POLITICAL FUNCTIONALISM AND THE IMPORTANCE OF SOCIAL FACTS

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I.

In the last few decades there has been a vibrant and in some cases hostile discussion concerning the method and point of political philosophy. Much of this discussion has been conducted under the somewhat obscure heading of the "ideal/non-ideal theory" debate.[1] There are many different debates here, and an article could be written (indeed, several already have been) just trying to sort out what is being claimed and argued.

In this paper, I want to set out a conception of the method and point of political philosophy that does not fit neatly within either of those categories, although I think the best understanding of this conception is that it suggests a clear and distinct role for work on both sides of the ideal/non-ideal divide. Having offered this conception of the method and point of political philosophy, the rest of the paper will serve as an extended demonstration of that method, looking particularly at questions about political legitimacy.

Call the conjunction of the following two views "POLITICAL FUNCTIONALISM":

> INSTITUTIONAL FUNCTIONALISM: Political and legal institutions are only instrumentally or functionally valuable—they are tools that can be used to address various practical problems of moral significance that arise when certain kinds of creatures live in relative proximity to each other (e.g. problems of scarcity, ignorance, disagreement, conflict, irrationality, prejudice, and so on).

> THEORETICAL FUNCTIONALISM: Political philosophy should help us engage in normative evaluation of political institutions, political actions, and political arrangements by providing insight into the moral issues in the political domain and conceptual resources to think about and discuss those issues, in order to help us make and evaluate various normative claims about particular political institutions, actions, and arrangements.

I think both of these claims are true; I endorse and will defend POLITICAL FUNCTIONALISM. But one could accept one of them without accepting the other.

It is natural to talk about views like THEORETICAL FUNCTIONALISM—a thesis about one "function" of political philosophy—in debates about the method and point of political

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[1] For relevant examples, see: Estlund, David, 2011, "Human Nature and the Limits (If Any) of Political Philosophy," Philosophy & Public Affairs 39 (3): 207–37; Mills, Charles W., 2005. "'Ideal Theory' as Ideology," Hypatia 20 (3): 165–83; Robeyns, Ingrid, 2008, "Ideal Theory in Theory and Practice", Social Theory and Practice, 34(3); Simmons, A. John, 2010, "Ideal and Nonideal Theory," Philosophy & Public Affairs 38 (1): 5–36; Stemplowska, Zofia, 2008, "What's Ideal About Ideal Theory?" Social Theory and Practice 34 (3): 319–40; Valentini, Laura, 2012, "Ideal vs. Non-ideal Theory: A Conceptual Map," Philosophy Compass 7 (9): 654–64.

philosophy. And indeed people have.[2] It might seem stranger to wed THEORETICAL FUNCTIONALISM to INSTITUTIONAL FUNCTIONALISM, and to consider both in a discussion of the point and method of political philosophy. But having a view about what political institutions are (artifactual, rather than natural, kinds), and what they are for, is essential for both helping to see why non-ideal theorizing is important, and for helping to think about what should be idealized and what should not be idealized in a given theoretical context or context of inquiry. In order to defend methodological claims about how some inquiry should proceed, one must have some view about the entity being studied. Endorsing INSTITUTIONAL FUNCTIONALISM has implications for how we should carry out our commitment to THEORETICAL FUNCTIONALISM, if indeed we have such a commitment. That's perhaps the central point of this paper.

THEORETICAL FUNCTIONALISM sets out several different tasks for political philosophy.[3] These are reflected in three importantly distinct categories of questions within political philosophy. The first category of questions, questions about "Concepts of Political Morality," concerns the concepts employed in the moral evaluation of legal and political institutions, actions, and arrangements. These concepts include justice, legitimacy, equality, autonomy (liberty, freedom, non-domination), responsiveness, welfare (utility, happiness, well-being), and so on. More generally, these concepts concern the whole range of practical problems of moral significance that do or may arise within social or political contexts. Questions in this category concern the correct or best conceptions of these concepts, and the interrelations, hierarchies, and interconnections amongst those concepts.

The second category of questions, questions about "Concepts of Politics and Law," concerns the 'nature' or best understanding of various (possibly non-normative) legal or political concepts, including law, precedent, rule, representative, election, legislation, adjudication, administration, democracy, citizen, judge, lawyer, constitution, crime, property, rights. These concepts might be construed as either purely descriptive concepts or "thick" normative concepts (normative role concepts with a substantial descriptive component). Understanding these concepts might be seen as part of descriptive political theory (at least in some instances), and empirical knowledge of existing institutions and systems might be particularly relevant for informing work in this category, in part just to have a sense of some of the options, or the capaciousness of the concepts. For questions about either the Concepts of Political Morality or the Concepts of Politics and Law, one thing that philosophers might do, in addition to theorizing about the best conceptions of existing concepts, is to propose new concepts.

The third category of questions, questions about "Evaluations of Institutions and Actions," concerns the moral evaluation of, and recommendations regarding, particular legal and political institutions, actions, and arrangements, where these need not be actual (they might be historical or hypothetical).

All three sets of questions are of both intellectual and practical interest. But there is no simple hierarchical relationship amongst these questions. In particular, I want to deny that one

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[2] John Dunn, for example, writes "[t]he purpose of political theory is to diagnose practical predicaments and to show us how best to confront them." Interpreting Political Responsibility (Cambridge: Polity Press, 1990), p. 193.

[3] It is worth stressing that THEORETICAL FUNCTIONALISM does not claim that *only* that which helps us engage in normative evaluation of political institutions counts as political philosophy. THEORETICAL FUNCTIONALISM is just the weaker and surely less controversial claim that political philosophy should help us engage in normative evaluation of political institutions—that is at least part of its point, not that it must be the whole of its *raison d'être*.

can and should first address the first two categories of questions, using the answers arrived at there to *derive* (or something approximating that) the answers to the third set of questions. Instead, all three categories of questions are important to help us carry out the tasks enumerated in THEORETICAL FUNCTIONALISM. Let me spell that out a bit more.

Here's my understanding of the importance of these three categories and the task of political philosophy more generally, assuming a commitment to INSTITUTIONAL FUNCTIONALISM. We begin with INSTITUTIONAL FUNCTIONALISM as a premise:

> Political and legal institutions are only instrumentally or functionally valuable— they are tools that can be used to address various practical problems of moral significance that arise when certain kinds of creatures live in relative proximity to each other (e.g. problems of scarcity, ignorance, disagreement, conflict, irrationality, prejudice, and so on).

Not all practical problems are morally significant, and not all practical problems arise due to creatures like us living in close proximity to each other. There might be debates about the proper boundaries here, but this is the general terrain of the political. This functionalism about institutions sets out certain requirements for our theorizing. So, the next claim:

> To understand the practical problems of moral significance that might arise or obtain, one must have answers to questions concerning the Concepts of Political Morality.

Answers to the Concepts of Political Morality questions are needed to help us see, understand, and theorize about the practical problems of moral significance. In some cases, understanding these problems will also require greater understanding of the Concepts of Politics and Law. But understanding either of these concepts is not enough to engage in the evaluation of particular institutions and actions in the way required by THEORETICAL FUNCTIONALISM. In particular:

> To engage in the moral evaluation of a particular legal and political institutional arrangement, LP, one must:
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> (i) know about the practical problems of moral significance that do (or are stipulated to, or are likely to) arise and obtain for the society, S, that will operate and be governed by LP; and
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> (ii) know whether LP will (or is likely to) effectively address the practical problems of moral significance that arise (or are likely to arise) for S.

This is where knowledge of real contexts, of the details of actual societies and the people in those societies, becomes important to the moral evaluation of particular legal and political arrangements. Different specifications of S will yield different verdicts about a particular LP. And the Concepts of Politics and Law questions—and all of political science, economics, psychology, law, sociology—becomes relevant for thinking about (ii), and for designing different and improved LPs.

One must know what problems arise in S (what bads must be 'conceded'), what solutions to those problems are available, and under what conditions, if any, those solutions will actually be successful. This knowledge enables one to determine which proposals can appropriately be dismissed as 'utopian' with respect to addressing *this particular S's* problems. Thus, focusing on INSTITUTIONAL FUNCTIONALISM allows us to see the way in which ideal and non-ideal parameters should be set in a given theoretical inquiry. This is one of the key methodological points. If one needs a political institution for a society, S*, in order to address a problem due to some limitation of the creatures living in S*, then in doing one's normative theorizing regarding which institutions would be best for S*, one must not assume away the relevant limitation.

What about theorizing with respect to the Concepts of Political Morality—justice, autonomy, equality, legitimacy, and so on? One thing to notice is that the moral issues covered by these concepts arise due to a combination of at least two factors: what the relevant creatures are like (what interests, abilities, and moral standing they possess) and what morally significant trouble they get into when they live amongst each other or attempt to impose legal or political order to their communities. These concerns arise for creatures relevantly like human beings, and so it would be a mistake to theorize about these concepts only imagining creatures with very different interests, abilities, and moral standing, or at least the role of such theorizing will be of more limited use (e.g. a "utility monster" might be imagined to highlight that our moral concerns extend beyond mere promotion of utility). That said, it is important to think about what our abilities actually are, and not to move too quickly from the claim that X would be atypical or unusual or difficult for creatures in this society or this context, to the claim that X would be impossible for creatures in this society or context. This might be the main lesson of David Estlund's admonishments regarding how we should understand the 'can' in 'ought implies can' in the domain of political philosophy.[4]

On the other hand, if we accept INSTITUTIONAL FUNCTIONALISM, and our focus is on offering normative evaluations of particular legal and political institutions, making good on THEORETICAL FUNCTIONALISM will require us to pay attention to whether and under what circumstances legal and political institutions will actually address the problems that arise. One system or institution might be better than another because it does better by moral demands of justice, equality, autonomy, and so on, under the actual current conditions of expected compliance and moral behavior of members of that society.

In this way, all evaluative claims about particular institutions become *relative* claims, indexed to a particular community or society. One cannot make truth-evaluable evaluative claims about types of legal or political institutional arrangements without specifying something about the relevant S, or—if we interpret the omission of the variable to allow for any specification of the variable—all such claims are false. Note that this relativity is due to the differences in the practical problems encountered by particular communities, not due to some more general relativism about these concepts of political morality.

With the introduction of the S variable, complications arise along at least two dimensions: (1) how S is defined; and (2) how we respond to the fact that no S is static—either in terms of its members, or the characteristics of those members—over time. Indeed, different LPs do or might affect what S is like. This second complication is particularly important, given that system A might be better than system B given current facts about the society, but system A will lead to various kinds of social deterioration over time, so that it actually does worse by norms of justice, equality, autonomy, and so on, if the assessment is made over a long enough

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[4] See Estlund (2011).

run of time. This suggests the importance of adding a dimension of temporal evaluation as well. Additionally, complexity abounds when one considers how to define a particular LP, and in thinking about how to evaluate the contribution that some one part of a particular LP makes toward addressing (or not) the practical problems of moral significance that arise for a particular S.

The discussion so far has been abstract, setting out a political functionalist conception of political philosophy and the way in which various 'non-ideal' or 'contingent' factors enter in on such a conception. What follows is a specific instance of this general picture, making the case with respect to the concept of political legitimacy and the evaluation of the legitimacy of different legal and political institutions. I endorse the more general picture across the board, but I only argue for it here with respect to legitimacy.

II.

Consider the following questions:

> Is there a type of political system such that all instances of that type are legitimate (in the normative, not descriptive, sense)?

> Is any constitutional democratic system that is roughly comparable to the United States system legitimate?

> Are there specific rights that must be constitutionally protected in every legitimate political system?

The next sections of the article presents and defends two claims—POLITICAL CONTEXTUALISM and POLITICAL NON-UNIVERSALISM—which, taken together, suggest that the answer to these questions is "no." Although the argument is philosophical in nature, the claims argued for have significant implications for the more practical enterprises of comparative public law, "constitutional borrowing," and the design of political systems. As will become apparent, these claims follow from an institutional functionalist view, and have implications for the importance of non-ideal theory and empirical information in carrying out the theoretical functionalist project.

This article focuses on the relationship between political systems and one central issue of political morality: the concern for *political legitimacy*, a concern which arises due to the coercive nature of political action. When political entities act, it is often to force people to act in a certain way, to delimit the scope of what people can do, to take things from them—always with the threat of the government's force behind these orders, delimitations, and takings. What makes this morally permissible? This is the question of normative political legitimacy.[5]

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[5] Normative legitimacy concerns whether a particular political entity is morally justified in acting. Descriptive legitimacy concerns whether a particular political action or political entity is *considered to be* morally justified. All references to "legitimacy" are references to normative legitimacy.

This article will focus on the question of what I call *macro* legitimacy—whether some political system is legitimate, rather than on questions of what I call *micro* legitimacy. Questions of micro legitimacy concern the legitimacy of particular political actions. I will

One of the conclusions of this article is that, if our concern is political legitimacy, striving toward some theory of the ideal political system or ideal constitution is misguided. We cannot make good on the theoretical functionalist project in political philosophy, on efforts to evaluate and criticize particular legal and political institutions and systems, without detailed consideration of the empirical situation in which those institutions and systems do or might exist. There are many political improvement projects worth pursuing—making political systems more legitimate, more just, more transparent, more responsive, better at promoting individual autonomy, welfare, and so on. This article provides philosophical arguments that bring to the fore what real-world experimentation has made apparent: that these objectives must be pursued with a great deal of real context sensitivity. There are no institutional silver bullets.

The first legitimacy-related claim is that assessments that some particular political system is legitimate cannot be made apart from detailed consideration of the societies over which the political system does or might govern. Here is a more precise statement of that claim:

> POLITICAL CONTEXTUALISM: For any political system, LP, (a set of constitutional and institutional elements $\{E_1, E_2, E_3 \ldots E_n\}$), one cannot conclude that LP is legitimate without taking into account certain facts about the current society, S, for which LP is or might be the operative political system, and without taking into account how S and LP will or might interact.

Some of the facts that may be relevant: facts about the racial, cultural, linguistic, and religious diversity of the members of the society, and the extent to which these differences have resulted (or might result) in "cross-cutting" or "segmental" cleavages within the society;[6] facts about the extent to which these differences are "persistent markers of political identity as well as bases for political mobilization"[7]; facts about the size of the society in terms of both geography and population; the existing state of communication technology, media institutions, and transportation infrastructure in the society; the current socioeconomic divisions and educational levels of the members of the society; recent political history; facts about the relative malleability of the above facts; and so on.

Note that there are at least two short routes to POLITICAL CONTEXTUALISM—neither of which turns out to be very attractive. One such route is to defend a pure *consequentialist* account of political legitimacy, so that a system is legitimate if and only if it brings about consequences that meet some specified threshold or criteria.[8] A second such route is to defend an *actual consent* account of political legitimacy, so that one would have to know "certain facts about the current society S for which LP is or might be the operative system," namely, the facts about

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assume that if a political system is macro legitimate, then the laws and policies created by that system are presumptively legitimate, although particular applications of those laws to individuals may be illegitimate. I argue against this very simple picture of the relationship between macro and micro legitimacy elsewhere, but it is broadly assumed in this literature, and the details of the more complex view aren't important for the argument here.

[6] The term "segmental cleavage" is best known from Arend Lijphart, <u>Democracy in Plural Societies</u> (1977).

[7] Sujit Choudhry, *Constitutionalism in divided societies*, <u>I-CON</u>, Vol. 5 (2007), p. 573.

[8] See, for example, Richard Arneson, *Defending the Purely Instrumental Account of Democratic Authority*, <u>Journal of Political Philosophy</u> 11, No. 1 (2003).

whether members of S had *consented* to LP. I do not follow either route, as both of these accounts of legitimacy are problematic, for reasons discussed below.

The second claim is related to this first:

> POLITICAL NON-UNIVERSALISM: There are no true, universal, a priori claims of the form: 'all instances of type of political system X are legitimate' or 'every legitimate political system must be of type Y.'

There is no type of constitution or political system which is universally legitimate; there is no universally legitimate system of constitutional protection (whether judicial review or something else) or method of constitutional interpretation.

POLITICAL NON-UNIVERSALISM implies that, from the perspective of political legitimacy, there is no ideal political system *in general*, only good or ideal systems for particular societies.[9] This view is opposed to a universalist model of political philosophy, which takes normative requirements to require similar constitutional and institutional structures and protections for any society. Ronald Dworkin, for example, has suggested that for a political system to be legitimate, "[t]here must be embedded constitutional rules stipulating that a majority cannot abolish future elections, for example, or disenfranchise a minority."[10] Many have defended the view that various democratic elements, particularly elections, are universally required by norms of political legitimacy.[11] Debates about the normative propriety of judicial review are often framed as being entirely or almost entirely context independent.

The opposition to universalism offered here is not because the underlying values relating to the permissible relationship between the State and the individual are relative. Indeed, it is an assumption of the article that the values relating to individual autonomy and equality, and the threat of state domination, are constant and universal, at least for creatures relevantly like us; it is the implications of these values in different contexts that are not constant.[12]

There is a sense, then, in which all affirmative legitimacy claims are *relative* claims. Importantly, however, the claims are relative to facts about either (a) the whole political system

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[9] In this article I defend non-universalism with respect to *legitimacy*. There are other normative concerns: concerns about equality, justice, autonomy, and responsiveness, etc. Arguments similar to the one made in this article in defense of non-universalism about legitimacy can also be made in defense of non-universalism about these other normative notions. The main reason for this is that all of these notions are, I contend, at least partly concerned with outcomes, about what political systems bring about, not just whether certain purely procedural conditions are satisfied. In particular, these notions all concern the moral importance of resolving problems that arise in political societies, and so are concerned with whether those problems are actually addressed by the political and legal institutions. Making this argument in full is outside the scope of this paper.

[10] Ronald Dworkin, *Constitutionalism and Democracy*, European Journal of Philosophy, Vol. 3 (1995)

[11] Others have made related claims that various democratic components are required by the relative normative concern of justice. John Rawls, A Theory of Justice (Rev. Ed. 1999), p. 194.

[12] For this reason, the claims of this article are compatible with G.A. Cohen's basic thesis that if a normative principle is sensitive to facts (in Cohen's sense), that is true only because there is some principle that is insensitive to facts. See *Facts and Principles*, Philosophy and Public Affairs, Vol. 31 (2003).

of which some feature is a part, or (b) the society over which the system will govern. One can still entertain the idea that there are fully objective, evaluator-independent normative truths about the legitimacy of political systems and features of political systems. It is just that those truths are truths about conditional propositions. Rather than this kind of proposition: *that systems of this kind (with these particular constitutional and institutional elements) are legitimate*, they will have this form: *that if we are in this kind of society, then systems of this kind are legitimate*. Perhaps surprisingly, legitimacy claims are contextually relative in this way *despite* the fact that this article starts with standard assumptions regarding individual autonomy and the equal moral worth of individuals.

Taken together, these claims have significant implications for political philosophy. First, they help to explain both the problematic nature of the inference from (1) constitutional/ institutional element E is good or essential for political legitimacy for our society to (2) E is good or essential for political legitimacy, and why it is potentially dangerous to encourage a simplistic kind of constitutional borrowing. Sujit Choudhry and others have highlighted this point with respect to the transportation of constitutional elements from non-divided to "divided societies" such as Northern Ireland, Bosnia-Herzegovina, Kosovo, Iraq, Afghanistan, India, Sri Lanka, and others.[13] Others have discussed how the strong independent executive model typified by the United States system might actually be dangerous in developing societies or societies with a history of centralized, authoritarian rule,[14] or how mass democratic institutions may lead to violence if certain surrounding institutions are not present.[15]

Second, these claims highlight that empirical investigation is required to engage in normative assessment of political systems and institutions. Some work in political philosophy can be done in assessing what the bases and grounds are for normative evaluation in the political context, but the work of recommending particular kinds of political systems must be done only with an understanding of how the systems are likely to function in a particular society.

Additionally, focus on and attendant valorization of certain aspects of what appear to be legitimate or good systems—say, focusing on the bill of rights and judicial review in the United States' case—may lead to possible misunderstandings regarding what actually makes the system work well.[16] The question to ask is not: do you have this particular elemen*t* (e.g. a bill of rights with, say, a right to be free from cruel punishment)? But: what in your system, if anything, does, prevents, or ensures X, Y, or Z? The slogan—fitting with the general political functionalist approach—is *function over form*. Assessing function requires more than mere superficial acquaintance with the system.

Here is an overview of the argument. Political action, by its nature, requires a certain kind of trespass on individual autonomy, trespass that requires justification. Systems that have

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[13] Choudhry (2007), at 573.

[14] See Bruce Ackerman, *The New Separation of Powers*, Harvard Law Review, Vol. 113, p. 633 (2000).

[15] See Edward D. Mansfield and Jack Snyder, Electing to Fight: Why Emerging Democracies Go to War (MIT Press, 2005).

[16] See, e.g., Steven G. Calabresi, *An Agenda for Constitutional Reform*, in Constitutional Stupidities, Constitutional Tragedies (Eskridge & Levinson eds., 1998), in which Calabresi asserts that "[T]he [United States] Federalist Constitution has proved to be a brilliant success, which unitary nation states and parliamentary democracies all over the world would do well to copy. I give it most of the credit for the fact that ours is the wealthiest, most technologically advanced, and most socially just society in human history."

this justification are legitimate; those that lack it are not. Because human beings are fundamentally autonomous and moral equals, justification is owed to each person living under the system—to each person who will directly have her freedom restricted if she disobeys the laws and other orders of the political entity. This creates a necessary condition on political legitimacy: that the political system is legitimate only if each person living under the system could reasonably agree to live under the system. The first main argument is that, for actual political systems, this necessary condition can only be satisfied by considering what the system actually brings about, rather than simply on procedural features of the system. The second main argument, which follows from the first, is that whether a particular system does or does not meet the burden turns on whether the system actually ensures or brings about the right kind of 'legitimating' consequences with respect to those living under the system—which will turn on facts about the particular society whose system it is or will be.

III.

The nature of political systems is such that political systems (as opposed to voluntarily entered into collective projects) represent a departure from the normative ideal of non-coerced, autonomous action. This is so because not everyone has agreed to be part of the group, not everyone agrees on what to do, and some individuals will be coerced or threatened with coercion to go along with X although they disagree with X. No actual political system can claim the consent (actual or tacit) of all those over whom the system governs. Additionally, it is part of the fundamental idea of politics that political institutions are necessary precisely when (and because) there is *not* agreement about what to do. Even in a close-to-best case scenario, the picture is more like this: in a 1000-person society, a fair and maximally inclusive vote results in 900 people voting to do X and 100 people voting against doing X. As a result of the vote, X is done. If the 100 attempt to undermine the effort to do X (by not paying taxes, refusing to do their share, or actively undermining the X effort), they may be coerced into compliance. This is the source of the need for moral justification for political action. This is the practical problem of moral significance that is covered under the heading of "political legitimacy."

I won't offer a full account of political legitimacy. There are accounts that focus on actual consent, hypothetical consent, idealized consent, or something other than consent entirely. I won't adjudicate amongst these different views. Instead, I will present and defend a modest condition—and only a *necessary* condition—of political legitimacy. Systems that meet this condition may be legitimate—that will depend on what other conditions might be required, what other necessary and sufficient conditions there might be, for legitimacy. But systems that do not meet this condition will not be legitimate.

Consider the following necessary condition of political legitimacy:

> Possible Agreement Requirement: A political system is legitimate only if those individuals living under the system could reasonably agree to live under the system.

This condition follows naturally from the notion of justification and its connection to moral permissibility. One way to see this is to imagine rejecting this condition, so that a political system might be legitimate, morally justified, vis-à-vis certain individuals, although some of those individuals could not reasonably agree to live under the system. This seems incoherent. If

there is a genuine moral justification, then it must at least be reasonable for those to whom it is addressed to agree to live under the system, if for no other reason than that those individuals could use the grounds of the justification as their reason to agree to live under the system, once those grounds have been made clear to them. It is of course possible that some activity or situation might be justified vis-à-vis some person even though that person does not or will not *in fact* accept the justification. But it is plausible that a genuine moral justification for a political system—or for anything—must be such that the person to whom it is addressed could be reasonable in accepting that justification. And if it could be reasonable for the person to accept the justification for some X, then it could be reasonable for that person to agree to X—even if they might not obviously or always prefer X.

The basic intuition is that it is a necessary feature of a justified political system that no one living under it would be acting *unreasonably* if she or he were to agree to live under the system. (For the sake of simplicity, I will assume that those individuals who count as "living under" a system are those who are subject to coercive enforcement by that system.) Note that this is not to say that this fact, *that it would be reasonable to agree to live under the system*, is what makes the system justified. Nor is it to suggest that what makes the system justified is that people explicitly or tacitly or rationally would hypothetically consent to live under the system. Importantly, this is only a *necessary* condition on political legitimacy; more is almost certainly required for legitimacy and full moral justification of political action.

The possible agreement requirement may seem superficially similar to Estlund's: "A state or kind of state is legitimate only if its coercive enforcement of law can be justified on a basis that is acceptable to all possible qualified points of view."[17] However, as David Copp points out,[18] by "is acceptable to all" Estlund really means "is not able to be rejected by any," rather than "could be accepted by all." This is apparent because Estlund intends the "acceptability" of a justification to all qualified persons to rule out the existence of any "qualified objections" or objections that could lead a qualified person to reject the justification.[19] Additionally, Estlund's condition explicitly requires demarcating the boundary between *qualified* and *non-qualified* points of view. The Possible Agreement Requirement, by contrast, just requires that, for every individual living under the political system, there is *some* route by which that individual could come to agree to the system, and that this route would not involve that individual's being unreasonable. It could be satisfied even if every individual also has or could have a reasonable objection (or several) to the system.

Several additional points of clarification are needed. First, there is a question of how to understand the modal status of "could" in the condition. Whether a person *could* reasonably agree to some system is intended to be a matter of whether there is some reasonable arrangement or permutation of that person's actual beliefs, values, and preferences that would permit agreement to the system. There are complexities here, but I will leave these to one side.

Second, there is a familiar concern about how to define or understand *reasonable* in this context. Importantly, the notion of reasonableness is not intended to cabin or limit those to whom justification is owed or whose agreement or consent matters, or to limit the kinds of reasons that a justification can employ. Rather, it is solely about whether it could be reasonable, whether it could make sense, for some particular individual to agree to live under a certain

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[17] Estlund (2008), p. 41.

[18] *See* David Copp, *Estlund's Qualified Acceptability Requirement*, Ethics, Vol. 121 (2011), p. 246.

[19] Estlund (2008), pp. 35-37, 47, 49.

political system or not. What would make such a decision reasonable or not? All of the standard considerations that go into any decision—some mix of prudential considerations, moral considerations, other-regarding considerations that are not strictly moral, and so on. These are the same kinds of considerations that go into determining whether it would be reasonable for someone to buy a car or to have a child. Some level of idiosyncrasy with regard to one's beliefs, valuations, and weightings is expected, certainly, although at extremes whether a person might actually agree to such a system or not may come apart from whether it would be reasonable for them to do so (in either direction: a person might unreasonably agree to live under a horrible system for pathological reasons, or a person might unreasonably refuse to agree under a system that would in fact be good for them).

Third, the notion of reasonableness at work here is connected to a relatively thick understanding of the normative significance of *agreement*, on which agreement is related to foundational ideas of autonomy and self-respect. On such a view, it can be reasonable to refuse to agree to a bad situation, even if that situation is not the worst situation, and even if that situation is better than one's other options. On this view, one cannot assume the reasonableness of agreement to X simply because on the agent's ranking of the options X comes out as the highest-ranked option. This connects to the familiar "baseline" problem. When we ask whether someone could reasonably agree to some particular political system, what the answer will be depends on what things will be like if that system isn't in place. If the baseline is set very low, so that the alternative is a relatively terrible Hobbesian state of nature, then it will seem that agreement is or could be reasonable in almost every case, for almost every system. If the baseline is set very high, so that the alternative is some utopian communal society, it will seem that agreement would not be reasonable in almost any case, for any system.

There is not an easy solution to this baseline problem, and I will not offer a solution here. Instead, let us simply restrict our focus to those cases in which an individual's actual alternatives are such that a decision to agree to the system counts as non-coerced and voluntary. When assessing whether some system satisfies the Possible Agreement Requirement, we should focus on the features of the system under consideration that might make the system acceptable and justifiable to that individual (non-comparatively), rather than on the badness of the alternatives. This suggests a reformulation of the Possible Agreement Requirement:

> Possible Agreement Requirement (2): A political system is legitimate only if those individuals living under the system could reasonably agree to live under the system, and not just because those individuals' alternatives are particularly dire.

This requirement is harder to satisfy than the previous one, because it rules out one kind of justification for the system that might be offered by a consequentialist about legitimacy; namely, that the individuals reasonably could agree to the system simply because it makes them better off than they otherwise would be. More on this below.

A fourth difficulty is that it is not clear that we can assess whether a particular system satisfies the Possible Agreement Requirement in the case of a particular individual by asking "could this person reasonably agree to this system?"—and by doing so one person at a time. For one thing, it might be that, although the person, A, does decently well under the system, A does much worse than B and C, and for no good reason (perhaps solely on account of A's membership in a particular racial group). So we should offer an additional refinement:

Possible Agreement Requirement (3): A political system is legitimate with respect to a person living under the system, P, only if P could reasonably agree to live under the system—while in possession of basic information about the system and P's relative situation under the system—and not just because P's or others' alternatives to the system are all particularly dire.

This requirement (henceforth "PAR(3)") makes explicit what is often left unclear or implicit: the requirement for legitimacy concerns whether a political system is legitimate with respect to particular individuals. This suggests the question: what proportion of those living under a system must stand in a "legitimated" relationship to the system for the system to be legitimate? Everyone? Or only enough of them, with "legitimacy" best thought of as a scalar notion that admits of degrees? These sorts of views add considerable complexity to the possibilities for an account of political legitimacy. For the purposes of this article, I will simply assume that macro legitimacy requires that the PAR(3) be satisfied for all individuals living under the system.

PAR(3) should be relatively uncontroversial. First, it is only a necessary condition on political legitimacy. Second, any view that took seriously individual autonomy and the burden of justifying political action would seem to be committed to something at least as strong as PAR(3). Still, PAR(3) can do substantial normative work, as the next sections will demonstrate.

IV.

Consider whether a simple majoritarian political system—in which every person gets to vote (either for specific policies or for a representative), and in which simple majorities are sufficient to enact law—could satisfy the PAR(3). Could individuals living under such a system reasonably agree to live under it? I will suggest that two familiar problems may arise for simple majoritarian systems in many actual social contexts: the consistent loser problem and the devastated loser problem.

Let's begin with the *consistent loser* problem. This concern is that, for systems that operate just by simple majoritarian democratic procedures, there is nothing from within the system that will prevent a majority from effectively dominating a minority. For all those societies that are such that there are some segmental (rather than crosscutting) cleavages, so that there are individuals who have clusters of beliefs, preferences, or views that put them in the minority on a significant range of issues, simple majoritarian systems will make it so that these individuals always lose. For these "consistent losers," it is hard to see what would make it reasonable for them to agree to live under the system. If there were individuals such that under some system their preferences and views were systematically overridden—overridden in every instance or close to every instance—it may seem implausible that they could reasonably agree to live under that system.

The *devastated loser* problem is different. This concern is that there is nothing from within the system that will prevent a majority of individuals from imposing what we might call *devastating losses* (to personal wealth, health, freedom, etc.) on particular individuals. Devastating losses are those losses that are so significant, or which are cumulatively so significant, that there is no hope of things balancing out over time so that the person might be reasonable in agreeing to live under the system. Those individuals might be also in a consistent loser situation—this might explain how they come to suffer devastating losses through the political process—but they needn't be.

There are two different kinds of responses one might give to these concerns. The first is that, even for consistent losers or for devastated losers, it may be reasonable for them to agree to a *fair* system, a system that they view as procedurally unproblematic, even if they always lose, or even if the losses they suffer are devastating. The second kind of response is only available as a response to the consistent loser problem: even consistent losers may be made better off by such a system—and not just better off than some terrible or dire alternative situation—even if they always lose. Given that they are made better off, it may be reasonable for such people to agree to live under the system, even if they always lose, and even if they might be made even better off in a system in which they did not always lose.

Once one goes in for the second kind of response, one has already acknowledged that it will not be possible to give an affirmative answer to the question of whether some system is legitimate without knowing something about the society over which the system governs, and the effects that the system brings about. That is because without knowing "on the ground" facts of this sort, one will not be able to assess whether the PAR(3) is satisfied, whether the right sort of consequences are in fact brought about so that it could be reasonable for even the consistent losers to agree to live under the system.

Pure procedural responses of the first variety might, in principle, allow one to conclude that some system is legitimate without knowing anything about the society over which the system governs. Consider, for example, an argument that suggests that some process is ideally fair, and so for that reason it is possible even for consistent or devastated losers to agree to live under the system. If there were such an ideally fair system, so that such agreement could be reasonable, this would undermine the three claims that I will defend later. So it is worth considering the viability of these responses.

One purely procedural justification for the decision to do X is that, although everyone may not have agreed to be part of some joint project, they are part of a polity (or community) and the only fair and egalitarian way to decide what the polity will do—when there is disagreement—is by majority vote. What should we think of such a justification presented to a devastated or consistent loser?

There are several problems with this kind of attempt at justification. First, in some cases the consistent or devastated loser can deny that she is part of the group. Of course, from a certain metaphysical perspective we can create a group out of any collection of objects we like: Linda, Jorge, Martin, a pancake, and the Eiffel Tower. But if *this* is all that is meant by "being a part of a group" then the initial fairness argument will not succeed. Being part of the group must have more than mere nominal significance. Much could be said about the grounds on which it is appropriate to treat some collection of people as a normatively significant group in the way required for this argument. The important thing for the discussion here is that the plausible further considerations (individual attitudes regarding group membership, actual benefit from group membership, etc.) will all require investigation into the details of the particular society and its actual members.

A second problem with this general strategy of purely procedural justification is that it is not clear why, in the face of disagreement, the group has to act at all. There are two thoughts here. First, there is no reason why *the group* has to act, qua group. If those who agree want to do X and are capable of doing X without coercing the dissenters, nothing is stopping them. But perhaps X is something that can only be done if everyone works together. If that is the case, then the second thought is relevant: given what's been said so far, there is no reason why any action needs to be taken in the face of disagreement. Why do anything as a group unless there is

agreement about what to do? There are responses that might be made here. The natural response is this one: even though the group disagrees about whether or not to do X, the question of whether to do X is a question that is *in need of resolution*. But this appeal to the need for resolution is straightforwardly an appeal to outcome-related considerations, and so can't be part of the purely procedural justification.

<center>***</center>

Here is a recap of where we are. Political institutions act in ways that intrude upon individual autonomy, because they operate backed by coercive force. This generates a justificatory burden on political institutions, a demand for an account of the moral permissibility of political action, for an account of political legitimacy. Offering such an account is a large task, one that this article does not undertake. However, we can identify at least one hurdle that any political system must be able to clear, a necessary condition for a system to be legitimate: the PAR(3). Once one considers whether a simple majoritarian democratic system could satisfy the condition, one runs into the two possible problems of *consistent losers* and *devastated losers*. It seems that individuals in either category could not reasonably agree to live under such a majoritarian democratic system. But perhaps that is too fast! Perhaps they could agree to live under such a system, simply because such a system treats all members of a disagreeing group as moral equals, or is a fair system to resolve intra-group disagreement. But purely procedural responses of this sort rely either on an unsuitable notion of *group*, or end up not being purely procedural. That is, there might be circumstances in which even consistent losers could reasonably agree to live under a political system on outcome-regarding grounds (a rising tide lifts all boats), but whether these circumstances obtain is a question that must be investigated with respect to particular societies.

<center>**V.**</center>

Let us turn now to POLITICAL CONTEXTUALISM:

POLITICAL CONTEXTUALISM: For any political system, LP, (a set of constitutional and institutional elements {E_1, E_2, E_3 … E_n}), one cannot conclude that LP is legitimate[20] without taking into account certain facts about the current society, S, for which LP is or might be the operative political system, and without taking into account how S and LP will or might interact.

The rough argument for POLITICAL CONTEXTUALISM is this:

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[20] Because this article just considers a necessary condition on political legitimacy—the PAR(3)—the claim is just concerned with affirmative normative conclusions that some political system *is* legitimate, since such claims can only be true if PAR(3) is satisfied. There might be non-contextually sensitive factors that serve as other necessary conditions for legitimacy, in which case one might be able to conclude that some system is *not* legitimate or justifiable *without* knowing certain facts about the society, simply because one knows that the system does not have this other non-contextually sensitive factor.

(P1) Because of the PAR(3), the consistent loser and devastated loser concerns must be addressed for a political system to be legitimate.

(P2) Whether the consistent loser and devastated loser concerns are in fact addressed by some political system depends on the particular features of the system, the society, and the interaction between the system and the society.

(C) Therefore, POLITICAL CONTEXTUALISM.

Section IV argued for (P1), and responded to one potential objection to (P2)—namely, that the consistent and devastated loser concerns might be addressed across the board by a system that employed adequately fair or egalitarian procedures (procedures that would ensure that all people could, simply by virtue of the presence of the procedures, agree to live under the system). This section will make a more affirmative case for (P2).

Consider three systems:

SD: a majority-vote democratic system (with no bill of rights or other non-majoritarian provisions) in which all competent adults have the right to vote for representatives who serve for four year terms, with each representative elected from a particular geographic district

CD: a constitutional democratic system like the United States, with mostly majoritarian voting procedures and some non-majoritarian institutions—such as a court with strong powers of judicial review charged with protecting a bill of rights—and with super-majority constitutional amendment provisions

CS: a consociational system like that described by McGarry and O'Leary,[21] the main relevant characteristics of which are: proportional representation in the legislature, courts, public employment, military, etc., using anti-discrimination and affirmative action quotas where needed; executive power-sharing mechanisms; and legislative voting rules that at least sometimes (in the most important and controversial cases) require parallel consent (an overall majority + majority of each 'recognized' group) or weighted majorities (e.g. 60% of all members + 40% of the members of each 'recognized' group)

Considering these three systems, we might ask, which of these best addresses the consistent and devastated loser concerns? POLITICAL CONTEXTUALISM implies that we won't be able to offer an answer to this question without knowing about not just the *system* we are evaluating, but also about the society. Thus, the question should not be, *which of these systems is best at addressing the consistent and devastated loser concerns*, but rather: *which of these systems is best at addressing these concerns for some particular society S*?

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[21] John McGarry & Brendan O'Leary, The Northern Ireland Conflict: Consociational Engagements (2004).

Should we accept POLITICAL CONTEXTUALISM? One reason that we should is that if we fail to specify the relevant society, our assessments regarding the satisfaction of PAR(3) will be unstable. Consider, for example, three possible societies, which are similar (in size, geography, and so on) except with respect to their relative diversity along various demographic lines:

> Alpha: the population is relatively homogenous along class, racial, ethnic, religious, linguistic, and national origin lines; there is no history of oppression along gender or any other lines; and there is no history of communal or other internal violence

> Beta: the population is relatively homogenous along religious, linguistic, and national origin lines, but is divided—85% to 15%—along racial lines, and there is a substantial history of oppression of the minority by the majority

> Gamma: the population is divided into two main deeply segmented groups, A and B, with this division lining up along class, religious, linguistic, ethnic, and cultural lines. A and B each constitutes roughly 45% of the population, a fact which has been quite stable over time. Various much smaller groups make up the remaining 10%. In this society there is a history of violence and oppression of A towards B and of B towards A.

From the perspective of addressing the concerns about devastated and consistent losers, which of the above systems is better? POLITICAL CONTEXTUALISM suggests that we won't be able to give an answer that abstracts from the question of whether we are in society Alpha, Beta, or Gamma, or some other society.

For Alpha, if we are worried about the extent to which the system could be reasonably agreed to by all, it is hard to see why we would prefer CD or CS to SD. If anything, it is reasonable to worry that giving power to anti-majoritarian or non-majoritarian institutions like a supreme court in the CD system would just make it possible for some small group of elites or other powerful individuals to control the levers of power in a way that might lead to the creation of consistent or devastated losers. Similarly with the consociational mechanisms of the CS system—it is hard to see how they could help make the system such that it could reasonably be agreed to by all, and it is easy to see how they might cause or contribute to worse results: for example, by creating divisions that don't presently exist.

For Beta, it seems that SD will routinely leave the 15% minority's voice out of the process almost entirely, leading to category of consistent losers. The SD system is clearly the worst for Beta. There is a worry that a CS system might give too much power to the 15% minority if they are a recognized group and parallel consent and weighted majority rules are employed. This concern is not about devastated and consistent losers, but about when a system becomes so non-responsive to the interests of the society as a whole that individuals could not reasonably agree to the system. Thus, something like CD seems best, in that it will help restrain majoritarian processes from imposing devastating or consistent losses on the 15%, although there are significant questions about whether and how the supreme court will protect minority rights.

For Gamma, there are worries that both SD and CD will lead to problematic results, since a slim majority made up almost entirely of As or Bs could rule over the other; in the case of CD, anti-majoritarian institutions like a supreme court would be hard-pressed to keep a check on the political branches; and the groups that comprise the remaining 10% could end up wielding an incredible amount of political clout, quite disproportionate to their number. Both of these systems might lead to cyclical politics in which a slim majority imposes devastating or consistent losses for its time in power, only for the other side to do the same when the situation reverses. A CS system would seem better, although there are worries about gridlock and entrenching divisions.

To summarize, using an artificial 0 to 10 point scale, with 10 being best:

	Alpha	Beta	Gamma
SD	10	0	0
CD	3	10	3
CS	0	3	10

This discussion is brief, and it focuses just on the consistent and devastated loser concerns, but it is hard to see how one could make an argument preferring CD to CS, or CS to CD, or SD to CD, etc.—at least not while taking into account the PAR(3)—without knowing the details of the society. And it is hard to see what it would mean just to say that CD is better than CS with respect to satisfying PAR(3) *in general* unless this is just an empirical statistical claim (more societies are like Beta than like Gamma).

One thing this makes clear is that the interaction between some particular system and particular features of a society is normatively significant. To defend some particular provision or system as being good for some society, work will need to be done to assess which features of the society are relevant. One role for the social sciences, including various areas of sociolegal studies, is to identify which kinds of facts have proved relevant for the failure or success of various political systems and constitutional structures with respect to achieving certain normative goals. And, of course, societal facts are not static; political systems can and will change features of the society. Which concrete political system does best at actually realizing the normative ideal in some particular society will be a matter of various social and historical facts, will depend on the 'local materials' available, and there may be circumstances in which for a given society, there are many different, equally good ways of accomplishing the same end. One role for comparative political science and comparative law, then, is to highlight the ways in which different political mechanisms "realize" the same goals for different societies, and to identify which kinds of mechanisms appear best suited for realizing certain normative goals in particular situations. This has been described by Mark Tushnet as a "functionalist" role for comparative constitutional law,[22] and fits nicely within the full political functionalist framework.

VI.

Reflecting on POLITICAL CONTEXTUALISM and the argument so far suggests that we should also endorse the following claim:

[22] Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, Yale Law Journal, Vol. 108 (1999), p. 1228.

POLITICAL NON-UNIVERSALISM: There are no true, universal, a priori claims of the form: 'all instances of type of political system X are legitimate' or 'every legitimate political system must be of type Y.'

POLITICAL NON-UNIVERSALISM concerns a certain kind of normative claim: affirmative legitimacy claims made regarding political systems. As has been suggested in the defense of POLITICAL CONTEXTUALISM, legitimacy claims about political systems must be 'indexed' to particular societies, where a society is defined by certain social, demographic, and geographical characteristics that obtain at some particular period of time. There are complexities here—how many changes can be made to a society before it becomes a 'different' society, which facts are relevant, and so on. But the basic idea should be clear. This is contrasted with a picture on which an affirmative legitimacy claim might be made in an unrestricted, decontextualized way, so that, for example, one might hold that it is simply true, for every society, or without qualification, that constitutional democratic systems like the one in the United States are legitimate.

POLITICAL NON-UNIVERSALISM is motivated by the arguments for POLITICAL CONTEXTUALISM. For imagine that POLITICAL NON-UNIVERSALISM were false; imagine that there were true general affirmative legitimacy claims about constitutions or political systems, claims which were true without restriction to any particular society. This would mean that one could make affirmative legitimacy assessments of at least some constitutions without taking into account any facts about the society for which the constitution is operative. But that is what POLITICAL CONTEXTUALISM denies. Thus, if POLITICAL CONTEXTUALISM is true, then POLITICAL NON-UNIVERSALISM is true as well.

Political Non-Universalism does not imply that there is *nothing* that all legitimate political systems have in common. It may be, for example, that all legitimate political systems have the following in common: under those systems, basic rights of persons are protected and respected; citizens are ensured equal treatment and equal consideration under the law; bodily, associational, and intellectual freedom are promoted and respected; and so on. The relevant political values for political legitimacy, tied, perhaps, to satisfaction of PAR(3), might well be uniform and universal.

The point here—the functionalist, "multiple-realizability" point—is that the constitutions and institutions need not be uniform, even if that is the case. There may be societies in which there is no need (from a legitimacy perspective) for a constitutional right protecting, say, freedom of worship, because the entire population is deeply committed to religious freedom, and has a uniform understanding of what that requires. And in those societies, a constitutional system that lacked any protection for religious freedom would not be, thereby, illegitimate.

As noted earlier, there is a sense in which POLITICAL NON-UNIVERSALISM's truth means that all affirmative legitimacy claims about political systems or features of political systems *relative* claims. Importantly, however, the facts to which affirmative legitimacy claims about political systems or features of political systems are relativized are not facts about our beliefs or desires regarding those legitimacy claims—instead, they are relativized to facts about the political system and/or the society over which the system governs—demographic facts, historical facts, geographic facts, cultural facts, and so on.

VII.

The truth of POLITICAL CONTEXTUALISM and POLITICAL NON-UNIVERSALISM has significant implications for normative political philosophy and for the normative evaluation of political systems. Both can be seen as part of the political functionalist view discussed in Section I, and motivate attention to real sociopolitical contexts. I will conclude by briefly suggesting some of these implications.

First, POLITICAL CONTEXTUALISM holds that for any political system, LP, one cannot conclude that LP is legitimate without taking into account certain facts about the current society, S, for which LP is or might be the operative political system, and without taking into account how S and LP will or might interact. This means that we need to think more about the S and LP variables, to think more about interactions between S's and LPs, and particularly about how LPs do (or don't) address consistent and devastated loser concerns. Detailed local knowledge is needed to understand what needs fixing, which mechanisms are working, and which aren't. For example, on paper, the United States system appears to have excellent criminal justice protections—including the 4th, 5th, 6th, and 8th Amendments of the U.S. Constitution. But those with familiarity with the system know that it is weakened by issues stemming from the inadequacy of publicly-provided counsel, and from the development of plea-bargaining and largely unregulated prosecutorial discretion, which have (arguably) made many of the trial-focused protections of the Constitution substantially less powerful. As noted above, the proper slogan is *function over form*, and assessing function requires more than mere casual or superficial acquaintance with the system.

Second, there is a variable, S, that must be defined. This raises the question of whether the definition of a particular S is something that should also be subject to evaluation. In other words, must we or should we take borders as fixed in our theorizing? If one maintains that Flanders, Wallonia, and Brussels are all going to comprise one particular S, then one will get a certain answer to the normative evaluation questions regarding which political system would be best. Recalling our three systems of government defined above, maybe it is best to have a CS for Belgium as it is currently constituted, but maybe it would (in some sense) be optimal to have a CD for Flanders, a CD for Wallonia, and a CS for Brussels. There will often be historical and practical limitations to the various S's that are real options, but it is another place where normative evaluation seems important, if not required.

Third, when defining S, what characteristics need to be taken into account? What factors might make a difference to legitimacy? I suggested racial, ethnic, religious, and linguistic factors; size and geographical factors; history of discrimination and/or violence and oppression; and so on. But we could include many more factors—total wealth, distribution of wealth, technology, natural resources, education, literacy rates, moral views, background prejudice, etc. One thing that seems clear is that which factors matter may differ depending on both the LP and the S under consideration. One probably will not be able to determine which factors are most important for any particular society from the armchair, although the PAR(3) can perhaps serve as a guide. Related to this, we must think about the interactions between LPs and S's. Some of the various features of S are not fixed characteristics, so we must think about the ways in which opting for some particular system may alter the S in question.

Fourth, it has been noted that "[i]n the latter part of the twentieth century . . . [constitutional] borrowing attained a new prominence," in part because "[i]n the wake of the cold war, an unusually large number of new constitutions were written over a relatively short period

of time, in circumstances that drew deliberately on world constitutional experiences."[23] Constitution making and constitutional borrowing has continued apace as Middle Eastern and North African countries such as Afghanistan, Iraq, Egypt, Tunisia, Libya, and others move toward democracy. The arguments in this article help to demonstrate why it is misguided and potentially dangerous to encourage a simplistic kind of constitutional or institutional borrowing.

Finally, Estlund notes that there is a danger that comes when political philosophers do philosophy with too much of an eye on practical constraints and considerations.[24] One concern seems to be that we will get our ideals wrong if we too quickly move to consider practical difficulties. One thing that the claims that I have argued for suggests is that, at least when evaluating and recommending particular constitutions and political institutions—a central task of political philosophy—it is a mistake to think that we can come up with ideal systems which we then use as our guiding light in making 'practically realizable' constitutions or political systems. Work in normative political philosophy can be done in assessing what the best or proper bases and grounds are for normative evaluation in the political context, but the work of recommending or rejecting particular kinds of political systems or institutions on legitimacy grounds must be done only with a robust understanding of local social problems and how the systems operate in particular societies. For example, one implication of this article is that there is no conceptual, a priori relationship between certain forms of constitutional democracy and political legitimacy. Making good on the political functionalist project requires paying attention to actual sociopolitical context.

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[23] Barry Friedman & Cheryl Saunders, *Symposium: Constitutional Borrowing: Editors' introduction*, I-CON, Vol. 1 (2003), p. 178
[24] Estlund, Democratic Authority.