by appreciating the problem to which the coercive state is a response. The problem is this: in the absence of the coercive state, people are free to harm one another with impunity in the most damaging and degrading ways. At the hands of their fellows, people may be physically assaulted or killed. They may be deprived of the material necessities of life. They may be forcibly enslaved, or forced to act against their most conscientiously held convictions. In sundry ways, both their dignity and interests may suffer enormously. Those who are powerful - physically, economically, socially, intellectually - may be able to largely prevent themselves from being so harmed, and, if harmed, may be able to effectively press their case against their aggressor. But, absent the coercive state, those who are weak are especially vulnerable, with no means of effective redress at their disposal. And as Hobbes well noted, even for those who are powerful, the difference between them and weaker

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437 Hence, the criticism that Mill's ethics aren't compatible with his politics, the aggregate utility-maximizing logic of his ethics with the sort of individual rights he defends in *On Liberty*. 
persons is never so great that the stronger is invulnerable to the collective aggression of the weaker. Thus the state, in the first instance, is a way of preventing individuals from suffering these basic wrongs and of upholding their cause when they do suffer. Locke was right: absent the state, individuals cannot act as their own judges, juries, and executioners but in an unfair and ineffective way. So, coercive public institutions exist to uphold laws that will protect the basic dignity and interests of all, both the relatively strong and the relatively weak. In other words, they exist to prevent basic wrongs.

Thus, according to the central thrust of CR legitimacy, legitimacy is a function of preventing basic wrongs. But do the comments of the previous paragraph really show this? After all, the modern state plays a variety of roles in society, and why not think that serving one of these other functions might also legitimize the state?

To see why, let's follow CR thought in further probing the most basic problem to which the coercive state responds. Given the plethora of roles assumed by the modern state, it is easy to lose sight of what this problem is. Modern states administer various social programs - such as public education, healthcare, unemployment insurance, and pensions - thereby redressing various social ills. Modern states also serve important coordinating functions and resolve collective action problems. For instance, they're largely responsible for building and maintaining society's infrastructure, they regulate traffic, and they manage public goods such as water and the natural environment. Furthermore, modern states facilitate the democratic participation of all citizens. Principally they do so by giving each person a vote. They also do so by making elected offices open to all without qualification, by electoral reforms designed to give equal weight to each person's vote, by campaign finance reform, and so on. Thus, they reduce a society's democratic deficit.
However, that basic wrongs to persons' interests and dignity are the primary problem to which the state responds, rather than one of these other problems, can be seen in the following way. Let us ask ourselves, Would any one of these other reasons by itself suffice to legitimate the legal coercion of free-and-equal persons? If it were only to improve the health outcomes of third parties, say, would it be legitimate to use legal coercion against someone who wanted no part of a collective healthcare system? Or if it were only to improve the literacy rates of third parties, would it be legitimate to legally coerce those who wanted to opt out of a collective system of education? If it were only for the purpose of maintaining infrastructure, would it be legitimate to legally coerce those who'd rather live "off the grid", as it were? Or if it were only for the sake of democratizing measures, would it be legitimate to coercively enforce these democratizing measures while leaving unmet the more fundamental demands generated by citizens' interests and dignity?

Given that others are my free-and-equal peers, I believe the answer to all of these questions is No. It seems to me that, by themselves, providing social services, securing public goods, and pursuing democratization, are all insufficient reasons for forcibly incorporating someone into a scheme of cooperation they want no part of. If this is right, familiar explanations are available. One is that individuals, who ought only be treated as ends-in-themselves, possess rights that cannot be permissibly traded off against collective welfare. Another might be that the great moral importance of recognizing individuals as dignified agents with a prerogative to lead their lives as they see fit is not easily outweighed by the countervailing moral importance of social services, public goods, and democratization.

438 According to "the second formulation of Kant's categorical imperative...one should treat humanity never merely as a means, but always also as an end. If you force someone to serve an end that he cannot share" - ie., if you trade off individual rights against collective welfare - "you are treating him as a mere means - even if the end is his own good, as you see it." (Nagel, Thomas, “Moral Conflict,” 223 n8.)
Conversely, if it were *only* for the sake of preventing basic wrongs - such as physical assault, material deprivation, and oppression - would it be legitimate to legally coerce unwilling others? In this case I believe the answer is surely Yes.\textsuperscript{439} Such wrongs constitute violations of basic rights, rights that are basic in virtue of the fundamental importance of the interests and dignity they protect. Likewise, coercion of rights violators in such cases is justified in terms of the fundamental importance of these interests and dignity as well. In discussing the idea of basic teleology below, I return to the connection between the *basic-ness* of basic wrongs and the legitimacy of coercion.

If I have answered the foregoing questions correctly, we can see that, in the first instance, coercive legal institutions are, indeed, a response to basic wrongs. They do not primarily respond to illiteracy, ill-health, or poverty *as such*,\textsuperscript{440} nor to collective action problems, nor to a democratic deficit.\textsuperscript{441} By itself, righting basic wrongs suffices to legitimize legal coercion. By themselves, none of the other tasks undertaken by modern states do. In other words, preventing basic wrongs is a *sufficient condition* for state legitimacy, unlike any of the other tasks when considered singly. In fact, what this argument also shows is that none of these other tasks are either sufficient or even *necessary* conditions for legitimacy. If preventing basic wrongs can, by itself, suffice for legitimacy, it follows that none of these others are necessary. Now, strictly speaking, this argument does not show that preventing basic wrongs is also a necessary condition

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\item \textsuperscript{439} I recognize that, in answering these questions, one may give greater weight than I have to values other than freedoms *qua* absence of state interference. A different weighting of competing values may yield constraints on legal coercion that are less strict. However, I stand by my answers to these questions. In my judgment, it would be illegitimate to legally coerce others simply for the sake of such goods as health or education, collective efficiencies, or democratic institutions. While I retain some doubt about my answers, I think my judgment is at least more plausible than its contrary - that coercion exclusively for the sake of such goods is legitimate - and has a great deal of intuitive pull.
\item \textsuperscript{440} Though if this illiteracy, ill-health, or poverty is a result - in whole or in part - of suffering basic wrongs at the hands of others, then part of the state's response to basic wrongs will involve promoting literacy, health, and wealth redistribution. But then the state is responding to illiteracy, ill-health, or poverty *qua* basic wrong, and not to these problems *as such*.
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for state legitimacy; while none of these other tasks by itself suffices for legitimacy, perhaps some combination of them would. I suspect, though, that further reflection upon our legitimacy-related CCs would also bear out that preventing basic wrongs is a necessary as well as a sufficient condition. In sum, my present argument has been this: since preventing basic wrongs - and only preventing basic wrongs among the state's various roles - suffices to legitimize the existence of the coercive state, the fundamental problem to which the coercive state responds is the need to right these wrongs.

In fact, to appreciate the full force of this argument, we should imagine governments playing one of these roles while failing in the others. Only in this way can we isolate the relevant variable in the most vivid way. I already had us do so for a regime that pursues democratization while leaving more fundamental demands - say, rights to material sustenance or due process - unmet. Now imagine a state that coercively taxes for redistribution, but fails to protect basic rights. Or imagine a state that coercively solves public goods problems, but fails to protect basic rights. It seems quite clear to me that such regimes are illegitimate. Now imagine one that struggles to promote social welfare, solve collective action problems, or give everyone a democratic say, but protects individuals' most fundamental rights. It may be less obvious that such a regime is legitimate, but surely such a regime at least has a much stronger claim to legitimacy than the others this paragraph imagines. This further step in the argument, then,

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441 Cf. Arneson, Richard J., “The Supposed Right to a Democratic Say.”
442 For instance, no matter how good a society’s infrastructure, public healthcare system, and democratic procedures might be, would its government be legitimate if it failed to protect such basic rights as freedom from slavery or freedom of religion? I think not.
443 Recall that I take the concept of legitimacy to represent a single threshold with three interlocking implications. One of these is that, above the legitimacy threshold, the very existence of coercive legal authorities is legitimate; below, it is not. This is what I earlier called the "in principle permissibility" of legal coercion. And this is the implication of legitimacy in view here. As I explain in the subsection, "What the Question Is Not", in Chapter 2, the threshold also has implications for when we are justified in exercising coercive political power over others and for when we are obligated to submit to the legal
reinforces the conclusion that the problem to which the coercive state primarily responds is basic wrongs.

This argument corroborates what I see as the CR tradition's central insight into the issue of legitimacy, an insight offered by tenet 4 as presented last chapter. The problem to which legal coercion responds is that people are wont to suffer basic wrongs at the hands of one another; or as it's put in the CR tradition, legal coercion is necessary "by reason of sin". Sinful human beings are wont to harm one another in various ways, both by commission and omission. Sometimes they actively mistreat one another through violence, deceit, unfairness, and disrespect. Other times they deprive one another of the goods and opportunities they're due, or fail to act on behalf of others when they should. The coercive state, then, is a means of protecting citizens from suffering such harms, and of upholding their cause when they do. As Romans 13 says, civil authorities "are not a terror to good conduct, but to bad". They exist as "God's servant for your good". How do they promote our good? By "bear[ing] the sword" for the purposes of carrying out "wrath on the wrongdoer". I do not think we should interpret this passage as saying that it is illegitimate for the state to perform any functions other than preventing and prosecuting basic wrongdoing. Rather, as the CR tradition seems to have interpreted it, what this passage confirms is the fact that the primary, first, or most foundational function of the coercive state is the prevention and prosecution of basic wrongs.

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coercion to which we are subject. These three implications are conceptually distinct, but, practically speaking, triggered by one and the same normative threshold - the threshold picked out by legitimacy. 444 "So whoever knows the right thing to do and fails to do it, for him it is sin." James 4:17. (The Holy Bible, 1013.)

445 These last comments are intended to suggest that, despite the negative character of CR legitimacy's central insight - preventing basic wrongs - I do not see CR legitimacy as being incompatible with the legal protection of positive rights and with the provision of social programs. For basic wrongs may take the form of failures to provide certain essential goods persons are due, and not only acts of aggression against persons' negative rights.

446 The Holy Bible, 948.
Suggested by the CR tradition, and corroborated by the foregoing argument, the controlling idea of my CR framework for legitimacy is that legitimacy is about the prevention of basic wrongs. As I said, I will explicate this central insight in terms of three further ideas - basic wrongs that are objective and teleological, as well as exogenous. I shall now explain, cite, and briefly argue for each.

2-The Objectivity of Legitimacy-Conditional Basic Wrongs

In theorizing legitimacy as a function of preventing basic wrongs, the wrongs CR legitimacy has in view are objective wrongs. The sense of objectivity invoked here is the same as that throughout. Holding these harms to be objective wrongs is to say that all people are bound by a moral duty not to commit them, whether or not individuals and societies recognize this duty. Thus, if oppression is an objective wrong, a society is wrong to oppress a minority group whether or not they think they have sufficient moral reason for doing so. If withholding basic material provisions from needy individuals is objectively wrong, it matters not that some will disagree in the name of property rights. Similarly, if failure to give affected parties political voice is an objective expression of disrespect, then it is wrong no matter the prevailing prejudices, cultural customs, or political precedents.

In positing the objectivity of legitimacy-conditional basic wrongs, the CR tradition is clearly opposed to what might be called the "social recognition" thesis. According to this thesis, "all statements about the existence of rights presuppose the existence of institutions or social practices governed by rules, rules that can be viewed as conferring rights on individual members of the community." But the CR position presupposes that social recognition is not required for

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individuals to possess basic rights. In supposing that individuals can be wronged even where social institutions do not exist to formally recognize or prosecute these wrongs, CR theorists presuppose an institution-independent moral standard by which we can judge that individuals have, indeed, been wronged. As we shall come to shortly, CR legitimacy equates basic wrongs with violations of basic rights. Thus, basic rights are institution-independent just as basic wrongs are. Institutions are needed to protect rights, not create them, just as institutions may prevent basic wrongs but do not make acts such as theft and oppression wrong. Quite independent of institutions, people are wronged when they suffer such harms, or when they are denied such freedoms as freedom of conscience. Such is the upshot of these wrongs being objective.

In what ways does the CR tradition suggest the objectivity of legitimacy-conditional basic wrongs? The doctrine of the *Imago Dei* is one reason why the CR position rejects anything like the social recognition thesis. The fact that each person is created in God's image means that each is of equal and inestimable worth. It is this fact - not social or institutional recognition - that confers on each person a certain inviolable dignity, such that when we encounter them their God-given value demands that they be treated and respected in certain ways. Otherwise, they are wronged. Thus, the *Imago Dei* provides grounds for structural critiques of whole social systems and legal systems, both past and present, domestically and internationally. It can give, and has given, philosophical justification to powerful movements of social reform.448 The *Imago Dei* is

448 For instance, Richard Wayne Wills argues that the *Imago Dei* was central to the Civil Rights Movement. A quote drawn from a sermon entitled, "The American Dream", given by Martin Luther King, Jr., is telling: "You see, the founding fathers were really influenced by the Bible. The whole concept of the *imago dei*, as it is expressed in Latin, the 'image of God,' is the idea that all men have something within them that God injected. Not that they have substantial unity with God, but that every man has a capacity to have fellowship with God. And this gives him a uniqueness, it gives him worth, it gives him dignity. And we must never forget this as a nation: There are no gradations in the image of God. Every man from a treble white to a bass black is significant on God's keyboard, precisely because every man is made in the image of God. One day we will learn that. We will know one day that God made us to live together as brothers and to respect the dignity and worth of every man. This is why we must fight segregation with all of our nonviolent might."
possessed universally, and so the moral duties it generates obtain universally as well.449

Moreover, the moral law of which the CR tradition speaks - a law both that is written on the conscience of every person and that properly serves as the standard for civil law - is a law given by God. As such, it is an objective law. It is promulgated by God who is rightfully sovereign over all persons, and thus we are bound by this standard whether or not we recognize its dictates as binding.

I've already marshaled evidence indicating that we believe basic rights to exist objectively.450 There I pointed to various historical figures and experiences that, in our praising or condemning them, reflect the objectivity of moral rights and wrongs. Simply reminding ourselves of these points should suffice by way of initial argumentation for this first premise of CR legitimacy. In condemning the injustice of religious intolerance, European imperialism, and slavery, and in praising social reformers such as William Wilberforce and Martin Luther King, Jr., we affirm the existence of moral norms that transcend cultural and political contexts. At least insofar as we hold ourselves to be rational in making such value judgments - morally evaluating persons and events from contexts not our own - we presuppose the existence of rights and wrongs that apply across contexts as well. There certainly is nothing novel about my argument here for the objectivity of moral duties. But I state it nonetheless to establish that legitimacy-conditional wrongs - which typically concern especially serious wrongs of the sort we're prepared to condemn even when they occur cross-contextually - obtain objectively.

As I shall explain later, considered by itself, the implications for legitimacy that we can draw from this first idea - the objectivity of legitimacy-conditional wrongs - are actually fairly

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449 For further discussion of how, from a more general Christian viewpoint, the Imago Dei relates to our moral duties toward others, see Moreland, J. P., *The Recalcitrant Imago Dei*. 

limited. For their objectivity cannot, by itself, explain why legitimacy-conditional wrongs are legitimacy-conditional. There are certainly objective wrongs which it seems inappropriate to prevent by legal force (eg., a broken promise between friends); and there may also be objective wrongs which, while being fit objects of legal enforcement, likely needn't be prevented as a condition of legitimacy. So the question is raised: which objective wrongs are legitimacy-conditional? How are we to discriminate between those which are and those which aren't? Answering these questions requires the second big idea of CR legitimacy, that of basic teleology.

Before moving on to that second idea, though, I should emphasize that the objectivity of legitimacy-conditional wrongs is a necessary part of an explanation of real-world legitimacy conditions. Even though, by itself, it is insufficient to explain them, their objectivity is nonetheless necessary to explaining them. For now, I simply preview the explanation given in Chapter 8 of why objectivity is necessary (even if insufficient): were legitimacy-conditional rights and wrongs not objective, then legitimate legal coercion could only come by consent; but their objectivity at least makes it possible for legal coercion absent consent to be legitimate, as we sometimes believe it is.

3-The Basic Teleology in Legitimacy-Conditional Wrongs

The general proposition that legitimacy-conditional wrongs are objective leaves much to be filled in. As I've just mentioned, there is the question of how we are to discriminate between those objective wrongs that are legitimacy-conditional and those that are not. Then there is also this question: What is the content of these legitimacy-conditional wrongs? In fact, in regards to the latter issue, there is a still more fundamental question. Whence are to we to derive the content of these wrongs? In other words, philosophically speaking, what are the appropriate terms in

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450 See "2.c) Asymmetry #3: Objective Rights vs. Rights-by-Consensus" in Chapter 4.
which to conceive of, and debate, the content of first-order legitimacy-conditional wrongs?

Given it is a general framework for understanding legitimacy that we're after, I am not as interested in fixing the specific content of legitimacy-conditional wrongs as I am in explaining how we might go about doing so. So the objectivity postulate leaves two gaps which I am presently concerned to fill in: how we are to discriminate between objective wrongs that are and aren't legitimacy-conditional; and how, philosophically speaking, we are to go about understanding and identifying the content of these wrongs.

The second big idea of CR legitimacy - that of basic teleology - speaks to both these issues. I shall address the two issues in turn.

a) How to Distinguish Legitimacy-Conditional Wrongs from Other Wrongs?

As to the first, how are we to discriminate between wrongs that are and aren't legitimacy-conditional? So far, with its central insight, the CR tradition has supplied us with a general understanding of what legitimacy is about, framed in terms of a negative task: legitimacy is about the prevention of wrongs. The coercive state is necessary "by reason of sin". And, with its affirmation of the objectivity of these wrongs, it has helped us make sense of our practice of cross-contextually denouncing certain regimes as illegitimate. Now how might it help us here in discriminating between wrongs that are and aren't legitimacy-conditional?

I believe that tenets 2 and 5 of the CR tradition point us in the right direction. Taken together, they imply that legitimate legal coercion is a matter of preventing basic wrongs. Thus, we discriminate between objective wrongs that are and aren't legitimacy-conditional based on whether or not the wrong in question is of a basic sort. How is this implied by these two CR tenets?
We have reason to believe that legitimacy is only about basic wrongs because there is widespread agreement about the harms that constitute basic wrongs\(^{451}\), while there is widespread disagreement over what further acts (or omissions) count as wrongs against others. Where do we see evidence of such widespread agreement? As suggested in the previous chapter, it is evident in the ubiquity of the Golden Rule - some version of which is evidently present in all religions. It is also evident in widespread agreement on certain basic moral prohibitions, such as those present in the Decalogue: prohibitions against murder, theft, lying, and the like. For more contemporary evidence, we may look to the UDHR, which has gained international acceptance despite its minority of detractors.

Here's why this widespread agreement is relevant.\(^{452}\) The CR tradition explains this agreement as the result of God writing the moral law on the conscience of every person (tenet 2). Thus, it would seem that what God has impressed universally on the human conscience is an awareness of basic wrongs, though not a comparably clear apprehension of further wrongs. The CR tradition then goes on to suggest that it is the moral law written on persons' conscience - rather than some thicker or sectarian vision of the ideal society - that ought to be the standard for civil law (tenet 5). So, then, if it is the moral law that ought to be the standard for civil law, and the moral law is equivalent to the basic wrongs of which persons are immediately aware, it

\(^{451}\) Note that my recognition here of widespread agreement about basic wrongs does not undermine my argument in Chapter 3, which emphasized reasonable disagreement. That is because my argument in Chapter 3 took exception to JL's requirement of *unanimity*. JL doesn't merely require widespread agreement, but unanimity. The former might obtain concerning justice, but it is not reasonable to expect the latter.

\(^{452}\) To clarify, this first reason for tying legitimacy to basic justice (see the present paragraph in-text) does not take universal acceptability to be a criterion of legitimate legal coercion, despite its leveraging of a certain widespread agreement. Requiring universal acceptability is a move made by JL; and as we have seen (in Chapter 3), a unanimity criterion leads to unacceptable consequences. Moreover, CR theorists are under no illusion that complete consensus can ever be reached, even if widespread agreement on basic rights and wrongs can. Rather, what CR theorists can do is point to widespread agreement on basic wrongs as *evidence* of a premise which, in turn, is used in the standard it sets for legitimate legal coercion. Roughly speaking, widespread agreement is marshaled as *evidence* of a criterion; but it is not the criterion itself.
follows that the standard for legal coercion ought to be, in other words, the prevention of basic wrongs. Now to say that basic wrongs are to be standard for civil law isn't quite the same as saying that legitimacy is about basic wrongs' prevention - but it entails it. How? If, in general, all legal coercion is to be patterned upon basic wrongs' prevention, it follows that the subset of legally coercive measures that suffice to meet the legitimacy threshold must also be concerned with basic wrongs' prevention.

To clarify, wrongs are basic given the great violence they do to persons' dignity and interests. Similarly, basic rights - of the sort universally acclaimed in the UDHR - are basic in virtue of the fundamental importance of the interests they protect and in virtue of the way they express a fundamental respect for the dignity of rights-holders. As I use the terms, basic wrongs correspond to basic rights. Such rights signal the strict impermissibility of the former; protecting them prevents people from suffering the former.

Furthermore, protecting these rights - and preventing these wrongs - constitutes the most elementary demands of justice. For justice is essentially about rendering to people what they are due, just as the language of rights - especially basic rights - is used to name what persons are due at the most fundamental level. Henceforth and throughout, then, I shall interchangeably use the locutions "preventing basic wrongs", "protecting basic rights", and "upholding basic justice".

453 As I explained earlier, though, in my reconstruction of the CR tradition's best insights I do not interpret tenet 5 to prohibit the state from going beyond the prevention of basic rights. That is to say, I do not think that the argument of this paragraph commits CR theorists to a libertarian state. Rather, as I'm suggesting here, I take the lesson to simply be that it is the prevention of basic wrongs that makes for legitimacy - not that basic wrongs' prevention exhausts the demands of justice or exhausts the legally coercive measures a state can legitimately take.

454 To be sure, not all of the rights in the UDHR are beyond dispute - such as the putative right to annual paid vacations. It is widely understood that some such "rights" represent ideals more than basic legal rights, strictly speaking. Nonetheless, many of those listed in the UDHR are, indeed, beyond dispute, and such are the type of rights that I consider to be basic.

455 And sometimes I will also interchangeably speak of "preventing and prosecuting basic wrongs".

456 As I've already tried to make clear, although the CR central insight into legitimacy - that it is about preventing basic wrongs - is framed in negative terms, we needn't construe it as being concerned only with negative rights.
All pick out the most important of the moral demands generated by persons' dignity and interests. We may say, then, that the CR tradition points us in the direction of discriminating between wrongs that are and aren't legitimacy-conditional by distinguishing between basic and non-basic rights, or between the basic demands of justice and those further demands that would make for full justice.

Moreover, it is in light of the great importance of the interests and dignity protected by basic rights (or that are violated by basic wrongs) that the state is justified in using coercion to ensure that these rights are protected (or that these wrongs are prevented and prosecuted). Thus, the CR tradition - tying, as it does, the legitimacy of coercion to the upholding of basic justice - would largely agree with Buchanan when he writes,

Notice first that there is a conceptual link between justice and coercion: in principle the need to satisfy the demands of justice provides a powerful reason for coercion, perhaps the most powerful reason.  

The state responds to the problem of basic rights violations, and it is justified in its coercive response because of the great importance of the interests and dignity these rights protect.

Are there not echoes in what Buchanan says of the CR affirmation that the state is necessary "by reason of sin"?

Now we might wonder what other reason there is for tying legitimacy specifically to basic justice, beyond this being the suggestion of the CR tradition. For let's assume that we're persuaded by the notion that legitimacy is tied to justice - as Buchanan is - and not to any of the other roles that modern states play, let alone to any of the antiquated ideas canvassed earlier.  Still, we might ask, Why basic justice? Why not rather say that legal coercion is legitimate when

457 Likewise, insofar as Wolterstorff is correct in saying that the "liberal position is that the proper goal of political action...is justice", the CR tradition would agree with liberals as well. For I take it that political action is essentially coercive (cf. "1-The Meaning of Paternalism" in Chapter 5), and, thus, Wolterstorff's assertion amounts to saying the proper goal of political coercion is justice. See Buchanan, Allen, “Political Legitimacy,” 704; Audi, Robert and Wolterstorff, Nicholas, Religion in the Public Square, 73.
used to enforce any justice-related obligations persons have toward one another? After all, even though we designate a certain subclass of rights as *basic* rights in virtue of the fundamental importance of the interests and dignity they protect, the further rights that people have remain rights nonetheless; they may be further demands of justice, but justice demands them still. So beyond the grounds furnished by the CR tradition, what more can be said for tying legitimacy specifically to *basic* rights?

First, we should follow the CR tradition in saying legitimacy is about basic justice because of the type of concept that legitimacy is, and how it works in our moral experience. As we saw earlier\(^ {459}\), legitimacy operates as a threshold concept, setting a bar that is lower than that of full justice. It makes sense, then, to equate legitimacy with only meeting the basic demands of justice, rather than with meeting all of its demands. In doing so, we "avoid conflating legitimacy with perfect justice...or with an ideal of political community at the outset of the analysis."\(^ {460}\) Likewise, we should also equate legitimacy with enforcing basic justice rather than with enforcing just any obligation of justice. We may eventually conclude that, *provided* basic justice is upheld, it may also be legitimate to legally enforce the further demands of justice.\(^ {461}\) But, if so, doesn't the legitimacy of enforcing these further demands crucially depend upon meeting the more basic ones? If *only* the further demands are enforced, I doubt that such uses of legal coercion will suffice for legitimacy. For if a state succeeds in preventing lesser injustices but fails to address more flagrant, damaging, and denigrating injustices, its claim to legitimacy will be seriously compromised.

Second, we should say that legitimacy is about *basic* justice because legal coercion may not always be the most effective way to pursue the full range of justice's demands. Since

\(^{458}\) I.e., not to natural right, divine right, actual consent, and so on.

\(^{459}\) See "1.a) What the Question Is" in Chapter 2.

\(^{460}\) Buchanan, Allen, “Political Legitimacy,” 691.
legitimacy is about the justification of coercion, we tie legitimacy only to legal coercion that stands to be effective and appropriate in light of its justice-related objective. For instance, we may conclude that legal coercion is an overly blunt tool to redress all the subtle ways that racial bias can express itself in interpersonal conduct, yet agree that all such expressions of racism are unjust. Sometimes the appropriate tool for pursuing certain demands of justice may be education, or perhaps social censure, or perhaps the nurture of a particular ethos of justice among citizens. It may also be that law is simply an ineffective, or even counterproductive, way of redressing certain injustices. This may be the case when outlawing a certain unjust practice has the effect of driving it underground, thereby exposing victims of such practices to even greater harm. Sometimes decriminalizing and regulating an activity may minimize injustice more than legally prohibiting it.

By contrast, we recognize that given the gravity of certain wrongs - how damaging and denigrating they are - the heavy-handedness of a legally coercive response is the only appropriate response. Thus, legal coercion is legitimate when used to prevent or prosecute such wrongs. So legitimacy-conditional wrongs are basic wrongs given that such wrongs can be effectively and appropriately remedied by legally coercive measures; and non-basic wrongs are not legitimacy-conditional wrongs since they may be more effectively addressed by other, non-coercive means.

Third, legitimacy is about basic justice because the basic demands of justice and its further demands may conflict, and when they do, it is more important for states to uphold the more fundamental ones. In a utopia of civic saints, I do not think such conflicts would exist. But in the real world, they may. They may, for instance, as when an individual willfully exercises his

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461 Cf. my discussion in "4-What, then, of Consent?" in Chapter 8.
462 To be clear, what I want to say in this paragraph is not that it is always necessarily illegitimate to combat such injustices with law. But I question whether these are the sorts of injustices which legitimacy requires we combat with law.
463 Arguments like this are put forward by advocates of legalized prostitution and safe injection sites.
basic freedom to pursue goals, or make choices, that are unjust. For example, although freedom of conscience is a basic freedom to which all are entitled, individuals may nonetheless hold and promulgate nationalist ideologies that discriminate against minority groups and foreigners.

Though the disrespect communicated by such ideologies is unjust, it is not as flagrant as would be the injustice of simply denying freedom of conscience. Similarly, although an individual justly has control over their own labour, G. A. Cohen may well be right that an individual can exercise this control in ways that are more just or less just. If, as a naturally talented person, someone refuses to work unless she is paid a higher wage than the person who naturally lacks talent, that person acts unjustly. Still, that injustice is of a less grievous sort than would be the injustice of altogether removing an individual's control over her own labour. If a state chose to sacrifice the more basic demands of justice for the sake of meeting its further demands when the two conflict, that state would jeopardize its legitimacy. For this reason, too, we should follow the CR tradition in tying legitimacy to specifically basic justice.

I put forward these three reasons as corroboration of the CR suggestion that legitimacy is about basic justice, that is, the prevention of basic wrongs. If we find them persuasive, our explanation of legitimacy will begin by taking legitimacy to be a function of upholding basic justice. This conclusion might be reached simply by considering the basic problem to which legal coercion is a response, and the importance of the interests and dignity basic rights protect. It is reinforced by the reasons just given for tying legitimacy to only the basic demands of justice rather than with just any demands of justice. Moreover, that legitimacy is about basic justice is the general understanding of the CR tradition. For legal coercion is necessary "by reason of sin", and, ex hypothesi, it is the moral law that is the standard for legitimate civil law.

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Before moving ahead, I would like to add two further comments to what's been said so far. First, even if we grant that legitimacy is a function of upholding basic justice, what account of basic justice will it be appropriate to use? As Alasdair MacIntyre has asked, *Whose Justice? Which Rationality?* In response to this question, it is tempting to simply say that the worry is over-exaggerated; the fact is that widespread agreement does seem to exist on basic rights and wrongs. But there is a more important answer to this question given the higher-order nature of the framework for legitimacy that we seek. In postulating that legitimacy is about basic justice, my point is that *however* we might fill in the content of basic justice, *that* legitimacy is a function of basic justice is an idea without which we cannot make philosophical sense of our legitimacy-related CCs. These are CCs such as that there exist certain basic rights which are legitimacy-conditional, and that much legal coercion is legitimate even in the midst of disagreement amongst seemingly reasonable persons. My CR account remains agnostic about exactly how the content of basic justice should be fixed, yet it insists we need to think of legitimacy in terms of upholding basic justice.

Second, the reader may notice that I have not emphasized the state as a means of preserving society, unlike tenet 4 as presented in the previous chapter. The observation is correct; I've somewhat diverged from the CR tradition in characterizing the basic need served by legal coercion not as the need to preserve society, but as the need to prevent basic wrongs. But as I said, theorists can reconstruct various more specific CR accounts out of the general tenets, and, in so doing, theorists will vary from one another in the points they choose to emphasize. De-emphasizing the state *qua* agent of preservation is one such choice that I have made. My account

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466 Egs., the Golden Rule basic moral prohibitions, the UDHR - as mentioned above.
467 As Dooyeweerd says, the state is a means for "arrest[ing] the dry-rot caused by sin". (Dooyeweerd, Herman, *The Christian Idea*, 4.)
downplays the preserving role of the state and foregrounds its upholding of basic justice; such an account, I think, puts the tradition's best foot forward. In upholding basic justice, the state will, of course, also serve the case of preserving social bonds. However, I do not think on reflection that the state's motivation should be, in the first instance, the preservation of society. Its aim is the upholding of justice - what Christian Scripture itself would seem to indicate in characterizing the state as "an avenger who carries out God's wrath on the wrongdoer"\textsuperscript{468}\textsuperscript{,469} - and preservation of society is a byproduct. It is the upholding of basic justice that makes for legitimacy.

\textit{b) Whence Comes the Content of Legitimacy-Conditional Wrongs?}

We now turn to the second issue to which the idea of basic teleology speaks. Legitimacy may be about preventing basic wrongs, but what is the \textit{content} of these legitimacy-conditional wrongs? More specific to our purposes, how, philosophically speaking, must we go about filling in the content of these basic rights and wrongs? What conceptual categories might yield a clear philosophical picture of what we're doing when we go about filling in this content? Here's one more way of putting the question: Legitimacy ostensibly depends upon protecting something like a basic charter of rights\textsuperscript{470}, but how philosophically is this list to be drawn up?

What I want to suggest is that in answering this last question, and to fill in the content of legitimacy-conditional wrongs, we cannot help but be committed to certain \textit{teleological} views of human well-being. That is, we cannot help but rely on - if only implicitly - a view of what is ultimately good for human beings, or a view of the kinds of lives that human beings \textit{ought} to live.

\textsuperscript{468} See Romans 13:1-7. (\textit{The Holy Bible}, 948.)
\textsuperscript{469} Cf. 1 Peter 2:13-14, which characterizes civil authorities as "sent by [God] to punish those who do evil and to praise those who do good". (Ibid., 1015.)
\textsuperscript{470} I say this in light of the conclusions, at least provisionally, reached so far, that legitimacy is a function of basic justice and that basic justice may be understood in terms of basic rights. As per Buchanan, the demands of justice provide "a powerful reason for coercion"; and, as per the UDHR, there is broad
or a view of the final ends that human beings should pursue. Or - what amounts to the same, I think - teleological views are views that identify some purpose or way of life achievement of which constitutes human flourishing (or well-being). They concern what human flourishing objectively consists in at some higher-order level, thereby helping us make sense of lower-order human practices. *Your* basic teleological views may differ from *mine*, but the present point is that, in either case, a person must have some such views in order to generate a list of basic rights in a non-arbitrary way.

First let me try and clarify the claim. I am not saying that non-teleological accounts of human well-being exist but are implausible. Nor am I saying that merely by definition all accounts of human well-being are teleological in nature; I see no reason to think that the very concept of well-being necessarily entails teleology, as, say, the concept of a bachelor entails that of an unmarried male. Rather, I am advancing what I take to be a substantive philosophical claim, namely, that the content of basic rights and wrongs philosophically presupposes some account of human flourishing. Not all accounts of human well-being definitionally entail teleology. But any sensible, non-arbitrary account of rights - and the aspects of human well-being it concerns - will necessarily rely on broader, substantive views about the final ends humans ought to pursue. In other words, teleology.

There are various ways of expressing the main idea here. As I said at the outset, the idea is that we cannot give an adequate account of the interests that correspond to basic rights apart

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471 Here "objective" has the same sense as earlier in the chapter and throughout. "Objective" values and duties are those which are binding on individuals and societies whether or not they recognize them as such. In the present context of discussing basic teleology, it is more objective values than objective duties that are in view.

472 In light of the basic teleology postulate, as I go on to develop it, my claim mustn't be this. Rather, it must be more like that non-teleological accounts of human well-being simply cannot exist. At least, they cannot exist except in a philosophically shallow way.
from an account of full human well-being. It is that you need to know what a good life is in order to know what the fundamental conditions for a good life are. Put another way, the idea is that you need to presuppose some scheme of final ends in order to elaborate primary goods. Or again, it is that we must have some idea of what rights are ultimately for in order to know what basic rights we have.\textsuperscript{473} As I say, these are but varied expressions of the same idea: that the interests and dignity that correspond to basic rights must be ensconced within a wider account of human interests and dignity. This wider view will necessarily involve presuppositions about final ends and human flourishing. We must begin with the end in mind; that's the idea of basic teleology.

I suspect everyone will readily agree that some account of human interests, needs, or well-being is needed to justify basic rights; but not everyone will recognize these underlying accounts as being teleological in nature, as being tied to some view of human flourishing or final ends. Hence, the novelty, the relevance, and the controvertability of my claim. Theorists presuppose teleological views in filling out the content of basic rights and wrongs, but are loathe to admit to them. To achieve a "clear and uncluttered"\textsuperscript{474} understanding, then, of what legitimacy is about, we must redress philosophers' refusal to call "teleological" what are, in fact, teleological views. So my claim bears emphasizing, for one, simply because I believe we cannot perspicuously understand what legitimacy is about without recognizing it. And two, it bears emphasizing because it is a point that gets especially obscured by JL and its social contract framework.\textsuperscript{475} In turn, since JL is the dominant approach to legitimacy in mainstream political

\textsuperscript{473} As I go on to explain below, this isn't to say that rights must necessarily be for the making of particular choices. They might also, more generally, be for the realization of a particular ideal of individual autonomy.
\textsuperscript{474} See n422 above.
\textsuperscript{475} Cf. discussion in "2.b) Asymmetry #2: Substantive Rights v. Contentless Proceduralism" in Chapter 4. JL largely doesn't answer the question, What counts as reasonable? and yet operationalizing JL requires, and implicitly presumes, a certain response. Here I'm suggesting that JL's oversight of the need for basic teleology is equivalent to its oversight of the need for an explicit answer to the question of what's
philosophy, much current discussion of legitimacy overlooks this very point. Or, at least, so seems to me the current landscape of political theory.

Having laid out the claim, let me highlight a few salient features of teleological views as I understand them. Each of these features should make us more open to the possibility that views not normally regarded as teleological are, in fact, just that.

First, teleological views can vary in the narrowness of the final ends they identify, yet remain teleological. So some such views might outline quite specific rules one must follow, or a specific experience one must have, in order to flourish. Others will be more permissive, and assume that humans can equally flourish while pursuing any one of a relatively wide range of lifestyles. I take it that all teleological views allow for at least some latitude in how human flourishing is realized, even those - such as religious doctrines - that seem most narrow. But certainly some do allow for a much wider latitude than others. My first point here is just that we should not assume that we can distinguish teleological from non-teleological views in terms of the former's narrowness and latter's permissiveness. A teleological view can be teleological while presupposing final ends of either sort, either relatively narrow or permissive.

Second, I take it that teleological views can either emphasize the act of choosing, or the making of particular choices (or some combination thereof). And whether it emphasizes choosing or particular choices is immaterial to its status as a teleological view. Again, there is a temptation, I think, to divide non-teleological from teleological views along these lines: it is supposed that views that emphasize the act of choosing are non-teleological, while those that require us to make specific choices are teleological. But this dividing line is unwarranted. It is perfectly possible to maintain that human flourishing consists in some ideal of human autonomy, reasonable. However, as stated earlier, the plan for the present chapter is not to further engage JL. So further discussion of JL’s interrelated needs for substance and teleology await us in Chapter 9.
without requiring any specific choices be made (beyond those which might be necessary for securing the conditions of autonomy in the first place). As such, at the outset we must be open to the possibility that autonomy-emphasizing views - just like views that require specific choices - can also be teleological.

Third, a view may speak to final ends - and thereby engage teleology - not only by what it affirms, but also by what it denies or omits. I question the coherence of maintaining - as is often maintained - that it is possible to elaborate basic conditions of human well-being while remaining agnostic about broader questions of human flourishing and final ends. Certainly it is a practical possibility to do so; but, philosophically speaking, is it really possible to give a fully adequate and consistent philosophical accounting of the former without also engaging the latter? I doubt it. But even though that question is surely contestable, this much seems relatively clear: when a view denies the relevance of some final end, endorsed by a rival view, to the articulation of basic human well-being, it implicitly takes a stand on final ends that is opposed to that of its rival. Doesn't it?

Fourth, one and the same goods may be variously incorporated into teleological views as either parts of human flourishing or as preconditions of human flourishing. (Or a teleological view might value certain goods in both these ways simultaneously.) For instance, on one view, a given freedom might be valued only instrumentally, valued only for the sake of some further, particular choice which one is enabled to freely choose. Meanwhile, on another view, that same freedom might be valued intrinsically - no matter what choice is made, a view might regard exercising free choice in some domain as important to a given conception of autonomy. Here is a

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476 These are points which I pick up again and expand upon in Chapter 9, at least the first, second, and fourth of them.

477 In expressing this doubt, I count not only Taylor (see further on) but also Alasdair MacIntyre as an ally. See MacIntyre, Alasdair, *After Virtue* (Notre Dame, IN: University of Notre Dame Press, 1984); MacIntyre, Alasdair, *Whose Justice?*. 

230
point we should not overlook: that many goods, opportunities, and freedoms which it is natural to value instrumentally can, and are, often regarded as intrinsically valuable as well. As such, goods, opportunities, and freedoms which are simply preconditions of human flourishing on one view can, on other views, play a rather different role. That is, they can also be constitutive of a teleological view - and such a view is no less teleological for it.

In the discussion to follow, this last point that freedoms can be part of an account of human flourishing - and not only preconditions for it - is one that I shall emphasize.

In sum, the idea of basic teleology is that the goods corresponding to basic rights can ultimately be justified only with reference to a view that includes assumptions about final ends: whether these ends are relatively broad or narrow, whether they emphasize the act of choosing or the making of particular of choices, whether they speak to final ends implicitly or explicitly, and whether basic goods are regarded as parts or merely as preconditions of the final ends presupposed. To reiterate, we must begin with the end in mind.

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I said above that JL, with its social contract framework, especially obscures the need for basic teleology. But it is not only JL that makes it easy to overlook the teleology implicated in basic rights. Wherever there is widespread agreement on basic rights - as there generally is in modern liberal democracies and beyond - it is also easy to overlook this point. We easily miss the basic teleological assumptions we necessarily, though perhaps unwittingly, make.

For instance, consider how three rights we're perfectly familiar with make certain teleological presumptions, albeit presumptions we rarely if ever squarely face: the right to bodily integrity, the right to material subsistence, and the right to personhood before the law. The right to bodily integrity assumes that it is objectively the case that a healthy body contributes to a

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478 Egs., the choice of what one regards as the true religion, or the choice of opera over pop rock.
flourishing human life. It is not simply the *de facto* objections people raise to violations of their bodily integrity that establish this right. We can see this by asking whether someone could, by raising a comparable *de facto* objection, establish a right to an inviolable 5-metre radius of personal space. Why would the former objections carry much weight while the latter would not? It is because we are assuming that for embodied beings such as ourselves, bodily integrity really is essential to a flourishing human life, but that a 5-metre radius of personal space is not. In other words, *there is no end humans ought to pursue which requires a 5-metre radius of personal space; but bodily integrity is required for human flourishing, either as itself partially constitutive of this flourishing or as a precondition for achieving some further end with which human flourishing is identified.*

Likewise, the right to the material necessities of life - but not to plovers' eggs\(^{479}\) - assumes that it is objectively the case that such things as food, clothing, and shelter are necessary for a flourishing human life. In denying a basic right to plovers' eggs, we assume that humans' final ends can be adequately pursued with or without plovers' eggs. As we've seen, basic rights are basic in virtue of the fundamental importance of the interests they protect. There is no basic right to plovers' eggs, for they are objectively *not* a human interest of fundamental importance - neither as a necessary precondition for human flourishing, nor as a necessary part of human flourishing.

Similarly, why is it easy to affirm personhood before the law as a basic right, but not a right to always everywhere being addressed with "Sir", "Madam", "Esquire" or some other honorific? It is because the former is a fundamental expression of respect for people who possess inviolable dignity, while the latter is not. *It is objectively the case that the former - but not the latter - is partially constitutive of, or at least a condition of, a flourishing human life.*

Now any of these cases might be judged differently, were we beings of a different sort or possessed less value than we do. Things would be different, say, if we were disembodied minds; or if we had hyper-sensitive sensory organs that left us feeling assaulted whenever our 5-metre radius of personal space was transgressed; or if we had no more value than dandelions. But we are the beings we are - with certain interests and value. As such, there are ways of living that are of objective value (e.g., enjoying bodily integrity, material sufficiency, and standing under the law), being a part or precondition of a flourishing life. And others, being neither a fundamental part nor precondition of a flourishing life, are either unnecessary (e.g., 5-metre radius of personal space), optional (e.g., plovers' eggs), or flatly disvaluable (e.g., denied standing under the law).

Moreover, these cases illustrate how views such as these, concerning valuable higher-order ways of life, help to order lower-order human practices. Here I have in mind the practices of recognizing and protecting certain rights (and not others), and, more broadly, of arranging our public institutions accordingly. Meanwhile, it stands to reason that functioning as an agent with control over one's own body, being well-nourished (where food is foregone only at an agent's own choosing⁴⁸⁰), and having public standing before the law, are partially constitutive of the higher-order ways of life that help give these practices their point and purpose.

So, as I say, in these cases - and those of all other rights we're prepared to recognize as basic - teleological assumptions are being made, if only we look for them.

In passing, it is worth noting the corollary of a point just made. Just as widespread agreement can conceal underlying teleological presuppositions, it is in the context of disagreements over basic rights that the need for teleology, and our implicit reliance on it, is brought out much more into the open. There are, of course, different ways of drawing up lists of

basic rights (despite the widespread agreement I've previously noted). Is there a basic right to higher education? Is there a basic right to play and leisure? Is there a human right to a democratic say? These disagreements are fuelled, at least in part\textsuperscript{481}, by disagreements over teleology. That is, our answers to these questions will depend on the degree to which one views human flourishing as consisting in the cultivation of one's mind and abilities, in participation in such activities as sport and the arts, and in civic engagement, respectively.\textsuperscript{482} It is, I think, as Michael Sandel says,

Justice is inescapably judgmental. Whether we're arguing about financial bailouts or Purple Hearts, surrogate motherhood or same-sex marriage, affirmative action or military service, CEO pay or the right to use a golf cart, questions of justice are bound up with competing notions of honor and virtue, pride and recognition. Justice is not only about the right way to distribute things. It is also about the right way to value things.\textsuperscript{483}

What is said here of justice can also be said of basic justice: it is "inescapably judgmental". Although we routinely invoke rights with an eye to adjudicating disagreements, it is also true that rights-talk - what rights are recognized, how they are justified and understood, how they are applied - is a way of expressing disagreement. The teleology to which I'm pointing is operative at this deeper level of disagreement that often attends disputed rights.

\textsuperscript{480} As might be the case, for instance, for religiously-inspired forms of asceticism, or for politically-motivated forms of activism.

\textsuperscript{481} I say that rights disagreements are fuelled only in part by divergent teleological views because there are other sources of such disagreements. It could be that parties to a disagreement share the relevant teleological views, but disagree in some other respect - such as whether it is the individual or society that is responsible for procuring the good in question. For discussion of this type of disagreement, see Macleod, Alistair M., “The Structure of Arguments for Human Rights,” in \textit{Universal Human Rights}, ed. Reidy, D. and Sellers, M. (Rowman & Littlefield Publishers, Inc., 2005), 17–36.

Nonetheless, basic teleological views are always operative at some level in constructing lists of basic rights. And when disagreements arise, we must squarely face the question of whether the disagreement is due to divergent teleological views. The culprit may be something else, but it seems to me that often it is caused at least in part, if not in large part, by disagreement over basic teleology.

\textsuperscript{482} Similarly, our answers will depend on how we interpret the demands of human dignity. Does it, for instance, demand a right to a democratic say?

\textsuperscript{483} Sandel, Michael J., \textit{Justice: What's the Right Thing to Do?} (New York, NY: Farrar, Straus and Giroux, 2009), 261. While I owe this quote to Sandel, I also am indebted to Keller for the idea that follows in-text that rights-talk is a way of expressing disagreements – not just of settling them. See Keller, \textit{Generous Justice}. 

234
Earlier I characterized my basic teleology postulate as "novel". To clarify, it is innovative in the sense that while often overlooked - amidst agreement over rights, or due to JL's unnecessary shuffle - it is a point that I foreground as essential to a philosophical understanding of legitimacy. On the other hand, the idea that teleology underwrites our views on basic justice certainly did not originate with me, and so is not novel in that sense. For one, the confluence of several lines of CR thought points in this direction.

The doctrine of the *Imago Dei* is suggestive of the idea. Being made in the divine image, human beings are typically equipped with certain capacities. To function properly and flourish fully, they are to develop and put these capacities to use. In earlier discussing the tenet of the *Imago Dei*, we saw that these include the capacity for creativity, rationality, and spirituality. Furthermore, VanDrunen notes,

> Though he located the image of God especially in the soul, Calvin, in a remarkable move for his day, granted that the image also resided in the body. The human person, he believed, was a *microcosm*, a world in miniature. The glory of the Creator displayed in the world at large was also revealed in small figures in each person. ⁴⁸⁴

If we follow Calvin's lead here, we shall also have objective grounds for saying that human well-being consists in *physical* flourishing. This is important to note, lest it be thought that a CR view, in emphasizing spiritual well-being - which it does - trivializes physical well-being - which it doesn't. Both are essential components of human flourishing in virtue of the *Imago Dei*.

Teleological thinking is also operative in the "two kingdoms" model (tenet 7). God intends and appoints human institutions to function in certain ways. CR thinking distinguishes the institutional church from civil authority in terms of the distinct ends they are respectively meant to serve. The end served by churches is the eternal salvation of its members; the end of

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civil authority is the temporary preservation of society. These are the telos of each, by divine
design. Thus, a teleological premise is implicated in justifying principles of justice as basic as
freedom of religion and church-state separation.

A particularly teleological picture is also painted by Kuyper in developing his concept of
sphere sovereignty. Kuyper paints this picture by characterizing society's various spheres in
organic terms. Each sphere flourishes when, "freed from all unnatural bonds"\textsuperscript{485}, it is allowed to
grow unobstructed toward its appointed end; its unique inner logic directs it toward this natural
end. That said, I do not find the supposition that each sphere functions best when left alone
together entirely persuasive. How can this be maintained in the face of, say, the havoc wreaked by the
2007 collapse of America's insufficiently regulated housing market? However, even if we find
Kuyper's picture unpersuasive in certain respects, it certainly suggests teleology as a conceptual
resource.\textsuperscript{486} And, again, it does so in justifying many of our most basic rights.\textsuperscript{487}

Additional CR inspiration for appealing to teleology comes from the work of Alvin
Plantinga. Although an epistemologist rather than social theorist, Plantinga's work falls squarely
within the CR intellectual tradition more broadly.\textsuperscript{488} The idea from Plantinga's epistemology that
is relevant for my purposes is this: we are entitled to trust the deliverances of our perceptual and
epistemic faculties only when we assume they are functioning in an environment for which they
have been designed.\textsuperscript{489} Without assuming that they are functioning correctly according to a

\textsuperscript{485} Kuyper, Abraham, \textit{Lectures on Calvinism}, 112.
\textsuperscript{486} Though we may need to deploy the concept somewhat differently from Kuyper.
\textsuperscript{487} Such rights as freedom of conscience, freedom of speech, and freedom of association are clearly at issue
when Kuyper advances the doctrine of sphere sovereignty, as are basic legal rights such as the right to due
process and to protection from unreasonable search and seizure. The former allow spheres such as religion
and education to function freely in pursuit of their appropriate ends, while the latter prevent the state from
transgressing into spheres other than the political.
\textsuperscript{488} Along with William Alston, Plantinga has been one of the foremost proponents of the view known as
"Reformed Epistemology".
\textsuperscript{489} For his proper functioning account, see Plantinga's trio of books, Plantinga, Alvin, \textit{Warrant: The
Current Debate} (New York: Oxford University Press, 1993); Plantinga, Alvin, \textit{Warrant and Proper
design-plan, Plantinga argues cogently that we've no reason to trust them nor their deliverances.

Now to function according to a design-plan is to have a *telos*. So in other words, Plantinga is saying that we've no reason to trust our epistemic faculties unless we assume they're operating *teleologically*. Similarly, I am arguing that we cannot make sense of basic rights unless we assume that they accord with a design-plan for (that is, a teleological account of) basic human well-being.

So there are various precedents within the CR tradition for thinking that basic rights and principles of justice presuppose teleology; my basic teleology postulate isn't novel in that sense.

In a still more direct way, the work of Charles Taylor also precedes this postulate.

Taylor helps us see that rights presuppose wider value systems. Summarizing the relevant points from Taylor's work, Lister writes,

> We cannot simply count the number of laws or forbidden actions in order to assess the level of coercion associated with a particular policy, for the same reasons that we cannot arrange our basic liberties so as to maximize liberty *tout court*. We should not say that there is less coercion in a society with no traffic lights and no freedom of conscience than in a society with freedom of conscience and heavily regulated traffic, despite the greater number of discrete acts of interference in the latter case...we need to assess the value of the liberties or opportunities that laws deny people, or create.\footnote{Lister, Andrew, “Public Justification and the Limits of State Action,” 160; Taylor, Charles, “What’s Wrong with Negative Liberty,” in *Philosophy and the Human Sciences: Philosophical Papers 2*, by Taylor, Charles (New York, NY: Cambridge University Press, 1985), 211–229.}

The point is that the freedoms we are prepared to recognize as a matter of basic right are freedoms that we *value*; they score high on a qualitative, if not quantitative, scale. And on what grounds do we value them? The answer invited by Taylor's illustrations is that we value certain freedoms in light of broader presuppositions about what's valuable in life - presuppositions about the sort of beings we are and about, in turn, the kinds of lives that are objectively valuable for us to lead. In this way, we find normative grounding for the freedoms that need protecting, and the

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wrongs that need to be prevented, as a matter of basic justice. This grounding allows us to discriminate between wrongs that are more or less serious. Of course, as Lister notes, which freedoms and wrongs are of fundamental significance "will often be the subject of reasonable disagreement". But that we must make such value judgments in order to simply make a list of basic rights - that is, any non-arbitrary such list - remains true. In Taylor's example, the value judgment is that freedom to live without regulation of one's religious beliefs is objectively more important than freedom to live without regulation of traffic. So, at least in this pairwise comparison, religious freedom is rightly regarded as a demand of basic justice, but not traffic freedom.

I put forward Taylor's work not just as historical precedent, but also as corroboration of my teleology claim. Taylor's discussion, including his example of the differential moral weight we attach to religious freedom and traffic freedom, persuasively demonstrates that basic rights presuppose wider value systems, as Lister himself acknowledges. As I read Taylor, the more general lesson to be learned is that what basic rights, in fact, presuppose are teleological views: views that identify some purpose, final ends, or ways of life, achievement of which constitute human flourishing, and that derivatively help to order other lower-order human practices.

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So far, then, I hope to have clearly explained what I mean by "teleology" in the idea of basic teleology, and to have lent some initial plausibility to my claim that legitimacy-conditional basic rights presuppose teleology. Let me now stress that the teleological aspect of basic teleology cannot be decoupled from the basic-ness aspect of basic teleology if this idea is to help us understand what legitimacy is about. My claim is that legitimacy-conditional rights and wrongs presuppose only a teleology of basic human well-being. This means that the teleological

491 Lister, Andrew, “Public Justification and the Limits of State Action,” 160.
views I have in mind are both like and quite unlike those of, say, Aristotle or Aquinas - that is to say, quite unlike them in their political applications. Now I fear that my basic teleology postulate might effectively be doomed by association - that is, doomed by a certain affinity with views we manifestly believe it would be unjust to impose on others (e.g., Aristotle's, or Aquinas'). Lest I needlessly raise the reader's hackles, then, let me begin to distinguish the idea of basic teleology from these traditional teleologies. (I take up this issue again in Chapter 9.)

To appreciate the distinction between the former and latter, consider what Steven Wall says about two different ways in which an ideal of human flourishing can "inform conceptions of political morality". On the one hand, such an ideal may be invoked as an aim the state should promote. On the other, such an ideal may be invoked simply as a way of underwriting the elementary demands of a political morality. The latter sense of teleology speaks to the question of "whether an adequate account of concepts such as justice, rights, obligation can be given without appeal to some ideal of human flourishing". The need for some such ideal points us to the type of teleological account I'm talking about, namely, one that - while committed to certain ends - nonetheless distinguishes between its basic and non-basic aspects. The aim of basic teleology is not to promote any teleological view, in the way that traditional views (such as Aristotle's and Aquinas') promote social blueprints sufficient to fully order society and the lives of its members. Instead, its aim is simply to make philosophical sense of basic rights. Teleology is needed for this task. But since it is only basic rights we have in view, we need invoke only the correspondingly basic elements of a given teleological account.

As I've indicated, it is not my intention in this chapter to compare-and-contrast CR legitimacy with JL or any other particular legitimacy account. Nonetheless, let us briefly

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493 Ibid.
consider certain familiar Rawlsian categories, in light of which the idea of basic teleology becomes more clear. Superficially, it may seem that my distinction between basic teleological views and traditional teleological views approximates Rawls' distinction between primary goods and final ends. In fact, it does not.

Rawls famously characterizes primary goods, the currency of Rawlsian distributive justice, as goods "a rational man wants whatever else he wants". That is, Rawls understands primary goods to be detachable from views on final ends. As such, primary goods are "all-purpose means" that can be used in pursuing any number of different, and even contradictory, conceptions of the good (or teleological views, we might say). As Rawls presents them, they are not components of any particular conception of the good, but they are preconditions for simply forming, revising, and pursuing any such conception. As Buchanan puts it, they are "conditions of the pursuit of ends in general" and "maximally flexible assets", consistent with any teleological view that is to be pursued in a rational manner.

Crucially, among the primary goods are basic rights and liberties. Thus, when I speak of basic teleology as pertaining specifically to basic rights, it may seem I have items in mind that are similar to Rawlsian primary goods in every respect but name. And when I speak of distinguishing the basic from the non-basic aspects of a teleological view, it may seem that I'm detaching basic goods and rights from final ends in like fashion.

But these appearances are misleading. While there may be overlap in the substance of basic teleology and primary goods, they are strikingly different in their philosophical justification. For Rawls contends that it is possible to elaborate primary goods without making

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494 Rawls, John, Theory of Justice, 79.
495 Buchanan summarizes, "...Rawls makes it clear that there is a distinction between one's own conception of the good and one's conception of one's own good and that the parties know only that they have a conception of the good...." [Buchanan, Allen, “Revisability and Rational Choice,” Canadian Journal of Philosophy 5, no. 3 (November 1975): 405.]
assumptions about final ends. By contrast, my contention is that it is only possible to elaborate basic goods or rights with assumptions about final ends in tow.\footnote{497} Similarly, Rawls - as does Buchanan - thinks it possible to elaborate the preconditions for having and revising a conception of the good without committing to any views about what the good is.\footnote{498} Conversely, my corresponding contention would be that it is only possible to elaborate the preconditions for rationality against a wider backdrop of assumptions concerning what rationality substantively consists in.\footnote{499} It seems evident to me that whether we're elaborating preconditions for rationality, the fundamental conditions for a good life, or basic rights, thicker\footnote{500} views about final ends, the good, and human flourishing will always be operative in the background. And if we are to give a fully adequate philosophical accounting of any of these basic categories, I think we must reckon with this being the case.

To clarify, then, the idea of basic teleology picks out the basic components of an otherwise full teleological view. Thus basic teleology is like the traditional teleologies of

\footnote{496} Ibid., 402.
\footnote{497} Thus I would share with authors such as Adina Schwartz and Michael Teitleman the view that (as Buchanan summarizes the critique), "The dominant preference for what Rawls calls primary goods is...not supportable by what Rawls calls the 'thin' theory of the good." [Ibid., 395; Schwartz, Adina, “Moral Neutrality and Primary Goods,” \textit{Ethics} 83, no. 4 (July 1973): 294–307; Teitleman, Michael, “The Limits of Individualism,” \textit{The Journal of Philosophy} 69, no. 18 (October 1972): 545–556.]
\footnote{498} In his defence of Rawlsian primary goods, this is the sort of interpretation Buchanan urges, that is, primary goods as preconditions for pursuing a revisable conception of the good. Buchanan particularly emphasizes revisability as a principle of rational choice. See Buchanan, Allen, “Revisability and Rational Choice.”
\footnote{499} There are, after all, different conceptions of what it means to be rational. Among these is a distinctly CR conception - though it is CR social thought rather than CR rationality that I’m mainly interested in. Eg., see Hart, Hendrik, van der Hoeven, Johan, and Wolterstorff, Nicholas, eds., \textit{Rationality in the Calvinian Tradition} (Lanham, MD: University Press of America, Inc., 1983).
\footnote{500} In turn, we should expect these varied conceptions of rationality to also yield varying accounts of the \textit{preconditions} of rationality; or, in other words, we should expect varying accounts of the preconditions of having and revising a conception of the good.

\footnote{500} By contrast, both Rawls and Buchanan would have us understand primary goods as based on merely "thin" conceptions of the good, based on nothing more than mere formal principles of rational choice.
Aristotle and Aquinas in being committed to views about final ends. It is quite unlike them, however, in distinguishing between the basic and non-basic aspects of a teleological view, with an eye only to underwriting the basic demands of justice. To elaborate these basic demands, we need the backdrop of a relatively complete teleology: we must begin with the end in mind. At the same time, we exercise restraint in bringing these views to bear on enforceable political morality. To be a little more precise, by the "basic components" of a view I mean those elements of a view which - according to that view - correspond to the basic demands of justice. As stated above, basic teleology differs from traditional teleologies in terms of its aim. Following Wall, it aims to provide the "ideal of human flourishing" necessary for "an adequate account of concepts such as justice, rights, obligation", without seeking to promote by legal coercion the view's final ends and otherwise non-basic aspects. 501

And, again, why should we accept the idea of basic teleology so understood? Why is it we must begin with the end in mind? I take it that Taylor's insight about the differential importance of various freedoms provides one non-CR line of corroboration. What makes it rational to prioritize certain freedoms over others is a presupposed teleological view, according to which certain freedoms (but not others) are either part or precondition of human flourishing. I also regard the foregoing examples of bodily integrity, material sustenance, and equal legal

501 It may be tempting to also understand basic teleology in terms of another Rawlsian distinction, that between "comprehensive" and merely "political" views. We must proceed here with caution, though. For, on the one hand, basic teleology is similar to political conceptions in terms of its directedness toward simply matters of basic justice. Although it would apply to an even narrower range of justice-related considerations than political conceptions do, its directedness towards basic rights at least approximates the first characteristic of political conceptions according to which the latter apply only to society's "basic structure". On the other hand, it is quite unlike a political conception in that it certainly is not "freestanding" - the second characteristic of a political conception. Indeed, largely the very point of basic teleology is to deny the philosophical sense of justifying basic rights independent of a wider teleological view. Moreover, rejecting as it does Rawls' "freestanding" requirement, neither does the idea of basic teleology involve the presumption that its substance will be common to each of many diverse comprehensive views. It might be, but need not be; and even if it is, its philosophical justification doesn't depend on this convergence. See John Rawls, Political Liberalism, 2005, 11–15.
standing as illustrative of this point. It is coincidentally true that the substance of these basic rights will be common to many diverse, even contradictory, teleological views. However, I take the lesson of that earlier discussion to be that a fully adequate philosophical justification of such rights will involve a much wider set of premises than we might initially suppose. They cannot be justified simply in terms of a convergence of diverse views. Rather, they can only be fully accounted for relative to a wider view that includes assumptions about the sorts of beings we are and about the final ends that we have (or don't have).

With the basic-ness of basic teleology in mind, we can reformulate my previous explanations of basic teleology as follows: it involves the identification of lower-order functionings, achievement of which is held to be a part or precondition of objective human flourishing, in light of a higher-order view of a well-lived human life. Thus, I hope these comments and this reformulation makes clear how the teleology of which I speak complements

502 For discussion of varied philosophical conceptions of the sorts of beings we are - from Plato's to Sartre's, from Marx's to Skinner's - see Stevenson, Leslie, Seven Theories of Human Nature (Oxford University Press, 1974).
503 Recall that teleological views are constituted not only what they affirm, but also by what they deny or simply leave optional.
504 The way I have organized this chapter may belie the substantive arguments I believe exist in favour of my side of this debate with Rawls. It may seem that my discussion of basic teleology here is simply a case of assertion followed by counter-assertion: Rawls asserts, without argument, that it's possible to articulate primary goods apart from assumptions about final ends; I counter-assert, also without argument, that it's not possible to articulate basic goods without making assumptions about final ends.

The present paragraph in-text, though, is meant to redress this misperception. Whatever substantive arguments Rawls might use in favour of his position, the arguments I've advanced in this chapter for my own position - and as I summarize them in this in-text paragraph - are as follows. First, basic goods presuppose final ends because it is necessary to presuppose a particular conception of agency even to identify basic freedoms. This argument follows from Taylor's discussion of the differential importance of religious freedom as opposed to traffic freedom. Second, basic goods presuppose final ends because the significance of such goods as bodily integrity, religious freedom, and equal legal standing is only intelligible in light of a broader understanding of humans' interests and dignity. I sought to make this argument above by highlighting the broader understandings presupposed by the rights to bodily integrity, material subsistence, and equality under law. Thus, it is with arguments such as these that I defend my claim: we must begin with the end in mind.

505 Here I introduce a piece of terminology borrowed from Nussbaum, who contrasts "functionings" with "capabilities". Whereas capabilities are capacities for functioning in various ways, functionings involve the actual exercise of capabilities. In Chapter 9 I explain the significance of functionings, and not just capabilities, to the basic teleology presupposed by basic rights and wrongs.
our previous conclusion that legitimacy is about upholding basic justice. For teleology of the sort I claim we must necessarily invoke to make philosophical sense of our legitimacy-related CCs is teleology of a restricted sort. It is only \textit{basic} teleology, needed to underwrite the \textit{basic} rights and wrongs which are, according to our CCs, legitimacy-conditional. It presupposes a full teleology, but brings only its basic components to bear on political morality.

Moreover, the CR tradition can point us not only in the direction of \textit{basic} justice, but also in that of \textit{basic} teleology. Consider the institutional divide between church and state. The broader set of CR views, of which CR social thought is a subset, clearly takes a stance on what full virtue consists in. However, CR social thought views the \textit{church} as the appropriate institutional context in which to fully cultivate Christian virtue - not the state. This division of labour implies that, in regards to the coercive state, we should not legally enforce the full demands of a teleological view, but only its basic demands - those that correspond to basic justice.

To conclude my present discussion of the idea of basic teleology, I want to emphasize that I have primarily \textit{philosophical} ends in mind. The idea is that we cannot make sense of basic rights without relying on basic teleology. Practically, we might wish it could be otherwise; for we might think that, were it otherwise, we could avoid certain political disagreements in the real world. But philosophically, I do not see how it can be otherwise. We cannot philosophically account for our conviction in basic rights without presupposing some teleology. And assuming we hold basic rights to be legitimacy-conditional, neither can we give an adequate philosophical accounting of legitimacy.
4-Legitimacy-Conditional Basic Wrongs constitute an Exogenous Moral Standard

The third idea of CR legitimacy is that the basic rights on which legitimacy is conditional constitute an *exogenous* standard. The meaning and significance of this third idea has been implicit in much of what has already been said, and the present discussion will be relatively brief. I shall simply try and set forth more clearly an idea that has been implicit throughout. The relevance of this idea to legitimacy shall be revisited at greater length in Chapter 10, where I will suggest that it can help us avoid the sort of structural paternalism that JL seems to involve.

First, concerning this third CR idea and the discussion to follow, a quick disclaimer. I am wary here of wading too deeply into meta-ethical waters. My intention is not to speak to any meta-ethical debates, let alone settle them. Rather, it is simply the more modest goal of developing a framework that seems to fit with our legitimacy-related CCs. But for this task, I ultimately find it necessary to say something more about the kind of moral standard our convictions seemingly presuppose, namely, I suggest we understand it as an *exogenous* standard.

Now in characterizing the moral standard constituted by basic rights as *exogenous*, CR legitimacy is saying something about the source of this standard. To wit, an exogenous standard is not one that is created by human beings in any sense; rather, it is a standard that exists independently of human beings, and, as such, its source is independent of human beings as well. An exogenous standard is one that imposes itself on human beings, but it is not one that human beings impose on themselves. The idea is directly opposed to the Kantian ideal of the moral agent as self-legislator, an ideal enthusiastically embraced by JLs and constructivists more

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506 Or at least directly opposed to one way of interpreting this ideal. As has been pointed out to me - and as I go on in-text to acknowledge - on one reading of Kant, the Kantian directive to conceive of ourselves as rational self-legislators is entirely compatible with the sort of exogenous moral standard I have in mind. Similarly, it might be thought that JL itself should be read this way, in a way that understands it, too, as being compatible with exogenous demands. On this comparatively weak reading of JL (and Kant), hypothetical proceduralism *qua* representation of moral demands is just that - simply a re-presentation of demands that obtain whether or not we engage in the proceduralist's thought experiment.
generally. Now Kant, JLs, and many constructivists certainly view morality in *objective* terms; that is, they regard the demands of morality to be binding on actual people and actual societies whether or not these demands are recognized. This is just the same sense in which I, too, am using the term "objective". However, they require that any moral demands which are to be certified as "objective" must be representable as the product of legislation by moral agents themselves.\(^{507}\) *Ex hypothesi*, these are hypothetical, not real, persons. But it is still persons themselves, in an act of self-legislation, who are depicted as the *source* of the moral standard. By contrast, an *exogenous* standard is one that is not the creation of human agents in any sense at all. Its source is outside human agents - whether these agents are real or hypothetical.

In describing a moral standard as *exogenous*, I am appropriating a piece of scientific terminology. *Exogenous* phenomena contrast with *endogenous* phenomena. Something is *endogenous* if it is "produced or synthesized within the organism or system"\(^{508}\). Conversely, something is *exogenous* if it is "introduced from or produced outside the organism or system"\(^{509}\). Similarly, the CR idea of an exogenous standard is that of a standard introduced to human agents from the outside, as it were; it is not one produced by human agents themselves.

In what ways has this idea of an exogenous standard been implicit in things already said? Here's just one example.

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However, I think that JLs appropriate Kant in a comparatively stronger way, and that we should interpret their express commitment to constructivism in a comparatively stronger way as well. Now I am no Kant scholar, and have no bone to pick about the proper interpretation of Kant. I am, though, interested in JLs' appropriation of Kant, and in how we should interpret JLs' Kant-inspired constructivism. Concerning these latter items, I do think a stronger reading is more appropriate than a weak one - that is, more in keeping with what JLs themselves say and in keeping with the general tenor and internal logic of their position. As such, the idea of an exogenous standard does directly oppose the idea of self-legislation as it’s been incorporated by JL theorists.

This matter of how to interpret JLs' commitment to representing social norms as the product of popular sovereignty, whether to interpret it strongly or weakly, is one I take up at greater length in Chapter 11.


It was implicit in our discussion of the first CR idea - that legitimacy is a function of preventing *objective* basic wrongs. I say it was implicit there not because I can be sure there is no non-exogenous way of accounting for objective moral standards - this would be too strong a claim - but because there is a natural fit between the concept of an exogenous standard and the way that objective demands bind even those who don't recognize them. A natural explanation of why the demands of justice apply apart from social or institutional recognition is that the *source* of these demands' normativity is outside of humans altogether, including outside their social conventions and institutions.

As for the CR sources of this idea, they are relatively easy to spot. The most obvious place to point out is tenet 2. As per tenet 2, the basic moral law is one given by God. He writes this standard on the conscience of every person; though we find it in ourselves, its origin is from outside ourselves. Repudiating the Kantian ideal of self-legislation is exactly what Kuyper seems to have in mind when he writes, "The Calvinist is led to submit himself to the conscience" but "not as to an individual lawgiver...." Instead, we are to submit ourselves to the conscience, and thereby the moral law, insofar as it is through the conscience that "God himself stirs up the inner man, and subjects him to his judgment."510

Also consider tenet 9 - that God ultimately establishes human governments. Accordingly, God is sovereign over all societies, the just and unjust alike. Why is it rational for us to denounce as unjust certain regimes in times and places not our own? It is because a sovereign God has delivered a basic moral standard that applies equally to all societies and all persons, a standard to which, in turn, we may also appeal across contexts.

Now does the concept of an exogenous standard necessarily involve a metaphysical commitment to God's existence? Not necessarily. For instance, one might believe in morality,
including its basic demands, as a kind of natural fact. As such, basic justice *qua* natural fact would impose itself on us in much the same way that gravity is an escapable fact for us. On the other hand, a theistic framework - such as the CR framework - does afford conceptual resources that readily and naturally answer the question of how it is that an exogenous standard might exist. I've just noted that tenet 2, in particular, of the CR framework serves exactly this purpose.

Whether or not it is conjoined with theism, though, I shall eventually offer JLs this reason for affirming the existence of an exogenous standard: without it, they seemed doomed to framing legitimacy in paternalistic terms. Insofar as they wish to avoid thinking paternalistically about legitimacy, then, they have reason to affirm exogenous moral demands. Such will be my suggestion in Chapter 10, albeit one that I make tentatively. But, for now, what else might be said in favour an exogenous standard? For such is the sort of standard, according to my CR account, that is constituted by legitimacy-conditional wrongs.

For one, characterizing basic moral demands in terms of an exogenous standard fits well with the phenomenology of these demands. It's been observed that, "in moral experience, we apprehend moral values and duties which impose themselves as objectively binding and true"⁵¹¹. Don't we? That is, we experience these demands as *forcing* themselves on us, as *non-optional*, and as constraints on the free exercise of our will rather than as the expression of it. Were these exogenous, experiencing them in this way is exactly what we should expect. If, however, they are the product of our own creation or legislation (at least in some sense), then our moral experience of these demands is less easily explicable. Consequently, the phenomenology of basic rights and wrongs suggests an *exogenous* source.

⁵¹¹ William Lane Craig, in "Is Faith in God Reasonable? A Debate with William Lane Craig and Alex Rosenberg". Debate hosted by Purdue University, West Lafayette, IN, USA, February 1, 2013. Accessed online at www.youtube.com.
Two, an exogenous standard can help political philosophers with the vexing task of reconciling equality with coercion. The CR tradition is sensitive to this challenge. Sensitivity to this problem is especially evident in the work of Kuyper, who explicitly rejects social contract theory as a putative solution. He rhetorically asks, "What binding force is there for me in the allegation that ages ago one of my progenitors made a ‘Contrat Social,’ with other men of that time?" If social contract theory will not do, how else might we conceptualize the standard presupposed by our legitimacy-related convictions so as to ease the tension between equality and coercion?

Following the lead of CR theorists such as Kuyper and Schaeffer, we might view the exogenous standard postulate as a possible solution. \textit{Ex hypothesi}, such a standard applies to all equally, thereby respecting the equal moral status of all. Given its source outside of human agents, there is no possibility of this standard being unduly tainted by class interests, social prejudices, or self-interest. Our interpretations of it may be affected in these ways, but not the standard itself. Moreover, where this standard authorizes the use of coercion, it does not authorize some moral agents more than others; none is naturally subject to another (tenet 3). So, then, \textit{ex hypothesi}, an exogenous standard applies to all equally; it also authorizes the use of coercion by all equally. In such ways an exogenous standard supplies possible solutions as we try to reconcile coercion and equality. JL presents problems instead - or so Kuyper argues, and so I also have suggested in highlighting the paternalism that JL might involve.

Three, inasmuch as we're committed to basic moral standards that are universally applicable we have reason to seriously consider the possibility that this standard is exogenous.

\begin{itemize}
\item Kuyper, Abraham, \textit{Lectures on Calvinism}, 69.
\item As was said in discussion of tenet 3, CR freedom is not freedom \textit{from} the moral law but freedom \textit{under} the moral law. An exogenous moral standard is one that imposes itself on us. What free-and-equal personhood means whilst we live under such a law, then, is a) that all are equally subject to one and the
\end{itemize}
This is because the idea of universal applicability is bound up with the concept of an exogenous standard. An exogenous standard is not of our own making, and neither can we opt out of it. The relatedness of these ideas is significant, since I take it that we are all committed to a standard of the universally applicable kind - CR and secular theorists alike. As we conclude discussion of this third CR idea, let us briefly revisit the question of why we all must believe that the standard is of a universal kind. There is nothing philosophically novel about the following points, but they bear worth repeating.

We must believe in a universal moral standard given that we take ourselves to be rational in denouncing as unjust regimes of times and places not our own. If the standard we invoked did not apply universally, then our application of it cross-contextually would be incoherent. Our denunciations would amount to little more than emotivist expressions of distaste. Assuming that we're not being incoherent, then, we must be presupposing a standard that applies to all equally. Similarly, if nothing more than conventionalism justifies our legitimacy-related convictions, then we are not necessarily justified in denouncing as illegitimate many regimes that violate basic rights. For then the moral imperative to respect basic rights would be a mere convention, applicable in modern liberal democracies perhaps, but not in polities lacking this convention. But we all - secular and CR theorists alike - do believe that we're justified in denouncing as illegitimate regimes that violate basic rights. So we must presuppose that legitimacy-conditional basic rights are constitutive of a standard that is universally applicable.

And if the presupposed standard is universally applicable, then it might well be exogenous to boot. For the two fit naturally together.

same moral standard, and b) that whatever freedom one may enjoy under such a standard is a freedom to which all have equal right.

514 "If Moral Conventionalism is true, it would seem that I cannot intelligently deny that slavery is, as a matter of fact, a morally justified practice. I seem left with no intelligible space in which to criticize my culture's practices on moral grounds." (Waluchow, Wilfrid J., The Dimensions of Ethics, 73.)
Conclusion

In conclusion, the central insight of the CR tradition regarding legitimacy is that legitimacy is a function of preventing basic wrongs. Additionally, we have drawn three other ideas from the CR tradition to help us explicate this view of legitimacy, of which the first two are especially important. First, legitimacy is a matter of rights and wrongs that are *objective* rights and wrongs. Acknowledging that legitimacy-conditional rights and wrongs apply universally is a necessary first step towards understanding legitimacy. Second, what count as basic wrongs can only be determined in light of a teleological account of basic human well-being. Legitimacy pertains only to *basic* justice - not full justice - and a teleological view makes available the content needed to fill in the substance of these demands. A third idea is that the kind of standard constituted by basic rights is an exogenous one, originating outside of humans and yet applying to all humans.

Putting them together, CR legitimacy says that legitimacy is a function of preventing basic wrongs: that is, preventing wrongs that are a) objective and b) determined according to a teleological account of basic human well-being, and which also c) are fruitfully understood as constituting an exogenous moral standard. I have reconstructed this CR framework for legitimacy out of the conceptual resources afforded us by the CR tradition of social thought. My thesis is that it offers a superior set of categories for making sense of legitimacy, categories that fit and illuminate our legitimacy-related CCs.

Note certain strengths and limitations of this account. As a response to my guiding question - What is legitimacy about? - what it primarily does is shed light on the philosophical foundations of the legitimacy-related convictions we hold. While it is an approach built up out of a religious tradition of thought, it is no part whatsoever of the approach's aim to impose a
sectarian view on others. Rather, the approach outlined here is philosophically oriented. Its immediate application is to theory, not practice. And given the CR tradition's principled commitment to church-state separation, religious freedom, and individual liberties, whatever downstream institutional implications it might have should be no cause for concern for the secularist.

What the theory doesn't do is provide us with a ready-to-hand list of concrete conditions that can be used in evaluating actual legal regimes. Does this limitation impugn the theory's significance? Hardly, I think. For one, I take it to be very philosophically informative. Secondly, I believe that this theory provides a firmer foundation for whatever specific, enumerated rights we are prepared to defend. It secures them by perspicuously formulating the normative grounds on which they stand.

But now I'm getting ahead of myself. An explanation of how CR legitimacy provides firmer philosophical grounds for basic rights than JL does awaits us in Chapter 9.  

515 For illustrations of these more perspicuous grounds, particularly see discussion towards the end of ”3-The Basic-ness of Basic Teleology” in Chapter 9.
Part III - JL and CR Legitimacy in Dialogue
Chapter 8

Justifying Coercion: Is Consent Needed?

Introduction

We now come to Part III, in which I will bring JL and CR legitimacy into dialogue with one another. Chapter 6 presented the CR tradition of social thought in its own terms. Then in Chapter 7 I reconstructed my particular account of CR legitimacy. I did so with recourse to some general, non-CR argumentation; but without reference to JL. What I want to do now, then, is bring JL back into the conversation and compare it directly with CR legitimacy. In particular, I will examine CR legitimacy in light of the unacceptable consequences of JL discussed in Part I. I hope to show how CR legitimacy avoids these very consequences, and, in so doing, makes better sense of our legitimacy-related CCs. Recall that making sense of these CCs was the desideratum I laid out for our best theory of legitimacy. Thus, I will conclude that CR legitimacy is superior to JL as a framework for understanding the issue of political legitimacy. Ultimately, I rest my case for CR legitimacy not on the initial argumentation offered in Chapter 7, but on its ability to make sense of those three CCs which we saw JL fall afoul of in Part I. Concerning these latter arguments, I now develop the first and second of them at length in the present chapter and the chapter to follow, respectively, while I offer the third more briefly and tentatively in Chapter 10.

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Straightaway I expect that the title of this chapter will be cause for serious concern. To court the idea that consent isn't necessary for legal coercion is a veritable return to the dark ages, 516 See "2-What will Settle the Issue?" in Chapter 2.
Isn't it? Isn't one of the triumphs of the modern era our realization that, as stated in the US Declaration of Independence, governments derive "their just powers from the consent of the governed"? To answer this question negatively - is consent needed to justify coercion? - seems a recipe for oppression.

I certainly expect JLs to be among those concerned by the title of this chapter. For as we saw in Chapter 3, consent is a central category to JL. Earlier, I did not explicitly identify consent as being the operative concept in that critique. But it was, given that JL was led to de-legitimize all legal coercion as a result of its unanimity condition (as I did explain).\textsuperscript{517} JL's unanimity condition expresses the importance of consent, reflecting the belief that the consent of all affected parties - if only their hypothetical consent - is needed for legitimacy. So let me now make clear: the first unacceptable consequence of JL results from consent being made a category of central importance to the JL framework. As such, JLs are one with America's founding fathers.

However, in this chapter I will explain why consent isn't actually needed to justify coercion - at least not many basic uses of legal coercion. To accomplish this, I will draw on David Estlund's idea of the "nullity of non-consent". The apothegm that just rule depends on the "consent of the governed" contains a great deal of truth, but, unless qualified, it is overly general and fails to reckon with considered judgments we hold that point in the opposite direction - that is, judgments that suggest legitimacy does not require consent. In due course I shall explain what this apothegm has right, but mostly I shall emphasize what's wrong with focusing on consent. Consent, I argue, is an unhelpful category for understanding normative legitimacy.\textsuperscript{518}

\textsuperscript{517} There I explained that JL's unanimity condition was the chief culprit in producing this unacceptable consequence, and that its accomplices were JL's sparse twofold criteria of reasonable persons and the reasonable multi-interpretability of key political concepts. But I identified the unanimity condition - consent, in other words - as the main instigator.

\textsuperscript{518} Recall that my interest is normative legitimacy, as distinguished from descriptive legitimacy. See the beginning of "1.b) What the Question Is Not" in Chapter 2. Perhaps in certain contexts consent is
What's the alternative? By the end of this chapter, I shall only get as far as arguing that
the alternative to consent is tying legitimacy to the prevention of wrongs that are objective.\textsuperscript{519} As
said in the previous chapter, the central insight of CR legitimacy is that legitimacy is about
preventing basic wrongs, and the first idea that helps us explicate this general insight is the
objectivity of these wrongs. The point of the present chapter is to now go further and explain
why the concept of objectivity ought replace consent as a category of central importance in our
understanding of legitimacy. The previous chapter also signaled a limitation of my argument in
this chapter: I shall argue that legitimacy is a matter of preventing objective wrongs, but I shall
say nothing about which of these objective wrongs are legitimacy-conditional.\textsuperscript{520} However, if we
simply go as far as conditioning legitimacy on objective wrongs, we will have paved the way for
an alternative to a consent-emphasizing account. For if legitimacy-conditional wrongs are
objective, then it is at least possible that consent is unnecessary for their legitimate legal
enforcement. \textit{Qua} objective, duties corresponding to legitimacy-conditional wrongs apply
whether or not they are recognized, giving us at least some basis for countenancing coercion
without consent. On the other hand, without the objectivity postulate, it seems legitimate
coercion could only come by consent. This last theme is one to which I shall periodically
return.\textsuperscript{521}

\textsuperscript{519} Objectivity is conceived here as throughout: objective moral duties and values are binding on all
whether or not they are recognized as such.
\textsuperscript{520} I take up this further issue in the chapter to follow, identifying objective wrongs which are legitimacy-
conditional as those which are basic.
\textsuperscript{521} Readers might take exception to my statement here that, in the absence of objective wrongs, legitimate
coercion could still come by consent. If there were no objective wrongs, why would coercion even need to
be legitimized? As one reader put it, if coercion were not wrong - because nothing is - it wouldn't need any
justification.

I do think this the most plausible position to take. Still, given the power consent normally has to
generate moral obligations seemingly \textit{ex nihilo} - eg., by voluntarily making a promise - I think we can
imagine a world in which consent would generate legitimate legal institutions and a novel obligation to
respect them, and in which legitimate legal coercion could not exist without consent. My suggestion here is
To summarize and preview: In contrast to JL’s problematic focus on consent, a CR approach makes legitimacy conditional on objective wrongs. The previous chapter explained how this idea is sourced by the CR tradition. In the present chapter, I will explain how a CR approach, focused on objective wrongs, is able to avoid the very problems to which consent-emphasizing JL leads us. In doing so, I shall refer to the case of the Bakuninist earlier discussed in Chapter 3.

In this discussion, I don’t imagine I will fully assuage the concerns raised by this chapter’s title, nor do I even intend to. What I do intend to show is that we’re already committed to denying the necessity of consent. Now if I can persuade readers that they are already committed to its denial, then presumably readers will more readily believe that it is possible to both deny the necessity of consent and avoid oppressive implications while doing so - for surely our consent-emphasizing instincts are motivated by a desire to avoid oppression. I believe our CCs reflect both sides of this equation, and, ultimately, I believe CR legitimacy gives us a framework for integrating both. However, it will take me till the end of the next chapter, where I defend the concept of basic teleology, to fully explain how it is possible to integrate the two. Only then will I hope to have fully addressed the concerns raised by offering a negative answer to the question, Is consent needed to justify coercion after all?

1-JL and Consent

As background to the present discussion, let us review some territory already covered.

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that short of a world in which truly nothing is right or wrong, the only sort of world we're left with when the importance of moral objectivity is de-emphasized is one of just this sort: where legitimate coercion is possible, but only by consent. Since I do not intend to defend the philosophical plausibility of such a world, and intend only to use it as a foil for understanding my alternative objectivity postulate, it matters not to me however much or little a reader might object at this point.
Consent is central to JL's characterization of legitimacy. JL requires that legitimate legal coercion be based on reasons that command the assent of every reasonable person. This is JL's unanimity condition: requiring the consent of every reasonable person. Consent is given in terms of finding the reasons for coercive proposals "acceptable" or "non-rejectable". All these points are part-and-parcel of the core JL principle, that legitimate legal coercion is based on reasons that all reasonable persons can accept. The concept of consent is clearly and centrally present in this formula, even if the actual word is not.

Of course, the sort of consent JLs have in mind is hypothetical consent. We've noted the rationale for this: actual persons have consented to all manner of unjust and illegitimate legal measures, and will presumably continue to do so. Obtaining the genuine, express consent of every last person within a modern large-scale democracy would be utterly impracticable besides, even if we all were saints.522 The parties envisioned by JL's agreement scenario are hypothetical, and, as such, the consent they give can only be hypothetical as well. The parties are meant to represent real-world persons in a meaningful way.523 However, the consent relevant to JL is not that of actual persons, but that of their hypothetical counterparts.

Even keeping this qualification in mind, though - that JL consent is hypothetical not actual - the category of individual consent undoubtedly remains central to JL legitimacy. For JLs maintain that consent in some sense, expressed in at least some possible world - however far removed from our own - is needed. The consent of real-world persons may not be required, but that of their hypothetical counterparts is. Thus, the category of consent remains central to a JL

522 For trenchant critique of actual consent theory, see "Chapter III. The Consent Tradition" in Simmons. On the impracticality of giving every actual person a veto - requiring actual unanimity, in other words - see "Chapter XIII. Rejecting the Democracy/Contractualism Analogy" in Estlund. (Simmons, A. John, Moral Principles, 57–74; Estlund, David M., Democratic Authority, 237–257.)
characterization of legitimacy. In other words, JL would still have us understand and conceptualize legitimacy in terms of consent.

It also bears emphasizing that JL is more concerned with *individual* consent than with simply *collective* consent via democratic decision-making. Despite their common focus on consent, these represent distinct approaches to the justification of legal coercion. On the former, we can legitimately coerce person A only if an idealized A would consent to the coercion. On the latter, we can coerce A only if the coercion is licensed by a democratic process in which A has a real opportunity to participate, as an equal. Now as I say, JLs' concern is the former. First of all, it is their concern given their understanding of the demands of free-and-equal citizenship. "We honour the idea of persons as free and equal by supposing that one person cannot rightly wield power over another unless they can justify the exercise of that power to the person over whom it is exercised."524 Relatedly, I have explained why, in light of Rousseau's problem, JLs cannot simply water down their unanimity requirement.525 Acceptance by *each* and *every* affected party is required. Moreover, JLs' concern with individual consent is also reflected in their idealizing of individuals, idealizing which makes it possible to represent coercive measures as acceptable to all. Or so JLs believe. In sum, the consent emphasized by JL is idealized unanimous consent, not actual majoritarian consent.

But is it appropriate and helpful for us to think in terms of this category as we conceptualize legitimacy? That is, in terms of consent so construed? To begin with, one reason for thinking not is that - at least as it is deployed in a JL characterization of legitimacy - it leads to an unacceptable consequence, one at odds with a legitimacy-related CC we hold. This was the argument of Chapter 3. There we saw that the JL requirement of universal consent, together with

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525 See "2.c) JL's Unanimity Condition: The Cause of the First Unacceptable Consequence" in Chapter 3.
JL's thin criteria for "reasonable" persons and the reasonable multi-interpretability of vague political concepts, leads to the de-legitimization of all legal coercion. Since JL requires even the consent of marginal views such as those of the Bakuninist, where proposals' justification will turn on contestable interpretations of such concepts as liberty and fairness no use of legal coercion will be able to satisfy JL's unanimity condition. There will always be reasonable persons who, for public reasons, can object to the grounds on which proposals are putatively justified; that is, there will always be reasonable grounds for withholding consent. But we need not, and should not, conclude that legal coercion is never legitimate. Rather we should call the consent requirement into question. Moreover, given that JL consent is hypothetical not actual, we have reason for questioning not only actual consent - which theorists have long done anyways - but also hypothetical.

Now let us consider a second reason why consent shouldn't be central to our account of legitimacy: it is evidently the case that amongst our CCs is the conviction that withholding consent is insufficient to de-legitimize many uses of legal coercion. Such convictions indicate that consent isn't, after all, needed for legitimacy. If so, we have reason to consider CR legitimacy's alternate approach that emphasizes objective wrongs rather than consent.

2-Estlund and the Nullity of Non-Consent

Presumably due to the individualism of modernity, it is widely believed pre-philosophically that coercion requires consent. This belief finds expression in the affirmation that legitimate rule derives "from the consent of the governed" and it is evidently widespread among philosophers in the Western, liberal tradition of political philosophy as well. For example, speaking generally of when coercing an individual is permissible, Audi writes that "we can coerce people to do only what they would autonomously do if appropriately informed and fully
This is a general statement on permissible coercion which, when brought to bear on the question of when legal coercion is permissible, informs Audi's account of JL. A comparable general view of coercion underlies all JL accounts, at least in terms of an emphasis on consent if not in further details. The basic belief here is akin to what Estlund calls the "libertarian clause", which states that, "Without consent there is no authority." The basic belief presupposed by JLs seems to be that without consent there is no legitimacy.

If true, this proposition would mean that one could escape legitimate coercion simply by withholding one's consent. Or, where consent is conceived hypothetically, it would mean that legitimate coercion is defeated so long as even one person is positioned to reasonably withhold consent. However, the upshot of Estlund's bombshell insight is this: very often we cannot de-legitimize legal coercion simply by withholding consent. This being the case, it cannot be true that legitimacy requires consent. For if legal coercion can be legitimate even in the absence of consent, it follows that consent isn't necessary for legitimacy. In such cases, where withholding consent is of null effect in de-legitimizing coercion, it seems there must be extenuating, non-consensual moral considerations that legitimize the legal coercion in question. To reiterate, Estlund's insight is a bombshell because it reveals that consent isn't actually required for legitimate coercion, despite the commonplace belief that it is.

Estlund's insight is what he calls the "nullity of non-consent". This notion is counterpart to the more familiar phenomenon of null consent. The latter occurs, for instance, when a promise is made under duress, or on the basis of grossly inaccurate information. In such situations, though consent is given, normatively the situation remains as if it had never been given; in such

527 Estlund, David M., Democratic Authority, 119.
528 At least not actual consent. And as I interpret the lesson to be learned, the fact that we actually don't require consent suggests we needn't hypothetically require it either. In effect, the rest of my discussion and application of Estlund's insight is elaboration of this lesson.
contexts, consent lacks its typical normative import. Comparably, Estlund points out that there are situations in which refusal to consent also seems to lack its typical normative import.

Normally, the effect of withholding consent is avoidance of some responsibility one would rather not assume. But if Estlund is right, not all responsibilities can be so avoided. Greater attention must be given to situations where withholding consent doesn't have this effect. Alas, it is situations just like these which we - with our emphasis on individual liberty and predisposition toward voluntarism - are wont to overlook. In such situations, though consent is refused, it would seem there remain extenuating moral reasons for which consent should have been given. Due to these extenuating moral reasons, individuals who withhold consent remain in the same normative position they would occupy had they given consent.

Why should we accept the nullity of non-consent as true? The example Estlund provides is as follows, the case of "despicable Joe". Despicable Joe is aboard a flight when it crashes. In the aftermath of the crash, a flight attendant issues an order to Joe which, in the judgment of the qualified and knowledgeable flight attendant, will help the maximum amount of injured persons. The question is this: is Joe under an obligation to submit to the authority of the flight attendant? Estlund answers affirmatively, believing it would be wrong of Joe to refuse the flight attendant's orders and, moreover, believing that Joe cannot escape the duty to submit to the flight attendant's orders simply by refusing to consent. If you agree with Estlund's analysis, then you are committed to the nullity of non-consent. For, at least in this case, you acknowledge that consent is not a necessary condition for being under authority. Extenuating moral considerations establish a duty to consent to authority, regardless of despicable Joe's withholding consent.

529 Though not a line of critique I wish to develop, this comment by Estlund is worth considering: "Appeals to hypothetical consent can seem to miss the point of consent. Often, it is a source of freedom and power to be able to refuse to consent to something and thereby prohibit certain actions of others. This is a value that hypothetical consent theories might be charged with ignoring." (Estlund, David M., Democratic Authority, 125.)
Now the moral of this story for Estlund is actually quite narrow.\textsuperscript{531} It is simply that one cannot escape \textit{authority} by withholding consent, and authority here is a technical notion meaning "the moral power to require action"\textsuperscript{532}.

I suggest, though, that the implications of Estlund's insight are much wider than Estlund supposes. As mentioned, for Estlund the doctrine has application only to the issue of political authority narrowly construed. But why not also apply it - or at least a generalized version of it -

\begin{itemize}
  \item To be clear, while I am drawing here on Estlund's point, the conclusions I draw are rather different - and certainly broader - than those that Estlund himself draws from his analysis. For one, as I say in-text, Estlund is concerned only with the nullity of non-consent in regards to the duty to submit to authority; I am concerned more broadly with both the duty to submit to legally coercive institutions and with the permissibility of establishing and implementing such institutions.
  \item Two, Estlund explicitly thinks that his doctrine of the nullity of non-consent does not inform the question of when it is legitimate to legally coerce others. ("Normative consent...can establish authority even if it cannot establish legitimacy.") He thinks it a separate question whether it is permissible to issue legal commands, even if one is required - in part owing to the nullity of non-consent - to obey any commands that might be issued. For my part, I fail to see how the same moral considerations that require one to support legal coercion cannot at the same time legitimate the use of that coercion; on my view, the need to uphold the basic demands of justice both obligates and legitimizes. For instance, in Estlund's own example of despicable Joe, wouldn't the same considerations that require him to submit to authority also legitimize third parties in using force to compel Joe to respect the flight attendant's orders? Such considerations include the serious needs at stake and the fact that the flight attendant is well-positioned to lead a cooperative effort in meeting them.
  \item Three, the category of consent still plays a major role in Estlund's account of authority (and that of legitimacy, so it would seem), even though I shall shortly argue that thinking in terms of consent is altogether the wrong approach to legitimacy. For the nullity of non-consent is nonetheless part of a wider view Estlund develops that he calls "normative consent theory" (emphasis mine).
  \item Fourth, the account of legitimacy in service of which I invoke the nullity of non-consent is a version of what Estlund calls "urgent task theory", which Estlund identifies as a type of "direct authority" account. However, Estlund rejects all direct authority accounts, including urgent task theory. At least one of the reasons for which Estlund wants to retain conceptual space for consent in spite of the nullity of non-consent is that, "It is intuitively compelling to maintain that there is, putting it vaguely again, \textit{some} moral independence of each person from the wills of others, having something to do with the fact that they, too, have a will that is just as morally important as anyone else's." I agree that it is important to capture, in some way, the "moral independence of each person from the wills of others". I seek to do this both by giving clearer philosophical grounds for basic rights (as in Chapter 9) and by retaining a place for consent in my wider view of political morality (see below "4-What, then, of Consent?"). But I don't think that individual consent - either actual or hypothetical - plays a role in justifying our most basic obligations of justice; such is my argument in this chapter.
  \item See Ibid., 127, 130–131.
\end{itemize}

\textsuperscript{530} Ibid., 124.
\textsuperscript{531} To be clear, while I am drawing here on Estlund's point, the conclusions I draw are rather different - and certainly broader - than those that Estlund himself draws from his analysis. For one, as I say in-text, Estlund is concerned only with the nullity of non-consent in regards to the duty to submit to authority; I am concerned more broadly with both the duty to submit to legally coercive institutions and with the permissibility of establishing and implementing such institutions.
\textsuperscript{532} Ibid., 118. In defining authority in this way, Estlund follows Raz.
to the issue of legitimacy as I've described it? And why not to a much broader range of our moral obligations as well? We should. In a more general form, I take the nullity of non-consent to be the idea that moral obligations - including those which it might also be legitimate to legally enforce - cannot be escaped by withholding consent when extenuating moral considerations produce these obligations. We should regard Estlund's insight as having widespread implications given the fit that exists between the generalized notion of null non-consent and our actual moral experience and practice.

The example of despicable Joe is one case where we affirm the nullity of non-consent. But we routinely affirm it other ways as well. We force libertarian-minded citizens to pay taxes needed to fund basic social services. We press criminal charges against, for example, polygamists in spite of their protests. We constitutionally prohibit discrimination on the basis of such factors as race, gender, and sexual orientation, no matter what prejudicial ideologies citizens might hold. We intervene militarily where regimes fail to uphold human rights. In all such cases, the coerced parties have hardly consented to the coercion to which they are subject, yet we take their non-consent to be null and void. In fact, whenever we believe ourselves justified on moral grounds in using legal coercion against unwilling others, we affirm the nullity of non-consent.  

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533 I have in mind here discussion in "1.b) What the Question Is Not" in Chapter 2. There I explained how I understand the legitimacy threshold to have normative implications for the very existence of coercive institutions, for the issue of authority, as well as for the issue of political obligation.

534 Kymlicka echoes this point in rejecting Charles Taylor's presumption that moral demands ought not outstrip people's power to fulfill them. Not only might this inability simply reflect our own moral weaknesses, but there are, after all, other means - legitimate means - for ensuring compliance when an individual's moral motivation runs out. To wit, coercion is legitimate way of ensuring compliance with at least some moral demands. Kymlicka writes, "But the individuals who are able and willing to enforce the standards need not be the same individuals who are asked to make the sacrifices. In many cases, moral progress is achieved by disadvantaged groups simply taking whatever it is they are entitled to, sometimes at the point of a gun." Sometimes individuals' internal moral motivation will suffice. But, "In other cases...high standards require coercion that forces people to do what they cannot freely accept." Kymlicka thinks it unproblematic when "we are living beyond our moral means" - as do I. Why? Because, "Whenever our moral means run out,
The point is this: in many ways, we already accept coercion without consent. In other words, our normal experience and practice bears witness to our conviction that often coercion is, indeed, legitimate without consent. This isn't to say that consent is never required for coercion to be fully justified; I have yet to distinguish between cases where consent is and isn't relevant. But our normal practices do suggest that there are cases where consent isn't relevant. In light of the nullity of non-consent, we can now go as far as saying that in principle legitimate coercion need not require consent; that is, it needn't necessarily require consent. Estlund prefaces his argument for the nullity of non-consent by observing that, "Moral obligations can simply befall us." Similarly, it appears that legitimate legal coercion can also "simply befall us", depending upon the extenuating moral considerations at work.

Thus, from at least these two angles we can see why we should de-center consent from our understanding of legitimacy. An account that emphasizes consent, such as JL, leads to the unacceptable conclusion of de-legitimizing all uses of legal coercion. As well, in practice we seem convinced of the nullity of non-consent: at least sometimes, otherwise legitimate coercion cannot be de-legitimized simply by the absence of consent.

3-A Category Shift: From Consent to Objectivity

a) The Inescapability of Objective Duties

In light of the nullity of non-consent, the question is why we should regard consent as a centrally important category in understanding the justification of legitimate coercion. JLs would
have us make it central, but why should we? Granted, you might think our experience only suggests that actual consent isn't required for legitimacy, while JL's requirement is simply one of hypothetical consent. That said, it's not clear that our experience doesn't also suggest that hypothetical consent is unnecessary for legitimacy as well. This is, in fact, what I do think it suggests. Indeed, were our conviction in the nullity of non-consent our only guide, we'd have no reason at all to try and explicate legitimacy in consent-emphasizing terms.\footnote{This isn't to say that our experience indicates consent is never relevant - only that it isn't always relevant. This indicates, in other words, that consent isn't a necessary condition for legitimacy, since legitimate coercion can - at least sometimes - exist absent consent.}

Put another way, since we reject the necessity of consent to legitimate coercion in the real world, why should we perform counterfactual contortions in order to vindicate it? Recognizing the implausibility of taking actual consent as a desideratum of legitimacy, JLs can preserve the link between consent and legitimacy only by way of a series of idealizations that remove actual persons ever further from the hypothetical persons who are said to represent them. These hypothetical persons are idealized materially, morally and cognitively. As such, their emotional attachments, their deliberative reasoning, and, of course, their reflective judgments differ from those of their real-world counterparts. One wonders whether the consent of such hypothetical persons is a meaningful proxy for the consent of real-world persons at all.\footnote{It might be thought that so long as we're critical of hypothetical consent, consistency demands that we embrace actual consent in its stead. I don't think it does, however, since criticizing hypothetical consent along these lines might simply be a way of charging JL with an internal inconsistency - that is, JLs themselves would seem to endorse individual consent but don't really honour it. Even if consistency doesn't demand that we embrace actual consent in lieu of hypothetical consent, it's not as though I regard consent as altogether irrelevant to a fully just polity. For discussion of where I do see consent as relevant (albeit not to legitimacy), see the subsection below "4-What, then, of Consent?"

Also, while I'm objecting to idealized consent, am I actually arguing not for less idealization but for more? Is understanding legitimacy in terms of objective wrongs simply to take public justification to the limit, where the range of views that qualify as reasonable is reduced to only one?

I don't think so. It's true that insofar as someone holds certain rights and wrongs to be objective, they privilege one particular account of morality's objective demands. However, in doing so they needn't necessarily regard all other accounts as unreasonable; they may, but they also may simply regard them as less reasonable or less defensible. Moreover, the objectivity postulate says that however many such
tenuous link that exists between actual and hypothetical consent, Estlund concedes, "It is natural to wonder whether we are being fickle - granting something to voluntarism, but then not really honoring it." If an account of legitimacy can only save consent by qualifying it in so many ways, doesn't this fact by itself suggest that consent may be a wrong category to be working with?

The conclusion that we should draw is that the justification of legitimacy should not be conceived of in terms of consent - hypothetical or otherwise. Our experience suggests as much, given the nullity of non-consent, as do the unacceptable consequences that result from JL's unanimity condition and the idealizations that are required to preserve even a semblance of consent. We have good reason to altogether reject consent - hypothetical or otherwise - as a putative desideratum of legitimacy.

By contrast, according to the first companion idea of CR legitimacy, legitimacy is a function of preventing *objective* wrongs. According to JL, legitimacy-conditional wrongs are wrongs *by consent*. It is in virtue of the unanimous agreement of the hypothetical parties both that a given social norm is substantively fair from a moral point of view, and that a given norm is legitimately enforceable. On CR legitimacy, though, the wrongs that must be prevented are accounts we regard as reasonable, we cannot ultimately make sense of our CCs without making at least some judgments as to what we regard as *most* reasonable - in other words, without at least some judgments as to what is objectively the case.

And it seems rather misleading to place my objectivity postulate along an idealization continuum, at a place further along the continuum than JL's idealized contractors. In affirring objectivity, I'm not asking people to imagine themselves with divine omniscience and moral perfection, in a way that would parallel JL's thought experiment. I'm simply challenging people to make sense of their convictions without presupposing an objective standard, and, believing this challenge can't be met, inviting people to reflect upon these objective demands as best they can.

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538 Estlund, David M., *Democratic Authority*, 130.
539 It is tempting here to say that JL is concerned only with the *legal enforceability* of norms, and not with their moral status. While JLs' emphasis is surely the former, though, their approach brings with it commitments concerning the latter as well. Insofar as the JL procedure is based on thoroughgoing moral values such as fairness, impartiality, and equality - which JLs freely admit it is - then the norms issuing from the procedure represent the *moral* demands of these fundamental values and not only the *legal* implications of them.

For instance, Rawls clearly states, “Political conceptions of justice are themselves intrinsically moral ideas, as I have stressed from the outset.” Similarly, Macedo says in no uncertain terms,
held to be objectively wrong - morally binding regardless of consent. Now in what sense is the
CR postulate of objectivity an appropriate counterpoint to JL's emphasis on consent?

The problem with JL consent is that it effectively allows parties to escape obligations that
we think should strictly be enforced, or that we think are at least legitimately enforceable. On a
JL framework, so long as an objector has a reasonable objection - one expressible in public terms
- a proposal is rendered illegitimate. Absent the objector's consent, the standard of no-
reasonable-rejection goes unmet. Within the JL framework, non-consent certainly is not null.
Rather, it has tremendous normative power to de-legitimize potential social norms and their legal

“Liberal public reasonableness is itself a moral view, and not a political view that purports to be
neutral on moral views. Indeed, it is for moral reasons of fairness and civility that public
reasonableness asks citizens to honor the authority of reasons they can share in public with
34.)

In a word, the claim must be that JL norms are both enforceable and fair. Thus, consent plays a
crucial role both in the legal enforceability of these norms, as well as in their very status as moral norms.
To clarify, what I mean here is that JL allows people to escape obligations we think they have, not that
people such as the Bakuninist would themselves use the JL framework as a means of escape. I don't at all
have in view here people who might try and pull a self-interested trick or who might try to game the
system. Indeed, people inclined to take advantage of cooperative arrangements in such ways have nowhere
near the moral scruples JLs themselves have. The problem I'm flagging here is just that there are certain
obligations we seem quite sure everyone has, but which actually no-one has - according to JL - so long as
someone can reasonably object to the proposal.

This last comment brings to light another feature of JL as I interpret it: if someone reasonably
objects to the reasons for a coercive measure, their reasonable objection blocks the measure as a whole and
not simply its application to them. I do not view reasonable objections only in terms of individual
exemptions from otherwise generally applicable laws. For one, JLs are typically most concerned with their
public justifiability principle as it applies to fundamental issues of justice or political morality - what Rawls
might call "constitutional essentials" and "matters of basic justice" - and these are social norms from which
no-one should be exempted. Besides, an exemption-granting construal of JL clearly runs contrary to the
general tenor of JL which would have us see citizens as joint authors of social norms to which they are all
subject.
Recall that I do not regard the so-called "error of symmetry" as an error at all. As I read JL, public
justification means that valid objections are any objections that can be formulated in public terms and
advanced by even one affected party, just as unanimous acceptance involves grounds that are formulated in
public terms and acceptable to all.
enforcement. Unfortunately for JL, our CCs tell us that much that would be vetoed is actually perfectly legitimate.\textsuperscript{542}

The problem can be illustrated with reference to the Bakuninist discussed earlier. Given our convictions, we seem sure that centralized states are legitimate - legitimate ways of redistributing wealth, of overseeing and regulating various industries, of funding large-scale scientific and athletic endeavours, and so on. Such states are imperfect to be sure, but legitimate surely. However, the Bakuninist has a reasonable objection to coercive centralized states, namely, that such states threaten freedom and equality given that "social life could easily take on an authoritarian character through the concentration of power in a minority of specialists, scientists, officials, and administrators."\textsuperscript{543} Applying the JL criterion of no-reasonable-rejection, then, the putative legitimacy of centralized states is defeated. We - you and I, real-world persons - feel sure it is legitimate for modern centralized states to exercise legal coercion, including over the Bakuninist. But JL means it is not. By withholding consent \textit{qua} advancing a public reason against the centralized state, the Bakuninist escapes any duty to submit to the centralized state as legitimate.\textsuperscript{544} Consent withheld, the Bakuninist escapes.\textsuperscript{545}

\textsuperscript{542} Hence, the first CC on which I focus, that much actual legal coercion is legitimate even amidst disagreement among seemingly reasonable people.

\textsuperscript{543} Bakunin, Michael, \textit{Bakunin on Anarchy}, 7.

\textsuperscript{544} Not only so, the Bakuninist's objection means that \textit{no-one} has a duty to submit. We all escape, for the centralized state is illegitimate.

\textsuperscript{545} It may appear in the present discussion, with my talk of parties "escaping" social obligations, that I have reverted to focusing on Gaus-style JL rather than Rawlsian JL (cf. subsection "3-An Overview of JL" in Chapter 2). It may especially appear this way if one thinks, as Lister does, that Gaus-style JL is susceptible to libertarian implications in a way that Rawlsian JL is not. [See Lister, Andrew, "Public Justification of What? Coercion Vs. Decision as Competing Frames for the Basic Principle of Justificatory Liberalism," \textit{Public Affairs Quarterly} 25, no. 4 (October 2011): 349ff.]

I have not. I regard this difficulty as affecting both consensus and convergence variants of JL. \textit{Pace} Lister, even on a Rawlsian, consensus view of JL, it seems that coercive arrangements can be blocked for all so long as least one person can reasonably object to the reasons given for the arrangements. In other words, we all escape the obligations such arrangements would involve just so long as the reasons given aren't, in fact, acceptable to every reasonable person. For further discussion of these points and of Lister's view, see the objections and replies in Chapter 3.
So how does the CR postulate of objective wrongs help us avoid such untoward results? In the subsection to follow, we shall further consider the particular case of the Bakuninist. But, as a first approximation, how does the objectivity postulate generally redress the problem of would-be objectors (like the Bakuninist) escaping norms that are seemingly real and enforceable (like the duty to support the centralized state)?

In general, the objectivity postulate helps us toward avoiding these problems by binding persons to their justice-related obligations whether or not they are prepared to recognize them. As has been said all along, this is the general nature of objective moral values and duties - they are binding on individuals and societies even if these values and duties are not recognized as such. Crucially, this feature of objective obligations allows us to say the following: that such obligations obtain regardless of an individual's consent. The normative force of such obligations is not generated by consent, nor is it blunted by consent withheld. Thus, the tenor of the objectivity postulate is generally in tune with that of the idea of null non-consent. By making objective wrongs central to our understanding of legitimacy, we can thereby displace the idea of consent from center-stage.

The CR tradition is clear that the wrongs that must be prevented as a matter of legitimacy are wrongs of this sort. As we saw in the previous chapter, the universality of the Imago Dei helps to ground rights and wrongs that are objective. Whether or not we consent to the obligations it generates, the Imago Dei imbuces every person with immense worth and dignity such that others are obligated to appropriately respect, value, and treat them.

We also saw that legitimacy-conditional wrongs are those that comprise the moral law. But this moral standard is certainly not one that humans, either individually or collectively, can
either veto or opt out of. Humans ultimately stand to be judged by God (at least in part) for their conformity to this standard. The demands of this standard largely take the form of prohibitions - such as those of the Decalogue, "You shall not commit murder", "You shall not steal", and so on - that press themselves upon us and demand strict adherence. The universal respect such principles command reflects that no individual and no society may escape their normative grip. And even where humans' apprehension of the moral law seems uncertain, ex hypothesi humans are held no less culpable for their failure to respect the moral law's demands. For traditional CR thought would say that humans themselves are responsible for the moral and cognitive distortions that may obscure the moral law - this in virtue of human sinfulness.

So the position of the CR tradition is clear, that the basic demands of the moral law bind persons whether or not they recognize them. That is to say, these demands are objective in nature. This means that thinking of these demands in terms of consent is unhelpful and wrongheaded.

b) Between Objectivity and Enforceability

Still, there is a noteworthy gap here. What the CR postulate of objectivity establishes is simply that the normative applicability of justice's basic demands is unaffected by consent given or withheld. What it doesn't necessarily establish is the legitimacy of using legal coercion to enforce these demands without consent. It might be thought that the normativity of justice's basic

546 This statement broaches the topic of CR views on soteriology and justification, which I am ill-equipped to address here. Suffice it to say, though, according to CR thought, at least part of the reason humans' stand under God's judgment and in need of Jesus' redemptive work on their behalf is that they violate their basic moral duties toward one another. The upshot of WCF 2.1 is that humans are culpable for their violations of the moral law; cf. discussion of tenet 2 in Chapter 6.

547 "It has characteristically been held that sin has darkened our capacities for acquiring justified beliefs and for acquiring knowledge. Reason is, in this way, not insulated from the devastation which sin has wrought in our existence. It is not that sin has affected our will but nor our reason" - as a Thomist might think.
demands can "simply befall us", but not the legitimacy of legal coercion. Or at the least, being convinced of the former doesn't entail that legitimacy also can befall us in like manner.

While the gap indeed exists, let us be clear about exactly what question is at issue in the present chapter. That is, Which concept is more aptly placed at the center of our understanding of legitimacy? That of consent, or that of objective rights and wrongs? To this, the answer supplied, and argued for, in this chapter is that objectivity is a far more apt category than that of consent. Given that non-consent is certainly null at least where legitimacy-conditional basic rights are at stake - null both in the moral applicability of the corresponding duties as well as in the legal enforceability of these basic duties - we ought understand these rights in terms of objectivity rather than consent. Now in assessing the significance of the gap for present purposes, it is important to bear in mind the narrowness of this question. For while the present chapter gives a clear answer to this relatively narrow question, this answer is only one part of how a CR approach theorizes legitimate coercion. It is, in other words, only part of how CR legitimacy would fill in the gap that remains.

To fully fill this gap, the second part of the CR thesis is also needed. On a CR approach, legitimacy isn't only a function of preventing objective wrongs. It is also a matter of preventing wrongs that are basic given a teleological account of basic human well-being. Essentially, the objector concerned about the purported gap is asking a) of the full range of objective moral duties by which we're non-optionally bound, which are legitimacy-conditional and legally enforceable and, b) why are these (and only these) legitimacy-conditional? The second clause of CR legitimacy is directed toward these queries. Objective moral duties which are legally enforceable are those which correspond to basic human interests and dignity in light of a basic teleology. It is

(Hart, Hendrik, van der Hoeven, Johan, and Wolterstorff, Nicholas, Rationality in the Calvinian Tradition, vi.)
these (and only these) that are legitimacy-conditional because they are basic, that is, because of the fundamental and urgent contribution they make to human well-being.

One might ask this pointed question: What good is the objectivity postulate if it leaves this gap unaddressed? In effect, what is the purpose of the first clause of CR legitimacy?

As I've indicated, its general purpose is to displace consent from the center of our understanding of legitimacy. This it does by giving us a moral basis for coercing others even when consent is absent. And such a basis is required if we are to reckon with situations where consent seems unnecessary (as where non-consent is deemed null).

For consider: without objectivity as a possible basis for legitimate coercion, consent seems all that is left. For even if we subjectively felt that $x$ and $y$ were wrongs that needed to be prevented as a matter of legitimacy, if it were not objectively the case that $x$ and $y$ were moral wrongs then I see no other way in which we could legitimately legally coerce others except by

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548 Again, it might be objected that in the absence of moral objectivity, neither would consent have any normative significance. This would parallel the way Patrick Riley critiques Hobbes' conception of the will. Hobbes defines will in a psychological way, without normative significance. But he then problematically deploys it in a moral way in his political theorizing, assuming willful acts can generate binding obligations. See Riley, Patrick, Will and Political Legitimacy, 23–60.

While I think this an entirely plausible contention, I remain unbothered by it since I do not mean to defend this world - a world without moral objectivity yet with consent-based legitimacy - in any case. I use it only as a foil in defence of the objectivity postulate. For the sake of argument, I think it reasonable for us to suppose that consent would remain normatively significant even were the concept of objectivity de-emphasized or diluted. Given this assumption, it does seem to me that, in the absence of objectivity, legitimacy could only come by consent. Moreover, if the objector is right that such a world is incoherent, I think that only reinforces my present point. It only reinforces that a strong sense of moral objectivity should be central to our framework for legitimacy.

One might contest this last claim. After all, what about clashes over allegedly morally objective schemes? In light of such disagreement, perhaps the need for moral objectivity doesn't actually speak in favour of CR legitimacy. And perhaps such disagreement speaks in favour of JL instead, since JL presents itself as a way of fairly arbitrating disputes between citizens.

In fact, this JL line gives us still further reason for giving moral objectivity pride of place. For in putting forth JL as a way of arbitrating between conflicting viewpoints, many JLS recognize that they must affirm JL itself as a morally objective principle. JLS such as Larmore and Quong (less so Rawls) would affirm the principle of public justifiability as in fact true or valid, objectively speaking. Again, then, objectivity appears to be a necessary category for making sense of our legitimacy-related convictions - a conceptual category as necessary for JLs as for the rest of us. We will differ in terms of how we fill in the content of moral objectivity; but evidently we must all rely on the concept to make sense of our legitimacy-related convictions.
consent. That is, I believe we must assume that *morally* speaking - quite apart from their enforceability - x and y are objective wrongs.

What the gap brings to light is that, *by itself*, postulating the objectivity of legitimacy-conditional wrongs fails to show why these wrongs are fit objects of legal enforcement as opposed to, say, fit objects merely of disapprobation. But we should not think, therefore, that the objectivity point is superfluous. Instead, what we should conclude is that the objectivity postulate is a *necessary* condition of understanding legitimacy, though not a sufficient one. If we seek some basis for coercion *other* than consent - which we must in light of null non-consent - the objectivity postulate seems an apt and needed alternative.

To reiterate, absent the objectivity of basic wrongs, only consent would suffice to justify their legal enforcement. But given the objectivity of basic wrongs, though it does not by itself suffice for legal enforcement, the objectivity postulate does help us make sense of why consent is at least sometimes unnecessary. One cannot divest oneself of a moral obligation simply by withholding consent. Thus, it may be legitimate to legally enforce an objective obligation, even if affected parties consent neither to the moral obligation nor to its legal enforcement.

In summary, what the first clause of CR legitimacy says is this: the basic rights and wrongs that must be protected for legitimacy to obtain are *objective* rights and wrongs. By itself, this fact does not legitimize coercion - there may well be objective rights and wrongs that, on their own, shouldn't be legally enforced.\(^{549}\) Yet we need this fact to explain why we are justified in coercing others without their consent - something which we do with regularity and which is now explicable in view of the nullity of non-consent. For if it is neither the case that consent is given nor that the basis of our coercion is morally objective, then coercing others without consent reduces to brute force. But if the basic wrongs we legally enforce are wrong objectively - morally
binding on all regardless of consent - then we have at least some basis for making sense of the phenomenon of legitimate coercion without consent.

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By way of illustration, let us once more revisit the case of the Bakuninist - but now from a CR approach, emphasizing objectivity rather than consent. In this case, we saw that the problem for JL was that moral duties it seems perfectly legitimate to enforce can be evaded by the Bakuninist. He does so by withholding consent, which he withholds by presenting reasonable objections to proposed uses of legal coercion. In the case of the Bakuninist, the proposal he considers is for a centralized state which, among other things, would allow for wealth redistribution. The duty corresponding to this proposal would be a duty to respect the legitimacy of the centralized state. By reasonably objecting that such states jeopardize freedom and equality, though, the Bakuninist de-legitimizes the centralized state and is under no obligation to respect its authority.

How would CR legitimacy avoid this result at odds with our convictions? CR legitimacy does not direct our attention to consent - either that of the Bakuninist or any one else - but to extenuating justice-related considerations that bear on the legitimacy of the centralized state. These considerations constitute an objective moral basis upon which the centralized state is, in fact, legitimate. The type of state in view here is the sort with which we in modern liberal democracies are familiar. These are coercive states that uphold basic rights, while also providing essential services and maintaining social order. On a CR understanding of legitimacy, it is, ex hypothesi, objectively the case that these rights must be protected, these services provided, this order preserved. Insofar, then, as the centralized state serves these ends, the Bakuninist is bound by a duty to respect the state despite his concerns. Consequently, CR legitimacy helps us

\[549\] Perhaps violating the trust of a friend, for example.
understand why we are justified in coercing the Bakuninist without his consent: we are justified in doing so because his lack of consent does not nullify the objective moral importance of protecting rights, providing essential services, and preserving social order. \textsuperscript{550} Assuming that the second clause of CR legitimacy is also met - and it would be, for surely basic rights, essential social services, and social order are components of the most plausible teleology of basic human well-being\textsuperscript{551} - the objectivity of these moral considerations explains why it is legitimate to legally ensure that the Bakuninst respects them \textit{even if he withholds consent}.

Going further, should the Bakuninist compromise basic rights and social services by rejecting the centralized state, \textit{he is simply wrong} in doing so. The importance of these rights and services is not a matter of being reasonable or unreasonable; it is one of right or wrong. Of course, \textit{why} it is objectively the case that persons possess both positive and negative moral rights remains a further question, and one to be answered with reference to teleological views. My present point isn't intended to settle that question, though. Rather, my point is that CR legitimacy gives us a foothold on understanding the legitimacy of coercing the Bakuninist where JL cannot.

For if it is legitimate to coerce the Bakuninist without his consent, then consent must be

\textsuperscript{550} In all likelihood, in objecting to the centralized state the Bakuninist would not mean to reject the moral importance of basic rights. Rather, he would disagree over the practical matter of how best to secure them. In the state, he sees a grave threat to basic rights, whatever the state's intentions. The problem for the JL is that the Bakuninist's reasonable rejection of the state means both that the \textit{legal enforcement} of basic social norms are defeated, and also that the \textit{norms themselves} are defeated. Since, \textit{ex hypothesi}, the norms issuing from JL's procedure are both fair \textit{and} enforceable, the JL seems unable to defend basic social norms either as fair, morally speaking, or as enforceable, legally speaking.

But assuming that the state does protect basic rights reasonably effectively, the objectivity postulate helps us see why it is legitimate to coerce the Bakuninist despite his practical objections. For the coercion is placed upon a moral basis that applies to the Bakuninist - the need to protect basic rights - no matter his reservations that remain. Now this moral basis would be - as with much else that is covered in this chapter - only part of the full CR response to the Bakuninist. The basic teleology postulate also helps us respond to the Bakuninist who doubts the propriety of a legally coercive approach to basic rights protection. Even so, the objectivity postulate provides the moral basis from which we can begin to understand why his consent is unnecessary, whatever his objections - ethical or practical.

\textsuperscript{551} As I say, this first idea must work in tandem with the second idea of CR legitimacy - that of basic teleology - to fully explain why we're justified in coercing the Bakuninist against his will. Go on to see Chapter 9.
inessential to legitimate coercion. If legitimacy instead is a matter of objective rights and wrongs - ones that apply regardless of consent - then the coercion of the Bakuninist is more readily explicable.

Thus, we can at least start to make sense of the legitimacy of coercing the Bakuninist, despite his reasonable objections. Replacing the idea of consent with that of objectivity is the key.

4-What, then, of Consent?

So far, I hope to have persuaded the reader that it's easier to make sense of our legitimacy-related convictions if we begin with the notion of objective rights and wrongs than if we begin with consent. I am arguing that the idea of consent should not be central to our understanding of legitimacy, neither actual consent nor hypothetical. As much is suggested by the nullity of non-consent in our actual moral experience.

But in other ways doesn't our lived experience also indicate the importance of consent? At risk of sounding contradictory, I answer: it certainly does. And these indications, I take it, fuel the intuitions that make JL so attractive in the eyes of so many. Put another way, our experience tells us that consent is important, a fact that JL exploits to elevate consent to a place of overriding importance. But does JL exaggerate its importance? (My answer can be anticipated easily enough.) Whether or not it does, I grant that I share many consent-emphasizing intuitions, and that often legal coercion isn't fully justified if coercion is absent.

How, then, are we to reconcile these conflicting sets of intuitions - those that suggest the importance of consent (which motivate JL) and those that do not, such as the nullity of non-
consent (which motivate CR legitimacy)? On my view, how do I see these fitting together? And what do I take to be the real import of each?

Taking into account the full range of our intuitions - both consent-emphasizing and consent-bypassing - what they suggest is a crucial asymmetry between two types of legal coercion. On the one hand, when an issue of basic justice is at stake, consent is not necessary to legitimize the use of legal coercion. On the other, when legal coercion is used to pursue some further demand of justice or some other social goal, consent is necessary. Thus, my proposal for reconciling our consent-emphasizing and consent-bypassing intuitions is a threshold model: below the threshold, consent is unnecessary; above, it is necessary.

This is the general model I propose for reconciling our consent-emphasizing and consent-bypassing convictions. Let me now add a few clarificatory points.

First, strictly speaking, I count all uses of legal coercion above the threshold as legitimate provided that basic justice is substantively upheld. I regard legitimacy as a predicate that primarily attaches to regimes, not individual laws. On my view, it is a property possessed by regimes who satisfy the condition of upholding basic justice. Moreover, such regimes retain this property however else they may authorize the use of, and exercise, legal coercion. Included in this allowance, such regimes retain legitimacy whether or not authorization of legal coercion for further purposes involves obtaining the consent of those who will be affected by the further measures. This may seem an implausible picture unless we bear in mind that the category of however else legal coercion might be used cannot, of course, involve uses of legal coercion that

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552 Note that in the following comments, concerning the reconciliation of our consent-emphasizing and consent-bypassing intuitions, I articulate views that seem to go beyond CR legitimacy as developed in Chapter 7 and as defended throughout the rest of Part III. These are views which I also hold, and which I take to be fully compatible with CR legitimacy as presented. But should the reader find them implausible, the reader should not immediately conclude that CR legitimacy as presented is also, therefore, implausible.

553 That is, above the threshold consent is necessary for further legal coercion to be fully justified or fully just. It is not necessary, though, to be legitimate. This is a point I go on to clarify in-text.
jeopardize basic justice itself. If so, legitimacy is forfeited. For, as per CR legitimacy, legitimacy consists in upholding - and maintaining - basic justice. We also need to bear in mind that we're talking about legitimacy here, not ideal or full justice, and remember the sort of concept that legitimacy is: a threshold concept that identifies legal coercion which, while falling short of full justice, nonetheless remains morally credentialed in a real way. On the model I propose, I readily grant that many measures going beyond basic justice that I'm prepared to deem legitimate will fall short - perhaps far short - of full justice. However, they remain morally credentialed being part of a set of laws which, as a whole, uphold basic justice. So, then, when I intimate above that "consent is necessary" above the legitimacy threshold, bear in mind what it is necessary for: for full justice, but not for legitimacy. Below the threshold, consent is unnecessary for legitimacy; and above the threshold, consent is unnecessary for legitimacy as well. Above, consent will surely be necessary for full justice, but it remains unnecessary for legitimacy; for all measures above the threshold are part of a set of laws which, taken together, uphold basic justice and are thereby legitimate.

Second, following from what has just been said, here is a clearer statement of how I think we ought view coercive measures above the threshold: above the threshold of basic justice, consent should be sought and justice isn't fully served unless consent is given. Contrast the situation below the threshold. There, consent needn't be sought and basic justice is served whether or not consent is given. Below the threshold, it may be desirable to reinforce otherwise legitimate laws with the consent of affected parties. Still, the legitimacy of laws pertaining to basic justice should not be regarded as captive to the consent of affected parties. Conversely, it is

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554 “Thus, legitimacy is a weaker idea than justice...At some point, the injustice of the outcomes of a legitimate democratic procedure corrupts its legitimacy, and so will the injustice of the political constitution itself. But before this point is reached, the outcomes of a legitimate procedure are legitimate whatever they are...Legitimacy allows an undetermined range of injustice that justice might not permit.” (John Rawls, Political Liberalism, 2005, 428 [emphasis mine].)
normatively proper to regard laws above the threshold as captive to the consent of affected parties. Though such laws, absent consent, are not illegitimate, neither are they fully justified.

In sum, the idea here is that consent is not necessary for legitimacy, but it is for full justice. Legitimacy is a function of meeting the basic demands of justice, but these are not understood as including a consent requirement.555

Third, note again the level of abstraction at which my proposal for reconciliation is aimed. As with my CR account of legitimacy developed in Chapter 7, my current proposal puts forth the general categories in terms of which we can most successfully reconcile our consent-emphasizing and consent-bypassing convictions. I take it that no-one, including the JL himself, can make sense of their convictions without appealing to some threshold of the kind that my model involves.556 For everyone has certain convictions about basic justice on which they are unwilling to budge - certain rights they would be unwilling to make vulnerable to democratic procedures. Everyone has such convictions - though what's considered non-negotiable will vary somewhat from person to person. Moreover, everyone also has certain convictions about all the

555 I agree with Arneson that there is not a basic right to a democratic say. See Arneson, Richard J., “The Supposed Right to a Democratic Say.” A right above the threshold? Yes. Below the threshold? No.

Bearing in mind the distinction between idealized unanimous consent and actual majoritarian consent, the reader might notice that I'm not, in fact, committed to Arneson's view despite my critique of consent. That is because my specific target is JL and its account of idealized unanimous consent, which one might reject while simultaneously upholding the need for actual majoritarian consent. If so, then one might think that there is, in fact, a basic right to a democratic say.

However, I don't think that our CCs bear out such a view. With or without democratic procedures, I think we would recognize the legitimacy of using legal coercion to protect a host of other rights which are properly regarded as basic - such as rights to bodily integrity, material subsistence, and religious freedom. If so, this tells us both that consent isn't essential to understanding legitimacy and that the right to a democratic say isn't basic. It suggests both these points even if the latter isn't strictly entailed once we clarify the consent in question as idealized unanimous consent.

556 I believe Rawls' comments quoted above reflect this, his emphasis on procedures belying what he demonstrably thinks. "At some point..." he says, procedural outcomes become so unjust that legitimacy is compromised. "But before this point is reached..." he alleges that it is procedures that make for legitimacy. Instead, it seems to me that what Rawls has done is identify a substantive threshold. Below it, even procedures can't suffice for legitimacy. Above it, procedures are called for - as I say, they're required for legal coercion to be fully justified - yet I don't think Rawls should say that lack of procedures at this level

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other stuff that is the fodder of politics, albeit convictions they hold more loosely. These other matters, important though they might be, are not the stuff of basic justice. As reflected by the fact that they're held to be negotiable, I take it that even those who hold these latter convictions would agree that they are not the stuff of basic justice. Moreover, in contrast to matters of basic justice, we can expect a greater willingness to subject these other issues to democratic adjudication.

My model, then, reflects this common category-distinction between issues that we are and issues that we are not willing to subject to democratic procedures. Accordingly, I propose we make sense of this category-distinction in terms of a threshold below which consent is not required for legitimate coercion and above which consent is required. The model does not say which first-order uses of legal coercion fall into one or the other category. On this we should expect disagreement. But, with an eye to the issue of legitimacy, it suggests that we reconcile our consent-emphasizing and consent-bypassing intuitions in terms of these general categories. On this we should find common ground.

I don't want it to go unnoticed that this consent-emphasizing dimension of my story is also fed by the CR tradition of social thought. A powerful democratic impulse courses throughout the ideals and writings of the tradition. It is evident in the intensity with which CR theorists affirm the equality of all citizens. We have seen Kuyper declare, "No man has the right to rule over another man...As man I stand free and bold, over against the most powerful of my fellowmen." The effect of rejecting any natural hierarchy among citizens is to place all on equal footing: "To have placed man on a footing of equality with man, so far as the purely human interests are concerned, is the immortal glory which incontestably belongs to Calvinism." As summarized by tenet 3 of the CR background, people are naturally free and equal; they are

impugn the legitimacy of the regime as a whole, provided the regime as a whole is meeting the threshold of substantive justice.

Kuyper, Abraham, Lectures on Calvinism, 69.
naturally subject to no other human being and ultimately accountable only to God. This
democratic impulse is also evident in CR theorists' sensitivity to, and conscientious rejection of,
all forms of oppressive government. Kuyper urges vigilance with which we "must ever watch
against the danger which lurks, for our personal liberty, in the power of the state."\textsuperscript{559} Oppression
lurks both, in an obvious way, where "no constitutional rights" are recognized "except as the
result of princely favor."\textsuperscript{560} But, in a less obvious way, it also threatens where modern Western
democracies have experienced a "takeover of our government and law by this other entity, the
materialistic, humanistic, chance world view."\textsuperscript{561} CR theorists are deeply concerned with the
limits of legitimate state power\textsuperscript{562}, and quick to point out the illegitimacy of state power when
these limits are exceeded.\textsuperscript{563}

These recurrent themes of democracy, individual liberty, and constitutional checks
against overreaching governments all suggest that consent is important. On my wider view, it
does, indeed, have a vital - even if circumscribed - role to play in a just social order. And,
remember, the only real qualification I am putting on consent is that it is unnecessary when
legitimacy-conditional basic wrongs are at stake.

So how would consent fit into a CR conception of a just social order? Its place is not in
the basic legitimizing logic of the coercive state. I suggest this as one interpretation of CR
thought, consistent with CR legitimacy as presented in Chapter 7 though not necessarily part of it.
Others may read the CR tradition differently. But on the interpretation I'd suggest, consent is no
part of the coercive state's basic logic. What necessitates the coercive state is the violation of the

\textsuperscript{558} Ibid., 19.
\textsuperscript{559} Ibid., 68.
\textsuperscript{560} Ibid., 84.
\textsuperscript{561} Schaeffer, Francis A., "A Christian Manifesto," 436. One might doubt whether this is a \textit{bona fide} case
of oppressive government. But one should not doubt Schaeffer's concern to identify and undo oppressive
government in all its forms, including those that appear relatively benign.
\textsuperscript{562} Eg., see Calvin, John, \textit{Institutes}, 1520; Dooymeweerd, Herman, \textit{The Christian Idea}, 45.
precepts of the moral law - an objective law given by God, in full force and effect regardless of human consent. If this is how legitimacy, in fact, works, it is right for Schaeffer to write, "It is time we consciously realize that when any office commands what is contrary to God's Law it abrogates its authority." Assuming that "God's Law" here is standing in for the basic moral law, then, as per CR legitimacy a state that lapses in its prevention of these wrongs and protection of these rights, does, indeed, forfeit its legitimacy.

However, for any state or polity that seeks to go beyond merely preventing basic wrongs and protecting basic rights, and seeks to achieve a more fully just and flourishing society, CR social thought certainly points us in the direction of robust democratic institutions. In so doing, a CR social order would also incorporate the emphasis on consent implicit in such institutions.

In short, consent is no part of my CR account of legitimacy. However, that consent plays an important role in any fully just polity is a further insight that can, and should, be appropriated from the CR tradition of social thought.

Conclusion

While a democratic impulse courses through the CR tradition, my focus in this chapter has obviously been how we ought not exaggerate the importance of consent in our political philosophy, particularly as regards the issue of legitimacy. I have sought to make this point by highlighting how, in our actual moral experience, we often don't regard consent as necessary for legitimate coercion. As suggested by Estlund, we are convinced of the "nullity of non-consent". Taken generally, this idea captures our sense that, at least concerning the basic demands of justice, individuals cannot escape coercion simply by withholding consent. When extenuating

moral considerations demand the use of legal coercion, coercion may be used with or without consent.

Broadly speaking, this is the import of the notion of null non-consent. As such, it counteracts the general tenor of JL’s consent-emphasizing approach.

More specifically, I explained that postulating the objectivity of legitimacy-conditional wrongs isn’t sufficient to explain the legitimacy of their legal enforcement, but that it is a necessary part of the explanation. This first idea of CR legitimacy isn’t that it is an objective fact that coercive enforcement of basic rights is legitimate. I take it that while such a fact, indeed, ultimately results from my account, articulating the first idea in this way would merely beg the question. The question, to clarify, is what legitimacy is about, and why. To simply say at the outset that, as a matter of objective moral fact, legitimacy is about the legal enforcement of basic wrongs would be mere assertion and lacking any power to explain why this is what legitimacy is about.

Rather, the first clause of CR legitimacy states that the basic rights, protection of which is necessary for legitimacy, exist objectively. That is to say, the moral duties that correspond to basic rights and wrongs are binding on individuals and societies whether or not these duties are recognized as such. Why is it that only objectively existing basic rights can be legitimately enforced without consent? That question is to be answered by the second clause of CR legitimacy, and, as such, this first insight is only part of a fuller explanation of legitimacy.

But why, then, must we accept that these legitimacy-conditional basic rights and wrongs exist objectively? Because otherwise, as I see it, consent is the only thing that could morally legitimize any coercion at all. And yet, as evidenced by the nullity of non-consent, we believe that coercion is often legitimate even where consent is absent. Such beliefs make no sense philosophically unless part of their explanation posits the objective existence of the rights we
enforce without consent. In other words, the objectivity postulate at least gives us some moral basis for coercion without consent, and consequently some way of making sense of our conviction that coercion without consent can be legitimate.

So, "Is consent needed"? That is, is consent essential to the justification of legitimate coercion? As I began this chapter, I expressed my expectation that simply asking this question would be cause for concern for many readers. Drawing on the idea of null non-consent, though, I hope to have persuaded readers that they are, in fact, committed to answering this question affirmatively in at least some instances. I explained the role that consent would play within my broader view. I also highlighted key themes within the CR background that suggest consent has an important role to play in a fully just social order. However, contrary to the impression one receives from sweeping statements such as that governments derive "their just powers from the consent of the governed", this role has definite limits. Principally, none of us would seem able to make good philosophical sense of our CCs without conceding that consent is unnecessary when legitimacy-conditional rights are at stake. For we all stand ready to coerce others amidst disagreement when the object of disagreement is a demand of justice we consider to be fundamental and non-negotiable. Thus, none of us would seem able to understand legitimacy without denying the necessity of consent, for we seem convinced that it is legitimate to legally enforce at least basic rights even when consent is absent.

The main conclusion of this chapter is that the category of consent should not be central to a philosophical understanding of the subject matter of legitimacy. Not only because we're convinced of the nullity of non-consent, but also because by replacing the idea of consent with that of objective wrongs CR legitimacy is able to avoid the first unacceptable consequence to which JL leads. As exemplified by our reassessment of the Bakuninist case, CR legitimacy gives us the conceptual categories for understanding why coercing such individuals is, indeed,
legitimate despite their protestations. Hence, while JL de-legitimizes all uses of legal coercion, CR legitimacy does not.

In sum, why doesn't CR legitimacy de-legitimize all uses of legal coercion as JL does? It is because CR legitimacy explains legitimate coercion in terms of objective rights. As such, the duties corresponding to these rights bind individuals whether or not they recognize them. While the objectivity of basic rights doesn't suffice to show their legal enforceability, it does ensure that individuals can't divest themselves of these duties - and thereby foreclose the possibility of their legitimate legal enforcement - merely by the withholding of consent.
Chapter 9
The Difference Made by Basic Teleology

Introduction

This is probably the most important chapter in this dissertation. For a clear appreciation of the philosophical foundations of our legitimacy-related convictions, the idea of basic teleology is essential. In both its aspects, it is essential: in both the teleological nature of basic teleology and in the basic-ness of these requirements. Chapter 7 already provided initial reasons for understanding legitimacy in terms of basic teleology.\(^{565}\) In the present chapter, I hope to go significantly further in my defense of this second idea. To this end, I will endeavor to paint a vivid picture of the difference that basic teleology makes in our philosophical understanding of legitimacy.

If I am successful, what sort of difference should the reader expect? To begin with, the reader shouldn't expect that the basic teleology postulate will make it any easier to make first-order legitimacy judgments; it won't necessarily. In many cases, doing so will still be difficult and will simply require a great deal of practical wisdom and judgment.

However, I do intend to make much clearer the sort of philosophical presuppositions that are involved in the making of such judgments. In other words, as I've noted earlier, I share Rawls' goal of achieving a "clear and uncluttered" understanding of the issue at hand.\(^{566}\) Such an understanding of legitimacy, I hope to show, requires us to appreciate the role played by basic teleology in our legitimacy-related convictions.

\(^{565}\) These were Taylor's contrast between the differential importance of religious freedom and traffic freedom, and my discussion of the background assumptions behind basic rights to bodily integrity, material sustenance, and equality before the law.
As I shall explain, basic teleology is the counterpoint to JL's idea of proceduralism. Rather than making clear the philosophical presuppositions of our legitimacy convictions, JL's proceduralism obfuscates them. This is the Humean point to which we've already referred; JL's proceduralist framework foregrounds the fact of agreement, but obscures the normative significance of the substantive reasons for which the agreement is made. But we should not follow Hume in replacing proceduralism with a utilitarian approach. Justifying rights in terms of aggregate utility is, I take it, simply a non-starter.\textsuperscript{567} Instead, the needed replacement for JL-style proceduralism is basic teleology.

Moreover, in Chapter 4 we saw that JL's proceduralism leads to the unacceptable consequence of undercutting legitimacy-conditional basic rights. It does so, I argued, by conflicting with key characteristics that we experience such rights as having. Whereas we experience legitimacy-conditional rights as procedure-independent, as having certain definite content, and as impervious to popular opinion, JL delivers rights that are fundamentally procedure-dependent, the product of a contentless proceduralism\textsuperscript{568}, and contingent on group consensus. I explained that, at root, these mischaracterizations of basic rights result from JL's commitment to proceduralism.

\textsuperscript{566} Rawls, John, \textit{Justice as Fairness}, 176.
\textsuperscript{567} Are we justified in killing an innocent person to quell a race riot? Certainly not, though utilitarianism - on grounds of aggregate utility - would seem to sanction this flagrant rights violation. That utilitarianism would permit rights violations of this sort I regard as fatal to the theory. For this famous example, see McCloskey, H. J., "A Non-Utilitarian Approach to Punishment," \textit{Inquiry} 8 (1965): 249–263.
\textsuperscript{568} Whenever I refer to the contentless proceduralism of JL, I urge the reader to bear in mind the excursus found in Chapter 4 on the content that JL does seem to provide. Ultimately, the internal logic of JL precludes content at a conceptually fundamental level. That is not to say, however, that JL theorists do not offer substance in certain limited ways. They do - as I acknowledge in Chapter 4 - and I want to avoid a straw man as my target. For explanation, then, of why I persist in characterizing JL in terms of "contentless proceduralism" despite this content, see again the excursus. In short, I do so both in light of JL's internal logic and in light of how JLS identify certain considerations as relevant but do not specify how they are to be weighed and integrated.
So how is basic teleology the needed antidote to proceduralism? In short, a teleological account of basic human well-being provides content where JL proceduralism does not. Thus, by understanding legitimacy in terms of basic teleology, CR legitimacy makes clear what lies at bottom of our legitimacy-related convictions, including those of JLs. That is, it makes clear the type of philosophical presupposition that lies at bottom. For even JLs themselves must ultimately rely on basic teleological views to operationalize their procedures\(^{569}\); this final and inescapable need for basic teleology is a point badly obscured by JL's proceduralist framework.

Moreover, if we conceive of rights as based on a teleological account of basic human well-being, we can make sense of the characteristics we experience basic rights as having. For the content and importance of these rights is determined by a substantive account of basic teleology held to be objectively true, not true by procedures and group consensus. Thus, basic teleology is an appropriate replacement for proceduralism insofar as it enables us to avoid undercutting basic rights - an unacceptable consequence to which, by contrast, JL's proceduralism leads us.

In the course of the following discussion, I hope to again make clear the level of abstraction at which my CR theory aims. By arguing that basic teleology is needed to provide content, my CR theory does not give first-order content in the way that, say, Nussbaum's capabilities approach\(^{570}\) or Henry Shue's basic rights approach\(^{571}\) does. Rather, my point is that **however** we fill in the details of our basic teleology, **that** we must rely on views of a basic teleological sort is inevitable. Thus, the basic teleology clause of CR legitimacy is part-and-parcel of my thesis' aim, namely, to illuminate the very subject matter of our first-order

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\(^{569}\) This is the upshot of the Humean point taken together with the idea of basic teleology, the idea that content - even basic content - presupposes a teleological backdrop.

\(^{570}\) Nussbaum, Martha C., *Creating Capabilities*.

\(^{571}\) Shue, Henry, *Basic Rights*. Shue prioritizes three substantive basic rights, to subsistence, security, and liberty.
legitimacy judgments. However, while operating at this more abstract philosophical level, a framework for legitimacy must still fit with, and confirm, our first-order legitimacy-related CCs - such as our conviction in legitimacy-conditional basic rights. It ought not undercut them.

Philosophical fit with these CCs is a reasonable desideratum of our best such framework, and, consequently, by the end of this chapter I also hope to have strengthened my case that CR legitimacy better satisfies this desideratum than does its JL counterpart.

I shall begin by briefly reviewing JL's problematic proceduralism. Then I shall highlight the difference that basic teleology makes. We will examine both the teleological nature of basic teleology as well as the basic-ness of this teleology; this second idea of CR legitimacy irreducibly contains these two aspects. I hope to lay bare the philosophical presuppositions of legitimacy judgments, and demonstrate how CR basic teleology avoids undercutting our basic rights the way JL does.

1-JL's Problematic Proceduralism Revisited

The problems with proceduralism, including JL proceduralism, may not be readily apparent. Indeed, fair procedures present themselves as a wholly appropriate way of resolving many real-world disagreements. Thus, it is unsurprising, and even laudable, that philosophers have imported the notion of proceduralism into their theories to try and deal with various issues within political philosophy.

As attractive as the idea might initially seem, however, we've seen that relying too heavily on philosophical proceduralism leads to problems of the sort we reviewed in Chapter 4.

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572 Cf. "The aim throughout was to show that the theory proposed matches the fixed points of our considered convictions better than other familiar doctrines, and that it leads us to revise and extrapolate our judgments in what seem on reflection to be more satisfactory ways." (Rawls, John, Theory of Justice, 507.) From the outset, I've agreed with Rawls' methodology of reflective equilibrium, even whilst disagreeing with Rawls qua JL theorist about much else.
For one, it is JLs' proceduralist aspirations that lead to what I've called the "vacuity of the reasonable", or what Estlund calls the "flight from substance". The internal logic of JL demands that the category of the "reasonable" be emptied of determinate content. This demand is made in the name of popular sovereignty: *ex hypothesi*, it is the procedure's participants who themselves provide the needed content. JLs are also committed to the vacuity of the reasonable since fixing "reasonableness" with determinate content would merely beg the question on behalf of some favoured view and would rob the procedure of any genuine heuristic value in explicating the demands of justice (or legitimacy). Furthermore, I explained in Chapter 3 why JL logic demands that "reasonableness" primarily apply to persons - not to reasons or proposals. Concerning the "reasonableness" of persons, we can detect the flight from substance in Rawls' spartan twofold criteria for reasonable personhood. These criteria provide scarcely any more content than to require that persons respect reciprocity as well as the demands of reasonable pluralism. The "vacuity of the reasonable"; the "flight from substance"; or think of Hegel's critique of Kant, that the Categorical Imperative is a merely formal principle bereft of the

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574 Here think again of what Fabienne Peter calls the "political egalitarian's dilemma": the fairer the procedure, the fewer the issues left open to democratic decision. See "1-On the Substance/Procedure Distinction" in Chapter 4.
576 See the subsection, "2.a) Reasonable Persons: Who's In? Who's Out?" in Chapter 3. Basically, this demand is made by JL logic in the name of maximal popular sovereignty. To recap: insofar as the JL procedure is meant to *justify* just social arrangements and not simply *assume* their justness - or reasonableness - these arrangements must be representable as legislation issuing from a fair procedure. In other words, they must be representable as the product of popular sovereignty. And JL logic demands this popular sovereignty be *maximized* since the less social arrangements are representable as the product of popular sovereignty, the less useful is the JL procedure as a means of justifying - and not simply assuming - their justness.

So JLs are not committed to saying that just anyone who can string together a few sentences in secular terms are reasonable, no matter how crazy or malicious they may be. That is, JLs do not make just social arrangements hostage to such marginal views. I recognize that, and I'm not saying that they do. Nonetheless, JLs *are* committed to maximal popular sovereignty insofar as just - and reasonable - social arrangements must be representable as the joint legislation of those who do qualify as reasonable, lest the constructivist procedure be robbed of its justificatory role.
substance provided by a concrete, historical, institutional conception of reason. All point to the same problematic phenomenon: the lack of content provided by philosophical theories that are overly procedural.578,579

A second concern is that proceduralist theories lend credence to the idea that something is right just because it is popular; yet we know this idea to be certainly false.580 A unanimity condition is essential to JL. The procedure underwriting the demands of justice (or legitimacy) must culminate in social arrangements on which all agree. More to the point, JL depicts the justifiability of the social arrangement as dependent on the fact of agreement itself (that is, on the action of hypothetical agreement).581 Without this group consensus, putative demands of justice or legitimacy are unjustified. But with this group consensus - by this consensus - the justifiability of such demands is secured. Of course JL's contractors are hypothetical, not real. But at the same time they are also intended to be, ex hypothesi, not so very different from real-world persons. Otherwise they could not serve as meaningful proxies for real-world persons themselves. Hence JL implies that the demands of justice or legitimacy really could be determined by popular opinion, if only our real-world circumstances were relevantly different from how they are at present. And already, at least according to a JL such as Barry, some real-world polities more

578 If not already evident, these comments pertain to the second asymmetry covered in Chapter 4, between substantive rights and JL's contentless proceduralism.
579 Again, for a fully balanced view of the substance that both is and isn't made available by JL, see the excursus in Chapter 4. In the main, however, JL is certainly content-lite.
580 Earlier I may have insufficiently emphasized that JLs themselves "never suppose that our thinking something is just or reasonable, or a group's thinking it so, makes it so." “Note that the standard is not what principles or institutions people will actually accept, but what it would be unreasonable for them not to accept, given a certain common moral motivation in addition to their more personal, private, and communal ends.” See John Rawls, Political Liberalism, 2005, 111; Nagel, Thomas, “Moral Conflict,” 221.
581 Freeman makes clear that the contract is normatively ineliminable. See Freeman, Samuel, “Moral Contractarianism.” See Chapter 11 for further discussion of how to most appropriately interpret JL's constructivism, whether strongly or weakly.
closely approximate the right circumstances than others, suggesting that these circumstances may actually be within reach.\footnote{582,583}

Taken together with the asymmetry between the procedure-dependence of JL rights and the procedure-\textit{in}dependence of basic rights, these two concerns lead to the more general problem that JL undercuts the basic rights we regard as necessary for legitimacy. How so? It portrays them as procedure-dependent, not procedure-independent. It portrays them as lacking content in the absence of political deliberation, whereas we experience them as having definite content given by our interests and dignity. It also portrays their justification as dependent on group consensus, even though something isn't made right by popularity. Thus, JL undercuts legitimacy-conditional basic rights by conflicting with characteristics we experience these rights as having. To say it "undercuts" them is to say that it calls into question the existence of rights so described - procedure-independent, substantive, and objective. For, according to JL, there \textit{is}, in fact, a procedure on which basic rights depend for their substance and validity, namely, the hypothetical procedure of JL. In sum, we experience these rights as the \textit{prerequisites} of fair procedures; but on the JL hypothesis, they are the \textit{products} of fair procedures instead.

To reiterate an issue already raised, proceduralism causes one further noteworthy problem which I regard as more a \textit{philosophical} than normative failing. Proceduralist approaches obscure the considerations that really justify any justifiable social arrangement. For any proposal to which all parties would supposedly agree within a proceduralist (or contractarian) framework, we may ask a further question: \textit{why} did they agree to the proposal? It is \textit{those} considerations which really justify a social arrangement. Or to put this point in the idiolect of JL, there is always the further question of why an agreement is "reasonable". What are the substantive

\footnote{582} Barry, Brian, \textit{Justice as Impartiality}, 106.  
\footnote{583} If not already evident, the comments of this paragraph pertain to the third asymmetry covered in Chapter 4, between objective rights and rights-by-consensus.
considerations that make it, or the reasons on which it is based, either reasonable or unreasonable to accept? It would seem to be these considerations, that underwrite substantive judgments of "reasonableness" and "unreasonableness", that really justify the social arrangements agreed upon. It is not the fact of agreement that does so. Hume leveled this very critique against the social contract theories of his day\textsuperscript{584} and it remains relevant to proceduralist theories of today, including JL. This criticism doesn't mean that proceduralist thinking ought not play any role in our practical reasoning whatsoever. But it does mean that, at most, its usefulness is as a mere heuristic\textsuperscript{585}, or as a kind of decision-procedure. It also means that, qua philosophical theory, proceduralism does not yield the "clear and uncluttered" view that we seek. Such a view would, instead, bring clearly to light the nature of the substantive considerations that make reasons and proposals worthy objects of unanimous agreement.

By way of reminder, then, the foregoing are the problems JL faces in virtue of its proceduralism. In what follows, I hope to lay bare the nature of the considerations that truly underwrite our judgments of legitimacy. By doing so, I also hope to place the basic rights we cherish on a firmer philosophical foundation.

\textit{2-The Teleology of Basic Teleology}

To understand our legitimacy-related convictions, we must understand that in holding them we presuppose certain teleological views. JL suggests that we can make sense of our convictions while eschewing such substantive views, but we cannot. To answer the ever-pressing question, "For what reasons do the parties agree to the social contract?" or "On what grounds is it 'reasonable' or 'unreasonable' to reject proposal $x$?", we must appeal to teleology. It is views of a

\textsuperscript{584} See Hume, David, “Of the Original Contract.”
\textsuperscript{585} For the suggestion that its usefulness is only as mere heuristic, see Pettit, Philip, \textit{The Common Mind}, 297–307.
teleological nature - whether or not they are recognized as such - that provide the content needed to operationalize a proceduralist approach. As Estlund might say, the flight from substance must end in substance. And this substance is given by teleology.

This sketch requires unpacking.

What is meant by teleology? What I said in Chapter 7 provides the basis for the present discussion. As explained there, teleological views are views that identify some purpose, final ends, or way of life the achievement of which constitutes human flourishing (or well-being). In other words, teleological views specify final ends or ways of living which human beings ought to pursue.

Another point previously explained but which bears emphasizing again is this: the particular ways of life endorsed by teleological views will vary in their specificity. Some such views will endorse a rather specific ideal of human flourishing. Others will admit of greater diversity and range of individual choice. But both relatively narrow and relatively permissive views can be genuinely teleological nonetheless. In what sense are both teleological? For an indication of the teleological nature of both, let us borrow again from Taylor. It is indicated by the fact that both presuppose ways of being that are - either explicitly or implicitly - "strongly evaluated" to be superior to alternative ways of being.

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586 "...deep deliberative democratic theory" - and so, too, JL I might add - "represents itself as wholly proceduralist, and as eschewing procedure-independent standards" but "it invokes independent standards after all". (Estlund, David M., Democratic Authority, 85ff.)

587 Taylor's idea of "strong evaluation" refers to the practice of distinguishing between higher and lower ways of living, and we make such distinctions in various ways. For instance, we admire certain ways of life while holding others in contempt. As well, we hold certain human activities and achievements in 'awe', others not. Taylor's point is that all such modes of "strong evaluation" are certifiable moral judgments, and yet they go beyond a narrow focus on the permissibility or impermissibility of discrete actions. [Taylor, Charles, “The Diversity of Goods,” in Philosophy and the Human Sciences: Philosophical Papers 2, by Taylor, Charles (New York, NY: Cambridge University Press, 1985), 230–247.]

Going as they do beyond a narrow focus on discrete actions, what else do such judgments reflect but that certain general ways of being are morally superior to others? And, furthermore, that certain of these ought to be pursued, while others avoided?
What are examples of teleological views? Aristotle and Aquinas provide the paradigm cases. According to the former, human flourishing consists in the exercise of practical wisdom as a member of a self-governing polity; according to the latter, in the beatific vision. But teleological views need not be so parochial. As I say, teleological views will vary in the specificity of their demands.

For instance, in elaborating the "diversity of goods" with which our political theory must reckon, Taylor lists the life of "personal integrity", that of Christian agape love, that of self-direction, and that of utilitarian rationality as four recognizable "modes of life" that find adherents in contemporary Western society. These ends would admit of much greater diversity in their realization than is permitted by Aristotelian or Thomistic accounts of human flourishing - at least the lives of "personal integrity" and self-direction would. Yet it is no stretch at all, I submit, to classify all of these views as "teleological". For each holds forth a given way of living as qualitatively superior to alternatives - and this, not as a matter of mere taste, but of moral fact.

For example, the life of "personal integrity" is judged superior to that of mere "conformity to established standards which are not really one's own". Or take the life of self-direction, which,

...sees the dignity of human beings as consisting in their directing their own lives, in their deciding for themselves the conditions of their own existence, as against falling prey to the domination of others, or to impersonal natural or social mechanisms which they fail to understand, and therefore cannot control or transform.

As one more example, the partisan of utilitarian rationality valorizes the person who divests himself of traditional metaphysical presuppositions and of the partiality traditionally involved in intimate human relationships.

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588 Though as noted earlier (in Chapter 7), they are not examples of basic teleology.
590 Ibid., 234.
591 Ibid.
Here, then, we have six teleological views by way of example: human flourishing \textit{qua} exercise of practical wisdom, \textit{qua} beatific vision, \textit{qua} personal integrity, \textit{qua} agape love, \textit{qua} self-direction, and \textit{qua} utilitarian rationality. Some have more the appearance of "comprehensive doctrines"\textsuperscript{592}, others less so; some are more narrow, others more permissive.\textsuperscript{593} But all are certifiably teleological; all identify a way of life the achievement of which constitutes human well-being. We should be careful not to overlook the teleological nature of each.

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In contrast to the proceduralism of JL, let us now reflect on the ways in which a teleological view delivers substance.

From both my characterization of what teleology is and from these examples, it should be clear that a teleological view, whatever its other traits, is essentially contentful. By this I mean that any such view specifies human flourishing in terms of concrete ways of being, whether variously narrow or general.\textsuperscript{594} On one view, flourishing is the exercise of practical wisdom; on another, it is self-expression; on still another, it is the exercise of autonomy; and so on. The content of each may be different, but each is, indeed, contentful.

In turn, each of these concrete ways of being requires certain material conditions for its realization. That is to say, there are particular political, economic, and social conditions that must be in place for the realization of each. Now the required conditions will vary depending on the way of living to be realized. For instance, those required by collective self-governance will likely differ from those needed for a life of self-direction. The latter sort of life may well require relatively strong individual property rights, in comparison to the relatively strong forms of public

\textsuperscript{593} Though I don't emphasize it here, it is also worth remembering that teleological ends are reflected not only in affirmations, but also in denials and omissions. Cf. Chapter 7.
ownership that would seem conditions of the former. And the conditions for both collective self-
governance and self-direction would be different again from those needed for the cultivation and
exercise of utilitarian rationality. A thoroughgoing education in science would certainly be
needed for the latter, though not for the former two - or at least not needed to the same degree.
Having wide space for a personal prerogative may be needed for maintaining personal integrity,
but is anathema to strict utilitarian impartiality. My point here is that, while the conditions for
various ways of being will vary, each way of being will, indeed, require certain concrete
conditions for its realization. These concrete conditions are then part of the determinate content
provided by a given teleological view.

Moreover, teleological views are contentful in the sense that each specifies a particular
functioning\textsuperscript{595} that ought to be achieved; for each, flourishing consists not merely in having the
opportunity to function in the requisite way, but in the actual functioning itself. This remains as
true for views emphasizing self-direction or personal integrity as it does for Aristotelians or
Thomists. Why should we say this?

We should say that all teleological views emphasize functionings - even relatively
permissive, liberty-emphasizing views - because for any opportunity we think it important to
have, we can ask the further question of \textit{why} it is important to have. The most natural explanation
of an opportunity's importance will avert to the significance of the functioning enabled by the
opportunity.

\textsuperscript{594} Cf. discussion of the substance/procedure distinction in Chapter 4. There I characterized substance as
determinate items required by a given account of justice or legitimacy. Here content has a parallel meaning
- the determinate goods that comprise a flourishing life.
\textsuperscript{595} Here as earlier, I have in mind Nussbaum's distinct categories of \textit{"capabilities"} and \textit{"functionings"}. Recall that capabilities are merely capacities for functioning in various ways, while functionings involve
the actual exercise of capabilities. In other words, then, my present point is that we cannot think simply in
terms of the importance of capabilities; we must ultimately evaluate the importance of various capabilities
in light of functionings we deem valuable.
For instance, why is having the opportunity to freely associate with others significant? Because association with others is a basic good of human life. In saying this, I should not be interpreted as saying that association with others is a good regardless of one's final ends. Such is how Rawls would characterize the good of free association qua primary good. Instead, my point is that the most natural way of explaining the value of free association is as one intrinsically valued part of a relatively complete teleological view which includes assumptions about final ends. The philosophical justification of free association as an intrinsic good, then, doesn't depend on its usefulness to people of varied comprehensive views. The substance of free association may be valued widely, and for different reasons. Philosophically, though, we can only understand association as a basic good of human life with reference to a wider teleological view in which association is deemed significant. Whether only specific or more general forms of association are valued will depend upon the particular teleological view.

Goods which explain the significance of corresponding opportunities in this way - as intrinsic goods made accessible by corresponding opportunities - might also be instrumentally significant to achieving some further end. But this additional fact doesn't obviate the intrinsic significance of these goods nor the way their intrinsic significance appropriately and perfectly explains the importance of corresponding opportunities. Thus, it is the normative importance of functionings which explains the normative importance of very many liberties and opportunities.

But can't we explain the importance of opportunities simply in terms of how they enable and maximize freedom? Moreover, if we can, isn't it perfectly sensible to speak of the importance of opportunities without speaking of the importance of functionings?

I think not - I think functionings are what remain important, not mere opportunities - and Taylor's insight discussed in Chapter 7 helps us see why. It is patently implausible to talk in
terms of "maximizing" freedom.\footnote{Think here also of H. L. A. Hart’s early critique of Rawls’ initial formulation of the Liberty Principle. Think, too, of G. A. Cohen’s discussion of the freedoms and unfreedoms involved in the case of Mr. Morgan’s yacht, and of the relative importance of certain of these and of the relative unimportance of others.} We must make judgments about which freedoms are morally significant. But making these judgments inevitably raises the question of why \textit{this} freedom rather than \textit{that}. And to answer this further question, we must suppose that certain functionings - that is, certain ways of functioning as a freely choosing agent - are of greater moral significance than others. JL theorists as much as non-JLs recognize that some freedoms are more significant that others.\footnote{Here is just a sampling of relevant statements by JLS: “Given this arrangement of the basic liberties, the notion of the \textit{significance} of a particular liberty, which we need to fill the second gap, can be explained in this way: a liberty is more or less significant depending on whether it is more or less essentially involved in, or is a more or less necessary institutional means to protect, the full and informed and effective exercise of the moral powers in one (or both) of the two fundamental cases.” “In Rawls’s account none of the libertarian economic liberties are necessary for the adequate development and full exercise of the two moral powers or to pursue a wide range of reasonable conceptions of the good.” “It seems to me beyond dispute that from the moral point of view a society without religious liberty is simply not adequately free.” “To figure out what the appropriate baseline is, for the purposes of applying the requirement of conclusive justification, we need to assess the value of the liberties or opportunities that laws deny people, or create.” In order, John Rawls, \textit{Political Liberalism}, 2005, 335; Freeman, Samuel, \textit{Rawls}, 58; Audi, Robert and Wolterstorff, Nicholas, \textit{Religion in the Public Square}, 4; Andrew Lister, “Public Justification and the Limits of State Action,” 160.}\footnote{For, as we’ve already seen, there are different ways of construing the life of a freely choosing agent. For instance, the life of personal integrity and the life of self-direction are both teleological views of broadly this type.} 

In saying this, we should appreciate that exercising freedom \textit{is itself} a functioning. A teleological view may \textit{intrinsically} value the exercise of freedom, and not only instrumentally value freedom for the sake of some further good. Nor should we regard a view as being any less teleological for identifying the life that ought to be pursued as the life of a freely choosing agent (construed one way or another). Similarly, the functioning valued by a given teleological view
may simply be functioning as a freely choosing agent (regardless of what choices are made), and not the functioning involved in making any one, particular choice.

But even when a teleological view is of this sort - emphasizing the exercise of free choice rather than the making of particular choices - the view must necessarily be partial to certain opportunities over others. (That is, it must decide why this freedom rather than that is important.) And it will make such discriminations in light of a presupposed view of what it means to meaningfully operate as a freely choosing agent, and of what the operative threats to the valued form of agency are. In other words, even for views that seemingly only seek to maximize opportunities (or liberties or freedoms), their choice of which opportunities are morally significant reflect a certain teleological picture of how people ought to function. In other words, the prioritization of some freedoms over others reflects a particular view of how persons ought to regard and conduct themselves as autonomous beings.

So, for example, on the Aristotelian view that functioning as part of a self-governing polity is of superior worth, certain freedoms are valuable (eg., the right to equal political speech). Meanwhile, on the competing view that functioning as a self-directing agent is of superior worth, other freedoms may be deemed of greater value (eg., having stronger individual property rights). In this way, it is views about functionings that lie at bottom of any talk of freedoms, rights, and opportunities - views about what it means, and what it takes, to function as an agent enabled to make significant choices. It is views about functionings that lie at bottom of these views, even when freedoms, rights, and opportunities are misguidedly acclaimed as being important as such.

599 By way of historical example, Locke exemplifies this conception of autonomy. “Equal political rights are then not among the inalienable liberties; Locke was a liberal but not a democrat.” (Freeman, Samuel, *Rawls*, 20.)
Nor will it do to suggest that we evaluate the importance of various opportunities simply with reference to what opportunities people, in a given and place, actually do value. For then we would fail to give a principled justification for the right or opportunity in question, and would only be giving a justification that stands to pass away in time.

Nor will convergence on an opportunity's importance suffice to justify the opportunity in question. Not only would protection of the right or opportunity then appear to be a mere modus vivendi. Additionally, the normative significance of the convergence stands to be scrutinized. If we find that convergence on only certain rights or opportunities is accorded significance, or only the convergence of certain viewpoints, then it would seem that some moral criteria external to the fact of convergence is what is truly normatively significant. We should then look to that external criteria for what rights are morally important and for their justification.

Nor again can we escape teleological presuppositions by attempting to justify the importance of a right or opportunity in terms of a hypothetical procedure. For we cannot escape asking why it would be reasonable for parties to make a given agreement, a question which cannot be answered without recourse to judgments about the importance of various functionings even if these functionings value only the exercise of free choice rather than the making of particular choices.

It seems to me, then, that presupposing the importance of actual functionings - not merely opportunities, rights, or freedoms - is inevitable. These functionings may involve the achievement of particular goods such as health and education (or a particular kind of religious experience). As well, these functionings may involve the achievement of a particular conception of autonomy; for instance, religious freedom may be valued in light of its perceived contribution

600 It is clearly JLs' intention - for example, clearly Rawls' intention - to provide a more robust moral basis for liberal institutions than merely a modus vivendi. See John Rawls, Political Liberalism, 2005, 147–149.
to individual freedom, and not because religious practice itself is valued. And in all likelihood, a teleological conception will involve some combination of both these elements: valuing some rights and opportunities instrumentally, others intrinsically. All the while, all rights and opportunities - valued in either of these ways - are evaluated and made sensible against some presupposed backdrop view of what human flourishing consists in.

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My basic point in this chapter is that the teleology postulate makes content available where the contentless proceduralism of JL does not. We have here been discussing ways in which teleological views do this. Content is made available by the particular concrete ways of life such views identify, or at least presuppose, as being of superior moral value. Moreover, it is the actual achievement of these ways of life that is held to be significant; it is actually functioning in these ways that is valued at a fundamental level - not merely having the opportunity to do so. This being the case, teleological views furnish us with more content than if it were possible to intelligibly talk about opportunities in the abstract apart from functionings. From the ways of life and functionings affirmed by teleological views, further content is derivatively given by the conditions needed to achieve them. Such will include the political, economic, and social conditions required for achieving a given way of life or functioning. In all these ways, we can count on a teleological view to make available substantive content where empty proceduralism does not. Thus teleology presents itself as an appropriate and needed category for understanding our legitimacy-related convictions, since these convictions are themselves substantive. To wit, the second CC on which I'm focusing is that there are certain basic rights that are legitimacy-

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601 To expand a little, it is certainly plausible to simultaneously hold that religion is unimportant but religious freedom important. In regards to the truth about reality, religion may be regarded as unimportant - it may be viewed as mere superstition. But in regards to personal autonomy, it may be regarded as important - a domain in which it is important for individuals to decide for themselves.
conditional - such as the concrete rights to bodily integrity, freedom of religion, material subsistence, and due process.

However, it is obvious that you and I will disagree over teleology, isn't it? Worse, it's not merely you and I who disagree, but it seems that disagreement over such issues as final ends and human flourishing is endemic to contemporary pluralistic societies. This raises the question of how can we legitimately exercise political power amidst disagreement over conceptions of human flourishing. As JLs see it, this is, in fact, the main question in regards to legitimacy. And since disagreement over teleology persists, it may seem that the teleology postulate - requiring us, as it does, to understand legitimacy conditions in terms of a particular teleological account - is ill-equipped to illuminate the issue of legitimacy.

Disagreement over teleology does not, in fact, impugn the significance of my teleology postulate to our understanding of legitimacy. The following three points help us see why it does not.

First, the issue of legitimacy is actually separable from multi-perspectival acceptability, and CR legitimacy does not take multi-perspectival acceptability as a desideratum of legitimate legal coercion. In Rawls' wake, it is sometimes assumed the concept of legitimacy, by its very essence, is one that addresses itself to multiple viewpoints in a distinctive way. This, however, is an unwarranted assumption. Instead, the general concept of legitimacy is simply that of a threshold which, while falling short of full justice, is nonetheless morally credentialed in some way. Multi-perspectival acceptability is one way of spelling out the moral credentials possessed by legitimate legal coercion, but certainly not the only the way. Protecting basic rights, for instance, is another. Moreover, if my argument of Chapter 3 is correct, then understanding legitimate coercion in terms of a unanimity requirement actually de-legitimizes all legal coercion,
giving us reason to reject such a requirement. This CR legitimacy does. Thus, even if the
teleology postulate falls afoul of a multi-perspectival acceptability requirement, its significance is
not impugned since such a requirement is neither a helpful nor necessary way of theorizing
legitimacy.

Second, despite disagreement over teleology, the basic teleology postulate helps
illuminate legitimacy by highlighting the sort of philosophical presuppositions involved in any
non-arbitrary account of legitimacy conditions. No-one can make philosophical sense of their
legitimacy-related convictions without presupposing teleological views at a fundamental level.\(^{603}\)
The postulate challenges any and all to philosophically account for their convictions without an
appeal to teleology, and concludes this is a challenge that none can meet.

Think again of the good of free association mentioned above. Each will understand the
significance of free association with reference to a different teleological view. But that we must
philosophically justify free association with reference to a teleological view is true for all of us.
None of us, I'm arguing, can adequately philosophically justify such a good in abstraction from
wider views about human flourishing and final ends. Taylor's reflections on liberties' differential
values suggests as much, and only a teleological view provides the determinate, objective content
basic goods involve.

Even if this point goes through, will it resolve the disagreements that exist amongst a
pluralistic polity? Hardly. But it does shed light on the philosophical presuppositions of our
legitimacy-related convictions. Not every disagreement over legitimacy convictions relates all
the way down to the fundamental level of basic teleological assumptions; as noted earlier, such

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\(^{602}\) What Rawls would call the "fact of reasonable pluralism".

\(^{603}\) It is, indeed, at least possible for someone to be a true amoralist - and perhaps that might be one way of
escaping teleological commitments. However, I question whether or not there really is any such person as
a true amoralist; simply denigrate whatever it is that someone cares about most deeply and they will almost
disagreements might exist at other levels over issues such as, say, implementation. But many of our disagreements will directly result from disagreement at this fundamental level, and even when they do not these teleological presuppositions are always operative in the background. We all need to get content from somewhere as we make legitimacy-related judgments. Ultimately this content comes from teleological views we either wittingly or unwittingly presuppose. It seems to me this is an inescapable fact of how we reason about legitimacy - whether or not these underlying teleological views are obscured by an overlay of proceduralism. Thus, the teleology postulate illuminates the issue of legitimacy, despite the existence of divergent teleologies and disagreement over which one is ultimately right.

Third, let me distinguish between questions that the teleology postulate is and isn't designed to help answer. As I said above, for JLs the main question is how it is possible to legitimately exercise political power amidst disagreement over conceptions of flourishing. However, this isn't an entirely helpful question, for I think it conflates two issues which are, in fact, separate from one another. On the one hand, there is the philosophical question of how to account for the legitimacy-convictions we hold - such as that much coercion is legitimate, even amidst disagreement, and that basic rights must be protected for legitimacy across all contexts. What philosophical concepts and presuppositions can make sense of these convictions? On the other hand, there is the practical question of how to deal fairly in real-world political contexts between individuals that disagree with one another.

Now here's the key point: CR legitimacy, including its teleology postulate, is addressed to the first of these questions rather than the second. By contrast, it seems to me that JL attempts to address both these questions in one go, and it might be that JL's weaknesses are traceable to this assuredly take up a moral posture in its defence. Moreover, even if it is possible, I don't presume that any of my readers will be amoralists. Certainly JLs, my main interlocutors, are not.
over-ambitiousness. For while impartial procedures present themselves as plausible mechanisms for dealing with the second issue, proceduralist thinking proves to be an unhelpful way of dealing with the first. For *philosophical* proceduralism leads to the sort of problems covered in Chapter 4 and reviewed at the beginning of this chapter. But CR legitimacy addresses itself only to the first question, leaving open the issue of how to fairly arbitrate real-world political disagreements as a further question.\(^{605}\) Consequently, disagreement over teleologies doesn't impugn the significance of the teleology postulate, since it is a problematic that pertains more to the second *practical* question than to the first *philosophical* question.

In sum, how we should proceed practically in the face of disagreement is a different question from the normative question of how philosophically to make sense of our legitimacy-related convictions. For the latter, I'm arguing that teleology is essential.

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We need to appreciate one further characteristic of teleological views if we are to understand how the teleology postulate helps make sense of our legitimacy-related convictions. So far I've emphasized that teleology provides content, which is necessary given that legitimacy-conditional basic rights are substantive. Additionally, I take it that a further feature of our legitimacy convictions is a certain *indifference* to those who would disagree with us.

That is, there are times when the appropriate response to an objector is simply to say that he is wrong. This certainly isn't to say that we don't have reasons for the views that we hold. But

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\(^{604}\) Eg., Who should be held responsible for securing the good that stands to be protected by a potential right? The individual or society?

\(^{605}\) So, too, do I regard the issue of how to secure the stability of liberal democratic institutions amidst pluralism as a further question. But while I regard this as a separable question from that of how to make sense of our legitimacy-related convictions, Rawls, for one, runs them together. ["Combining both questions we have: how is it possible for there to exist over time a just and stable society of free and equal citizens, who remain profoundly divided by reasonable religious, philosophical, and moral doctrines?" (John Rawls, *Political Liberalism*, 4).] I think running them together is unhelpful, just as I think it unhelpful to conflate the philosophical and practical questions I enunciate in-text.
it is to say that concerning some of our moral convictions of which we're most sure, our position should be that objectors are simply wrong even if they are our epistemic peer. There are people out there who think it legitimate to violate basic rights? They're wrong, I'm likely to respond: legitimate coercion of rights violators can, and ought, proceed apace. There are people who think that political inequality does no disrespect to moral equality? They, too, are wrong; to deny someone equal standing before the law is, without question, to deny their moral equality as well.\textsuperscript{506}

Now as I attempt to explain this indifference toward others - as I attempt to understand it as a rational response to objectors in certain contexts - how can teleology help?

In addition to their being contentful, the teleological views we presuppose are also ones we hold to be objective. Such views equate human flourishing with particular functionings not merely as a matter of preference, but as a matter of moral fact. Of course, any given view might have the facts wrong - and whether they do is, at least in part, what philosophers must discuss when evaluating first-order legitimacy conditions. But, whether accurately or inaccurately, what a teleological view lays claim to is the status of moral fact. Put another way, it lays claim to \textit{objectivity}. By holding our teleological view to be objective, we assume that the moral values and ideals involved in our view are relevant to individuals and societies whether or not they recognize them. They stand to be morally evaluated for their success or failure as measured against these values and ideals.

Making this last statement, though, doesn't necessarily mean that we will use the language of moral impermissibility to evaluate those who reject our teleology. We may well hold that one that can reject our general teleological picture without failing in any of their moral duties.

\textsuperscript{506} Separate but equal? No. As a matter of fact, separate \textit{isn't} equal.
How then do we know that, in fact, we're still committed to the moral objectivity of our teleological view? Because censuring someone for having failed in their duties is only one of several ways in which we might "strongly" evaluate our teleology as objectively superior to others. And even if we don't assert its superiority in terms of duties and obligations, our commitment to its objective superiority is yet revealed in one or more of these other ways. For instance, one might admire adherents of one's own teleology, while holding in contempt those who think otherwise. Or one might stand in “awe” of the moral values involved in a given teleological picture, regarding other teleological views as trivial by comparison.607 Or again - as I think is often the result of holding an autonomy-emphasizing teleological view - one may simply express moral indifference toward rival views, while positively praising one's own view for its fairness, tolerance, magnanimity, and liberality. However it is expressed, we remain committed to the objectivity of the teleological views presupposed by our political convictions, as reflected by these ways in which we engage in strong evaluation.

If we didn't presuppose the objectivity of our teleological views, the indifference we sometimes feel to those who disagree with us would be difficult to explain. Given the presumption of objective teleology, though, indifference of this sort is a perfectly rational and explicable posture for us to assume. This is because our holding of teleological views involves the assumption that these values apply to others even if others fail to acknowledge them.

In sum, then, how does the teleology postulate help us make sense of our legitimacy-related convictions, especially in the midst of people whose competing views conflict with our own? First, it explains why our convictions have the specific content that they do. Second, it helps explain why it is rational for us to maintain our most cherished legitimacy-related

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607 This discussion of the variety of ways in which we display commitment to the objectivity of our views is much indebted to Taylor.
convictions even in the face of objections from epistemic peers, and also the rationality of evaluating our peers according to standards they themselves might reject.\footnote{At different points in our discussion (e.g., when discussing the idea of an exogenous moral standard in Chapter 7), we've reflected upon the philosophical commitments revealed in our practice of evaluating regimes' legitimacy cross-contextually. Such are the sort of evaluations I have in mind here.} For teleology underwrites our convictions, and we presume this teleology to obtain objectively.

Furthermore, in Chapter 4 I argued that the unacceptable consequence of JL's proceduralism was its undercutting of legitimacy-conditional basic rights. Now in light of all that's been said so far, how does teleology so described help place basic rights on a firmer philosophical foundation?

In does so as follows. Given that, \textit{ex hypothesi}, the teleology on which basic rights are based obtains objectively, their basis is neither mere procedure or group consensus. Rather, this teleology itself serves as a normative check on procedures, and it means that a group stands to be praised if their rights are consistent with the teleology of basic human well-being and blamed if they are not. As well, the teleology underwriting basic rights explains the content of these rights. It is not as though it is left up to any polity - hypothetical or otherwise - to give basic rights their content. In these ways, then, a teleological basis for rights provides firmer, more perspicuous philosophical grounds for legitimacy-conditional basic rights - rights we experience as being procedure-independent, as having definite content, and as being impervious to popular opinion. The JL category of proceduralism does not afford us rights of this sort; but the CR category of teleology does.
3-The Basic-ness of Basic Teleology

In understanding our legitimacy-related convictions, the teleological nature of the basic teleology these convictions presuppose is essential. So, too, is the basic-ness of this teleology. Why is this?

We left off the argument in Chapter 8 by acknowledging that positing the objectivity of legitimacy-conditional wrongs is a necessary but insufficient condition for explaining why it is sometimes legitimate to coerce persons without their consent. It is a necessary condition, for, if these wrongs aren't objective, it seems that all legitimate legal coercion would require consent. It is not a sufficient condition, however, since some objective wrongs seem unfit objects for legal enforcement (e.g., violating a friend's trust) and others seem not to be legitimacy-conditional even if plausibly enforceable. The question then becomes, of all the moral rights (and wrongs) that befall us which are legitimately enforceable absent consent? And on what basis do we discriminate between those that are and those that aren't?

The CR answer: objective rights (and wrongs) which are legitimately legally enforceable are those which are basic. It is in terms of the basic-ness of wrongs that we discriminate between those that are and those that aren't legitimately enforceable. While the objectivity

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In light of my wider views, I should qualify this statement. (Cf. discussion at “4-What, then, of Consent?” in the previous chapter.) I suggest here that it is always illegitimate to legally enforce wrongs that go beyond those which are basic, but, in fact, I don't think this is necessarily the case. If such wrongs are coercively enforced by a regime which, at the same time, is protecting basic rights, then I judge enforcement of these further wrongs to be legitimate. The point I am making here is that, in principle, what makes the very existence of legally coercive institutions legitimate is the protection of basic rights. It is perhaps better for me to say that coercively upholding further rights can be legitimate, but doing so never makes for legitimacy. Rather, what makes for legitimacy is the enforcement of basic rights - this is my present point. And why? As I explain in-text, it is because of the importance of the interests and dignity that such basic rights protect (and that such basic wrongs jeopardize).

So for ease of presentation, I will persist in saying that only basic rights are legally enforceable. But the reader should keep in mind throughout that, strictly speaking, my view is also prepared to recognize as legitimate the legal enforcement of further rights so long as basic rights are protected. The reader should also bear in mind that these aspects of my view go beyond what is involved in CR legitimacy as I develop it in Chapter 7. I view them as compatible and fitting with CR legitimacy so described, but not necessarily part of CR legitimacy itself.
postulate by itself cannot explain the legitimacy of legally enforcing certain wrongs, it can when paired with the basic-ness of the basic teleology postulate. It is legitimate to legally uphold certain rights, even in the absence of consent, given that they obtain objectively and given the fundamental importance of the interests and dignity such rights protect.

Chapter 7 also laid the groundwork for our present discussion of the basic-ness of basic teleology. There I pointed to a variety of considerations suggesting that legitimacy was a matter of basic justice rather than of full justice. For instance, we considered the type of concept that legitimacy is (namely, a threshold concept), as well as some practical reasons for tying legitimacy only to basic rather than full justice (eg., education may be a more apt tool for redressing certain injustices than the criminal code). We considered, too, the CR suggestion that legitimate coercion is a function of the basic moral law to which, ex hypothesi, all have access and on which, evidently, there is widespread agreement. But while those considerations motivate the basic-ness postulate in a general way, I now hope to defend this postulate by highlighting the difference it makes in comparison to JL.

Remember the problem with JL that we're trying to redress: the way JL undermines real-world basic rights in virtue of its content-free proceduralism. So far our basic answer to this problem has been the teleology postulate. That is, a teleological view provides definite and objective content where JL proceduralism does not, helping to explain why it is that we experience basic rights as being procedure-independent, as having certain content, and as being impervious to popular opinion.

However, unless we qualify teleology in some way, teleology will still appear to be the wrong sort of concept for explaining our legitimacy convictions. This is because teleological
views often - though not always\textsuperscript{610} - involve requirements that go far beyond those of basic justice or morality. Yet we think the proper purview of the state is restricted to only these fairly basic moral requirements. Likewise, teleological views often (but not always) make moral pronouncements on matters we intuitively think are none of the state's business. Now what we want to explain are the basic rights we view as necessary for legitimacy, but teleology seems the wrong category insofar as teleological views often purport to explain much more than only basic rights.

So why do we need basic-ness to the basic teleology postulate? To ensure that teleological views provide us with the right kind of content for explaining these basic rights. That teleology provides content where JL proceduralism does not is the general answer to JL's second unacceptable consequence. More specifically, though, for the purpose of explaining our CC in legitimacy-conditional basic rights, it is basic teleology that provides the appropriate content which JL lacks. That is to say, basic rights do presuppose a relatively complete teleological view. But, as per the basic teleology postulate, we bring to bear on political morality only the basic elements of an otherwise full teleology.

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Here the point is that it is appropriate to talk about basic teleology since it is basic rights we're concerned with. What we're seeking to make philosophical sense of is our conviction that legitimacy is conditional upon protecting basic rights. Teleology, we might say, provides us with too much content. It is content which is definite and objective (which is helpful for explaining

\textsuperscript{610} See above for my discussion of teleological views that emphasize the exercise of free choice over the making of particular choices. Such views, while more permissive than either their Aristotelian or Thomistic alternatives, are nonetheless bona fide teleological views. This is a point I've meant to stress both in Chapter 7 and now in the present chapter. They are teleological insofar as they presuppose accounts of objective human flourishing, where to flourish is to function as a free agent in a certain way depending upon the operative conception of autonomy. Their requirements seem more in keeping with what we've come to intuitively expect of the state; they are no less teleological for this reason, however.
legitimacy-conditional basic rights), but also content which pertains to seemingly every aspect of human life (which is unhelpful). Basic teleology, however, ensures we get the right kind of content. Teleology of a basic sort provides us with content that is definite, objective, and also pertinent to the explication of the basic rights we believe are necessary for legitimacy.

Recall some of what was said earlier in Chapter 7. There I explained that basic teleology involves the identification of lower-order functionings achievement of which is held to be a part or precondition of objective flourishing in light of a higher-order view of a well-lived human life. Lower-order functionings will generally break down into two categories. Some will involve the actual experience of certain goods: being healthy, accessing food and shelter, receiving education, possessing some measure of wealth. Others will involve exercising free choice over some area that affects one's life: freedom of religious choice, freedom of speech, freedom of assembly, freedom of movement. In turn, these lower-order functionings will be prioritized in light of some higher-order teleological view, whether one that is relatively narrow and emphasizes the making of particular choices (e.g., the life of agape love) or one that is relatively permissive and emphasizes the free act of choosing (e.g., the life of personal integrity, or that of self-direction).

We must begin with the end in mind. We identify what the fundamental conditions for a good life are by knowing what a good life is.

But while a basic teleological view remains conceptually connected to the broader teleological view of which it is a part, it distinguishes itself in terms of its aim. Basic teleology is purpose-driven teleology where the aim is to philosophically underwrite basic rights (and wrongs). As I said in Chapter 7, my distinction between teleology and basic teleology runs parallel to Steven Wall's distinction between two ways in which an ideal of human flourishing
can "inform conceptions of political morality"\textsuperscript{611}. A political morality might draw upon a full teleological view with an eye to its promotion, but this is not the role of a \textit{basic} teleological view. Instead, the latter sort of view is what we must use to answer the question of "whether an adequate account of concepts such as justice, rights, obligation can be given without appeal to some ideal of human flourishing"\textsuperscript{612}. We find it cannot, and so we draw upon the basic elements of a teleological view for the requisite account.

In our present discussion, I should also reinforce that it is the basic-ness of certain rights and wrongs that justifies their legal enforceability. This, too, was a point made earlier which we should now revisit with the specific comparison between CR and JL legitimacy in mind. To discriminate between those objective wrongs that are and are not enforceable, we say that those which are enforceable are those which are basic. In other words, the interests and dignity protected by basic rights are of fundamental importance. And these interests and dignity are of fundamental importance to human beings given the sort of beings that we are, with the worth we intrinsically possess. For instance, given that we are embodied beings, a right to bodily integrity is fundamentally important. Given that our bodies require nutrients and maintenance to sustain life, rights to material provision and healthcare are essential. Given humans' significant potential for intellectual development and for agency, education and provision for autonomous choice is of immense value. Or again, impartial application of the law is a fundamental expression of respect for the equal moral worth of all persons. And in general, given humans' inherent value and inviolable dignity, their basic rights should be respected as being of overriding importance. Why should we consider any of these rights to be basic? Rights to such goods as bodily integrity, healthcare, material provision, education, autonomy, and fair application of the law? It is not, as

\textsuperscript{611} Wall, Steven, \textit{Liberalism, Perfectionism and Restraint}, 12.
\textsuperscript{612} Ibid.
JL would have it, because no-one could reasonably reject such rights; as we've seen with the example of the Bakuninist, legal rights to these goods can be rejected on perfectly "public" grounds. Rather, these rights are basic given the fundamental importance of the interests and dignity they protect given the sorts of beings that we are.

In saying all this, we can't help but presuppose certain basic teleological views. What the previous paragraph illustrates is the very general sort of reasoning we must engage in as we move from a given teleological view to those rights which demand legal protection. Whatever one's teleological view, it is basic human well-being as conceived by the view which serves to justify the legal enforcement of basic rights. It is the content of a given view of basic human well-being that provides the content of basic rights, and it is the *basic* importance of this content that justifies its legal enforcement. Various teleological views will, of course, understand the sort of beings we are - what our interests are, what dignity we have - in varying ways. But for any given teleological view, its views on our interests and dignity will inform its account of *basic* human well-being which, in turn, will inform its account of the interests and dignity that are legally enforceable *qua* basic rights.

My point here - in line with general level of abstraction at which my CR framework is pitched - is not to defend any one account of basic teleology. Rather, it is to outline the terms in which we should understand the transition from a teleological view to a view of basic rights. If *any* account of basic rights is to be drawn up in a non-arbitrary way, I submit that these are the sort of philosophical presuppositions and categories that will have to be involved.

In sum, basic-ness is essential to the difference made by basic teleology because it helps to clarify what kind of content is appropriate for filling in the gap left by JL's contentless proceduralism. It is teleological content, but content which refers only to basic human well-
being. This is content which, while teleological in nature\(^6\), aims not at final ends insofar as it bears on legitimate legal coercion; basic teleology cannot be philosophically understood without reference to final ends\(^6\), but promoting these ends through political institutions is not its aim. Rather, in invoking basic teleology our aim is simply to marshal the philosophical resources necessary for making sense of the basic rights we consider necessary for legitimacy. Moreover, its basic-ness enables basic teleology to be an apt tool for discriminating between rights that are and aren't legally enforceable. As such, it gives us an alternative to the JL method of drawing this distinction on the basis of unanimous multi-perspectival acceptability. These are the essential roles played by the basic-ness of the basic teleology postulate in a CR account of legitimacy.

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At the outset of this chapter I expressed my intention "to paint a vivid picture of the difference that basic teleology makes in our philosophical understanding of legitimacy". In bringing our discussion of the basic-ness postulate to a close, I hope the following illustrations help make good on this intention. Put plainly, I believe the difference made by basic teleology is that it helps us explain the justification of basic rights with much greater philosophical clarity than does its JL counterpart. Likewise, it helps us explain with superior clarity why these basic moral rights are legally enforceable as well. This is particularly the case with any positive rights that we regard as basic and as legitimacy-conditional.\(^6\) So let me now sketch, ever so briefly - yet suggestively I hope - the different type of justifications made available by basic teleology.

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\(^6\) By "teleological in nature", I mean part of a teleological view - not abstracted from such a view, or freestanding of such a view.

\(^6\) Or to human purposes, human flourishing, or higher-order ways of living, in other words.

\(^6\) Cf. "3-IL and the Threat to Positive Rights" in Chapter 4. There I explained how JL especially threatens positive basic rights, even more so than negative ones. Accordingly, the basic teleology postulate can be seen as especially helpful in underwriting these positive rights.
For instance, what justifies coercive redistribution that ensures all receive a social minimum? It is well-known that justifying redistribution is an issue with which JL struggles.\textsuperscript{616} For there evidently are reasonable objections to coercive redistribution, such as those put forward by libertarians; hence, such a scheme falls short of JL’s legitimacy-granting unanimity condition. If we are quite sure, though, that such redistribution is justified, how else might it be justified?

Alternatively, we might justify it in terms of basic teleology. That is, given that humans are embodied beings with physical needs, achievement of basic physical health is of fundamental importance to their well-being. Therefore, provision for these basic physical needs is also of fundamental importance - material subsistence that will ensure adequate nutrition and shelter.\textsuperscript{617} These considerations justify both a moral, as well as a legally enforceable, right to a social minimum. JL struggles to make sense of a legitimacy-conditional right such as this, given that such a right is subject to disagreement amongst persons who would qualify as reasonable by JL lights. But a CR approach, emphasizing basic teleology, can readily make sense of it, and does so with philosophical clarity.

To clarify, the justification offered here is not that adequate nutrition and shelter are important \textit{whatever further ends one might have}.\textsuperscript{618} Rather, it is that, according to a given teleological view, basic physical health is important \textit{given that particular view’s scheme of final ends}. Depending upon the scheme, material provision might be valued more intrinsically or

\textsuperscript{616} And in turn, different JLS have proposed a variety of responses. We’ve seen that Nagel and Andrew Lister are among the many JLS who have contributed to this discussion, in attempts to defend JL against the charge that it jeopardizes redistribution. See Chapter 3.

To reiterate and make clear, I regard the redistribution problem as equally affecting both Rawlsian JL and Gaus-style JL. I do not think that the problem assumes convergence JL, and the fact that consensus JLS - like Nagel and Lister - have responded to the problem reflects that it threatens both convergence and consensus JLS alike.

\textsuperscript{617} A right to public healthcare could be justified along similar, basic teleological lines.

\textsuperscript{618} Various teleologies may coincidentally overlap on the importance of physical provision. Indeed, they almost certainly will. However, \textit{pace} Rawls, this convergence is not significant to philosophically
instrumentally, more as a part of flourishing or as a precondition for flourishing. Either way, the justification of a social minimum results from the role that physical well-being plays within an overall teleological view that includes assumptions about final ends.

Or what justifies the right to basic education? As JLs would have it, universal education is justified because no-one could reasonably reject it. But does such an explanation really get at the moral considerations that are operative in the justification of public education? It seems not. If anything, what justifies a right to basic education is not hypothetical unanimity but the moral importance of intellectual development for beings such as ourselves. The further facts that schooling nurtures young people's capacity for individual agency and prepares them to assume productive places in society also seem eminently relevant to a proper justification of the right to education.

In explaining why universal education cannot be reasonably rejected, JLs will presumably point to considerations such as these. But on the JL justification of universal education, it is not these considerations that are primary; rather it is the fact of agreement itself. So even if JL can justify a right to basic education, it doesn't seem to do so with reference to the operative moral considerations. On the other hand, CR legitimacy would justify it, and with greater philosophical clarity - not on the basis of hypothetical agreement, but in light of a basic teleological view of individual and social well-being. Given a view of what full individual and social flourishing consists in, education can be seen as a basic component of human well-being. In turn, it corresponds to a basic right to education.

To take one more example, what justifies the right to religious freedom? At least at first glance, a JL justification seems able to protect religious freedom. Despite the trend toward justifying the importance of physical provision. What is significant are further assumptions about human flourishing and final ends.
secularism in the West, both in public and in people's private lives, most people would still consider the choice to be religious or not important for the exercise of individual autonomy. Thus, given these mores, JL would deem it "reasonable" to reject any proposal that would significantly restrict traditional religious practice. Religious freedom would seem safe.

However, given the rising tide of scientism in Western society, one wonders just how secure this defence of religious freedom is. For a growing segment of the population regards religious belief as patently unreasonable; often it is regarded as intellectually dubious, and sometimes as positively retrograde. The so-called "new atheists" are both exemplars and instigators of this growing movement of antipathy towards traditional religion. On this view, it might well not be unreasonable to deny religious freedom. For if religious belief is regarded as false and intellectually retrograde, there may be no reason not to censure religious practice, nor any reason to think that denying religious freedom is denying freedom over some area that is important to individual autonomy.

619 Of course, there is already widespread garden-variety respect for science in our society - as I agree there should be. But scientism is the more radical view that holds that science, and science alone, can deliver truth and knowledge.

However, while philosophically more radical, scientism is gradually becoming more culturally mainstream, as endorsed by prominent public intellectuals such as Lawrence Krauss and Alex Rosenberg.

620 Among the leading figures in this movement are Richard Dawkins, Sam Harris, Daniel Dennett, and the late Christopher Hitchens.

621 It might be, though, that so long as many citizens actually do regard religious belief as central to their identity, secular liberals will still have reason to preserve religious freedom; perhaps so. However, if this is the only basis on which religious freedom is respected, then religious freedom will, indeed, be compromised insofar as the trend toward secularism in people's private lives continues. Moreover, even if this trend didn't continue - or reversed - tying religious freedom to the prevalence of actual religious practice hardly seems a principled basis for this basic right. Rather, it would be unsurprising to me if secular liberals came to regard themselves as having instead a principled basis for denying religious freedom even if a majority of the population was, de facto, religious. After all, this is already the posture JLs seem to take towards the issue of young-earth creationism. Eg., see Freeman, Samuel, Rawls, 387.

With these considerations in mind, I suspect that secular liberals would, in fact, see no reason at all for not censuring religious practice if religious belief came to be widely regarded as intellectually retrograde in Western society. This is only speculation, though, which is why I simply say in-text there "may" be no reason not to censure religious practice should the current trends of secularism and scientism continue.

622 Just as traffic freedom isn't deemed significant, neither might religious freedom be deemed significant.
By way of example, consider a not uncommon posture taken towards the teaching of young-earth creationism in public schools. In the minds of many secular liberals, the young-earth creationist's alternative hypothesis to Darwinism is so scientifically dubious that there is no problem in preventing it from being taught in public schools. They would seem to count it unproblematic even where a majority of the populous favours it, and even if this belief is of great religious significance to its adherents. In other words, since these secular liberals regard it as patently false, they don't balk at coercively discouraging this belief. Moreover, neither do they regard it as a significant limitation on freedom to not even present students with a choice between Darwinism and young-earth creationism. If, then, one adopts a secularist or scientistic view along these lines, JL might actually prescribe religious unfreedom rather than religious freedom.

Conversely, assuming that there is in fact a basic right to religious freedom, how might a CR approach justify it? Such an approach would affirm, as a matter of basic teleological fact, the fundamental importance of religious freedom. Depending on one's teleological view, this importance might be due to religious practice itself being regarded as objectively significant. Such a view of the objective importance of religious practice plays a role in the CR tradition's defence of religious liberty. This view is coupled, though, with the CR belief that religious

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623 As well, Nussbaum discusses how various religious views, now regarded as mainstream, actually and already flaunt the characteristics of substantively "reasonable" comprehensive views outlined by Rawls. See Nussbaum, Martha C., "Perfectionist Liberalism and Political Liberalism." What I think this means is that we should not think it unlikely that secular liberals - including JLs - might eventually come to regard all religious practice as beyond the pale of "reasonableness" and all claims to freedom of religious practice as "unreasonable" demands on social institutions.

624 For instance, consider the case of the state of Arkansas, which was challenged by the American Civil Liberties Union when it passed a law "allowing creation to be taught in the public schools". This case is discussed at Schaeffer, Francis A., “A Christian Manifesto,” 479–480.

625 Cf., "...simply because people in a society commonly accept and reason in terms of a common religion does not make that doctrine part of public reason. Even assuming that all the members of an Islamic state, such as Saudi Arabia, accept the Muslim religion and appeal to religious reasons in deliberating and discussing laws, this does not make Islam part of public reason." (Freeman, Samuel, Rawls, 383.)
practice that is objectively significant is only that which is voluntarily chosen. So the CR tradition gives us one way in which religious freedom might be underwritten by a teleological view that affirms the objective importance of religious practice.

It might also be, though, that religious freedom is regarded as intrinsically important given one's view of individual autonomy. We've noted that there are various conceptions of what it means to operate as a freely choosing agent in a morally significant way, with each conception regarding certain types of choice as more significant than others. On many such views, then - though not necessarily all - religious freedom might be teleologically affirmed *qua* its perceived contribution to meaningful individual autonomy.

Either way, given a teleological basis, the explanation of why religious freedom is important is parsimonious and clear: the right to religious freedom is significant because a basic component of human flourishing is the exercise of free choice over religious matters. Whether this exercise is accorded instrumental or intrinsic significance, it is a functioning of fundamental importance given the sorts of beings we are.

In defending religious freedom in either of these teleological ways, we could of course be wrong. That is, CR legitimacy certainly does not assume that people are infallible in their understanding of basic teleology. What the best such account is, and its implications, are matters philosophers must investigate and debate.

So how exactly does a CR approach help us justify religious freedom (even as I admit the possibility that the exercise of religious freedom might not actually be part of our basic teleology)? It helps in this way: assuming that there *is* a basic, inalienable right to religious freedom, CR's basic teleology postulate gives us a philosophical basis for understanding why this right exists. This right exists because the exercise of religious freedom is, in fact, a component of basic human flourishing. And since the value of religious freedom to basic human flourishing
obtains objectively, the normative justification of religious freedom remains unaffected by the rising tides of secularism and scientism.

My hope is that these three examples we've briefly considered - rights to a social minimum, to education, and to religious freedom - at least point, in a fairly vivid way, to the difference made by the concept of basic teleology. In contrast to JL's putative justifications of these rights, basic teleology allows these rights to stand on clearer, firmer, more satisfying philosophical grounds. Basic teleology seems a more appropriate category for understanding legitimacy-conditional basic rights than that of content-free proceduralism. If we begin with the end in mind, we can appreciate both which elements of well-being are fundamentally important and why they are. Similarly, we can appreciate both which interests correspond to basic rights and why they merit coercive legal enforcement.

4-But what about the CR Tradition?

It might seem that I've not said much about the CR tradition in all this. It might seem I've said much about teleology, about objective values and duties, about fundamental human interests and dignity, and about basic justice - but not much about CR thought. But this impression should remain only until we remember that all these points find a basis in CR thought. My own reflections on these issues have been veritably incubated by the CR framework.

As we saw in Chapter 7, CR thinking is steeped in teleological propositions. As creator, God has designed human beings to function and flourish in particular ways. Made in the divine image, human beings are - uniquely among all animals - equipped with certain capacities for reason, creativity, and spirituality. These are capacities which must be nurtured if humans are

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626 Tenet 1. Every person is made in the image of God.
to flourish according to their design-plan. Moreover, humans have been designed for an *earthly* existence, with attendant needs for health, material sustenance, and physical integrity.

God has designs not only for individual humans, but also for human societies. The two kingdoms concept captures God's intention for spiritual and civil institutions to function distinct from one another.\(^{627}\) In line with these intentions, God writes on the heart of every person the basic moral law which is to be the standard for civil law.\(^{628}\) By contrast, in the church it is the special revelation of Scripture that is the standard for belief and practice. God sanctions civil authorities to use the coercive power of law to uphold justice. But his design is that spiritual advances be made voluntarily, through love, not law. Kuyper's doctrine of sphere sovereignty speaks to this divine design-plan for human societies, societies designed to function with complementary spheres of activity.\(^{629}\)

The blunt type of moral prohibitions associated with the moral law invite the distinction between the basic and further demands of justice. These are interdictions such as "You shall not murder" and "You shall not steal.\(^{630}\) Jesus' teaching on these commandments indicates that their underlying spirit has implications for our conduct far beyond those of minimal morality.\(^{631}\) At the same time, this teaching also reflects that the moral law, as represented by the Decalogue, constitutes a certain *basic* level of justice. There's a distinction here between the *letter* of the moral law and the *spirit* of the law, one that approximates my distinction between the basic and further demands of justice, respectively.

Moreover, there is an urgency to meeting these basic demands of justice that seemingly warrants the intervention of coercive political institutions. Hence the apparently negative

\(^{627}\) Tenet 7. God governs through two distinct modes. There are two kingdoms, not one.

\(^{628}\) Tenets 2 and 5.

\(^{629}\) Tenet 8. The state *ought* to be separate from the church (and other religious institutions), and each ought to be sovereign within its respective domain.

\(^{630}\) Exodus 20:13, 15. (*The Holy Bible*, 61.)
language with which the state's scope of legitimate authority is characterized. The state does not "bear the sword in vain", but is "the servant of God, an avenger who carries out God's wrath on the wrongdoer"\textsuperscript{632}. Or as we've seen Kuyper put it, the state is only necessary "by reason of sin".\textsuperscript{633} CR theorists are inclined to portray society, absent the coercive state, with Hobbes-like desperation; it is the state which keeps sin in check and preserves the possibility of an orderly society. All this informs the basic-ness of the basic teleology postulate: it is because of the basic, urgent importance of the interests and dignity protected by basic rights that such rights are legally enforceable (with or without consent).

Created in the image of God, humans are recognized as having immense worth, worth that outstrips that of any non-human part of the created order. Look at the birds of the air: they neither sow nor reap nor gather into barns, and yet your heavenly Father feeds them. Are you not of more value than they?\textsuperscript{634} All humans share an inviolable dignity, a fact having significant political ramifications. The \textit{Imago Dei} serves as a basis for both the interests and dignity that, on a CR teleology of basic human well-being, would be of fundamental importance and requiring legal protection.

Perhaps most obviously of all, the CR tradition unequivocally would have us conceive all these points as being \textit{objectively} true. Whether or not people realize they've been created according to a design-plan, they have. Whether or not they see their flourishing as consisting in following this design-plan, it does. Whether or not they recognize others as having equal and immense value, they should. And however much or little they might value the interests and dignity protected by basic rights, these interests and dignity are of such importance that they are legally enforceable regardless of consent. This inclination toward understanding our political

\textsuperscript{631} See Jesus' "You have heard it was said..." teachings at Matthew 5:21-48. (Ibid., 810–811.)
\textsuperscript{632} Romans 13:5. (Ibid., 948.)
\textsuperscript{633} Tenet 4.
\textsuperscript{634} Matthew 6:26. (\textit{The Holy Bible}, 811–812.)
values and duties in strongly objective terms stems from the centrality of God's sovereignty to CR thought.\textsuperscript{635} Ultimately it is God, the creator, designer, and moral lawgiver, who sets the terms of basic justice and morality - not humans. It is not humans who set these terms, in any sense; they neither set them individually nor collectively, neither actually nor hypothetically.\textsuperscript{636}

This is an admittedly quick sketch of how the CR tradition has been latent throughout this chapter's discussion of basic teleology. But despite possible appearances to the contrary, I submit that our discussion of basic teleology has been saturated with CR insights. And as much as one might try to altogether divorce these insights from their wider CR background, I question whether it is ultimately wise or possible to do so. Further discussion of this last comment, however, awaits us in Chapter 11.

**Conclusion**

Why do I regard this chapter of such importance? It is because while the main thrust of CR legitimacy makes legitimacy conditional on preventing basic wrongs, it is this second idea - that of basic teleology - that is most important in its explication. Of the three ideas of my CR account, the second is most important to a clear philosophical understanding of legitimacy.

Why does a CR approach theorize legitimacy largely in terms of the negative task of preventing wrongs? It is because these are wrongs of a basic sort, and their corresponding interests and dignity call out to be protected with particular urgency.

And, philosophically speaking, what type of considerations are ultimately responsible for justifying the basic importance of basic wrongs? These considerations are given by basic teleological views - that is, by the basic elements of an otherwise full teleology. For any given

\textsuperscript{635} The centrality of God's sovereignty to CR thought - including social thought - is not a point I've yet emphasized, but which I will emphasize in closing (Chapter 11).
teleological view, there will be elements of basic human well-being that correspond to what, according to that view, are the basic demands of justice. It is these - and only these - elements of a teleological view that are brought to bear on enforceable political morality.

By illuminating where the content of basic rights comes from, and by explaining why certain rights rather than others are legally enforceable and legitimacy-conditional, this second idea is especially valuable in making philosophical sense of our legitimacy-related convictions.

In comparison with the content-free proceduralism of JL, CR legitimacy makes available the content we need with its basic teleology postulate. Its teleology makes content available, and its basic-ness ensures this is content of the right kind. In doing so, CR legitimacy can avoid the unacceptable consequence of mismatching the characteristics we experience legitimacy-conditional rights as having. Basic teleology delivers rights that are procedure-independent, contentful, and objective. It places them on firmer philosophical grounds - grounds that don't depend upon procedures or group consensus. By providing determinate content where JL does not, CR legitimacy also makes clearer the philosophical grounds on which justifiable basic rights rest. It avoids the unnecessary philosophical shuffle involved in contractarian theories such as JL, and justifies these rights in terms of their vital contribution to human interests, dignity, and flourishing.

In conclusion, the basic teleology postulate avoids the unacceptable consequence to which JL's proceduralism leads - that of undercutting basic rights - and makes possible clearer, more satisfying explanations of basic rights' philosophical justification. This has been my argument in this chapter. This is the difference made by basic teleology.

636 It is this very line of thought that I further develop and defend as the exogenous standard postulate in Chapter 10.
637 And again, lest readers think I'm attacking a straw man in characterizing JL in terms of "content-free proceduralism", I refer them back to the excursus in Chapter 4 on what substance - albeit limited substance - JL does provide.
Chapter 10

How to Steer Clear of Paternalism

Introduction

As I suggested in Chapter 5, JL seems to involve us in a problematic, albeit unusual, form of paternalism. If so, this would be a third unacceptable consequence to which JL leads. JL seemingly involves paternalism by posing a question of self-interest that is not answered by affected parties themselves, but by their hypothetical counterparts.

In Chapter 5 I also identified the key distinction on which my charge of paternalism turns: the difference between enacting coercion for people's good and doing so for the sake of justice. My suggestion was that JL falls on the wrong side of this divide, by making a question about people's good central to its justification of legitimate coercion. Let me clearly state upfront that, once again, this is the basic intuition that drives my argument in the present chapter - that there is an important difference between interest-based and justice-based justifications. It also lies behind my contention that CR legitimacy justifies coercion in relevantly different terms that avoid paternalism.

Yet I acknowledge the difficulty in delineating the different philosophical territories the two occupy. The difficulty arises since, in some sense, interests also seem to factor into approaches that would foreground justice (such as CR legitimacy). In this chapter, then, I take up

638 Previously in drawing this distinction, I aligned myself with Gutmann and Thompson who write, "The paternalist claim is not that the conduct is morally wrong but that it is harmful to the citizen herself...Legal paternalism is the restriction by law of an individual's liberty for his or her own good." (Gutmann, Amy and Thompson, Dennis, Democracy and Disagreement, 261.) But while they contrast interest-based restrictions with conduct restricted because it "is morally wrong", my interest is the difference between interest-based and justice-based justifications of coercion. In light of the CR tradition's central insight into
again the issue of how interests factor differently into interest-based and justice-based justifications. The fact that I admittedly make only partial progress on the issue is partly why my argument here is more provisional than those of Chapters 8 and 9.

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So our question now: Why wouldn't CR legitimacy have the same effect? How would it steer clear of the paternalism to which JL leads?

To preview, my answer will be that a CR approach avoids paternalism because it explains legitimacy in terms of an exogenous standard addressed to real persons rather than in terms of a self-legislated law produced by hypothetical persons, as JL does. Paternalism is a function of the type of question asked and of who provides the answer. Given JL's constructivist commitment to representing legitimacy conditions as the product of popular sovereignty, JL asks whether a proposal is acceptable to each citizen in light of their self-interest considered severally; that is, it asks a question of self-interest. But to answer this question, JL does not direct us to actual citizens, but to their hypothetical counterparts. Conversely, CR legitimacy understands the relevant moral standard not as a product of human self-legislation, but as exogenous. Thus, the operative question concerns the basic demands of this standard - that is, the basic demands of justice. The need for hypothetical persons doesn't even arise within a CR framework; since the question isn't one of self-interest, we needn't mitigate factors that might distort or bias people's answers to a question of that sort.

I've already discussed, in Chapter 5, the factors that conspire together to produce JL's paternalistic implications. I will review them here only briefly. After that, I will explain the CR legitimacy, and in light of other considerations canvassed in Chapter 7, we're examining the hypothesis that legitimacy is a function of upholding basic justice.

As previously stated, my other reason for presenting my third critique of JL and its corresponding CR idea in tentative terms is this: even if JL is, indeed, guilty of the paternalism I allege, it may not be thought a worrisome form of paternalism given its unusual features.
alternative and how it can help us make sense of legitimacy while steering clear of paternalism. Relatedly, we will consider how CR legitimacy incorporates a concern for people's interests in way that seems relevantly different from JL. Given the lesser importance of this chapter to my overall argument, I shall move relatively quickly through these steps. I hope to say enough to make a provocative, pregnant, and plausible suggestion - but not more.

1-JL's Possible Paternalism: A Quick Recap

Recall how JL leads to paternalism.

JL takes the first step down this path when it endorses constructivism. JLs are committed to representing the demands of legitimacy as the product of human legislation. I take this to be more than a commitment to proceduralism as a mere heuristic or decision-procedure. JLs make clear that the procedure itself and the fact of agreement are of crucial importance to their position. The reasons for agreement and the arrangements agreed upon may also be important, but they are not accorded primary significance. If they were, JLs would treat the proceduralist apparatus as a mere aid to discovery, and eliminable. But JLs do not regard their proceduralism in this way. Rather, JLs regard constructivism as the only appropriate mode of justification given citizens' free-and-equal status. The spirit animating JL's constructivism is the aspiration to make political communities wholly sovereign over the norms that govern them. Although our

640 The whole thrust of Freeman's argument is that the social contract is not an unnecessary philosophical shuffle because the fact of agreement itself is significant. See Freeman, Samuel, “Moral Contractarianism.”

641 As he draws his sweeping Between Facts and Norms to a close, Habermas says of his "procedural paradigm" of law, "Certainly this understanding, like the rule of law itself, retains a dogmatic core: the idea of autonomy according to which human beings act as free subjects only insofar as they obey just those laws they give themselves in accordance with insights they have acquired intersubjectively." (Jürgen Habermas, Between Facts and Norms, 445–446.)

642 In reading JL as well as the broader secular liberal tradition of which it is part, one also senses the aspiration, shared with Marx, to bring philosophical concepts and justifications down from heaven to earth. This seems also to be involved in the animating spirit of JL.
moral experience strongly suggests that moral duties can, indeed, "simply befall us"\textsuperscript{643}, constructivism resists this possibility in regards to social norms. Norms of legitimacy - or justice or political morality - do not simply befall us, but are the product of popular sovereignty in one sense or another. They hold onto this commitment even if it means appealing to hypothetical acts of self-legislation by political actors.\textsuperscript{644}

In our earlier discussion of JL's possible paternalism, I mentioned - but did not emphasize - that the category of self-legislation lies at root of the problem. But let me do so here: as far as JL's possible paternalism is concerned, we can ultimately trace the problems back to JLs' insistence that we understand legitimacy in terms of self-legislated norms.

Given this commitment, JLs query what proposals might receive unanimous support within an idealized procedure. The question becomes this: \textit{can we imagine a proposal receiving the unanimous support of citizens, when each evaluates it in terms of self-interest as seen from their distinctive viewpoint?} Unanimity is required by citizens' free-and-equal status; it is assumed that no citizen can be legitimately coerced by a majority decision he cannot accept. JLs also assume a society marked by pluralism. Each party to the agreement occupies a distinctive viewpoint, whether or not they're conceived as having recourse to their comprehensive views.\textsuperscript{645}

Logic also demands that the question posed to citizens be one of self-interest - or, at least, not a question of justice or legitimacy. If it were either of the latter, JL would simply be a way of passing-the-buck from ourselves to the hypothetical contractors. Making the question one of self-interest avoids this potential circularity.\textsuperscript{646}

\textsuperscript{643} Estlund, David M., \textit{Democratic Authority}, 117.
\textsuperscript{644} This issue of how to interpret JL's constructivism - whether strongly or weakly - is one to which I will return in Chapter 11.
\textsuperscript{645} As Rawls' conceives the agreement scenario, they don't. As Scanlon conceives it, they do.
\textsuperscript{646} For discussion, see Estlund, David M., \textit{Democratic Authority}, 245–248. Also, see discussion at the end of "2.a) A Crucial Premise in the Argument: The Questions JLs Ask" in Chapter 5.
In sum, the picture that emerges is of a procedure that resembles real-world voting processes in various ways. It involves persons occupying diverse standpoints; who have some sympathy towards others and the common good⁶⁴⁷; but who each decide how to cast their vote chiefly on the basis of their own self-interest, as they themselves perceive it.

However, despite these resemblances, JL ultimately directs us to hypothetical rather than real persons in assessing the multi-perspectival acceptability of a proposal. Why? Because actual persons cannot be counted on to discern their own reasonable self-interest. They cannot given the moral, epistemic, and economic obstacles they face, all of which serve to distort how they perceive their own self-interest and to bias social arrangements.⁶⁴⁸ JL's imaginary scenario is meant to correct for these defects.

⁶⁴⁷ As per Rawls, JL's contractors are neither egoists nor altruists.
⁶⁴⁸ In saying that actual persons misperceive their "reasonable self-interest", I think JLs mean to both prevent biased social arrangements and correct misperceptions of self-interest. Primarily, their concern is the former; they do not mean to question people's ability to correctly perceive their self-interest as much as they mean to prevent people from unduly biasing social arrangements in favour of their correctly perceived self-interest.

That said, I don't believe that JLs are entirely unconcerned with correcting for misperceptions of self-interest as well. For instance, JLs would impose certain social arrangements - eg, redistributive programs - that some actual persons do not perceive as being in their self-interest. Certainly part of the JL justification of such programs claims they are fair; that is, they ensure social arrangements are not prejudiced in favour of persons who are wealthy. But that is not the whole of the justification, the other part being that such programs are - despite what actual persons might think - in everyone's self-interest as well. Indeed, fairness cannot be the whole of the explanation because the self-interest claim is the subsidiary consideration JLs use to explicate what fairness demands. If fairness were the whole of the justification, then JLs would simply be presupposing what their proceduralism is meant to justify.

Moreover, it is possible to glean indications of JLs' concern to correct misperceptions of self-interest. For instance, Barry justifies a public system of employment insurance in this way. ("Much, I suggest, turns on the answer to questions like these: under what conditions would it be rational for someone dependent on employment for an income to decline insurance, if available on reasonable terms, against loss of earnings?...Where almost all rational choices would go the same way, leaving people the choice is rather like leaving a stretch of dangerous cliff unfenced so as to leave people the option of plunging into the sea.") Also, Freeman's defence of Rawls' inclusion of "the pleasures of a deeper understanding of the world" among the political values of public reason, as compared to "spirituality" which is excluded, seems aimed at misperceived self-interest. Not only is it unfair to bias social arrangements in favour of any particular view of spirituality. It is incorrect for citizens to regard spirituality as important to the development of their two moral powers, but right for them to regard science as important to their development. So seems to be the message. (See Barry, Brian, “Chance, Choice and Justice,” in Contemporary Political Philosophy: An Anthology, ed. Goodin, Robert E. and Pettit, Philip, 2006, 233; Freeman, Samuel, Rawls, 390–393.)
But while the aim of proceduralism might be noble - to realize fairness - the effect, I'm suggesting, is perverse. For by transmuting actual persons into hypothetical ones, we render the actual persons unable to speak for themselves. *Ex hypothesi*, we substitute *in* the judgment of hypothetical persons and substitute *out* that of actual persons. And because the hypothetical parties are presumed to speak *concerning a question of actual persons' self-interest*, paternalism results.

In light of discussion to follow (especially subsection 3 below), I think it bears reinforcing that JLs view contractors' interests severally. Contractors' occupy the array of distinctive vantage points available within the bounds of reasonable pluralism. This diversity is important to JL logic. For JL addresses itself to the pluralistic polities of contemporary liberal democracies, and presents itself as demanding the assent of citizens whatever their worldview.

Now if I am right that JL involves a form of paternalism, then we should be able to identify cases where actual persons might have a justifiable complaint against the legal coercion to which they are subject. The examples raised in this footnote, I think, provide us with such cases. If, on JL grounds, actual persons' property is expropriated by the state for redistribution or for a public employment insurance program, actual persons might justifiably complain they are being treated paternalistically. Likewise, if a scientific education were made a requirement of citizenship on the grounds that it nurtures citizens' two moral powers, actual persons might justifiably complain of paternalism - and especially so if elements of this education are in tension with persons', say, religious beliefs.

So while there are two aspects to "reasonable self-interest", I don't think they can be entirely prised apart. Nor do I think JLs are wholly interested in one to the exclusion of the other. The idealized circumstances don't only correct for moral shortcomings, but also epistemic ones. They prevent biased social arrangements as well as misperceptions of self-interest. Throughout, whenever I speak of JL's concern with self-interest, I have both these intertwined aspects in mind.

649 Though this isn't to say that JLs necessarily allow contractors full-scale recourse to their particular comprehensive views. Some don't, such as Rawls.

650 E.g., "We join this first fundamental question with a second, that of toleration understood in a general way. *The political culture of a democratic society is always marked by a diversity of opposing and irreconcilable religious, philosophical, and moral doctrines.* Some of these are perfectly reasonable, and this diversity among reasonable doctrines political liberalism sees as the inevitable long-run result of the powers of human reason at work within the background of enduring free institutions. Thus, the second question is what are the grounds of toleration so understood and given the fact of reasonable pluralism as the inevitable outcome of free institutions? Combining both questions we have: how is it possible for there to exist over time a just and stable society of free and equal citizens, *who remain profoundly divided by reasonable religious, philosophical, and moral doctrines?*" (John Rawls, *Political Liberalism*, 2005, 3–4 [emphasis mine].)
Moreover, narrowing the range of hypothetical contractors' viewpoints in a stipulative way would also beg the question in favour of the results preferred by JLs.\textsuperscript{651}

**2-CR Legitimacy's Response: An Exogenous Moral Standard**

How does CR legitimacy steer clear of this possible paternalism?

As I've explained, the root cause of JL's paternalism is the insistence on popular sovereignty. That is, the insistence that we understand ourselves to be the authors of the basic norms that govern our societies - even if this means appealing to hypothetical persons. Correspondingly, the solution proposed by CR legitimacy cuts off the problem at its root. Instead of insisting upon a self-legislated standard, a CR approach explains legitimacy in terms of an *exogenous* moral standard.

As explained in Chapter 7, "exogenous" is a scientific term meaning "introduced from or produced outside the organism or system"\textsuperscript{652}. Likewise, an exogenous moral standard is one that is not constructed by humans. It impresses itself upon human polities, but, *ex hypothesi*, originates altogether outside of them. It is not constructed by humans in any sense, neither severally nor collectively, neither actually nor hypothetically. Positing such a standard is consistent with acknowledging one or another decision rule as a helpful tool in discerning the demands of this standard. Indeed, I would regard both the Golden Rule as well as counterfactual contractarian scenarios in this vein. But positing an exogenous standard is *in*consistent with holding such heuristic devices to be of primary, or essential, normative significance. For an exogenous standard - one introduced into human affairs from *outside* - is not essentially

\textsuperscript{651} The line of thought here is similar to the logic that demands JLs not saddle their conception of reasonable personhood with too much substance, and that JLs' subsidiary question be one of self-interest. See "1-The Heart of the Argument" in Chapter 3 and "2.a) A Crucial Premise in the Argument: The Questions JLs Ask" in Chapter 5.

\textsuperscript{652} http://www.merriam-webster.com/dictionary/exogenous?show=0&t=1362000632
connected to modes of reasoning that represent the standard as emanating from inside human affairs. Being exogenous, it would obtain whether or not decision procedures such as the Golden Rule or contract scenarios were available to us as shortcuts for discerning its demands.

CR theorists clearly recommend this first move - that is, replacing the JL starting point of popular sovereignty with something like an exogenous standard. In an introduction to Kuyper's Stone Lectures, McKendree R. Langley rightly says of Kuyper's thought, "The notion that people themselves create basic norms (that is, popular sovereignty) is rejected." Similarly, in reference to Dooyeweerd's views, one commentator writes, "What then is the secular state? The secular state is that state which denies any transcendental claim upon itself." In my terminology, this is tantamount to denying an exogenous standard. And just as Dooyeweerd regards the secular state as folly, so would he judge insistence upon popular sovereignty - and rejection of an exogenous standard - to be folly as well.

As for the next step: in saying that the demands of legitimacy constitute an exogenous standard, CR theorists are rejecting the notion that their justification depends upon how persons perceive their own self-interest. This is a notion JL accepts, postulating as it does that legitimacy results from each person accepting a proposal in light of their self-interest as they themselves perceive it. Ex hypothesi, each person evaluates their self-interest reasonably - such is the effect of JL's idealizations. But each person also does so from a distinctive viewpoint, even if they

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655 My critique of "popular sovereignty" in this chapter is liable to give rise to a misunderstanding. Throughout this chapter, what I'm rejecting is not the idea that, practically speaking, real-world political communities have a right to govern themselves. That is a right I readily recognize. What I am rejecting is popular sovereignty qua the insistence that we understand even the most basic moral norms that govern just societies in terms of human self-legislation. I have already explained "popular sovereignty" in this way a couple of times in-text. I hope this point will not be lost throughout.
656 As explained before, these idealizations are moral, cognitive, and economic in nature.
come to substantively similar conclusions as those of someone occupying a different viewpoint. Conversely, CR legitimacy makes no use of the idea of multi-perspectival acceptability based on perceived self-interest.

Thus, on CR legitimacy, we are not forced to justify coercive laws with reference to the question, "Should person \( x \) regard a proposal as being in \( x \)'s self-interest?" This is a question we are wise to avoid in our philosophical account, since once it is posed we must determine who will answer it: person \( x \) herself? Or someone else? Paternalism results if we presume someone else's evaluation of \( x \)'s interests to be superior to \( x \)'s own evaluation, and justify coercion on this basis. Better just to altogether avoid this dilemma of who speaks for \( x \).

Instead, on CR legitimacy we justify coercive laws with reference to the question, "Is this law consistent with the basic demands of justice?" That is the subsidiary question we should ask. Such demands, CR legitimacy explains, constitute an exogenous standard. Thus, it makes little sense to try and understand these demands in terms of self-legislation. In turn, it also makes much less sense to try and understand them in terms of how persons severally perceive their self-interest. If an exogenous standard were relevantly similar to positive law - which typically and sensibly is evaluated with reference to persons' perceived self-interest - then it might be sensible to evaluate its demands in similar fashion. But it is not relevantly similar, for it is not self-legislated.

In light of CR legitimacy's characterization of basic justice, I suggest we ask this further question as well: does this condition correspond to basic human interests and dignity in such a fundamental way that we feel we have no choice but to coerce others to respect it, with or without

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657 To clarify, I do not mean "perceived" in the sense of how actual persons, with their biases, identify (and misidentify) their self-interest. Instead, I mean "perceived" in the sense of how hypothetical persons identify their self-interest with reference to their own distinctive viewpoint rather than with reference to some impersonal, absolute, omniscient viewpoint.
their consent? Answering it will, I think, help us zero in on the basic demands of an exogenous moral standard. My contention is that this and the last are the right questions to be asking - come what may\textsuperscript{659} - and the questions that we must ask if we are to steer clear of the structural paternalism that JL would seem to involve.

As for the step after that, on a CR approach there’s simply no need to appeal to hypothetical persons since the question put to us is not one of self-interest. The justification of legitimacy conditions does not depend upon persons’ perceived self-interest. Thus, we need not worry about correcting for distorted perceptions of self-interest. Rather, CR legitimacy puts to us a question of basic justice, a question which can ably be investigated without appeal to hypothetical persons. We consider actual persons simply as they are - with the interests and dignity they objectively have, given the sort of beings they are.

With neither a question of self-interest nor hypothetical respondents in view, the threat of paternalism is avoided. With legitimate coercion at stake, CR legitimacy does not require us to substitute out the judgment of actual persons and substitute in that of hypothetical counterparts. The type of standard in terms of which a CR approach explains legitimacy doesn’t require us to countenance persons’ self-interest conceived severally. Instead, it is one under which we all stand as equals, and the conversation to which theorists are invited is in terms of the fundamental demands of this standard. Legitimacy is not a matter of a moral standard that justifies coercion whilst denying actual persons the right to represent their own self-interest. Rather, the standard justifying coercion is one that requires us to regulate our pursuit of self-interest in light of its

\textsuperscript{658} See the latter stages of Chapter 8 for my view on when consent is necessary for legally coercive measures to be fully justified.

\textsuperscript{659} As I hope is becoming increasingly clear over the course of this dissertation, CR legitimacy is not a proposal for regulating public political discussion. If it were, I agree there are likely better alternatives. But while I do not put forth CR legitimacy - nor this question - as a way of regulating public political discussion, I do believe that CR legitimacy - including this question - makes the best philosophical sense of our legitimacy-related convictions. And it is making sense of these convictions that is my aim.
demands. It is an *exogenous* standard that imposes itself on us in spite of persons' perceived self-interest - not because of it.

But, it may be asked, why should we believe that such a standard exists? Without averting to deep questions about theology or meta-ethics, and operating only within the domain of political philosophy and the present inquiry, we can say this: only if we posit the existence of such a standard can we ostensibly account for our legitimacy-related CCs. These include the conviction at hand, namely, that it is illegitimate to coerce others on paternalistic grounds. Postulating an exogenous standard, we seem able to steer clear of the structural paternalism in which JL entangles us. Without it, we seem left only with popular sovereignty as a starting point660, and with the paternalism that results from it.

3-Incorporating Interests while Steering Clear of Paternalism

To some, the CR alternative I've presented here may not look any better. The objection I have in mind is this: all theories, include CR legitimacy, are paternalistic insofar as all justify coercion based on people's interests. After all, doesn't CR's teleology postulate tie legitimacy to the *interests* and dignity involved in basic teleology? Doesn't CR legitimacy understand basic justice in terms of basic *interests* and dignity? It might seem that wherever we turn, we must ultimately give an interest-based justification of coercion. And if such justifications are paternalistic, it might also seem that we are doomed to paternalism.

660 To reiterate, in saying this I am not supposing that only *religious* grounds can be given for an exogenous standard. At least at this stage of the argument, I remain open to the possibility of secular accounts of exogenous morality. Views that regard morality as a type of natural property would be one such secular account, a possibility I do not wish to foreclose at present.

Also, it is not as though the wider philosophical world does not offer us options other than an exogenous standard or proceduralist constructivism. In the pairwise comparison between JL and CR legitimacy, though, to reject the exogenous standard postulate is, indeed, to accept the JL starting point of popular sovereignty. And my dissertation focuses primarily on this pairwise comparison.
Earlier I suggested that while all accounts of legitimacy - both those that offer interest-based justifications and those that offer justice-based ones - do incorporate human interests in some sense, there are different ways in which this can be done. Some of these ways involve paternalism, and some do not. My basic response to the present objection is to grant that CR legitimacy accounts for human interests in a certain way, but deny that it is relevantly similar to JL's way. In the following comments, I hope to make clearer this distinction between how interests factor into justice-based as opposed to interest-based justifications of coercion.

Let us consider three seemingly relevant differences between how interests factor into the two types of justification, and, accordingly, how interests factor differently into CR and JL legitimacy. As I've indicated, I find this difficult philosophical terrain. Whatever progress I make is admittedly partial. But hopefully it is, at least, progress. The intuitive difference between coercion for people's good and for the sake of justice remains compelling and it remains worth pursuing even if we can only do so imperfectly.

First, though JL and CR legitimacy answer the same primary question, the subsidiary question asked by each is different. Following Estlund's aforementioned distinction between primary and subsidiary questions\(^{661}\), the primary question for both is that of political legitimacy - How are we to understand what makes laws legitimate even if imperfect? But here is the crucial point: while JL's subsidiary question is one of perceived self-interest, CR legitimacy's is not.

In this chapter we've already seen what JL's subsidiary question is: should everyone regard a proposal as being in their reasonable self-interest? Answers to the primary question - that proposal y or z is a legitimate use of legal coercion - are justified in terms of this subsidiary

\(^{661}\)Estlund, David M., Democratic Authority, 245–248. To review, a subsidiary question is one that is derivatively asked to help answer the primary one. Consequently, the nature of the subsidiary question shapes the way answers to the primary question are justified.
question. Proposal y or z is legitimate because everyone would - or at least should - regard it as being in their reasonable self-interest, as based on reasons they deem acceptable.662

Conversely, the subsidiary question on a CR approach is along these lines: does this proposal respond to the demands of basic justice? Here, proposal y or z is legitimate, if legitimate, because it responds to a demand of basic justice. Now to answer this subsidiary question, I've also offered a variation on this question we might find a more helpful heuristic.663 That is, Does proposal y or z protect conditions so basic to human flourishing that we feel we have no choice but to coercively enforce them, regardless of consent?

Now it is, indeed, true that I spell out basic teleology in terms of humans' basic interests and dignity. However, notice that on a CR view interests do not enter the picture in terms of the subsidiary question, as they do on JL. I think this more than merely a verbal point. For this difference in subsidiary questions allows us to characterize JL and CR approaches in strikingly different ways. On JL, something is part of basic justice because it's in people's reasonable self-interest. By contrast, on CR legitimacy, something can reasonably be in people's self-interest only if it respects basic justice. The former is true of JL since its subsidiary question is one of self-interest. The latter is true of CR legitimacy since its subsidiary question is one of basic justice. More than merely a verbal point, then, the difference between JL and CR subsidiary questions seems to indicate that interests play a much more foundational role in JL than in CR legitimacy.

662 To be sure, JLs never explicitly say something as bald as, "Proposal y is legitimate because y is for your own good." Nor do they intend to say this. As I acknowledged earlier (in "2.a) A Crucial Premise in the Argument: The Questions JLs Ask" in Chapter 5), JLs' intention is clearly to explain legitimacy in terms of justice- or fairness-based requirements.

My point here, though - as it was earlier - is about what JLs are committed to saying, about what their logic amounts to. Despite their official or intended position, they tie legitimacy to self-interest as seen by the subsidiary question they ask. Such is how I think we ought reconstruct JL logic.

663 And here I do offer this question as a mere heuristic, unlike the different and stronger sense in which JLs' put forward their hypothetical procedure as a "heuristic".
Let's now consider a second way of seeing the difference between JL's and CR legitimacy's incorporation of interests. Both approaches are concerned with citizens' interests in some sense, but the vantage points from which they presume to evaluate these interests are rather different. JL incorporates the interests of individuals as judged from their own subjective points of view. Conversely, a CR approach considers the interests of individuals as judged from an impersonal, third-person point of view. We've already seen how JL requires us to take up multiple subjective viewpoints - hence, the multiplicity of perspectives involved in multiperspectival acceptability. That CR legitimacy would have us understand interests in terms of a third-person point is implied by the very strong sense of moral objectivity that pervades the CR tradition. This way of seeing the contrast between JL's and CR legitimacy's incorporation of interests - as the difference between first-person points of view and a third-person point of view - also, I think, helps illuminate why JL leads to possible paternalism while CR legitimacy does not.

For consider the following. Were legal coercion used against a basic rights violator because they had violated moral standards regarded as obvious and universal, it seems mistaken to label this a case of paternalism. Perhaps there are other grounds on which we'd object to the coercion. But given the type of justification proffered for the coercion, it seems mistaken to label it paternalism. On the other hand, if by way of justification we instead said to the basic rights violator, "This is for your own good," we would rightly be accused of

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664 This is true both on Rawlsian and non-Rawlsian versions of JL.
665 Cf. "2-The Objectivity of Legitimacy-Conditional Basic Wrongs" in Chapter 7.
667 For instance, perhaps we think those exercising coercion do so ineffectively and counterproductively.
668 As I explain above, JLs never say nor intend to say anything so blunt. But such a sentiment - tempered by fairness considerations - is, I'm arguing, a crucial element of their approach to legitimacy.
paternalism. Why this difference? It seems to me that we judge these cases differently with respect to paternalism because the former justification averts to a third-person perspective (i.e., a moral standard regarded as universal) while the latter to a first-person perspective (i.e., to the good of the coerced rights violator). Similarly, since a CR approach takes interests into account from an objective, impersonal perspective, whereas JL takes them into account from multiple first-person perspectives, JL seems liable to paternalism in a way that CR legitimacy does not.

Third, we should remind ourselves of Steven Wall's two ways in which teleology may factor into a theory of political morality. One way involves a teleological view as something that a polity should promote. The other imports only those aspects of a teleological view that are needed to underwrite basic rights and duties. The distinction between JL and CR ways of incorporating interests can be understood along parallel lines.

On the one hand, there is an evident sense in which JL justifications are concerned with promoting people's interests as they themselves perceive them. In Rawls' agreement situation, his contractors seek to maximize their share of primary goods. The case is structurally the same in other JL accounts. There are certain limitations, related to fairness, on the extent to which JL's contractors can promote their own interests – for instance, in Rawls' case the limitations imposed by the Veil of Ignorance. But within these strictures, the contractors are directed to press their own interests. That they do so is a necessary part of JL logic, lest JL's subsidiary question collapse into its primary question. If the agreement scenario is to "have any heuristic value in

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669 Though perhaps because of the high stakes involved - ex hypothesi, it is basic rights that are at risk - we would accept even a paternalistic justification in this case. If so, however, isn't it still basic justice that ultimately legitimizes the coercion? Paternalism might be the subjective motive of the coercers, but it seems the objective considerations that legitimize their coercive actions pertain to basic justice.

670 The Rawlsian question is, as Estlund puts it, "Which of the proposals before me will maximize my bundle of primary goods?" (Estlund, David M., Democratic Authority, 246.)

671 Again, I refer readers back to "2.a) A Crucial Premise in the Argument: The Questions Jls Ask" in Chapter 5.
explicating the nature of justice or right”⁶⁷² - or legitimacy - contractors must be tasked with pursuing their own interests, not justice.

On the other, CR justifications invoke teleology only insofar as is needed to make sense of the basic rights on which legitimacy is conditional. As a result, given that interests enter the CR picture only as part of basic teleology, interests are invoked only to underwrite basic rights as well. Meeting legitimacy conditions, as understood by a CR approach, would certainly have the effect of serving humans' basic interests. But aiming at their promotion - in the sense of maximizing persons' self-interest within the bounds of fairness - plays no role in a CR account of legitimacy.

In sum, I believe that while interests play a role in both JL and CR justifications of legitimate coercion, the role they play is relevantly different. I have suggested three angles from which this difference can be appreciated. First, the subsidiary question of JL directly involves persons' self-interest, whereas the subsidiary question of CR legitimacy does not. The latter does so only indirectly. Second, JL incorporates interests by way of multiple, first-person perspectives, whereas CR legitimacy would have us conceive of basic human interests from an impersonal, third-person perspective. Third, a JL-style justification involves promoting and maximizing interests, whereas the CR alternative incorporates interests only insofar as doing so is needed to philosophically underpin basic rights.

Let me conclude these reflections by clarifying their import, as I see it.

These considerations represent an admittedly clumsy and only partially adequate account of the difference between JL's and CR legitimacy's incorporation of interests. Taken together, I believe they strongly suggest that such a difference does exist, and that it has differential

⁶⁷² Cf. Estlund, David M., Democratic Authority, 247. It seems that JL’s hypothetical contractors need to promote their own self-interest for the same reason that subsidiary questions need to be different from the primary questions to which they correspond. Both seem demanded by non-circular reasoning.
implications for paternalism. In light of these considerations, we can more readily see how the exogenous standard postulate helps us toward justice-based rather than interest-based justifications of coercion. For such a standard accounts for interests differently than JL does.

As with JL's possible paternalism, giving further attention to CR legitimacy's possible solution is warranted.

4-CR Theorists and the Threat of Paternalism

Recall the main question driving this chapter, Why doesn't CR legitimacy lead to paternalism while JL does? Appreciating the different ways these two approaches incorporate interests is one piece of the puzzle, a piece we've just now considered. But recall as well the larger part of the answer: the root cause of JL's paternalism is the insistence upon popular sovereignty - the insistence that we explicate even the most basic moral norms that govern society in terms of popular sovereignty. So CR legitimacy attacks paternalism at the root, replacing this insistence upon popular sovereignty with the idea of an *exogenous* moral standard. This is a standard that is introduced to human affairs from the outside, with no essential link to popular sovereignty or guarantee that its demands will be explicable in terms of popular sovereignty. In turn, this kind of standard leads to a subsidiary question that isn't about self-interest. Then, given CR legitimacy's subsidiary question, there is no need to appeal to hypothetical persons, and no danger of hypothetical persons silencing the actual persons to whom they supposedly correspond.

In the course of the foregoing discussion, a couple of explicit references to CR theorists have been made. But lest we lose sight of the CR tradition in relation to the present discussion, let us recap some of what CR theorists have said about paternalism before concluding.
CR theorists are keenly aware of, and concerned about, the threat of paternalism. For example, perceiving the legally coercive imposition of a secular worldview on Western society, Schaeffer sounds the alarm bell:

Law in this country has become situational law...That is, a small group of people decide arbitrarily what, from their viewpoint, is for the good of society at that precise moment and they make it law, binding the whole society by their personal arbitrary decisions.\(^673\)

Schaeffer's broader concern is the secular worldview that has come to replace Christianity as the basis for Western society. But, as seen in this quote, Schaeffer is also worried about paternalism which he thinks an inevitable outworking of secularism. Now I am more optimistic than Schaeffer about the moral possibilities of living within a predominantly secular society. Still the concern about paternalism - whether well-founded or not - is evident.

Not only are they keenly aware of the threat, but CR theorists also believe JL-style approaches fail to truly respect equality. Speaking of political theorizing that insists upon popular sovereignty, Kuyper writes,

And herein lies its self-abasement...from the standpoint of the sovereignty of the people, the fist is defiantly clenched against God, while man grovels before his fellowmen, tinseling over this self-abasement by the ludicrous fiction that, thousands of years ago, men, of whom no one has any remembrance, concluded a political contract, or, as they called it, 'Contrat Social'.\(^674\)

What is the alternative to going hypothetical? The suggestion of CR theorists, it seems to me, is positing a law "above the lawmakers"\(^675\). This is a law such that, "...all men, even the king, are under the Law and not above it."\(^676\) We may add that not only is the law envisioned by


\(^674\) Kuyper, Abraham, Lectures on Calvinism, 75.


\(^676\) “The governing authorities were concerned about [Samuel Rutherford’s] Lex Rex because of its attack on the undergirding foundation of seventeenth century political government in Europe – ‘the divine right of kings.’ This doctrine held that the king or state ruled as God’s appointed regent and, this being so, the king’s word was law. Placed against this position was Rutherford’s assertion that the basic premise of civil
Schaeffer above the lawmakers and above the king. It is also a law above philosophers, above democratic bodies, and even above hypothetical contractors. As we've seen, another way CR theorists characterize the alternative is in terms of a transcendent standard, as distinct from the immanent standards associated with popular sovereignty and self-legislation.\(^677\) Given by God to humans\(^678\), the standard in view is clearly exogenous: originating from outside human polities yet applicable to them. The alternative to immanent law - in other words, to law by popular sovereignty or hypothetical agreement - is a higher law, one that applies equally to all.

Such a standard also helps remedy paternalism, for it does not justify coercion on the basis of affected parties' perceived self-interest. Were popular sovereignty the last word on political morality, it seems we would be constantly threatened by the sort of paternalism JL ostensibly involves. But it's not. As I have argued, popular sovereignty - or self-legislation - isn't the right category for understanding legitimacy. Once we've traded conceptual categories, self-legislation for that of an exogenous standard, a solution to the threat of paternalism comes available. I suggest CR theorists can help show us the way forward.

**Conclusion**

So why might not CR legitimacy lead to paternalism in the way JL seems to do? I have answered this question with reference to a series of steps. First, I explained that a CR approach explains legitimacy in terms of an exogenous moral standard. This category contrasts with that of popular sovereignty, on which JL insists. Second, we thereby avoid making the question one of government and, therefore, law, must be based on God’s Law as given in the Bible. As such, Rutherford argued, all men, even the king, are under the Law and not above it.” (Ibid., 473.) Samuel Rutherford was a 17th-century CR theologian and thinker.

\(^677\) See Kuyper, and also R. J. Rushdoony’s introduction to Dooyeweerd. (Kuyper, Abraham, Lectures on Calvinism, 76; Dooyeweerd, Herman, The Christian Idea, xi–xiii.)

\(^678\) Schaeffer says that “law is king” and “law is above the lawmakers”. To be sure, though, "God is above the law...." (Schaeffer, Francis A., “A Christian Manifesto,” 450.)
To be clear, on JL this is perceived self-interest, meaning interests relative to idiosyncratic viewpoints rather than relative to the objective human good. Third, in light of its different subsidiary question, CR legitimacy has no need for recourse to hypothetical persons. As such, we mitigate the threat of paternalism for we are not required to represent actual persons' self-interest in terms of how hypothetical persons would view them.

My argument here, as throughout this dissertation, is that CR legitimacy makes better sense of the CCs we hold concerning real-world legitimacy. In Chapter 3, I explained that JL has the unacceptable effect of de-legitimizing all uses of legal coercion. And in Chapter 8, I argued that the CR concept of objective wrongs is superior to JL’s focus on consent given that objectivity helps us avoid JL’s first unacceptable consequence and explains our conviction that many real-world uses of legal coercion are legitimate even amidst disagreement between epistemic peers. In Chapter 4, I explained that JL has the unacceptable effect of undermining legitimacy-conditional basic rights. And in Chapter 9, I argued that the CR concept of basic teleology is superior to JL’s proceduralism given that the former helps us avoid JL’s second unacceptable consequence and helps us explain why certain definite, substantive, basic rights are legitimacy-conditional.

Now in the present chapter, I have taken up the issue raised for JLs in Chapter 5. There I raised the possibility that JL involves us in a structural form of paternalism. How might we avoid this unacceptable consequence? Likewise, how might we make better sense of our CC that legal coercion on paternalistic grounds is illegitimate? In this chapter, I have suggested that the concept of an exogenous moral standard is an appropriate antidote. We ought understand legitimacy conditions not in terms of popular sovereignty, as JL would have us do. Rather, we should understand them in terms of an exogenous standard. Doing so would enable us to justify coercion on non-paternalistic grounds, avoiding an unacceptable consequence to which JL leads and helping us explain a legitimacy-related conviction with which JL is seemingly at odds.
My proposal in this chapter has been somewhat tentative. My suggestion in Chapter 5 that JL involves paternalism was only provisional, and so, too, is the potential solution I've presented here as well. But while JL's paternalism is, I grant, only a possible paternalism, it seems wise to altogether steer clear of it. Inspired by the CR tradition, I hope to have shown how we might do just that. There's a difference between coercion for people's good and for the sake of justice. JL at least runs the risk of being on the wrong side of this divide. Better to be safely on the right side.
Chapter 11

Conclusion

Introduction

Let me recap the ground covered so far.

My guiding question has been this: what is the best framework for a philosophical understanding of legitimacy? We recognize that coercive political power may be legitimate even if imperfectly exercised, and yet the concept of legitimacy is not well understood. My concern has not been to formulate a list of first-order legitimacy conditions. Rather, it has been how we ought go about formulating such a list. To further our understanding of legitimacy, I have sought to identify the most apt conceptual categories for theorizing legitimacy at a higher-order level of abstraction.

JL represents one response to my guiding question. It does not elaborate a list of specific legitimacy conditions so much as it provides a way of conceptualizing legitimacy and of formulating specific conditions. According to JL, legitimate legal coercion is based on reasons that all reasonable persons can accept. JLs explicate this core principle with reference to a hypothetical procedure; legal coercion is legitimate when it would receive unanimous support in such a procedure. Thus, on a JL framework, legitimacy is understood in terms of consent, procedures, and self-governing polities responsible for legislating even the most basic justice-related norms.

Alas, JL leads to consequences that are unacceptable insofar as they conflict with CCs we hold about legitimacy. I explained how JL unacceptably de-legitimizes all legal coercion, principally owing to its consent-emphasizing unanimity condition. We saw how JL also
undercuts legitimacy-conditional basic rights, conflicting with the characteristics of procedure-independence, substantiveness, and objectivity that we experience such rights as having. As well, we considered the possibility that JL structurally involves paternalism in the way it justifies coercion. If this is right, JL runs counter to our conviction that coercion on paternalistic grounds is illegitimate. Failing as it does to make sense of these convictions, we should reject JL in search of an alternative. Even JL-sympathizers such as Bohman and Richardson have already rejected the category of "RACAs" and decisively parted ways with JL so described. My critiques of JL provide further reason for doing the same.

The alternative I suggest, though, is rather different from Bohman and Richardson's: I suggest we turn to the CR tradition of social thought to develop a better framework for legitimacy. First I outlined the tradition by way of nine general tenets, advancing it as a rich fund of conceptual insights and resources. Then out of these resources I reconstructed a CR theory of legitimacy. The main CR insight concerning legitimacy is that legitimate legal coercion is a function of preventing basic wrongs. Coercive political power is necessary only "by reason of sin". I explicated this main insight in terms of three companion ideas, of which the first two I count especially important. Legitimacy is a function of preventing wrongs that are a) objective and b) determined in light of a teleological account of basic human well-being, and which also c) are fruitfully understood as constituting an exogenous moral standard. So formulated, CR legitimacy differs from theories that list specific conditions - such as Nussbaum's capabilities or Shue's basic rights approaches. But only in this way can it stand on all fours as an alternative to JL and aptly respond to my guiding question.

679 Not only Bohman and Richardson, though. See two articles by Chambers, both of which serve to survey the current state of debate over public justification. (Chambers, Simone, “Theories of Political Justification”; Chambers, Simone, “Secularism Minus Exclusion.”)
680 "RACAs", those are, reasons that all can accept. See Bohman, James and Richardson, Henry S., “Liberalism, Deliberative Democracy, and ‘Reasons’."
Most recently, I've argued that CR legitimacy can help us at those very points where JL is inadequate. Why doesn't a CR approach de-legitimize all legal coercion the way JL does? By replacing consent with objectivity as a category of central importance, CR legitimacy prevents non-consent from de-legitimizing coercion that is otherwise seemingly justified. Why doesn't a CR approach undercut basic rights the way JL does? It does so in virtue of the determinate and appropriate content made available by basic teleology, in contrast to the content-free proceduralism of JL. And if, indeed, JL structurally involves a problematic form of paternalism, how might a CR approach help us avoid it? Whereas JL's emphasis on self-legislation leads to interest-based justifications of coercion, understanding legitimacy in terms of an exogenous standard instead leads to justice-based coercion that accounts for human interests in a relevantly different way. Such was the tentative suggestion of Chapter 10. In sum, since it makes better sense of our CCs, I conclude that CR legitimacy provides a framework for understanding legitimacy that is superior to that of JL.

Now in this chapter, I will conclude by executing three final tasks. First, I will consider a couple more objections. I cannot, of course, hope to respond to all the objections that can be sensibly raised against my account. But I would like to answer what I take to be a couple of the more serious questions that may linger, and that pertain to the project overall rather than to any specific part of it. Second, I will say a word concerning future directions that further development of CR legitimacy might take. Third, I would like to offer some final reflections, both on what I hope to have accomplished and on where the disagreement between JL and CR legitimacy may really lie.
1-Objections and Replies

a) Objection: JL and CR Legitimacy are More Compatible than It Seems

Granted, JLs will want no part of the "teleology" label. They will be among those who recognize the need for some account of human needs or well-being to underwrite basic rights, yet deny that such accounts need have anything to do with final ends. Rawls, for one, thinks it possible to distinguish the conditions for simply having a conception of the good from the conditions prescribed by a particular conception of the good. But this is denied by the basic teleology postulate.

Teleology aside, however, it might seem that JL is perfectly compatible with the other ideas I attribute to CR legitimacy - those of objectivity and an exogenous standard. Both these ideas avert to moral obligations that actual persons have regardless of their de facto views. That actual persons have such obligations is not something JLs would want to deny. Rawls makes explicit the conception of moral objectivity with which he operates, a conception that "never suppose[s] that our thinking something is just or reasonable, or a group’s thinking it so, makes it so". Indeed, the irrelevance of de facto views is reflected in JLs' abstracting away from actual to idealized persons. Now throughout I've characterized objective values and duties as those that bind individuals and societies whether or not they recognize them. So it seems that JLs would readily embrace my objectivity postulate, if not also the exogenous standard postulate.

Relatedly, the objection might not only be that I've exaggerated certain apparent differences between JL and CR legitimacy; it might also be that I've misinterpreted JL and its constructivism. As I've explained, JLs are constructivists in their commitment to representing the

681 For compelling interpretations of Rawls along these lines see both Kymlicka and Buchanan. (Kymlicka, Will, “The Ethics of Inarticulacy”; Buchanan, Allen, “Revisability and Rational Choice.”)
682 Eg., “Note that the standard is not what principles or institutions people will actually accept, but what it would be unreasonable for them not to accept, given a certain common moral motivation in addition to their more personal, private, and communal ends.” (Nagel, Thomas, “Moral Conflict,” 221.)
demands of justice or legitimacy as the product of a suitable procedure. Now the question arises how most appropriately to interpret this commitment. Previously, I've indicated it might be given either a strong or a weak reading. That is the issue I shall now take up at greater length. For the purveyor of the current objection likely interprets JL's constructivism weakly, in which case JL does appear much more compatible with the ideas of objectivity and exogenous demands. Correspondingly, the objector would likely regard my strong reading as a misinterpretation. So how best to understand JL's constructivism?

Let me first clarify what I mean by "weak" and "strong" readings. On a weak reading, JLs' procedural representation of justice-related demands is just that: simply a re-presentation of moral demands that obtain quite apart from the procedure. A procedural representation doesn't make a given principle obligatory; it simply reveals it to be obligatory. Or, as I've also previously put it, on a weak reading the procedure is interpreted as a mere heuristic. It may be a helpful decision procedure, but maybe not - and, in any case, it is in nowise essential to the normative justification of the principles in question.

By contrast, according to a strong reading of JL's constructivism, a procedural representation does make a principle obligatory - it doesn't simply reveal it to be such. The procedure isn't a mere heuristic, for apart from a procedural representation a putative principle is held to be unjustified. It seems fitting to call this the "strong" reading since constructivism so interpreted involves a stronger commitment to the normative significance of JL's hypothetical procedure.

Though I've not so far defended it, throughout I have operated with a strong reading of JL's constructivism. Indeed, I think this the most appropriate interpretation of JL's constructivism. Now why do I read JL this way?

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Let me canvass four lines of response.

First, many explicit statements can be gleaned from JL texts indicating a strong reading. For instance, Nagel says of enforceable moral principles that "their rightness will not be demonstrable independent of th[e] possibility" of representing them as the product of an appropriate procedure.\textsuperscript{684} So as to distance himself from procedure-independent moral criteria, Rawls writes, "Once more I stress that there is no criterion of a legitimate expectation, or of an entitlement, apart from the public rules that specify the scheme of cooperation."\textsuperscript{685} And in resisting Habermas' criticism that he is insufficiently procedural, Rawls responds,

In justice as fairness, these basic [ie., constitutional] liberties are not in a prepolitical domain; nonpublic values are not viewed, as they might be in some comprehensive doctrine (such as rational intuitionism or natural law), as ontologically prior and for that reason prior to political values...In my reply I have simply observed that from within that political conception of justice, the liberties of the moderns do not impose the prior restrictions on the people's constituent will as Habermas objects.\textsuperscript{686}

If one looks hard enough, it is certainly possible to also find countervailing statements in the JL corpus. Nonetheless, JLs seem to hold a strong commitment to constructivism at least insofar as they affirm statements such as these.

Quite apart from proof-texts, though, there are additional, more robust philosophical considerations weighing in favour of a strong reading. One of these is that JLs seemingly interpret free-and-equal personhood in a way that involves a strong constructivism. For JLs, people's free-and-equal status is denied \textit{unless} they can see themselves as joint authors of the social norms to which they are subject. "It is part of citizens’ sense of themselves, not only collectively but also individually, to recognize political authority as deriving from them and that

\textsuperscript{684} Nagel, Thomas, “Moral Conflict,” 220–221.
\textsuperscript{685} Rawls, John, \textit{Justice as Fairness}, 72.
they are responsible for what it does in their name."687 Apart from procedural representations of political authority, free-and-equal citizens cannot properly understand themselves. Similarly, Freeman explains that constructivism involves “an idealization of moral agency where free persons are conceived as autonomous, responsible not only for their actions and ends but also for the very rules and principles by which they regulate their actions and pursue their ends”688. If, then, JLs wish to retain these conceptions of freedom and equality, it seems they must attach significant normative weight to their procedural representations of legitimacy conditions.

A third consideration favouring a strong reading is that JL seems to lose much of its philosophical distinctiveness if we treat the procedure as mere heuristic. If it is mere heuristic, then it seems altogether possible that there are other ways - involving neither a procedure nor social agreement - of reasoning out and philosophically justifying legitimate social arrangements. But, it seems to me, JLs would be swift and firm in their rejection of this possibility. For instance, Freeman's defends contractarianism as a basis for morality on the grounds that only such an approach justifies moral principles in the right way, namely, "in a way that is reasonable or fair to everyone"689. The contract (or procedure) is essential on this view, for only the contract ensures fairness. As proceduralism is essential to Freeman's contractarianism, so it would seem essential to JL. Without it, not only would JLs' aim to fairly arbitrate between competing comprehensive views be undermined. So, too, would its distinctiveness as a normative theory, for it would seemingly be rendered compatible with any comprehensive view where substantive

689 Ibid., 75 n32.
"reasonableness" and "unreasonableness" were specified by such a view. In light of these costs, a strong reading seems most appropriate.

So much can be said in favour of interpreting JLs to be strongly committed to constructivism. But even if they aren't so committed - and I grant the point is disputable - I still regard my thesis as relevant and instructive. How so?

It would remain pertinent given my fairly general aim of urging a shift in categories in our understanding of legitimacy. Even if, strictly speaking, there is no conceptual incompatibility between JL and key features of CR legitimacy (the objectivity postulate, and possibly the exogenous standard postulate as well), it is certainly true that JL emphasizes certain conceptual categories more than others. Moreover, these are different from CR legitimacy's points of emphasis. It is certainly true, in other words, that JL foregrounds concepts such as consent, procedures, and self-legislation; meanwhile, a concept such as moral objectivity, if indeed present, is distant in the background. My thesis has traction, then, insofar as I'm urging that the ideas of objectivity, basic teleology, and exogenous standards ought be central to our understanding of legitimacy. The centrality of these concepts JL definitely does deny, even on a weak reading.

That said, for the aforementioned reasons I do think JL is best interpreted as strongly committed to constructivism. As such, JL's conceptual categories (consent, procedures, self-legislation) contrast more sharply with those of CR legitimacy (objectivity, basic teleology, exogenous standard). The two aren't as compatible as the objector seems to think.

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690 Barry is right to note, “For it is quite possible to accept the claims of ‘equal respect’ and ‘the ideal of reasonable unanimity’ and yet still maintain that they are compatible with the imposition of your conception of the good.” (Barry, Brian, *Justice as Impartiality*, 182.) It will be possible if we assume a procedure-independent criterion of substantive reasonableness and if this criterion is provided by a comprehensive view that requires its imposition on others.

691 Objectivity as I've described it, that is, as duties and values that bind individuals and societies regardless of their consent.
b) Objection: The CR Tradition is Superfluous

I have suggested that we turn to the CR tradition of social thought for an alternative to JL, and I have reconstructed my CR account out of the tradition's general premises. My account is constituted by the following propositions: that legitimacy is a function of preventing basic wrongs; that legitimacy-conditional wrongs are morally objective wrongs; that legitimacy-conditional wrongs presuppose basic teleological views; and also that these wrongs constitute an exogenous standard. In light of my reconstruction, one might wonder whether it is possible to simply translate all that I've said about CR social thought and legitimacy into secular terms. This question gives rise to a second objection. I take it this second objection pertains more to my secondary aim concerning comparative political theory than to my primary aim concerning normative political theory.692

All its worthwhile ideas are indeed translatable into secular terms, so this second objection goes, and as such the larger CR background is superfluous. The propositions constituting my CR account contain no references to God or other conspicuously religious concepts. As they stand, they exemplify secular translations of ideas originally overlaid with superfluous religious language. As the objection was once put to me, the CR tradition seems neither necessary nor sufficient to my CR account. It isn't necessary, for we can simply begin with the propositions in their secular formulations. Nor is it even sufficient, for reconstructing CR legitimacy has required me to selectively interpret the tradition and discard distinctively religious elements. It might seem, then, that there's little use in either secular or religious

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692 Recall, this secondary aim is to advance the CR tradition of social thought as a rich source of conceptual insights that can be brought to bear on various issues within political theory, both by CR as well as secular theorists. See "Clarifying My Aims" in the Introduction.
theorists mining the CR tradition for conceptual insights - *pace* my suggestion. Political philosophers can carry on perfectly well without it.

Now unlike the contract metaphor of JL, I don't think appeal to the CR tradition represents an unnecessary philosophical shuffle. In response to this second objection, there are two main points I would like to make.

First, the CR background isn't superfluous inasmuch as it provides a wider conceptual context for the specific propositions that pertain to political theory. This wider context gives philosophical depth to these propositions, drawing connections - so far as such connections are of interest - between them and concepts from other philosophical fields that bear on them. To illustrate this point, let me highlight two ways in which the wider CR background gives philosophical depth to specific propositions of CR legitimacy. These correspond to two challenges with which JLs, or other secular theorists, are left should they try to appropriate the propositions apart from the wider background.

For one, the CR background gives us a way of ontologically grounding the objective values and duties to which the objectivity postulate refers. It is, of course, possible to simply assert that legitimacy-conditional wrongs are morally objective wrongs. So far as one is exclusively interested in political theory, it may be reasonable to simply take their objectivity as a primitive fact. However, the objectivity postulate clearly raises a question of *moral ontology*, which, while going beyond the purview of political theory, is nonetheless a relevant and important philosophical question. The wider CR background offers a ready answer to this question: objective values and duties are grounded in the character and commands of a good God. *Qua* tradition of social thought, the CR tradition as I've presented it offers a ready answer but does not develop it at length. Nonetheless, it makes available a deeper philosophical reading of the objectivity postulate than is possible if the proposition is simply considered on its own.
Correspondingly, the challenge left for JLs and other secular theorists is to find some alternate grounding for the objective values and duties that bear on the issue of legitimacy. Some JLs, such as Rawls, articulate a constructivist conception of moral objectivity, but it remains an open question whether such a conception adequately addresses the issue of moral ontological grounding.

Two, assuming that my claim about basic teleology goes through, the CR background provides a way of understanding humans as having certain teleological ends. As I say, the teleological views of autonomy-emphasizing political theories are revealed in the way they "strongly" evaluate lives of autonomy as superior. Though they regard themselves as abstaining from teleological commitments, they demonstrably equate human flourishing with self-direction in accordance with some favoured conception of autonomy. Yet it is difficult to see how this, or any other teleological view, is compatible with the sort of metaphysical naturalism that I presume is in the backdrop of secular views such as JL. The challenge here for JLs is to metaphysically account for the teleological assumptions involved in underwriting

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694 See "2-The Teleology of Basic Teleology" in Chapter 9. We "strongly" evaluate when we admire certain ways of living more than others, when we hold certain ways of living to be obligatory in comparison to others that are optional, or when certain ways of living appear extraordinary and others merely ordinary.
695 As per Kymlicka's and Buchanan's readings of Rawls, we might think autonomy-emphasizing views are committed merely to the social preconditions for exercising autonomy; they are not, it might be thought, committed to any teleological view which assumes autonomy as a final end. See Kymlicka, Will, “The Ethics of Inarticulacy”; Buchanan, Allen, “Revisability and Rational Choice.”

To the contrary, I think they are. For there are different conceptions of autonomy and different views about what autonomy is (or isn't) for, which, in turn, influence one's view on the social preconditions for adequately exercising autonomy. To repeat, we must begin with the end in mind. This would seem to hold as true for views that emphasize the act of choosing as it does for views that emphasize particular choices.
696 Indeed, it is a deep philosophical question how, given metaphysical naturalism, it makes sense to speak of anything having purposes - let alone humans having the robust normative purpose of living autonomous lives. For these and other far-reaching implications of metaphysical naturalism, as drawn out by a philosopher who is himself an atheist, see Rosenberg, Alex, *The Atheist's Guide to Reality: Enjoying Life Without Illusions* (New York, NY: W. W. Norton & Company, Inc., 2011).
basic rights. By contrast, teleology is very much at home within the wider CR context. Again, *qua* tradition of social thought, theorists within the CR tradition do not focus on the metaphysical questions pertaining to teleology. Yet the CR background indicates where the relevant connections lie: political actors are both citizens politically *and* divine image-bearers teleologically, and the moral and physical environment they inhabit is not reducible to the mere movements of subatomic particles.

In passing, I think these examples also call into question whether or not all the worthwhile ideas of CR social thought really can be translated into secular terms. It is certainly possible simply to assert bare propositions that, stripped of any religious language, appear entirely secularized. Yet underlying such propositions are distinctively theistic claims, such as that moral objectivity is grounded in God and that human beings are made in the image of God to flourish according to a divine design-plan. Surely these deeper claims are not translatable. It might also be asked here why a CR approach is necessary, as opposed to a theistic approach more generally. My answer is that a CR approach is much more amenable to certain CCs of the modern era than other theistic approaches. For instance, by emphasizing *voluntary* spirituality and by its two kingdoms doctrines, it's more amenable to our convictions concerning religious freedom and church-state separation. I think other political theologies - Roman Catholic, Lutheran, Muslim, etc. - are less so. So the CR tradition makes distinctive claims that cannot be entirely captured either by secular translations or alternate theisms.

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697 I don't mean to claim here that it is impossible for JILs and other secular theorists to meet this challenge and the last. I mean only to identify them as issues that seem readily explicable given a theistic background, but that seem less so given a secular background. And, of course, the more general challenge my argument leaves JILs with is the challenge of making better sense of our convictions about legitimacy.

698 Parties from each of these camps will surely challenge my claim here. For instance, we've already noted (in Chapter 6) that since Vatican II Roman Catholicism has officially endorsed church-state separation. In response, I cannot hope to adequately address each of, say, Roman Catholicism's, Lutheranism's, and Islam's political theologies. But let me just clarify my claim. It is not that, as they now stand, these
In light of these two examples, then, I hope we can see my wider CR story as not mere superfluity. Insofar as we seek deeper philosophical understandings of specific propositions related to political theory, the wider background is invaluable.

There is also a second reason for retaining the CR background. While I have brought the tradition to bear on the question of political legitimacy, it may also be helpful in addressing other substantive normative questions within political theory. The idea here is quite simple. We've found the tradition helpful once; we might find it helpful once again. And in line with the previous reason, there is no guarantee that the ideas we might find helpful will be translatable into secular terms. So it will not do, I think, to grant that the tradition might be helpful again, but to assume that whatever help it might provide can equally be found by pursuing some other philosophical path. It might not. Moreover, in advancing the tradition as a fund of conceptual insights and resources, I've emphasized that these might be brought to bear on any number of issues within political theory. I wonder, for instance, how the CR tradition's distinctive conception of natural law might inform the longstanding debate between natural law and legal positivism; or how the CR concept of a moral standard written universally on humans' consciences might bear on discussions of reasonable pluralism and reasonable disagreement. The idea is that every line of rational inquiry is necessarily tradition-bound, and that when theorists encounter difficulty they may benefit from approaching an issue from an altogether different perspective - that is, as it would be approached by a different tradition. Such has been my attempt here, to approach the issue of legitimacy from a CR perspective given the difficulties encountered traditions remain incompatible with religious freedom and church-state separation. Hardly. Instead, the claim - which I do think is defensible - is that these concepts more naturally fit within the CR tradition than within the others. I think this more modest claim holds in light of CR theorists' longstanding concern with such issues as freedom of conscience, the protection of religious minorities, and limits on legitimate state power - the CR tradition being birthed out of the political and ecclesiastical upheaval of the Reformation along with the European Wars of Religion.
by JL and its secular backdrop. Since it might be comparably helpful in addressing other issues, the wider CR background I’ve provided is not merely superfluous.

In sum, the CR tradition may seem neither necessary nor sufficient to my CR account, but only, I think, if we view matters rather narrowly. The tradition is unnecessary only if we regard the relevant propositions in their barest form, without concern for the deeper philosophical issues underlying them. The tradition is insufficient only in the sense that it takes some philosophical work to appropriate its insights; it does not, as it were, wear on its sleeve a theory of legitimacy formulated in the terms of contemporary analytical philosophy. However, the tradition indeed is sufficient insofar as it possesses all the raw conceptual materials needed to reconstruct the theory. Moreover, it may well yield conceptual resources that can also help us address other problems within normative political philosophy.

2-Future Directions

There are various directions further work on CR legitimacy might take. Here I mention just two, corresponding to two important challenges I face.

The first challenge is to move from the higher-order level at which CR legitimacy operates to a concrete set of first-order legitimacy conditions. I regard the account I’ve developed as very philosophically informative. That said, I’ve presented the account as the right way to go about formulating first-order conditions. Thus, much of the practical pay-off of the project must come in eventually formulating a list of these conditions.

The account assumes that we cannot philosophically justify a whole host of basic rights without presupposing that humans have been designed to flourish in particular ways. Discussion

699 This thesis is developed by MacIntyre in his books, MacIntyre, Alasdair, After Virtue; MacIntyre, Alasdair, Whose Justice?.

362
in Chapter 9 briefly illustrated how this reasoning from basic teleology to basic rights might go, particularly with respect to the elements of basic teleology that might underwrite religious freedom. But what else must we presuppose about basic teleology in order to philosophically justify a fuller set of fundamental rights? We need a fuller account of basic teleology in order to adjudicate disputes over the fundamental rights individuals possess, such as possible rights to leisure or to newly emerging technologies. In other words, we need not only the category of basic teleology. We also need that particular teleological view which is best suited to underwrite basic rights and adjudicate such disputes. Further work is required to discover and work out the specific features of this view, and, in so doing, to move from a higher-order level to a set of first-order legitimacy conditions.

The second challenge is to more fully explain how CR legitimacy, positing as it does the need for particular teleological views to justify basic rights, comports with the reality of pluralism. This is an especially poignant challenge given that JL theorists often emphasize the need to abstract away from such views. Teleological views of the sort CR legitimacy requires are, so far as legitimacy is concerned, typically seen as part of the problem rather than as part of the solution. To the contrary, a CR approach boldly asserts that a morally appropriate and politically legitimate strategy for dealing with pluralism cannot be philosophically justified apart from presuppositions of the sort CR legitimacy identifies - including teleological presuppositions. Much would obviously be required to fully work out and evaluate this claim. Similarly, in Rawls' wake multi-perspectival acceptability is often seen as part of the very concept of legitimacy. A fuller explanation is required of why a CR account rejects this assumption, and of how a CR conception of legitimacy can address diverse views within pluralist societies. Further work is

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700 See discussion at "3-The Basic-ness of Basic Teleology" in Chapter 9. Additionally, we briefly considered basic rights to a social minimum and to education.
also required for a CR appraisal of the so-called "fact of reasonable pluralism", and for a CR appraisal of the "burdens of judgment"\textsuperscript{701}, of reasonable disagreement, and of disagreement among epistemic peers. All these varied issues seem implicated in reconciling CR legitimacy with pluralism.

If I am right, the CR tradition of social thought offers myriad research possibilities as its insights are brought to bear on various issues within political theory. Here I have mentioned but two, concerning issues raised by my particular CR account of legitimacy.

3-Final Reflections

Again my guiding question has essentially been, What is legitimacy about?

In response to this question, it should be apparent that I have not argued for any very specific thesis. While my overall argument has been comprised of various specific ideas, my hope is that the collective force of these ideas will have a fairly general effect. That is, they are intended to give us cause to reconsider the categories in terms of which we, under the influence of the regnant JL approach, theorize legitimacy. My goal is a framework for understanding our convictions about legitimacy. To this end, I have generally urged on us a shift in categories - from conceiving legitimacy in terms of consent, procedures, and self-legislation, to conceiving it in terms of objectivity, basic teleology, and an exogenous standard. If the collective force of my arguments has made this category shift at all plausible, I count this philosophical progress.

Throughout, I have been motivated by, and remained tethered to, certain key ideas. I don't mean the formal ideas that I developed as part of CR legitimacy. Rather, I mean more informal ideas which have made periodic appearances while influencing my thinking throughout.

\textsuperscript{701} John Rawls, \textit{Political Liberalism}, 2005, 54–58. These are the well-known epistemic barriers we face especially in matters of philosophy, religion, and morality, such as the difficulties of weighing evidence, interpreting vague concepts, and correcting for personal bias.
Perhaps chief among these is the Humean point that parties to a social agreement have reasons for agreeing, and that it is these reasons that are most normatively significant. Similarly, if a reason or social arrangement is deemed normatively "reasonable", there must be independent grounds for doing so and it is these grounds which are most important. Another of these informal ideas is that teleological views - or comprehensive views, or conceptions of the good, or some such thing - are always operative in the background of political theories. I think this goes both for theories where the background views are explicit as well as for theories where they are only implicit. I regard the nullity of non-consent as crucial, as a normative reality with which legitimacy theorizing must reckon. So, too, is our practice of distinguishing between matters we're willing to subject to democratic adjudication and basic rights we regard as valid independent of procedures. As actual political actors, these are two categories we all seem to trade in, though how we each fill in their content will differ somewhat from person to person. A last idea worth mentioning can be drawn straight from the CR tradition: that political coercion is necessary "by reason of sin". To my ears, that legitimacy is fundamentally about preventing basic wrongs rings true all the way down as we seek to achieve reflective equilibrium between various levels of legitimacy-related convictions and propositions.

It is ideas like these that convince me the JL framework fails to capture what legitimacy is about. The CR tradition, with its affirmation that coercion is only necessary "by reason of sin", seems a much more apt starting point for understanding legitimacy. My CR account, and the arguments I offer in its defence, is the fruit of reflecting upon these ideas and attempting to

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formulate them in ordered, analytic terms - all the while, drawing inspiration and insights from the CR tradition.

I think it bears emphasizing one last time that what I have presented here is a *philosophical* account, not a *practical* proposal. I've been arguing that as theorists we cannot make good *philosophical* sense of legitimacy convictions without the sort of presuppositions identified by CR legitimacy. Without them, we cannot account for our convictions - as in the legitimacy of much actual legal coercion, in legitimacy-conditional basic rights, and in the illegitimacy of paternalism - in an internally consistent way. That said, it is no part of the view defended here that, as political actors, we should *practically* invoke theistic or Christian premises in the public square. Such would be a bad misinterpretation of my argument. Ironically, it would also be an utter mischaracterization of the very CR tradition I'm suggesting we turn to - for central to this tradition are a principled church-state separation and religious freedom (see especially tenets 7 and 8). As per my CR account, the only teleology that can properly be brought to bear on political morality is one that pertains to basic rights and basic justice. Anything further is, in a word, illegitimate.

In closing, one further reflection on where, in the final analysis, I believe JL goes wrong.

As it seems to me, the root problem of JL is this: JLs try to ground legitimacy in some version of popular sovereignty, rather than in the character and moral standards of a sovereign God. Indeed, all of the challenges with JL that I've discussed - those owing to its unanimity condition, those owing to its proceduralism, and as well as any that might owe to its idealized self-legislators - can be traced back to this root issue. Now a more general premise of CR thought is that *any* field of human inquiry will come up short if it does not take God's sovereignty as its
Thus, CR theorists might well view the unacceptable consequences to which JL leads, and its ultimate failure *qua* explanation of legitimacy, as vindication of this claim.

As I noted at the closure of Chapter 6, we should regard a high view of God's sovereignty as the single most foundational premise for any inquiry conducted along CR lines. Though I've not yet emphasized this point, let me do so now. While I've argued for the conceptual categories of objectivity, basic teleology, and exogenous moral demands, it may be that, in turn, we cannot make sense of these categories apart from theistic premises. Of course, this latter claim has not been part of my present argument. But if such turns out to be the case, it is exactly as CR theorists would expect.

However contentious these last reflections might be, I hope the reader will see in my project progress on the substantive normative issue of political legitimacy.

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703 This style of presuppositional apologetic was influentially developed by CR philosopher Cornelius Van Til (1895-1987).


