

---

**Political Utopias**

CONTEMPORARY DEBATES

*Edited by* **KEVIN VALLIER AND MICHAEL WEBER**

**OXFORD**  
UNIVERSITY PRESS

**OXFORD**  
UNIVERSITY PRESS

Oxford University Press is a department of the University of Oxford. It furthers the University's objective of excellence in research, scholarship, and education by publishing worldwide. Oxford is a registered trade mark of Oxford University Press in the UK and certain other countries.

Published in the United States of America by Oxford University Press  
198 Madison Avenue, New York, NY 10016, United States of America.

© Oxford University Press 2017

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, without the prior permission in writing of Oxford University Press, or as expressly permitted by law, by license, or under terms agreed with the appropriate reproduction rights organization. Inquiries concerning reproduction outside the scope of the above should be sent to the Rights Department, Oxford University Press, at the address above.

You must not circulate this work in any other form  
and you must impose this same condition on any acquirer.

CIP data is on file at the Library of Congress  
ISBN 978-0-19-028060-4 (pbk); ISBN 978-0-19-028059-8 (hbk)

9 8 7 6 5 4 3 2 1

Paperback printed by Webcom, Inc., Canada  
Hardback printed by Bridgeport National Bindery, Inc., United States of America

## CONTENTS

- List of Contributors vii
- Introduction 1  
*Kevin Vallier and Michael Weber*
- 1 On the Messy "Utopophobia vs. Factophobia"  
Controversy: A Systematization and  
Assessment 11  
*Laura Valentini*
- 2 Prime Justice 35  
*David Estlund*
- 3 Can Nonideal Theories of Justice Guide Action? 57  
*Robert B. Talisse*
- 4 Why Public Reasoning Involves Ideal  
Theorizing 73  
*Blain Neufeld*
- 5 Justice and Feasibility: A Dynamic Approach 95  
*Pablo Gilibert*
- 6 Political Functionalism and the Importance of  
Social Facts 127  
*Alexander Guerrero*
- 7 Will the Real Principles of Justice Please  
Stand Up? 151  
*David Wiens*

- Rawls, John. 1999. *A Theory of Justice*. Rev. ed. Cambridge, MA: Harvard University Press.
- Rawls, John. 2001. *Justice as Fairness: A Restatement*. Cambridge, MA: Harvard University Press.
- Roemer, John. 1994. *A Future for Socialism*. Harvard, MA: Harvard University Press.
- Scanlon, T. M. 2003. "Rawls and Justification." In *The Cambridge Companion to Rawls*, edited by Samuel Freeman, 139–67. Cambridge: Cambridge University Press.
- Sen, Amartya. 2009. *The Idea of Justice*. Cambridge, MA: Harvard University Press.
- Southwood, Nicholas. 2016. "The Thing To Do" Implies "Can." *Nósis* 50: 61–72.
- Swift, Adam. 2008. "The Value of Philosophy in Nonideal Circumstances." *Social Theory and Practice* 34: 363–87.
- Temkin, Larry. 2009. "Illuminating Egalitarianism." In *Contemporary Debates in Political Philosophy*, edited by Thomas Christiano and John Christman, 155–78. Oxford: Blackwell.
- Valentini, Laura. 2012. "Ideal vs. Nonideal Theory: A Conceptual Map." *Philosophy Compass* 9: 654–64.
- Vetter, Barbara. 2013. "'Can' without Possible Worlds: Semantics for Anti-Humans." *Philosophers' Imprint* 13 (16).
- Vranas, Peter. 2007. "I Ought, Therefore I Can." *Philosophical Studies* 136: 167–216.
- Wiens, David. 2015. "Political Ideals and the Feasibility Frontier." *Economics and Philosophy* 31: 447–77.
- Wolf, Jonathan. 1998. "Fairness, Respect, and the Egalitarian Ethos." *Philosophy and Public Affairs* 27: 97–122.
- Wright, Erik. 2010. *Envisioning Real Utopias*. London: Verso.

## 6 | Political Functionalism and the Importance of Social Facts

ALEXANDER GUERRERO

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.<sup>1</sup> 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

<sup>1</sup> For relevant examples, see David Estlund, "Human Nature and the Limits (If Any) of Political Philosophy," *Philosophy & Public Affairs* 39, no. 3 (2011): 207–37; Charles W. Mills, "'Ideal Theory' as Ideology," *Hypatia* 20, no. 3 (2005): 165–83; Ingrid Robeyns, "Ideal Theory in Theory and Practice," *Social Theory and Practice* 34, no. 3 (2008): 341–62; A. John Simmons, "Ideal and Nonideal Theory," *Philosophy & Public Affairs* 38, no. 1 (2010): 5–36; Zofia Stempłowska, "What's Ideal about Ideal Theory?," *Social Theory and Practice* 34, no. 3 (2008): 319–40; Laura Valentini, "Ideal vs. Non-ideal Theory: A Conceptual Map," *Philosophy Compass* 7, no. 9 (2012): 654–64.

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 philosophy. And indeed people have.<sup>2</sup> 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 (artificial, 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 is perhaps the central point of this paper.

**THEORETICAL FUNCTIONALISM** sets out several different tasks for political philosophy.<sup>3</sup> 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 among 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, and 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 among these questions. In particular, I want to deny that one 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 is 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

<sup>2</sup> John Dunn, for example, writes, “The 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], 193).

<sup>3</sup> 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.

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, this makes evident the role for Concepts of Political Morality:

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

- (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
- (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—become 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 troubles they get into when they live among 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.<sup>4</sup>

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

<sup>4</sup> See Estlund, “Human Nature.”

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 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 US system legitimate?

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

The next sections of the article present and defend 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 that 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.<sup>5</sup>

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 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  $\{E_1, E_2, E_3 \dots E_n\}$ ), 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 are these: 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,<sup>6</sup> facts about the extent to which these differences are "persistent markers of political identity as well as

<sup>5</sup> 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 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 are not important for the argument here.

<sup>6</sup> The term "segmental cleavage" is best known from Arendt Lijphart, *Democracy in Plural Societies* (New Haven: Yale University Press, 1977).

bases for political mobilization"; 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 shortcuts 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.<sup>8</sup> 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 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 that 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.<sup>9</sup> 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

<sup>7</sup> Sujit Choudhry, "Constitutionalism in Divided Societies," *L·CON* 5 (2007): 573.

<sup>8</sup> See, for example, Richard Ameson, "Defending the Purely Instrumental Account of Democratic Authority," *Journal of Political Philosophy* 11, no. 1 (2003): 122–32.

<sup>9</sup> 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.

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."<sup>10</sup> Many have defended the view that various democratic elements, particularly elections, are universally required by norms of political legitimacy.<sup>11</sup> 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.<sup>12</sup>

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 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,

<sup>10</sup> Ronald Dworkin, "Constitutionalism and Democracy," *European Journal of Philosophy* 3 (1997): 2–11.

<sup>11</sup> Others have made related claims that various democratic components are required by the relative normative concern of justice. See John Rawls, *A Theory of Justice*, rev. ed. (Cambridge: Harvard University Press, 1999), 194.

<sup>12</sup> 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* 31 (2003): 211–45.

Iraq, Afghanistan, India, Sri Lanka, and others.<sup>13</sup> Others have discussed how the strong independent executive model typified by the US system might actually be dangerous in developing societies or societies with a history of centralized, authoritarian rule,<sup>14</sup> or how mass democratic institutions may lead to violence if certain surrounding institutions are not present.<sup>15</sup>

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 US case—may lead to possible misunderstandings regarding what actually makes the system work well.<sup>16</sup> The question to ask is not, Do you have this particular element (e.g., a bill of rights with, say, a right to be free from cruel punishment)? Rather, it is, 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 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 ‘legitimizing’ 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 1,000-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 will not 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 will not adjudicate among 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

<sup>13</sup> Chaudhry “Constitutionalism in Divided Societies,” 573.

<sup>14</sup> See Bruce Ackerman, “The New Separation of Powers,” *Harvard Law Review* 113 (2000): 633.

<sup>15</sup> See Edward D. Mansfield and Jack Snyder, *Electing to Fight: Why Emerging Democracies Go to War* (Cambridge: MIT Press, 2005).

<sup>16</sup> See, e.g., Steven G. Calabresi, “An Agenda for Constitutional Reform,” in *Constitutional Stipulations, Constitutional Tragedies*, ed. William Eskridge and Sanford Levinson (New York: New York University Press, 1998), in which Calabresi asserts that “the [United States] Federalist Constitution has proved to be a brilliant success, which military 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” (22).