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CHAPTER 5

Political Legitimacy¹

Justice and legitimacy

In Part I began developing the idea of an international legal order based on justice, where justice is understood chiefly as the protection of basic human rights. In this second part, I turn to an examination of the conditions under which it is morally justifiable to exercise political power to enforce international law, in the pursuit of justice.

In our world, progress toward justice often requires the exercise of political power. But the exercise of political power is itself subject to the demands of justice. We need to know not only what political power should aim to achieve, but also when the exercise of political power is morally justified.

From the standpoint of a moral theory of international law, there are two chief questions concerning legitimacy: What justifies the exercise of political power by individual states, and what justifies the exercise of political power through the agencies of the international legal system itself? To answer these questions it is first necessary to answer the more general one: What makes the exercise of political power morally justified?

This chapter develops a justice-based conception of political legitimacy. I define 'political legitimacy' as follows: An entity has political legitimacy if and only if it is morally justified in exercising political power. The exercise of political power may be defined as the (credible) attempt to achieve supremacy in the making, application, and enforcement of laws within a jurisdiction.

¹ This chapter is based on Allen Buchanan, 'Political Legitimacy and Democracy', *Ethics* 112/4 (2002), 689-719.

I will argue that an entity that exercises political power is morally justified in doing so only if it meets a minimal standard of justice, understood as the protection of basic human rights. The conception of political legitimacy I offer is meant to be perfectly general. It applies to any entity that wields political power, whether at the state, regional, or international level.

This general conception of political legitimacy will serve as the basis in Chapter 6 for a proposal for an international legal practice of recognizing as legitimate states—as possessors of the full bundle of powers, liberties, rights, and immunities that constitute sovereignty—only those new entities claiming the status of state that are legitimate in the sense just defined. The same general conception of political legitimacy will also serve in Chapter 7 as the point of departure for an examination of the idea of the legitimacy of the international legal system as a whole. In Chapter 8 I will again rely on the conception of political legitimacy developed in this chapter to advance a theory of the right to secede, an account of when a state's claim to a portion of its territory can be voided to clear the way for the creation of a new state there.

1. *Political Legitimacy and the Morality of Political Power*

It is fair to say that the dominant view on the legitimacy of the state system is that it is secured by state consent. One important upshot of this chapter's analysis is that the dominant view ought to be rejected, for two reasons. First, state consent is of dubious moral significance in a system in which many states often do not represent all or even most of their citizens or take their basic interests seriously. Second, it is a credible commitment to the protection of human rights, not consent, that confers political legitimacy. Consent of the governed, I shall argue, is not necessary for the justified exercise of political power, whether within individual states or in the workings of international legal institutions. Nor is it sufficient.

Political legitimacy and political authority

The term 'political legitimacy' is unfortunately ambiguous. One source of confusion is the failure to distinguish clearly between political legitimacy and political authority.²

² For a more detailed analysis of the distinction between political authority and political legitimacy, as well as a view of the relationships of these concepts to that of authoritativeness, see *ibid*.

I will distinguish carefully between political legitimacy and political authority. I will also articulate two different variants of the notion of political authority. Having drawn these distinctions, I will argue first that political legitimacy, rather than political authority, is the more central notion for a theory of the morality of political power. My second main conclusion will be that where democratic authorization of the exercise of political power is possible, only a democratic government can be legitimate.

Although it is common to conflate the democratic choice of government officials and legislators with consent, they are distinct. Democracy is first and foremost a method for choosing who shall exercise political power and how it shall be exercised. Nothing is gained by assuming that when democracy exists the individuals who participate in it are thereby giving their consent to anything, much less to everything that results from the democratic process. Hence one can reject the consent theory of legitimacy and still consistently hold, as I do, that where democracy is possible it is required for legitimacy.

Another ambiguity is also a source of confusion. Sometimes it is unclear whether 'legitimacy' is being used in a descriptive or a normative sense. In this chapter and those to follow I am concerned exclusively with legitimacy in the normative sense, *not* with the conditions under which an entity is *believed* to be legitimate. This is a notable distinction, not least because much of the literature on international law uses 'legitimate' to mean 'is believed to be legitimate'.

Political power and political legitimacy

According to the terminology I am recommending, an entity has *political legitimacy* if and only if it is morally justified in wielding political power, where to wield political power is to (make a credible) attempt to exercise supremacy, within a jurisdiction, in the making, application, and enforcement of laws. The supremacy feature is necessary if we are to distinguish political power from mere coercion. A state not only uses coercion to secure compliance with its rules; it also attempts to establish the supremacy of those rules and endeavors to suppress others who would enforce its rules or promulgate their own rules without its authorization. Typically those who attempt to wield political power also claim that they do so rightfully and hence that they are justified in asserting supremacy.

Note, however, that supremacy does not imply that there are no limits on state power. Supremacy refers to the lack of a rival for the state's making, application, and enforcement of law within an assumed jurisdiction (typically understood as a territory). This is compatible with the scope of the rules it imposes being limited, for example, by human rights principles imposed by international law or by a bill of rights included in a constitution.³

This definition of political power is deliberately inclusive. It covers not only the actions of the government of a state within its own borders, but also those of an occupying military force. Some might think that the fact that the definition encompasses the latter shows that it is too inclusive. Recall, however, that the goal is to formulate a conception of political power, not a conception of a genuine or ideal political community, in which political power is wielded by a group of people over themselves. To object that the definition of political power offered here must be defective because it leaves open the possibility that a government of military occupation might satisfy the conditions for being legitimate, that is, for being morally justified in wielding political power, is to beg important questions about the conditions under which political legitimacy is possible.

The definition of political power I am operating with 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. It also leaves

³ It might be thought that this conception of political power is not sufficiently political—that it does not capture what is distinctive of political as opposed to other forms of power. For it seems that it would apply to the administration of a prison or mental hospital, assuming that the administration promulgates rules and enforces them within the institution, and attempts to do so in a way that denies others in the institution the opportunity to perform these functions.

This is not the case, however. To the extent that institutions such as prisons or mental hospitals within society employ supreme coercive power within certain subdomains of the state's sphere of control, in principle they do so as agents of the state or at least with the state's permission to do so. If something further is needed to distinguish clearly between political power and the power wielded within such institutions as correctional facilities or mental hospitals, one may add that political power is the attempt to make, apply, and enforce rules with supremacy over the broadest class of citizens, including what might be called the "unencumbered" population, not just those in a special class, such as convicted criminals, the mentally infirm, or minors, whose civil and/or political rights are subject to special restrictions.

open the possibility that entities wielding political power can be legitimate even if the individuals over which political power is wielded do not constitute a political community in some normatively robust sense according to which all members of the group are said to have significant special obligations toward each other.

One reason to take this approach is to avoid conflating legitimacy with perfect justice (understood as requiring democracy) or with an ideal of political community at the outset of the analysis. Of equal importance, we need a conception of political power, and an account of the conditions under which wielding it is morally justifiable, that is not restricted to cases where a "genuine political community" already exists or where democratic government is feasible, because we need to know when it is morally justifiable to attempt to achieve supremacy in the use of coercion in order to build genuine political communities and develop democratic institutions under conditions of state breakdown.

I shall say that an entity has *political authority* if and only if, in addition to (1) possessing political legitimacy, it (2) has the right to be obeyed by those who are within the scope of its rules; in other words, if those upon whom it attempts to impose rules have an *obligation to that entity* to obey it. To say that X has a right to be obeyed by P implies that if P does not comply with X's rules P wrongs X, violates X's right to be obeyed.

Some who employ the term 'political authority' in this way are unclear as to whether the entity that is said to have the right to be obeyed is the state or the government; indeed one suspects that they use these terms interchangeably in some cases. However, there is a distinction and it is significant. The state is a persisting structure of institutions for the wielding of political power. Within this structure there are roles that empower their occupants to exercise power in various ways, and the government consists of the occupants of these roles or at least the more important of them. States typically persist through changes of government. Given this distinction, the more coherent view is that obedience is owed to the government, not the state, since the idea of owing anything to an institutional structure, as opposed to those persons who occupy roles in it, is problematic.

Some who use the term 'political authority' do so in a different way. The idea of the right to be obeyed is still crucial to the notion, but the subject of this right is not said to be the government, but

rather one's fellow citizens. Locke, for example, is best interpreted as arguing that it is not the government, but one's fellow citizens to whom one owes obedience (in a properly constituted polity). On this view, where political authority exists, the right to be obeyed is owed to those in whose name and on whose behalf it is wielded, rather than those who actually wield power (except perhaps in the rather extended sense in which it can be said that the people wield power through the agency of the government).

In the analysis that follows, I will distinguish, where it is relevant to do so, between these distinct conceptions of who has the right to be obeyed. What the two variants of the notion of political authority have in common is that they both include the idea that citizens have an obligation to obey someone—that someone has a right to be obeyed—not just the idea that someone is justified in imposing rules on them. In the former variant the obligation is owed to the government, the actual (or at least proximate) wielder of political power; in the latter to one's fellow citizens. I will argue that if political authority is understood as including the obligation to obey the government, it is largely irrelevant to the question of what justifies the exercise of political power and what gives those over whom political power is exercised reason to comply with its demands.

Theorizing the morality of political power

My focus on political legitimacy and my skepticism about the significance of the idea that we owe compliance to the government are both based on a conception of what is needed for a theory of the morality of political power. The chief objective of such a theory is to answer two questions: (1) under what conditions is it morally justifiable for some agent or agents to wield political power (the agent-justifiability question), and (2) under what conditions do those upon whom political power is exercised have sufficient reasons to comply with its demands (the reasons-for-compliance question)? As will become clear shortly, answering these two questions does *not* require an account of political authority, where this is understood as including a right to be obeyed on the part of the government. Nor does answering them require recourse to the notion that we owe our fellow citizens compliance with the laws, except in circumstances where democratic authorization for the exercise of

political power is feasible; and even in that case the obligation is only presumptive.

II. *The Irrelevance of the Idea that We Owe Compliance to the Government*

The relationship between political authority and political legitimacy

Political authority, understood as including the right of the government to be obeyed, entails political legitimacy, but not vice versa. An entity may be morally justified in attempting to exercise supremacy in the making, application, and enforcement of laws without it also being the case that those upon whom it enforces the laws owe it an obligation to obey. Whether an entity is politically legitimate depends only upon whether the agents attempting to wield political power in it are morally justified in attempting to achieve supremacy in the making, applying, and enforcing of rules. In other words, political legitimacy is an agent-justification notion, having to do solely with the normative sufficiency of the justification for imposing rules, not with whether those upon whom the rules are imposed have obligations to those who impose the rules. An agent can be justified in exercising political power even if no one owes it obedience.

Similarly, whether we have sufficient reasons for complying with rules does not depend upon whether those who impose them have the right to be obeyed. Of course it is true that *if* one is obligated to obey X, then this gives one a reason to comply with the rules X promulgates. But being obligated to obey X is not *necessary* for having good or sufficient reasons to comply with the rules. For as A. John Simmons and others have emphasized, we can have *other* good and sufficient reasons and indeed we can be morally obligated to comply, in the absence of any obligation to those who wield political power.⁴ For example, we may have weighty prudential reasons (we are likely to be punished for noncompliance) or religious reasons (we believe the scriptures and the scriptures say to render

⁴ A. John Simmons, *Moral Principles and Political Obligations* (Princeton University Press, Princeton, 1979), 29–38, 152–3.

unto Caesar what is Caesar's) or we may have weighty general moral reasons (the law codifies sound moral principles that prohibit killing, theft, etc.) to comply with the laws the government imposes. Yet none of these reasons implies that we owe compliance to the government (or to our fellow citizens).

So both the agency-justification and reasons-for-compliance questions can be answered without recourse to the notion that compliance with the laws is owed to the government. So the first variant of the concept of political authority, according to which obedience is owed to the government, is irrelevant to the two main tasks for a theory of the morality of political power.

III. *Explaining the Preoccupation with the Government's Right to be Obeyed*

The notable absence of political authority

In the past three decades there has been an extensive debate in political philosophy about political authority. Some of this literature has focused on the first variant of the notion of political authority, according to which we owe compliance to the government, but in some cases it may be the second variant, according to which compliance is owed to fellow citizens, that is assumed instead. I believe that the single most compelling conclusion to be drawn from the recent normative literature on political authority is that virtually no government possesses it, not because no government is morally justified in exercising political power nor because we have no sufficient reasons to comply with the rules governments impose, but because the conditions for citizens having an obligation to their government to comply with the laws are not satisfied and are not likely to be satisfied.⁵ Given these disappointing results, there is all the more reason to ask whether analyses of the morality of political power should focus on, or even include, the issue of political authority.

If the conditions for political authority appear to be unattainable, one ought to ask: Why is political authority so important? I have argued that the answer cannot be "Because without political authority, the wielding of political power is not justifiable," nor "Because

if the state lacks political authority we cannot have good reason to comply with the laws."

Sometimes the conclusion that virtually no governments have or are likely to come to have political authority is equated with the thesis that the state cannot be "justified." But that is unfortunate, because it either fails to distinguish not only between the government and the state but also between political legitimacy and political authority—or else wrongly assumes that the only "justification" of interest for the state is one that shows it to have not only political legitimacy but the more demanding characteristic of political authority.

Preoccupation with political authority overlooks the simple point noted earlier: We can have sufficient reasons (prudential, religious, and moral) to comply with the law, indeed we can have weighty obligations to do so, without it being the case that we owe obedience to anyone, whether it be the government or our fellow citizens. So lack of political authority need not raise the specter of anarchy, if by anarchy we mean a condition of general lawlessness. One would only conclude that general lawlessness is the likely result of the lack of political authority if one assumes that most people will not find the other reasons for compliance compelling (apart from being obligated to the government to obey it). But this assumption is dubious. Once we recognize how demanding the notion of political authority is, and how unconnected it appears to be with the important questions concerning the morality of political power (the agency-justification and reasons-for-compliance questions), it is puzzling that some recent political philosophers seem to have assumed that an account of political authority must be a centerpiece of a viable political theory.

Why political authority has seemed important

Perhaps the best explanation of the preoccupation with political authority has to do with the popularity of the theory of government by consent. The theory of consent flowered at a time when two key liberal notions were coming into their own: the idea that liberty is the proper condition of human beings and the idea of the fundamental moral equality of persons. If we are all equal, what can justify some persons (the government) making, applying, and enforcing

⁵ For the most detailed criticisms leading to this conclusion, see *ibid.*, 7–190.

rules on us? How can the justified wielding of political power be squared with the fundamental equality of persons? And if liberty is our proper condition, how can the use of coercion, which government essentially involves, be justified? To both of these questions the theory of consent provides an elegantly simple, but flawed answer: Those who wield political power over us are justified in doing so if and only if we consented to their doing so.

Often it is assumed that the chief virtue of consent is that it takes the sting out of coercion, reconciling individual liberty with political power, and this is surely part of its attractiveness. But the justification of coercion as such is of paramount concern only if one assumes that liberty in the sense of freedom from coercion is the only or at least the most fundamental value. However, as Thomas Christiano has observed, quite apart from the question of liberty, the consent theory is attractive simply from the standpoint of reconciling *equality* and political power. Consent theory has much to commend it from the standpoint of those who take equal consideration of persons to be the preeminent value, quite apart from any special preoccupation with the justification of coercion.⁶

Political power as a challenge to equality as well as liberty

Political power is problematic from the standpoint of equality (not just liberty) because it involves *some* persons imposing rules on others. In brief: If we are all fundamentally equal, why should only some of us wield political power? The answer consent theory gives is that I have authorized you to do so by my consent. To the question "How is the coercive nature of political power compatible with individual liberty?" the consent theory answers that we best preserve our liberty by the free choice of consenting to a political power to enforce a regime of individual rights. Even better, consent theory reconciles power with equality and liberty in a way that respects autonomy. For according to consent theory, it is not sufficient that the government secure my liberty for me by exercising coercion over me; rather, the state may coerce me even for my

own good only if I freely limit my own liberty by authorizing the state to impose rules on me.

Consent theory, the gold standard?

In fact, according to this venerable theory the answer to both of the most important questions about political power is the same. (1) It is our consent that morally justifies the government in wielding political power (the answer to the agent-justification question). (2) Our having consented to be ruled gives us sufficient reason to comply with rules issued by those wielding political power (the answer to the reasons-for-compliance question). In addition, consent theory provides an account of political authority. On one variant of the theory, the "contract of government" view, we are obligated to the government to obey it because we gave our consent to those who comprise the government; on the "social contract proper" variant we are obligated to our fellow citizens because we gave our consent to them.

Perhaps the ability of the consent theory to answer all of these questions has led political philosophers to treat it as a kind of gold standard, to assume that any adequate account of the morality of political power would have to do what consent theory purports to do—not only solve the agent-justification and reasons-for-compliance questions, but also provide an account of political authority, understood as including the right to be obeyed. In addition, as I have already suggested, the consent theory is at first blush very attractive, at least within the broadly liberal tradition, because it seems to reconcile political power with the preeminent values of liberty and equality.

The demand for consent as a denial of politics

Although the consent theory has the attraction of answering all these questions, it does so by virtue of a concept that is remarkably ill-suited to the political world and so extraordinarily demanding as to remain utopian in the worst sense. The idea of consent is ill-suited to the political world for this reason: Not only are there no existing entities or any that are likely to come about that will ever enjoy the consent of most of their citizens, but politics seems to be concerned, in some fundamental way, with how to get along when

⁶ Christiano, 'Justice and Disagreement at the Foundations of Political Authority', review of Christopher Morris, *An Essay on the Modern State*.

consent is lacking. Whether we assume that what is to be consented to is the system as a whole, its processes for generating laws, or all the particular laws themselves, some citizens, for good reasons or bad, will not consent even if presented with the possibility of doing so. Moreover, no existing states, including the ones we intuitively regard as the most legitimate, have developed mechanisms for even trying to obtain the consent of all their citizens.

The nonconsensual conditions for consent

When confronted with the fact that the consent requirement is utopian for any real political entity, instead of asking "Why is political authority so important?" (given that we can answer the agency-justification and reasons-for-compliance questions without it), some theorists, including Locke, have fallen back on the idea that citizens tacitly consent by simply remaining within the state. However, the idea of tacit consent rapidly runs aground on two difficulties. First, as Hume observed, for many people in many states the costs of exit are so high or the prospects of a better situation elsewhere so dim, that remaining in place cannot count as consent. This first objection by itself seems to doom the idea of tacit consent. Second, Simmons and Wellman have argued that to have the right to determine that a citizen's continued residence within the state counts as consent, someone would *already* have to have the authority or rightful power the consent theory is supposed to explain.⁷

The second objection can be elaborated as follows. The problem with taking continued residence as a sign of tacit consent is that there is no such thing as a natural act of consent, at least not in the case of consent to political power. For some bit of behavior—for example, saying "Aye" in an assembly—to count as consent there must be certain conventions already in place; for example, conventions establishing where and when groups must meet if they are to count as assemblies, who is qualified to participate, how something to be consented to must be stated, by whom, what noises or signs are to count as consent, how long consent will be regarded as binding, whether there are implicit exceptions to consent rooted in some

conception of intent, and so on. To think that there is some act that could count as consent prior to a process that establishes such conventions is as incorrect as thinking that an exchange of words between two people could count as a contract in the absence of a framework of legal institutions.

So before maintaining residence in the state can count as consent, there must be some process by which these conventions are established. But that process itself would have to be legitimate; otherwise, the problem of legitimacy would simply be pushed back to this earlier stage: Who is justified in imposing the convention that such-and-such behavior is to count as consent (for the sake of taking consent as conferring legitimacy)? In brief, the problem of justifying the exercise of political power must already be solved before the consent theory can get off the ground.

The Simmons–Wellman argument may not be as conclusive as it first appears. For it might be objected that there can in fact be "natural" acts of consent. Thomas Scanlon has argued that in the absence of any institutions or social conventions whatsoever certain acts can count as promises to reciprocate. Scanlon asks us to imagine two strangers in a situation in which there is the possibility of an exchange of simple acts of aid, and surmises that they could signal, by some simple gesture, an intent to reciprocate.⁸ Similarly, one might argue, there can be natural acts of consent.

However, Scanlon's natural act of promising and the case of consent seem deeply dissimilar, mainly because what one agrees to in the case of the exercise of political power is not only much more complex than what the two strangers agree to in Scanlon's example, but disputable as well. To consent to the exercise of political authority, if this consent is to have normative force, presupposes agreement on some conception of the scope of political power—at least some rough idea of how and for what political power is to be used. Open-ended consent, agreement that someone, somehow, is to attempt to achieve supremacy in the making, interpretation, and enforcement of general rules, for wholly unspecified purposes, would be irrational. But quite apart from whether consent to an unspecified object of consent would be irrational, it is difficult to imagine how Scanlon's

⁷ See Simmons, *Moral Principles and Political Obligation*, 75–95; and Christopher Wellman, 'Liberalism, Samaritanism, and Political Legitimacy', *Philosophy and Public Affairs* 25 (1996), 211–37.

⁸ See Thomas Scanlon, *What We Owe to Each Other* (The Belknap Press of Harvard University Press, Cambridge, MA, 1998), 297–8.

strangers could by some simple act, in the absence of an established process or convention, signal such open-ended consent to the exercise of political power. (One can perhaps imagine a natural act of total submission—for example, prostrating oneself or kissing the other person's foot—but this would be more like agreement to become a slave than consent to the exercise of political power).

Presumably some sort of collective process would be needed to enable individuals to converge on at least a rough conception of the scope of the exercise of political power that is to be consented to. Without this, any gesture they might make would not succeed in indicating just what it is they are consenting to nor hence give any assurance that they were consenting to the same thing. And further, since what the scope of political authority should be is a contested issue, it makes perfectly good sense to ask whether the process that identifies the proper object of consent (the scope of political power), and that designates some particular act as consent to that object, is itself legitimate. But if this is the case, then there can be no natural act of consent to the exercise of political power. The Simmons–Wellman conclusion stands.

Another difficulty is that even if it were true that consent is necessary for political authority (the right to be obeyed), it cannot be sufficient for having reasons to comply, nor for being obligated to obey the government. The fact that I have consented to government cannot itself show that I am obligated to comply with its demands, because there are some things that no government should require of anyone (namely, acts that are grossly immoral), and the fact that I have consented to government cannot change this. But once we hedge our consent-based obligations by appeal to independent moral principles, especially principles of justice, the question arises as to whether we can dispense with consent and simply argue that we ought to comply with a system of laws if it promotes justice and does so in ways that are themselves just. To summarize: In its unconditional form the view that consent obligates us to comply is false, but qualifying it threatens to make consent superfluous as an account of reasons to comply with the law.

Once its flaws are appreciated, as well as its essential irrelevance in light of the fact that it is not important to show that governments enjoy political authority (as opposed to legitimacy), consent theory should no longer serve as the gold standard for a moral theory of

political power. We should not assume that an adequate theory will do what consent theory would do if successful, namely, articulate realizable conditions not only for the justification for wielding political power, but also an account of the obligation to the government to obey it.

However, one of the virtues of consent theory ought to be exemplified by a theory of political legitimacy: the reconciliation of the inequality involved in the exercise of political power—the fact that it involves the imposition of laws by some upon others—with the fundamental equality of persons. In the next section I develop the main outlines of a theory of political legitimacy and then argue that it successfully reconciles political power with equal regard for persons.

IV. *Toward a Theory of Political Legitimacy*

Political legitimacy without political authority

My aim in this section is to develop a theory of political legitimacy that does not rely upon the notion of a right to be obeyed. The central idea is this: A wielder of political power (the supremacist making, application, and enforcement of laws in a territory) is legitimate (i.e., is morally justified in wielding political power) if and only if it (1) does a credible job of protecting at least the most basic human rights of all those over whom it wields power and (2) provides this protection through processes, policies, and actions that themselves respect the most basic human rights.⁹

The intuitive appeal of this view of legitimacy can be stated quite simply: The chief moral purpose of endowing an entity with political power is to achieve justice. Given the state's coercive and monopolistic character and the fact that it necessarily involves inequality of power, nothing short of this could justify creating an entity so capable of causing harm, infringing freedom, and creating or maintaining inequalities. A wielder of political power that does a credible job of achieving justice is morally justified in wielding that power, if it provides a reasonable approximation of justice through processes that are themselves reasonably just. This conception of

⁹ My argument in this section draws on Buchanan, 'Recognitional Legitimacy and the State System'.

political legitimacy is founded on a liberal conception of what states are primarily for, namely, the provision of justice.¹⁰

The intuitive idea of the justice-based conception of legitimacy can be elaborated as follows. The Moral Equality Principle requires us to take very seriously certain basic interests that all persons have; it grounds both negative and positive duties of justice, as I argued in Chapter 3. One exceptionally important way of promoting these fundamental interests is by ensuring that the basic human rights are protected. Adequate protection of basic human rights requires the exercise of political power—an agency to make, apply, and enforce laws, and to approximate supremacy in doing so.

So long as political power is wielded for the sake of protecting basic human rights and in ways that do not violate those same rights, it is morally justified—unless those over whom it is exercised have a right not to be coerced to respect basic human rights. But there is no right not to be coerced to respect basic human rights, so long as coercion is used in ways that do not themselves violate basic human rights.¹¹

¹⁰ Of course this is compatible with the possibility that once a political entity satisfies the conditions for legitimacy it may justifiably pursue other ends than justice, including improving the general welfare, etc.

¹¹ This argument has the same structure as that advanced by Christopher Wellman in several papers on political obligation and samaritanism. There is a significant difference, however. Wellman begins with a much more limited moral principle than the Moral Equality Principle: a duty to rescue others from dire physical harm. His argumentative strategy in choosing this starting point is that he believes that the existence of this duty is more intuitively plausible than a more substantial moral premise such as the Moral Equality Principle. Notice, however, that Wellman's starting point is a positive obligation, a duty to prevent harm, not just a duty not to cause harm. In that regard, his argument and mine both reject the libertarian view that there are only negative obligations. The drawback to Wellman's approach is that it is incapable of justifying the liberal, as opposed to the libertarian or "police and nightwatchman state." Because he starts out with only the duty to prevent serious physical harm, he cannot by this argument justify the use of political power to ensure the protection of even a fairly lean list of human rights, so far as these exceed the right against serious physical harm. I believe that this is too high a price to pay. Once one has already acknowledged that there is one positive obligation, the duty to prevent serious physical harm, it is better to argue, as I have in Chapter 3, that there are other positive obligations as well, corresponding to a broader list of basic human rights. Moreover, unless one assumes something like the Moral Equality Principle, it is hard to see why we are obligated to all other persons to prevent serious physical harm to them. And once we explore *why* it is important to prevent serious physical harm to persons, it seems arbitrary to limit our concern for them to serving their interest in avoiding serious physical harm. In other words, preventing harm is obligatory because of how harm affects persons, but a proper regard for persons requires that we also acknowledge that they have other rights as well.

This argument provides a plausible answer to both of the chief questions a moral theory of political power should answer, the agency-justification question and the reasons-for-compliance question. It shows what an entity must be like to be justified in wielding political power, and it explains why we should comply with the laws an entity that meets that description imposes. The answer to both questions is that equal regard for persons requires us to promote certain basic interests that all persons have, and that doing this requires the exercise of political power, in order to ensure that their basic rights are protected.

V. *Why Should Some Persons Rather than Others Wield Political Power?*

Democracy and political legitimacy

Earlier I observed that a theory of political legitimacy must answer the egalitarian challenge to political power—it must explain why it is, if we are all fundamentally equal, that some should have the power to make, apply, and enforce laws on the rest of us. From the standpoint of a justice-based theory of political legitimacy that takes equal consideration of persons as fundamental, no justification for the wielding of political power—no conception of political legitimacy—can be complete unless it provides a convincing answer to this question.

It might be thought that the egalitarian challenge only applies to nondemocratic forms of political power. This is not the case, however. Even in democratic societies—including those that are much more democratic than what we now call democracies—some individuals (government leaders, judges, legislators, administrative officials, police officers) wield power that ordinary citizens do not. So even in a democracy we can ask: Is the wielding of political power compatible with a proper recognition of the fundamental equality of persons?

Democratic theory itself provides an answer to this question, and does so without invoking the fiction of consent. According to what may be the most plausible versions of democratic theory, the inequality that political power inevitably involves is justifiable if every citizen can participate as an equal in determining who will wield the power and how it will be wielded.

The egalitarian democratic theorist acknowledges, as he must, that government leaders, legislators, administrative officials, judges, and the police wield powers that ordinary citizens do not. Even in a direct participatory democracy in which every citizen has an equal vote on every law, government officials will wield powers ordinary citizens do not. It is this asymmetry of power that raises the question of whether political power is reconcilable with the fundamental equality of persons. The egalitarian democratic theorist attempts to achieve the needed reconciliation, not by denying the asymmetry of power, but by arguing that it is compatible with acknowledging the moral equality of persons—if all citizens participate as equals in public processes for determining who will wield political power.

Thus one of the chief attractions of democratic theory is that it purports to do what consent theory claimed but failed to do, but without the over-demanding requirement of consent: reconcile equality with the exercise of political power. Whether or not any form of democracy that could be reasonably approximated in something resembling a modern state can fully achieve this reconciliation is not clear. The more complex the system of laws and policies becomes, the more difficult it is to satisfy the requirement that all citizens are to participate as equals in the public processes that determine who wields political power.¹²

Nevertheless, if we take the equality of persons seriously, then a political order that not only honors the commitment to equal regard by respecting all citizens' human rights, but also does so by political processes that themselves express this commitment to equality by being democratic, would seem to provide the best answer available to the problem of reconciling political power and equality. In other words, if the wielding of political power is morally justifiable only if it is wielded in such a way as to recognize the fundamental equality of persons, and if democracy is necessary for satisfying this condition, then political legitimacy requires democracy, at least in circumstances in which democratic institutions are feasible.

However, one might question the assertion that legitimacy requires democracy as follows. It is true that to be morally justified,

political power must be exercised in such a way as to manifest equal regard for persons. But this will be achieved if the *content* of the laws is sufficiently egalitarian, more precisely, if the regime of laws provides adequate protection for the basic human rights of all.

The difficulty with this reply is that it is unresponsive to the fundamental egalitarian challenge to political authority: If we are all equal, why should only some of us have control over the making, application, and enforcement of laws? The requirement of democracy at least goes some distance toward answering this challenge, even if it does not answer it fully due to the fact that even the most democratic society will still include inequalities in political power (because citizens at best only have an equal say in choosing legislators, vote directly only on "ends" not "means", have no direct say over the determination of rules for administering policies, do not participate in adjudication and enforcement of laws, etc.).

To put the same point differently: Democracy does not actually achieve equality in political power; but it does take seriously the idea that inequalities in political power are problematic from the standpoint of a commitment to equal regard for persons. It does this by offering an account of how majoritarian processes can contribute to equalizing power over the *allocation* of inequalities in political power (in particular by ensuring that all can participate as equals in determining who will occupy the highest government offices and who will make the laws). In contrast, a theory of legitimacy that does not include a democratic requirement faces an unanswerable objection: If the political system should express a fundamental commitment to equal consideration of persons, why shouldn't this commitment be reflected in the processes by which laws are made and in the selection of persons to adjudicate and enforce the laws, not simply in the content of the laws?

Here it is important to acknowledge an implicit but crucial assumption of the argument that democracy is a necessary condition for legitimacy. The argument assumes either that (1) democracy can do at least as well as alternative systems in producing laws that satisfy the requirement of equal regard for all persons' basic interests, or that (2) participating as an equal in the public processes for determining who wields political power is such an important dimension of equal regard for persons that democracy is required even if a non-democratic arrangement would do a better job of

¹² For an exceptionally valuable treatment of this problem, see Henry S. Richardson, *Democratic Autonomy: Public Reasoning about the Ends of Policy* (Oxford University Press, New York, 2002).

producing laws that achieve the goal of equal regard for all persons' basic interests. If (1) is true, then there is no reason why those who are committed to equal respect and concern for all persons should settle for laws whose content or effect evidences equal regard; they will also insist on participating as equals in the public processes by which it is determined who shall wield political power, since this is a further affirmation of equality and comes at no loss in terms of the protection of all persons' basic interests. If (2) is true then democracy is required even if it can result in laws that do not treat all equally.

Assumption (2) is clearly the more problematic one. Supporting it requires showing that participating as an equal in the public processes that determine who wields political power is such a profoundly important dimension of equality that it must be achieved even if doing so comes at the cost of losses in other dimensions of equality, namely, in laws whose content or effect is not appropriately egalitarian.

My aim here is not to advance a full-blown defense of democracy as being required by equal regard for persons. However, it seems to me that there is much to be said for the idea that all being able to participate as equals in the processes that determine who wields political power is presumptively required by equal regard for persons and that opponents of democracy have not defeated this presumption by showing that democracy is less likely than other systems to produce laws that achieve equal protection of all persons' basic interests. On the contrary, democracies seem to do better at protecting the basic human rights of all citizens than undemocratic governments. If this is correct, then assumption (1), and with it the argument for democracy as being required by equal regard for all persons, is plausible.

VI. *Democracy and Mutual Obligations among Citizens*

Democracy, political authority, and political community

I have argued that democratic theory provides a more satisfactory answer than consent theory does to the question of how to reconcile the equality of persons with the exercise of political power. I also observed earlier that consent theory—if it worked—would answer the question of political authority as well: If I have consented

to your exercising political power over me, then I am obligated to you to comply with your directives.

Democratic theory, in contrast to consent theory, does not provide an account of political authority if by this is meant an explanation of the conditions under which we are obligated to the *government* to obey it. It could not and should not do this, because the whole point of the doctrine of popular sovereignty upon which democratic theory is built holds that states are merely institutional resources for the people and governments are merely agents of the people, chosen to employ those institutional resources on the people's behalf, and therefore do not themselves have a right to anything, including our obedience.

Instead, democratic theory provides an account of the conditions under which citizens can have an obligation *to one another* to take compliance with the laws seriously. In other words, the same commitment to the equal consideration of persons that requires democracy as a condition for the morally justified exercise of political power also gives citizens a weighty reason to comply with the laws that emerge from democratic processes, because these processes are the best available way to express the fundamental commitment to equal regard for persons.

This is a great advantage of democratic theory. It makes sense of the idea of the polity as a *moral community*, not merely an instrumental association of individuals, yet it does so without assuming that the basis of this community is ethnicity or nationality or religion or even ideology.¹³ And in so doing, democratic theory demonstrates that there is another important reason to obey the law, beyond reasons of self-interest (to avoid penalty) and even beyond the fact that the law includes (some) sound moral principles that we ought to obey anyway. In a democratic state, each citizen's recognition of the equality of all citizens supplies a reason for compliance with the laws. And it is a weighty reason because it is grounded ultimately in the most fundamental moral principle of all, the principle of equal concern and respect for persons.

It does not follow from this, of course, that citizens in a democracy have an unconditional obligation to comply. No one can be obligated to comply with a law that is itself a clear and serious

¹³ I am grateful to Thomas Christiano for clarifying this point.

violation of the principle of equal regard for persons, even if that law is the result of a democratic process.

Democratic theory and the particularity problems

In Section V I argued that the protection of basic human rights justifies the exercise of political power. However, from this it does not follow that any particular agent is justified in coercing us in the name of protecting rights. Nor does it follow that equal regard for persons requires us to support the particular coercive agent that is the government of the state in which we find ourselves.

In other words, a satisfactory account of the morality of political power must provide an answer to two distinct particularity problems: (1) what makes any particular wielder of political power justified in doing so, and (2) why should we comply with the rules imposed by the particular coercive power that happens to be the government of our state? Although any satisfactory account must solve the two particularity problems, they seem to be especially pressing and difficult for an approach to political legitimacy founded ultimately on the highly abstract idea of equal regard for persons.

It will not suffice to say that honoring the Natural Duty of Justice requires us to support whoever happens to be effectively wielding political power in our locale. If existing institutional resources allow for a way of choosing among aspirants for political power or for endorsing an existing wielder of political power that expresses equal regard for persons, then we can and should demand more than mere effectiveness.

In other words, where institutional resources exist for *democratic authorization* of a government, proper respect for the fundamental equality of persons requires that they be utilized. For as I have already argued, proper recognition of the fundamental equality of persons requires a convincing answer to the question "If we are all fundamentally equal, why should some persons enjoy the special control over our common life that the exercise of political power entails?" Democratic authorization of a wielder of political power answers this question.

If a wielder of political power can be chosen through democratic processes, then there is an answer to both of the particularity problems. First, this particular agent is justified in wielding political

power over us—and in attempting to do so monopolistically—because it is *this* agent that has been chosen by our democratic processes. Once this selection is achieved, there is one and only one agent who can justify its efforts to impose rules on us, because any agent who attempts to impose rules on us without enjoying democratic authorization would not satisfy the requirement of reconciling the inequality that the exercise of political power involves with the fundamental equality of persons.

Second, when an agent has been authorized to wield political power over us by democratic processes in which we can participate, we have a weighty moral reason to comply with the rules *this* agent imposes on us, not just because it is capable of effectively protecting our rights (others may be equally capable), but because to fail to comply with the rules *this* agent imposes, in the absence of some weighty moral reason for doing so, would show a disregard for our fellow citizens as beings entitled to equal moral regard. The same act of democratic authorization that makes it justifiable for this particular agent to wield political power over us gives us a weighty reason to comply with *its* rules, rather than the rules that some other coercive agent might supply. We ought to comply with the rules this agent imposes on us because this agent was authorized by a process that is required by, and at the same time expresses, the fundamental equality that obtains among us.

Notice also that the democratic authorization solution to the second particularity problem avoids the unsavory conclusion that we owe compliance to the government as such. It solves the second particularity problem without embracing the noxious idea that the government is itself a subject of rights, rather than simply the agent through which the people act.

I observed earlier that consent theory, in one of its versions, in contrast answers the second particularity problem by asserting that we are obligated *to the government* (this particular government) to obey the laws. However, another version of consent theory holds that we are obligated to our fellow citizens to comply with the rules the government imposes on us. The question arises, then, as to whether the idea of democratic authorization implies that we have an obligation *to our fellow citizens* to obey democratically created laws.

This conclusion appears to be too strong if it means that whenever one violates a democratically created law one thereby wrongs

one's fellow citizens. It is more plausible if it means only that we wrong our fellow citizens—by failing to take seriously the fact that equality requires democracy—if we violate democratically created laws without some morally weighty reason for doing so. The obligation we owe our fellow citizens, then, is not an obligation to obey every democratically created law, but rather to show proper respect for them as equal moral persons by taking the fact that a law is democratically created as a weighty reason for complying with it.

Notice, however, that to solve the second particularity problem, the account of democratic authorization need not even go as far as asserting this latter obligation to our fellow citizens. All that is required is the claim that the fact that this particular coercive agent has been authorized by democratic processes gives us a weighty reason—a reason grounded ultimately in equal regard for persons—for complying with *its* demands, rather than with those of some other, perhaps equally effective coercive agent. And recall that we can have a weighty reason for complying with the government's demands without owing obedience to the government.

Democracy as an element of justice

So far I have argued for an account of political legitimacy that is grounded in the moral equality of persons and that includes the idea of democratic authorization as a solution to the two particularity problems. For this approach to succeed, it is necessary to show that the Moral Equality Principle requires supporting or helping to create democratic institutions, and this in turn requires showing that democracy is either an element of justice or a necessary instrument for achieving justice. This is clearly not the occasion to establish either of the latter large claims. Here I can only indicate the kind of argument that is needed and which is developed in more detail by several current democratic theorists.

The core idea is that whatever its instrumental value for achieving justice, democracy is morally required by the commitment to equal consideration for persons. If justice requires recognizing the fundamental equality of persons, and if this in turn requires that there be institutional resources that make it possible for all persons to participate as equals in the public processes for determining who shall wield political power, then justice requires democracy. Thus the

same fundamental moral principle that requires us to support a coercive order for the protection of persons' basic rights also requires us to support a process of democratic authorization that singles out a particular wielder of political power, and this gives us a weighty reason for complying with the rules imposed by that agent because we owe it to our fellow citizens to take seriously the results of democratic decision-making.

The limits of democratic authorization

There are two quite different situations in which the problem of political legitimacy arises and the second of them reveals the limits of democratic authorization. The first is where people are already successfully organized as a democratic political society—where the state as a structure of institutions exists and already includes democratic processes for identifying agents to wield political power. Under these conditions the only question is who shall be the agents, and democratic processes are capable of yielding an answer. Once the agents are identified, there will be a single answer to the question "Who is justified in wielding political power?" and to the question "Whom ought the people to support?"

In the second situation the institutional resources for democratic authorization are not available, either because the state has disintegrated or because the state exists but is undemocratic and recalcitrant to democratization. Here there may at first appear to be an unbridgeable gap between the commitment to acting on the Moral Equality Principle and the acknowledgment that acting on it requires institutions that protect basic human rights, on the one hand, and the justification of any particular agent's use of coercion to enforce the protection of rights, on the other.

In such conditions, individuals who strive conscientiously to help ensure that basic human rights are protected will find themselves in a painful predicament: It is necessary to establish and support some particular coercive agency that lacks the imprimatur of democratic authorization in order to achieve the modicum of order needed to develop the democratic institutions which alone make the exercise of political power fully legitimate. Reasonable persons may find themselves on opposite sides of the barricades because they may

make different but not unreasonable predictions about which coercive agents to support, and for how long.

However, as Jeremy Waldron has rightly noted, matters may not always be so grim. In some instances one particular potential coercive agent may be salient—if only because it already enjoys more support than its rivals.¹⁴ If this is the case, then persons who strive conscientiously to act on the Natural Duty of Justice will support the salient potential government, at least if they have good reason to believe it will do as good a job of protecting basic rights as its rivals.

Mere salience versus democratic authorization

However, the fact that a particular agent is salient among those capable of enforcing a regime of rights cannot serve to legitimate it if institutional resources allow for democratic authorization. For if democratic authorization is feasible (and is also likely to be achievable without excessive risks to persons' basic rights), then the same Moral Equality Principle that requires us to work to ensure that all persons have access to a rights-respecting regime also requires us to achieve democratic authorization of the exercise of political power to protect rights and also requires us to support only that agent that is selected by the process of democratic authorization. On this view, the core of justice, namely, equal regard for persons, requires democratic authorization where this is feasible (and can be achieved without excessive risk to persons' basic rights).

This account does not provide a solution to the problem of how we are to converge in our support for a particular coercive agent when the institutional resources for democratic authorization are lacking. It is not clear that it should. What the account does tell us, and all that it can be expected to tell us, is two things: First, that we have a Natural Duty of Justice, grounded in the Moral Equality Principle, to help develop institutions for the wielding of political power to protect individuals' basic rights; and second, that we should do this in such a way as to support, or where needed to create, processes for democratic authorization of agents to wield political power in the name of justice. In conditions in which institutional

resources for democratic authorization are not yet available, the best way—indeed the only way—we can honor the moral equality of persons is by helping to create a regime of law and order that protects basic rights and at the same time facilitates, or at least allows for the development of, democratic institutions. Where democratic authorization is not possible, it cannot be a requirement for legitimacy.

VII. Conclusions

I began this chapter with the observation that it is not enough to know that the international legal system should take justice as a primary goal. In addition, we need to know the conditions under which political power can be exercised for the sake of justice; we need an account of political legitimacy.

I have argued for a general conception of political legitimacy that is grounded in the liberal tenet that protection of basic human rights is the core of justice and the *raison d'être* for political power. I have also argued that although political authority is not required for political legitimacy, democratic authorization is necessary if institutional resources are available for the democratic selection of an agent to exercise political power and if attempting to achieve democratic authorization is not unduly risky from the standpoint of persons' basic rights.

According to this theory, we may distinguish between what might be called minimal and full political legitimacy. Where institutional resources for democratic authorization are lacking, an entity can be politically legitimate—can be morally justified in exercising political power—if it satisfies minimal standards for protecting individuals' rights by processes and policies that are themselves at least minimally just. However, this legitimacy is deficient or at least less than optimal: It fails to reconcile the exercise of political power with the fundamental equality of persons.

Where democratic authorization is possible (and can be pursued without excessive risks to basic rights), it is necessary for political legitimacy. Moreover, where political legitimacy is achieved through democratic authorization, genuine political community, not merely a rational association for mutual protection, can be attained. And democratic authorization of the exercise of political

¹⁴ Jeremy Waldron, 'Special Ties and Natural Duties', *Philosophy and Public Affairs* 22 (1993), 3–30. See also Buchanan, 'Political Legitimacy and Democracy'.

power is superior because it achieves or at least approximates equal regard for persons.

In the next chapter I adapt the foregoing account of political legitimacy to address an urgent issue in the nonideal moral theory of international law: What principles should guide the practice of recognizing *new* entities that claim the status of legitimate states (in particular those that emerge as the result of secession)? There I argue for a normativized practice of recognition according to which new entities ought to be incorporated into the society of states only if they satisfy justice-based criteria, that is, only if they do a credible job of protecting the basic human rights of their citizens and refrain from serious violations of the basic human rights of those beyond their borders.

Then in Chapter 7 I explore a surprisingly neglected question: Under what conditions is the international legal system itself legitimate? More specifically: What would the system have to be like for it to be true that efforts to exercise supremacy in the making, application, and enforcement of principles of both international and transnational justice is morally justified?

Drawing on the present chapter's argument, I conclude that so long as global democracy is not feasible, the international legal system can be legitimate if it does a credible job of protecting basic rights by processes that do not violate those rights, but that equal regard for persons requires efforts to make global democracy a reality, if this ideal can be pursued without undue risk to basic human rights. This sets the stage for an exploration of different conceptions of what it would be to democratize the international legal system.

CHAPTER 6

Recognitional Legitimacy

I. *The Concept of Recognitional Legitimacy*

Three subjects of recognition

In the preceding chapter I outlined an argument for a justice-based general conception of what might be called *internal* political legitimacy, the conditions under which the exercise of political power within a political entity's own borders is morally justified. I now want to use this conception of internal political legitimacy as a component of an account of recognitional legitimacy (also called international legitimacy).¹

The concept of recognitional legitimacy plays a central role in international legal institutions and international affairs. States, governments, and insurgency movements may all be recognized or not recognized as legitimate by individual states, groups of states, or regional or international organizations. My primary focus will be on recognitional legitimacy as applied to states—that is, on the judgment that a particular entity should or should not be recognized as a member in good standing of the system of states, with all the rights, powers, liberties, and immunities that go with that status. The guiding idea of my approach is that recognition is an act with serious moral implications and as such ought to be governed by rules that are themselves morally justifiable.

The idea of a justice-based theory of recognition

My aim is to develop a justice-based account of the proper criteria for recognition of legitimate states and then to use this to address

¹ The following two sections are drawn from Buchanan, 'Recognitional Legitimacy and the State System'.