

A Leap into Darkness: Domination and The Normative Structure of International Politics

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Abstract

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Philosophers have developed sophisticated theories of domestic legitimacy that discuss how a coercive state could be justified to its citizens. Yet, theorizing about global justice is characterized by a pervasive methodological failure: principles of justice are presented without any consideration of whether the current (or any) international regime may legitimately enforce them. The dissertation responds to this failure by, first, presenting and defending a particular account of legitimate political authority founded on the elimination of domination through the provision of a lawful, constitutional order. Next, the dissertation applies this account to the current coercive structure of international politics, showing it to be substantially characterized by dominating exercises of power. Then, proposals for the reform of international politics are evaluated in light of the value of non-domination: the Kantian foedus pacificum, John Rawls's Society of Peoples, the world state, and networked sub-, supra-, and transnational global governance institutions. In each case, the proposed reforms fail to create the conditions for the legitimate exercise of power free from

domination or they are pathway infeasible. That is, the appropriate reforms cannot be instituted without also undermining the currently just relations between members of legitimate states. The final chapter of the dissertation argues that the creation of new, non-dominating institutions will require revolutionary action where those who wish to change the system may find that they must do wrong with the hope that, in the end, their 'leap into darkness' will be justified by the success of their reforms.

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Chapter One

§ The Necessity of the State: Political Authority and its Limits

"No one can build his security upon the nobleness of another person."

-Willa Cather

Introduction

The purpose of this dissertation is to determine whether it is possible for there to be genuinely legitimate political authority in international politics. The first step of that determination is to characterize and outline the general features a political agent ought to possess in order to rightfully issue commands and use force to execute them, and that is the goal of this chapter. I argue that coercive political authorities are morally justified in virtue of *how* (understood as the procedures by which they decide to coerce and the coercive means they adopt) they coerce as much as *why* they coerce (the goals or the ends of their action), and most contemporary accounts tend to focus on the latter at the expense of the former. This chapter has three sections. In the first section, I lay out—in broad outlines—the way in which legitimate authority must be responsive to the need to be exercised in a non-dominating fashion. In section two, I examine three influential accounts of legitimate political authority and show that they fail to take the normative complaint of *domination* sufficiently seriously. In the final section, I develop a critique of Pettit's account of freedom as non-domination in order to lay out a fuller account of political authority which sets—*prima facie*—the minimum institutional requirements for legitimate coercion.

Domination and the Problem of Legitimate Political Authority

The realm of the political is distinguished by the large scale production and deployment of coercive power. Unlike private associations such as a fan club or a church, even the comparatively mundane activities of political institutions involve coercion or invoke

the threat of it. Taxes are collected, regulations and contracts are enforced, currency is issued, people and property are seized, and borders are secured in virtue of the state's coercive capability. The state is defined--both theoretically and in terms of international law--as the institution that successfully claims a monopoly on the legitimate exercise of force¹. Modern states deeply influence the distribution of wealth and economic opportunity, structure our social lives, and regulate the most intimate and basic of human activities. Some states even have the power to end all life on earth, and unlike previous political institutions, modern states lack significant internal rivals capable of resisting their power². As a result, they claim to be not only *an* executor and guarantor of the rights of their citizens but to be the only appropriate one. The modern state further demands that it be the supreme and final arbiter of disputes between its citizens. The state, taken in its entirety, is legislator, executive, and judge. Finally, the modern state wields these powers in the name of its citizens, claiming to speak for, represent, and express the will of its constituents. What's more, the modern state claims the right to be the *authority of last resort*. While the constitution of a state might make it possible for various decisions to be *revisited*, the state claims the right to make final determinations and set the terms of any possible revision. That is, the state claims *sovereignty*

¹ This claim even extends to that of self-defense, as the state claims the authority to determine, adjudicate, and determine the conditions where a private citizen may 'legitimately' use private power in self-defense. Of course, the state's claim may be unjustified, but the state claims--at least in principle--the right to determine how and why a private citizen may use power, even in self-defense. I thank Bill Talbott for asking about self-defense.

² This is in sharp contrast to feudal polities where ostensibly private individuals often possessed considerable military, taxing, and judicial power. Perhaps the most explicit physical manifestation of this independent power was the castle of a great baron, earl, or duke that immunized him from most royal interference. Modern, centralized *national* states do not contain such political rivals. For example, England essentially ended its feudal political arrangements when Henry VII could decree—and enforce—the banning of private 'affinities' or armies that had hitherto been the source of the dynastic Wars of the Roses. Of course, modern interest groups may be quite powerful and influential in their own right, but they use this influence to *capture* the institutions of a well-functioning modern state, not *defy* them. On the success of the modern state in displacing ancient and feudal political systems and the key role that the capitalization of warfare played in this development, see Tilly (1990) and McNeil (1984).

over its citizenry, the right to be the final adjudicator, legislator, and executive within the territory and to act in the name of its citizenry. For the sake of simplicity, I will call this collection of claims, powers, and rights the *political authority* of the state. To claim political authority is a normative act, it is to say that one rightfully make rules, deliver sanctions, and make binding, final rulings. Thus, the following question arises: what must be true of a state so that it can justly claim such authority over its citizenry?

Generally speaking, we take coercion and coercive authority to be an especially serious threat to one's freedom. It is easy to see why this should be so: one cannot be the author of one's own life, deciding how one should live, if other people are in a position to force you to do what they wish. Whether it comes under the guise of the highwayman, the slaveowner, the tyrannical patriarch, or the despot, the paradigmatic cases of unfreedom involve being subject to people who use force--or the threat of force--to shape the choices available to the victim. And, yet, this is precisely what the modern state does, shaping the choices of its citizens and structuring their interactions through the targeted deployment and exercise of coercive threats. So, the question becomes, "How--if it can be done at all--can the coercive authority of the modern state be made consistent with the freedom and autonomy of its citizens?" I take this to be the problem of *rightful* or *legitimate political authority* and it has exercised political theorists since the first modern states appeared.³

If we look at the paradigmatic examples of normatively problematic political and social relationships—slave and master, despot and subject, patriarch and subordinate wife—they have in common that one party dominates another, and there is a long history of opposing domination and freedom. Domination is used to describe a variety of situations,

³ See Ripstein (2004) for the difference between this kind of political authority and the philosophically dominant conception.

not all of which are politically relevant. For example, a particular action is ‘strategically dominant’ in game theory when it gets the best results regardless of the actions of one’s opponent. A poker hand ‘dominates’ another when the odds are overwhelming that it will win compared to the other. Max Weber uses ‘domination’ to describe the sheer probability that one’s commands will be followed. Yet, essentially all uses of domination make reference to being in a superior position. The concept of domination that will be useful for this project is one that builds on this core idea in order to develop a specific normative complaint. So, in what follows, I want to argue that ‘domination’ is always at least *pro tanto* wrong. To claim that one is being dominated to is to claim that one is being subject to a particular kind of injustice and that one is suffering from a particular political failure, and this is opposed to those theorists who use ‘domination’ and other political concepts like ‘oppression’ interchangeably. There are other ways that political and social institutions may fail, so a non-dominating state may nonetheless not be fully just. It is, however, the case that we usually (and, I wish to eventually show, rightfully) take domination to be a serious injustice and that the adequate protection of citizenry from it is a necessary component of rightful political authority.

To be dominated is to be subject to the arbitrary superior power of another. The person with arbitrary, superior power is in a position to easily interfere, block, and redirect the choices available and made by the weaker party. They are in a position to costlessly—or nigh-costlessly—coerce (or make credible threats to coerce) in order to get the weaker to serve the stronger. In other words, someone is dominated—and thereby unfree—when one is *subject* to the whims of the *dominus*⁴ who may structure the choices available to the

⁴ *Dominus* is the term I will sometimes use to refer to a person who is in a position to dominate. It is latin for ‘master’ and was used to describe the head of the household, possessor of authority to punish, banish, or reward at his whim.

dominated without accountability or being responsive to those subject to it. In the limit case of domination, the will of the powerless is essentially replaced by the will of the *dominus*:

Suppose that an agent can interfere with the life of another more or less at will: they can just as their own whim or judgment leads them; they can act at their pleasure. Suppose, moreover, that the agent is subject to no particular difficulty or cost in exercising their capacity to interfere with someone: there is no prospect, for example, of suffering retaliation. And suppose, finally, that the interference in question is the most effective available: it can remove any options that the agent does not like or it can impose unbearable costs on the person's choice of those options. Such an agent will enjoy an absolute power of arbitrary interference over that person. The only brake on the interference that they can inflict is the brake of their own untrammelled choice or their own unchecked judgment, their own *arbitrium*.⁵

And in this description we can see many of the paradigm cases of political injustice. Sulla, a tyrant of republican Rome, could prescribe, dispossess, and execute any citizen that he wished. Antebellum slaveowners in the United States had human beings at their beck and call, who could only resist in comparatively minor ways. Overseers could coerce and threaten as they wanted; slaveowners could command sexual assault, destroy families, and order whippings as they saw fit. Similarly, for much of the history of urbanized civilization, women only had legal and social status in relation to their fathers and husbands, were unable to own property, and, in many cases, even leave the home. Such mechanisms of social control gave men considerable power over women, who were systematically excluded from positions of power and influence, leaving them vulnerable to the whims of men. So, to be subject to *arbitrary* superior power is, at first glance, is to be under the power who can easily (cheaply, in terms of their own interests) determine your choices and life chances as they wish.

But surely *domination* is not the only thing wrong with patriarchy, slavery, and political despotism. Slavery and despotism depend upon routine rights violations; people are whipped, beaten, and killed. Why should we focus on the *power relations* rather than the rights

⁵ Pettit (1997), page 57

violations? If the *interference* is morally wrong, then why should concentrate our analysis on the *capacity* to interfere that characterizes the position of the *dominus*? The answer is that a focus on the specific acts of interference that often characterize despotic political regimes will fail to detect the full wrongness of those interactions. After all, most despotisms do not operate by constant interference and direct coercion; most people follow the rules and the commands of the powerful because they know they would be coerced *if* they disobeyed. A focus purely on actual acts of interference and not on capacities will vastly underestimate the extent to which superior, unchecked power makes people unfree. Even more perniciously, a focus on ‘direct’ rights violations will lead us to ignore or underestimate the *preference-adaptation* effect of superior power. Some people obey the powerful because they are actively being intervened upon, some wish to disobey but are afraid of being interfered with if they do, and some obey because the relations of domination have inculcated a disposition of servility in those subject to it.⁶ This kind of preference adaptation may be a perfectly reasonable negotiation of the dominating social relation, so I don’t wish to morally criticize those who develop the disposition. I do want to suggest that this disposition represents a morally important constraining of their autonomy and any account of legitimate political authority must be responsive to. So, one reason to take domination as to be a serious *pro tanto* wrong is that doing so captures the influence that power has upon the freedom or autonomy of those subject to it beyond the effects of the exercises of that power.

Domination occurs when one person is subject to the arbitrary superior power of another person. Two things are important here. First, being *subject* to an arbitrary authority does not require that one be interfered with by that authority. It is a conditional notion: a courtier is subject to the king because *if* the king had the slightest desire to dispossess or

⁶ Pettit (1997), pages 60-61

abuse the courtier, it *would* happen. Of course, the courtier *may* be a court favorite and the placated king may shower her with lands and gifts but that hardly changes the power dynamic between the two individuals. The point is that arbitrariness is a not function of the content, goal or result or the force exercised, but rather about relations of accountability and responsiveness between the agents. Let's explore the concept by looking at a few comparatively abstract examples:

- 1) **Red Button One:** Members of a community must return to a fortified apartment complex each evening after working the fields. Above the living area, in a completely separate, impenetrable, and self-sustaining office, a person is set before a red button that can unlock the only doorway out of the main living areas, which locks automatically every evening. Every day the button-pusher conscientiously presses the button for every person as they leave and as they return.
- 2) **Red Button Two:** Same as Red Button One, but the button-pusher has gotten bored and now requires that every person dance for him before he will allow them to leave.
- 3) **Red Button Three:** Same as Red Button One, except this time the button-pusher rightfully sees that the people in the community would see their quality of lives improve with some exercise. So, he requires that each person do some strenuous calisthenics. He does so because he wishes to increase the health and happiness of the people of the community and he picks fairly effective means for doing so.

The key thing to realize is that Red Buttons One through Three are *all* examples of domination, since they all express relations of arbitrary power, and I would submit that we all take those scenarios to be morally non-ideal.⁷ What they show is a continuum as to how benevolent that domination ends up being. Red Button Two is an unproblematic example of a constraint on individual freedom. The button-pusher issues a threat: he will trap them in the building (a building they must return to) unless they do as he wishes. In structural terms,

⁷ I hope to convince you of this by referring to the examples, the problematic relationship of unilateral power of decision and autonomy, and, finally, the need to capture the way in which power adapts preferences even without interference. However, if you remain unconvinced, then you can take the rest of the dissertation to be conditional. *If* you take domination, as I have described it, to be a serious political wrong, then this leads to significant implications for the legitimacy of both current and imagined global political orders.

Red Button Three is essentially the same constraint (the body movements might not even be all that different) but the button-pusher is using his unchecked and arbitrary power to force people to do something beneficial. This might make the unfreedom more *palatable*, but the condition still holds: whether we are in Two or Three is entirely at the discretion of the button-pusher. It is Red Button One which really makes the difference here. If we are so concerned about someone being able to *issue* threats on the basis of their particular whims--no matter how benevolent those whims might be--then it should *remain* worrisome when a person *refrains* from issuing a threat at all based upon their particular whims. In other words, the domination theorist will suggest that not only being subject to an effective threat that can be easily made good restrains one's freedom but also that being subject to a person who *could* make those threats constrains one's freedom. In Red Button One, there is no threat and individuals are not interfered with, but the condition still holds: the lack of a threat remains at the discretion of the button-pusher. In each case, there is nothing that *requires* that the button-pusher be responsive to the interests of the community and, consequently, no genuine accountability.

If the above analysis is plausible, then it follows that an individual with unchecked power *necessarily* dominates regardless of how that power is used. Non-arbitrary power is accountable power while arbitrary power is not. So, imagine a slightly different case:

Red Button Four: The button-pusher, who scans for danger, lives in a watch-tower and is tasked with unlocking the door only when it is safe. However, the community has a teleporter that allows, with suitable deliberation and the vote of the group, them to replace the button-pusher.

It seems clear that the apartment community is much freer, politically speaking, in Red Button Four as opposed to Red Button One, and the reason is that the power of the button-pushers plays a clear role in the community's common good while nonetheless being responsive to those upon whom that power is exercised. The power of the button-pusher in

Four is constrained by external forces in ways qualitatively different from One, Two, and Three. And this is precisely why the button-pusher would not act as he does in Two and would only act in Three if the community consented; they can remove him if he does a poor job or abuses his position. In other words, there is a structural feature of the political order that enables the community to prevent the person with superior power from merely acting on a whim. The button-pushers are *accountable* to the group over which they wield power in a way that goes beyond whether they are inclined to behave virtuously. If they aren't accountable, then they may be a nice tyrant or a despotic one, but tyrants are morally problematic no matter how nice they may be.⁸

But why focus on domination when it looks like the truly egregious cases appear to be Red Button Two and Red Button Three? But both Two and Three involve genuine threats and interference, so why not simply say that rights of community members were violated by the interference of the button-pusher? The reason to focus on domination is that the very relation of domination can implicitly direct and control an individual even without interference. In other words, domination can detect the wrongness of direct rights violations *and* the kind of relationship and preference adaptation whereby superior power achieves obedience without interference. Let us look at an example:

THE NICE SLAVEOWNER: Emma has enslaved Harriet. As a result, Harriet, whenever and however she acts, must ask Emma for permission. However, Emma is embarrassed and uncomfortable with her "rights" over Harriet. Emma has complete power over Harriet yet *chooses* never to exercise it due to that discomfort. Harriet generally lives her life as she would if she wasn't enslaved. In fact, given the material splendor that living with Emma affords Harriet, she is able to pursue options that would not have been

⁸ Pettit (2012) has, more recently, re-interpreted this point in the following way: freedom involves having *equal control* over how coercion is being deployed. If the deliberations over the replacement of the button-pusher exhibit fair equality of political liberty, then the equal control condition is met. Since we can control the button-pusher in his exercise of coercion over all of us, then we remain free even while subject to superior power.

available to her as a free woman. Harriet does not wish to upset the current dynamic, so she *chooses* to do the relevant chores.

Emma has a superior position over Harriet; she possesses greater power in virtue of a complex combination of political position, legal status, and social standing with regard to Harriet. Furthermore, this superior power is arbitrary in that there are no agents, institutional structures, or incentives that might reliably constrain Emma's use of power over Harriet, and Harriet has no reliable mechanism of making Emma accountable to her. Of course, Emma might have a particular desire or whim that could lead regularly to Emma taking Harriet's interests fairly seriously, (she may even be quite virtuous given the context) but there is a deep and abiding sense where it is up to Emma how she treats Harriet. Emma may constrain Harriet's rights and life chances at her whim and may structure Harriet's life such that she needs to serve Emma's interests instead or ahead of her own. What's more, Emma's *mere* possession of arbitrary, superior power is enough to change the relationship between Emma and Harriet even if that power is never exercised; Emma need not actively force Harriet to perform her chores in order for Harriet's autonomy to be significantly constrained. After all, Harriet may shape her behavior and adapt her preferences so that she not only performs her duties without any force needed, but she may actually come to *enjoy* or *prefer* her subordinate position when asked. Despite those preferences, Harriet remains unfree because she remains subject to the arbitrary authority of Harriet whether or not Harriet actually issues any meaningful threats. Finally, I take the relationship between Emma and Harriet to be deeply unjust and that any state that permitted or actively supported it would fatally undermine its claim to rightfully exercise coercion over its citizenry.

Domination, then, has several important features. First, it is *relational* as the concept of domination is applicable only when agents are related in a quite specific way: domination occurs only when one agent or agents possess superior, arbitrary power over other agents.

Second, domination—as a moral complaint—is aimed at the relation itself: domination remains a morally problematic relationship regardless of the ends to which dominating power is put. More specifically, domination is *always* a *pro tanto* wrong⁹. Of course, some dominating relationships can be fairly benign and others particularly vicious. Perhaps Emma will grant Harriet a great deal of autonomy and treat her fairly well, but this does not make the relationship between them less dominating. It is, of course, better to be under the heel of a gentle rather than a cruel tyrant, but no one should be under anyone’s heel. Relatedly, one can be treated with supreme indifference—as serfs normally are by their kings—by the dominating power and remain dominated. Domination is a feature of a relationship, but this relation is characterized by the capacity to structure another’s choices arbitrarily; actual coercion, attention, or interference is unnecessary. As a consequence, domination-oriented analysis can make sense of the way in which both dominator and dominated can be warped by the very possibility that the superior force will be used. The dominated often comes to have an attitude of sycophancy or servility as they adapt to the social relationship, quite reasonably shaping their lives and aspirations so that they are coerced relatively infrequently. Further, dominators frequently come to be arrogant and paternalistic, taking the servile

⁹ That is, we should always act to minimize or eliminate domination as far as we are able, and we should treat the domination we are temporarily unable to alleviate to be a significant wrong to be rectified in the future if possible. John Nolt, for example, has rejected the claim that all forms of domination are problematic. He presents two examples: the Nuremberg War Crimes Tribunal and a parent’s relation to their children. The first example concerns international justice and will be considered later. The second example fails as a counterexample for two reasons. First, domination is a threat to autonomy but children do not have fully developed capacities for autonomous action, so it would not be surprising if domination operated a bit differently in that context. Second, domination *is* problematic in the child-parent relation. And as Kant has argued (*MM* 6:281-282), this is *precisely* why modern states must have family law and child welfare services; parents are not allowed to possess unchecked power over their children. To consider another example: a legitimate state is justified in regulating self-defense because subjecting my rights to your private judgment about whether self-defense is justified is, itself, a kind of domination. But this domination can be resolved if the state, satisfying the conditions below, sets the right sorts of constraints on one’s exercise of private power in self-defense.

acceptance of their privilege as their natural right or as consent of the oppressed. Third, domination—especially in its more pernicious and inescapable forms—is usually both ‘structural’ and ‘social.’ We might be able, barely, to imagine asocial and strictly interpersonal cases of domination whereby one possesses arbitrary power simply in virtue of one’s superior strength or intelligence, but these forms of domination are—for reasons that that Hobbes¹⁰ has ably demonstrated—notoriously unstable and almost never, if ever, populate our social world. Rather, the stable instances of domination that occur in our world depend upon social sources of superior power. Emma need not be trained in martial arts to be in a superior position with regards to Harriet. Rather, Emma can take advantage of her legal status to command assistance from the state, her wealth to hire overseers, and a social matrix of privilege to ensure that Harriet has no real option but to serve her interests.

Domination and non-domination are intimately linked to the state’s legitimate coercive authority because they are inextricably linked to power. After all, the *dominus* has superior power, in virtue of physical strength or social position, and may wield that power arbitrarily and unaccountably over her subordinate. The modern state—with its articulated bureaucracy and specially trained and equipped enforcement agents—possesses overwhelming power over any particular citizen¹¹. The legitimacy of that power depends, at least in part, on whether that power can be deployed in a non-dominating fashion. This issue is particularly pressing, since many of the paradigmatic instances of injustice we’ve discussed are either direct instances of political domination (despotism, imperialism) or indirectly depend on the power of the state as a major support structure (slavery, patriarchy).

¹⁰ Hobbes (2002), pages 93-95

¹¹ Of course, some states are sufficiently dysfunctional that an individual can come to have a private army that challenges the state (e.g. Sudan or Somalia) but this is seen as a kind of state failure to monopolize the legitimate use of force in its territory. It works against the state’s claim of sovereignty and, in the limit case, it indicates that the state no longer exists. And, equally obviously, there are many states that have been captured by powerful interests and essentially act as their tool (e.g. Russian kleptocrats), but this is not contrary to the point that that tool is uniquely powerful.

The rest of this chapter is dedicated to describing the various ways in which the power of the modern state can and ought to be structured, checked, and directed such that its claim to coercive authority can be legitimate in light of the necessity of non-domination for genuine freedom. In the process, I shall examine some influential contemporary accounts of legitimacy and argue that they systematically fail to take the threat of domination sufficiently seriously. As a consequence, they do not provide plausible accounts of legitimate political authority. This is especially true when we think of political authority in terms of *power* and not simply in terms of the issuance of morally binding rules. After diagnosing the central problem of mainstream contemporary accounts, I then turn to two accounts of legitimate political authority that have domination as a central concept: neo-republicanism and Kantian-republicanism. These two views begin with fundamentally quite different accounts of domination and the nature of the moral wrong it represents, but they do form a strong consensus on how a state might be institutionally structured so that it wields power non-arbitrarily.

Domination and Contemporary Accounts of Legitimacy

The value of non-domination provides a perspective that is radically different from most contemporary theorizing. In this section, I lay out two influential and contemporary theoretical perspectives and show that they are unresponsive to the moral requirement that political power be non-dominating. In particular, I will argue that A. John Simmons' Lockean account of legitimacy, which I call *voluntarism* in virtue of its reliance on consent, and the human rights based accounts of legitimacy of Allen Buchanan and Kit Wellman, which I call *instrumentalism* due to its focus on the ends or the results of political action, *fail* to justify the exercise of coercive political power by the state.

Voluntarism

Despite its inadequacy, voluntarism is a view with a venerable political history. In fact, voluntarism has become so closely connected with the legitimation of political authority that they are often treated as synonyms. Allen Buchanan, for example, has concluded that there could be no such thing as robust political authority because voluntarism fails.¹² The fundamental motivating conceit of voluntarism is that the right to govern depends upon the consent of the governed. So, for the purposes of our analysis, voluntarism is the claim that the coercive political authority is derived, in some way, from the citizenry agreeing or granting that authority to a corporate agent. A John. Simmons has developed the most sophisticated contemporary voluntarist account, and it is to his view we now turn.

Simmons begins his analysis with an important distinction between the justification and the legitimacy of a state. He writes:

...the general quality or virtues of a state (i.e., those features of it appealed to in its justification) are one thing; the nature of its rights over any particular subject (i.e., that in which its legitimacy with respect to that subject consists) are quite another thing. The legitimacy of a state with respect to you and the state's other moral qualities are simply independent variables, in the same way that the right of some business to provide services to you and to bill you for them is independent of that business's efficiency or generosity or usefulness.¹³

The justification of the state is a theory about what makes it good for individuals to be subject to them. For example, we might think that the fact that a state maximizes utility as compared to living in the state of nature is a moral reason in its favor. But the *legitimacy* of the state is a stronger claim. It consists in a collection of rights and permissions that constitute the state's claim to have authority over any particular citizen. One of the key insights of Simmons' voluntarism--and one that similarly motivates this dissertation--is that justification and legitimacy can come apart. In fact, this can happen in a couple ways. First, it

¹² Buchanan (2004), page 240

¹³ Simmons (2001), page 136

might very well be the case that the benefits of living under a coordinated system of laws is so great that living under even a comparatively unjust state is morally superior to living without a state at all, but the mere fact that a particular political order is better—in terms of welfare—than no state does not grant that the illegitimate state the power to command me. I cannot be ordered around simply because it would be a good idea for me to follow those orders. I may decide to follow that a rule, but that is not quite the same thing as being obligated to follow the rule *in virtue* of the fact that it has been commanded, still less is it the same thing as being in a position to be justly *punished* if I refuse to obey. We can think of many relationships that motivate actions that may be morally justified (or even required) but nonetheless lack this right to command and to punish. A corporation may offer a truly excellent product, but it has no authority to command me to purchase it. My significant other and I may agree to be monogamous, but I can't be forced to remain faithful.¹⁴ We might call this the *authority challenge*: In other words, what needs to be true about a political authority so that it may rightfully coerce its subjects if the paternalistic justification (the command is good for me) is insufficient? Second, we have the *particularity challenge*. Moral justifications for the state don't seem responsive to particular relations of command and

¹⁴ If my partner threatens to leave me if I am unfaithful, is that a kind of coercion, punishment, or threat of force? I do not think so. Rather, my partner is setting the conditions on her participation in a particular kind of relationship which I can accept or reject. Furthermore, while my partner can increase the costs of my behavior, she can only do so in the *context of our commitment to a mutual relationship*. The state, on the other hand, coerces in both broader and more robust ways, raising costs by directly threatening my person or property entitlements. This captures the intuitive sense that my partner can make induce me to behave by making my life *unpleasant*—especially if I am committed to the relationship—but it would be wrong if either the state or my partner *forced* me to remain faithful by threatening my person or my freedom. Finally, intimate relationships might make lives go well, but they are not necessary for autonomous functioning in the way that entitlements to my person and property are. But there are cases where coercion *does* exist within a relationship, such as those described by Okin (1991) when discussing the need to for equitable divorce law. Getting someone to change their behavior by threatening to leave is not coercion, but keeping someone from leaving through the monopolization of economic resources within a relationship definitely is. The former is a question for interpersonal ethics; the latter is a question of social justice.

subordination. For example, if I have some obligation to obey a state because it adequately protects human rights, then this obligation applies equally as well to the French government as my own. However, this seems to ignore that the special and particular relationship of command and authority that obtains between the US and myself. France might be just as important or more important when it comes to adequately protecting human rights, but it has no authority over me. According to Simmons, something needs to fill the gap between the moral justification of the state and its authority to command particular people to do particular things. The consent of the person governed to the authority of a particular state fills that gap, just as the consent of the consumer to purchase the excellent product at that particular time gives the corporation an authoritative claim over the person who purchased it.

The right to punish and sanction those who refuse to follow the prescriptions of the state is a consequence of the possession of legitimate authority. The distinction between justification and authority does mean that a state can be imperfectly just and still possess coercive authority as long as its citizens consented. Furthermore, a state may offer fairly extensive moral benefits—in terms of welfare or protection of human rights—and still, strictly speaking, lack the right to make coercively binding commands if the citizenry subject to them has not consented. In fact, the latter condition is how Simmons describes the vast majority of people the vast majority of the time. Since almost nobody is today in a position to meaningfully consent, individuals are morally obligated to follow the laws of the state only insofar as that obedience is required by other moral duties. For example, the Nazi regime had laws against committing murder, so German citizens ought to have done what those laws required, but that is simply because we have an antecedent duty to not murder people; the fact that the Nazi state prohibited the activity ought to play no normative role in our

deliberations, except insofar as the likelihood of even illegitimate punishment might provide one with additional reason not to murder.

How does the legitimation of coercive power work on the Simmons-voluntarist view? And why is it that only consent can confer that legitimation on a state? The important move is Lockean: the state is an artificial imposition on a pre-governmental moral baseline that can be characterized *fully* without any reference to social and political institutions. In the state of nature, individuals are empowered themselves to enforce their rights and others. This right, dubbed the *natural executive right* (NER), allows individuals to exercise their own judgment and deploy whatever force they happen to have to protect their entitlements--and the entitlements of others--from transgression. The state is created when individuals consensually alienate or forfeit their NER to an artificial polity. Why do individuals in the state of nature choose to alienate their NER to this new corporate agent? The answer lies in the *justification* of the state, which relies on the problems and difficulties of the 'natural' enforcement of rights through private judgment. These problems are taken from Locke; correspond to the executive, legislative, and judicial powers of the modern state as described earlier; and are quite serious. First, individuals will disagree concerning the nature and extent of their pre-political moral entitlements, and even individuals of good faith will tend to resolve these disagreements in their favor. Second, individuals naturally tend to over-punish wrongs done against them and to under-punish (or to demand under-punishment) of the wrong they themselves perform. Third, a system of private, bilateral (that is, one person uses their NER to punish another person) punishment and enforcement is subject to various executive failings. There will be failures of coordination, where two individuals punish at cross-purposes, and there will be failures of capacity: it's likely that private individuals will not be well placed to punish other private individuals under certain circumstances. The state

then offers various legislative, judicial, and executive virtues as an inducement for citizens in the state of nature to offer up their NER in a social contract which legitimates the political authority the state has over its citizenry. The legislature provides public specification of coordinated entitlements, the judiciary provides impartial dispute resolution, and the executive provides reliable enforcement of the laws. The requirement that the citizenry consent to the authority of the state provides a significant check on state power, as it is implausible that citizens will long consent to tyrannical behavior or to a state that provided no mechanism of democratic accountability. The state's coercive authority is a function of the aggregate NER of its citizenry alienated to a single corporate agent. On the voluntarist view, the legitimate state can exercise political authority over the citizenry because those citizens have *agreed* to that political authority: citizens cannot complain about being coerced when they have granted the coercive authority its right to do so. Furthermore, this account also explains why the state has authority over its citizens, but not over the citizens of other states. The state has authority only over those that have alienated their rights to that agent, and foreigners¹⁵ have, almost definitionally, not done so.

Voluntarism has been immensely influential, and voluntarist idioms occur frequently throughout democratic theorizing. However, voluntarism is a deeply flawed understanding of political authority. The view is fundamentally predicated on two claims: individuals possess a NER and that NER needs to be alienated to the state in order for it to possess political authority. However, neither of these claims can ultimately be made consistent with the account of domination described in the first part of this chapter. The NER is derived

¹⁵ Setting aside non-refugee and non-trafficked foreigners who have visited the country voluntarily.

from a *rights forfeiture* account of the right to punish. According to Locke¹⁶, God has positively authorized and obligated human beings to preserve humankind, as defined by the preservation of each individual's suite of natural rights. These natural rights generally prevent persons from being coerced, but when someone commits the relevant moral transgression, they forfeit their rights against unilateral coercion and property acquisition. Setting aside the theological underpinnings, we get something like this: individuals have a general obligation to protect themselves and others, but this obligation is constrained by the 'natural rights' other people generally possess against violations of their persons and property, and individuals who commit a crime give up those rights. However, the rights forfeiture exposes the transgressor equally to all agents, so essentially every person is now in a position to justly punish the rights violator. Thus, the obligation to preserve mankind transmutes into a natural right to punish rights violators. What is needed, then, for the state to gain coercive authority is an explanation of how all of these individual rights come to be possessed—in the aggregate—by the corporate agent of the state. And according to Simmons and Locke, this can only be done if each person voluntarily alienates their rights.

There are several problems with this analysis. First, voluntarism presupposes a number of important features of the consensual alienation of the NER. To begin, much depends on the claim that violators 'forfeit' their right against being coerced or having their property expropriated. Yet, this claim is substantially under-described, and I will argue that there is no way that the NER can be plausibly constructed so that it respects the importance of non-domination while *simultaneously* playing the role the NER is supposed to play in

¹⁶ In Chapter Two of the Second Treatise, Locke (1988) argues that we are bound by the Law of Nature to preserve humankind by respecting the rights of all. We have those rights in virtue of our status as being created by God and the need to respect his creation. For a more secular reconceptualization of Locke's view, see Simmons (1994).

voluntaristic accounts of political authority. When one transgresses the rights of another, does one forfeit one's general right against being coerced or expropriated or did one forfeit one's right against being *unilaterally* and *arbitrarily* coerced or expropriated? If it is the former, then a rights violation exposes one to punishment *under suitable, non-arbitrary, and rightful circumstances*; if it the latter, then transgressors may be punished under essentially any circumstances. The nature of the forfeited right matters significantly.

Simmons comes closest to engaging this question when he discusses the following scenario: imagine a group of vicious gangsters that go around cutting the throats of random people. Now, further imagine that one of those who is killed is, unbeknownst to the gangsters, an unpunished murderer herself. It would appear that, on the rights forfeiture view, the gangsters have not violated the rights of the murderer, and this seems absurd. Simmons responds that that various moral considerations indicate that that what individuals have forfeited is a right against *respectful* punishment, but not against all possible inflictions of harm¹⁷. In order for the punishment to be rightful, it must be the case that the person is punishing for the *right reasons*. Simmons suggests that the gangsters do not punish in a way that respects the full moral status of the murderer; rightful punishment requires that you inflict harm on an individual *because* they committed a transgression. It is not enough that that a person happens to have committed a crime and happens to be harmed by someone; one needs to be inflicting harm *as* a punishment and needs to believe that punishment is appropriate. However, Simmons explicitly *rejects* the idea that respectful punishment includes procedural protections against being punished arbitrarily. All that is required is that the

¹⁷ I am assuming here that capital punishment can be, in principle, a rightful response to murder. If one does not think this, the example can be applied *mutatis mutandis* to whatever infliction of harm one feels is appropriate to the relevant crime. I think Jamie Mayerfeld for pointing this out.

person being punished actually committed the crime and that the person doing the punishment is doing it because the rights violator deserves it.

In short, Simmons requires that we adopt an interpretation of the rights forfeiture view where rights violators not only give up the right not to be punished, but they also give up their 'right' against being subject to arbitrary power because, as we say, the mere virtue of the person exercising the power is insufficient for non-arbitrariness. Simmons is saying, essentially, that as long as the punisher is like Red Button One--she does the right thing for the right reasons--then the power is exercised non-arbitrarily. But on the domination account, one cannot claim that the exercise of one's power is justified *simply* because you happen to get the right answer; it must be exercised by an authority that is relevantly accountable to those subject to it. Thus, procedural safeguards are inherently built into the notion of non-arbitrariness. In other words, one can be fully in the 'right' in the sense of punishing precisely the amount the crime might demand and, yet, fail to act justly if one fails to find oneself in a non-dominating political order. Consequently, Simmons appears to be placed in a fairly unstable position: a rights forfeiture theory that would countenance rightful punishment *by accident* would be unbearably unfair and arbitrary, but a rights forfeiture account that countenances arbitrary punishment is perfectly acceptable. Of course, Simmons could argue that dominating punishment is perfectly fine as long as the dominator *gets it right* and inflicts harm on the right person, but this is precisely the understanding of punishment he has earlier rejected. And it is far from obvious that one can take seriously the moral status of a free and equal person while similarly asserting that a transgression eliminates any principled concern about whether we dominate them with our actions. In fact, we might think that an important justificatory goal and feature of state punishment is that it offers the possibility that punishment might be accountable, rule-governed, and non-arbitrary. Rights

forfeiture views, it appears, are only plausible if we grant that individuals cannot forfeit their rightful claim to non-domination in their relations with others.

But this is not a trivial concession. If we take seriously the thought that domination needs to be solved structurally and institutionally—that is, individual virtue is simply not enough—then it looks like the state of nature is one where domination is unavoidable. After all, there are, by definition, no coercive political structures in the state of nature, and there can be no reliable external checks on individual exercises of power, no mechanisms of adjudication and accountability that we routinely include in the civil condition to make power non-arbitrary. In fact, it is the very existence of these institutions that is the marker between state of nature and civil condition. It is for this reason that Kant argues that the state of nature is one of ineliminable domination:

From private right in the state of nature there proceeds the postulate of public right: when you cannot avoid living side by side with all others, you ought to leave the state of nature and proceed with into a rightful that is, a condition of distributive justice...Given the intention to be and remain in this state [i.e. the state of nature] of externally lawless freedom, human beings do one another no wrong at all when they feud among themselves; for what holds for one holds in turn for the other, as if by mutual consent. But in general *they do wrong in the highest degree* [my emphasis] by willing to be and to remain in a condition that is not rightful, that is, in which no one is assured of what is his against violence.¹⁸

The state of nature is a world where the problem of domination cannot be solved as long as we remain there. Of course, it might be that this or that particular person happens to be sufficiently charismatic or personally powerful that he is not subject to others, and it may be the case that these powerful, Herculean individuals are agents of good faith and wisdom, but none of this eliminates domination in the state of nature. It is simply another version of benevolent despotism. So, if this is correct, then individuals in the state of nature *do not* have

¹⁸ *MM* 6:307-308

a natural executive right. The state of nature is necessarily a consequence of a series of bilateral interactions between people, families, or clans that lack an external public check other than the power of the other party. The right to punish is really only a right to punish non-dominatingly, and such punishment is impossible in the state of nature. Since individuals lack the NER (or rather, are unable to rightfully exercise the NER in anything like the state of nature even if they did possess it), then voluntaristic accounts of political authority fail. No coercive right exists to be voluntaristically transferred to the state, so it cannot be the source of coercive authority.

However, this might be too quick. It might be true that people in the state of nature cannot be in a position to justly *exercise* their right to punish transgressors, but that voluntarism is still necessary for political authority. That is, the state might provide a necessary set of institutional preconditions for rightful punishment, but individuals still must alienate their (unexercisable) right to the state for it to be legitimate. Let's assume we can make sense of a person possessing a right that, due to ineliminable features of a particular context, ought never be exercised, does this leave a space open for voluntarism? I do not think so, and this is the second place that where the view problematically ignores the problem of domination. In order for consent to be morally relevant, it must be the case that *not* consenting is a live moral option. Consider the classic cases where consent seems to make a real moral difference: voluntary market interactions and sexual relations. In each case, it matters that I voluntarily choose to engage in the activity because, in part, acting and participating is morally discretionary. I may purchase the toaster or I may not; I may be intimate with an exotic stranger or I may not. It is perfectly acceptable for me to exclude a person from my wallet or my person, so they need my permission if they wish to enter. However, if the state of nature is a world of domination, then it is *not* morally acceptable (it

is not only unjust, but it impossible for it to ever be just) for us to remain there. Leaving the state of nature is *not* morally discretionary, so *consent* seems irrelevant to whether one could be allowed to remain there. The fact that one might prefer to be in a position where one can dominate other people and thus would *not* consent to a more egalitarian relationship should not be taken as a reason to refrain from forcing them to act in a non-dominating manner.¹⁹ Furthermore, the reverse is also true and demonstrates the power of domination-based analyses. Suppose that one has adapted one's preferences or become so used to ingratiating oneself to power that one would quite sincerely consent to be dominated. The domination theorist will argue that consent is only of normative importance when it is imbedded in a structural scheme of power and authority where that consent is not a response or an adaptation to being subject to the arbitrary whims of others. The domination theorist and the voluntarist, then, conceive of the justification of the state in very different terms. Voluntarists view the state of nature as fundamentally acceptable, and the state as an artificial imposition on the natural rights of prepolitical humanity. This artificial imposition must then be positively justified as a movement away from a natural baseline, and it is natural to think that, as long as the natural baseline is normatively acceptable (or, at least, as long as it is possible for that baseline to be morally acceptable), then it would be wrong to non-

¹⁹ Michael Blake has denied this. He argues that there are cases where we think consent is necessary even when the person has no right to deny what we demand. Imagine that someone owes me money and there are no good reasons to delay repayment while I need the money badly. My debtor may not refuse my demand for repayment, yet I cannot take the money. I think there are several responses. First, the reason I cannot take the money is because we both live in a legal order that can make and enforce non-dominating judgments about how reasonable it is to demand repayment. So, I can *force* him to repay me; I just cannot act unilaterally. Second, I think it is likely that there is a difference between using a person non-consensually to achieve a higher *degree* of justice and doing it *to make justice possible*. Third, the philosophical anarchist's claim is that we may unilaterally *leave* an order where just relations are possible in order to enter a state that is necessarily wrong. So, the anarchist is consenting to a moral universe where only private coercion is possible, where we can repair violations of our rights through coercion, and where she violates our rights by so consenting. In that context, it does not seem wrong to use coercion to keep her in a moral order where just relations are possible.

consensually move someone off of that baseline. Domination analysis has a quite different justificatory perspective on coercive authority. The domination theorist argues that the state of nature is no less a realm of power than the ‘civil condition’ of the state. The power exercised by private individuals in the state of nature—and the corresponding domination—is no more ‘natural’ or in less need of legitimation than that exercised by the state. It is not that freedom is an especially important and urgent (and neutrally definable) goal that political authority is aiming to further or achieve, but rather that part of what it is to be free is to be subject to political authority as opposed to the inherently or intrinsically unfree state of nature. The question for the domination theorist is not ‘How can the imposition of a new coercive authority be justified when compared to a world without coercion and subjugation?’ but rather, ‘How can the unjust world of anarchic coercion be replaced with political world where justice is possible?’ On this view, being subject to power is ineliminable, so all that remains is to be subject to rightful power. This is done by structuring the power in the appropriate way, along constitutional lines. As Philip Pettit says:

The strategy of constitutional provision seeks to eliminate domination, not by enabling dominated parties to defend themselves against arbitrary interference or to deter interferers but rather by introducing a constitutional authority--say a corporate, elective agent--to the situation. The authority will deprive parties of the power of arbitrary interference...The reason the constitutional authority will not itself dominate the parties involved, if it does not dominate them, is that the interference it practices has to track their interests according to their ideas; it is suitably responsive to the common good.²⁰

In other words, a legitimate political order replaces the anarchy, domination, and gangsterism of state of nature with the rule-governed and public power of a well-ordered

²⁰ Pettit (1997), pages 67-68

sovereign state.²¹ So, if we accept that domination is an important political value, then we have good reason to reject voluntaristic accounts of political authority.

Instrumentalism

Most contemporary theorists have been dissatisfied with voluntarism as well, but for quite different reasons. Rather than examining the extent to which voluntarism fails to engage with the problem of domination, they have argued that voluntarism is too demanding.²² If political authority requires the consent of each citizen, then essentially no modern state has it.²³ Many contemporary theorists have accepted this result, granting that voluntarism is true about political *authority* but that there is a weaker concept—the right to rule via the coercive imposition of sanctions—that states can nonetheless possess. Instrumentalists argue that a state’s right to rule—to coerce and be the final decision-making authority in a territory—is ultimately derived from its ability to adequately protect fundamental human interests.

Let’s begin with Andrew Altman and Kit Wellman’s theory of political legitimacy. They argue that a state is legitimate when it adequately performs the ‘requisite political functions.’ What are these functions? They fall under two categories: the adequate protection of human rights internally and the refusal to violate the human rights abroad. That is, a legitimate state is one that provides ‘adequate and reliable’ protection against ‘recurrent and

²¹ Of course, states must have certain features in order to resolve the problem of domination. Some states are simply Mafias writ large, populated by gangsters themselves. Such states do *not* resolve the problem of domination satisfactorily and can be as deeply unjust as the state of nature. Yet, most such states retain the possibility of justice in a way the state of nature does not and even deeply unjust political orders do a better job of protecting human welfare than the state of nature. So, such cases (which Arthur Ripstein describes as ‘barbarisms’) raise difficult, even paradoxical problems, and I discuss them in Chapter Five.

²² Altman and Wellman (2009), pages 3-5 and 77-80

²³ It is also the case that if the comparison is between the state of nature and any state at all, most people would consent to the state no matter how unjust. So voluntarism is both too demanding and too undemanding. I thank Bill Talbott for this point.

standard' threats against 'basic human interests' and refrains from so threatening unjustly the basic interests of non-members. Such legitimate polities have earned the right to make, enforce, and adjudicate laws within their territory as well as a general right of self-determination. These basic human interests, which they also describe as basic human needs, provide the content for an account of human rights. Human rights then serve a functional role in characterizing which corporate agents rightfully possess the full range of political and legal rights to law-making, coercive enforcement, territorial sovereignty, treaty-making, non-intervention, and self-determination that make up what it is to be a legitimate state.

There are, at least, three ways that domination undermines this picture of legitimacy. First, though we will discuss this in more detail in Chapter Two on international domination, we might worry about *who* ultimately adjudicates, concretizes, and enforces these judgments of legitimacy. There are for example, some vague concepts at the core of the view; what constitutes a 'basic interest' and 'adequate protection?' Yet these concepts play an important functional role in international public law (namely, they delineate which political agents have fairly robust rights of non-intervention and self-determination), so we might worry that relying on private agents—NGOs, states, and the like—to make individual, arbitrary (in the technical sense described above as being subject to no structural check) judgments when making determinations of legitimacy exposes individuals subject to those determinations to domination. That is, their right to non-intervention or self-determination ultimately depends on the judgments of political agents that are not, in any institutional or structural sense, accountable to those who will see their rights limited or upheld. This seems structurally similar to the case of the dominating punisher: the punisher may be correct that the criminal has transgressed, but they might nonetheless lack the rightful authority to punish. Similarly, the well-meaning superpower might be correct that a particular state is illegitimate and

intervene, but it might be the case that it lacks the rightful authority to non-dominatingly make and act on that judgment.

Second, we might worry that a legitimate state's right to non-interference in non-human rights related matters provides too much room for domination. On Wellman's view, a benevolent dictator could adequately protect the basic interests of its citizenry, yet this would be consistent with widespread domination along ethnic, gender, class, or religious lines on all issues beyond that of the human rights minimum. It seems strange to think that a state that provided no mechanisms of accountability to its most oppressed citizenry could possess law-making authority over those very citizens as long as it protected their most basic interests. In other words, there is an odd bifurcation in the view: we ought to be *deeply* concerned that a certain minimum threshold is very adequately protected, but we should be relatively *unconcerned* if that adequate protection is performed by a political agent that dominates its citizens in all other aspects of their political and social lives.²⁴

Third, and finally, the Wellman-Altman standard is fully consistent with what Rawls describes as a 'benevolent despotism.' On their view, all that matters is the reliability of the protection of human rights, and there would be no principled reason to require non-despotic safeguards and checks on the political power of the tyrant as long she did an adequate job of protecting human rights. Again, this is precisely the kind of political wrong that domination was designed to detect, the very fact of overwhelming arbitrary power is a wrong *even if* that power is used for good or if those under it have become so good at ingratiating themselves to that power that its exercise is unnecessary. Of course, it could very well be the case that

²⁴ This is not, without any further argument, an argument for a right to democracy since there could be mechanisms of accountability that could be minimally acceptable as a condition of legitimacy yet full short of full democracy.

no dictator—as a matter of fact—could be reliably expected to protect such rights, but this is not a way of treating domination as a fundamental political value.

Allen Buchanan and Robert Keohane have presented a somewhat more robust account of political legitimacy that that can be read, at least in part, as a response to these worries. Their account of legitimacy, in full, is the following:

(1) The institution must be morally justified in attempting to govern (must have a liberty right or permission to try to govern) in the sense of issuing rules (that prescribe duties for various actors) and attempting to secure compliance with them by imposing costs for noncompliance and/or benefits for compliance and (2) those toward whom the rules are directed have substantial, content independent moral reasons for compliance and others have substantial content-independent reasons for supporting [or to not interfere with] the institution's efforts to secure compliance...²⁵

Condition (1) is equivalent to Wellman-Altman's view: states possess a right to rule when they protect basic human rights. Reliable human rights protection is a necessary condition on legitimacy, but it is not sufficient. Political legitimacy also requires that those subject to the law have 'substantial content-independent moral reasons' for compliance. What does this mean? "Content independence" is meant to capture the idea that legitimate authorities ought to be obeyed—or have a claim to be obeyed—above and beyond whatever reasons we would have to act if it had never been commanded. The clearest example of a law where content independence looks like it plays a small role are those prohibiting murder: we would have decisive moral reasons not to murder *even if* there were no laws prohibiting it. If a political agent possessed content independent authority and made murder illegal, then this would provide an *additional* moral reason not to murder; murdering would thus wrong the person killed and the authority that one wrongfully disobeyed. Similarly, there might be bureaucratic rules where the only moral reasons we have to obey a prescription is that they

²⁵ Buchanan (2010), pages 138-139

were issued by a rightful political authority (for example, we might think that a hair stylist lacks any moral reasons to go through 350 hours of training, but that the rightful commands of the sovereign create an obligation of obedience). So, a political agent possesses content-independent authority when those subject to it have reason to comply with its commands regardless of content.

The second condition is that the content-independent reasons for compliance must be *moral* reasons. This is meant to prevent the following type of counterexample: Alabama passes an unjust law prohibiting African-Americans from enrolling in the state university and stands ready with overwhelming coercive power (police, National Guard) to ensure compliance. Now, imagine a potential African-American student considering enrollment at the University of Alabama. Does this student have any content-dependent reasons to obey that law? Surely not, the law is unjust and discriminatory. Does the student have content-independent reasons to obey? Surely yes, the student has very good reasons to avoid being harmed or jailed. However, Buchanan and Keohane, unsurprisingly, do not want to conclude that any political agent that is sufficiently powerful has the relevant sort of authority. So, they constrain the nature of the content-independent reasons that can count towards political legitimacy. Only *moral* content-independent reasons, as opposed to prudential ones, matter. And what constitutes a moral, content-independent reason for compliance? Well, this is where the locution is a bit misleading. While there may be *procedures* or *institutional structures* that provide inherently moral content-independent reasons for compliance in virtue of their widespread inclusion or constituent-participation, this is not what Buchanan and Keohane have in mind. Rather, they typically focus on institutions, authorities and agents that are *epistemically virtuous concerning moral matters*. Institutions that are structured so that they can learn from the particular knowledge of those subject to them, allow for the appropriate

aggregation of elite, expert, and grassroots knowledge, are responsive to failure, and reward success are the kind of institutions. That is, epistemic virtue is a ‘moral’ reason when the virtue is generally aimed at producing normatively relevant knowledge, such as how well a particular policy is serving the interests of its constituents. These reasons are content-independent because we could, at least in theory, determine whether an institutions has these epistemically relevant virtues independently of whether the particular decision they made is the right one (such as when we say that the jury system has epistemic virtues based on the Condorcet Theorem even while acknowledging or asserting that particular juries get it wrong). When a political agent has these virtues, then those subject to it have substantial content-independent moral reasons for compliance, and as long as that political agent does an adequate job of protecting human rights, it possesses the legitimate authority to issue coercively enforceable commands and claim final decision-making authority in its territory.

Does the Buchanan and Keohane account effectively respond to the three objections I presented to the Wellman-Altman view? B-K would argue that most states would lack the relevant authority condition when it comes to making judgments of legitimacy concerning other states. After all, why would the United States be particularly good at collecting data, expertise, and structuring institutions so that it could reliably make accurate judgments about whether other states are legitimate? If the United States does lack those virtues, then it doesn’t have authority to make those pronouncements. On the B-K view, it might very well be the case that only a relatively impartial international adjudicative institution that was responsive to grassroots input would possess the content-independent authority to make judgments of legitimacy. As for the second objection, B-K could argue that the authority condition provides a good reason to think that legitimate states can make binding decisions on issues beyond those of human rights. The epistemic virtue of these institutions provides a

moral rationale for why it rightfully claims political power on issues of justice beyond those implicated in the protection of basic human needs against standard threats. After all, legitimate states would then possess content-independent authority on matters other than that of human rights. Finally, B-K could argue a benevolent despotism would fail to possess the relevant epistemic virtues and thus would not be legitimate.

While certainly an improvement, these are inadequate responses to the problem of domination. First, B-K seem to think it unproblematic that a political agent gains a liberty right to coerce as long as the coercion is necessary for the protection of basic human rights. But if the domination analysis is correct, then rightful coercive authority is, at least partly, related to how force is deployed and not just why. A slaveowner or a king who does a fairly good job of providing for the basic needs of their subjects is not thereby have a liberty right to coerce. It also matters how the coercion is performed, by whom, and what sort of checks that authority is responsive to. So, at the basic level, B-K's account of how the state comes to have a liberty right to coerce is no more satisfying than W-A's. Each view, at its fundamental level, is indifferent to whether coercive power is dominantly administered as long as it achieves the appropriate state of affairs, but this is, again, simply to assert that domination is irrelevant to the justification of coercive authority.

But does the condition (2) help? Unfortunately, it does not. According to B-K, content-independent authority is generated by institutional epistemic virtue or by its ability to solve coordination problems, but we might worry that this only gets us part of the way to various anti-domination measures like democratic accountability. Could an institution, for example, be epistemically virtuous in the relevant way but still be dominating? To close the gap, B-K rely on a burgeoning literature on social epistemology that indicate that institutions usually become more epistemically responsible in virtue when they become more inclusive in

their deliberations. Broadly speaking, epistemic institutions that can aggregate information from crowds, especially when the grassroots members are highly motivated to have true beliefs about the situation (such as when they are forming beliefs about when their basic needs are being met) are often superior to those institutions that rely solely on experts. Some have attempted to justify democracy on these grounds. When elites and policy-makers are subject to regular, free, and fair elections, then the elections can serve as an epistemic check on those who hold power. For example, Amartya Sen²⁶ has shown that democracies with free presses do not suffer from famines, and part of the explanation is that democratic policy-makers are motivated to be made aware of severe policy failures. Elections, on this view, serve a similar informational role as markets: they aggregate information. So, there is some reason to think that, generally, epistemically virtuous institutions will be those that are accountable to their constituents. This would mean that B-K's view would be indirectly responsive to domination concerns as possessing content-independent authority would require political contestation.

Unfortunately, B-K's view only draws a contingent connection between content-independent authority and non-domination, and there are two ways in which that connection can be severed. First, there is no principled reason why a genuine expert could not have content-independent authority. After all, expertise is an epistemic virtue and most accounts of 'content independent' authority accept that an expert may—simply in virtue of that expertise—possess it. Granted, it is likely that there are particular instances where a market or an election will be superior to an individual expert, but there are many other cases where this isn't so. Famously, most constitutional orders include judicial review and rights that are substantially independent of democratic revision for precisely this reason. In other words, B-

²⁶ Sen (1999), pages 168-188

K's account of legitimacy is no more able to provide a principled reason for avoiding a benevolent dictatorship than A-W. B-K focus more explicitly on the need for the dictator to be a genuine expert, but it is doubtful that an inexpert benevolent dictator would reliably protect human rights anyway.

But perhaps more importantly, institutions can be responsive to bottom-up input and possess considerable epistemic virtues without being politically contestable in a way that is non-dominating. As an example, let's look at the British and American military experiences fighting insurgencies in the 20th and 21st centuries. John Nagl, in *Learning to Eat Soup with a Knife* (Nagl, 2002), argues that the superior counterinsurgency capability of the British military in Malaysia as opposed to the American experience in Vietnam is a consequence of two important institutional differences. First, the British demonstrated a greater ability to form relationships and be responsive to the concerns of the local population. Second, the British military had an internal structure that was conducive to 'institutional learning' by which they could accept input from their interactions with the local populace, experiment with ways to achieve their objectives, and reward those who met with success. The American military in Vietnam, by contrast, was separated from the local population, indifferent to their grievances, and locked in an institutional culture that punished dissent while discouraging innovation. It seems clear that the British military in that context, had institutional virtues that would provide content-independent reasons for obeying its commands. It is responsive to the interests of those subject to its power and possesses significant epistemic virtues. But is the British military thereby a non-dominating candidate for legitimate political authority? The clear answer seems to be 'No.' Surely it is better to be subject to British imperial authority in Malaysia than to be under the authority of an American military irrationally focused on 'search and destroy' missions in Vietnam. The British command in Malaysia *really*

did want to serve the interests of the local populace (if only as a necessary condition for defeating the insurgency) and the Brits had a virtuous internal structure that would lead to increased effectiveness in serving those interests over time. But none of this changes the fact that the British dominated and unjustly subjugated their subjects during the course of imperial relationship with Malaysia. And the reason is simple and related to the basic dynamics of domination: the British may or may not be genuinely interested in protecting their Malaysian subjects, but ultimately it is *up to them* whether they so act. From the standpoint of a Vietnamese or Malaysian peasant, the imperial power they are subject to is simply arbitrary, and the institutional virtue of that power does not change that

Instrumentalists argue that a state's moral standing to rightfully deploy power against free and equal citizens is predicated on the *especially urgent* interests that they are protecting. Namely, states may rightfully use force when they reliably protect human rights. These views, then, struggle to incorporate domination because they struggle with the notion that anything other than the reliability or effectiveness of political authority could be relevant. Now, both A-W and B-K have elements that would allow them to incorporate domination but only at the cost of dramatically changing their moral commitments. For example, A-W could argue that the matrix of 'standard threats' to human needs include the threat of being subject to arbitrary power in various contexts. Similarly, B-K could argue that 'content-independent' moral authority requires that the authority be non-dominating. While I doubt these revisions can be made consonant with their other theoretical commitments, their ability or inability to fully accommodate the political value of non-domination is ultimately irrelevant to my project. Either the instrumentalists artificially incorporate domination into their view and, as a consequence, my arguments about the legitimacy of the coercive authority of the state and the importance of international domination apply, or they must

accept that their view cannot be responsive to the moral problems raised by dominating power.

Republicanism: Freedom as Non-Domination

Perhaps the central result of the previous section is that non-domination is inherently social; individuals operating in an institutional vacuum are simply not in a position to avoid domination as long as some of them possess superior power. *Republicanism*, as a family of political theories, builds on that insight in two ways: first, the state is both justified because people can live free under its authority and it is evaluated according to how effectively it protects its citizens' freedom²⁷, which is understood as non-domination. A political agent, on this view, possesses legitimate political authority when it does an adequate job of exercising power non-arbitrarily in order to protect its constituents from the arbitrary power of others. That is, the legitimate state replaces the anarchic arbitrariness of the state of nature. We have seen that much contemporary theorizing about legitimate coercive authority fails to take the notion of domination especially seriously. Time and time again, theorists attempt to legitimate state power on the basis of the usefulness political authority has for the achievement of morally good ends while failing to consider whether that authority exercises its power non-dominatingly. However, much of the preceding discussion on domination operated on a fairly abstract level. But more particularly, we need to examine what institutions are capable of non-arbitrary power. Individual virtue is insufficient, but it is

²⁷ There are interesting questions about republicanism's relationship to other values that are less easily understood in terms of domination of a free person. For example, can republicanism productively engage with questions concerning the protection of noncitizens, nonhuman nature or future generations? To the first point, we will engage that question in the following chapters. As to the second, I am tempted to think that republicanism is ineliminably anthropocentric in its understanding of political justice. That is, the preserving or degradation of nature is only a question of justice, on republican grounds, when it affects the interests of humans. As for the last point, I do think that republicanism can be meaningfully applied to questions of intergenerational justice: see Smith (2012 and 2013). I think Jamie Mayerfeld for pressing me on this point.

the thesis of the remainder of this chapter that *impersonal* and *private* institutions, powers, and structures are also insufficient. By examining the views of Phillip Pettit and Arthur Ripstein, I argue that non-domination requires that interactions between citizen and citizen, citizen and non-citizen, and citizen and government must be mediated by a particular kind of public, legal status. This is why the *state* with its attendant legal powers, and not impersonal market forces or semi-private practices of shaming or shunning, is what satisfactorily generates non-domination.

Phillip Pettit argues that the purpose of legitimate political authority is to maximize individual freedom by replacing the domination of personal whims in the state of nature with the law governed and substantively constrained non-dominating coercive power of a constitutional order. It does this not by *eliminating* power but by making the exercise of power *non-arbitrary*. Much depends, then, on the difference between arbitrary and non-arbitrary power. For Pettit, one person is subject to another when the dominator may at little or no cost--and without external check--force the weaker party to serve the dominator's interests rather than their own. Whether the subjugated agent can act freely depends utterly on what the dominator decides. There is nothing that requires or ensures that the subjected party will have their interests served by the relationship. Thus, it might turn out that Harriet could live a life of prosperity, but that depends completely on Emma. Pettit describes how coercive authority can be non-dominating here:

The parliament or the police officer, then, the judge or the prison warden, may practice non-dominating interference, provided--and it is a big proviso--that a suitably constraining, constitutional arrangement works effectively. The agent or agency in question may not have any discretion in the treatment of the persona affected, so that they cannot interfere at will, only under constitutionally determined conditions. Or if they have certain areas of discretion--for example in the way in which the judge may have some discretion in sentencing--then their ability to exercise it to the intentional detriment of the person is severely limited: their actions may be subject to appeal and review, so that they are exposed to sanction in the event of using

that discretion in a way that is not properly controlled by non-sectional interest and judgment.²⁸

So, non-domination is the condition where the exercise of superior power is checked so that it reliably serves the avowed interests of those subject to it. On Pettit's view, the problem with domination lies in the fact that the dominator may costlessly intervene in the choices of the dominated. Freedom as nondomination, for Pettit, exists in a structure of social and political relations where power is checked and channeled so that it serves the common good. But most importantly, checks on the superior power of political agents are *external* to that agent. That is why the virtuous character of the queen has no effect on the extent to which she dominates her subjects. It is surely true that a queen with a good character will--all things being equal--do a better job at serving her subjects than a vicious despot, but this is, again, irrelevant when it comes to whether the queen dominates. What matters is whether the queen suffers a cost if she mistreats her subjects from a check that is external to her particular whims and desires. And this is, presumably, what would happen in a functional, constitutional order. For example, the individual police officer in a just, constitutional order, when she exercises power, is subject to a variegated panoply of checks: civilian review boards, police superiors accountable to elected officials, the institutional culture of her fellow officers, and possible lawsuits heard in an independent judiciary. Each of these elements--and others besides--serve to check each other. In other words, a functional constitutional order reduces domination by dispersing power amongst various agents so that every agent in a position to exercise superior power is subject to a reliable external check.

So, we are fully free in the neo-republican sense when everyone we meet either lacks superior power or possesses superior yet non-dominating power. Non-dominating power

²⁸ Pettit (1997), page 65

has, fundamentally two features: it is *externally checked* and *reliably serves the common good*. So, on Pettit's view we have a kind of consequentialism: non-domination is a state of affairs to be maximized, and the legitimacy of the state is a function how well it minimizes domination. And like most consequentialist views, the state of affairs to be maximized is characterized *non-normatively*. The common good is constituted by the aggregate avowed interests of the constituents of the state, the costly or costlessness nature of an exercise of power is, again, characterized by the avowed interests of the superior power, and the reliability of the constitutional order is defined probabilistically. So, a just state is one that structures the incentives and costs of wielding superior power in a such a way as to maximally guarantee (make as probable as possible) that those subject to it will see (what they take to be) their interests served.

Two theoretical consequences follow from this account. First, since the extent to which power is reliably and externally channeled towards the common good is a continuum notion, freedom of non-domination operates on a sliding scale. The more reliable the legal order, the less domination that exists and the freer the citizenry. The greater the 'externality' of checks on power--and the lesser extent to which the system relies on the virtue of the powerful--the less the domination. The more significant the costs one must pay for interference, the less dominating the political order. Further, the legitimacy of state must then be characterized in terms of providing some minimally adequate level of non-domination. If the state meets that threshold, then the exercise of its power is superior--in terms of freedom from non-domination--than the state of nature. One cannot then complain about the imposition of coercive state authority on the grounds of human freedom; freedom can only be adequately achieved in the relevant social and political context.

The second feature of Pettit's view follows from the first, and that is the fact that any of the *particular* features of the legal and social order are only *instrumentally* justified in reference to their effects in reliably constraining coercive power and channeling it in a particular direction. There is nothing in Pettit's view that requires the elements of the state we described in section one. It might be true, as a matter of fact, that a legal and political order characterized by a constitutionally structured separation of powers with an executive with a monopoly on the use of force, an independent and impartial judiciary, and a legislature in charge of positive law will be needed in order to establish non-domination. Similarly, it might very well be the case that the creation of a *legal order* where every person is granted equal legal status as citizens might be required--given certain empirical conditions--for non-domination. But in neither case is that a *necessary* consequence of Pettit's view; it may very well be the case that we don't need those sorts of institutions at all. In both cases, non-domination is not constituted by these institutions, rules, and statuses but is merely and contingently produced by them. As Louis-Phillippe Hodgson has argued, this makes Pettit's view curiously insensitive to important differences between the various ways in which domination can occur:

Something appears to be missing from Pettit's view. If I live in a particularly nasty part of town, then it may turn out that, when all the relevant factors are taken into account, I am just as vulnerable to outside interference as are the slaves in the royal palace, yet it does not follow that our conditions are equivalent from the point of view of freedom. As a matter of fact, we may be equally vulnerable to outside interference, but as a matter of right, our standings could not be more different. I have legal recourse against anyone who interferes with my freedom; the recourse may not be very effective--presumably it is not, if my overall vulnerability to outside interference is comparable to that of a slave--but I still have legal standing. By contrast, the slave lacks legal recourse against the interventions of one specific individual: his master. It is that fact, on a Kantian view--a fact about the legal relation in which a slave stands to his master--that sets slaves apart from freemen.²⁹

²⁹ Hodgson (2010), 816

As Hodgson points out, the guarantees that the palace slaves have for their security may be sufficiently robust that they, in terms of non-domination, outweigh whatever protections individuals who possess the status of 'freemen' but nonetheless live in a 'bad part of town' where police protections are less than adequate. In other words, Pettit's neo-republican account of domination fails to detect--as qualitatively important--the distinction in legal status between slave and free since it simply focuses on the bare likelihood of unchecked interference. We might think that a legally freeperson subject to inadequately constrained criminals is freer than a palace slave *even though* both individuals are equally likely to be arbitrarily coerced. If so, then Pettit seems to have missed an important way in which legal status interacts with non-domination.

However, Pettit could respond to Hodgson in two ways. First, the intuition that Hodgson is relying upon isn't an especially clear one: both the palace slave and the gang-ridden slum renter are subject to considerable injustice and it might be difficult to determine who has it worse, particularly in the abstract. Second, it is unclear that the palace slaves are dominated to an equal extent when compared to the impoverished free person. It is undeniably true that the palace slaves live lives of greater prosperity and security (if that is understood as the probability of being intervened upon), but Hodgson seems to ignore that simply living better lives does not equal a lesser amount of domination. If the palace slaves are subject to unchecked power, then the fact that the power is used sparingly is irrelevant to the extent of their domination. So, at the very least, it is unclear that the two cases really are of equal domination. A better counterexample would show that there are cases where public, legal status was the difference between legitimacy and illegitimacy and that there could be a case of an illegitimately dominating social order which nonetheless possessed significant non-legal checks on individual behavior. The important feature of the following two

examples is that Pettit is indifferent to any qualitative differences between different kinds of checks on power besides their reliability in influencing the behavior of the powerful. So consider a variation on Emma and Harriet:

THE PRUDENTIAL SLAVEOWNER: Darcy owns Wickham. Darcy treats Wickham quite well, giving him a wide latitude in day to day activities, comparatively plush accommodations, and even discretionary income to be spent on his days off. Darcy does not especially like Wickham, but he treats him well for two reasons. First, Wickham has very special economic abilities and talents that are valued greatly by the market and are only effective if he is comparatively stress free. Second, Wickham is very well-liked by the other members of Darcy's social class.

Furthermore, Darcy's social class has a norm--much akin to our norms concerning pets--against the mistreatment of slaves that are enforced through informal mechanism of ostracism and marginalization.

Unlike Emma, Darcy would suffer considerable costs--under his own avowed interests--if he mistreated Wickham. Furthermore, those costs would be externally imposed. In the economic case, the penalties paid by Darcy are caused by those who participate in the market who will refuse to do business at Darcy's higher prices or who will chose to do business with other people with either cheaper or higher quality products. In the case of social marginalization, Darcy's penalties are imposed by his fellow aristocrats when they decide to exclude him during the social season, refuse to form marriage relations with his family, or undermine his position at court through gossip. These costs can be high and they can be fairly reliable in commanding behavior. So, on Pettit's view, Wickham is fairly free of domination, especially when compared to Harriet. In fact, if the checks are sufficiently reliable, Wickham might simply be free and his relation to Darcy a just one. This is especially true when one considers that, on Pettit's view, it is the *avowed* interests of the subjugated person that are relevant. In other words, Pettit is deeply concerned that an individual will adapt their preferences to the whims of the dominant and thus avoid interference. But his view opens up the possibility that one will adapt one's avowed interests to becomes interests

that will tend to be protected by impersonal yet reliably non-arbitrary power. That is, Wickham does *not* have to adapt his preferences to Darcy's whims of the day, but he *might* adapt his preferences such that they are the ones that are likely to be protected by the external checks to Darcy's whims. In any case, it seems clear that Pettit has to view the PRUDENTIAL SLAVEOWNER as a significant improvement over the NICE SLAVEOWNER, and he must leave open the possibility that the checks on Darcy's power could be so reliable--and the costs imposed so high-- that Wickham could be described as reasonably free from domination. Of course, we might discover, empirically, that such systems could only operate under unattainably idealized conditions, but Pettit has no resources in his view to argue that--in principle--a legal slave protected by impersonal market forces is nonetheless dominated.

Pettit's position here is an uncomfortable one. It is not implausible, I suppose, to suggest that Wickham is less dominated than Harriet, but it is much more problematic to claim that the mechanisms described in the PRUDENTIAL SLAVEOWNER could ever be fully adequate on their own. Adequate or legitimate non-domination does not appear, then, to be simply a function of reliability. Consider the following case:

THE LAW-ABIDING CEO: Gordon employs Bud, who is a talented analyst, in his firm. Bud is valuable, but not irreplaceable, and he has negotiated a contract with Gordon to be treated fairly well. Furthermore, Bud is protected by a system of public law that delineates minimum adequate treatment in the workplace. This system of public law is, admittedly imperfectly, enforced by a regulatory agency with the power to levy fines, publish a list of offenders, and shut down especially incorrigible offenders.

I would suggest that Bud's position is superior to Wickham's in terms of domination, and this would be true even if Wickham's protections were more reliable than Bud's. More importantly, the political order that protects Bud seems to be legitimate, all other things being equal, but the economic and social order that protects Wickham is not.

Furthermore, if the difference between LAW-ABIDING CEO and the PRUDENTIAL SLAVEOWNER is *not* the bare externality and reliability of the checks on the exercise of power, then what could it be? I think there are several differences, and they all indicate why a system of public law is a necessary element of any system of non-domination. First, the PRUDENTIAL SLAVEOWNER depends on mechanisms of enforcement and power dispersion that are essentially private. Individuals make decisions unilaterally according to their own judgment as to whether Darcy needs to be punished. Private economic actors decide, on their own accord, not to do business with Darcy, and his aristocratic friends decide, again, on their own accord, whether to include him in their social events. There are no publicly available mechanisms for Darcy or Wickham to appeal or activate these private decisions. And the rules themselves are held privately and individually; they are not publicly promulgated in a way that makes it possible for Darcy and Wickham to structure their projects in response to those rules. This is part of the reason why we should be worried about Wickham adapting his preferences to the social situation: without the foreknowledge of a public legal system, he will simply need to adapt to the arbitrary and private dispositions of Darcy's aristocratic friends.

A further consequence of the private nature of the enforcement mechanisms in the PRUDENTIAL SLAVEOWNER is the *partiality* of those making the judgment. One reason why Darcy's economic and social partners are willing to step in is that they tend to *like* Wickham, and so this partiality is an ineliminable part of the system of effective checks and balances. But a significant part of what motivates the theoretical turn to domination is that the rights of individuals *shouldn't* depend on arbitrary whims and affections. The fact that

Pettit's view³⁰ simply moves these whims up another level seems to expose it to the following objection: if being subject to another's whims is so dominating, then how could the fact that everyone is *mutually* subject to an interlocking matrix of private judgments and desires solve the problem? To put it another way, if being subject to Darcy is unacceptable, why is being subject to an entire social *class* of Darcys permissible as long as they check each other? The lack of a legal status whereby Wickham's claim to non-domination is recognized and enforced means that Wickham remains dependent on *aristocrats as such*. The fact that those aristocrats check each other does not effectively engage with their collective relation of domination towards Wickham.

Moreover, we might think the matrix of checks and balances in the PRUDENTIAL SLAVEOWNER is *reliable*, but it is not especially *robust*. There are two reasons why this seems to be so. First, the private actors in the PRUDENTIAL SLAVEOWNER lack the coercive and executive will to enforce their judgments *whatever it takes*. What do I mean? The nature of the private checks in the PRUDENTIAL SLAVEOWNER is that the business and social partners can impose a cost on Darcy, but if Darcy decides to pay that cost, then there is nothing further to be done. If he dislikes Wickham sufficiently so that mistreating him is worth social marginalization and economic dislocation, then he can mistreat Wickham. Bud, conversely, can rely on a system with both overwhelming coercive power and a will to see its judgments obeyed. This means that, if necessary, they will *make* Gordon stop mistreating Bud by shutting down the firm or, in extreme cases, jailing Gordon. As a matter of *reliability*, the difference between the two cases can be quite slight: Gordon and Darcy may both be equally likely to mistreat their subordinates. After all, who would risk

³⁰ Pettit (2012) seems to take this kind of criticism to heart. In that work, Pettit changes his view by arguing that *publicness* and *equal control* are necessary conditions of non-domination. This collapses much of the difference between Pettit's republicanism and that motivated by Kant.

marginalization and bankruptcy in the case of the PRUDENTIAL SLAVEOWNER? But if we think of non-domination as a kind of non-contingent *guarantee* against arbitrary power, then the disposition and power of the state in the case of the LAW-ABIDING CEO makes a substantive, qualitative difference when compared to the relationship between Darcy and Wickham.

The second source of worries about the robustness of Pettit's view is that the *intentional aim* of the system of checks is irrelevant. In other words, nobody in the PRUDENTIAL SLAVEOWNER is imposing costs on any agent according to rules that are designed to produce non-domination and no one is explicitly aiming at Wickham's freedom when they exercise power. In the case of the economic costs, those who do business with Darcy are trying to maximize profits and Darcy's fellow aristocrats are either serving their own personal affection for Wickham *or* enforcing a norm that is related to Wickham's welfare, but not his freedom. The combination of the private, *ad hoc*, non-robust, and impersonal nature of the checking mechanisms makes Wickham's protection from Darcy a kind of happy accident. Non-domination is not simply a function of externality and reliability. It requires a *specific kind of reliability*, an active guarantee. This guarantee should come in the form of a particular type of *status* that can serve as mediating element that systematically structures political, economic, and social relationships.

But what is the *real* difference between the kind of 'guarantee' generated by the public order and that of the private? After all, aren't we subject to government agents being virtuous and following the rules of the system? Can't government officials be corrupt and a political order fail to protect the basic interests of individuals?³¹ The guarantee represented

³¹ Both Michael Blake and Bill Talbott raise this concern. A nice example of the worry is represented by the constitution of the Soviet Union: the public rules were excellent, but public officials were completely unconcerned with following them. I should note that there are *doctrinaire* answers to these questions that also

by the robust protection against domination by a public, impartial political order simply cannot mean that the order is *perfect* at protecting the relevant interests. The relevant difference between a private order and a public order then seems to ultimately reduce to the increased *probability* that a public order characterized by checks and balances will protect individuals.

First, it is important to see that robustness is not measured by *likelihood*, though it is obviously related to it. A protection is robust if it protects individuals through a relatively wide range of possible worlds, but this is different than the probability of it operating effectively in *this* world. It may very well be true that the protections of Wickham and Bud, in their respective worlds, could be equally likely to 'kick in' and stop a behavior while acknowledging that there are close possible worlds where one protection will be effective and the other will not. For example, we can imagine two worlds: one that is backed by a federal reserve that acts as a 'lender of last resort' in emergencies and another that uses a system of entirely private banks. If things go a certain way, I may be equally likely over the course of my life to get a loan from the federal reserve system as I am from the entirely private system. There might not ever be a depression, so that particular eventuality where one protection would apply simply never occurs. So, the public order of 'THE LAW ABIDING CEO' is going to protect Bud *even if* Gordon resists, but the same cannot be said of Wickham. Of course, that eventuality might not come to pass, so the overall deployment

play a role here: later Pettit (2012) will argue that Wickham or Bud *themselves* needs to have equal control over the mechanisms of his protection in order to be free of domination. This holds for Bud if we grant he is the member of a constitutional democracy with fair equality of political liberty. Kant, on other hand, will argue that the causal likelihood of protection is an empirical element that can only come to undergird the freedom of others in context of a general will where we understand ourselves as *mutually* and *reciprocally bound* by the same laws. I think these are useful, and my response is inspired by them.

of interference or coercion might very well be the same, but that does not mean that there is no difference between the orders.

There are two things to note about this kind of robustness. First, it is *physical* in an important sense and it represents a deeply coercive exercise upon the body. The SEC will go in to Gordon and Bud's workplace *and make Gordon stop*. Whereas the slaveowners will only offer an *incentive* for Darcy to cease his treatment of Wickham. *This* is the sense in which the treatment of Wickham is 'up to' Darcy in the way that Bud's treatment is not 'up to' Gordon. Second, it plays a key role in understanding how we can avoid the problem of *adaptive preferences*. After all, Wickham can reduce the probability of interference and the slaveowning class will not exercise its protective dispositions if Wickham just does what Darcy wants. How can we be relatively sure that Wickham's actions are freely chosen? The answer, I should think, is to create protections where should Wickham decide to rebel against Darcy, that ultimately don't depend on what Darcy's wants to do. But in the PRUDENTIAL SLAVEOWNER, the lack of a physical enforcement mechanism means that Wickham's life ultimately still depends on Darcy in way that is not true about Bud and Gordon. But, again, the *likelihood* of coercion for Bud and Wickam or Gordon and Darcy might be practically the same even while the robustness of the protection differs.

Robustness demands overwhelming coercive power, but it is insufficient. After all, in the PRUDENT SLAVEOWNER, we could imagine a class of aristocrats that would, upon their judgment that Darcy abuses Wickham, physically take custody of either Darcy or Wickham. This would assure more robust protection, but it would still fall short of Bud's non-dominating position. The reason is that these new, more robust PRUDENT SLAVEOWNER represents a coercive order that is not governed by public rules. It is *still* the particular judgments of the aristocrats who decide *on their own* who receives their protection

or who doesn't. And there is nothing that Wickham can do to open those proceedings or issue a complaint that is then discussed and judged by the new aristocratic vigilantes.

This lack of publicness has major consequences. First, since the actors are not guided by, and cannot point to, public rules as part of their justification for acting, those subject to their power have little ability to petition for the revision of those principles or attempt to get them to revise their understanding of the principles being acted upon. In other words, Wickham is not simply incapable of instituting the relevant proceedings (in virtue of his position as dominated) but he is similarly not capable of presenting reasons for changing how these aristocrats conceive of their robust position. In other words, Wickham lacks *public, legal status*: he cannot initiate public proceedings nor can he act in public fora for the shared deliberation of the principles by which his life is governed. From Wickham's perspective, Darcy represents a cruel god, requiring supplication in order to avoid incurring his wrath. The other aristocrats are the good gods, coming to save him but only on *their* terms. They are unresponsive and unaccountable *to* Wickham, and this drives home the fact that his society is *not* committed to his status as free and equal. Bud, however, experiences the world differently because his society *is* publicly committed to his status as free and equal.

Of course, the police officer on the street may act to violate that public commitment, but there is a difference between *failing to live up to* a public commitment and never having one at all. It is true that a republican state, Kantian or otherwise, needs its officials to have a certain kind of virtue: they need to demonstrate public integrity. Pettit writes:

Does this point mean that no difference is made by the fact, if it is a fact, that the power-bearer is benign or saintly? That depends. If being benign or saintly means that the person acknowledges that they are subject to challenge and rebuke...then that entails that they cannot interfere with complete impunity; they can be quoted, as it were, against themselves...If, on the other hand, being benign or saintly simply means that the person happens to have inclinations that do no harm to anyone else...then it

will not entail a reduction in the domination of those who are under this person's power.³²

Officials need to see themselves as bound by the rules that we make together, as a willingness to match their actions with their public commitments. Of course, this needs to be *combined* with institutional systems that generate additional checks and balances for those who violate these public commitments, but these public commitments--including and especially their public nature--play a key role in an individual's freedom: they make it possible for a person to turn away from adaptation for he or she can say, 'The public order, of which I am a part and that which is committed to me as a free and equal person, will robustly protect me regardless of what *you* want me to do.' When combined with effective institutional design that impose significant material costs on those who act contrary to this commitment, the constitutional order provides a kind of protection and represents a kind of *status* that no merely private system of protection can provide.

So, let's sum up. A coercive authority is non-dominating when those subject to its prescriptions are guaranteed--in virtue of that power--a legal status as free and equal that constrains how one may use power over another according to publicly available rules. Furthermore, the exercise of power by particular agents--even and especially when those agents are private--is subject to robust checks and balances that protect that status. Furthermore, political authority is directly and explicitly accountable to its citizenry who may directly contest and demand public justifications from that authority. In other words, non-dominating political authority is one where power is explicitly and publicly structured such as to protect the ability of individuals to make decision about how to pursue what they take to be worthwhile.

³² Pettit (1997), 64

What are the institutional consequences of this view? I will discuss three, each corresponding to the three moral failures Kant describes in the state of nature³³. What we have established is that the solutions to these failures must be *meaningfully public* and consistent with the value of non-domination. The conceptual and institutional upshot of the need for a non-dominating solution to these normative failures will be several fold. They will motivate a need for a state with the three major powers described in the beginning of the chapter and a need for the state to possess sovereignty over its subjects.

The state of nature is defined by the lack of positive law. Positive law performs three vital functions, according to Kant. First, positive law makes concrete entitlements that would be justified according to more general moral principles. For example, we might think that—as a general principle—property that has been abandoned by its owner may be appropriated by others. But this general principle leaves much to be determined. How long must the property be left unattended before it is abandoned? What constitutes being left unattended? How may the re-appropriation occur? Who may re-appropriate? If we grant that there is a range of reasonable answers to these questions, then there needs to be an agent who can create rules for the creation of *specific* property entitlements. These entitlements are themselves *rights* that can defended by force. But if they are to be genuine entitlements backed up by force, then the determination of who possesses them and why must be performed by a non-dominating authority. As a consequence, private individual citizens are morally prohibited from imposing their particular judgments on how entitlements ought to be concretized as they lack the requisite standing to be non-dominating authorities. If the argument of this section is correct, then only a public agent--responsive and accountable to everyone relevantly bound by the entitlement--can make those judgments about how to specify individual

³³ Ripstein (2009), pages 145-181

entitlements. In other words, a non-dominating authority will possess a legislative function that will specify particular entitlements through the creation of positive law. The same argument applies, *mutatis mutandis*, through the creation of positive law that resolves coordination problems. Reason cannot determine upon which side of the street we should drive, but any decision will create rightful entitlements amongst the citizenry (for example, if I get into an accident in virtue of the fact that another person was driving on the 'wrong' side of the road, then I will likely have different legal recourse than if I was driving on the 'wrong' side). So, a body that can make coercively binding prescriptions in coordination cases is one that must be non-dominating. As we've established, that can be nothing other than a public authority.

The second failure of the state of the nature is adjudicative. Individuals will be involved in disputes, in part because they will have differing judgments about the nature of the rights with regard to others. For example, we can imagine two people forming a contract where one person is paid to paint the garage by the other. Now, the legislature may be able to set conditions under which these contracts are valid, but disputes may arise over vague language within the document or about questions of fact. What constitutes due diligence when painting a garage? Or perhaps the two parties disagree over what, as a matter of fact, the painter actually did. In the event of the dispute, each side will--purportedly--be making coercively enforceable normative claims on each other. The agent in charge of adjudicating those disputes must be capable of resolving those disputes in a non-dominating fashion. This means that neither of the parties to the dispute can do so, and that an impartial judge is needed. Of course, the two parties could contract to have their dispute resolved by a private mediator, but it must be the case that there is an impartial public judge who will adjudicate if

one of the parties think that *that* contract has been violated or improperly discharged. So, any non-dominating coercive authority will make provision for impartial, independent judiciary.

The third failure is an executive one, and it relates to the issue of robustness. In the state of nature, individuals must rely on private and unilateral coercive power. So, our entitlements are coercively enforceable and we need to be protected from the coercive powers of others. On this view, domination occurs not *only* when we are interfered with, but also when we co-exist with others who are *capable* of so interfering. So, we need protection from domination and need to be able to coercively enforce our entitlements. Yet we have seen, in our analysis of Pettit, that merely private and impersonal checks on coercive power are unacceptable. However, it is also the case that the private individual executive right is inherently dominating. So, the coercive, mutual assurance of individual entitlements can only be done by a public agent that represents everyone. Furthermore, that assurance must be *robust*, so it must be the case that the public authority possesses overwhelming power in comparison to any private individual. If it did not, then the enforcement of the law against that private agent would ultimately be arbitrary. However, that executive authority needs to be constrained in order to prevent individuals from being dominated *by* the public authority itself. So what's required is an executive authority that is constituted by both overwhelming power over private agents and is internally checked.

So, the legitimate state will possess three fundamental powers: legislative, judicial, and executive. It will produce public rules, employ impartial judges, and deploy overwhelming coercive power. And in so doing, it will give content to the legal status held by its citizens. To be a citizen, then, is to have specified privileges and rights as set by system of public law and to have the right to participate in and contest the judgments of that system.

Chapter Two

Fear the Leviathan: International Domination and the World State

*For I dipt into the future, far as human eye could see,
Saw the Vision of the world, and all the wonders that would be;
...
Till the war-drum throb'd no longer, and the battle-flags were fur'd
In the Parliament of man, the Federation of the world.
There the common sense of most shall hold a fretful realm in awe,
And the kindly earth shall slumber, lapt in universal law.*

-Alfred, Lord Tennyson, "Locksley Hall"³⁴

Introduction

In the previous chapter, I presented an account of *non-domination* as being a central political value. I further showed that superior power can be non-dominating if it is responsive and accountable to those subject to it. In addition, non-dominating political

³⁴ I am grateful to Paul Kennedy's *The Parliament of Man*, where he relays the anecdote that Harry Truman kept a copy of this Tennyson poem in his pocket.

authority performs essential legislative, judicial, and executive functions in a way that publicly and robustly defends the legal status of its constituents as free and equal.

International domination threatens to undermine the legitimacy of states. States possess great power and that power must ultimately be justified to those subject to it. But state power is exercised both abroad and domestically, so the legitimacy of that power depends on whether it can be justified externally and internally. As a consequence, international domination threatens to 'unzip' the legitimacy of state power, even if that state does an excellent job protecting the freedom of its own citizens. Anna Stilz writes:

... Justice does not stop at the bounds of the state, on a Kantian view; instead, all institutions are evaluable in terms of equal freedom, and if institutions impose externalities that jeopardize the freedom as independence of outsiders, then they should be reformed...Recall that for Kant, I can only justly acquire rights to property that are consistent with other individuals' innate right to equal freedom: my property must be justifiable to others...Persons outside my state are owed such a justification of my holdings just as much as insiders to it. Citizens or residents of a particular state, in other words, possess only those rights to property that (a) are compatible with the continued independence of their fellow citizens, and (b) are compatible with the continued independence of other individuals outside their state...³⁵

This chapter explores the ways in which the current international system is deeply inadequate in terms of non-domination and begins the examination of potential solutions.

At the center of this chapter, and this project, is a profound asymmetry between the domestic and the international in liberal political theory. This asymmetry, first discussed by an Enlightenment, Jacobin thinker, Anacharsis Cloots³⁶ is that anarchy is treated in fundamentally different ways in the domestic and international contexts. Liberal theorists find *interpersonal* anarchy—a state of nature occupied by people unmediated by state

³⁵ Stilz (2009), page 103

³⁶ See Kleingeld (2006), pages 560-566

membership or protection by political institutions—unacceptable and call for its elimination via the social-contract created civil condition. Yet, *international* anarchy does not draw the same sort of condemnation and the corresponding solution—the creation of a world government with the powers and sovereignty of a domestic state—is often considered not only unnecessary but positively despotic. This chapter attempts to undermine some of the key elements of that asymmetry.

The first section of this chapter describes the sources of international domination. Importantly, international domination is one of *individuals*. While we sometimes speak of states dominating each other—often as a useful shorthand—the key element of international domination is the way in which that domination affects the entitlements and life prospects of individual people. Further, international domination is a consequence of the anarchic structure of international politics; the *lack* of political authority is the source of the problem. There are two important consequences that ensue from this particular dynamic. First, it is not the case—as many theorists assume implicitly or explicitly—that international justice is *merely* a matter of discovering which principles should guide international institutions—however they happen to be structured—it is also a matter of *how* those institutions should be structured so that they act non-dominatingly. Second, our rejection of private or impersonal checks on power as being sufficient means that *balance of power politics*—one of the primary historical mechanisms for limiting state power and one that has long been favored by (neo)republicans like Philip Pettit—is normatively unacceptable.

The second section shifts focus to what seems to be the obvious solution to international domination: the world state. After all, if a domestic state with legitimate political authority can resolve the problem of *interpersonal* domination, why not simply re-use the same solution globally? Despite its elegance as a solution to international domination, the

world state is far more likely to be presented as an obviously unacceptable boogeyman than as a genuine possibility. I canvass, and generally find wanting, the objections that are normally pressed against the world state.

The third, and final section, points to a new and decisive objection to the world state. Namely, the formation of the world state would require that currently existing political communities who do an adequate job at protecting their people have their sovereignty be broken up and transferred to the world state. Unfortunately, any contractual or quasi-contractual transfer of authority could only be legitimate if there were background conditions that had *already* resolved the domination problem. In other words, the world state—if it was our starting point—would be a perfectly acceptable solution to the problem of domination, but getting to a world state from *our* world would require unacceptable injustice.

The Sources of International Domination

One agent dominates another when he is in a position to exercise superior power arbitrarily. Power is wielded arbitrarily when there are no robust and public checks that require that power to be accountable to those subject to it. There are two features of international politics that make it a particularly fecund ground for domination. First, there is much greater variation in terms of power amongst states than amongst individuals. As Hobbes points out in the *Leviathan*, most human beings operate within a fairly narrow range of capability and even the strongest person can be taken down by a confederation of weaker people. This is the reason why the *interpersonal* anarchy of the state of nature is so less stable and more violent than the anarchy of international politics. States can be sufficiently powerful to be confident of their security:

...yet in all times, kings, and persons of sovereign authority, because of their independency, are in continual jealousies, and in the state and posture of

gladiators; having their weapons pointing, and their eyes fixed on one another; that is, their forts, garrisons, and guns upon the frontiers of their kingdoms; and continual spies upon their neighbors; which is a posture of war. But because they uphold thereby, the industry of their subjects; there does not follow from, that misery, which accompanies the liberty of particular men.³⁷

States have more robust security capabilities, which can have a stabilizing effect on the political scene. However, a consequence of the current distribution of power in the system makes it ripe for domination. The United States is the preponderant power in the world. Economically, it represents a quarter of the world's output and most of its major competitors face major difficulties, from environmental degradation to political disunity. Militarily, the superiority of the United States is even more pronounced: it spends one half of all the defense money in the world, with most other major spenders close allies. In other words, it is hard to imagine an alliance of powers that could significantly threaten American superiority. What's more, there are many countries whose contribution to such an alliance would be essentially zero as they lack any meaningful ability to project power. So, international politics is characterized by extreme power differentials: the difference between the most powerful and the least powerful is wide. Further, international politics is characterized by a steep power gradient: there are not many states that have any significant economic and military power and the drop-off is dramatic. Finally, the difference between the powerful and the weak is one that is fairly intense in absolute terms. Even weak states are usually more powerful than their own citizens, but strong states can spy on and kill people around the globe, and they even have the capacity to end all human life on earth. They can intervene dramatically in the economies of small states, causing them to become impoverished or prosperous. Domination becomes an issue when one agent or group comes

³⁷ Hobbes (2002), pages 96-97

to have superior power over others. Furthermore, the greater the superiority in power, the less costly its exercise and the harder it is to contain or check, the more skeptical we ought to be of its justification and more concerned about its exercise. As a consequence, the larger the power differential, the more concerned—at least *prima facie*—one ought to be about the possibility of domination.

Second, international politics is formally anarchic. This is not to claim that the international politics is chaotic, fails to be rule-governed, or that there are no other actors beyond states that provide any meaningful constraints on state behavior. Formal anarchy is a consequence of the structure of political authority. As Waltz says:

The parts of domestic political systems stand in relations of super- and subordination. Some are entitled to command; others are required to obey. Domestic systems are centralized and hierarchic. The parts of the international-political systems stand in relations of cooperation. Formally, each is the equal of all the others. None is entitled to command; none is required to obey. International structures are decentralized and anarchic.³⁸

Formal anarchy holds when the interaction between agents is not mediated by superior political authority. In other words, anarchy is defined by the lack of a political agent capable of performing essential legislative, judicial, and executive functions. There is no agent that can make binding positive law, perform final adjudications in disputes, and execute those laws and adjudications with overwhelming force. This means that the typical problems of the state of nature are resolved privately: there are no judges, no public statutes, no legislatures, and no police. As a consequence, states must usually rely on their own resources when disputes arise. Furthermore, international politics lacks a unified legal system capable of conferring legal status on a global citizenry. As Samuel Freeman writes:

When Rawls says that the political constitution is part of the basic structure, he does not just mean the procedures that specify how laws are enacted and

³⁸ Waltz (1979), page 88

that define offices and positions of political authority. He means more or less the entire legal system, including most public and private law, that is the product of the constitution in this procedural sense. Modern legal systems, such as the federal system of the United States, are made up of countless acts of legislation, administration, judicial precedent, and other legal rulings that are issued by multiple legal bodies with lawmaking authority. An economic system that is regulated by the legal norms that are issued by the political constitutions is also part of the basic structure. Here, of course, the legal norms of property, contract, commercial law, intangibles, and so on that are essential for economic production and exchange are to be included in the basic structure. What makes possible the incredibly complicated system of legal norms that underlie production, exchange, and consumption is a unified political system that specifies these norms and revises them to meet changing conditions....*Nothing comparable to the basic structure of society exists on the global level.*³⁹

In other words, there is no *single*, international agent that can play the role of a political authority as described in Chapter One. International politics lacks a legislature that is legally empowered to make binding laws on all states in the system, lacks an impartial forum for the adjudication disputes, and lacks an executive that can enforce those laws and adjudications with overwhelming power. Finally, there is no authority that can publicly confer various legal statuses and entitlements on the global citizenry. As a consequence, states will need to resolve disputes and cooperate on the basis of their own bilateral and multilateral interactions with other states that is uncoordinated by public, enforced rules of conduct. Again, this is not to say that there are no international institutions that play a role in the mediating, channeling, or otherwise affecting the behavior of agents; this is simply to say that there exists no robust constitutional order and political authority in world politics. In other words, this is not to say that state actors are not constrained; it is, rather, to say that they are not constrained by a republican, constitutional order.

We can see the operation of both of these dynamics dramatic and mundane exercises of political power in the international realm. They combine to make for an especially

³⁹ Freeman (2006), pages 38-39, emphasis added

pernicious problem in terms of domination. As we saw in the previous chapter, differences in power are not *necessarily* dominating if there are robust checks. Gordon can be more powerful than Bud as long as there is some external public agent that guarantees Bud's legal status. Similarly, the lack of an external, public authority need not *necessarily* lead to domination as long as the agents interacting are equally situated. The international order combines the problematic features of both scenarios: unchecked, superior power. And this is reflected in international politics. For example, international institutions are often structured to give decisive advantages to the powerful nations of the world. The United Nations gives a veto to the permanent members of the Security Council. These members are—at least for the moment—the most powerful nations on the planet. The World Bank and IMF are structured such that richer nations receive a greater say in their operations.⁴⁰ Powerful nations systematically structure international institutions to favor their interests—whether these be protectionist agricultural policies or strong intellectual property guarantees to pharmaceutical companies—while remaining comparatively unconstrained by the interests of the poor and marginalized global south.⁴¹

Let's take a fairly dramatic, yet not unrepresentative, example from recent history to show not simply that sometimes states misbehave, but the underlying structure of the interaction is dominating:

WARRING NATIONS: This war was a consequence of a conflict between the United Kingdom and Argentina over possession of an island chain in the South Atlantic. Argentina's claim was fundamentally historic, arguing that that Malvinas were taken as a consequence of imperialist aggression long ago. The United Kingdom has argued that their claim is

⁴⁰ World bank voting rights and board membership, for example, are determined by the number of shares each country possesses. The United States, for example, owns 15% of World Bank shares and has guaranteed board membership even though it only represents 5% of the world's population.

⁴¹ See, for example, Pogge (2003) "Assisting Global Poor" and Beitz (1974)

based on precedents set in international law and in treaties with Argentina and Spain and that remaining in the UK is the popular will of most Falklanders.

Now let's imagine a similar conflict in a domestic and legitimate constitutional order:

FEUDING FAMILIES: The Hatfields and the McCoys have long been feuding over a copse of trees between the property held by the two families. The Hatfields, the current owners, argue that they contracted with the McCoys to purchase the copse and that they have made it a productive walnut orchard through their own labor. The McCoys argue that the original contract was invalid and merely reflected the Hatfield's illegal occupation of the copse in the first place.

We do not need to go into the legal minutiae that have long occupied the debate between the UK and Argentina. The point is *not* whether—on the basis of our best normative account of property entitlements, international law, or territorial integrity—ideal justice demands an Argentine Malvinas or a British Falkland Islands, a Hatfield or a McCoy copse. Rather, the issue is *how* the issues could be resolved, regardless of whether they are ultimately resolved correctly. In FEUDING FAMILIES, the resolution is comparatively simple. Each Hatfield and McCoy possesses a legal status by which they can demand the adjudication of their dispute from an impartial judge. That judge will be aided by positive law—produced by an adequately responsive legislature—that establishes the principles for the valid transfers of property. The rules governing the operation of the court will be designed, in various ways, to produce a fair hearing on both sides⁴², and the judge will *not* be a party to the dispute or be in a position to benefit from a ruling in favor of either party. In order to strengthen the tendency towards procedural fairness, there may very well be appellate courts, but these will eventually terminate when a final adjudication has been made. This final adjudication will then be enforced by the coercive apparatus of the state, which is overwhelmingly superior to

42 See Waldron, "How the Law Protects Dignity":(December 15, 2011). NYU School of Law, Public Law Research Paper No. 11-83. Available at SSRN: <http://ssrn.com/abstract=1973341> or <http://dx.doi.org/10.2139/ssrn.1973341>

either the Hatfields or the McCoys. That coercive power is subordinate to, and directed by, the adjudicative order and that coercive power is relevantly checked so that those who exercise it do so according to these public constraints. The important thing to see is that the enforcement of the judicial order is subject to the same *publicity* and *impartiality* constraints as the legal process that produced the order itself. And the overwhelming power of the coercive authority establishes its robustness. As a consequence, the particular strength of either family has—as far as possible—been made irrelevant to who comes to have a legal entitlement over the copse of trees. In other words, the existence of a legitimate domestic order eliminates the possibility of private domination between the Hatfields and the McCoys.

Let us now consider WARRING NATIONS⁴³. There is no public, positive international law that can be used to evaluate the conflicting claims of Argentina and the United Kingdom. And even if there were, there exists no binding international venue that has jurisdiction to adjudicate those claims in light of that positive law. Again, even if there were such an adjudicative body, it cannot order any coercive agency to enforce those claims. In international politics, how was the dispute adjudicated? What determined the respective rights of the British, Argentineans, and Falklanders? The answer is quite simple; the militarily and economically stronger party determined the entitlements. Argentina invaded the Falklands because they thought that the United Kingdom would not intervene. The Argentines thought that their right to the islands could be vindicated by military force. Similarly, the enforcement of the United Kingdom's entitlement—and the right of Falklanders to remain on the island and citizens of the UK—fundamentally depended on the

⁴³ I am explicitly setting aside the current institutions of international law-making and adjudication. In Chapter Four, I will take up the question of whether those institutions can resolve problems of domination *even though* they fall short of a republican constitutional order.

contingently superior military might of the United Kingdom. In other words, we have the precise *opposite* of FEUDING FAMILIES. In the domestic case, the relative power of the two families was irrelevant, but a similar dispute in the arena of international politics is resolved almost entirely according to the relative power of the parties to the dispute.⁴⁴

Again, perhaps the final result of this exercise of British power ultimately produces the result a just constitutional order would converge upon, and perhaps there are many cases where the powerful could press their advantage but decide not to. But it is precisely the point of the domination analysis that being able to exercise arbitrary and unchecked power is an injustice even if that power is used virtuously. And it is hard to see how the Falkland Islands dispute could be resolved any way except through an interplay of the comparative power of the two parties (and their allies) in the dispute.

Constraining Elements of International Politics: Hegemonic Stability Theory and the Balance of Power

There are a couple of ways to resist the idea that the current structure of international politics is inherently dominating. First, one might argue that the existence of international institutions and civil society effectively constrains (or has the potential) to constrain state power. International regimes can recapitulate the capabilities of the state at the global level and, even, perhaps undergird a kind of global, public status. We will discuss this possibility in both Chapters Three and Four, so I will set it aside for the moment.

The second objection to the view presented in the previous section would be that it treats states as having far too much freedom to exercise power arbitrarily in the international arena. There are *structural* features of the international system that constrain how powerful states may behave, and these features might have the effect of reducing the domination

⁴⁴ For ways in which powerful countries enforce their property claims through force, see Cavallero (2010). Pogge (2002) describes how particular principles of the international system are imposed by powerful agents in ways that inhibit the reform of LDCs.

inherent in an anarchic system. There are two structural forces that I wish to focus on: hegemonic stabilization and balance of power. The second, in particular, has been historically influential in the republican tradition. However, neither of these forces fundamentally change the dominating dynamic of international politics.

Let's begin with hegemonic stability theory. The basic idea is that the dominant economic and military power (the hegemon) will provision certain public goods that benefit all of the agents in the system. In particular, it provides a system of rules that help govern trade and the use of force in a way that serve the interests of every agent in the system when compared to pure anarchy. The hegemon provides these goods because it benefits disproportionately from the existence of stable, rule-governed interactions. So, this represents a force that could reliably drive agents in the system to follow rules that serve the interests of the people who operate within it. The hegemon stands ready to use its superior power to enforce those rules, and the other states in the system are externally checked by the hegemon. This indicates a possible reinterpretation of the WARRING STATES case. Instead of conceiving it as an anarchic, self-help adjudication of a dispute, the hegemonic stability theorist would argue that it is a police action by proxy. Argentina violated a 'rule' of the system by resolving the dispute through invasion and the hegemon (the United States) through active logistical support, intelligence assets, and tacit acceptance simply provided the means for one of its proxy allies to enforce that rule. The United Kingdom *looks* like it is simply acting in a self-help manner to resolve a bilateral dispute, but that is deceiving. The United Kingdom is both *providing* a check and *being* checked as, presumably, there are actions that the hegemon would not accept as a response to the Argentinean invasion of the Falklands.

Now, hegemonic stability theory does have an important insight and it does clarify my claim that the international system is characterized by 'anarchy.' It is true that an anarchic system can have sophisticated structural undercurrents that reliably constrain what actors may do in virtue of how other actors in the system may react. It is also true that these constraints can be both effective and external, so on the *neo-republican* account of domination, hegemonic stability theory is a justice-enhancing feature of the international system. However, there are substantial problems with using hegemonic stability theory to undermine international domination. First, the hegemon is externally unchecked⁴⁵ and different hegemons can and do institute radically different rules of the system.⁴⁶ There is no real sense in which the individual citizens of weaker nations can make it such that the rules the hegemon uses to build the international system under its power will be genuinely responsive to their interests. Of course, some hegemons will be more virtuous than others, but there is no real mechanism for *ensuring* that the hegemon will so act. What's more, hegemonic stability theory violates the requirement of impartiality in its structuring of the international order. It is a *feature* of the system that it serves the interests of the hegemon to a greater extent than other agents in the system. Furthermore, there are no institutional guarantees that ensure that the implicit legislative and judicial judgments are performed impartially. In WARRING NATIONS, the United States must judge for itself that Argentina is the aggressor—and not, for example, simply responding to an extended period of British aggression—and the US must judge for itself that the one of the norms of the system will be non-aggression. However, the United States does not even attempt to institute the basic

⁴⁵ Of course, it is true that hegemonic powers may feel *self-constrained* for a variety of reasons, but this is different from being checked in the sense required for non-domination.

⁴⁶ We will discuss the difference between American substantive multilateralism and Nazi bilateralism in Chapter Four. See Ruggie (1998), 107-112.

procedural mechanisms that would allow those judgments to be impartial. In fact, given the long and robust alliance the United States has with the United Kingdom, its decision to tacitly support the British claim is a paradigmatic case of being partial. So, hegemonic stability theory appears to be very much akin to a fairly distant dictator, but, importantly, a dictator that does see the value in treating its subjects well.

So, the primary problems with hegemonic stability theory are that the hegemon lacks an external mechanism of accountability and that the rules are constructed without input from or accountability to those who will eventually be subject to them. Republican political theorists have historically argued that the arbitrariness of the hegemonic behavior can be reliably constrained by *balance of power politics*. The balance of power operates to constrain the hegemon through the threat of a coalition of great powers (i.e., those powers that have sufficient power to put up substantial resistance to the hegemon) forming to block tyrannical hegemonic actions. In other words, balance of power politics creates a system of *mutual* checks. The hegemon checks other powers and generally sets the rules of the system, but other great powers always have the option of creating a balancing coalition if either the rules or the hegemonic actions become too oppressive. In this way, republicans argue that the structure of international politics can be made more non-arbitrary and non-dominating:

Coalitions among weaker countries, if they can only hold together, may often be able to drag them [the more powerful nations who wish to flout international rules] back to the table and exploit constraints of discourse-compatibility in their own favour...International forums are always in danger of becoming sites for the exercise of brute power, of course, but there is no necessity attaching to that result. If the power on different sides looks to be even roughly balanced, then that may create a space where the international order can interfere in the affairs of different states under the equal and effective control of terms that are accepted on all sides.⁴⁷

⁴⁷ Pettit, 2010a, pages 159-160. See also Pettit (2010b), page 84.

Balance of power politics then plays a key role in the neo-republican theory of international non-domination. Each agent is externally checked by another agent and those checks reliably serve the interests of individual people. The hegemon provides public goods—including a generally peaceful global order—and other powers check the hegemon. Moreover, each member of the balancing coalition is motivated *by their* own interests to check the hegemon. After all, the more powerful the hegemon, the more the other Great Powers will fear their own domination. So, everyone is incentivized in ways to act in the name of the public good and check everyone else in the system. If these political arrangements are structured well, then they can effectively serve the common, global good. On the republican view the important disanalogy with the domestic case is that states possess an increased ability to absorb an initial attack, monitor the capabilities of others, and protect themselves. As a consequence, interactions between states need not be mediated by a robust constitutional order. So, on Pettit's view, there is no reason for a superior political authority as long as the agents in the system mutually check each other. None of the individual great powers can meaningfully check the hegemon, but combined they represent a serious threat.

Unfortunately, the reliance on balance of power is itself predicated on a flawed understanding of non-domination. As we saw in Chapter One, non-domination is not simply a feature of the externality and the reliability of the mechanisms that constrain superior power. Consider how *WARRING STATES* looks on the neo-republican analysis. The hegemon (the United States) establishes certain rules of the system, including the rule of nonaggression. The hegemon determines that Argentina has violated that rule when it invaded the Falkland Islands and supports the United Kingdom as it enforces the norm and retakes the islands. If the other Great Powers do not agree with the United States' support of the United Kingdom, then they may act as a coalition to reduce the hegemon's power in

order to protect themselves over the long term. This seems to be *very* similar to the way in which Wickham is protected by Darcy in PRUDENTIAL SLAVEOWNER. In particular, it looks very much like the *market* protections that constrain Darcy. Since Wickham is so productive, the aggregated actions of firms in a particular structure of interactions provides Darcy with a very strong incentive to treat him well. Or rather, they will impose significant costs on Darcy for his mistreatment of Wickham. Similarly, there are systematically organized groups of agents that will impose significant costs on the hegemon for acting without regard for the common good.

The same objections apply to the balance of power version of the WARRING STATES as to the PRUDENTIAL SLAVEOWNER. While it is true that the self-interest of Great Powers might be quite reliable in their constraining of each other's substantial powers, this is normatively inadequate just as the protections afforded to Wickham by the market are inadequate. First, while balance of power politics might resolve the interstate domination of the hegemon and other powerful states, it does not resolve the domination of the *class* of Great Powers over smaller and less powerful countries. And just as Wickham is not part of Darcy's social and economic class, Argentina⁴⁸ does not belong with the United States, the United Kingdom, and the other Great Powers. As a consequence, balance of power politics does not resolve the way Great Powers dominate the rest of the world. And it is not difficult to find cases where balance of power politics did not prevent even fairly extreme examples of international domination. European imperialism around the world was, at the very least, left unchecked and probably *encouraged* by the European balance of power.

⁴⁸ Of course, we might think, as a matter of substantive justice, that Argentina's claim was spurious and the British claims well-justified. The point here is not whether we should be especially sympathetic to the Argentine junta. Rather, it is that the rights of particular Argentines, Falklanders, and Brits all depend on the arbitrary constellations of power between the actors. One can be in the wrong and nonetheless dominated.

There are two ways that the balance of power thesis could be expanded. First, the Great Powers could simply become more virtuous and come to care for the interests of the global underclass when they formulate the rules that govern the international system. Unfortunately, this expansion would fail to really resolve the problem of *domination* as the check would depend on the internal virtue of the Great Powers and would not represent genuine accountability of the Great Powers to those with less power. It would be up to the Great Powers to be so virtuous. Second, we could create a system where every state in the system was a Great Power. That is, if every citizen of the world was a member of a minimally adequate domestic constitutional order and every such polity had sufficient power to put up significant resistance to the hegemon, then this would require the hegemon to be genuinely accountable to every state in the system. Of course, that world is not ours and that world would lose many of the benefits of hegemonic stability as the hegemon would lose the ability to easily and decisively make and enforce the rules of the system. But in any case, such a radically multi-polar system would recapitulate the problems of a state of nature between individuals. States would be forced to rely on their ability to form alliances with other 'great powers' in order to resolve international disputes. In other words, arbitrary constellations of states, mostly relying on their own power and their ability to ally with other states, would determine the outcome of international issues. But this really just is the problem of domination in a state of anarchy applied to the international level.

On a deeper level, none of these solutions look very likely to be successful because they ultimately depend on impersonal and private forces. Hegemonic stability theory and balance of power politics do not ultimately amount to a constitutional order where those subject to power can contest and demand accountability of its exercise. At best, they are externally reliable ways of *channeling* that power in socially productive ways. But as we saw in

Chapter One, reliable channeling is not the same as non-arbitrary exercise. This channeling lacks the features of publicity and accountability that seemed so important in the normative comparison of the PRUDENTIAL SLAVEOWNER to LAW-ABIDING CEO. There is no sense in which a person in the Third World can demand justification from and meaningfully influence the content or the enforcement of the rules of the international system in the context of balance of power politics. Of course, a hegemonic power might be more likely to *behave* if there are other powerful states that stand ready to block its activities, but that does not make the system as a whole any less dominating.

The World State

In the light of these considerations, the solution to international domination seems obvious. We should simply re-create the successful solution of a constitutional order across the entire globe. If a constitutional domestic order solves interpersonal domination but does not resolve international domination, why not create a constitutional order with substantial political powers that has sovereignty over the entire planet? If there are no political powers other than the world state, and the world state possesses adequate protections against internal domination in virtue of its constitution, separation of powers, and democratic accountability, then the problem of political domination appears solved. So, it seems that what should be done is that the people of the world should create a world state with robust legislative and judicial authority, backed by the overwhelming coercive power.

However, despite the apparent elegance of eliminating international domination by eliminating international politics, most republicans—whether they be Kantian or neo-republican—reject the world state as a solution. For example, Kant argues that all rights are fundamentally provisional in the state of nature and, as a consequence, the first moral

obligation of every person is to create a state and enter into the civil condition and avoid doing 'wrong in the highest degree'⁴⁹:

It is true that the state of nature need not, just because it is natural, be a state of *injustice*, of dealing with another only in terms of degree of force each has. But it would be a state *devoid of justice* in which rights are *in dispute*, there would be no judge competent to render a verdict having rightful force. Hence each may impel the other by force to leave this state and enter into a rightful condition; for although each can acquire something external by taking control of it or by contract in accordance with its *concepts of right*, this acquisition is still only *provisional* as long as it does not yet have the sanction of public law...⁵⁰

And this civil condition possesses certain necessary features for it to even count as a potential solution to the problem of interpersonal domination.⁵¹ Then, in his discussion of 'international right,' Kant argues that interactions in the international state of nature have the same fundamental moral flaws as those in the interpersonal state of nature. In fact, he explicitly says that states do *wrong in the highest degree* by remaining in anarchy, which is precisely the same complaint that motivated the creation of the domestic state:

The elements of the right of nations are these: (1) states, considered in external relation to one another, are (like lawless savages) by nature in a non-rightful condition. (2) This non-rightful condition is a *condition* of war (of the right of the stronger), even if it is not a condition of actual war and actual attacks being constantly made (hostilities). Although no state is wronged by another in this condition (insofar as neither wants anything better), this condition is in itself still wrong in the highest degree, and states neighboring upon one another are under obligation to leave it.⁵²

One would *expect* Kant to then argue for the creation of a public political authority that can create a global civil condition and that each state has a moral obligation—above all else—to

⁴⁹ *MM* 6:308

⁵⁰ *MM* 6:312

⁵¹ Kant lays out the necessary condition for being a legitimate public authority in 6:314-6:334

⁵² *MM* 6:344

form that civil condition. But at this precise moment, Kant steps back from that argument, rejects the world state, and argues that we can only reach an 'approximation' of true justice:

So *perpetual peace*, the ultimate goal of the whole right of nations, is indeed an unachievable idea. Still, the political principles directed toward perpetual peace by entering into such alliances of states, which serve for continual *approximation* to it, are not unachievable. Instead, since continual approximation to it is a task based on duty and therefore on the right of human beings and of states, this can certainly be achieved.⁵³

Kant suggests that the best we can hope for internationally is a voluntary confederation of peaceful, republican states. He denies not only that we are required to create a world state—which seems to be implied by his view—but also that it would be even be *permissible* to create a world state to solve the problem of international domination. Philip Pettit, likewise, seems to think that the domestic state is, by a wide margin, the best tool for reducing interpersonal domination, but explicitly denies that that the world state would be an acceptable solution.

In order to explain this puzzling dialectic, we need to examine why the world state has, historically, been considered a non-starter. Of course, domination oriented theorists are not alone; the rejection of the world state is well-nigh universal amongst political theorists. Objections to the world state generally fall under three categories. Some objections are based on *feasibility*: an effective and accountable world state is simply beyond human capabilities. Theorists who argue against the world state on the basis of *methodology* accept the that the world state is possible but nonetheless argue that it is sufficiently far away that to place any theoretical emphasis on it would be problematically utopian. Finally, some have presented *normative* objections, arguing that the world state would be necessarily dominating or despotic.

Feasibility Problems: Is the world state even possible?

⁵³ MM 6:350

Let's begin with the feasibility objections. Most who object to the world state do so because they think the *end-state* is unachievable, and this will be contrasted latter with some theorists that think that the world state is *pathway infeasible*. The world state is a theoretic non-starter in the same way that a public policy predicated on human immortality is a non-starter: it simply is not going to happen. And these objections to the world state usually come in the form of a dilemma. A world state that was sufficiently powerful to actual constrain modern states would be so powerful as to be uncheckable. So, we must either choose a despotism or a weakling. Many theorists have rejected the world state for this reason. For example, Kant says:

Only in a universal *association of states* (analogous to that by which a people becomes a state) can rights come to hold *conclusively* and a true *condition of peace* come about. But if such a state made up of nations were to extend too far over vast regions, governing it and so too protecting each of its members would finally have to become impossible, while several such corporation would again bring on a state of war.⁵⁴

And Rawls agrees:

Here I follow Kant's lead in *Perpetual Peace* (1795) in thinking that a world government—by which I mean a unified political regime with the legal powers normally exercised by central governments—would either be a global despotism or else would rule over a fragile empire torn by frequent civil strife as various regions and peoples tried to gain their political freedom and autonomy.⁵⁵

A world state with relevant institutional capabilities *and* democratic accountability is simply impossible given limitations in transportation, communication, and, perhaps most importantly, the ability to change the ingrained nationalism of most of the global citizenry. As a consequence, the world state will either be weak, unable to institute policy or prevent

⁵⁴ *MM* 6:350

⁵⁵ Rawls (1999), page 36. The Kant passage Rawls refers to is Ak:VIII:367. This view of the world state was widely shared by Enlightenment thinkers, see Rawls (1999), fn 40.

widespread civil wars, or it will be a totalitarian tyranny, possessed of irresistible superior power.

I believe that the easy confidence with which that the world state is rejected is predicated on a notion that a public political culture filled with such a diverse panoply of different ethnic, linguistic, and ideological groups cannot be sustained, especially when there are radical economic and social differences between them. There must be some kind of shared self-conception to support genuine democratic politics. Without that shared conception, the exceptional power of the world state will necessarily be divvied up among these various interest groups and identity groups (thus, leading to civil war and disintegration) or one group—or perhaps a proper subset of groups—will come to dominate the state apparatus, leading to despotism. This tendency is then exacerbated by the transportation and communication difficulties associated with creating a global public culture. These worries are of a piece with some of the earliest republicans, who argued that that non-dominating political systems would have to be small and culturally homogenous⁵⁶ usually city-states. The underlying view seems to be quite similar to contemporary nationalists, who argue that democratic politics requires that the citizenry share a minimally adequate cultural substratum.⁵⁷

End state feasibility concerns do not really strike me as decisive. First, we have considerably more experience with successful multi-ethnic and multi-lingual polities than we did during the Enlightenment, and radical improvements in communications and transportation undermine problems of geography and size. For example, it is now much

⁵⁶ For example, Rousseau preferred states the size of a city-state; Geneva could be made just and France could not be.

⁵⁷ See Miller (1997) and Tamir (1993)

easier—both in terms of time and expense—for a representative to cross continents and oceans than it was for individuals to cross relatively small countries a few hundred years ago. For example, travel between Edinburgh and London in 1750 took 12 days and even as late as 1850, travel between London and Sydney took four months. Now, one can—even going by sea—reach Australia from London in about 30 days and by plane in 22 hours. In other words, travel around the globe is faster *now* than travel would have been around even a small country in 1750. And unsurprisingly, the world is populated by continent spanning republics that would likely have been inconceivable during the enlightenment. And this radical change works both ways; it allows for the world state to project power *and* makes a global public culture with democratic accountability possibility. In others words, the *physical* constraints on a world state do not seem importantly greater than those facing the governance of the American states in mid 1800s or the French states in 1700s.

The *ideational* constraints, on the other hand, do seem monumental. Even comparatively unambitious attempts to politically unify relatively similar polities have met with difficulty. How can we possibly conceive of a polity that covers such a diverse group of languages, conceptions of the good, and political institutions To put it in Rawlsian terms, it does not appear possible to formulate an overlapping consensus that would allow for a world state to exercise power in such a way that could be agreed to by all. But this is too quick. Certainly, it seems that the political and cultural circumstances obtaining right *now* do not appear to be especially conducive to the creation of a unified political culture, but it less obvious that it will always be so. First, the tendency for much of modern history is *convergence* on institutional political formations.⁵⁸ The diversity of political formations has been steadily decreasing, and we are approaching a global consensus that the only *legitimate* form of

⁵⁸ See Tilly (1990).

government is democratic and constitutional. Second, some have argued that this diversity will actually increase pressure to create a world state.⁵⁹ We already see this in the creation of an unprecedentedly robust matrix of international institutions designed to solve problems—from human trafficking to banking regulation to climate change—that are increasingly global in their orientation. Furthermore, Alexander Wendt⁶⁰ has argued that the world state is an inevitable consequence of the same dynamics that has led to the creation of modern states:

Each culture of anarchy is a relatively stable stage in this process[leading to a universal state to match the universal person], forming a local attractor in the system's development. However, all stages short of a world state are unstable. New stages with more demanding boundary conditions emerge as solutions to instabilities that require further elaboration for their resolution. In short, the logic of anarchy transforms structures of recognition and identity from a territorial to a global basis, giving us a Weberian world state by creating a Hegelian one.⁶¹

The creation of the modern state is, according to Wendt, a consequence of individuals seeking a particular kind of *recognition*. His account of public recognition is actually quite similar to my understanding of public legal status as free and equal:

Thin recognition is about being acknowledged as an independent subject within a community of law. To be recognized in this way is to have the juridical status of a sovereign person rather than an extension of someone else (like a child or slave), and thus to be a legitimate locus of needs, rights, and agency—a subject rather than object. These are rights are nevertheless 'thin' because they acknowledge nothing more about the actor's particularity other than the simple fact of difference, and so everyone who has this status is essentially the same, a 'universal person.'⁶²

⁵⁹ Both Wendt (1993) and Deudney (2007) have argued that the world state is an inevitable consequence of ideational (Wendt) and material (Deudney) developments in international politics.

⁶⁰ Wendt (2003).

⁶¹ *ibid*, 517.

⁶² *ibid*, 511.

Wendt argues⁶³ that the human desire for recognition drove the formation of public legal institutions. The domestic state can protect and give content to that recognition for individuals as free and equal, especially in the face of large differentials of power and influence. That legitimates, and gives purpose, to those institutions. Wendt then suggests that the drive for *states*—as agents themselves—to seek recognition as free and equal will lead to the same process. States will seek a legal environment that will guarantee their status as free and equal even in the face of differences in capability and wealth. This will lead to the creation of a world state over the long run. We can strengthen Wendt's argument by placing less reliance on the controversial idea that states themselves are recognition seeking entities. Rather, I think that *citizens* will come to see that their own recognition as free and equal will come to depend on a world state. After all, if my previous arguments are correct, then respect for individuals as citizens requires an institutional solution to international domination. All we would need for the Wendtian system to operate is for individuals to understand that full recognition as free and equal *citizens of a particular state* depends on a broader, global order. So, if Wendt is correct,⁶⁴ then the ideational diversity of the international system will, as a matter of fact, pressure the system towards the creation of a world state. Thus, the descriptive and the normative would be in happy convergence over the long run.

Finally, diversity is not always the death knell of a reasonable public culture. There are reasons to think that non-domination is often *served* by a wide variety of interest groups

⁶³ *ibid*, 512-514

⁶⁴ There are some reasons for skepticism about Wendt's argument. First, Wendt's argument that the world state *will* (as opposed to *should*) occur is based on a controversial teleological metaphysics. Second, Wendt argues that the *political* demand for recognition as free and equal will trump other kinds of identity, but this seems predicated on a strained understanding of human psychology.

and perspectives. James Madison, in *The Federalist Papers*, turns the standard arguments for small republics on their head. He argues that the smaller the republic, the more likely it will be that a single faction will come to dominate its politics:

The other point of difference is, the greater number of citizens and extent of territory which may be brought within the compass of republican than of democratic government; and it is this circumstance principally which renders factious combinations less to be dreaded in the former than in the latter. The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression. Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other. Besides other impediments, it may be remarked that, where there is a consciousness of unjust or dishonorable purposes, communication is always checked by distrust in proportion to the number whose concurrence is necessary.⁶⁵

Large republics are more stable precisely *because* they have a large number of factions, none of which are capable of completely dominating the apparatus of the state. Large republics demand *coalitional* politics, and large republics are more likely to produce competent representatives capable of participating in complex political interactions. These factions have the consequence of providing rich possibilities for checking each other. Of course, we have seen that such checks are not *sufficient* for non-domination, but they are certainly helpful. At any rate, Madison has been at least partially borne out in that many thought that a republic the size of the United States was bound to fail, while Madison was more optimistic.

So, my argument against end-state feasibility objections to the world state has three components. First, modern developments in transportation and telecommunications have made a world state physically possible, and this is evidenced by the competent functioning of

⁶⁵ Federalist Papers, No. 10.

continental, multiethnic states. Second, there are reasons to think that global nature of emerging problems and the increasingly globalized calls for recognition will put pressure on international politics to create a world state. Furthermore, these problems will also lead to a more general cultural and institutional convergence. Third, a robust political culture cannot only be sustained in the face of factional diversity but also encouraged.

Methodological Worries: Is the world state worth our time?

Feasibility objections depend upon a strong modal claim: the world state is impossible or so close to impossible as to make no difference. *Methodological* objections depend on the weaker claim that the world state is possible but so far off as to be practically irrelevant. Perhaps one day—after a long process of social evolution—a world state will become a real possibility but not today. To focus our theoretical resources and attention on this distant, utopian possibility is a mistake, diverting our focus from the real improvements that can be made now. In fact, focus on the world state would be a symptom of a more general disease: the excessive attention paid to practically irrelevant ideal theorizing in the face of concrete and particular injustice. Amartya Sen and Elizabeth Anderson have been the primary advocates of *comparativist* political philosophy. Anderson writes:

In nonideal (*comparativist*) theory, ideals embody imagined solutions to identified problems in society. They function as *hypotheses*, to be tested in experience. We test our ideal *by putting them into practice* (my emphasis) and seeing whether they solve the problems for which they were devised, settle people's reasonable complaints, and offer a way of life that people find superior to what they had before.⁶⁶

Rather than focus on ideal theory, political philosophers should concentrate upon evaluating concrete policy interventions that we can pragmatically test and evaluate. Rather than compare the intervention to the ideal, we compare it to the *status quo* and determine whether

⁶⁶ Anderson (2010), page 6. Anderson also describes several problems with ideal theory (pages 3-6). Amartya Sen (2009) makes similar claims.

it improves the world. This type of analysis, so argue Anderson and Sen, can be done independently of ideal theory and is more likely to be productive and action-guiding. The comparativist objection to the world state, then, is not that it is impossible or even undesirable, but rather that talking about it is pointless. The world state is such a long way off and would require such dramatic changes, both institutional and psychological, that it is functionally a dead letter. We can create a profoundly sophisticated account of the world state complete with a written constitution, voting procedures, capital city and so forth, but no matter how elegant or convincing, it would not help actual people solve actual problems. Anderson and Sen suggest that political philosophy ought to be action-guiding in a deeply pragmatic sense: it should assist those engaging in present-day politics

Indeed, there is something utopian about the world state. After all, while my response to the end-state feasibility objections shows that the world state isn't quite so far away, it would still require considerably more institutional and ideational convergence to go before it becomes achievable in anything like the short term. Why should we focus on a political reform that is at least one, and perhaps many generations away? I do not think that the comparativist objection applies to the republican argument for the world state. First, it does not follow from the fact that an objective is utopian that it cannot be action-guiding. There might be important differences in how one might go about reform if one has one goal in mind compared to another. Perhaps even more dangerously, the lack of a clear political endpoint might encourage one to engage in political interventions that, while improving on the status quo, nonetheless lead reformers down a cul-de-sac that makes further improvement vastly more difficult.

Consider the following example. In the beginning of the 19th century, liberals allied themselves with nationalist movements around Europe. Hungarians, Poles, Italians, and the

like all sought their own state to correspond with their respective nations (linguistic-cultural groups). The comparativist would conclude, correctly, that a 19th century with a dedicated Hungarian state and a dedicated Austrian state would have been better than the century of civil war, repression, and exploitation. Yet, the political alliance had the long-term effect of legitimating nationalist claims and increasing the likelihood of conflict. Many years beyond the solution of the "Hungarian" problem, Europe found itself convulsed in nationalist violence. It is this alliance that helped generate the Balkan conflicts that lead to the First World War, to undergird the German claims to the Sudetenland, and even to motivate the Russian-Georgian conflict as late as the 21st century.

Of course, the above story might be false in every particular. But that doesn't matter; it *could* very well be true. From the liberal standpoint, an ideal theorist would push the possibility, and even the desirability, of multi-national states or would perhaps even be skeptical that nationalist identity—as it was conceived in essentialist terms in the 19th century—should play a large political role at all. At the very least, the ideal theorist would recognize that this alliance was one of temporary expedience, deeply non-ideal, and would be cognizant and wary of the dangers the alliance represented. But the comparativist would only see the short-term gain. The comparativist is *not* in a position to critique the alliance as problematic. After all, it achieves everything the comparativist cares about. The problem with the comparativist political project is that it can lead to a kind of 'tunnel vision' and lack of political imagination. It is easy to see the great injustice of the world and to think in relatively tactical terms in order to achieve real advances, but it is also important to occasionally stop looking at one's feet and glance ahead.

The last problem with the comparativist critique is that, on the republican view, the world state is *not* an ideal. Rather, the republican argument is that there is a very real

problem—international domination—to which the world state looks like a fairly elegant, and perhaps unique, solution. In fact, to treat the world state as an *ideal* as opposed to a real political solution to a genuine problem is to implicitly accept an instrumentalist understanding of legitimacy. The comparativist view of international justice imagines a sliding scale. This intervention moves the scale up a notch when compared to the status quo and so it should be performed as long as there are no other interventions that do better. So, a particular intervention will improve the protection of human rights or is superior along some other metric that allows for an easy comparison with the status quo. What the comparativist view has some difficulty with is the idea that there could be a radical normative cleavage between two scenarios that is not easily captured by the metric. For example, if we use the distribution of capabilities, primary goods, or human rights as our metric of evaluation, then it is clear that the metric will fail to consider domination. Again, domination can be a legitimate normative complaint even if the dominating power does a good job of distributing the appropriate capabilities, goods, or rights. But if *domination* is the relevant metric, then the world state *isn't* subject to a comparativist objection as long as several conditions hold. First, it must be the case that non-domination is not perfectly telic or continuous. If it is true that public, legal status is a necessary feature of a non-dominating political order and it is true that this public recognition doesn't come in degrees, then it looks like non-domination is qualitatively different from domination. No amount of technocratic improvement will solve the domination problem. Second, the world state would need to be the only plausible way to produce that radical, qualitative shift. *If* both of those things were true, then the comparativist with a domination metric would need to conclude that the only course of action would be to act to create the world state. No incremental improvements would be superior to the status quo in terms of domination, so there would be no other

options. The only path, then, that would be superior to the status quo would be the world state, so the comparativist would be committed to its creation. I don't claim to have *established* that the comparativist would be so committed since I haven't shown that the world state is the only possible way of creating the relevant kind of public status. But I have established that the comparativist objection to the world state is dependent upon other normative commitments—either instrumentalist or about the nature of non-domination—that are normally not explicit.

Normative Worries: Is the world state desirable?

The final, and most important, category of objections to the world state, purport to show that the world state would be unjust. In particular, I plan to focus on arguments that the world state would be necessarily despotic and unavoidably dominating. The first such argument is implicit in some of the feasibility concerns mentioned above: the sheer power of the world state makes it problematic. In order to be able to project power and enforce economic and social arrangements around the globe, the world state would need to possess military and police powers that would dramatically outstrip those of any individual citizen. Such a concentration of power would be dangerous and uncontrollable, leading inevitably to domination, or so this objection goes.

This objection, however, seems to show too much. It is hard to see how the power differential between any individual citizen and the world state would be dramatically and qualitatively different than between a citizen and a well-functioning and competent state today, especially a Great Power. In fact, Tilly has argued that the striking improvement in coercive power by political institutions is no coincidence: the national state has come to dominate the political landscape precisely *because* it is better than other political formations at translating human productive activity into coercive power. And the very concept of the state

implies a profound difference between citizen and state: the state has a *monopoly* on the legitimate use of force. The capabilities of the modern bureaucratic state are so superior to that of a private citizen that any increase by the world state is simply a matter of degree, rather than kind. The world state will possess a monopoly on legitimate power and will be backed by similarly constituted executive (police, military, paramilitary) and regulative capabilities. For the domination theorist, the extent of one's power superiority is not inherently problematic as long as it is effectively checked and accountable. There does not appear to be any world state specific reason to think that the power of the world state is less easily checked than the corresponding power of a domestic state.

Pettit recognizes this and presents an objection that purports to show that any political system with only one sovereign will be inherently dominating. For Pettit, the availability of other sovereign polities serves a necessary role in checking state power:

Considerations of feasibility alone would argue against seeking a federal, world state: it is very hard to see how existing states and peoples might be persuaded to give up their sovereignty irrevocably to a distinct entity. But those considerations are supported in any case by a distinct, normative argument. It is not clear how a state could be legitimately denied the right of exit, as federation would strictly require, in the event of its members deciding against continuing membership.⁶⁷

A world state will be inherently dominating because multiple sovereign polities play two key republican roles: they allow for the possibility of exit and intervention in the internal politics of other states in order to prevent particularly egregious instances of domination. On Pettit's view, the availability of other sovereign states provides a 'safety valve' where oppressed peoples can find refuge and a protector of last resort. And we can see examples of this role, especially in the 20th century. Many states provide a haven for refugees from political and

⁶⁷ Pettit, 2010a, page 156

religious persecution and there are, perhaps, a few examples of international intervention to prevent egregious human rights abuses.

While Pettit is correct that a multifarious and diverse state system does provide these opportunities, especially when combined with balance of power considerations, it is less obvious that these are *necessary* or even *effective* constraints on the exercise of power in the international system. First, the ability to exit seems to play a quite minimal role when it comes to non-domination by a domestic state. Even under fairly extreme oppression, most elect to stay in their country of origin, and many lack the resources to leave even if they wish. And even those that *can* leave are—under the current international system—dependent on other states letting them in, which is not guaranteed. Furthermore, refugees frequently find themselves in a politically and economically precarious position in the host country, opening themselves up to domination by their purported rescuers. Similarly, states are not especially effective or consistent in their commitment to protecting the foreigners from the domination of their own government, and their interventions often make possible new forms of domination or expose the 'rescued' population to new dominators. So, the constraints that Pettit describes seem comparatively trivial, inconsistent, and fraught with danger.

But more importantly, the *ideal* demand for exit opportunities fits poorly with the republican perspective. After all, if the world state protects its citizenry from private domination and is internally structured such that its powers are separated, checked, and accountable to its constituents, then the power it exercises is non-dominating and those subject to it are *free*. In fact, being subject to a non-arbitrary and accountable constitutional order is the freest possible condition. If the world state does not dominate its citizens, then what, precisely, is the normative complaint that the ability to exit supposed to resolve? Of

course, if you adopt a *voluntaristic* conception of legitimacy, then the opportunity to exit might be a necessary condition of legitimacy. While I am skeptical that even a fairly robust right of exit could motivate claims that an individual *tacitly* consents to a particular political authority, one could think, quite plausibly, that in order to consent to something, it must be the case that you have a real option of refusing to so consent. But the domination theorist thinks that a reliance upon consent is precisely backward: consent is only morally relevant in a non-dominating context, consent does not make a situation non-dominating. The fact that no one can really consent to a world state is irrelevant, just as the lack of consent to the authority of a domestic order is irrelevant as long as its power is non-arbitrary. The opportunity to exit a truly non-dominating political authority is simply an opportunity to create the possibility of domination, which seems rather perverse. Of course, if you assume that the world state will be despotic *for other reasons*, then giving it global police and military capabilities might lead to disaster. However, this cannot be an argument that the lack of an opportunity to exit is *inherently* despotic. Rather, it is a kind of bet: we accept the domination of the current international system because of the risk that the non-dominating institutions of the world state would be unstable. Obviously, if there was a way of eliminating international domination without taking on the risk of a despotic world government, then we might prefer that option. I look at those other options in later chapters. But what we haven't been given is a reason to think a world state will be, or is likely to be, unstable in the relevant sense. If it is properly designed so that it exercises power non-arbitrarily, then why would it fall into despotism? And if it doesn't fall into despotism, what possible reason could there be—in terms of domination—to prefer a system of international anarchy to a constitutional order? In short, it seems that we are comparing, illicitly, a non-ideally unstable world state

with a comparatively idealized anarchic international system filled with states that take in refugees and rescue individuals suffering from oppression.

To sum up, there is nothing about the multiplicitous structure of international politics that is especially virtuous when it comes to non-domination. To give up a reliance on the ability of individual states to charitably act to protect the rights of refugees and the oppressed is a minor concession when compared to the gains that can be achieved by eliminating the domination inherent in an anarchic system. In other words, the essential republican protection against domination is membership in a public, constitutional order, dependence on the good will of foreign polities is not.

A New Objection to World State: Pathway Moral Infeasibility

So, the world state is not end-state infeasible, there is no methodological problem with theorizing about it, and an ideal version would not be inherently dominating. Furthermore, the world state would solve the problem of international domination. In combination and setting aside possible solutions that retain international anarchy, these claims would imply a fairly straightforward result: we should take the world state as our political ideal and aim for its creation. Of course, its creation would be a generational project, would be extraordinarily difficult, and would require careful and wise political judgment. The world state cannot simply pop into existence from Zeus' brow; it will require the extensive disruption and painful adaptation of currently existing political communities.

And it is precisely on *this* point that the world state is problematic. While *end-state* feasibility worries might be unpersuasive, one might still worry that there is no *path* from our current political environment to the world state. We might call these *pathway feasibility* concerns, and there come in two varieties: empirical and moral. In the former, there might be some morally desirable end-state that—if we could accomplish—would be a dramatic

improvement over the status quo, but we lack the causal capacity to actually achieve it. For example, we might think that a Polish defeat through conventional military means of the German invasion in 1939 would have been exemplary state of affairs, ending Nazi aggression without the general European conflagration that then followed. So, there would be no objection to the end state, and there would be little *normative* objection to the use of conventional military means of self defense. Unfortunately, Poland simply lacked the actual capabilities to bring about this state of affairs. No change in policy, strategy, tactics, or doctrine could have lead to a Polish victory; they were simply outmatched, especially when the Soviet Union attacked as well. There was no causal means for achieving their end. *Moral* feasibility, on the other hand, deals with whether there is a morally acceptable path for achieving a desirable end-state. To return to our previous example, perhaps the only way that Poland could have effectively resisted Germany's unprovoked aggression was to use biological weapons—developed in secret—to cause deadly epidemics in German population centers. More generally, any 'proportionality' constraint on military action opens up the potential that the cost of victory might be so great as to make military action unacceptable, even if that the war is being fought for a just cause.⁶⁸ It is not that there is no *causal* mechanism for producing an end-state, it is that there is no morally acceptable strategy for achieving the goal.

The most serious objection to the world state, I suggest, is that it is morally infeasible; there is no permissible path to its creation. Furthermore, the impermissibility of these paths is derived from the very set of moral considerations—those of domination and accountability—as those that motivate the creation of the world state in the first place. So,

⁶⁸ This was the main axis of criticism of both Russian and Georgian armed forces during the 2008 conflict. In both cases, the Russians and Georgian did have just cause to engage in military action, but they did so disproportionately. See http://www.ceiig.ch/pdf/IIFFMCG_Volume_I.pdf, pages 22-32.

this is not a case where there are two incommensurable values and instantiating one requires inhibiting the other and vice versa.

So, how might a world state come to be and why would those paths be morally acceptable? First, and perhaps least promising, a world state may be formed through imperial conquest. There are many, many examples of the authority of domestic states being territorially extended, perpetuated, and ultimately legitimated over time. The French conquest of the Languedoc, the English conquest of Wales, and the American conquest of the West are all examples, to greater and lesser extent and success, of cases where an initially wrongful invasion and conquest served as the foundation for the (relatively) rightful authority of a (eventually) legitimate polity. Of course, in many of these cases, the invading polity was illegitimate *at the time of the invasion* and then, only later, became non-dominating. That way, when various political reforms came to pass and the French, American, and British governments came to be relatively non-dominating, they already possessed the relevant political and legal powers (judicial, legislative, and executive) over their ill-gotten territory. I suppose we could imagine something similar in the global context. A modern day Napoleon might come to conquer the world, a conquest that is eventually legitimated by institutional reform and restructuring. In other words, non-domination can be a consequence of appropriately accountable power, but it might nonetheless be the case that the power precedes the accountability. In fact, Thomas Nagel⁶⁹ has argued that power *must* precede justice. One way of interpreting what Nagel says here is that the business of political power creation and accumulation is prior to the appropriate applicability of concepts of justice. *How* the agent comes to have the power it does is not, for Nagel, a question of

⁶⁹ Nagel (2005), pages 145-147. Hegel (1975) makes a similar argument that the great state builders needed to violate individual rights in order create political institutions that better realize the world spirit.

justice. So, our modern day Napoleon can cheerfully accumulate global power knowing that, for Nagel, nothing he does can be unjust. Once the power has been accumulated, then we can make the order non-dominating.

We have good reason to be wary of the conquest-usurpation strategy, even accepting the fact that it was often the tactic of choice for early state builders. First, and perhaps most obviously, world conquest would almost certainly involve extensive violence and suffering. Second, the conquest strategy is, *pave* Nagel, unjust. Nagel is, of course, correct that one cannot demand a world political order to do things in the name of justice it lacks the power to do, but a conqueror still dominates even and especially in a global political context where they are unchecked. A conqueror is the paradigm case of an individual with superior and arbitrary power over her subjects. Nagel faces a dilemma: he can accept that a would-be conqueror *already* has sufficient power to make her subject to the claims of justice or he must accept the perverse result that powerful agents can immunize themselves from claims of justice by refusing to create the institutions and political agents that might be able to hold them accountable. In any case, conquest does not appear to be an obviously permissible pathway to the creation of the world state. The early state builders were wrongfully indifferent to the complaints of domination made by the Welsh, the Languedoc, or Native Americans, even if we can grant that the current political authority that controls those territories is *today* legitimate.

The other strategy for the creation of the world state is through agreement. We can imagine a variety of scenarios that might lead to some kind of contractual formation of the world state. Perhaps a spontaneous constitutional convention will be held which will then be ratified in democratic or republican fashion (much like 1787) or perhaps the polities that represent people, either domestic states or regional supranational institutions (such as the

European Union), around the globe will contract to alienate their power and authority to a centralized and global corporate agent. Rawls, for example, suggests this method for creating larger polities:

Suppose that two or more of the liberal democratic societies of Europe, say Belgium and the Netherlands, or these two together with France and Germany, decide they want to join and form a single society, or a single federal union. Assuming they are all liberal societies, any such union must be agreed to by an election in which in each society the decision whether to unite is thoroughly discussed...Beyond this condition, the electorate of these societies must vote on the political conception they believe to be the *most* reasonable, although all such conceptions are at least reasonable.⁷⁰

And this seems to be a much less dominating mechanism for fashioning a global polity. After all, individuals are agreeing, or at the very least they are offered a substantial role in political deliberation and contestation concerning the formation of the new political agent. This would appear to be more responsive to the value of non-domination than conquest-usurpation.

Despite the promise of this strategy, I do not think it ultimately succeeds. The fundamental problem is this: the basis of neo-republican and neo-Kantian political theory is that consent becomes morally meaningful *within* a political order.⁷¹ By itself, consent does little to resolve problems of domination outside of a constitutional system that provides the consenter or dissenter with genuine power or the capacity to motivate political agents to deploy power on their behalf. The idea is this: without a prior constitutional order, consent and contracts are simply empty words. This is a key feature of domination analysis. It motivates the notion that the state of nature is morally unacceptable in the first place: if *consent* between individuals was sufficient to reduce or eliminate domination, then the civil

⁷⁰ Rawls (1999), page 43, fn 53.

⁷¹ See Pettit (1997), pages 61-63.

condition could potentially be superfluous. This is precisely why one can be *freer* in the civil condition than the state of nature: one replaces the private, arbitrary power of individuals with the public and accountable power of a constitutional republic. Kant, for this reason, uses the notion of a social contract as a *hypothetical* device to provide guidance as to how to structure the institutions and formulate the principles of civil society. When it comes to actual states, Kant suggests that we must treat—as a practical postulate—states *as if* they represent the general will and common assent of all. But this is not a problem for Kant since the contract is not meant to justify the authority of civil condition; only the role that public right plays in sustaining the Universal Principle of Freedom by making private right non-provisional can do that. And if individuals are subject to *different* political orders, then there is no overarching institution that provides the robust guarantee that the agreement between the two individuals will be agreed to, no institution that can make the private rights of the two individuals non-provisional. Similarly, in WARRING STATES, the dispute between the Falklanders who wish to retain their property within one order and the Argentines that wished to see their birthright returned to them was resolved through might. Now, let's imagine that Argentina and the United Kingdom come to an *accommodation* before the invasion. Have the underlying power dynamics—and thereby the dominating relationship—been altered by the fact that both parties ultimately decided they'd rather talk than fight? Clearly not.

The consequence of this analysis is that in order for a state to transfer legitimately its powers (assuming that states can, in fact, alienate those powers at all; a point to which I will return) via a contract, there would already need to be a constitutional order. But the contract is supposed to be what *creates* the constitutional order. So, any contractual transfer of power which attempted to alienate the powers of legitimate states to as yet nonexistent global polity

would be, from the standpoint of this analysis, essentially no different from usurpation. Constitutional convention strategies, whereby *ad hoc* representative bodies are used to create new institutions independently of the deliberation within existing polities, are even worse.⁷² They would presume to remove the powers of legitimate states and transfer them to another entity without the contestation or consent of political agent who actually and currently possesses those powers. And even if these constitutional conventions could come to an agreement concerning the appropriate power and structure of the world state, what would provide the appropriately contestable and robust guarantees that these agreements would be mutually adhered to? It would seem that these conventions would necessarily need to rely on the arbitrary and contingent power dynamics currently at play in international politics. The convention itself adds little, though it might be preferable to the conquest-usurpation strategy if it can avoid the potential bloodshed.

So, it appears that the world state is morally infeasible: the creation of the world state would require that the state builders dominate. This leaves two moral possibilities: either there are non-dominating mechanisms for structuring global politics that are morally feasible that have not yet been considered (we shall examine that possibility in Chapters Three and Four) or we might be faced with a situation where we dominate by remaining in the current situation but lack any non-dominating means of reform (a situation which we shall consider in Chapter Five).

This conclusion seems too quick. Of course, we could adopt a telic or consequentialist understanding of domination, and then our only requirement would be to minimize domination *insofar as that was possible*. But even if we adopted a more Kantian

⁷² The Constitutional Convention of 1787 moved *far* beyond its legal mandate in creating a new constitution and circumventing the Articles of Confederation with its own ratification procedure.

strategy that was predicated on a qualitative difference between domination and non-domination that does not allow for maximization or minimization, one could argue that the moral infeasibility of the world state depends upon an illicit assumption that there is a *difference* between the interpersonal and international states of nature. That is, the problem I describe would disappear if the solution to interpersonal domination could be directly adopted in the international case.

What do I mean? Well, let's consider Kant's solution to the problem of interpersonal domination. The state of nature is morally unacceptable and requires civil society to make freedom possible. Kant argues that to remain in the state of nature is, essentially, to actively place one in a position of dominance of others, to put one in a position to block the freedom of others. So, Kant concludes that in the state of nature, the Universal Principle of Freedom implies only one obligation: leave the state of nature and enter civil society. And for Kant, this obligation necessarily includes a right to coerce. The rightful thing to do, then, is to suspend the normal rules of private right and coerce anyone who remains outside of civil society to enter into rightful relations with you since only then can the principles of private right be justly applied. One cannot *complain* about the coercion needed to force individuals into civil society. Presumably, one cannot object that being privately coerced interferes with one's right to continue engaging private coercion.

So, why not say the same about the international state of nature? The 'domination' that one must engage in, either through agreement or usurpation, is not morally problematic because states cannot complain about the use of private coercion to block their attempts to *continue* engaging in domination. So, it seems that states 'do wrong in the highest degree' by remaining in a necessarily unrightful condition and have an obligation to leave that

condition. This is exactly what Louise Phillippe Hodgson concludes is the consequence of Kant's argument. He writes:

Once again, the key idea is that an agent lacks the standing to impose its judgments about matters of right on others unless it realizes conditions of reciprocity with respect to them. Applied to the international case, this means that, to have the standing to enforce rights on the international state, a state would have to fulfill conditions of reciprocity with respect to all states whose freedom is codependent. That is, it would need to take on the task of securing the rights of all states against one another, which would entail granting equal rights to all states, and having the power to enforce them reliably when needed. In short, *to make rights conclusive at the international level, a state would have to make itself into a world state.*⁷³

States have no moral complaint, on this view, for precisely the same reason that individuals in the state of nature have no complaint when they are forced into civil society. And indirectly, forcing states to enter into civil society with one another (i.e., creating a global public authority) *just is* forcing individuals who causally interact with one another to create institutions that make the non-dominating adjudication and enforcement of their relative entitlements.

Yet, there is an important disanalogy between the interpersonal (henceforth: first order) and international (second order) cases. In the first order case, when I coerce another person to enter into civil society, I am requiring them to enter into non-dominating rightful relations where before there was only power. This could very well lead to some particular sub-components of my agency—desires, projects, and intentions—that would otherwise be acted upon or satisfied being left unfulfilled. Perhaps I would be able to go yachting regularly in the state of the nature but life under the civil condition would make this impossible (maybe the yachting I wish to do risks violating environmental protections that my polity has

⁷³ Hodgson (2012), page 21. Hodgson's argument proceeds in three steps. First, Hodgson argues that the freedom of individuals requires the freedom of their state (17). Second, the freedom of the state, especially its territorial integrity and its ability to make treaties (20) cannot be accomplished through anything other than the world state. Third, strategies of isolation and agreement fail (24-25).

reasonably imposed). Does this fact represent a countervailing moral reason to forming civil society? Should the mere fact that civil society will frustrate some of my desires be enough to make us pause about forming it? Or to put the question somewhat oddly, do the sub-components of my agency have a *right* to be expressed? Surely not. Moral *persons* have standing and ought be taken into account, but one's *actions* ultimately need to be justifiable to others. Desires or intentions have no 'right' to be expressed, satisfied, or acted upon in and of themselves. In other words, they have no *standing*, they are only acceptable or permissible insofar as the *agent* has a right to so act. So, in the first order case, once we have shown that the agent lacks any right to act in ways that affect others in the state of nature, then there is no *additional* step where we address the claims of any *components* or sub-agential *modules* that have standing or are owed justification.

The second order case, however, is quite different. Unlike sub-agential components and modules, people *do* have moral standing and are owed justification. This means that when creating a world state involves the disruption of existing relations and communities, it might be morally relevant in ways that the effects of civil society on one's desires and intentions are not. So, let's draw a distinction between *internal legitimacy* and *external legitimacy*. A polity is *internally* legitimate when its institutions are so structured as to resolve the problem of interpersonal domination amongst those persons over whom they wield direct legal authority, generally within their own territory.⁷⁴ A state is *externally* legitimate when it treats those who are members of other states not under their legal authority rightfully.⁷⁵

⁷⁴ I say 'generally' because states sometimes claim effective legal authority extraterritorially and sometimes effectively exercise authority *within* their territory over non-citizens (tourism and immigration).

⁷⁵ If the arguments of this dissertation go through, then there is no such thing as *external legitimacy* in the long run. The only acceptable political orders are those that have authority over all those with moral standing. But I haven't yet established that.

Hodgson points out that, even if the Kantian argument about the wrongfulness of international politics goes through, it could still be the case that political relations *between* citizens of the same polity could remain rightful:

But the authority the domestic state has with respect to its citizens means that whatever problem *they* face in having to share a territory is already solved. For all the citizens of a state, in all their dealings with one another, *rights are already conclusive*. If we are citizens of the same state, then there is no sense in which our rights with respect to one another are provisional—as if we could not *really* know which one of us is the rightful owner of your car until a world state was in place.⁷⁶

In other words, a state can be internally legitimate—resolving the problem of domination among those under its legal authority—while nonetheless remaining externally illegitimate. And this is unsurprising given the *relational* nature of domination and the equally relational nature of justice on Kant's view. Since domination is about how people relate to one another (i.e., does X have superior, arbitrary power over Y?), two people can relate to each in a non-dominating fashion whilst dominating someone else. And so it is with an internally legitimate yet externally illegitimate state. It has accomplished no mean feat: it has made possible rightful relations for those under its power and those just relations are morally significant and worthy of respect. And this is why the attempt to resolve the problem of external legitimacy, brought on by international domination, through the world state is more morally fraught than the coercive imposition of civil society in the first order state of nature. The creation of the world state will involve the usurpation, either through conquest or an illegitimate contract, of the legal and political authority of states, just as the formation of civil society requires that individuals give up some authority over their actions to the public authority that will mutually enforce reciprocal principles of justice. So, if the world state will take authority away from internally legitimate states, and those states have no mechanism for

⁷⁶ Hodgson (2012), page 30

the rightful transfer of that authority, then it looks like the creation of the world state is fundamentally at odds with and risks the disruption of rightful relations between citizens that exist at the moment. This means that the creation of a global constitutional order is itself dominating in a way that the civil society that resolves the first order state of nature is not.

Hodgson worries that a truly centralized world state would face resistance and could potentially be despotic, but he argues that a world state need not compete with the domestic authority of internally legitimate states. He writes:

...states can be constrained by a world state *only to the extent that freedom itself requires it*. In other words, the only powers that a world state could justifiably exert against legitimate states are those necessary to secure the rights of states against one another. A world state would thus have the authority to regulate matters concerning relations among states—territorial disputes, trade relations, immigration, and so on. But its authority would stop there: it would in general have no right to intervene in the internal affairs of legitimate states, since each state's activity of enforcing rights within its territory would be consistent with the freedom of other states.⁷⁷

Hodgson conceives of international and global justice as being structured by a strong division of labor between the global state and its constituent, territorially constrained states. Local states work to maintain internal legitimacy while the world state specifies rules of interstate interaction, adjudicates disputes between states, and enforces the rights that legitimate states have from interference, exploitation, or abuse by other states. In other words, the world state regulates the interactions between states, ensuring their independence from other states as well as their external legitimacy while leaving the domestic policies of these states untouched. This division of labor has many salutary effects. First, while Hodgson's world state will require *substantial* and *independent* law enforcement, taxation, and military capabilities, it will require substantially less than a world state which is also tasked with policing the domestic policies of legitimate states. So, we have considerably fewer

⁷⁷ Hodgson (2012), 30

feasibility worries, while the constrained legal mandate and capabilities lessen worries of despotism. Furthermore, the creation of a world state with these specific powers only requires that states alienate power and authority that they were never in a position to rightfully exercise. No disruption of rightful relations or dominating usurpation of legitimate political authority needed.

This seems to be a rather neat solution, but the view ultimately relies upon an untenable and artificial distinction between internal and external legitimacy. There are two problems with drawing global political authority along the lines that Hodgson describes. First, Hodgson lists a series of public policy realms and competencies that the world state would be expected to handle: international crime, the environment, war crimes and aggression, trade, and immigration. Hodgson conceives a world state that would handle these issues, coercively enforcing and adjudicating disputes in these areas, that nonetheless leaves individual domestic polities free rein to direct domestic entitlements. Yet, this appears to be impossible. Rules that structure and regulate the flow of people, capital, and goods across state borders will also structure and influence the distribution of entitlements between citizens. For example, let's take a quintessentially global issue: climate change. The emission of carbon in one part of the world will remain in the atmosphere, affecting people around the world for many years.⁷⁸ So, presumably, the world state ought to possess a mandate to regulate carbon emissions. There are several reasonable policies the world state could institute: large scale reforestation and carbon sequestration, top-down restriction of carbon emissions, gas mileage standards, cap and trade, or even a carbon tax. The broader point is that each one these policies, either singly or in conjunction with the others, will constrain the *domestic* economic activity of every state on the planet and will help determine who gets more

⁷⁸ See Gardiner (2011) and Smith (2012).

and gets less even when we are dealing with an economic interaction strictly between citizens. Decisions made at the level of the world state, then, can directly influence the rights and entitlements of citizens even in a strictly domestic context. If the world state was accountable in the relevantly public way, there is nothing in principle wrong with it making those decisions and structuring individual entitlements in order to make them consistent with global justice. But, this argument *does* show that Hodgson's position is fundamentally unstable: a world state that had the power and the legal authority to solve the problems of global coordination and domination would necessarily impugn on the domestic policy—and not simply the foreign policy—of legitimate states.

But even if the previous worry could be overcome, there is an even deeper problem with Hodgson's suggestion and those similar to it. Namely, Hodgson argues that the world state will also be the arbiter of when states are internally legitimate. In other words, the world state will be constitutionally mandated to make an impartial judgment as to which territorially constrained states are 'rogue' and which are 'legitimate.' Furthermore, it will be empowered to intervene on the basis of that judgment. The key, however, is to recognize that the world state is making a judgment of *both* internal and external legitimacy. That is, a 'rogue' state, for Hodgson, is one that violates the principles of *international* law laid down by the world state but it could also be a state that fails—for whatever reason—to resolve the problem of interpersonal domination amongst those under its legal authority.⁷⁹ Hodgson does not see how dramatically this increases the political authority of the world state, making it far more like the centralized world state he fears. After all, in a world where the world state can intervene for what it takes to be violations of *internal* legitimacy, the entitlements of each

⁷⁹ Setting a public criteria for this judgment by the international community is one of the purposes of a 'practical account of human rights' in Rawls (1999, 64-67) and Beitz (2009, 128).

citizen—even on purely domestic matters—are now subject to veto by the world state.

Hodgson writes:

If a state utterly fails to secure the rights of its citizens—because it lacks the power to do so (as in the case of failed states), or because it lacks the will (as in the case of oppressive states)—then it loses its legitimacy, and by the same token its right to non-interference. In such cases, a world state would be justified in intervening to establish a proper state.⁸⁰

And there is something attractive about this view; it is hard to imagine a world state worthy of respect that was created to protect individuals from domination sitting idly by while egregious internal oppression occurs in one of its constituent polity.⁸¹ But this means that, in principle, the world state could cancel or rearrange currently existing patterns of rights and entitlements if it came to the conclusion that the current arrangement was unacceptable. This makes everyone subject to the authority of the world state even in *purely* domestic contexts regardless of whether there is any international or global interaction at all. But the world state's authority in this case is, ultimately, inconsistent with the political authority of the territorially defined states located within it and subordinate to it.

Again, the world state's possession of the final authority described above is not *inherently* unjust as long as its determinations of which states are legitimate or rogue are regulated by an effective and public constitutional order (just as the authority of the domestic state to evaluate whether my actions are non-dominating is not unjust), but the objection being considered is that of *normative pathway feasibility*, not whether the world state

⁸⁰ Hodgson (2012), 32

⁸¹ This nicely illustrates the asymmetry between first order and second states of nature. In the first order state of nature, it seems reasonable to claim that the state has no business in assuring the 'internal legitimacy' of individual people, even if we could make sense of the idea. For example, Kant argues that it is actually *impossible* for a state to force people to be virtuous since the coercion would make it impossible for individuals to act on the correct maxim. See *MM* 6:219.

would ultimately be just if it ever came into being. Hodgson wants to argue that the political authority of territorially constrained states need not conflict with that of the world state as long as the division of labor holds. However, as long as the world state claims the authority to determine which states constitute members in good standing and to determine whether and to what extent to intervene in the domestic affairs of the constituent states, then the division of political labor is only apparent, from the normative perspective. As a consequence, there is a necessary conflict between the claims of political authority made by the world state and the claim to sovereignty of a legitimate, territorial state. This means that creating a world state does indeed require the disruption and, ultimately, the destruction of the sovereign authority of internally legitimate states. And this provides a countervailing reason for fashioning a world state: we are eliminating something that works, at least in a particular context, on the speculative *risk* that the new political authority we might be able to create will do better. In *Chapter Five*, we will discuss the nature of that risk and the constitutive principles of justice that regulate our behavior when we decide to take it. But before we examine the nature of that risk, we still need to consider whether we need to take it. In *Chapters Three and Four*, we consider others ways of structuring international politics that may solve the problem of international domination yet do not conflict (or do so in a way that is non-dominating) with the authority of internally legitimate states.

Conclusion

In this chapter, I argued for several claims. First, the formally anarchic nature of international politics exposes individuals to domination. Since there is no constitutional order that regulates international interactions, the rights and entitlements of individuals around the globe depend on arbitrary geopolitical constellations of power and interest. The kind of public guarantee that is needed for non-domination is absent in the international

context, and this dynamic both makes possible substantial international injustice *and* is direct source of injustice itself.

I then considered a potential solution to the problem of international domination. If first order domination can be resolved by the creation of a domestic constitutional order, then why not solve second-order, international domination by creating a global constitutional order? Theorists have, historically, presented three types of objections to the world state: feasibility objections, methodological objections, and normative objections. I argue that these historically influential objections to the world state generally fail.

However, despite the failure of these 'standard' objections, I argue that the world state is not a morally acceptable solution to international domination. The reason is that the world state is *pathway morally infeasible*: while the world state might solve the problem *once it is created*, there is no current pathway for creating it that does not itself recapitulate the problem of domination. The reason why this problem arises in the second order case, but not in the first order state of nature, is that current states are *internally* legitimate even if they dominate non-citizens external to their political and legal orders. Any method for creating the world state will necessarily require the usurpation of these internally legitimate political orders, which represent non-dominating relationships between agents with moral standing. Louis Philippe Hodgson has described a particular institutional structure for the world state that attempts to avoid this problem by granting domestic states and the world state non-overlapping legal and political mandates. Finally, I argue that Hodgson's account fails because the distinction between external and internal legitimacy is inherently unstable and that the political authority of the world state will necessarily be inconsistent with the sovereign authority—even if it is only over domestic matters—of its constituent, territorial states. As a consequence, creating the world state will necessarily involve the disruption and

elimination of internally legitimate states that represent successfully non-dominating political relationships, and the need to respect those relationships provides a substantial block to efforts to rightfully create a world state.

Chapter Three: International Domination and the Association of Virtue States

*Do inward and outward justice necessarily go together? Following the rules of Plato's analogy, we might pursue this question by asking whether inward and outward justice go together in the case of actual political states. Is a nation's honesty and fairness in its dealings with other nations the natural outward expression of consequence of its honesty and fairness in its dealings with its own citizens? Certainly we can spot, in a general way, pressures and tendencies in this direction, although they may not seem decisive. To start with, there are simple embarrassments of elementary inconsistency--making a big fuss about human rights abroad while trampling on them overseas, say--but there are other sorts of pressure as well. **It is hard to have a free press and yet lie to the world.***

-Christine Korsgaard⁸²

Introduction

In the previous two chapters, we have seen that non-domination requires a public, constitutional order with an independent judiciary, accountable legislature, and a robust executive capable of *ensuring* that the entitlements of its constituents are not subject to the arbitrary whims of either private citizens or government officials. Furthermore, the current structure of international politics lacks the basic mechanisms that would make non-domination possible. While the world state itself could be a legitimate solution to the problem of international domination, the creation of the world state would require the unjust disruption of rightful domestic relations *within* legitimate states. As a consequence, the world state is *moral pathway infeasible*. So, we seem to be in the strange situation where we

⁸² *Self-Constitution: Agency, Identity, and Integrity* (2009, 183)

currently dominate others yet the most obvious way to avoid doing so is morally impermissible.

Yet, before we turn to Chapter Five and discuss how we might deal with the dilemma, we need to ask whether there are ways of escaping it. I think there are two important questions that need to be answered. First, are there trans-, supra-, and international institutional matrices that can replace the functions of the world state but do not problematically disrupt the internal legitimacy of current states? Second, are there features of the *second* order state of nature that make it more amenable to non-dominating resolutions that fall short of establishing a state-like constitutional order? The first question will be dealt with in Chapter Four, and it is in this chapter that we discuss the second.

The question of the asymmetry between first and second order states of nature seems especially acute since it played a key role in the moral infeasibility of the world state. After all, it is because of the fact that states are composed of individual agents that founds my objection to the world state. And other thinkers have thought that second-order anarchy is fundamentally different precisely because the agents are corporate in this way. For example, Hobbes thought that the second order anarchy of international politics was fundamentally different from that of the first order: some states enemies and enforce the contracts and rights of their citizenry.⁸³ As a consequence, the second order state of nature is tolerable and there is no need to create a global leviathan. Furthermore, and somewhat paradoxically, the large scale differences in the offensive capabilities between states (and the difficulty in rapidly increasing them) has the effect of making the second order state of nature less conflictual: states can afford to cooperate because they are under much less

⁸³ See Hobbes (2002), pages 96-97

danger of being annihilated. So, for Hobbes, the first and second order states of nature are not strictly equivalent: and do not require the same solution.

This chapter will assume that large differences in state capabilities will exist for the foreseeable future but draw quite different normative conclusions from that fact. Unlike Hobbes, the focus of this dissertation is on domination, which is *intensified* by differences in capability. The fact that the United States is not threatened by the Maldives does mean that the United States can cooperate with that country at little risk to itself, but it also means that should the United States want something that is contrary to the interest of Maldives, the latter country has few mechanisms for holding the United States accountable. So, our conclusion is the precise opposite of Hobbes: a world of states of radically different amounts of power is one of intensified injustice even if fear of other powers constrains them.

Rather, the asymmetry this chapter will focus on will be the same one that motivated the moral infeasibility arguments in Chapter Two: the individuals who constitute the state are beings of independent moral value and they can create internally legitimate institutions that make rightful relations between them possible. The fact that individuals can *check each other* and form institutions that structure their relations between themselves creates new opportunities of the resolution of domination that do not exist in the interpersonal case. Or so the argument goes.

The argument of this chapter is that the 'virtue' of internally legitimate political institutions does not resolve the problem of international domination. In other words, it is not the case that we should expect that states that are internally legitimate will necessarily and non-arbitrarily be externally legitimate. In fact, many of the reasons that that lead to the creation of *domestic* basic structure apply with equal or greater force to the creation of a global basic structure.

A Confederation of Virtuous States

One can be forgiven for thinking that the international world described in Chapter Two bears little relation to the one we currently occupy. There are, at least two reasons for this. The first, which will be dealt with in Chapter Four, is that the model of political interaction discussed in Chapter Two was state-centric: the United Kingdom and Argentina, for example, were the primary actors. Yet, the international realm is increasingly populated by nonstate actors and institutions that may offer new strategies of non-domination. The other reason--and the one that we will be concentrating on in this chapter--is that, even granting the relatively state-centric analysis of Chapter Two, the states themselves have been 'black-boxed' and simplified in ways that disguise potential mechanisms for resolving domination. During the discussion of WARRING STATES, I made two assumptions about the nature of the players involved. First, I ignored the fact that the United Kingdom and Argentina were *corporate* agents that were themselves composed of agents with moral standing. Second, I assumed that the dominating nature of the Falkland Islands dispute resolution did not depend on one or both of the states being *internally* illegitimate. In other words, I assumed that internal and external legitimacy were essentially separable: internally legitimate states were no different from illegitimate ones when it comes to the domination of outsiders.

Both of these assumptions need to be interrogated. First, the corporate nature of states and the moral status of the individuals that compose them played a significant role in the argument for the moral infeasibility of the world state. So, naturally, it would behoove me to see if that same feature of international politics can also play a role in making the world state unnecessary. Furthermore, Kant argues that this represents the primary difference between international and domestic justice:

In this problem the only difference between the state of nature of individual men and of families (in relation to one another) and that of nations is that in

the right of nations we have to take into consideration not only the relation of one state towards another as a whole, but also the relation of individual persons of one state towards individuals of another, as well as toward another state as a whole.⁸⁴

States have relations with each other, with their own citizens, and with the particular citizens of other states. These represent potential constraints that do not figure in to the analysis of the first order state of nature that requires the formation of a common, civil order.

This possibility can be paired with a rejection of the second assumption. Theorists have long suggested that a free association of appropriately "virtuous" states would be able to effectively eliminate the problems associated with international anarchy. The 'virtue' of a state is the justice of the institutions that mediate relations between co-members of the polity. In other words, the general notion is that states that are well-structured will not *only* be internally legitimate but will also treat foreigners and their political communities with the requisite respect. As we shall see, this is really a consequence of *internal legitimacy*. The idea is that satisfying the claims of justice towards their own citizens will also lead states to satisfy their obligations towards foreigners; the same institutional mechanisms and protections ultimately provide for both. In Korsgaard's words, "It is hard to have a free press and yet lie to the world." This view, in turn, leads to a fairly straightforward and plausible prescription: resolving international domination requires that everybody find themselves under the authority of a minimally just state. This strategy has the added benefit of avoiding the infeasibility problems of the world state. After all, the internal legitimacy of each state is the *goal* of the reform, so such reform need not disrupt already legitimate political orders.

But before we continue and examine particular views, we should dispense with an obvious objection. In Chapter One, I established that virtue was necessarily insufficient for

⁸⁴ *MM*, 6:343-4

nondomination, so why should we expect virtue to be sufficient in the case of international justice? It is irrelevant, so this objection goes, that legitimate states will treat other states *well* since it is ultimately *up to* the states to so act. The 'association of virtuous states' view doesn't even get off the ground. Yet, this is where the first assumption is playing a bit of a deceptive role. In the first order case, individual virtue is insufficient because the commitment of the individual agent to the relevant moral principles represents the wrong kind of 'check' on unjust behavior. The guilt or self-flagellation one might feel at violating one's principles could not be the right sort of check on the superior power of a dominator since it doesn't change the relevant fact of being *subject* to the dominator. But in the second order case, this is not true. The 'virtue' of the state is *constituted* by an institutional order where individual citizens are subject to external, public checks. If a political agent (say a customs control officer or the negotiator in a border dispute) exercises the delegated power of an internally legitimate, constitutional order against a non-citizen in the context of international politics, it is not the case that how he treats the non-citizen is dependent on their whims for precisely the same reason it is not up to him how he treats citizens. He is checked by the public, constitutional order of which he is a member. Of course, non-citizens are not a full members of that order, but they have been accorded *some* status by it and they are protected by their own civil order. If a constitutional order structures the exercise of political power so that it protects and furthers the interests of both members and non-members, then it would appear that that order is non-dominating in its exercise of power both internally and externally. What remains to be seen is whether internal legitimacy and external legitimacy can be so easily linked and whether the linkage we can expect actually satisfies the requirements of non-domination. For that, we must turn to particular views.

Kant

Perhaps the most influential and famous advocate of a virtuous association is Kant. He argues⁸⁵ that 'perpetual peace' and the final approximation of genuinely rightful relations is found in a voluntary association of 'republics:

*The First Definitive Article of a Perpetual Peace: The Civil Constitution of Every State shall be Republican.*⁸⁶

International politics is regulated by a free and voluntary association of states. But the important feature of this association is that it is composed of states with a republican constitution. A republican constitution is characterized by certain features:

A republican constitution is founded upon three principles: firstly, the principle of freedom for all members of a society (as men); secondly, the principle of *dependence* of everyone upon a single common legislation (as subjects); and thirdly, the principle of legal *equality* for everyone (as citizens).⁸⁷

Beyond being committed to moral and legal equality, republican constitutions necessarily make provisions for the separation of powers, so that one agent cannot both legislate and execute the general will:

The second classification depends on the form of government and relates in which the state setting out from its constitution (i.e. an act of the general will whereby the mass becomes a people), makes use of its plenary power. The form of government, in this case, will be either *republican* or *despotic*. *Republicanism* is that political principle whereby the executive power (the government) is separated from the legislative power. Despotism prevails in a state if the laws are made and arbitrarily executed by one and the same power and it reflects the will of the people only insofar as the ruler treats the will of the people as his own private will.⁸⁸

Furthermore, a republican institution also includes an institutional means by which the people can be represented as a general will. A legitimate public order, then, is characterized

⁸⁵ My analysis here owes much to Michael Doyle (1983), especially Section IV.

⁸⁶ Kant (1997), page 99

⁸⁷ Kant (1997), page 99

⁸⁸ Kant (1997), page 101

by separation of powers, a public commitment to moral and legal equality, and mechanisms of popular deliberation and representation. As a consequence, it is designed to be the servant of the legitimate interests of its citizenry.

This republican association will be bound together and external legitimacy maintained by three interrelated elements. First, war for reasons other than self-defense will be exceedingly rare. Kant writes:

If, as is inevitably the case under this constitution, the consent of the citizens is required to decide whether or not a war is to be declared, it is very natural that they will have great hesitation in embarking on so dangerous an enterprise. For this would mean calling down on themselves all the miseries of war, such as doing the fighting themselves, supplying the costs of the war from their own resources, painfully making good the ensuing devastation, and, as the crowning evil, having to take upon themselves a burden of debt which will embitter peace itself...⁸⁹

Kant thinks that one of the prime drivers of warfare is moral hazard. The aristocratic and monarchic leaders of the European states of Kant's day could engage in dynastic and imperialistic wars in part because they could reap the benefits of those wars without having to pay any of the costs. A republican political order will decrease the likelihood of war since citizens will be wary of agreeing to wars that they will need to support with their own blood and treasure. The people who will ultimately pay the costs of the war, in a republican constitution, have a veto over going to war. This will provide a much less favorable political environment for militarism.

Second, Kant argues that reliably peaceful international relations will both strengthen and be strengthened by the spirit of commerce between nations. Kant writes:

Salt and *iron* were next discovered, and were perhaps the first articles of trade between nations to be in demand everywhere. In this way, nations first entered into *peaceful relations* with one another, and thus achieved mutual

⁸⁹ Kant (1997), page 100

understanding, community of interests, and peaceful relations, even with the most distant of their fellows.⁹⁰

The association will encourage commercial linkages between member states. Trade is in the interests of the people and republican states will respond to the legitimate demands of their citizenry by developing stronger economic ties amongst members. This will both be encouraged by and encourage peaceful relations, creating a virtuous cycle by which commerce prevents war and peace encourages commerce.

Third, publicity plays a key role in the Kantian argument. Michael Doyle writes:

Domestically, publicity helps ensure that the officials of republics act according to the principles they profess to hold just and according to the interests of the electors they claim to represent. Internationally, free speech and effective communication of accurate conceptions of political life of foreign peoples is essential to establish and preserve understanding on which the guarantee of respect depends.⁹¹

The public nature of republican deliberations and political commitments will reduce suspicion and mistrust by avoiding secret deals and secret plans. Furthermore, agreements and commitments between members of the association can be taken seriously, guiding behavior. Lastly, the public commitment of republican states to follow the principles of international right help guarantee proper respect, understanding, and cooperation amongst members of the association.

There are several important features of Kant's view I wish to emphasize. First the association cannot be mistaken for a world state: there is no central authority with the power to enforce particular behavior over members. In fact, Kant later asserts⁹² that the association will be *voluntary*, a feature which is demonstrably not an element of Kant's account of

⁹⁰ Kant (1997), page 111

⁹¹ Doyle, (1983)

⁹² *MM*, 6:345

domestic justice. Second, the international justice of the association is generated by the internal features of the state that are *already* required by the demands of public right in the domestic context. Any constitution that is not republican, for Kant, is despotic and condemnable for reasons independent of whether it helps resolve international domination. Yet, the now popularly responsive constitutional order will only go to war on the consent of the people who will need to pay the costs of going to war and, as a result, will be very reluctant to do so for any reasons besides self-defense. Finally, the constraint on state behavior is, like the virtue of the individual person, internal and private to the standpoint of the state operating in an international context without effective public law, but it is *not* internal and private from the standpoint of the actual citizens constrained by the institutional structure of a republican constitution.

Rawls

In *The Law of Peoples*, Rawls has produced an updated version of Kant's argument. Like Kant, Rawls believes that the demands of international and domestic justice are different, requiring different principles. In the domestic context, the principles of justice are designed to regulate the basic structure of society. The key feature of Rawls's analysis is that the basic structure represents a set of *already existing* institutions to which we apply the principles of justice in order to guide their operation and reform. The market, the legal system, or the family might be dramatically altered in light of the demands of justice, but the domestic case is one where we already have a fairly deep and intuitive understanding of the institutions and their capacities⁹³. Many, in response to Rawls's domestic account, argued that the international institutions and economic integration represented a basic structure, making

⁹³ See Blake (2012) for a more thorough discussion of this point.

it appropriate to apply those same principles of domestic justice globally. For example, Charles Beitz has written⁹⁴:

[I]f evidence of global economic and political interdependence shows the existence of a global scheme of social cooperation, we should not view national boundaries as having fundamental moral significance. Since boundaries are not coextensive with the scope of social cooperation, they do not mark the limits of social obligation. Thus the parties to the original position cannot be assumed to know that they are members of a particular national society, choosing principles of justice primarily for that society. The veil of ignorance must extend to all matters of national citizenship, and the principles chosen will therefore apply globally.

Beitz wishes to point to an already existing institutional structure of international law and global governance that a global principle of justice can direct and reform, just as Rawls's conceives of the domestic realm.

The purpose of this analysis is not to litigate the dispute between early cosmopolitans like Beitz and those who deny the global applicability of the principles described in *A Theory of Justice*. Rather, the point is to illustrate the difference between Rawls's understanding of what the principles of justice are supposed to do in the context of international justice. The principles of international justice, for Rawls, *constitute* the 'basic structure' of international politics. The purpose of the principles of international justice is to 'guide the foreign policy' of liberal states (and eventually all minimally just states⁹⁵) in their interactions with each other; it is not to direct the actions of institutions that have authority *over* those states. This is why, in *Political Liberalism*, Rawls describes his project as to direct theoretical attention 'outward' from his account of domestic justice as applied to a basic structure to that of international justice, which is pointedly not described in terms of a basic

⁹⁴ Beitz (1979), page 151

⁹⁵ Rawls, himself, calls the members of the just international order 'peoples' (1999, 23-27) as a way of emphasizing the 'moral nature' of these political orders as opposed to traditional states. I will, however, continue to use the formulation 'legitimate state' as a synonym for 'people.'

structure. Of course, it may very well be true that states should create institutions to help them satisfy certain principles⁹⁶ but these institutions are not necessary, nor are they taken as a given. Samuel Freeman has picked up on this analysis, persuasively arguing that the *current* international order does not constitute a basic structure similar in shape, power, or authority to that of the domestic. Freeman writes:

When Rawls says that the political constitution is part of the basic structure, he does not just mean the procedures that specify how laws are enacted and that define offices and positions of political authority. He means more or less the entire legal system, including most public and private law, that is the product of the constitution in this procedural sense. Modern legal systems, such as the federal system of the United States, are made up of countless acts of legislation, administration, judicial precedent, and other legal rulings that are issued by multiple legal bodies with lawmaking authority. An economic system that is regulated by the legal norms that are issued by the political constitutions is also part of the basic structure. Here, of course, the legal norms of property, contract, commercial law, intangibles, and so on that are essential for economic production and exchange are to be included in the basic structure. What makes possible the incredibly complicated system of legal norms that underlie production, exchange, and consumption is a unified political system that specifies these norms and revises them to meet changing conditions....*Nothing comparable to the basic structure of society exists on the global level.*⁹⁷

Of course, this isn't especially surprising given the analysis of the previous two chapters. If a basic structure is something like Kant's civil condition, then the lack of a civil condition in the global context is one of the key features that drives the problem of international domination.

But what Freeman and Rawls have not directly discussed is the further question of why a basic structure is unnecessary in the global context, which is distinct from the ontological investigation about whether there *is* currently a global basic structure. It might

⁹⁶ See, for example, page 115 where the Society of Peoples will set up institutions for the purposes of regulating trade.

⁹⁷ Freeman (2006), 38-39, emphasis added)

very well be true that without mutual membership in a basic structure, certain kinds of distributive obligations are not activated. If so, then we cannot refer to the satisfaction of *those* distributive obligations as a reason for creating a basic structure, but there nonetheless could be important reasons to *create* the relevant institutions even if they did not exist.⁹⁸ This is clearly Kant's view of the first order state of nature: if we are not in a civil condition then our primary duty of justice to each other is to create it. While Rawls does describe, in the *Law of Peoples*, why the egalitarian distributive justice of the domestic context does not apply globally, he never explicitly tells us why the principles of international justice do not themselves require a basic structure for their rightful application, adjudication, or specification.

In order to reconstruct a Rawlsian argument that a global basic structure is *unnecessary*, I will look at Rawls's comments about the necessity of the basic structure in the domestic context. Rawls often takes this question to be akin to the inquiry as to why we should focus our theoretical attention on the basic structure, but it seems clear that his analysis is meant to respond to the libertarian or anarchist question of why we need a state to govern our interpersonal interactions at all. In other words, Rawls needs to motivate his account of pure procedural justice where there is a strong division of labor between individual citizens who may pursue their own goals as long as they follow the rules and support just institutions and the institutions themselves which have primary responsibility for maintaining background justice. Then, we will be in a position to see whether these reasons apply in the international context. I will argue that there are ultimately three reasons why, on the Rawlsian view, a domestic basic structure is morally non-optional: the need for

⁹⁸ This is the central question of Ronzoni (2009). When do the requirements of background justice require the creation of a basic structure where none previously existed? This is the question I wish to pursue. I take Rawls's view is that not only is there no global basic structure but also that it is unneeded.

coordination, the fundamental influence of those institutions on human agency, and the final specification of entitlements in light of reasonable pluralism.

In "The Basic Structure as Subject" and the section on "Distributive Justice" in *Justice as Fairness: A Restatement*, Rawls argues that while there is something attractive in the libertarian ideal of social relations where individuals interact and pursue their projects through freely arrived at agreements, it is an inadequate picture of how to instantiate just relations amongst citizens. The problem with any account that relies on individual, one-on-one contracting is that the justice of those contracts requires more than simply the parties' agreement. As an example, let's consider Nozick's classic case of the person who, through a series of voluntary appropriations and contracts, buys up all the drinkable water in a particular area.⁹⁹ Even according to Nozick, a series of voluntary contracts could run afoul of the 'Lockean Proviso,' which renders his transactions, in the aggregate, unrightful. This case shows that a series of contracts, freely arrived at, can eventually and in aggregate undermine the background conditions that make legitimate contracting possible. Once someone possesses all of the watering holes, they can charge prices that are unjust *even if* everyone else agrees to them. Reliance upon contracts and agreements between agents is fundamentally unstable: over time, free contracting can undermine the ability of agents to freely contract in the first place. In other words, we need to ensure that the conditions of background justice obtain. This is the job of the basic structure: it maintains the conditions of background justice.

Yet, one might argue that this does not demonstrate the *necessity* of the basic structure since we could incorporate the requirement that one's contracts do not undermine the conditions of background justice as part of the moral responsibilities of foregrounded agents

⁹⁹ Nozick (1974), 179-181

who contract with each other. This seems to be the clear point of the 'Lockean Proviso' in Nozick's account. On his view, a contract is only justice-preserving if it is the consequence of free agreement *and* it satisfies the provision that it leaves 'enough and as good' for everyone else, thus maintaining the minimum conditions for the legitimacy of free agreement. Thus, just as individuals have a moral responsibility to refrain from force and fraud when making consensual agreements, they equally have a responsibility to determine whether this or that agreement will decisively undermine background justice and to refrain from enacting those contracts which violate that prescription. Of course, many people will not bother to engage in those calculations, but it is equally true that some people will use force and fraud to get what they want. On this view, if everyone is *truly* virtuous and follows the dictates of the Proviso as much as other side constraints, then there is no reason for a basic structure. The actions of foregrounded agents are sufficient to sustain the relevant background justice.

Rawls rejects this possibility, arguing that even a world of fully virtuous agents would need institutional coordination:

Again, the conditions necessary for background justice can be undermined, even though nobody acts unfairly or is aware of how the overall result of many separate exchanges affects the opportunities of others.¹⁰⁰

There are two distinct problems with the "Proviso Solution" as described above. These problems then motivate two reasons for creating a basic structure. First, the Proviso Solution imposes unreasonable or impossible cognitive demands on individual agents. Rawls writes:

There are no feasible and practicable rules that it is sensible to impose on individuals that can prevent the erosion of background justice. This is because the rules governing agreements and individual transactions cannot be

¹⁰⁰ Rawls (1993), 266

too complex, or require too much information to be correctly implied; nor should they enjoin individuals to engage in bargaining with many widely scattered third parties, since this would impose excessive transaction costs... Thus any sensible scheme of rules will not exceed the capacity of individuals to grasp and follow them with sufficient ease, nor will it burden citizens with requirements of knowledge or foresight they cannot normally meet.¹⁰¹

The question of whether a particular contract ultimately undermines background justice is one of great complexity, involving many interactions made by many people. After all, it would be quite rare for there to be a situation where a particular contract, shorn of any social context, would *by itself* decisively undermine background justice. Perhaps the last acquisition that leads one to have monopolistic power would (such as when somebody with rights over all other watering holes finally manages the purchase the last one) be directly evaluable in that way, but most actions would not be. In order to know whether I have left 'enough and as good,' I would need to know how much is left, but that is not entirely up to me. And we can imagine how these complexities would multiply if we were to reject. If it was even possible for individuals to be able to collect, organize, and remember the relevant economic and social facts, doing so would quickly be all-consuming. Only the coordinated action of individuals mediated through a basic structure could such demands become reasonable.

But even if individuals could collect and retain all of the relevant information at a reasonable cost, Rawls argues that we would still have a problem of coordination. Rawls writes:

This is an important though obvious point: when our social world is pervaded by duplicity and deceit we are tempted to think that law and government are necessary only because of the propensity of individuals to act unfairly. But, to the contrary, the tendency is rather for background justice to be eroded even when individuals act fairly: the overall result of separate and independent transactions is away from and not toward background justice. We might say: in this case the invisible hand guides things in the wrong direction and favors an oligopolistic configuration of accumulations

¹⁰¹ Rawls (1993), 267-268

that succeeds in maintaining unjustified inequalities and restrictions on fair opportunity.¹⁰²

It does not follow from the fact that virtuous agents are making individually virtuous choices that these choices will ultimately converge on the same solution in a way that will actually maintain background justice. Consider the following case:

UNLUCKY CONTRACTORS: Nicholas and Ralph are two virtuous individuals who are considering two economic transactions. They are not transacting with each other, but they are in the same market. If Nicholas or Ralph individually performs the transaction with a vendor, then the level of carbon emissions produced will remain beneath the relevant threshold needed to sustain background justice.¹⁰³ However, if they both engage in the transaction, background justice will be decisively undermined. There is no reason, let's grant, in terms of justice to favor either Nicholas or Ralph in determining who should get to engage in the transaction.

The broad point of this example is that the justice of Nicholas's and Ralph's actions are fundamentally 'entangled.' There is no problem with either action individually but only in tandem, just as there is no problem with driving on the left side of street as long as everyone else does. This is not simply a problem of not *knowing* what other people are doing, but the fact that what the right thing to do depends on our mutually entangled choices or being motivated to do the right thing. The right thing to do, for Ralph, is not determined until Nicholas acts and vice versa. There is no reason to think that individuals will always converge on the same resolution *even if everyone has the same view of justice and is properly motivated*. An externally specified and enforced norm that resolves conflicts in a reliable way seems necessary.

The second reason that we need a basic structure is that our social circumstances help determine our identity. We do not spring into existence, fully-formed from Zeus's

¹⁰² Rawls (1993), 267

¹⁰³ It is well beyond the scope of this chapter to lay out a specific account of 'just emissions,' but Shue (1993) and Caney (2012) are good places to start.

forehead as confident self-owners. Our desires, capacities, and plans are shaped by our family and friends, our social and economic environment. Rawls writes:

Consider further how the three contingencies [social class, native endowments and the opportunity to develop them, and luck] affect the content of people's final ends and purposes, as well as the vigor and confidence with which they pursue them...Hence the basic structure as a social and economic regime is not only an arrangement that satisfies given desires and aspirations but also an arrangement that arouses further desires and aspirations for the future. This it does by the expectations and ambitions it encourages in the present, and indeed over a complete life.¹⁰⁴

The basic structure of society provides us the capacity to intervene, reform, and structure that pervasive and constitutive influence. In a sense, this is the claim that there must always already be a basic structure in the first-order, interpersonal sense. It is simply unavoidable that we will have social institutions of some kind, even if by social institutions we mean relatively simple hunter-gatherer societies, and these institutions partly determine our capacities and talents. The only question is whether these institutions will ultimately be responsive to concerns of justice, not whether they will exist.

The third reason for a basic structure is less explicit in Rawls's writings but is a deep consequence of the Fact of Reasonable Pluralism. Rawls believes that a society will only be able to generate a stable consensus on important questions of value and the purpose of human life through force¹⁰⁵. In other words, there will be an *ineliminable* and *justified* diversity of opinion within a free society concerning ultimate questions of value, ethics, truth, and meaning. It is important to note that we should not treat this pluralism as an unfortunate consequence of free institutions that should be eliminated if possible. Rather, it is a *reasonable* pluralism and this has two implications. First, some individuals will be *unreasonable* and their

¹⁰⁴ Rawls (2001), 56

¹⁰⁵ See, in one example among many, Rawls (1993) 35-40.

comprehensive views might ultimately justify projects that ultimately will need to be blocked by or prevented by the institutions of a free society. Second, those comprehensive views that are reasonable (or rather, reasonable people holding those views) are deserving of a thorough-going toleration that moves beyond a *modus vivendi*. That is, reasonable people ought to have their views respected *even if* we currently possess the power to change their minds. Of course, we can try to persuade these people to change their minds, person to person, but we ought not use the power of the state to suppress views that we think are incorrect, as long as they are reasonable. As we shall see, one purpose of the basic structure is to provide an institutional structure that can be regulated by and then apply a freestanding conception of justice that can adjudicate conflicts between reasonable people with conflicting views of the good. So, what makes a person reasonable and why will diversity be the natural consequence of liberal institutions? The first condition is that a reasonable person accepts the burdens of judgment. These involve the recognition of the ways in which reasonable people can differ on moral and political questions in virtue of the following:

- a) The evidence--empirical and scientific--bearing on the case is conflicting and complex, and thus hard to assess and evaluate.
- b) Even where we agree fully about the kinds of considerations that are relevant, we may agree about their weight and so arrive at different judgments.
- c) To some extent all our concepts, and not only moral and political concepts, are vague and subject to hard cases; and this indeterminacy means that we must rely on judgment and interpretation (and judgments about interpretation) within some range (not sharply specifiable) where reasonable persons may differ.
- d) To some extent (how great we cannot tell) the way we assess evidence and weigh moral and political values is shaped by our total experience of life up to now; and our total experiences must always differ...citizens' total experiences are disparate enough for their judgments to diverge, at least to some degree, on many if not most cases of any complexity.
- e) Often there are difficult kinds of normative considerations of different force on both sides of an issues and it is difficult to make an overall assessment.
- f) Finally...any system of social institutions is limited in the values it can admit so that some selection must be made from the full range of moral and

political values that might be realized. This is because any system of institutions has, as it were, a limited social space.¹⁰⁶

The inherent complexity and difficulty of questions of ultimate value indicate that we should expect that equally reasonable people will come to different conclusions.

If this is true, it represents a problem for liberal society. For, how can we resolve disputes and act collectively if there is an ineliminable diversity of opinions of how to proceed? This leads to a second condition of a reasonable person:

Reasonable persons, we say, are not moved by the general good as such but desire for its own sake a social world in which they, as free and equal, can cooperate with others on terms all can accept. They insist that reciprocity should hold within that world so that each benefits along with others.¹⁰⁷

That is, there is a strict limit on the amount of diversity that is tolerable. So, part of what makes reasonable persons reasonable is that they are committed to the treatment of all citizens as free and equal. What's more, they find support within their own reasonable comprehensive doctrine for committing themselves to this political conception of freedom and equality. This generates, in Rawls's words, an 'overlapping consensus' where all reasonable persons find themselves committed to the same political conception where all citizens are free and equal in a political context. This 'free-standing' political conception of justice governs the basic structure and serves as a mechanism of collective adjudication between all reasonable comprehensive views. Yet, the pluralism goes deeper than comprehensive views, Rawls also accepts that there is really a 'family' of equally reasonable free-standing political conceptions. He writes:

There is a family of reasonable liberal conceptions of justice...Citizens will differ as to which of these conceptions they think the most reasonable, but they should be able to agree that they are all reasonable, even if barely so.

¹⁰⁶ Rawls (1993), 56-57

¹⁰⁷ Rawls (1993), 50

Each of these liberalisms endorse the underlying ideas of citizen as free and equal persons and of society as a fair system of cooperation over time. Yet since these ideas can be interpreted in various ways, we get different formulations of the principles of justice and different contents of public reason. Political conceptions differ also in how they order, or balance, political principles and values even when they specify the same principles and values as significant.¹⁰⁸

Of course, Rawls thinks that his own view is the most reasonable member of that family, but he clearly thinks that there are multiple understandings of freedom and equality in the political context that are morally legitimate. There is a set *core* that every view must have (a set of basic liberties that have priority over other social values and a robust guarantee that every citizen will have the all-purpose means to take advantage of those freedoms), but there can be considerable penumbral variation in how various primary goods ought to be distributed. A consequence of this reasonable diversity in both comprehensive and free-standing political conceptions is that there are many potential constellations of entitlements that are, for Rawls, reasonably acceptable in principle. Both society A and Society B could have a population of reasonable citizens with overlapping consensuses that nonetheless have fairly different distributions of income and wealth as they adopt different freestanding political conceptions of justice. And this provides a key rationale for the basic structure, as it makes possible public deliberation and adjudication concerning which of these constellations of entitlements this particular society wishes to adopt. In other words, the appropriate specification of what people are owed in terms of justice depends on which of the particular political conceptions, or combination of political conceptions, that are accepted. Some of them represent mutually exclusive sets of rights and liberties, so choices need to be made.

¹⁰⁸ Rawls (1999), 14

The domestic basic structure represents a, perhaps the only, way of non-arbitrarily making that choice.¹⁰⁹

We should summarize where we are before we proceed to Rawls's discussion of the Law of Peoples. The robust political, economic, and social institutions that constitute the domestic basic structure is, on Rawls's view, morally non-negotiable. There are three reasons for this. First, the basic structure improves upon significant limitations of individual action in maintaining the conditions of background justice required for 'ideal social process' or 'pure procedural' accounts of justice. These limitations are generated both by the reasonable expectations that a theory of justice ought to make on the cognitive and motivational resources as well as the problems created by uncoordinated individual action in the face of 'entangled' normative prescriptions. Second, there is a sense in which political and social institutions are both unavoidable, pervasive, and determinative. Third, the basic structure provides a deliberative mechanism for considering, reforming, choosing, and executing a reasonable and freestanding political conception of justice.

Rawls appears confident that these three rationales for resolving the first order interactions amongst individuals do not apply to the interactions between sufficiently well-ordered states. The key feature, for Rawls, is that *peoples* (states that are minimally well-ordered) have a moral nature that makes a basic structure unnecessary. He writes:

[The conditions for a lasting peace] would be fulfilled by peoples living under liberal constitutional democracies. These peoples honor a shared principle of legitimate government and are not swayed by passion for power and glory, or the intoxicating pride of ruling...Such regimes are not bent on the religious conversion of other societies, since liberal peoples by their constitution have no state religion...Domination and striving for glory, the excitement of conquest and the pleasure of exercising power over others, do not move

¹⁰⁹ I think this is one way of interpreting Joshua Cohen's work (1989) on deliberative democracy.

them against other peoples. All being satisfied in the way, liberal people *have nothing to go to war about*.¹¹⁰

So, peoples are structured are governed by a freestanding political conception of justice. And this sets the limits on the kinds of reasons that they will act on in the international scene. These reasons are: 1) territorial integrity 2) guaranteeing the autonomy of their well-ordered political institutions and 3) proper pride in those institutions. Peoples will not exploit other peoples economically or engage in wars of conquest simply because they will fail to see those uses of state power as legitimate.

Let's look at a specific example. Pogge has argued that two main drivers of global poverty are the way in which global economic institutions create perverse incentives for authoritarian governance. For example, a dictator can take over a country and immediately benefit by contracting with transnational corporations to extract that country's natural resources¹¹¹. Why does the developed world use the WTO, bilateral treaties, and other mechanisms to impose this international resource privilege? The answer (or, at least, an answer) is that economic prosperity, understood in terms of growth in GDP per capita, is thought to play an important role in the legitimation of liberal regimes. By ensuring relatively cheap access to natural resources, the rich nations can maintain their legitimacy by guaranteeing economic growth. If we change that political understanding, then we undermine one of the strong incentives to exploit the bargaining power of rich nations to exploitative trade regimes. Furthermore, an internally just regime will be less likely to be respond to particular moneyed interests that often play an outsized role in these trade

¹¹⁰ Rawls (1999), 47

¹¹¹ Pogge (2002), 112-116

deliberations. So, a virtuous state will generally lack the motivation to engage in exploitative behavior, making it easier to commit to the relevant international principles.

But this is only half of the story. Virtuous states will lack reasons to conquer or exploit, but it is also the case that virtuous states will be more *resistant* to exploitation and abuse. Rawls argues that the key driver of a your quality of life is the nature of the political institutions to which you find yourself subject:

The political culture of a burdened society is all-important...I believe that the causes of wealth of a people and the forms it takes lie in their political culture and in the religious, philosophical, and moral traditions that support the basic structure of their political and social institutions, as well as in the industriousness and cooperative talents of its members.¹¹²

There are really two elements of Rawls's view at work here. First, a well-ordered society will have institutions that select for politicians that pursue the common good and pressure them to keep with that commitment. So, when a transnational corporation or another nation tries to undermine the interests of its citizenry, these politicians will be in a far more robust position to resist the temptation to serve only one sector of their economy or one privileged class over the common good. Furthermore, since nations will be unconcerned generally with economic inequality and won't be committed to unsustainable economic growth for their legitimacy, then agents that would tempt others to undermine the legitimacy of their home institutions for short and medium term gain will have less to offer corruptible officials. So, for Rawls, an association of well-ordered states deals with association on both the 'supply' side and the 'demand' side. Virtuous states will be far less willing to use bribery, exploitation, and coercion to pressure other state's into compromising positions both because they conceive of their interests in such a way that doing so gains them nothing: they have no interest in conquest, domination, or even economic growth for its own sake. On the other

¹¹² Rawls (1999), 108

side, virtuous states will be much less willing to accept Faustian bargains even if they are offered.

The Inadequacy of the Association of Virtuous States

Problems Internal to the Rawlsian Account

So, is an international realm governed by the Rawlsian-Kantian Association of Virtuous States (AVS) morally acceptable and nondominating? Or, conversely, are we required to develop a basic structure composed of powerful, coordinating institutions? Miriam Ronzoni has argued for the latter. She suggests that the current system, composed of current actors, creates and permits conditions of 'background injustice':

The most pressing question is not whether we *have* a global basic structure, but whether we *need* one. The absence of a full-blown basic structure at the global level cannot settle the question of global socioeconomic justice once and for all in the negative. If problematic background justice conditions are generated, it is the very absence that may constitute an injustice...Global actors may be experiencing injustice not because they are subject to a clear institutional order that coercively imposes unjust rules on them, but, quite on the contrary, due to an institutional *vacuum*, or to the asymmetrical and heterogeneous character of the institutional regulation to which they are subject.¹¹³

The idea is that only a basic structure will make possible the needed coordination between currently existing states that *protects their effective sovereignty*, or their freedom of action in domestic policy¹¹⁴. In other words, without a global basic structure, states will not be able to maintain their own domestic freedom of action. For example, she argues that coordination concerning tax law will lead to a kind of 'race to the bottom' whereby individual states, competing for the business of transnational corporations, offer tax breaks that can ultimately

¹¹³ Ronzoni (2009), 243

¹¹⁴ *ibid*, 248

undermine state capabilities and social justice¹¹⁵. Without an international system regulating tax policy, states will ultimately find themselves unable to sustain their own domestic institutions as competition with other states that are all trying to maximize economic growth drives tax revenues downwards. Unfortunately, Ronzoni's examples rely on the less than virtuous behavior of current states. Ronzoni imagines states that drive the hardest possible bargain without concern for the effects on other states. The race to the bottom is caused by the willingness of states to exploit their position concerning trade policy in order to drive the a bargain that is, at least, indifferent to legitimate interests of other states and by 'host countries' lack of concern or even active support for exploitative behavior by transnational corporations headquartered within their borders. To put it in Rawlsian terms, Ronzoni motivates the creation of the basic structure by developing a model where all states could be *rational* and yet end up producing effects and equilibria that end up undermining the institutions of the participants. But in order to show that the AVS is inadequate, we need to show that even if states are *reasonable* in the Rawlsian sense (that is, willing to offer and abide by fair terms of cooperation) there would still be irresolvable moral problems.

Above, I delineated three reasons the basic structure is necessary on the Rawlsian view. Unlike Ronzoni, I would like to now consider whether these three reasons apply *even if* we grant that all (full) members of the international are reasonable. To make things a bit more concrete, I am going to illustrate the operation of the AVS using only a few of the principles of international justice that Rawls describes. This shouldn't be taken as an endorsement of these particular principles; I am using them as a means for illustrating an internal inconsistency in the Rawlsian picture. I focus on three elements of Rawls's view:

- (1) Peoples are equal and are parties to the agreements that bind them.

¹¹⁵ *ibid*, 249-251

- (2) Peoples have the right to self-defense but no right to instigate war for reasons other than self-defense.
- (3) Peoples have a duty to assist other peoples living under unfavorable conditions that prevent their having a just or decent political social regime.¹¹⁶

In what follows, I will argue that while some of the reasons for a basic structure do not apply, others apply with even greater force.

It seems clear that some of the political tendencies and human limitations that lead to the necessity of the basic structure in the domestic case apply with much less force internationally. First, the cognitive, epistemic, and informational problems are much reduced in the international context. States and the political institutions that constitute them are vastly more capable than individual human beings in terms of their ability to collect and process information, if only because they can aggregate the knowledge of many human beings. In fact, some have argued that it is an important feature of legitimate states that they are appropriately structured so that they are epistemically virtuous, and this has long been held to be one of the chief virtues of democratic political institutions. What's more, one of the major reasons for developing these political institutions in the first place is to collect and process information that is relevant to distributive justice. Furthermore, the informational requirements for the application of distributive justice are lighter in the international rather than the domestic context. For Rawls, distributive justice in the domestic context requires the complex application of the difference principle continuously to economic transactions which will require careful interventions into the economy on a regular basis, although there are some ways to make a Rawlsian state less interventionist¹¹⁷. In the international context,

¹¹⁶ Rawls (1999), page 37

¹¹⁷ The fact that the property-owning democracy instantiates the principles of justice with a minimum of *post hoc* redistribution by assuring widespread ownership of productive capital is one of the chief points in its favor. See Rawls (2001), 139.

the duty of assistance to burdened peoples, according to Rawls, is much less complicated. All that is required is that every state have certain minimum capacities and resources and this is much less epistemically demanding than ensuring that the overall consequence of the operation of an entire society's economy is that the expected value of the primary goods over the complete life of a representative person of the least well class is maximized.

Second, it also seems clear that the *constitutive* effects of international politics, if it is structured by an AVS, are relatively minor when compared to that of the domestic arena. The reason is that, in the international context, the state acts as a mediator between the effects of the international realm and the fundamental shaping of the person's agency. To put it another way, it is hard to imagine a world where fundamental interpersonal relations do not, at least partially, constitute and found our projects and agency. Thus, it seems of vital importance to have institutional mechanisms that can govern and structure those interactions such that they are consistent with the requirements of justice. On the other hand, it is comparatively easy to imagine a world where international relations are kept simple, voluntary, and relatively inconsequential. Samuel Freeman argues:

While the absence of cooperative relations with other societies means the absence of many potential benefits, if we deprive people of society then *everything* changes. Social cooperation is necessary to your development of person, the realization of our reasoning and moral powers, the development of our social capacities, and our having a conception of the good...Social cooperation is the most profound and influential relationship that humans can have: it a fundamental precondition for our developing our distinctly human capacities and achieving a status as free agents with a capacity for practical reason and a conception of our good...By contrast, global cooperation is not a precondition of our survival or flourishing as developed persons, or to the development of our rational, social, and moral powers.¹¹⁸

On this view, the institutions of interpersonal governance are vital, but international relations can only have a similar constitutive effect when things go quite wrong. Again,

¹¹⁸ Freeman (2007), 421-422

Pogge has argued that the two main mechanisms the international system employs in order to guarantee the affluence of the rich and powerful nations are the international borrowing privilege and the international resource privilege. Setting aside differences between the two, Pogge argues that these two privileges fundamentally shape the life chances of many people who live in Less Developed Countries (LDCs). But the key element is *how* these privileges do so. Even according to Pogge, the primary effect of these privileges is that they undermine domestic governance, perpetuate 'extractive' political equilibria, and block potential reform:

I have shown how two aspects of the global economic order [the international borrowing and resource privileges] imposed by wealthy societies and cherished also by authoritarian rules and corrupt elites in poorer countries, contribute substantially to the persistence of severe poverty. The two privileges crucially affect what sorts of persons jostle for political power and then shape national policy in the poor countries, what incentives these people face, what options they have, and what impact these options would have on the lives of their compatriots.¹¹⁹

In other words, the primary effect of these international privileges is on the nature of domestic basic structure: it prevents states from being well-ordered and thus serving the interests of their citizens¹²⁰. The domestic structure has a certain fundamentality: it mediates both the interactions between citizens and between those citizens and the international system. If we remove those privileges and assume an AVS, then the international system will not play the kind of constitutive role that the basic structure does. So, international political interactions are not characterized by the kinds of epistemic and cognitive limitations that help motivate the domestic basic structure, nor does the international system have the kind of constitutive effect as the domestic basic structure. The simplicity of Rawls's distributive

¹¹⁹ Pogge (2002), 115

¹²⁰ This is also consistent with Robinson and Acemoglu (2002, 1235), who argue that state institutions are primary determinants of national prosperity, but that international interventions (most importantly, colonialism) can influence the nature of state institutions.

requirements, the reasonableness of well-ordered states, and their greater capacity does seem to honestly undermine some of the rationales for a global basic structure.

It does not, however, undermine them all. It is not obvious why the problems of coordination and entangled obligations do not apply to the actions of peoples in the international realm. Of course, all peoples will be well-ordered, so they will be *motivated* to act reasonably and treat others with respect, but will that be sufficient? It looks not. Let us look at the *Duty of Assistance to Burdened Societies* (3) and *Duty to Respect the Equality of Peoples* (1). Reasonable peoples will have a general obligation to ensure two things. First, all people who do not currently live under the political authority of a minimally well-ordered state (i.e., a people) will be aided so that their political institutions become well-ordered. Second, peoples should not undermine the free and equal status of other peoples. Yet, it seems clear that both of these obligations create problems of 'entanglement.' Take the duty to respect the equality of peoples when making treaty and engaging in trade negotiations. It seems relatively simple to model a case where three nations are engaged in trade negotiations and the rightfulness of particular trade provisions depends importantly on what was agreed to with the other parties. Suppose that Country A and Country B are negotiating with Country C for rights to harvest a natural resource. Suppose, though, that Country C cannot sustainably contract with both Country A and B. Thus, even a virtuous negotiator for Country A will find it difficult to satisfy the principle (1). Unlike the domestic case, it might not be all that difficult to understand the negotiating position of Country B. After all, there is only one other player, instead of thousands. But this does not change the fact that what is permissible for the negotiator for Country A to offer and depends on what Country B offers and accepts, and vice versa. This requires the coordination of behavior between Country A and Country B, but why should we be confident that even well motivated agents will converge

on acceptable answers? It seems possible that Country A and B, both acting in ways that appear individually acceptable, have the aggregate consequence of undermining the institutions of Country C.

Similar things can be said about the *Duty of Assistance to Burdened Peoples*. In fact, we might think the coordination issues are somewhat worse, for not only do states need to coordinate on *means*, they must also coordinate on *cost-sharing* and *ends*. First, it is clear that even virtuous agents genuinely interested in developing burdened institutions and peoples could select assistance strategies that work at cross purposes. And this could be true *even if* each strategy would be effective when adopted by everybody. Thus, it seems clear that one country could, by adopting a particular development package, make another country's package impermissible and vice versa. Similarly, peoples would need to agree on who bears the particular costs of assisting burdened states. Simply because there are virtuous agents who sincerely wish to help does not mean that every nation will converge on *its fair share* of the burden

Finally, in the case of trade negotiations described above, neither country A, B, nor C needed to converge on each other's objectives. Rather, they only needed to converge in terms of guaranteeing that a particular side constraint of their agreements be satisfied. Yet, for Rawls, sufficient well-orderedness admits of many different instantiations. Of course, for Rawls, *decent* well-ordered societies¹²¹ are acceptable even though they are neither liberal nor democratic. The details of Rawls's argument for the minimum acceptability of decent societies are not important here. What is important is that it looks like any plausible view of

¹²¹ Decent societies have the following features: they are peaceful, respect human rights, generate bona fide obligations of support in virtue of their common good conception of justice, and have a mechanism by which the people can be consulted on questions of policy. Rawls argues that such a state is deserving of respect in virtue of 'not being fully unreasonable.' See Rawls (1999), 64-67. Nothing in the following arguments depends on the specifics of decent societies.

what constitutes a well-ordered society will necessarily admit of a range of institutional formations. For example, Michael Blake¹²² has argued that essentially any meaningfully democratic state will be minimally acceptable. Even constitutional democracies within, essentially, the same political traditions can take on a wide range of reasonable variations. And if one agrees with Rawls that a decent consultation hierarchy would be also be legitimate, then well-orderedness is consistent with a fairly bewildering array of institutional structures. It is not at all obvious that the same development interventions will be necessary to create a well-ordered consultation hierarchy, welfare-state democracy, property-owning democracy, or social democracy. So, again, it would seem that equally virtuous agents might decide on different interventions on the basis of the institutional goal they are trying to achieve; there is no guarantee that virtuous agents will converge on the same goal. This is especially true because these institutional formations are all, *ex hypothesi*, reasonable and acceptable well-ordered basic structures.

These coordination problems are, at the very least, exacerbated by the final reason for the basic structure. Basic structures are needed for the non-arbitrary specification of particular schemes of entitlements from amongst a range of reasonable possibilities. The basic structure allows for collective deliberation and a political resolution of disputes, particularly about constitutional essentials. So, do those reasons apply in the international context? Well, let's return to our examples. Imagine Countries A, B, and C, where countries A and B are competing for the sustainable extraction of a natural resource. The entitlements of individuals in Countries A, B, and C will depend on the specific details of the agreements made. Yet, how will those agreements be made? It cannot be that the citizens of A and B come together and resolve the dispute through common political deliberation. Equally

¹²² See Blake (2013), especially 2013

obviously, it would be profoundly illiberal, from Rawls's point of view, to simply decide on the basis of who 'merits' the contract. After all, we are presuming that countries A, B, and C are all reasonable and that their claims are, individually, perfectly within bounds. Accepting the burdens of judgment would seem to preclude structuring the entitlements of people in ways they could reasonably object to in the absence of mutually deliberating about how to resolve the dispute. The resolution seems to depend upon contingent constellations bargaining power between A, B, and C. The well-orderedness of peoples ensures that they will not act intentionally to exploit their superior economy or power to undermine the institutions of other well-ordered peoples. So, if the only issue was the effect of the agreement on Country C and its citizens and the effect on Country A and its citizens, resolving the coordination through a one to one consensus might be plausible. But any agreement with Country A will influence the entitlements of citizens in Country B and vice versa. It means that some business will have supply inputs that become more or less expensive, labor in one sector will come to be more or less in demand, and some industries will become more or less competitive. As a consequence, some people will be unable to get the job they want or pursue the project they wish. *Within* a domestic state, this is the normal operation of any economy even remotely market oriented and is not *necessarily* a problem of domination as long as legitimate political institutions that are relevantly accountable to the people regulate and govern the economy so that people are not dominated in the process. But in the international case, there are no such institutions that ensure that the effects of a treaty with Country B on Country A and vice versa meet the conditions of legitimacy set by Rawls.

The same can be said, but at an even more fundamental level, when it comes to the *Duty to Assist Burdened Peoples*, for the nature of the disagreement is much wider. As I argued,

effective development of a burdened society depends upon coordination amongst the actors, *especially* on the topic of constitutional essentials (e.g., whether the burdened society will be a decent consultation hierarchy or a property-owning democracy). But it is *precisely* on that issue that there is a significant range of *reasonable* possible formations. So, again, let's imagine that two wealthy, well-ordered nations (A and B)--one a decent consultation hierarchy and the other a social democracy--that are on good terms decide to cooperate in assisting a third nation (C) that has long been burdened with failing institutions. The entitlements of citizens in C clearly depend on the choice of constitutional essentials; the rights, liberties, and resources enjoyed by particular citizens of C will be different in a property-owning democracy as opposed to a welfare state. But somewhat less obviously, the entitlements of particular citizens in A and B *also* depend on that choice. For example, most development plans will be expensive, but not all expenses will be distributed equally. In one development plan, Country A might provide advice and construction personnel for infrastructure projects while Country B provides capital investments in agriculture. In another, one country might mostly contribute through cultural and political advice while the other provides monetary transfer payments. The appropriate distribution of those costs and responsibilities will ultimately depend on both the goals and methods of the particular development intervention. So, in other words, effective assistance--as well as the permissible actions of the assisters--depends upon the convergence of the parties on a particular development goal. But in the world of the AVS, how is this convergence to be achieved? Of course, just as above, we could simply depend on *consensus* and simply hope things work out. But this seems too quick. Rawls's own commitment to recognizing the burdens of judgment seems to preclude simply choosing a development policy on its merits and then applying it over dissent. Similarly, one cannot simply hope that there will be a consensus: the fact of

reasonable pluralism will surely apply to difficult political judgments about the application of Rawls's principles of justice. In fact, since there is neither an overlapping consensus across people nor shared bonds of affection or history, one might imagine that the range of views will be wider concerning international debates about development policy than domestic debates concerning questions of social justice.

It is important to realize that these points are not about how *difficult* it might be to get people to agree on the right course of action. It is that it would be illiberally *intolerant* to try to impose one view over another. Of course, these issues get resolved in the domestic case by having institutions of political adjudication that can specify the relevant branch of the tree of reasonable free-standing conceptions of justice that are supported by a robust overlapping consensus of reasonable comprehensive views. But in the international case, an AVS would need to resolve these questions *unaided by the institutions of political adjudication and the overlapping consensus*. Rawls treats the application of his principles of international justice as 'technocratic' problems that can be resolved by the good will and good faith of reasonable peoples coming together in consensus. This view is not entirely without merit as *some* of the reasons for having a basic structure don't apply in the international context. However, it is overly optimistic. The very problems of specification and coordination that make it necessary for *even fully virtuous* agents to be governed by the basic structure in the domestic case apply with equal or even greater force in the international context. Thus, an AVS is necessarily insufficient, even on the Rawlsian view.

AVSs as a Guarantor of Security

The analysis of the previous section already describes some significant sources of international domination. The basic criticism is that the rights that individuals will come to possess will depend crucially on the various ways in which institutions are structured, there

does not exist any uniquely reasonable specification of those institutions, so there is a need for a common, deliberative mechanisms to legitimate any particular entitlement scheme. Both the current international system and one characterized by AVS lack these mechanisms of accountability. As a consequence, individuals are having their entitlements and their choices structured by agents of superior power that are not appropriately accountable.

But we might think that these results are the consequence of other, contingent features of the chosen examples. For example, the argument of the previous section relied on the existence of the Duty of Assistance to Burdened Peoples. Satisfying that duty in a non-dominating way seems impossible in the second order state of nature even if the states attempting to meet their obligations are themselves internally just. This might be a consequence of two contingent features: the complexity of the duty of assistance and the existence of burdened peoples. After all, if there are no burdened peoples, then there is nothing about which the virtuous states can disagree. Second, the key element of the disagreement concerns the provision of a well-ordered basic structure for the burdened peoples, but the precise details of this basic structure are subject to reasonable disagreement but nonetheless require the consensus of those that would help create it. This creates a problem of domination: one citizen of a burdened people would have certain rights under one set of principles and different rights under a different set, but the agents deciding which rules she ends up subject to are not accountable to her. But suppose that states only have very minimal obligations: nonaggression, noninterference, and the protection of human rights that all reasonable views can accept as absolutely necessary.¹²³ In response, I will show that AVSs fail even in their most favorable context: the nondominating provision of security.

¹²³ Human rights, for Rawls (1999, 79-81), set out the limits of toleration for liberal foreign policy. Any state that fails to respect them is subject to sanction. They are not supposed to be parochial or uniquely liberal in their orientation.

The AVSs of Kant and Rawls were designed, first and foremost, to produce *peace*. What's more, the principle of nonaggression appears to be relatively simple: the use of armed force is limited to cases of self-defense. If AVSs cannot solve the problem of domination in this context, then it would seem, *a fortiori*, they will be unable to solve it anywhere.

For Rawls and Kant, the provision of international security follows from the internal constitution of the states: virtuous states will have mutually acceptable, non-conflictual reasons for their behavior since the usual reasons for war will not motivate just states. In other words, Rawls and Kant believe that wars are caused by states being motivated by unacceptable reasons: they pursue territorial aggrandizement, the 'honor' or prestige of the prince, or economic gain. Kant and Rawls rely on different mechanisms¹²⁴, but a virtuous constitution alters how states conceive of their interests and their subsequent behavior. Just states are not guided by the kind of illegitimate interest that leads to war. The idea is that a virtuous state will only go to war to protect its legitimate interests and that these interests are all *coherent*. Every state can pursue its legitimate interests without working against the legitimate interests of others. If we can reliably constrain the motivations of states through internally legitimate institutions, then states will never need to go to war to pursue what they may rightfully claim. These conjectures are allegedly given empirical support by 'democratic peace theory.'¹²⁵ Democratic peace theorists purport to have detected a startling empirical generalization: stable democracies do not go to war with each other, even when they are quite likely to go to war with non-democracies. This is often deployed to support the idea

¹²⁴ Kant relies on the enlightened self-interest of the citizenry while Rawls relies on the mechanism of an overlapping consensus and the citizenry's commitment to the free-standing conception of justice.

¹²⁵ Democratic peace theory has been most influentially described in Doyle (1983) and Russett (1993).

that if states were internally legitimate, this virtue would translate into peaceful behavior abroad.¹²⁶

Rawls and Kant rely on a controversial 'second image' analysis of international conflict. Kenneth Waltz has argued that there are three perspectives¹²⁷ that one can adopt when analyzing the 'source' of international conflict. The first image is based on an account of human nature. A 'first image' explanation for international conflict would be that war is a consequence of the inherently warlike, greedy, or murderous character of the individual humans that compose the participants in the war. Ending war, according to the first image, would require that we make individual people morally better. A second image explanation is, again, the argument that the institutional structure of states is what produces conflict. A *third image* explanation is one that argues that conflict is a consequence of the *system* within the agents find themselves. If third image explanations are correct, then agents could be virtuous and act quite reasonably, yet conflict could still result. Unlike older political theorists who adopted first or second image accounts of international conflict¹²⁸, neo-realists have argued that international conflict is really a consequence of the anarchic system of interaction. The specific features of states are ultimately irrelevant in a third image analysis. Waltz writes:

In defining international-political structures we take states with whatever traditions, habits, objectives, desires, and forms of government they may have. We do not ask whether states are revolutionary or legitimate, authoritarian or democratic, ideological or pragmatic. We abstract every attribute of states except their capabilities. Nor in thinking about structure do we ask about the relations of states--their feelings of friendship or hostility, their diplomatic exchanges, the alliances they form, and the extent of the

¹²⁶ The 'democratic peace' hypothesis is controversial. Some have argued that the small number of democracies and geopolitical contingencies explain the (not necessarily statistically significant) generalization; there is nothing particularly interesting about democratic governance in and of themselves (Mearsheimer 1990 and Spiro 1994).

¹²⁷ Waltz (1954), 2001.

¹²⁸ Morgenthau (1948) is a nice example of the genre.

contacts and exchanges among them. We ask what range of expectations arises merely from looking at the type of order that prevails among them and at the distribution of capabilities within that order.¹²⁹

If Waltz is correct and structural forces put pressure on states to come act in certain ways simply in virtue of the self-help and anarchic nature of international politics, then there is every reason to think that these pressures will also apply to virtuous states. There are two relevant features of the neo-realist analysis. First, the interests that found the neo-realist analysis are precisely the same that AVS theorists grant are legitimate. John Mearsheimer¹³⁰ defines the relevant interests motivating the neo-realist analysis as 'territorial integrity and political autonomy.' That is, what constitutes 'survival' for states in the neo-realist analysis is that they continue to possess and govern 'their territory.' Rawls similarly describes the legitimate interests of a 'satisfied' well-ordered people: their territory, the autonomy of their political institutions, and their self-respect as an equal member in the Society of Peoples. Second, we can generate significant conflict between agents even when the participants in the system act only on the basis of legitimate interests.

So, let us return to WARRING STATES. Argentina and the United Kingdom have a dispute concerning who should possess the Falkland Islands. However, instead of the United Kingdom and Argentina as they actually were, let's us instead imagine that they were both internally legitimate, with non-dominating constitutional orders characterized by a representative legislature, independent judiciary, and effective executive. Let us grant, with Kant and Rawls, that the internal legitimacy of these states means that they will only go to war to maintain their territorial integrity and the autonomy of their just institutions. Does

¹²⁹ Waltz (1979), 99

¹³⁰ See Mearsheimer (2001), especially 31-32.

this change the dynamic we have described in Chapter Two? I do not believe so for three reasons that flow from the insecure and anarchic nature of the relations between the agents.

First, the judgment that a particular area of the earth is part of the territory of a particular polity is, obviously, a political judgment as well as one that influences the entitlements of others. How a people can and should conceive of its territory is subject to political contestation: the English regard Scotland and Wales to be part of the 'their' territory under the overall guise of the United Kingdom while others disagree. And just as the fact of reasonable pluralism and the burdens of judgment apply to both deep questions of fundamental meaning and morality as well as constitutional essentials, we might think that a natural consequence of the free application of human reason is reasonable disagreement about the principles that ought to determine when a state's claims over a territory are rightful. And, again, one of the chief purposes for developing and sustaining public mechanisms of deliberation, adjudication, and contestation is that they allow for the *non-arbitrary* resolution of disputes concerning the specification of entitlements from the set of reasonable possibilities. To return to WARRING STATES, it seems entirely possible¹³¹ that *both* Argentina and the United Kingdom could have reasonable claims to the Falkland Islands/Malvinas and that both countries could reasonably construe the islands as 'their' territory.

¹³¹ Even if one thinks that, currently, the Argentinean claim is fairly specious, we can readily imagine cases where disputing claims are not. This becomes even more complicated when we come to discuss 'economic exclusion zones' where there is considerable disagreement concerning how *far* the right to exploit the natural resources extends beyond one's land territory. It should also be noted that one should not conflate the idea that both countries have a reasonable claim to the territory that both nations are *correct* or that individuals in the background culture could not give better arguments for some principles rather than others. Rather, the basis of my argument is that using force in the absence of adjudicative institutions when there are two conflicting and reasonable claims remains dominating even when one side has the better argument.

Second, states have legitimate interests that depend on the policies of other states but are themselves not in a position to know and guarantee those policies. There are two elements of this uncertainty. The first is that the policy deliberations of traditional states have often been opaque to others. In a world of monarchical and authoritarian states, policy-making was viewed as the rarified domain of a select few and treaties were kept secret in whole or in part as a standard tool of statecraft. In that environment, one state could never be confident that the public face of its fellows would actually match their policy, and this uncertainty could not help but create an environment of fear. Yet, the AVS resolves this problem: it is one element of the internal legitimacy of virtuous states that their 'public personas' match their actual policies. Yet, the second problem is left unresolved and even exacerbated by internal legitimacy. Namely, even if a particular *government's*¹³² policies are fully (or at least adequately) transparent, there is no guarantee that the government policy will remain stable over time¹³³. Some of this instability is a consequence of the fact that the governments of internally legitimate states are occasionally overthrown and replaced with those who change the institutions of state in a such way that they cease to become virtuous while the rest is a consequence of regular elections and party politics. As long as the two states are institutionally distinct, it remains possible that a perfectly reasonable consensus between the two is disrupted by institutional failure or by the election of a new government. The key point here is that the questions of institution choice, support, and aid that plague

¹³² The distinction between a 'government' and a 'state' is that the state represents the general institutions of political deliberation, coordination, and adjudication (the national assembly, the office of prime minister or president etc) while a *government* represents a group of people who are linked in some way who occupy those offices and staff those institutions. Parliament is an institution of the state; the Thatcher government is the Tories that occupy the relevant positions within the state.

¹³³ Deudney (2007, 154ff) suggests that ignoring the material vulnerability of republics in international politics one of Kant's primary political failings.

the Duty of Assistance to Burdened Peoples remain present even when it comes to satisfying one's own interest in the defense of one's territory. Each individual state will need to make its own judgment as to whether *even currently virtuous states* are sufficiently stable or whether the changing policies of possible governments will be acceptable. Even if we grant that two states converge perfectly on a unique specification of the relevant borders, this does not resolve the potential problems of domination. In other words, threats and potential threats to a virtuous state's legitimate interests, even when these are characterized in a minimalist and reciprocal manner, do not come simply in the guise of armies gathering at the border. A state can sincerely restrict its concerns only to universally acknowledged legitimate interests and yet find itself intervening in controversial ways in the internal politics of other states. What's more, *further* negotiations with another nation over a disputed territory may be colored by the judgment that the internal politics of that country is unstable or changing; relationships between states are iterated and states might adopt what appear to be unnecessarily confrontational or interventionist positions in virtue of their own, private, long term judgments about the policies of other nations¹³⁴. Yet, in all of these cases, the AVS lacks the mechanisms to help resolve disagreements concerning these issues. So, in each case, individual states will need to muddle through on the basis of their own judgments and deliberations; judgments and deliberations in which other nations can only with difficulty participate and then only haphazardly.

Finally, even if we assumed relative narrow convergence on the relevant principles and assumed that states will have stable policies over time even in the face of both legitimate

¹³⁴ It gets worse. The very judgment of a state as virtuous in the relevant respects is itself subject to political contestation and revision. Later behavior can lead people to revise their judgments about another state *even in the absence of institutional change*. See Oren (1995) where he describes how the judgment about whether Wilhelmine Germany was 'democratic' changed in the United States because of Imperial Germany's *foreign* policy. The actual institutional structure remained unchanged.

and illegitimate attempts of reform, the current wide differences in power would seem problematic in and of themselves. The reason is that the resolution of international disputes does not occur in a vacuum. One of the main advantages of *domination*-oriented theories of justice is that they can 'detect' injustice in cases where one side voluntarily shapes its preferences, habits, and policies in order to fit the preference of the more powerful agent, avoiding any direct intervention. In WARRING STATES, let's grant that the United Kingdom has a strong preponderance of military power, yet both nations see the Falklands as part of their territory. Let's further imagine that, unlike in the real case, negotiations reach a mutually acceptable compromise and war is avoided. I would suggest that the mere fact that direct interference has been avoided does not show that there is no morally problematic relationship between the United Kingdom and Argentina. The idea is that the mere *availability* of an unanswerable threat from one side of the negotiating table puts the other side in asymmetric dependence. This kind of dependence cannot help but color the negotiations and relationship between the negotiators even if the material results are not different than they would be between equals. Given the lack of proper deliberative institutions that are designed to equalize the relative power and influence of the participants as well as the burdens of judgment, it seems that the resolution of these disputes cannot help but be subject to contingent and arbitrary constellations of bargaining power. And we can see this in how disputes between *actual* democracies are resolved, even in the context of democratic peace theory. Christopher Layne looks at four 'case studies' of 'near misses' where two democracies almost went to war. He argues that these disputes were not actually resolved by any mechanism identified by democratic peace theorists:

In each of these crises, at least one of the democratic states involved was prepared to go to war (or, in the case of France in 1923, to use military force coercively) because it believed it had vital strategic or reputational interests at stake. In each of the crises, war was avoided only because one side elected to

pull back from the brink. In each of the four crises, war was avoided not because of the 'live and let live' spirit of peace dispute resolution at democratic peace theory's core, but because of realist factors. Adverse distributions of military capabilities explain why France did not fight over Fashoda, and why Germany resisted the French occupation of the Ruhr passively rather than forcibly. Concerns that others would take advantage of the fight (the 'waterbirds' dilemma) explain why the British backed down in the Venezuela crisis, and the Union submitted to Britain's ultimatum in the *Trent* affair. When one actually looks at the *result* of these four crises ('democracies do not fight democracies') and attempts to understand *why* these crises turned out as they did, it becomes clear that democratic peace theory's causal logic has only minimal explanatory power.¹³⁵

The idea here is that even if we granted that these states could resolve their internal disputes through democratic politics, they fail to be immune from the power dynamics that characterize foreign policy.

This dynamic is radically different from the political equality of citizens who are co-members of a republican constitutional order. The participants of the negotiations in a domestic order are, in an important sense, equal in their status of being mutually subject to a constitutional order; this is why differences in physical and economic power can, in principle be made consistent with the freedom and equality of all citizens. The overarching political order can reorganize and redistribute that power and if someone tries to take advantage of their power to dominate others, that political order (where the rich and poor have equal influence) can step in. This creates an important *recognition and security of status* that is absent in the international scene. This mutual recognition and security of status is undermined by the large scale power differentials between the actors *combined* with the lack of institutions that might serve as a mutual and common check to those differentials.

We began the section with the plausible idea that the institutions of an internally legitimate United Kingdom could act as indirect guardians for the rights of Argentineans and

¹³⁵ Layne (1994) in Brown, Jones, Miller (1996), 190.

vice versa. If that was true, then an AVS could resolve the problem of international domination while *also* avoiding the moral pathway infeasibility of the world state. Yet, this was only plausible if the internal legitimacy of a virtuous state instantiated a political structure that led to the robust and public consideration of the freedom and equality of those subject to the power of these states. However, this is *not* what we found when we examined the logic of the AVS. In each case, the internal structure of the state made it so that it would *reliably act in certain ways*. For both Rawls and Kant, they attempted to explain that states would not invade, conquer, and aggrandize in terms of the interests of their citizenry: Kant thought that the citizenry would not approve of wars out of self-interest, Rawls argued that internal legitimacy would remove the temptation for wars of aggression. Rawls and Kant each construct an internally legitimate state that leads to mutual freedom and equality and then try to show that they also *happen* to be peaceful. What is lacking is a sophisticated matrix of incentives, institutions, and commitments that put real, *robust* pressure to take foreigners into account when deliberating and to be accountable to their interests. In other words, even if we grant the possibility that public guardianship of non-citizens could resolve the problem of non-domination, the mechanisms of the AVS described by Kant and Rawls do *not amount to guardianship*. Rather, they amount to institutions that act in ways that happen to guard the relevant interests, but they lack the institutional structure and commitments to actually *be* guardians.

Why not simply incorporate more robust protections? If the problem is that *internally* legitimate institutions are only focused on creating and maintaining just *domestic* relations, why not simply advocate for new institutional formations within each state that would force them to be responsive to the interests of foreigners? But can we create nondominating institutions that are appropriately responsive to the interests of those who are prohibited

from participating in the order itself? I doubt it, and this is where the analysis of the role of basic structure, the Duty of Assistance, and the problems with a unilateral right to self-defense becomes especially relevant. In a world structured by this more robust AVS where each state takes itself to be a guardian of the rights of all, how will these individual member states relate to one another? For each citizen, their own domestic state is *also* their guardian. Yet, there does not seem to be any mechanism that would make these guardianships compatible in a way that is itself non-arbitrary. Given that there is a reasonable range of entitlement schemes, even in the fairly minimal context of self-defense, two *different* guardians could reasonably disagree about whether a particular person's rights are being respected and we would need to resolve that dispute. It would seem that the legitimate resolution of *that* kind of dispute would require some kind of common political order, with institutions that allow for common deliberation. Without them, the problem of domination simply recapitulates as the rights of individuals come to depend on who happens to succeed in imposing their judgment in the resolution of the dispute. Of course, all the guardians *might* act well and, as a consequence, no dispute ever arises. But the same thing can be said of Emma and Harriet or in any dominating relationship. The problematic dynamic that is revealed when things go wrong is not unproblematic simply because conflict happens to be avoided, particularly if peace is achieved by the weak adapting to the strong.

If there was a uniquely reasonable set and coherent of global principles of justice and the virtue of each state necessarily created an effective global convergence on those principles, then perhaps we could resolve the problem of international domination with an AVS. Each agent with power would be publicly checked by other agents and there would be no arbitrary adjudications that would, by necessity, be resolved by geopolitics rather than justice. But those things are not true and even the interests that the AVS theorist takes to be

basic and legitimate lead to ineliminable conflicts that cannot be resolved strictly by reference to uniquely reasonable principles.

One possible solution is the creation of judicial and legislative inter-,trans-, and supranational institutions that can play the coordinative *and* deliberative roles that are missing above. It is to that possibility I now turn.

Chapter Four

Trust-Busting and the False Moral Promise of International Institutions

"You are a civilian, subject to the United Nations of Earth. Is that correct?"

"No, it bloody isn't...I keep telling you people, the UN is not a government! I'm affiliated to Pinkertons for purposes of legislation and insurance; that means I obey their rules and they protect me against infringers. But I've got a backup strategic infringement policy from the New Model Air Force which, I believe, covers situations like this one. I've got agreements with half a dozen over quasi-governmental organizations, but none of them entitled to claim sovereignty over me--I'm not a slave!"

-Charles Stross, Singularity Sky

Introduction

In the previous section, I raised the possibility that other institutional structures besides the world state might resolve the problem of international domination. When we discussed the AVS, I assumed a relatively minimalist understanding of the association and a comparatively 'Westphalian' population of international actors: states are the only important agents and the AVS is simply a set of principles that mutually regulate the behavior without having any particular institutional structure outside the states themselves. In fact, the AVS is barely an association at all. The purpose of such minimalism was to see if the internal legitimacy of states would be sufficient to establish a nondominating international order. It

was not. Yet, this minimalism is not an accurate picture of global politics. It is undeniable that the realm of international politics has become populated with an increasingly complex and multifarious set of actors at the sub-, supra-, and transnational levels. These agents-- running the gamut from formal international organizations to *ad hoc* advocacy networks of experts--exert pressure, provide information, and make administrative rules and judgments that influence the life chances of people around the globe. In other words, these organizations claim to possess authority over states and their citizens. Some have suggested that this is a positive moral development, arguing that the modern state is an arbitrary and contingent historical construct that is ultimately unresponsive to basic human interests. On this view, we have no special *moral* reason to favor the political institutions of the 'traditional' state. Perhaps these new international actors will be *more* responsive to welfare of their constituents when compared to modern nation-states.¹³⁶ As the power of international actors grows, the question of how they can come to wield power justly will have increasing urgency.

Current states have (or at least claim to have) a vertically integrated monopoly on governance within a territory. The final decision concerning issues as variable as economic practices, law enforcement, environmental preservation, and more are all under the authority of the national state regardless of both competence and the very real likelihood that a particular issue will require the coordination of actors across national boundaries¹³⁷. Many theorists¹³⁸ have argued that we should break up this monopolistic and unified structure of authority and replace it with a multi-level and diverse set of actors that perform particular

¹³⁶ For example, see Thomas Pogge, 'Cosmopolitanism and Sovereignty' (1992) 103 *Ethics*, 48

¹³⁷ Pogge (2002, 182 and 186) refers to nuclear weapons proliferation and global warming as paradigm cases of global issues.

¹³⁸ Examples include Caney (2005) Slaughter (2004) Pogge (1992 and 2002), Kuper (2006) and Buchanan (2000, 2004, 2010).

tasks in specific issue areas. So, instead of one single agent with authority over all governance, we ought to have a multiplicity of agents that deal with specific issues and nonarbitrary geographic regions that are empowered--if need be--to issue binding commands in multiple national jurisdictions. What's more, these new institutions can provide new arenas of accountability and contestation, serving as a check on the excesses of national governments. So, the attractiveness of 'breaking up' the political authority of the modern national state is several fold: the new agents and institutions will be designed with particular competencies and issues in mind, these new authorities will be able to handle issues that cross state boundaries more effectively, and they can serve as a check on whatever 'rump' powers still retained by states. Furthermore, these institutions will operate as constraints on the *sovereignty* of modern political states, providing collective security and operating as a mechanism to remove a state's political authority when it fails to meet basic global requirements¹³⁹. For ease of reference, I will call this collection of new global agents and institutions the 'cosmopolitan global order' as it takes governance to primarily inhere in the global perspective that is then parceled out to various agents as needed. Ultimately, I will argue that the cosmopolitan global order--at least as it is presently conceived--cannot solve the problem of international domination.

Political Authority and Instrumentalism

It is important to be clear on what precisely constitutes the modern state's *unified* political authority and what it means to 'break it up' along functional or geographic lines. The state of nature is necessarily unjust as a consequence of three problems, and the political authority of a well-ordered state corresponds with its nondominating resolution of these problems. First, general principles of justice must be specified in ways that pick out

¹³⁹ Smith (2008) is an excellent description of this function of the new governance institutions.

particular entitlement schemes. Second, disputes between particular individuals over particular entitlements need to be adjudicated in ways consistent with the equality of both parties. Third, the coercive enforcement of entitlements should not depend on or be structured by contingent power relations between private citizens. A republican state, then, adopts a mixed constitution characterized by a separation of powers to resolve each of these three problems. A democratic legislature is an accountable mechanism of specifying the principles of justice that allow for participation and control by the citizenry, an independent judiciary provides for an impartial resolution of disputes, and a public executive with a monopoly on the legitimate use of force ensures that the enforcement of one's rightful claims does not depend on whether one is sufficiently powerful. To put a bit more broadly: the essential idea is that unilaterally deciding which entitlement schemes are uniquely reasonable without taking the judgment of others into account, unilaterally deciding a dispute without accounting for the status of the other disputant, and unilaterally forcing others to rely on their contingent physical and social power for rights enforcement are all morally acceptable. Finally, the modern-republican state, through a public constitution, relates these three powers so that they operate coherently while providing checks and balances. We also take the state to possess *sovereignty*, which I will take as the right to make final, determinative decisions within a territory.

As a consequence of the analysis above, the 'trust-busting' of the cosmopolitan global order has two vectors. First, we can separate out the various powers ascribed to the modern state. That is, we argue that certain non-state agents do or should have *legislative*, *judicial*, or *executive* powers. Some institutions may possess one, two, or all three powers in a particular context. For example, the International Criminal Court is fundamentally an institution that possesses judicial powers to adjudicate disputes concerning particular rights

violations that were delineated in the initial Rome Statute. Yet, beyond this *judicial* power, the charter of the ICC contains mechanisms for amending the Rome Statute in a way that increases its jurisdiction. The Kampala Review Conference of 2010, for example, led to the adoption of two amendments that extended the crimes over which the ICC could initiate and try cases. Notice, these amendments did not concern *particular* adjudications but rather the *definition* and *addition* of the general *type* of crimes that were subject to ICC authority. Interestingly, the 2010 Conference also *rejected* another amendment that would have expanded ICC purview to cover drug trafficking cases. In other words, the Conference and the subsequent amendments represented an exercise of *legislative* power in addition to a judicial one. Similarly, the WTO ministerial conferences can exercise a legislative power by altering the various trade agreements, usually by consensus, that constitute the rules of the trading system established by organization. But the WTO also possesses formal, institutional mechanisms for resolving disputes concerning whether those rules have been broken in the guise of Dispute Settlement Bodies and the Appellate Body. In other words, the WTO has legislative and judicial components. Conversely, the World Health Organization can issue guidelines and recommendations to coordinate state responses to a particular health problem, but it relies almost entirely on the persuasiveness of its expert authority to effect policy since it lacks any judicial or executive powers over states. So, we can separate out the *powers* of the modern state. Thus we should not assume that, at a fundamental level, the three basic powers of the modern state ought to operate together within a single constitutional order. There is nothing natural about the linking of all three political powers; it is open question whether they need to all act in concert. Let's call this feature of political authority its *unity* or its *disunity*.

But as the examples above illustrate, there is another vector when it comes to the 'trust-busting' of the modern state. One significant feature of state sovereignty and power is that it takes itself to cover *all* issues of governance. Of course, there might be some features of human life and flourishing that are properly not subject to any governance whatsoever, but the modern state claims the right to make determinations on *all* governance issues; the only issues and action beyond its purview are those that are beyond that of any political authority whatsoever. The cosmopolitan global order rejects this feature of modern state sovereignty. Rather, the authority of various institutions will be *contextual*: their ability to exercise the relevant powers (whatever suite might be deemed appropriate) is limited to the specific issue areas. The WTO makes laws concerning global trade but does not prosecute war crimes. The ICC will (now) prosecute crimes of aggression but lacks the authority to issue guidelines concerning how to respond to SARS. Issue competency and functional role constrain and define the authority of these political institutions. Furthermore, political authority might be reasonably constrained according to geographic relevance. For example, there might be environmental issues that require global perspective and global regulation, but there might be other environmental issues that are only relevant to the Pacific Northwest or to the city of Seattle. So, rather than try to force these issues and geographic necessities *into* general political categories, the cosmopolitan global theorist argues we should construct political authorities that 'fit' the actual problem they are trying to solve. So, if there genuinely is a governance problem that affects the Pacific Northwest specifically, why should we think the best way to resolve the issue is to have the governments of Canada, the United States, Washington state, and British Columbia try to haphazardly coordinate with each other rather than to create, legitimize, and imbue with authority an agency that more naturally governs the problem. So, the cosmopolitan global order imagines a complex matrix of political

authority that is federalist and multi-level: final decision-making power does not always or even often reside at the level of national governments. It is simply a question for practical, pragmatic investigation how we should structure the multiplicity of political authority and global governance. Let's call this feature of the cosmopolitan global order its *specificity* and this is opposed to the fully *general* political authority of the neo-Kantian republican constitutional order.

So, the cosmopolitan global order imagines a *normative* structure of global governance where political authority is *disunited* and *specific* and where the particular authority held by particular actors and institutions is driven by the needs of the particular governance context.

As Pogge writes:

What we need is both centralization and decentralization--a kind of second-order decentralization away from the now dominant level of the state. Thus, persons should be citizens of, and govern themselves through, a number of political units of various sizes, without any one political unit being dominant and thus occupying the traditional role of state. And their political allegiance and loyalties should be widely dispersed over these units: neighborhood, town, county, province, state, region, and the world at large.¹⁴⁰

The distribution is both geographical and functional: local and global governments will differ in their scope but also in what policy areas they regulate. The *key* element of the cosmopolitan global order is that there is no *privileged* level that has ultimate decision-making authority regarding the entitlements that individuals possess. Instead we have a complex, multilayered web of institutions that operate at multiple levels simultaneously. This defining feature of the order is supposed to be the core of its advantage over a world of states *and* differentiates it from a world state. In the former case, it is the multiple layers of authority that provide the appropriate checks, foster cooperation, and allow political power to be more flexible and responsive. In the latter, a world state would presumably be characterized

¹⁴⁰ Pogge (2002), 178

by a constitutional principle that gave the global legislature, judiciary, and executive sovereignty over the lower orders while the cosmopolitan global order would lack precisely this privileged sovereign political order. Thus, we have a third difference between the political authority as conceptualized by republicans and as it is understood within the cosmopolitan global order: the former is hierarchically organized along formal, constitutional lines while the latter is organized 'consensually' through cooperative dialogue, aided especially by judicial forums. So the question becomes, 'Is a cosmopolitan global order--with the specific, disunited, and consensual nature of its political authority--one that can resolve the problem of international domination?' Or conversely, 'Is it morally necessary for there to be at least *some* level that possesses general, united, and as a consequence, final authority?'

Most advocates of the cosmopolitan order have not attempted to answer this question because they have assumed an *instrumentalist* account of political authority. Recall, an instrumentalist account treats political institutions as *effective* tools for the satisfaction of pre-political interests. What gives a political agent *authority* (or on the Buchanan-Keohane view, its *legitimacy*) is that there are content-independent moral reasons for obeying the prescriptions of the political agent. In other words, what normally justifies the possession of authority is that following the commands of that agent, in a particular context, will lead to a greater protection and furtherance of the duties of justice we owe in virtue of their status as free and equal. Political authority is, on this view, a particular example of the more general concept of 'authority,' applied to the specific question coordinating large scale social behavior in order to satisfy a particular set of normative concerns (namely, those of justice). The 'content-independent' nature of the reasons to obey a political authority usually involves policy expertise and superior capacities to collect and analyze political relevant information. But even inexpert political authority can be justified if it is more important for the

satisfaction of one's prior reasons that your behavior converge with others than for you to act optimally. That is, if one's reasons are substantially entangled with others, then everyone might be better off accepting one agent's authority even if that authority isn't fully expert and fails to advocate what would be the best option if everyone were to converge upon that policy. It might be better to drive on the left side of the road or on the right side, but it is far more important to everyone's interests that everyone converge on one side. So, every driver will do better if they simply accept the traffic laws about which side of the road to drive as authoritative rather than judge the usefulness of particular law on a case by case basis. And this can be true regardless of whether the particular political agent is a policy expert, though policy expertise could also be a source of content-independent reasons for obedience.

According to the instrumentalist, justified political authority can be a traffic light even when it isn't a Geiger counter. That is, a traffic light can possess authority even if it manages traffic sub-optimally (it lacks the 'expertise' of the Geiger counter) as long as we are better able to drive safely with that light than by following the directives of our own judgment or the commands of other candidates.

This instrumentalist conception is often the implicit backdrop for discussions of international political authority in the context of the cosmopolitan global order. For example, Allen Buchanan and Robert Keohane argue that legitimate international institutions essentially fulfill two requirements. Buchanan¹⁴¹ writes:

¹⁴¹ It should be noted that this is Buchanan's definition of legitimacy for international institutions, but it is not substantially different from and, if anything, more detailed and sophisticated than his corresponding account of state legitimacy (See Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law*, Oxford University 2010, 247-260) The broad point is that there will be no difference between the *accounts* of legitimacy for states and international institutions, though states will probably require stronger moral reasons to justify their right to rule since states interfere in individual lives to a much greater extent. Hence, Buchanan emphasizes the protection of basic rights to a greater extent in his account of *state* legitimacy.

(1) The institution must be morally justified in attempting to govern (must have a liberty right or permission to try to govern) in the sense of issuing rules (that prescribe duties for various actors) and attempting to secure compliance with them by imposing costs for noncompliance and/or benefits for compliance and (2) those toward whom the rules are directed have substantial, content independent moral reasons for compliance and others have substantial content-independent reasons for supporting [or to not interfere with] the institution's efforts to secure compliance...¹⁴²

These conditions are instrumentalist. First, Buchanan and Keohane set the relevant domain of reasons for actions as the interests protected by basic human rights (thus, providing political institutions with a liberty right to issue commands backed by sanction¹⁴³) that states and individual citizens have strong reason to respect antecedent to the authoritative pronouncements of legitimate institutions. Second, legitimate international institutions are structured and organized such that those subject to their commands have 'content-independent' reasons to think that obeying those commands will lead to greater protection of human rights. In other words, an international institution possesses the authority to issue binding commands when there are good reasons to think adopting the general policy of obeying their orders will lead to superior respect and protection for fundamental human interests. "Content independent" reasons are multifarious; an institution can possess them due to policy expertise, capability to coordinate grassroots political action, or an epistemically virtuous internal structure¹⁴⁴. In any case, Buchanan and Keohane found an agent's right to

¹⁴² Buchanan (2010), 138

¹⁴³ In a sense, *all* of the work, for Buchanan and Keohane, in justifying *coercion* (as opposed to preemptive commands) is done by the sheer importance and urgency of human rights; the 'authoritative' nature of a particular institution does not necessarily tell us about the legitimacy of their acts of coercive enforcement.

¹⁴⁴ Buchanan and Keohane say that the authority must be based on content-independent 'moral reasons.' This is meant to block an institution from imposing a sanction, thus giving people a self-interested reason to obey, and then claiming that sanction as a 'content-independent' reason for obedience. Reasonably thinking that following someone's orders will lead to better human rights protection because they have policy expertise is a 'content-independent moral reason.'

issue commands by arguing that treating those commands as authoritative will make things *go better* in the relevant domain of reasons for action.

There are two consequences to this commitment to *instrumentalism*. First, instrumentalist authority easily fits into the diverse, variegated, and multilayered nature of the transnational institutions described in the cosmopolitan global order. The political authority of an agent only goes as far as his or her content-independent reasons for obedience. The WHO's guidelines are authoritative during a SARS outbreak because WHO will usually have better information and greater institutional expertise. Also, other agents will almost certainly need to coordinate their responses. But if the WHO issued regulations concerning, say, the environment or trade policy that was irrelevant to its functional role, then those receiving them would lack content-independent reasons for obedience and the WHO's regulations would, correspondingly, lack authority. So, the functional dispersal of authority appears unproblematic on the instrumentalist conception. Geographic dispersal looks similarly unproblematic: the ultimate appeal will always be to human rights. Should the city of Seattle, the Pacific Northwest, the United States, or the United Nations exercise coercive power in a particular case or concerning a particular issue? The instrumentalist answer is simply, 'Whichever does or will do a better job protecting or furthering the particular political interests we deem important in this context.' The notion that an individual might have effective power and the relevant expertise to instantiate a relevant entitlement demanded by justice but be disbarred from enforcing that claim because they lack the relevant status or authority is anathema to the instrumentalist conception. As a consequence, they tend to ignore the possibility that the multiplicity of political authorities might do a reasonably reliable job of protecting human rights only at the cost of generating equally multiplicitious possibilities for domination.

The second consequence of the instrumentalist conception is that coercive power is treated as a non-ideal add-on to political theory and not a necessary component of any ideally just political order.¹⁴⁵ This means that instrumentalists tend to focus their theoretical attention on the legislative and judicial power but that executive power is under-theorized. In other words, the assumption is that, generally, if coercive power is reliably deployed according to the 'correct' principles then nothing more about the possession of that power need be said. For example, Pogge argues that power should *usually* reside in the smallest and most local competent authority, but this is simply a defeasible presumption based on the empirical claim that locality will be most responsive to the interests of the citizenry. That a particular group of individuals is linked by institutions of corporate decision-making and that this might change the moral status of their collective enforcement plays no *principled* role in the instrumentalist analysis. In what follows, I will argue that it is precisely the moral demands of a nondominating executive that requires the unification, generality, and finality of at least one level of political authority.

Executive Domination and Transnational Institutions

It is comparatively easy to see how we might 'coordinate' legislative and judicial powers across multiple jurisdictions. Even today, we can see how courts and legislatures can rationally influence each other by offering good reasons for a particular statute or judgment. Furthermore, courts and legislatures are geographically and topically limited and these

¹⁴⁵ One example among many should suffice: Simon Caney essentially ignores the question of enforcement. He lists the various functions of international institutions at the procedural level: aired, discussed, evaluated, and decided. Notice that he never includes 'enforced' as part of the *procedural-democratic* level of analysis: enforcement is entirely part of the instrumental level of analysis (Caney, 2006, 743). In his entire article, only one paragraph concerns enforcement, and the only reform is to restructure the WTO so that states enforce its rules multilaterally instead of individually (Caney, 2006, 746-747). In that paragraph, fines are 'levied' and sanctions are 'imposed' by faceless enforcement agents that perfectly obey the multilateral determinations of the WTO. Similarly, both Pogge and Slaughter fail to discuss how law enforcement powers will be effectively distributed.

mosaics of interlocking legislative and judicial authorities often operate without conflict. In what follows, I will proceed by stages. I begin with the most informal and consensus oriented conception of the cosmopolitan global order, namely, that of Anne-Marie Slaughter and then proceed through various reforms that purport to make the mechanisms of global, executive accountability more robust.

Case Study in Constitutivist, Political Authority: Anne-Marie Slaughter

Domination-oriented analysis gives us good reason to be skeptical of the possibility that domestic states with their corresponding claim of sovereignty over a territory can be justly replaced by less formal and more consensus-driven networks of functionally and territorially related political authorities. Anne-Marie Slaughter, in her work *A New World Order*, describes a world where state sovereignty has been consistently worn away by the development of ‘disaggregated’ governance networks. Slaughter imagines a global political order where the authority and sovereignty normally held by a territorially limited state has been distributed *horizontally* across multiple polities.¹⁴⁶ Thus, it would be fundamentally different from the current state-driven dynamic where legislative and judicial power is distributed *vertically*. It would lack the dynamic of hierarchy and jurisdiction: we would have *networks* of equally situated political agents working cooperatively rather than a hierarchy of agents organized along lines of super and sub-ordination. Of course, vertical integration is consistent with there being multiple arenas of political power, as long as there clear lines of superior authority and corresponding subordination. There might be multiple legislatures that govern a territory, but they are hierarchically organized: municipal councils are subject to state or department legislatures that, in turn, are subject to the national assembly or congress. The final, national legislature thus claims a kind of supreme authority in legislative

¹⁴⁶ Anne-Marie Slaughter (2004), 19

matters. A *horizontal* distribution represents a cooperative network of formal equals. In a horizontal structure, a municipal council takes seriously the decisions of other, similarly situated, municipal councils in other states and, in turn, their decisions are taken seriously by their counterparts. In fact, these municipal councils may create formal or semi-formal means to trade information, laws, and effective tools of governance and insofar as they have collective interests, these formal or semi-formal collective bodies may make binding legislative decisions for councils across state boundaries. Similarly, judiciaries are now structured *vertically*: district courts give way to appellate courts, which give way to supreme courts. This hierarchy occurs *within* a single polity. A *horizontal* integration of judicial authority occurs when networked groups of judges in various states come to take the decisions of their counterparts as binding or relevant in much the same way that the holdings of *higher* courts bind them today. Thus, the suggestion is to simply reject the idea of a vertically sovereign state with an ultimate authority and more broadly distribute decision-making authority across many agencies that are not hierarchically related.¹⁴⁷

Now, Slaughter herself suggests that there are serious problems of *contestability* and *accountability*¹⁴⁸ associated with horizontal integration, but it does have one quite significant benefit: it produces an organic and flexible means for similarly situated political agents to replicate the effectiveness of hierarchical organizations. If the problems with accountability can be worked out, then, presumably, we do not need to rely on *states* or on vertically integrated institutions at all. What we require is a greater degree of institutional imagination and less of a reliance on vertically integrated, hierarchical political orders.

¹⁴⁷ Young (2002) suggests something quite similar, as does Buchanan (2010).

¹⁴⁸ Slaughter (2004), 29-31

Again, there is something quite attractive about this, especially when one considers the horrors that can be produced when the full and unchecked institutional power of the modern state is unleashed upon its defenseless citizenry. However, it is telling that Slaughter spends her book discussing the horizontal distribution of authority amongst judiciaries and legislatures but does not discuss the horizontal distribution of *executive* authority.¹⁴⁹ And this seems to be yet another consequence of adopting the instrumentalist view of the justification of political power. If the *real* questions are those that are resolved by judges and legislators, and the enforcement of those commands by presidents, administrators, cops, and soldiers is really only a pragmatic issue, then it makes sense that Slaughter is unconcerned with considering or discussing how coercive power could be horizontally distributed.

It is also likely that Slaughter fails to discuss the horizontal distribution of executive power because it is very hard to see how that could be done in a normatively attractive way. The important thing to understand about executive power is that it is constituted by coercion in a way that judicial and legislative authority are not. Legislators make laws and judges make rulings, but legitimate executives are the ones that non-arbitrarily assure that people actually follow those laws and act according to those rulings. And this coercive assurance is inherently physical. That is, the ability to coerce is about moving people about in the physical world.¹⁵⁰ Executing an injunction requires the use (or threat of use) of people

¹⁴⁹ Slaughter *does* discuss regulators as creating yet another horizontal network in Chapter 1 but does not really discuss the possibility of those regulators coercively enforcing the laws without the permission of their national governments. Even 'enforcement networks' are limited to 'intelligence sharing' and 'capacity building' but *not* independent coercive enforcement. Ibid, 55-58.

¹⁵⁰ By emphasizing the *physicality* of executive political power, I do not mean to suggest that all power, or even all political power, operates through the mechanism of crude threats to the body. Rather, it is to show that political adjudication and entitlements are about inducing behavior and structuring people's relations in space. Even the transfer of money, which in of itself does not necessarily involve the transfer of anything physical, leads to differences in terms of what individuals can *do*. Even if, for example, 'biopower' (see Michel Foucault, *The History of Sexuality*, 1976, especially Part IV) operates through medicalization, essentialization, or the

with weapons to move to a particular area and preventing other people from doing what they want. Executing a subpoena or a discovery order requires sending an enforcement agent to seize a person or a document and taking them or it to another location. Or consider an economic transaction that operates at the highest level of abstraction: the large-scale movement of capital across transnational boundaries. Of course, such transactions can be immensely complicated and difficult to fully parse, but they still represent an *entitlement* that allows the persons who engage in them (or represent those that do so) to do things in the world that they would not have been able to do otherwise. And the *enforcement* of those entitlements will similarly invoke a kind of physicality: the physical movements—whether it be the withdrawal of cash from a bank, the use of a credit card to purchase heavy equipment, land, or labor for a factory, or the right to the use of an object or home via contract, lease, or mortgage—are what the state guarantees through its effective enforcement. The broad point is that executive authority is fundamentally about the control of bodies in space. And it is hard to see how reliable, non-arbitrary, and effective executive authority can be organized spatially along any other lines than hierarchical.

It is worthwhile to analyze this claim about the physical, and therefore hierarchical, nature of legitimate, executive authority a bit more deeply.¹⁵¹ Imagine a legal system where there was no final adjudicative authority and where there are multiple, legitimate executive officials in a territory (this assumes that we can make sense of this scenario as being a single legal system at all) or, similarly, there are coercively empowered agents that can be

internalization of social norms, biopower fundamentally concerns the control of bodies and the regulation of behavior in space.

¹⁵¹ This argument is, at least partly, predicated on the need for a fully characterized set of entitlements that are effectively action-guiding. See Lon Fuller, in *The Morality of Law* (1969) and, subsequently, Jeremy Waldron's "How the Law Protects Dignity" (2012) both discuss the ways in which legal orders are structured in order to protect the autonomy of those subject to them.

commanded with equal authority by two legislative or judicial agents. Now imagine that there is a dispute between two neighbors over the placement of a boundary fence and there are two legitimate, coercive authorities that issue judgments in the matter, with one judgment favoring each of the neighbors. There are, perhaps, several ways that this dispute could be resolved, but they all recapitulate the problems of the state of nature.¹⁵² For example, it is possible that one of the coercive authorities is simply more powerful and so one of the neighbors is forced to yield by either threat or actual coercion. But this is simply the third problem of the state of nature, where the lack of a superior powerful authority means that disputes are resolved according to arbitrary constellations of power. Or the two neighbors could themselves resolve the dispute, but this would be a recapitulation of both the second and third problems of the state of nature: this is another way of having the private judgments and negotiations of the two parties to the dispute determine the outcome of the issue. Finally, the two coercive parties could negotiate the resolution, either on an ad hoc basis or using mutually agreed upon rules. But, again, it is hard to see how this does not simply repeat the problems between the two neighbors at a higher level. After all, ad hoc determinations would fail to be relevantly public, and even rule-guided agreements would either be unenforced as there is no superior power between the two authorities *or* only be enforced through the arbitrarily and contingently superior coercive power of one authority or another. Thus, it appears that having two equally legitimate coercive authorities within a legal system re-instantiates the problems of the state of nature.

¹⁵² Elaine Fahey "'On the Use of Law Transatlantic Relations: An 'Authority-Free' Site in a Transnational Space" forthcoming in *Transnational Legal Theory* is a description of US-EU relations that represents, I would suggest, an excellent example of how two formally equal legal authorities engage in comparatively *ad hoc* negotiations in the absence of a common political sovereign.

One could object that this analysis depends on the coercive authorities making different judgments and issuing different pronouncements. After all, this objection goes, it is only because there is a *disagreement* between the coercively backed commands of two apparently legitimate authorities that the resolution of the dispute between the two neighbors looks conflictual and arbitrary. Perhaps it will be the case that, as institutions become more just and more responsive to the interests of their constituents, there will be greater and greater effective convergence on what justice requires. Therefore, legitimate authorities will rarely disagree. We can strengthen this tendency by having the two authorities engage in regular dialogue and consensus building. If both authorities always agree, then there is, apparently, no need for a superior authority to adjudicate disputes between authorities that never arise.

There are, at least, three problems with this objection. First, it is far from obvious that, empirically, it will be the case that even fairly responsive and well-constructed political institutions will reliably converge on principles of justice or on judgments in particular cases.¹⁵³ One might think, in fact, that disagreement and dispute are ineliminable features of human social interaction, even amongst those of good faith.¹⁵⁴ Second, the objection assumes, contra the arguments in Chapter Three, that there is a uniquely correct specification of the principles of justice. It must be the case that there is a single, correct resolution of a particular dispute concerning particular entitlements for the nonarbitrary convergence by just institutions on a single solution to be plausible. If, however, we grant

¹⁵³ Certainly, 'democratic peace theory' (See Doyle, 1983) is not much help here. It may very well be the case that democracies do not go to war with each other, but this is not the same thing as converging upon the view that a particular scheme of entitlements is uniquely reasonable.

¹⁵⁴ This is essentially a restatement of Rawls's Fact of Reasonable Pluralism (1993, 4): the free exercise of human reason operating under the burdens of judgment will inevitably produce reasonable disagreements concerning the nature of the good and the right.

that one function of political authority is the legislative specification of particular entitlements among a range of reasonable yet exclusive possibilities, then there is no uniquely just solution for political institutions to converge upon. Third, to argue that the fact of general agreement eliminates the need for non-arbitrary methods of adjudication is to implicitly adopt the instrumentalist conception of authority. It is to rely on the idea that there is no problem since the two authorities both ‘got the right answer.’ But part of what motivates the republican/Kantian understanding of political authority is that merely because an agent is *correct* about what they command, they do not necessarily possess rightful authority to coercively impose that judgment. To put it another way, republicans argue that even though two agents—who are equally positioned in terms of their authority over each other—in the state of nature might be able to form a consensus, the lack of a public, common, and non-arbitrary mechanism of adjudication nonetheless undermines the freedom of both agents. If you accept *that* argument, then it seems like it applies *mutatis mutandis* to the two political authorities that are equally positioned with regards to the authority they have over each other. They may be able to form a consensus, even a fairly reliable one, but the lack of a public, common, and non-arbitrary authority over each other represents a serious moral failing.

At a fundamental level, the very fact of political conflict is motivated by our embodied vulnerability and our need to causally interact with each other. As Kant said, political authority is only made necessary if you cannot ‘avoid living side by side with everyone.’¹⁵⁵ It is causal interaction that makes coercively enforceable rights necessary by making rights violations possible. So, we have the following conjunction of claims. Political

¹⁵⁵ HLA Hart, similarly, argues that our moral concepts are predicated on our vulnerability. If we had invulnerable armored shells, we would probably find most of our rights unnecessary.

authority is justified by the need for embodied beings to be assured of fully specified rights. One necessary mechanism for the satisfaction of this role is the effective capability of that authority to adjudicate disputes between those who engage in substantive causal interaction and then reliably enforce those adjudications. Finally, we see that we cannot have two authorities that claim sovereignty over the *same* domain of dispute between people. Combined, these claims appear to imply that political authority is about controlling territory and that it must be hierarchically organized. After all, if multiple political authorities lay claim over the same physical territory, then we have all the problems described in the previous section of two authorities claiming sovereignty over adjudicating disputes between constituents.¹⁵⁶ The question we need to ask, then, is if more formal institutional mechanisms that are explicitly designed to direct state enforcement capacity in public, rule-governed ways will accomplish what Slaughter's view cannot.

Case Study in Transnational Political Authority: Substantive Multilateralism

So, we cannot simply rely on consensus-oriented horizontal networks to solve the problem of international domination. But what if instead of dissolving the coercive political authority of states, we create a cosmopolitan global order that non-arbitrarily *directs* that power in more just directions¹⁵⁷. Organizations as diverse as the WTO, the ICC, and UN Security Council purport to adjudicate disputes and to issue binding pronouncements that are backed by the threat of sanction according to publicly promulgated rules and

¹⁵⁶ This is consistent with a federal system of political authority, such as that of the United States, where considerable authority and important domains are constitutionally *devolved* to local and provincial governments. The key element is that the national or federal government is composed of elements that can make a final determination as to how powers are distributed: American states have certain domains of authority, but these are constrained, specified, and defined by Congress, the Constitution, and the Supreme Court.

¹⁵⁷ This is, ultimately, Smith's account (2008): functionally oriented global organizations represent a new kind of sovereignty that directs but does not conflict with the traditional territorial sovereignty of the national state.

principles.¹⁵⁸ They purport to direct and control the exercise of state power according to a public and law-governed international multilateralism.

In fact, John Ruggie has argued that the development of these institutions represents a kind of decisive break from previous iterations of international politics. Historically, states have frequently acted in ways that were only "nominally multilateral." There have long been international political interactions whereby two or more states acted together in a coordinated fashion to achieve some particular goal, such as when a coalition of states acted to restrict the power of Napoleonic France. Yet, the post WWII international environment has been increasingly characterized by an institutionalized *substantive* multilateralism.

Ruggie describes the difference:

Multilateralism is an institutional form which coordinates relations among three or more states on the basis of 'generalized' principles of conduct--that is, principles which specify appropriate conduct for classes of actions, without regard to the particularistic interests of the parties or the strategic exigencies that may exist in any specific occurrence...In contrast, the bilateralist form, such as the Schachtian device and traditional alliances, differentiates relations case-by-case based precisely on a priori particularistic grounds of situational exigencies.¹⁵⁹

Several features characterize this new multilateralism. First, unlike an international politics that is mostly built out of particular state-to-state diplomatic interactions (e.g., when Bismarck engages in immensely complicated and secret negotiations with Austria and Russia), the postwar international era has been replete with the creation of multi-member regimes. So, we get the WTO—where many different states all sign on to the same regime of rules—as opposed to particular trade agreements between particular states. Relatedly, these

¹⁵⁸ I am going to deliberately remain neutral concerning the institutions of the European Union. At the moment, it might be possible to interpret the EU as a quasi- or nascent constitutive authority, but it also seems possible to interpret it as an extremely robust set of transnational instrumental authorities.

¹⁵⁹ John Ruggie (1998), 109

regimes are constructed out of *general* norms and rules. Thus, instead of bilateral treaties that make essential reference to the particular parties of the agreement, postwar multilateralism creates rules that apply to all states that are members of the international order simply in virtue of their membership.

Ruggie argues that these multilateral institutions have independent political power combined with considerable flexibility and durability. What they represent, perhaps, is a new way of structuring international politics such that political authority rests in these new institutions rather than (or, perhaps, in addition to) the authority that currently rests in states. After all, nominal multilateral or simple bilateral arrangements do not represent a challenge to state authority. States, in these types of agreements, represent their own interests and their own judgments. In substantively multilateral agreements, however, states ‘give up’ their judgments in particular cases by committing themselves to public, general rules that also guide the *other* participants so that no one state has the position to act unilaterally. In a multilateral, substantive collective security arrangement such as NATO, states are committed to protecting members (understood generally) from threats (again, understood generally), regardless of who is attacking or being attacked. It would be considered *inappropriate* and contrary to the animating logic of NATO for individual states to act as if they had strategic discretion when one member was subject to unprovoked aggression.¹⁶⁰ There is a sense in which states now must replace their own strategic judgments for the political judgments of the multilateral institution. And these processes can take on a life of their own, such as when

¹⁶⁰ This is stated a bit too strongly in the actual case of NATO, since member nations are only required to ‘assist’ attacked nations in ways they ‘deem necessary.’ So, member nations retain *some* discretion about the nature of the assistance when the collective right of self-defense is invoked. I do not think this undermines any of the subsequent argument since some state discretion *is* given up and we could readily imagine a NATO charter that played a similar role but more specifically defined necessary state responses to aggression against an ally. This would be a difference in degree rather than in kind.

Canada finds itself contributing troops to counterinsurgency in Afghanistan as a result of an attack on the United States by a transnational, stateless terrorist organization. We can see similar dynamics at play in other substantively multilateral regimes like the ICC, where it is an important and attractive feature of those institutions that states 'pre-commit' to the prosecution of crimes that states expect they will be unable to reliably prosecute on their own.¹⁶¹

Do these multilateral regimes deploy legitimate political power? Well, they certainly have the potential to solve some problems of the state of nature. Insofar as the regimes are constituted by rules and norms that specify particular entitlements (which seems quite plausible in cases like the WTO and NATO), then they can play a legislative function. Second, many substantively multilateral regimes create a judicial component (such as the International Criminal Tribunal for Former Yugoslavia or the WTO's Dispute Settlement Body) that could, at least in principle, provide an impartial mechanism for the adjudication of disputes. What's more, these elements seem to be structured by public and transparent rules and principles. So far, so good. And while it is true that many current multilateral institutions have a problematic and difficult relationship with genuine accountability (e.g., the 'democratic deficit' whereby international institutions seem to be cutoff from the interests of those subject to their rule-making, especially in the cases where the member states who sign the multilateral agreements are not themselves democratic), this does not seem like a *necessary* feature of multilateral institution making as some regimes seem to be more accountable than

¹⁶¹ See Mayerfeld (2004)

others. The democratic deficit is a call for a reform, not a demonstration of conceptual inadequacy.¹⁶²

Yet, substantively multilateral regimes do fall short in other ways. One necessary component of political authority is that it possesses executive power superior to any private individual in order to assure compliance with the relevant principles. This is connected with the condition of *non-arbitrariness*; there needs to be an agent external to the antecedently existing parties to the agreement that can reliably assure obedience in a public and accountable way. And this is lacking in the case of international multilateralism. To put it another way, while it is true that a multilateral regime might have public mechanisms of legislation and adjudication, the actual coercive enforcement of those principles depends on the contingent choices of the 'private' members of the agreement. And those private members have radically different coercive capabilities, economic power, and cultural influence. This means that particular instances of coercive obedience are consequences of arbitrary constellations of power amongst the states that are members of the regimes. Instead of having a police or a military that enforces the commands of a sovereign, international regimes essentially 'hire out' enforcement to the executive capabilities of member states. And importantly, this 'hiring out' is not responsive to the massive power differentials between the members of the regime. It is as if, in the domestic context, the state was in charge of law making and adjudication, but then 'contracted out' the enforcement of those law and rulings to the resources of private citizens. A predictable consequence of this policy would be that private citizens with greater resources would be able to purchase superior enforcement capabilities and, if sufficiently motivated, use those capabilities to

¹⁶² A possible way these reforms might go is described in David Held's *Democracy and the Global Order* (Stanford University Press 1995), 267-283

simply ignore the prescriptions of the state. Now, perhaps wealthy private individuals are so virtuous and so public spirited that they will use these resources only in the name of the common good, but that is problematically dependent on the desires of the rich and powerful. Similarly, perhaps the global hegemon, or an alliance of particularly powerful states, will use their resources to provision global public goods and support justice-enhancing regimes, but that is dependent on the contingent intentions of the hegemon or the alliance. In both cases, the arbitrariness of that reliance is normatively unacceptable. If we accept the republican understanding of legitimate political authority, then relying on the contingent whims of others for the protection of rights is unjust even if those whims happen to push people in the right direction. But this reliance appears to be an ineliminable feature of any meaningfully multilateral international politics.

To put the point a bit more generally, the instrumentalist orthodoxy leads to an unjustified asymmetry in the treatment of legislative and judicial powers on one side and the executive powers on the other. It is, for example, relatively uncontroversial that there is a problem with unilaterally judging your own case in a dispute. Not only is there the real possibility of bias, but there is something disrespectful with the following attitude: you and I both disagree about some issue and I get to decide what the right answer *for both of us* without your input or being concerned with what you think. Or even further, you get to speak but only *I* get to decide how important or accurate your opinions may be. Rightly, we are skeptical about such claims, and it is this kind of skepticism that, say, drives the creation of the ICC. The reason we need to create institutions like the ICC is precisely *because* we cannot expect states to be reliable judges in their own case. We can make a similar case for unilateral legislation: we wish to specify a particular entitlement scheme that will affect *both of us*, yet

you claim the right to decide for us without any input or participation from me. This seems fundamentally contrary to the notion of us being free and equal.

The key point here is that it seems that the same thing can be said about a regime of unilateral enforcement. Of course, there is the problem of *actual* bias creeping into the exercise of even relatively impartial judicial and legislative mechanisms if they know the enforcement of commands depends on the actions of those over whom they lack authority: perhaps we get reliable obedience only at the cost of, at least sometimes, shaping our orders to that which is acceptable to those with executive power. But even if you were unconcerned with that problem, the attitude and the corresponding legal status is implied seems similarly objectionable: your rights need to be enforced but they shall only be enforced only as far as *I allow* and there will be no mechanisms of accountability or contestation *short of the use of the power you happen to be able to command* to protect your status as free and equal. It is odd indeed to think that we cannot trust states to be the right kind of judges or legislators but we *can* trust them to be the right sort of executive. The asymmetry is *especially* strange when one realizes that it is the *actual* enforcement of rights that protects the urgent interests of individual agents: judicial and legislative powers are ineliminably important elements of any legitimate political order, but legal rights--no matter how well-legislated and fairly adjudicated--are toothless without rightful enforcement. Of course, none of this is to say that the cosmopolitan global order is not *admirable* in certain respects: it is much better to reliably protect human rights than to fail to do so (in fact, it is consistent with my view that this is a *necessary* condition of any political order). But a political order may nonetheless be tyrannical even if it does things that no one should deny are admirable.

Case Study in Transnational Authority: Thomas Pogge's and David Held's

Cosmopolitanism

Slaughter seems to imagine a world where coercive authority is an unnecessary and vestigial element of a bygone Westphalian system. Ruggie thinks that the coercive power of the modern state can be tamed and directed by transnational legislative and judicial authorities. David Held and Thomas Pogge, on the other hand, conceive of a cosmopolitan global order where coercive, executive authority is quite radically reorganized and executive capacity redistributed in various directions.

Thomas Pogge's conception of the cosmopolitan global order is composed, primarily, of political units of various territorial sizes assisted by functional institutions, with each polity possessing its own native executive power. He says:

We can best lower the stakes by dispersing political authority among several laws and by institutionally securing economic justice at the global level...Here the kind of multilayered order I propose has the great advantages of affording plenty of checks and balances and of assuring that, even when some political units turn tyrannical and oppressive, there will always be other, *already fully organized* political units--above, below, or on the same level--which can render aid and protection to the oppressed, publicize the abuses, and, if necessary, fight the oppressors. The prospect of such organized resistance would have a deterrent effect as governments would understand that repression is more likely to reduce than enhance their power.¹⁶³

On Pogge's view, what we have are 'nested' political authorities, each possessing all three powers that are structured by consensus: what makes this political structure fundamentally different is that there is no assumption that the coercive political authority of the city of Seattle must be subject to the judgments of the state of Washington or the United States. We should also not assume that the 'state of Washington' and the 'United States of America' will be political entities that will be preserved. And Pogge argues that the following principle should structure the distribution of political authority:

Taken by themselves, considerations of the first two kinds yield the result that any political decision should rest with the democratic process of a

¹⁶³ Pogge (2002, 183)

political unit that (i) is as small as possible but still (ii) includes as equals all persons significantly and legitimately affected by this decision.¹⁶⁴ On an issue with global scope and global effects, then, a global agent will be empowered with the relevant legislative, judicial, and executive capabilities and authority to effectively accomplish the relevant policy goals. On an issue of merely urban scope, then an urban polity will be so empowered. Two elements are important to note here. First, these polities or agents are not necessarily related to each other in terms of public law: the cooperation between different political groupings is negotiated, not legislated. Simon Caney, for example, suggests that a principal advantage of a cosmopolitan global order where no polity has final authority is that this will *force* political agents to cooperate:

"There may be no one political institution that has final authority. Supra-state, regional, state-level, and sub-state levels would have no privileged status over each other...[this] is an advantage since it prevents the centralization of coercive power. It forces people and different institutions to negotiate and cooperate with each other."¹⁶⁵

So, for Pogge (and for Caney), the dispersal and multilayering of political authority is *expressly* designed to create a mosaic of political agents that are not coordinated or related through lines of effective public law. In other words, what distinguishes Pogge's cosmopolitan political order from both the world of states and the world state is that there is no level of governance that is characterized by general, unified, and final sovereign political authority. Second, there is little reason to think that, for example, the nuclear proliferation and the global warming agents (as well as, for example, the administrators of the global resource

¹⁶⁴ Pogge (2002), 187. It should be noted that Pogge also adds a third desideratum that makes clear that his view of how to distribute political authority is fully instrumental in the end. He writes: "So a consideration of a third kind comes into play: what would emerge as the proper of vertical distribution of sovereignty from a balancing of the first two considerations alone should be modified--in either direction--if such modifications significantly increases the democratic nature and reliability of the decision-making." Pogge (2002), 187.

¹⁶⁵ Caney (2005), 163. Kuper (2006) makes a similar argument. Cited in Schaffer.

dividend¹⁶⁶) will need to be same. In fact, this is one of supposed *advantages* of the cosmopolitan global order: political authority can be flexible, tracking policy competencies rather than trying to fit competencies with agents that aren't really appropriate for them.

There are, at least, four problems with Pogge's proposal. First, it is hard to see what the *principled* reason for the new global order is supposed to be. After all, the criticism of the current 'world of states' is supposed to be, at least partially, that the relations between states are ineliminably driven by the happenstances of geopolitical bargaining power: might and not right drives global politics. But the relationship between particular cosmopolitan political agents is no different from that between modern states: authority over a particular area interacting 'cooperatively' in a system where no party has superior authority in virtue of effective public law. A world where no agent has final authority is, ultimately, a world where every agent has final authority. Why should we imagine that the City of Seattle, if removed from its context of being subject to the sovereign authority of the United States, is any more likely to cooperate with the Tri-Cities or Wenatchee than the United States is likely to cooperate with Mexico or the Maldives? Similarly, why should we imagine that the City of Seattle is any more likely to cooperate with the newly created (and also in possession of its own authority) with Pacific Northwest regional parliament than the United States is with the United Nations General Assembly? And much more importantly, why should we think that the cooperative informal relations between this multiplicity of political agents would be somehow *free* of geopolitical influence?¹⁶⁷ It does not seem like simply adding more agents

¹⁶⁶ Pogge (1994) argues that the global resources tax can be administered by experts running the global organization. This council can make binding determinations concerning the level of taxation and whether the GRT will be effectively distributed without input from member nations. See 202-203.

¹⁶⁷ For example, Held (2002, 35) argues that the fundamental problem of international relations is that the 'power logic' that currently applies is singularly inappropriate for issues of global governance. But why should we imagine that cities are somehow less likely to submit to the 'power logic' than states?

somehow transmutes geopolitics into lawful interaction. What prevents dispersed, developed world political agents from, for example, recreating the international borrowing or resource privilege? What is doing the *real* work in Pogge's view is that the agents that constitute the cosmopolitan global order will follow Pogge's principle of protecting human rights while the society of states will or does not. But if we are going to compare the ideal case of the cosmopolitan global order to the unreformed society of states, then *of course* the cosmopolitan global order will look superior. Pogge could, and probably would, argue that he is really just making an empirical speculation: if it turned out that a system of states would do a better job of reliably protecting human rights, then the case for their final authority is made. Thus, there is no *principled* reason to favor the cosmopolitan global order over, say, an AVS where the states retain final authority.

Second, Pogge ignores the fact that the 'level' that a particular global governance issue is 'assigned' is itself a political decision. What constitutes the correct level of political authority to assign a policy competence and mandate is not simply a technocratic question of what constitutes the most 'efficient' solution for a particular problem: what constitutes a 'problem,' a 'solution,' and 'efficiency' are matters of political debate. Even the notion of what constitutes a 'level' is subject to political judgment. This is not to say that there are not better or worse ways of characterizing global governance issues, but that the relevant descriptions are neither natural nor neutral to the entitlements that individuals come to have.

Johann Karlsson Schaffer writes:

The functional argument [the distribution of political authority to different levels based upon the 'best' way to handle complex issues of global governance] relies on a naive, technical understanding of political problems. Some cosmopolitans claim that pressing global problems...cannot be sufficiently handled by nation-states and suggest that political authority must be reordered in order to tackle them. While [these issues] are certainly real phenomena, they become social and political problems only once they are articulated by political actors. Like all social problems, these policy issues are

constructed through political struggles; struggles over the privilege to define the issues and control the agenda. *Crucially, the scale at which to address problems is often itself a matter of contention...* So the argument that certain problems somehow naturally belong to certain levels conceals the ways in which the framing of problems itself may be subject to deep-seated political disagreement.¹⁶⁸

The point¹⁶⁹, again, is not to adopt an agonistic or relativist view that there are no better or worse ways of structuring global governance issues. Rather it is to bring to the foreground a particular problem: treating something as a technocratic, natural, or obvious rather than as a political issue is to attempt to inoculate or immunize it from scrutiny in a particular way. It is to say that a particular governance regime, which structures the exercise of the freedom of individuals, should be imposed on individuals in a way that blocks or burdens meaningful shared deliberation, contestation, and accountability. The 'assignment' of particular governance issues to particular political levels is a process that necessarily involves all of the levels of governance, yet Pogge's account of the cosmopolitan global order makes no allowance for its nonarbitrary determination.

Third, even if we grant that global governance regime and its corresponding issue mandates, Pogge dramatically underestimates the extent to which subunits of a territory will need to engage in common deliberation and coordinate policy responses in the face of tradeoffs. There are two elements of this problem. First, resources are not infinite¹⁷⁰ and making policy tradeoffs is an important element of political deliberation and adjudication.

Politics is occasionally zero-sum and resources taken from one issue cannot always be made

¹⁶⁸ Schaffer (unpublished, downloaded 2012), 13. Emphasis added.

¹⁶⁹ This is the difference between Schaffer and myself. He conceives of the problem in a thorough-goingly constructivist fashion: the problem is shaped by how it is conceptualized. I, on the other hand, find it significant that this is a topic for political contestation that can be resolved in a dominating or non-dominating way.

¹⁷⁰ I join with Rawls (and Hume) in thinking that justice would be significantly less important if we didn't rely upon others for the resources needed for a flourishing life under conditions of scarcity. See Rawls (1971), 126-127

good. For example, let's grant with Pogge that there is sense in which nuclear proliferation ought to be handled globally, in virtue of the externalities involved. Imagine the following case:

TRADEOFF: The Global Non-Proliferation Agency (GNPA) makes the determination that it will be able to dramatically improve its ability to regulate the production of nuclear weapons and energy by creating a global satellite system capable of detecting particular radiation. Creating that network would require an expansion of the GNPA's budget; it also requires extensive research and development from aerospace and materials engineers at Boeing. The City of Seattle has a different project that involves the development of sustainable energy of only local importance that requires the use of many of the same people and equipment. The GNPA raises taxes and spends the money, crowding out Seattle's investment. As a consequence, either the GNPA or Seattle can pursue its projects, but if they both do then both projects have a dramatically increased risk of failure.

Again, Pogge has an instrumentalist answer as to how this dispute should be adjudicated: we should do whatever best protects basic human rights. And again, this is not an especially useful answer, for a few reasons. First, there are basic problems of political adjudication.¹⁷¹ Who is the 'we' that makes this determination and engages in deliberation about the question? What guarantees that Seattle will not simply be 'outbid' by the global agency or what guarantees that the GNPA will have a fair shot at the resources given that the engineers are located in Seattle? If a political resolution being subject to an arbitrary constellation of influence and bargaining power is morally problematic, then it seems that the adjudication of the dispute between Seattle and the GNPA suffers from that flaw. Second, it might be the case that there is no obvious answer as to which actually does best protect basic human rights or that the answer is subject to reasonable disagreement. 'Basic human rights' probably do not determinately answer every political question, but in this case reasonable disagreements about 'risk' probably play a large role in weighing the two projects (Seattle's

¹⁷¹ This is why Caney, for example, argues that we need global institutions and fora that can be the locations of democratic deliberation that then fairly distribute both responsibilities and resources. See (2006, 743-744).

project is likely to directly aid individuals, but the GNPA's project lowers the likelihood of a large-scale catastrophe). The fundamental notion here is that control over the relevant resources (in terms of manpower, money, equipment, information) is really control over the relevant agency. What happens when a global and a local agent claim the same resources? Whoever *controls* the distribution of resources will have a substantial power advantage, perhaps even amounting to *de facto* sovereignty: the power to tax is the power to destroy¹⁷². So, it seems that either side having principled control over the resources is inconsistent with the claim that neither has final authority, but if the answer is 'both' or 'neither,' then disputes seem necessarily subject to arbitrary power relations.

Finally, the dispersion of authority seems to present a problem concerning precisely *what* any particular person is entitled to. The idea is that to have an entitlement to a particular piece of the world is to have a kind of all-things-considered claim to it. This is, of course, consistent with property ownership being constituted by a cluster of different rights, powers, and privileges which are, at least in principle separable. For example, I can own a painting and have the right to sell it without thereby having the right to destroy it, even though property typically involves both rights. It is also consistent with the Rawlsian notion of property as being a consequence of a social procedure: what I have an entitlement to is whatever I can claim as a result of the operation of a basic structure governed by fair principles. My claim is rather more general, which is based on the very reason individuals ought to be granted *entitlements* in the first place. The basic justification for rights to *private* property is that individuals need to have parts of the world that are *theirs* in order to exercise their freedom: there needs to be some guarantee of a share of resources that can serve as both the basis of their status as a physical being in the world and as the necessary substratum

¹⁷² Chief Justice Marshall, majority opinion, *McCulloch vs. Maryland*.

for the pursuit of a rational plan of life without the let of others.¹⁷³ In other words, there can be constraints that govern when an individual *has* an entitlement, but it seems like there must be a point at which one can form a reliable and concrete expectation that one will continue to have what one has a right to. That is, rights cannot serve their function if one cannot rely on a political judgment that can make a *final* determination about one has a right to do with one's entitlements that is routinely subject to revision.

Of course, *part* of what it is to have an entitlement could include political mechanisms for the revision of property entitlements. For example, American property rights are subject to the due process, as well as changes in the tax code and eminent domain. At the limit case, you could have social ownership of the means of production as long as there were robust political guarantees that individual citizens would have sessions where they had exclusive use. There are two reasons why Pogge's account of global politics does not take this feature of property entitlements sufficiently into account. First, the increased number and the functionalist foundation of political authorities in the cosmopolitan global order seems likely to increase the likelihood of conflicts where different political agents come to different conclusions about particular entitlements. Second, the fragmented nature of the cosmopolitan political order means there is no agent delegated with the authority to make the relevant all-things-considered judgment about to do. There are no fora or mechanisms of common deliberation that might make the nonarbitrary resolution of these issues possible. This means that this judgment must be achieved through *ad hoc* consensus building between political authorities that are not related through formal, legal, and public lines of super- and subordination. To sum up, Pogge's account of the cosmopolitan global

¹⁷³ This is the key insight of Nozick's (1974, Part II, Chapter 7, Section One) argument against 'patterned theories' of distributive justice.

order creates three loci of domination: the distribution and attribution of governance competencies and mandates to local, regional, and global political agents; the adjudication of disputes between the both geographically and functionally differentiated levels of governance; and the final specification of reliable entitlements across a range of political and social considerations. Call these the *assignment, fragmentation, and specification* concerns, respectively.

David Held has developed an account of cosmopolitan global governance that seems to respond to these issues. Held shares with Pogge a commitment to decreasing the power of the traditional national state and empowering both local and global governance institutions. Yet, there are features of Held's view that make it distinctly responsive to each of the concerns that undermines Pogge's view. First, Held's view adds intrinsically democratic features to elements of the global cosmopolitan order that Pogge leaves uncertain or in the hands of technocratic elites. Held, for example, imagines a genuine global parliament where members are subject to regular elections as well as an elaborate system of regional, national, and local assemblies that ensure a minimum level of accountability at each level. Furthermore, functionalist institutions--such as the WTO or the WHO--are to be amended to include democratically elected, or at the least appointed from democratically elected parliaments, governance boards¹⁷⁴. Second, Held articulates a more elaborate and robust system of *democratic juridification* in order to respond to *assignment* and *fragmentation* worries. That is, as opposed to global administrative law approaches which respond to worries about mandates and fragmentation by pointing to the *epistemically-virtuous* features of

¹⁷⁴ Held (1995), 273.

the various agents.¹⁷⁵ Held argues that only a global boundary *court*, empowered, staffed, and enforced by the global parliament, that has the mandate to adjudicate disputes between the various political agents can appropriately resolve conflicts between political authorities. He writes:

The principle that decisions about public affairs should rest with those significantly affected by them, or their representatives, will, of course, not always lead to clear demarcations among the appropriate levels of decision-making...Disputes about the appropriate jurisdiction of particular communities will in all likelihood be complex and intensive...Accordingly, 'issue-boundary' forums or courts will have to be created to hear cases concerning where and how a 'significant interest' in a public question should be explored and resolved.¹⁷⁶

Third, the global parliament will come to have a 'frame-setting' role that, ultimately, assigns or validates the mandates and competencies of the smaller geographical and functionalist agents beneath it. Held argues that his scheme is based upon "the subordination of regional, national, and local 'sovereignities' to an overarching political legal framework..."¹⁷⁷ In other words, the boundary courts and the global parliament (and perhaps others) fill in the interstitial gaps between various legislative and executive authorities, ensuring that the various claims cohere in a particular entitlement. Finally, the global parliament will come to have a monopoly on military force as national militaries wither away.¹⁷⁸ Thus, the global parliament will come to have the need executive force to implement the cosmopolitan framework that Held describes.

¹⁷⁵ See Held (1995) 272-274. For the global administrative law (which concentrates on the instrumental and epistemic effectiveness of global governance institutions)/ conflicts law (which focuses on the creation of juridical fora for dispute resolution) distinction, see Kuo (2013).

¹⁷⁶ Held (1995), 237. See also Schaffer (2011)

¹⁷⁷ Held, (2006), 26.

¹⁷⁸ Held (1995) 276-277.

These features help resolve all three worries. First, the *fragmentation* worry is alleviated by a combination of the Boundary Court, which has public and formal legal authority over the other agents within its issue domain. The Court's authority is delineated by the global parliament and enforced, if necessary, by the global parliament's monopoly on military power. As a consequence, actual disputes can be resolved in a non-dominating fashion. *Assignment* is accomplished by the global parliament, which has the 'frame-setting' power to determine the shape of the cosmopolitan global order by determining the level and nature of the institution that ultimately comes to have primary responsibility for a particular governance issue. Presumably, the constitutional order provides for a robust global democracy, which can then make these assignments in a way that is nondominating. Finally, since the global parliament, the global executive, and the Boundary Court make public pronouncements and decisions, are constitutionally related to one another, and are subject to constitutional checks as well as genuine accountability, individuals can be reasonably secure in their entitlements. One need not worry about a functionalist organization making their own judgment about what you should be allowed to do and disrupting whatever *ad hoc* consensus the various governance organizations have come to. Or rather, that could happen, but in Held's cosmopolitan order, we would have mechanisms of adjudication that do not rely simply on the arbitrary machinations of geopolitics: we have distinct and dedicated public fora for resolving those disputes.

Held's account is plausible, and it resolves serious difficulties in Pogge's view by providing for common deliberation about issues that are not simply areas of technocratic concern, but important subjects for political contestation. Unfortunately, Held's view creates a cosmopolitan political order that is too centralized for it to serve as a genuine alternative to the world state. Held imagines a cosmopolitan global order that, in the end, is a

constitutionally directed and constructed set of institutions that possess final legislative, executive, and judicial authority. This constitutional order possesses a court that can ultimately determine which, whether, and how all other global political agents handles a particular issue; a parliament that can legislate and tax; and a monopoly on the legitimate use of military force is a world state.¹⁷⁹ Of course, Held's state is heavily federal, with significant powers devolved to an extensive panoply of administrative, functional, and geographic units. But just as in the United States, it is the institutions at the top of a hierarchy of political authority that determine the nature and the extent of those devolved powers, and those institutions have the overwhelming force to execute their judgments if need be. This is not a criticism of Held's view; the world state *is* a genuine solution to the problem of international domination. But the purpose of this chapter was to explore whether there was a cosmopolitan global order *short* of a world state that could resolve the problem of international domination while *avoiding* the moral infeasibility worries discussed in Chapter Two. It does not seem so; any multilayered order of international institutions that did not structure executive power would fail to resolve the problem of private domination by powerful actors, but any cosmopolitan global order that gave its constituent institutions executive power without providing a distinct and final *base* level of political power would be subject to *fragmentation*, *assignment*, and *specification* worries. But if a cosmopolitan global order assigns that base level to *multiple* levels and agents, then the problem of international domination reemerges.

What I take to have shown at this point is, in some ways, quite limited. First, it is decidedly *not* a defense of the *status quo*: the current system is one where geopolitics, and not

¹⁷⁹ It is not a coincidence that Cabrera (2004) describes an institutional structure very close to Held's as a global state.

moral considerations, are the primary elements in determining the policies of great powers *and* the most significant transnational institutions. This is not morally acceptable. And the 'cosmopolitans' may, in fact, be correct that the institutional structures they advocate will do a better job than the current system at producing certain states of affairs. This is an empirical conjecture that has some if not necessarily decisive evidence in its favor.¹⁸⁰ What I have shown is that even if the cosmopolitans are right, their account of global justice is incomplete. If it matters not just *what* happens to a person, but *how* it happens. If an important element of justice is that individuals are recognized as having a public status as free and equal and this status is inconsistent with being subject to the unilateral will of a superior, then the cosmopolitan global order is subject to serious criticism: it does not make possible rightful relations between free and equal agents. In the next chapter, I will discuss what, if any, practical consequences this criticism might have.

Pogge's Objections

Before I proceed to Chapter Five, I would like to examine Pogge's response to what he describes as 'Type I-Juridical' objections. Pogge is one of the very few instrumentalists to take these objections at all seriously. He describes the objection like so:

A juridical condition, by definition, involves a recognized decision mechanism that uniquely resolves any dispute...But so long as this agency [i.e., the decision mechanism] is limited or divided...a juridical condition has not been achieved because there is no recognized way in which conflicts over the precise location of the limit or division can be authoritatively resolved. A genuine state of peace requires then an agency of last resort--ultimate, supreme, and unconstrained.¹⁸¹

¹⁸⁰ Mayerfeld (2011) provides some support for Pogge's conjecture.

¹⁸¹ Pogge (2002), 179

So, the objection is that the determinate and effective maintenance of one's rights requires that there be a political authority with absolute sovereignty. This would tell against a multilayered political order. Pogge responds:

...the historical facts of the last 200 years [show] conclusively that what cannot work in theory works quite well in practice. Law-governed coexistence is possible without a supreme and unconstrained agency. There is, it is true, the possibility of *ultimate* conflicts: of disputes in regard to which even the legally correct method is contested...From a theoretical point of view, this possibility shows that we are not insured against, and thus live in permanent danger of, constitutional crises. But this no longer undermines our confidence in a genuine division of powers: we have learned that such crises need not be frequent or irresolvable. From a practical point of view, we know that constitutional democracies can endure and can ensure a robust juridical condition.¹⁸²

So, Pogge's response has three parts. First, Pogge asserts that 'federations' lack a Kantian or Hobbesian sovereign¹⁸³. As a consequence, there is always the possibility of 'constitutional crisis' where the various agents and institutions of the constitutional order press their powers as far as possible. Second, these 'federations' are adequately stable, effective, and reliable protectors of the fundamental interests of their constituents. As a result, we have no reason to think that a final or sovereign level of political authority is practically necessary. So, Pogge makes essentially three claims in his response: one empirical, one conceptual, and one normative. The empirical claim is that federative republics are generally stable and provide effective governance, or at least not so unstable as to be problematic. The conceptual claim is that federative republics are not importantly different in their political structure from the multilayered, cosmopolitan political order. The normative claim is that the reliable and

¹⁸² Pogge (2002), 179

¹⁸³ It should be noted that Kant and Hobbes differ quite dramatically on their account of the sovereign. Hobbes, at least occasionally, seems to argue that sovereignty must inhere in an *actual person* (the Austinian sovereign). Kant, however, does not think this. For Kant, a single sovereign can nonetheless be composed of different branches and be structured by separation of powers.

effective protection of certain basic interests is the only normatively relevant feature for evaluating the justice or legitimacy of a political order.

All three claims are problematic. First, federations have chronic stability problems.¹⁸⁴ Generally speaking, federations have a lifespan of roughly forty years, frequently collapsing from their internal political contradictions. And generally, the more pluralistic the order, the less stable it is. More importantly, this instability is related to the conceptual problems in Pogge's analysis. Those federations that do appear to be stable are those that have clear constitutional principles and place sovereign authority at a distinct level. It is not a coincidence that the major constitutional crises of the American system have a clear trajectory of federal superiority: the Constitutional Convention, the Civil War and the Reconstruction Amendments, and New Deal jurisprudence all saw major institutional divisions that led to crises of varying severity. In each case, the resolution was to grant additional powers to the federal government or to validate powers they had already claimed. What's more we see this demand for greater centralization and the development of a constitutional principle setting a distinct level of sovereign political decision-making in the EU during its current crisis.¹⁸⁵ Suggestively, there appears to be a correlation between the decrease in human violence and the greater centralization of political authority.¹⁸⁶ This

¹⁸⁴ Filippov et al (2004) argue that most federations in the modern period last fewer than 30 years and the majority of the postwar federations last less than ten. Cited in Schaffer (2012, 17).

¹⁸⁵ See Habermas (2012) as an example for a call for a more robust constitutional order with stronger Europe-wide institutions. Schaffer (2012) also describes constitutional principles which grant political supremacy to European-wide institutions.

¹⁸⁶ Tilly (1990) has shown a strongly centralizing tendency in the modern period: the number of distinct, sovereign political entities has sharply fallen in the last 500 years and national states also vanquished internal pretenders to their authority. Pinker (2011) argues that violence has seen a similar drop in the same period.

should not be so surprising. As Jeremy Waldron and Ian Shapiro¹⁸⁷ have pointed out, much discussion of legitimacy and constitutionalism have problematically focused on 'limiting' the power of the central government while ignoring the important fact that centralized power is often a prerequisite for accomplishing necessary political ends. If 'smaller' or limited federal government means the closing of the Freedmen's Bureau or the scaling back of FBI lynching investigations, then smaller or limited government is no virtue and effective power is no vice.¹⁸⁸ What the modern, constitutional democracy has accomplished is no small feat: it has managed to combine the prospects for physical and economic security of an effective monopoly on force with the relevant checks and accountability that make it difficult for that power to be despotically deployed against its citizenry. Such a feat should not be taken, or disrupted, lightly.

At any rate, the conceptual claim is also problematic. Stable federal republics have constitutional principles that distinctly relate one set of actors at one level as having superior authority over the others. As we have seen, the United States Constitution empowers the agents at the national level to determine the nature and extent of the delegated authority to other agents. What's more, there are distinct powers of final authority that obtain at the national level: the President is the commander-in-chief of the armed forces, only Congress

¹⁸⁷ Both Waldron (2012) and Shapiro (2012) argue that the current focus on 'limited government' and 'separation of powers' can lead us to ignore the fact that sometimes the prevention of particular forms of domination requires that the state *do* things, not simply *refrain* from doing things. And this requires considerable power and centralization.

¹⁸⁸ Take the Posse Comitatus Act of 1878. This law creates a sharp separation between the armed forces and federal law enforcement (at the time, the latter was almost entirely limited to the US Marshal Service). The military was prohibited from engaging from civilian law enforcement. At first glance, this looks like an important republican innovation: it creates an additional check on the ability of the state to use military power to oppress its people. On second glance, the actual effect of this law was the end of any attempt to enforce the rights for freed slaves in the reconstructed former Confederacy. The only institution with the power to protect African-Americans from private domination was the Union army and checking the exercise of that power essentially ended Reconstruction.

can declare war and make treaties, and the Supreme Court produces final interpretations of the law. Furthermore, the Constitution asserts its own ultimate supremacy; no state or local government may pass competing constitutions or pass laws that clearly violate its precepts (and it is federal institutions that determine what constitutes a violation). In other words, executive, legislative, and judicial authority and power is concentrated at the federal level. This is consistent with different federal systems emphasizing different elements of the federal level,¹⁸⁹ what matters is that there is a distinctly superior level and the elements of that level are related through a constitution that claims sovereignty over the polity. This is quite distinct from Pogge's account of cosmopolitan global governance: there is no formal constitutional relationship between the various agents who populate the system and there certainly is no concentration at a particular level.

So, federal states are not especially stable, and most federal states that are stable are those that operate quite differently from Pogge's proposed reforms. But even if they were stable, it is not obvious that mere stability is normatively sufficient, for reasons we have considered in detail. So, it might be the case that unitary systems are distinctly superior to federal systems normatively in much the same way that they are generally characterized by superior political stability. A final Millian point, which we encountered in our analysis of the world state: we should be careful not to compare the ideal operation of one system with the real world performance of another. Since the broad point of this chapter is that both the current system and Pogge's are inadequate even in the ideal case, this has not been especially relevant. But it *is* relevant to the comparison that *Pogge* wants to make. One of the benefits of the republican analysis is that it forces us to look at the power dynamics even when they are

¹⁸⁹ For example, Germany has a much more circumscribed judicial review in its constitution when compared to the United States.

apparently harmless. It is easy to design a system that looks vastly superior to the current one where states can act in a unilateral fashion when one simply assumes that the new political agents will follow the principles one lays down. Of course, it is unsurprising to see current states--particularly rich and powerful ones--use their unilateral and superior power to structure the international system in ways that favor their interests, but it would equally be unsurprising to see the constituents of the cosmopolitan global order do the same thing. This is not a reason for cynicism or apathy. When doing strict compliance theory, it is obviously fair to say that one system will perform better than other if everybody obeys the relevant principles of justice. And when comparing actual political systems, it is equally fair to show that--given plausible empirical premises about human behavior--one system will do better than the other. But to compare one system under the rules of the former with another system under the rules of latter does not tell us much.

This will be important to keep in mind when, in the next chapter, I argue that my analysis both places and removes constraints on how we may reform the international system. It may come to pass that in order to respect and further the value of non-domination we may need to accept, at least temporarily, the less reliable protection of human rights in some contexts. This will, not unreasonably, appear to be a fairly perverse trade. It will be important to remember, in that context, that the republican analysis attempts to reform the *underlying* power dynamics that makes many kinds of oppression possible. And it is not always true that responsibly reforming those power dynamics will be consistent with our ideal accounts of where we would ultimately like to end up.

Chapter Five:

A Leap Into Darkness

In no sense do I advocate evading or defying the law, as would the rabid segregationist. That would lead to anarchy. One who breaks an unjust law must do so openly, lovingly, and with a willingness to accept the

penalty. I submit that an individual who breaks a law that conscience tells him is unjust, and who willingly accepts the penalty of imprisonment in order to arouse the conscience of the community over its injustice, is in reality expressing the highest respect for law.

-Martin Luther King Jr., *Letters from a Birmingham Jail*

Introduction: the Moral Tragedy of International Politics

We seem to have found ourselves at an impasse. There are institutional structures that could potentially resolve the problem of international domination, but they are morally infeasible. We cannot help but dominate others with our current political institutions and yet any attempt to move towards a more acceptable political order will wrongfully disrupt the rightful relations between citizens of an internally legitimate national state. Only means that are themselves dominating can lead us to escape domination. We face a moral tragedy¹⁹⁰: we can only escape doing wrong by wronging others.

The practical consequences of this claim, however, are unclear. In the first-order state of nature, the wrongful and dominating nature of the interactions between private individuals had important ramifications: the coercive imposition of the state on non-consenting private citizens was justified in virtue of the fact that one *could not* have rightful relations outside of the juridical condition. Yet, the tragic nature of the current situation is different and worse than the one imagined by Kant. The moral unacceptability of the first order state of nature was a synthetic *a priori* truth: it was inescapable and there were not

¹⁹⁰ Blake (2013) uses a similar concept: arguing that we lack acceptable mechanisms of international reform. He cites Rawls's claim that the family might be both problematic in terms of fair equality of opportunity and an association that nonetheless demands respect. Their accounts are similar to my own because the tragedy results from the problem that the only measures that would reform the overall system would be unacceptably intrusive to morally valuable associations. However, my view is, I think, somewhat different. Blake and Rawls are concerned about the contingent (yet inescapable as a practical matter) side effects or damage of the intrusive steps needed to reform the system. On the Blake-Rawls view, if we could reform the system utterly harmlessly with the press of a button, then it would be acceptable to do so. I am saying that the anarchic international system *necessarily* represents a moral tragedy independent of the morally problematic features of particular reform strategies: pressing the reform button remains wrongful, though as we shall see, it may be retroactively justified as a revolutionary act.

contravening moral factors that inhibited the deployment of the only solution (the republican state). In the case of international politics, the relations are different. I still do wrong 'in the highest degree' by avoiding a global juridical position, but there are some people who I do not wrong at all; namely, I do not wrong those with whom I share the civil condition. What's more, I can recognize that while a person in another country wrongs *me* by remaining in the second order state of nature, she participates in valuable non-dominating relations with her fellow citizens that ought to be respected. These rightful relations generate constraints that do not apply in the first order state of nature. As a consequence, there is no obvious way to avoid dominating, and thereby undermining the autonomy, of others while attempting to reform international politics.¹⁹¹

The point of this final chapter is to explore why it matters that international politics is tragic and to describe a way out of the tragedy. One might be tempted to think that if domination is inescapable, then there is no reason to be *practically* concerned with avoiding it until it is possible to do so. Yet, I will show that the nature of this moral tragedy imposes unique constraints and presents unique opportunities for the would-be reformer. In particular, I will adapt concepts from Bernard Williams and Kant, arguing that the potential reformers of the international system will be able to take *revolutionary moral risks* where their actions are, strictly speaking, impermissible and but can still be retroactively justified. The idea that one can engage in impermissible behavior—even behavior that violates basic human rights—with the promise of later justification is subject to ready abuse. What's more, a revolutionary free-for-all would be insufficiently responsive to the already existing rightful relations that do exist. For these reasons, I suggest that there are constraints on *how* one can

¹⁹¹ If we came to the conclusion that no states were internally legitimate, then the differences between the first order and second order states of nature would collapse.

take the kind of revolutionary moral risks that will be needed to reform the international system. In order to develop those constraints, I turn to the concept of 'civil disobedience' since it shares many of the same features of the revolutionary action I envision. Civil disobedience is usually taken to be a morally extraordinary action aimed at the social or political reform, often operating against what we would normally take to be important moral values. The civilly disobedient reformer *recognizes* they are working against important values and, in order to respect them even in the breach, constrains herself in important ways. In the end, I show that international reformers cannot engage in civil disobedience on the larger stage, but appropriate revolutionary action will have the same features: reformatory action taken in violation of individual rights that is procedurally constrained so that the freedom and equality of each person is 'honored in the breach.'

Moral Tragedy and Revolution

'Revolution' –the wholesale replacement of the political institutions of society through the public and spectacular rejection of those institutions¹⁹² –has been a bit out of vogue in contemporary normative theorizing. It was not always so; when the national states of the early modern era were still forming, political philosophers routinely discussed when revolution was justified. Hobbes, famously, argued that revolution was, essentially, never justified and that revolutionaries could be treated in any way the sovereign wished. Locke, equally famously, argued that the citizenry could–if sufficiently provoked by extensive rights violations–rightfully and *legally* rebel against the existing sovereign and replace it with a new political authority. Both Locke and Hobbes, ultimately, justified their positions on revolution in instrumentalist terms: Hobbes arguing that a legal right to revolution would undermine the civil condition that keeps the war of all against all at bay and Locke arguing that a legal

¹⁹² Smith (2008), 408

right to revolution is a check of last resort that can lead to the replacement of a despotic government with a legitimate one.¹⁹³ Of course, Locke is aware that the violence and chaos that frequently accompanies revolutionary political action can sometimes be worse than the injustice it purports to replace and this is why revolution is not a justified response to just any rights violation. But in any case, the Lockean revolutionary can, relatively straightforwardly, be justified in so acting as long as she reasonably believes that the benefits—in terms of the protection of natural rights—will outweigh the costs.

Kant's discussion of the right to revolution is almost bewildering in its unconcern for instrumental considerations. In fact, many have found his account of revolution to be almost perversely rigoristic in the name of obedience to political authority. According to Kant, there can be no legal or moral right¹⁹⁴ to revolution *regardless* of how poorly a sovereign acts and that the people 'must put up with' the bad acts of the sovereign. This claim is then somewhat perversely combined with the idea that there are *substantive* constraints on the justice of the sovereign¹⁹⁵ where individuals can reasonably and correctly judge that the sovereign is not acting justly.

All resistance against supreme legislative power, all incitement of the subjects to violent expressions of discontent, all defiance which breaks into rebellion,

¹⁹³ Smith (2008), 409. For instrumentalist interpretations of Hobbes, see Kavka (1986). For a non-instrumentalist interpretation, see Korsgaard (1996).

¹⁹⁴ Hill (2012, 286-288) attempts to soften Kant's view by arguing that Kant is only committed to there being no *legal* right to revolution. This leaves open the possibility that there could be a moral right to revolution. While I don't want to be bogged down in Kant interpretation, this does not seem especially plausible. Kant does not employ the moral/legal distinction. To *have* a right, according to Kant, is to have a claim that can be rightfully enforced using coercive means by the relevant political authority (*MM*, 6:231); all legal rights are moral rights.

¹⁹⁵ This is one of the many reasons that those who have interpreted Kant's political philosophy as essentially Hobbesian are mistaken. There is nothing the Hobbesian sovereign can do to its subjects that is unjust, although the sovereign can imprudently and irrationally act against natural law. For Kant, this is false. The paradox for Kant is to explain how a person could rightly judge the sovereign as acting unjustly and yet possess no moral right to revolution.

is the greatest and most punishable crime in a commonwealth, for it destroys its very foundation. The prohibition is absolute. And even if the power of the state or its agent, the head of the state, has *violated the original contract by authorizing the government to act tyrannically*, and has thereby, in the eyes of the subject, forfeited the right to legislate, the subject is still not entitled to offer counter-resistance.¹⁹⁶

Kant does not say here that the person cannot revolt because she is mistaken in her judgment; he rather asserts that the one cannot revolt even if the government is acting tyrannically. So, a person in a Kantian state can judge, accurately, that a sovereign is acting unjustly and, yet, not be in a position to rightfully oppose it. Kant's deference to the status of currently existing political authority goes yet further:

...if a revolution has succeeded and a new constitution has been established, the illegitimacy of its beginning and of its success cannot free the subject from being bound to accept the new order of things as good citizens, and they cannot refuse to honor and obey the suzerain who possesses the authority.¹⁹⁷

So, revolution is morally unacceptable, but any successful revolutionary government is granted the same supreme and unchallengeable authority as the original. In other words, the initial government must be treated as the rightful authority until the moment it is toppled; then the usurpers must be so treated. It is as if we have an absolute prohibition on home theft, but then granted full property rights to the thieves once they fully took control of the house. In fact, Kant suggests that states rightfully may punish people that inquire into the historical basis for the legitimacy of the state with the purpose of motivating resistance to its authority.¹⁹⁸ To do so would be to act in a way that could illegitimately undermine the sovereign's claim to authority.

¹⁹⁶ Kant, from his work "On the Common Saying: "This May Be True in Theory, but It Does not Apply in Practice" as quoted in Korsgaard (1997), 299. My emphasis.

¹⁹⁷ Kant, from the *Metaphysical Principles of Justice*, as quoted in Korsgaard (1997), 299

¹⁹⁸ *MM*, 6:319

Before I show why Kant holds such a strange view and what it says about international politics, it is important to see what is *not* driving the problem. To that end, we consider the interpretations of Anna Stilz and Sarah Williams Holtman. First, it is important to see that Kant's objection to revolution is not predicated on an implausibly thin account of what constitutes a just sovereign. Anna Stilz argues that it is the *lack* of a robustly democratic account of legitimacy that motivates Kant's position. What we need, according to Stilz, is an account of a general will that the sovereign *could fail to satisfy*: She writes:

For Rousseau, freedom could never give us a reason to obey the arbitrary will of a particular private person, including the will of the sovereign. Instead, he holds that the only kind of state that we could possibly have a genuine obligation to obey must be one based on a general will—a collective will that protects a set of a set of common interests, and that imposes protections in the form an impersonal law.¹⁹⁹

The solution to the problem is, then, to incorporate "Rousseauian" elements that add various kinds of democratic protections. For these democratic protections create a constraint on what could even *count* as a general will whereby everyone obeys a non-dominating political authority: any 'sovereign' that failed to meet these constraints wouldn't be a sovereign at all, but just an arbitrary private person dressed up as a sovereign. But this can't resolve the problem that Kant's conception of revolution is trying to solve because Kant *already* has requirements of justice that apply to the sovereign, without which the sovereign is not acting justly or structured legitimately. Here is a list of the features that any omnilateral will must possess²⁰⁰:

- 1) Separation of powers, or a republican constitution
- 2) Adherence to the law of equality, which prevents individuals being directly discriminated against when it comes to the burdens of the state
- 3) Supreme proprietorship of the land and regulation of the state's finances

¹⁹⁹ Stilz (2009), 59

²⁰⁰ This list is derived mostly Kant's 'General Remarks' starting at 6:318 in the *Metaphysics of Morals*.

4) The provision of social welfare programs

Stilz is right that, for Kant, the above list only serves a 'diagnostic function' and the sovereign's failure to satisfy them cannot justify violent resistance. But if that is a problem for the Kantian, arguing for additional, more robust constraints on what counts as a sovereign cannot solve it. Kant argues that a sovereign with a despotic constitution must nonetheless be obeyed because the revolutionary would have to already possess political authority in order to rightfully use coercion to enforce his or her judgment. But *that* problem of unilateral judgment and assurance cannot be solved by simply *adding* some more stringent conditions; the revolutionary lacks the relevant political standing to use force to impose a republican constitution *or* to impose a more substantively democratic political order. Any interpretation of Kant's rejection of revolution must be consistent with the fact that Kant thinks there are *substantive* constraints on what counts as an omnilateral will and *yet* still concludes that we do not have the right to revolt against a political order that we correctly believe fails to meet them.

Sarah Williams Holtman, on the other hand, motivates Kant's rejection of revolution by referring to the epistemic limitations and the need to accept the burdens of judgment and to be reasonable in the concrete specification of justice:

If I have understood Kant correctly, his claim that we require the state in order to honor moral equality rests, most fundamentally, on the view that the demands of justice are inevitably underdetermined. Since no argument will resolve many significant disputes, we need some designated authority to settle on just one option.²⁰¹

Holtman is correct that it is our relationship with others and the need to respect their entitlements that drives Kant's account, but where she is mistaken is claiming that *only* the limitations derived from underdetermination matter. Holtman interprets Kant as arguing

²⁰¹ Williams Holtman (2002), 225

that we need to be epistemically *humble* in the face of complex political issues, as well as acknowledge that *some* questions of justice are more or less discretionary. This epistemic humility operates in two ways. First, we should not think that revolution can be justified on the basis of comparatively fine-grained political judgments about injustice in particular cases: the possibility that there might be reasonable disagreement or that I might make a mistake is too great in a one-off instance of injustice or in the case of relatively small differences in policy. Second, we should be humble about our ability to anticipate the future consequences of our revolutionary action and about our ability to institute political institutions that are sufficiently better as to outweigh the uncertainty and violence of the revolution. In other words, we should recognize the fallibility of our judgments and that unilaterally acting without strong evidence is not just risky but disrespectful towards others whose rights you cancel in the name of revolutionary action. This, according to Holtman suggests a natural limitation on Kant's proscription of revolutionary political action:

Justice may indeed be underdetermined for some, even many, circumstances. This does not mean, though, that it is underdetermined in all circumstances and for all questions. Certain laws and institutions will clearly contravene basic Kantian commitments...Slavery, genocide, and severe deprivations of liberty on arbitrary grounds fall outside the bounds of what is acceptable. That some will disagree may have consequences for our response to them, but not for a decision about the permissibility of these acts...And, if this [the non underdetermination and the Kantian spirit of freedom driving us to act] is true, it becomes increasingly doubtful that Kant may forbid revolution absolutely consistent with his own commitments.²⁰²

Holtman argues if the injustice is sufficiently general, egregious, and obvious, then we *can* know that revolution is justified. According to her, Kant is simply wrong about the

²⁰² Williams Holtman (2002), 225-226

implications of his view. Revolution has a *very high* justificatory requirement, even higher than a strict consequentialist calculation would suggest, but it can be justified.²⁰³²⁰⁴

Holtman's interpretation is insightful, correctly relying on the notion that acting on a unilateral private judgment can be disrespectful even when the judgment is correct. It is also important to keep this notion of epistemic humility in mind when calling for radical changes in political systems. Yet, Holtman's view fails both as a general Kantian account of revolution and as an interpretation of Kant.²⁰⁵ Holtman's most significant problem is that her view remains in the throes of the instrumentalist conception. In other words, the *real* question is still the theoretical characterization of what we owe to people as a matter of justice. That one could be *entirely justified* in one's judgments about what justice demands and about whether one could actually generate just outcomes and yet still lack the relevant political authority to enforce a particular claim is anathema to the instrumentalist conception and it explains why Holtman thinks that the real problem driving Kant's analysis of revolution is the epistemic worry about whether one is *correct* about one's judgments that revolution is necessary. But Kant's claim that revolution is necessarily wrongful is implied by the same fundamental insight that the state of nature is necessarily a world 'devoid of justice.' In the state of nature, one can make all sorts of accurate judgments about the substantive principles of justice (after all, that's precisely what Kant's section on private right is all about)

²⁰³ This is quite similar to how Ripstein attempts to soften Kant's view. Ripstein (2009, 337-343) argues that Kant's prohibition against revolution only applies to *despotic* regimes. But once the injustice takes a particular form or becomes sufficiently egregious, then the regime becomes a *barbarism* and the prohibition against revolution no longer applies.

²⁰⁴ Smith (2008, 409-410) lays out a strong consequentialist argument against revolution that any justification must at least consider even if he ultimately rejects a consequentialism as a moral framework.

²⁰⁵ The major interpretive problem with Holtman is that, while it is undeniably true that the underdetermination of justice plays an important role in Kant's argument for the necessity of the state, it is far from the primary, only, or most important reason. Ripstein (2009, 145-181), Korgaard (1997), and Varden (2008) suffice here.

that ought to guide the actions of the sovereign. Yet, individuals *cannot* unilaterally enforce, judge, and legislate those principles on other agents outside the operation of the political institutions that can make those actions appropriately public and non-dominating. I am not permitted to *remain* in a non-judicial state and rely on my own judgments; doing so is fundamentally disrespectful.

The same thing can be said about the revolutionary. The recalcitrant anarchist impermissibly claims the right to unilaterally and privately decide what entitlements she should be able to claim against others, to make judgments about whether they have been violated, and to enforce those judgments and decisions. In other words, the recalcitrant anarchist claims the right to decide for *herself* what *everyone else* is entitled to do and use; this is not consistent with the status of each person as free and equal. The revolutionary claims the right to decide *on her own* (or in conjunction with like-minded revolutionaries) whether the entitlements of everyone in the state ought to be cancelled and restructured in a way that makes the right sort of public contestability impossible. Korsgaard writes:

If government exists by the general will, a revolution could be legitimate only if it in turn were in accordance with the general will. Otherwise, it is just a few lawless individuals making war against the nation. But we should ask how it could be established that a revolution *is* in accordance with the general will...The government contains agencies for determining and interpreting what the general will is. Of course the people may decide that the government is not doing a good job of this. But the judgment can only be made by someone who has the right to speak for the people.

After all, the kinds of institutions that make collective deliberation and adjudication possible are the things that the revolutionary rejects. The revolutionary, then, claims the right to determine the entitlements for everyone else on the basis of her superior judgment than that of the sovereign. In order for the revolutionary to be able to *rightfully* claim the authority to completely reform the entitlements of the citizenry, she would have to *already* be a representative of the general will. Kant writes:

For in order for the people to be able to judge the supreme political authority with the force of law, they must already be viewed as united under a general legislative Will; hence they can and may not judge otherwise than the present chief of state wills.²⁰⁶

So, in other words, justice requires the creation of a public agent that—through the development of various institutions and directed by the constitution—allows the people to 'speak with one voice' and issue and enforce laws that are reciprocally binding on all. But the revolutionary is saying that the current government is illegitimate because it acts contrary to its position as a 'representative of the people.' Yet, the revolutionary then simultaneously claims to *speak for the people* in her judgment that the sovereign must be toppled. Such claims represent a kind of paradox: the people are incapable of speaking as one as a consequence of the corruption or breakdown of the fundamental political relations and yet they speak as one when it comes to judging the sovereign illegitimate. If the revolutionary is to claim to be something other than a private citizen exercising her own judgment to resolve some private grievance, then she must be committed to being the kind of representative that, according to her own criticism of the current government, she cannot be. So, as a consequence, the revolutionary is subject to a dilemma: either the juridical condition does not exist or it does. If the juridical condition exists, then we must treat the current representatives as legitimate. If it does not, then we are in the state of nature where rights are merely provisional. Then, the revolutionaries and the current government represent two private groups competing for effective control over the territory, a necessary condition for establishing a juridical condition. The later horn of the dilemma explains why we must take the revolutionaries as the legitimate government if they manage to defeat the previous government. If the juridical condition disappears, then the revolutionaries' success is establishing effective control over a

²⁰⁶ *MM* 6:318, as quoted in Korsgaard (1997), 311

territory recreates it. The revolutionaries are then justified in forcing the other members of the territory to enter into their civil condition. But in either case, revolution is never rightful. Either the current government is legitimate and rightfully punishes the revolutionaries, or we are in a position where the 'government' was never really an authority to be toppled in the first place.

So, as long as we have a government that can plausibly claim, and make good on that claim, to be in a juridical condition (effective control, functioning legal system etc), then citizens must treat it as legitimate and revolution represents a wrongfully unilateral attempt to restructure the very conditions of rightful relations. Yet, Kant was so notorious for his enthusiasm for the French Revolution that he was called the "Old Jacobin." And as Korggaard says, we not only think that sometimes revolution is justified, we are sometimes *inspired or moved* by revolutionary action:

I have another motivation for examining this category of cases. It is that human beings seem to find them profoundly interesting and somehow attractive. Literatures and movies are full of them. We are shown a good person who, rather than violate his own standards, submits to the unjust treatment of himself and others. He holds out against solicitations to rebel long enough to convince us that his honor is real. And then a moment finally comes when, breaking the rules he has set for himself, he takes up his weapons and fights. Fletch Christian finally mutinies against Captain Bligh. Ransom Stoddard, who came to the West to bring it law, picks up his gun and heads to the street for a shootout with Liberty Valance. Instead of feeling disappointed at their defection, these are moments that we find *thrilling*.²⁰⁷

So, can Kant's (and our) enthusiasm for revolution and his categorical rejection of its rightfulness be squared? I think it can be, but we need to understand the revolutionaries' plight as a similar kind of moral tragedy as the one I have described in international politics.

²⁰⁷ Korggaard (1997), 298. Korggaard ignores comics and superheroes, but I think they represent even more dramatic illustrations of the point.

We can find ourselves in a political condition that Ripstein describes as a 'barbarism'²⁰⁸: the government is really just a gang writ large, a particularly powerful Mafia. Such a state is doubly vicious: it commits its own share of injustice and makes impossible rightful relations between even well-intentioned people. A barbarism is a kind of moral acid, corroding the moral character of all interactions amongst its subjects. Even though the revolutionary can rightly conclude she is subject to barbarity, she may not be in the appropriate position to rightfully resist it. Not doing anything represents a kind of complicity, but active, violent resistance wrongfully claims an authority that one lacks. It is little wonder that Kant suggested that the only options for an oppressed citizenry is the 'power of the pen' and a passive resistance, refusing to obey rather than violent defiance.

The answer, I submit, is that revolutionaries should understand their actions as taking a *moral risk*. An action is morally risky when it can only be subject to retroactive justification: the action is wrong when you perform it, but its moral status *may* be changed upon the *successful* completion of the later, justifying action. I borrow this concept from Bernard Williams:

Let us take first an outline example of the creative artist who turns away from definite and pressing human claims on him in order to live a life in which, as he supposes, he can pursue his art. Without feeling that we limited by any historical facts, let us call him *Gauguin*...Gauguin, in our story, is putting a great deal on a possibility which has unequivocally declared itself. I want to explore and uphold the claim that in such a situation, the only thing that will justify his choice will be success itself. If he fails...then he did the wrong thing, not just in the sense that platitudinously follows, but in the sense of having done the wrong thing in those circumstances he has no basis for the thought he was justified in acting as he did. If he succeeds he does have a basis for that thought....Even if he succeeds, he will not acquire a right that they [those he abandoned] accept what he has to say; if he fails, he will not even have anything to say.²⁰⁹

²⁰⁸ Ripstein (2009), 338-339

²⁰⁹ Williams (1981), 22-24

Now, Williams's example is not a good one²¹⁰. The important thing is not the specifics, but the general structure. Gauguin abandons the moral duties he has towards his family in order to pursue his life's work as a painter in Tahiti. Williams's point is that it seems incorrect to engage in the following sort of reasoning: Gauguin has a certain probability of success in creating masterpieces and that probability will either make it all-things-considered justified to act or not to act. Of course, some actions are like that. The consequences are not always certain, and if one has a reasonable chance of generating the right sorts of consequences, then one might have been justified in acting even if it did not work out. For example, the rationality of a bet in a poker game does not normally depend on its outcome. If you go all-in with a dominant hand and then lose to a bad beat, it does not retroactively make the bet a bad move. In this sense, justification for our actions is rarely retroactive: later consequences do not justify risky behavior in the present, our reasonable judgments about their likelihood do. But risky moral actions are not like that: *only* success can serve as the basis of a retroactive justification. Gauguin needs to *actually* produce masterpieces in order for his decision's moral status to be changed, for him to have anything to say. If Gauguin turns out to be untalented, then leaving his family remains wrong. If he gets hit by a wagon or dies from illness, then leaving his family remains wrong.

What are the constraints, tell-tale signs and, moral consequences of a risky action? First, we might think there are basic externalist conditions on taking a risky action. These are the following. The good consequences that one takes the action for must be sufficiently proportional or weighty to even be candidates for retroactive justification. Furthermore, the

²¹⁰ As much as we treasure Gauguin's Tahitian paintings, I do not find it plausible that they justify—retroactively or otherwise—his abandonment of his children to the tender mercies of the 19th century French child welfare system.

individual must be correct in believing that the wrongful action is genuinely necessary for achieving the potentially justifying consequences. Lastly, the action must be a last-resort where good-faith efforts to achieve one's goals rightfully have failed or can be seen to be otiose. Second, we have internalist conditions: we need to have good reason that the agent understands the nature of their wrongdoing and *takes on* the responsibility and the onus of generating the retroactive justification. Generally, this will take the form of *agent-regret*²¹¹. Agent-regret in the case is characterized by two elements. First, the agent must necessarily 'wish that things had been otherwise.' That is, the agent must have an understanding *that* harm was done and that his or her actions were not justified at the time. Second, it must be *agent regret*: the agent must understand not just that something bad happened, but that *he or she* made it happen and that they have opened themselves to criticism in so doing. So, it must be clear in the agent's actions that they understand the special nature of the action they undertake. This could take the form of attempts to rectify one's wrongdoing by publicly apologizing or compensating one's victims as far as one can and still pursue the retroactive justification. Conversely, there could be an observable, standing disposition to limit the effects of one's wrongdoing: we could see the risk-taking agent incur costs to herself to mitigate or limit the wrongness of their actions insofar as that is consistent with their ends.

The most important difference between a risky action and a standard action lies in the response of others. In a standard action, taking the relevant precautions and having the right intention significantly mitigates, or eliminates entirely, the reasons that others have to criticize, resent, or oppose you. A person who criticizes you for making a bet in a poker game *simply* on the basis that you lost the hand is just making a mistake, and the truth of the claim that 'it was an accident!' usually has at least some force in making attitudes like

²¹¹ Williams (1981), 27-31

resentment, blame, or indignation inappropriate. With a risky action, however, these attitudes remain appropriate. Gauguin's children rightfully resented his actions, and the whole panoply of practical consequences of that resentment ought to borne *without complaint* by the risk-taker. If individuals criticize Gauguin in print, organize a boycott of his work, or work to ostracize him from the artistic community, they are acting in a morally appropriate fashion. After all, what Gauguin did was seriously wrong, and these attitudes and actions are the correct response to that wrongdoing.

Let's apply this analysis to the case of revolutionary political action. Recall, there were two paradoxical elements of revolution. First, we need to understand how a good person could be deeply committed to performing a wrongful action, remain a good person, and not be making a mistake. Second, we wanted to explain how it could be wrong to revolt and yet still grant the revolutionary government legitimacy if it wins. Third, we would like to explain why we find such actions exciting and inspiring: portrayals of rebels, vigilantes, and revolutionaries dominate popular fiction as exemplars and not cautionary tales.

Revolutionary political action as a particular kind of risky moral action resolves these paradoxical elements and does so in a satisfying way. First, we can easily incorporate the insights about revolutions from earlier: they are justified only with difficulty, require extremely weighty evidence, and ought to be treated as a last-resort. The externalist conditions easily accommodate these features: the retroactively justificatory end of the revolutionary must be sufficiently weighty to overcome the consequences of her wrongdoing, the revolution must be necessary, and the extraordinary nature of retroactive justification demands that revolution be a tool of last resort. If these externalist conditions are met, then the retroactive justification is at least plausible. The moral riskiness further explains how a good person could be deeply committed to doing a bad thing deliberately and

yet still be admirable. It also helps explain what it means to say that revolution is still wrong at the time it occurs even if it becomes retroactively justified: those who oppose the revolutionaries were not wrong to do so, even if the revolution is retroactively justified. This seems to capture the real complexity of political action in a revolutionary context: revolutions are always messy and difficult, with individuals of good faith on the 'conservative' side as well as the radical. Revolution places people in a fraught moral arena where one can, at least potentially and retroactively, be justified in violently resisting a regime while another can be morally justified in opposing your actions with force of their own. The revolutionary who is put in jail is not wronged, on this view, even if they are jailed by an unjust state that needs to be overthrown. Yet, the successful revolutionary can be right in the end and legitimately exercise political power that they had no right to take in the first place. Such are the paradoxes that occur when dealing with moral tragedies.

Finally, what is so inspiring or heroic about the vigilante or the revolutionary? On this view, shouldn't we view revolution somewhat dourly, a necessary and unfortunate resort of the desperate? The answer, I think, lies in the moral nature of the risks involved in acting to topple the juridical condition. A key clue, I think, lies at the end of the Declaration of Independence:

And for the support of this Declaration, with a firm reliance on the protection of divine Providence, we mutually pledge to each other our Lives, our Fortunes and *our sacred Honor*. (my emphasis)

Yet, what does it mean to stake one's *honor* on a revolution? It must mean that revolutionaries do more than simply risk their lives, freedom, or property (though they obviously do and that is no small thing), they risk their 'good name.' In other words, revolutionaries risk being subject to both suffering *and* expressions of public condemnation

(as well as the condemnation of their own conscience²¹²). Of course, such condemnation is, justified or not, deeply unpleasant in a way that both exacerbates and is separate from the physical suffering that is a key feature of legal punishment. But if the view above is correct, then what the revolutionary faces is worse: the condemnation is, in an important sense, *correct*. They don't just risk their public reputation with their treason; they risk their *actual* honor. If they lose, then they were *just committing treason*. It is one thing to risk the unjustified and self-serving criticism of moral hypocrites and the 'timid men,' but it is quite another when your critics are right. That is, one of the things that makes it agonizing to commit treason is that one risks rightful punishment. But revolutionaries are willing to take that moral risk, and do so in the name of achieving a more just world. That is what is exciting and inspiring about the revolutionary: they risk *everything* in the name of making the world better. The revolutionary that acts to end a barbarism opens up new possibilities for moral action by risking her soul.

At this point, my view is quite clearly aligned with Korsgaard's. She says the revolutionary who acts to end barbarism can be virtuous, perform an action that is wrongful, and yet may be retroactively justified through success. So far, so good. But there is a significant blindspot in most neo-Kantian discussions of revolution. Ripstein, Holtman, Stilz, and Korsgaard tend to concentrate on *whether* a person might be morally justified in revolting and what institutions justify revolution or ought to be instituted after a successful revolution, but they tend to ignore the question of *how* a revolutionary ought to proceed *once* they have

²¹² Korsgaard (1997, 314) writes: Revolutionaries who are caught may be held legally liable not only for the crime of sedition but for the death, injury, and mayhem that result. But Kant makes it clear that this not merely a legal point. He says that the consequences of violating a perfect duty should also be imputed to the agent "by his own conscience" (*MPV* 431). So someone who undertakes to start or participate in a revolution must regard himself as responsible for the results. A revolutionary must see himself as the author of the loss of life and limb, the social disorder, and the suspension of the juridical condition that results from revolution.

made the judgment that revolution is necessary. In other words, once we have returned to the state of nature and war exists between the revolutionaries and the existing government, does consequentialism reign and the revolutionaries should 'do what it takes' to secure the success of the revolution? After all, rights are merely provisional in the state of nature, so the revolutionary can only be constrained by might and not right²¹³. I think this is mistaken, at least partially. The revolutionary should not and cannot understand herself as constrained in the way that the law enforcement officer is constrained; the juridical condition is gone. Yet, in the next section, I will show that there are *substantive* constraints to revolutionary activity that make it so the revolutionary respects the relevant political values in the breach rather than in the observance. I will show that revolutionaries must act in certain ways to retain *even the possibility of retroactive justification*. The moral risk-taker can include consequentialist analysis in much more robust way than is typically permitted, but this is not to say that *only* consequentialist reasoning is applicable: retroactive justification is only available for those who are constrained by the need to appropriately acknowledge the rights they are violating in order for retroactive justification to be possible. These constraints on the revolutionary are driven by the requirement that the risk-taker take on board and demonstrate their fidelity to the political values of the rule of law and public accountability even as they act against them.

Revolution and Civil Disobedience

Civil Disobedience

Civil disobedience exemplifies two important features that I argue also characterize revolution: the very nature of a political activity can set non-instrumental constraints in how one achieves one's political goals and there is a way to uphold an important value even when

²¹³ This view is aptly stated by Tom Zarek in the *Battlestar Galactica* episode 'Blood on the Scales' when in response to his fellow mutineers who balk at his execution of resisters, says, "This is a coup...This is what happens."

one is, strictly speaking, acting against it. For example, we see Rev. Martin Luther King's claiming that a civilly disobedient actor is acting with the highest respect for the rule of law while engaged in deliberate law-breaking. Civil disobedience is, on the one hand, different from *both* the 'normal politics' of protests, letter-writing campaigns, and lobbying that we often see used as mechanisms of persuasion in a democratic political culture and the 'revolutionary politics' of insurgency or rebellion. Furthermore, it is also different from the 'sick-ins' or work 'slows' that represent spontaneous resistance or protest to a perceived injustice and try to achieve their goal by making the continued unjust behavior inconvenient or increasingly costly.

Civil disobedience is typically defined as a:

...public, nonviolent, and conscientious act contrary to law usually done with the intent to bring about a change in policies or laws of the government...Civil disobedience is a public act which the dissenter believes to be justified by this conception of justice, and for this reason it may be understood as addressing the sense of justice of the majority in order to urge reconsideration of the measures protested and to warn that, in the sincere opinion of the dissenters, the conditions of social cooperation are not being honored.²¹⁴

Civil disobedience is, at its core, the protest of an unjust political system via an unlawful act. The unlawfulness of the act of protest is what fundamentally differentiates it from the typical or normal methods of political persuasion. The features of civil disobedience that, combined, distance it from more radical protests are publicity, non-coerciveness, conscientiousness, and submission to lawful punishment.²¹⁵ *Publicity* is the condition that the

²¹⁴ Rawls (1969) in Rawls (2001), 181

²¹⁵ Other common elements of civil disobedience are not required. For example, often civil disobedience involves the breaking of the *particular* unjust law being protested. This is frequently useful as it helps prevent misunderstanding, but there can be cases where one law is violated (e.g., say a draft law or a tax law) in order to protest another law (e.g., an unjust authorization to use military force). This follows from the communicative nature of the act.

action is taken in full view of one's fellow citizens and there is no attempt to perform the action in secret; the *purpose* of the action is for all other members of the polity to know you are breaking the law in order to protest an injustice. *Non-coerciveness* is the condition that civil disobedience does not aim at the forceful overthrow of the existing order and the unwillingness to use force to accomplish one's political ends. *Conscientiousness* is a motivational requirement: civil disobedients are acting in order to bring attention to an injustice and not out strictly out of self-interest. Finally, the civil disobedient accepts the judgment of the political community when it comes to punishment. She does not attempt to avoid the punishment or typically claim that punishment is wrongful. Rather, the civil disobedient takes punishment as part of the understood cost of engaging in a particularly forceful protest.

Civil disobedience has these necessary components because of the *communicative* logic the action.²¹⁶ The civil disobedient does not engage in the unlawful act in order to intimidate, coerce, and pressure agents to not enforce or to change the law. Rather, civil disobedience is an attempt to *rouse* the conscience of fellow citizens and to convince them to reform the unjust action or law through standard means. The civil disobedient sees that the majority or the elites have ignored or actively suppressed the attempts by the oppressed to use normal channels of political deliberation and contestation and appeals to their *sense of justice* by bringing the injustice into stark relief. In other words, the act of civil disobedience is an act of political persuasion, albeit a dramatic one. And like the revolutionary, the civil disobedient stakes much on their action, risking and accepting legal punishment in order to make their point. Civil disobedience is not an attempt to impose an unacceptable cost on the execution of an unjust law; it is not an attempt to restructure the bargaining power within a *modus*

²¹⁶ Brownlee (2007) and (2009).

vivendi. Its purpose, and its unique power, is to treat even those who oppress as free and equal citizens capable of coming to see the injustice of the action if they are presented with the moral commitments of the civil disobedients. The necessary features of civil disobedience are derived from this more basic conception of how the civil disobedient conceives of her relation to her fellow citizens. An act of civil disobedience must be public in order for it to act as an instance of political communication to one's citizens. To act privately would confuse or block the message. Similarly, if civil disobedients were breaking the law in order to serve their own ends, they would not be treating their fellow citizens as free and equal as well as being inconsistent with communicating a message about the need to repair an injustice. The civil disobedients need to be communicating a moral message. Third, the use of violence, attempting to block the unjust act or overthrow the government, would be a failure to rely on the sense of justice of one's fellow citizens. Rather, it would be an attempt to *shortcut* the sense of justice of others. Finally, civil disobedients *accept* the legal punishment associated with the law-breaking, and this plays two roles. First, it acknowledges the status of other citizens as free and equal who have, rightly or wrongly, instituted the laws being violated as well as respecting the need for stability and regularity in the application of laws in order for individuals to flourish. But equally importantly, the willingness to accept punishment plays an essential role in the message being communicated. Avoiding punishment for the act would undermine the communication because it conveys an unwillingness to accept the legitimacy of the political order one is trying to change. It represents the claim that the political culture and the corresponding sense of justice of the citizenry is not beyond persuasion and the political relations between majority and minority—while strained by the failure of the majority to follow just principles—are not beyond repair. The civil disobedient presents herself as addressing a serious wrong but in a way that still

treats her interlocutor worthy of being addressed. To put it in Kantian terms, the revolutionary is engaged in a kind of paternalism, making a unilateral decision for everyone else how society should be constructed. The civil disobedient, by contrast, fundamentally accepts the omnilateral authority of the sovereign, yet acts to bring attention to injustices done in its name. It is this respect for one's co-citizens while still protesting their unjust actions that gives civil disobedience its bifurcated character: it is both a radical rejection and an act that is relatively optimistic. It is a recognition that injustice is being done *and* that the majority cares, at least minimally, about acting justly.

Revolution

We clearly cannot apply the above account of civil disobedience directly to revolutions. Revolutions are not primarily communicative political actions. Change occurs through the overthrow and seizure of political power and not through persuasion. A revolutionary is making precisely the claim that the civil disobedient eschews: the political relationship between oppressor and oppressed is irrecoverable through any means that can be interpreted as demonstrating respect for the sense of justice or for the shared institutions of political deliberation. What's more, since the civil disobedient accepts the legitimacy of the legal procedures and corresponding punishments, civil disobedience can be *proactively* justified. In other words, civil disobedience involves a respect for the omnilateral, collective, and public judgments of the sovereign; it is, essentially, a dramatic exercise of the 'power of the pen' that is an attempt to *persuade*. Since the action is not initially wrongful, it is not *morally* risky in the same way that revolution is, for all the real danger that a civil disobedient puts herself in: a civil disobedient may be perfectly justified in her protest even if she fails to change the policy or law.

So, the claim is not that revolution is some extreme or extended version of civil disobedience. Yet, as I will argue, revolution shares its structure. The key element of a revolution, and the basis of its wrongfulness, is that it represents a replacement or alternative will of the people. The revolutionary claims to speak 'for the people.' And this captures, I think, our intuitive sense that there is something quite different about an insurgency like (the modern day) FARC or the Taliban that, even setting aside the problems with their political ideology, is really an organized crime syndicate pursuing its own selfish interests and an organization like the Provisional IRA or the PLO which purports or purported—with some sincerity—to represent the common will of the people. The fundamental act that motivates civil disobedience is one of *communication*. The corresponding basic concept for the revolutionary is one of *representation*. The revolutionary, by necessity, is making a judgment that only a representative of the people could possibly make. A revolutionary that acts in a way that cannot be interpreted as presenting an alternative mode of political representation of the general will is not really engaged in revolution, merely banditry; just as a civil disobedient that is not engaged in a public communication is not really engaged in civil disobedience at all. So, I suggest that the idea of *representation* can play a corresponding role in deriving constitutive standards that ought to constrain the actions of revolutionaries.

In what follows, I don't purport to describe a *full* theory of representation, but I do want to describe some plausible necessary conditions and then see if the corresponding theory of risky, revolutionary behavior can be productively applied in the international context. First, as in the case of civil disobedience, revolutionary action needs to be relevantly public, guided by open declarations of principle.²¹⁷ Secret, shadow organizations can topple

²¹⁷ Paradigmatic examples of these sorts of public principles are the American Declaration of Independence and French Declaration of the Rights of Man.

governments, but they cannot be revolutionaries for one cannot purport to truly *represent* the people in secret.²¹⁸ Second, the condition of *conscientiousness* is also applicable to the revolutionary. The members of the movement must all (or, at least, a substantially number) be sincerely motivated to engage in revolutionary political activity in order to institute a better juridical condition; one cannot be deliberately pursuing one's self-interest and yet purport to represent the interests of the people. Of course, in a juridical condition where political agents are subject to robust checks and contestation, the representative *system* can survive and even exploit a certain amount of self-interest. But a revolutionary movement is in a very different position: institutional checks are lacking *and* the revolutionary is claiming the right to engage in extralegal violence. As a consequence, the motivational requirements for a revolutionary need to be correspondingly higher. Obviously, no person can be *free* of self-interest, individual motivations are usually opaque, and liberation often usually serves the personal interests of the oppressed so the distinction between self-interest and the interests of justice are not sharp. Nonetheless, revolutionary movements need to take steps, incur costs, and limit their actions in ways that demonstrate their public-spiritedness. When a revolutionary movement uses its actions to enrich and aggrandize members of the revolutionary cadre, it undermines its claim to be an alternative to the existing government.²¹⁹

Clearly, conditions three and four of civil disobedience cannot be applied to revolutionary movements, which are defined as those that attempt the violent overthrow of

²¹⁸ Of course, there might be secret codicils for the revolutionary. For example, Fidel Castro might make public declarations that omitted his socialism. Insofar as he uses his powers to impose a socialistic order that was not part of the initial revolutionary agenda once he takes power, he acts beyond his revolutionary mandate and undermines any retroactive justification for his actions.

²¹⁹ We might think that this why attempts to show that the American revolutionary cadre were motivated by narrow class interests are threatening, if true, to the moral status of their actions. See Beard (1913) and Zinn (1980). Also, one might also think this became a serious problem with revolutionary cadres that while, initially high-minded, came to be excessively concerned with the interests of the cadre (e.g., Mao or the Bolsheviks).

the existing political order. Revolutionaries cannot militarily resist the despotism they are fighting and simultaneously welcome their punishment in the fashion of the civilly disobedient.²²⁰ Yet, I think there are *equivalent* conditions that *do* apply. The third condition is that the *internal*, decision-making structure of the revolutionary movement should *model* the improvements and justice-enhancing features it is attempting to inculcate in the society at large. Generally, this will require that revolutionary movements be *inclusive, open to dissent, and democratic* (in some relatively loose sense) as far as this is consistent with military effectiveness. To put it somewhat differently, revolutionary movements are required to be 'the change they wish to see in the world' where they model to the society they are attempting to claim control the kind of juridical condition they plan to create. There are three reasons for this condition. The first is epistemic. Revolutionary movements need to satisfy the *externalist conditions* in order for their actions to retroactively justified, and revolutionaries need to reasonably believe that those conditions have been met. If revolutionary movements are 'epistemically closed' groups that are unresponsive to dissenting voices and exclude entire classes of society, then they are likely to formulate and act on policies that are ignorant of and unresponsive to failures and unintended side effects. So, *epistemic virtue* seems to be an important feature of revolutionary justification that has often been historically lacking. Second, these institutional structures have a *signaling effect* that indicates to neutral members of the polity (that will ultimately need to either be allied with or, minimally, indifferent to the revolutionary movement in order for it to succeed) that they are sincere in their political convictions. In a similar vein, these internal structure will serve as a robust a check as is possible on the corruption or exploitation of the revolutionary

²²⁰ Perhaps, if captured, we might find it admirable if the revolutionaries accepted their punishment. But as long as the revolutionary war is ongoing, it seems excessively demanding to require captured revolutionary soldiers to make no attempt to escape.

movement as it comes to take power. Finally, inclusivity and democratic internal structures seem like *substantive* requirements on what it is to represent a people. For a revolutionary movement to be plausibly considered *representative*, then it must be at least *open* to members from the relevant classes of society. Of course, the very unjust institutions that make revolution necessary will probably make robust inclusion, where the revolutionary cadre is *in fact* made up of members from all over society, impossible. It is one thing for limitations based on operational security and the oppression of a despotic government to make it *hard* for revolutionary cadres to be composed of all affected groups; it is quite a different thing for the revolutionary movement to *in principle* be committed to excluding significant (and especially other oppressed groups) classes of people. The former is an unfortunate consequence; the latter undermines the movement's claim to being genuinely revolutionary.²²¹

The fourth condition might be called the 'inherit the wind' limitation.²²² Kant argued that we could derive moral constraints on the practice of warfare from the overriding value of peace:

The greatest difficulty in the right of nations has to do precisely with right during a war; it is difficult to even form a concept of this or to think of law in this lawless state without contradicting oneself (*inter arma silent leges*). Right during a war would, then, have to be the waging of war in accordance with principles that always leave open the possibility of leaving the state of nature among states (in external relation to one another) and entering a rightful condition.²²³

²²¹ For example, the revolutionary coalition in the French Revolution had relatively few members of the first and second estates, but aristocrats and clergy were welcome if they were willing to endorse the ideals of the revolution. However, women were systematically excluded from the coalition. The former is not problematic in terms of the French Revolution's retroactive justification but the latter is.

²²² Andrew Sabl argues that a focus on the *future* political order and the need to reform that system in a way that is consistent with future just relations between citizens is what justifies the civil disobedience and all of its particular features. See Sabl (2001).

²²³ Kant, *MM* 6:347

A just and lasting peace is the *only* rightful goal of warfare and so one cannot *fight* wars in ways that make that kind of peace impossible. In other words, *how* you fight wars affects what is possible after them and so one must be careful to fight them in a way that is consistent with rightful relations once the war is done. Walzer makes a similar point in his discussion of the Allied insistence on unconditional surrender in WWII:

Nazism was a conscious and willful challenge to the very existence of such a world [e.g. a world of mutual understanding and shared values]: a program of extermination, exile, and political dismemberment. In a sense, aggression was the least of Hitler's crimes. It is not quite right, then, to describe the conquest and occupation of Germany and the trial of Nazi leaders as so many (unavailing) efforts to deter future aggressors. They are better understood as the expressions of a collective abhorrence, a reaffirmation of our own deepest values. And it is right to say, as many people said at the time, that the war against Nazism had to end with such a reaffirmation if it was to end meaningfully at all.²²⁴

Again, the idea is that a particular way fighting and exiting a war influences the nature of the peace. The Nazis represented such a deep threat to the idea that there could be *any* constraints on how one fought wars (in other words, the Nazis were a threat to the very possibility of a just war regime) that the only way to endorse and inculcate any kind of just war regime whatsoever was to make the Nazi defeat total and undeniable.

I suggest that revolutionary war is subject to a similar sort of constraint. Revolutionaries are not permitted to salt the earth before them, fighting a revolutionary conflict in a way that makes a reasonably just juridical condition impossible *even if* those tactics could be justified on consequentialist grounds. This follows from the fact that part the necessary core of a revolutionary movement is that it is an *alternative* to the existing government as a representative of the people. But if it the cadre routinely acts as if *victory* is more important than creating a superior juridical condition, then we can reasonably ask

²²⁴ Walzer (2000), 116.

whether it is representing any interests other than that of a narrow constituency. For example, Tito's partisans in WWII era Yugoslavia constituted the largest insurgency against the Nazi-supported puppet government and was dominated by Serbs. In the process of forging the most effective guerrilla fighting force in occupied Europe, Tito took advantage of, inflamed, and exploited the age-old division between Croats and Serbs. This was, actually, an effective tactic as Croats were (unsurprisingly, given the history of ethnic warfare between Serbs and Croats and the prior domination of the Yugoslav state by Serbs) amongst the most pro-Nazi of European ethnic groups. The Nazis were sufficiently unjust that it is, at least, possible that the benefits of inflaming and hardening ethnic divisions to increase the military effectiveness of one's resistance forces outweigh (in the strictly consequentialist sense) the costs to the later political order. Yet, I suggest that Tito, if he was to take advantage of the retroactive justification offered by risky, revolutionary action, was required to incur at least *some* costs and to take *some* risks to tamp down and mitigate the ethnic hatred between Serb and Croat in order to make possible a minimally just multi-ethnic polity. In any case, the idea here is that a revolutionary cannot be *indifferent* to how the revolutionary tactics they choose can foreclose and make possible post-revolutionary political resolutions and still claim to be anything other than a warlord using violence to seize control of the state for their idiosyncratic and self-interested purposes. After all, the *very point* of revolutionary action is to replace the current despotic government with one that makes possible a fuller and more ideal expression of rightful relations between free and equal citizens. To act in ways that demonstrate an indifference to that eventual goal or that demonstrates a willingness to sacrifice vulnerable classes to improve the position of a select few.

So, revolution is a moral risk that can only be justified retroactively through the successful creation of a new and improved juridical condition. There are, then, two elements

that any revolutionary movement ought to satisfy, each with own its own sub-components. The first is what we might call the *internalist element*: a revolutionary movement needs to satisfy these conditions in order for it to be sufficiently *representative* that their actions can even be candidates for retroactive justification. Representativeness requires publicity, conscientiousness, inclusiveness, and an unwillingness to salt the earth. However, these conditions merely make it possible for us to conceive of the movement *as* revolutionary, as opposed to one that is secessionist or of simple brigandage/warlordism. Yet, not every revolutionary movement that is appropriately interpreted as an alternative, representative body is justified in its actions. The second element is constituted by *externalist* conditions: these are the actual states of affairs that need to obtain for the revolutionary action to be retroactively justified. Namely, it needs to be the case that the revolutionary movement can and does, eventually, achieve effective control over the territory it claims to represent, the juridical order it imposes must be an improvement, and the revolution must be the necessary means for achieving the relevant improvements. This is why it is important to realize that the wrongness of revolution is *not* about the moral authority of the sovereign but rather the wrongness of acting and speaking in the name of everyone: both neutral citizens and revolutionaries can make well-justified *judgments* that a particular action by the sovereign or the revolutionary is acting justly or not, but the question is how the revolutionary can come to rightfully *represent* 'the people' they purport to speak for. In any case, revolutionaries face a tall order of justification and can fail to be retroactively justified in several ways: the revolutionaries might be too quick to resort to violence, they might resort to violence when there is no hope of improvement, they might lose, or they might win and yet fail to achieve any relevant justice-enhancing reforms (replacing one despotism with another).

A Leap Into Darkness: Revolution and the Moral Tragedy of International Politics

Revolution represents a potential response to the problem of moral tragedies in the political context. Recall that the problem facing the international reformer is that she does wrong in the current situation yet lacks any morally permissible means for escaping it. The possibility of retroactive justification offers a way out: the reformer genuinely does wrong when she uses a dominating means to reform the international system, but successful reform can retroactively alter the deontic status of the action. In what follows, I apply and modify my account of revolution for the international sphere, looking at a couple case studies and alternative views.

Goodin and Buchanan on Illegal 'Law-Making' in International Law

The idea that international actors may need to violate international law in order to reform it is not especially new. Robert Goodin, for example, has argued that states can engage in 'civil disobedience' by deliberately and publicly violating international laws against coercive intervention in order to conscientiously establish a new principle based on the responsibility of the international community. He argues that this can be one of the 'primary' mechanism for changing international law:

The crucial fact for present purposes is just this: In both common law and in customary international law change in the law presupposes a case coming before the bar of justice. That is to say, legal change of the sort here in view presupposes someone having done something that was, by existing standards, a *breach* of the law. In the absence of any formal amendment procedure, the only way in the situations here in view for states to 'propose an amendment' to customary law is by *breaking* that customary law.²²⁵

He provides a few examples of how this civil disobedience might work in the international case:

²²⁵ Goodin (2005), 231

-Britain used its position as the leading naval power of the nineteenth century to suppress piracy on the high seas, which eventually led to agreements and concerted action among the major states to protect ocean shipping.

-A country's territorial waters were traditionally defined in terms of some fixed distance from the shore...In 1945, US President Harry S Truman unilaterally declared the US extended all the way to the edge of the continental shelf. In so doing, he anticipated and accepted that all other nations would follow suit, and eventually they did in the convention on the Law of the Sea.

-President Nixon unilaterally 'closed the gold window' of the Bretton Woods monetary regime in the early 1970s, which upset Japan and European countries, but eventually led to the creation of the International Monetary Fund and the G-8 summit process.²²⁶

Goodin wants to describe a particular kind of lawmaking: actors will violate international law in order to change it, do so according to a publicly stated intention to change the relevant law, accept the general applicability of the new law, and yet be willing to accept concomitant sanctions for their violation.²²⁷ This represents one of the 'primary' mechanism for changing international customary law.²²⁸

Yet, international civil disobedience does not operate according to the same expressive mechanism as the domestic. In the domestic case, we expect the public act to inflame the conscience of one's fellow citizens *and oppressors* and to affect the public culture as well as the results of common deliberation. But in the international case, there is no constitutional order or institutions to affect. Rather, civil disobedience in the international arena *directly* changes the law: there are no legislators to elect or citizens to convince.

International law, contrary to domestic statutes, is created through three mechanisms: treaties, custom, and the opinions of international jurists. In other words, one of the prime

²²⁶ Goodin (2005), 245.

²²⁷ Like Goodin, I will set to the aside complications concerning the *opinio juris*. Customary law has two requirements: state practice and a subjective feeling that the state feels at least somewhat bound by the norm as law.

²²⁸ Unfortunately for Goodin, none of his examples actually illustrate all the features of international customary law-making through breach. After all, none of the actors readily accept sanctions for their illegalities.

drivers of what constitutes international law is simply the customary norms that are acted upon and accepted by the actors in the system. This means that if states stop acting in certain ways and begin acting in others, international law can be changed without any changes in 'statute.' In the international case, 'law-breakers' can sometimes be 'law-makers.' The civil disobedience imagined by Goodin thus operates by blatantly disrupting the usual operation of the prior principles and by attempting to convince other states to reject the customary norms that govern state behavior. Then, international actors can be in a position to institute new norms. The undermining of long held customs requires either a gradual wearing away or dramatic and deep break. Goodin's civil disobedient relies on the latter.

Yet, Goodin does not fully acknowledge how deeply this change in the logic of the disobedient action changes the normative constraints facing the civil disobedient. First, non-violence is no longer a constraint, as Goodin himself readily acknowledges. As international lawmaking is no longer communicative or an attempt at persuasion, so the civil disobedient need not act through the sense of justice of those whose entitlements are being rejected or violated. As a consequence, radical law-making in the international arena can be, and often is, accomplished through force.²²⁹ But equally importantly, the willingness to accept punishment is no longer necessary or even desirable in radical, customary law-making. Accepting punishment, in the case of changing customary law, seems to be actively counter-productive. After all, part of the norm one is trying to change is that a state, or some other actor, ought to be sanctioned for doing what the state is doing. It seems that violating a norm and arguing that one should *not* be punished is an even more dramatic and significant disruption of customary law than the easy acceptance of sanction. Further, accepting

²²⁹ As we shall see in the case of Nuremberg and Kosovo, as well as Goodin's first example concerning piracy (and perhaps more dramatically, Britain's campaign against the international slave trade).

sanction can confuse the communicative nature of the action to accept punishment in this particular case since the sanction is sometimes the only indicator we have that an important norm has been violated; some might simply see the norm being upheld rather than being undermined. Also, accepting sanction seems morally dubious if it means that citizens of the disobeying state are punished *rather than* the policymakers. It does not seem keeping in the spirit of *risking oneself* to further justice if a policymaker takes the risks and accepts the sanctions which will likely affect them only minimally and indirectly. Finally, it is unclear why the disobedience must *necessarily* be public and conscientious once we have given up the communicative logic of the domestic case. In the context of customary law, it can be useful to undermine the relevant norm *even if* you are not doing it for the right sorts of reasons as this opens up a space for a new norm to be developed and instituted at a latter time²³⁰.

What's more, the other mechanisms for changing international law require neither publicity nor conscientiousness: opinions of jurists and treaties can be changed through private or purely self-interested action. For example, a state can act for prudential reasons of statecraft and geopolitics and yet have that action *reinterpreted* by international jurists in a way more conducive to justice. Similarly, an actor can behave in a ways that are not really accessible, either because they are private or esoteric, to the general public, yet these actions can play an important role in how international jurists interpret other state actions and thereby affect the doctrines they endorse. To put it another way, disobedients in the international scene do not have a *demos* structured by institutions of public deliberation as their target or audience, hoping this will lead to change in the constitutional order or in positive law, so the constraints that apply in that context do not apply here.

²³⁰ This is especially true since international norms can later be *reinterpreted*. Breaches that were initially interpreted geopolitically can come to be understood as conscientious and vice versa.

So, the *internalist*, or constitutive, constraints on civil disobedience do not seem to apply in the international context. Or rather, 'law-making disobedience' in the international context can use nonviolence, publicity, willingness to accept punishment, and conscientiousness instrumentally, but they are not *necessary*. Allen Buchanan seems to recognize this and has presented an account of illegal law-making that is, essentially, fully instrumentalist in its reliance on a justificatory account that depends entirely on externalist justice-enhancement. He describes eight criteria for justified law-making through illegality; the first four describe features that make illegal law-making harder to justify and the second four describe the features that make it permissible:

Elements of the international system or the intervention that make illegal law-making harder to justify: the system being disrupted more closely instantiates the (1) rule of law, (2) substantive justice, (3) legitimacy. (4)The intervention violates important moral principles.

Elements of the law-making illegality that justify it: The intervention improves the system's (1) legitimacy (2) substantive justice or (3) adherence to superior moral principles. The greater the improvement, the easier the justification.²³¹

Since legitimacy is, for Buchanan, really a function of the system's adherence to substantive justice and the rule of law is only instrumentally important in maintaining the relevant just states of affairs, really all of these principles amount to the following: an intervention is justified when it improves the system in terms of justice over the long term. So, an international actor is justified in directly violating international law if doing so will reform the international system in ways that are justice-enhancing. For Buchanan, two unusual features of international law make it particularly susceptible to illegal law-making: the unequal and

²³¹ Buchanan (2010), 319

only partially effective nature of the international rule of law²³², and its basis on custom. The first undermines the reasons we generally have for respecting the rule of law even in the face of injustice. The second makes international law particularly susceptible to illegal law-making. Buchanan, essentially, argues for revolutionary action to overturn established norms in those cases where that action will result in a system of norms that more closely matches his account of substantive justice.

Buchanan and Goodin make two mistakes in their analysis. The first, which we have already discussed, is that they presume that at least some of the constitutive features of civil disobedience apply to illegal law-making (even Buchanan seems to think that publicity is required). The second, and more important, is that both Buchanan and Goodin focus on the *norms* that drive the behavior of the institutions of international law and less on the institutional structures that constitute the power dynamics that undergird international politics. And this is a consequence of their focus on the customary nature of international law: the illegal actions of the particular international actor change the relevant international *law*, it does not necessarily change who is adjudicating or enforcing it. In other words, the illegal law-making envisioned by Buchanan and Goodin is about changing the *principles* that regulate the behavior of the actors within a dominating system, but they are not aimed at changing the underlying distribution of power within that system. For example, Buchanan argues that a principle of humanitarian intervention that allowed the General Assembly to *bypass* a Security Council veto would be a significant improvement, potentially justifying illegal actions:

For example, a norm requiring that individual states or groups of states may intervene in domestic conflicts to protect human rights only when explicitly

²³² The United Nations Security Council (UNSC) holds that some states are fundamentally superior to others: permanent members of the council have a veto and everyone else does not.

authorized to do so by a supermajority vote in the UN General Assembly would provide a valuable constraint on Great Power abuses.²³³

Yet, this does not change the substantively multilateral structure of the United Nations and the corresponding relationship between *either* the General Assembly or Security Council authorization and the actual exercise of coercive power to engage in the intervention. The United Nations would not become more powerful agent or gain the authority to constrain bad actors simply through a change in its internal norms. Of course, Buchanan and Goodin may be correct that replacing a principle of Westphalian sovereignty with a principle that is more permissive of humanitarian intervention will lead, in the long run, to better protection of fundamental human rights, but it is not obvious how 'illegal law-making' can, by itself, change the dominating relationships that currently characterize international politics.

Revolution in International Politics

The foregoing analysis of Goodin and Buchanan does point to three features of international politics that will be important to my account of international revolution. First, a domestic revolutionary is attempting to *replace* or *change* an already existing constitutional order, whereas the international revolutionary is attempting to *create* a constitutional order where none exists; this is why the sources of international law are so different from that of the domestic²³⁴. Importantly, this means that international revolution will be multi-sided and complex in a way quite different domestic revolutions. In the domestic case, the revolutionary coalition may have diverse interest groups, but there tends to be a united understanding whereby these diverse elements oppose government forces for control over the institutions that regulate political life within a territory. Usually, revolutionaries do not

²³³ Buchanan (2010)

²³⁴ It is also why theories of international law often speak of *global constitutionalism* and global governance rather than a global constitution and a corresponding world state.

build completely from scratch and there are a set of recognizable boundaries to the territory, either in the minds of the citizens of the territory, international law, tradition, or all three. In other words, both revolutionaries and government forces, to a certain extent, agree over what is being fought over and that they are fighting each other.²³⁵ In the international case, these accepted reference points will be absent: international agents will be building new institutions from scratch while the citizens subject to these institutions will often lack a shared tradition or common identity. This makes international revolution a much more fraught and complicated undertaking, and it seems likely that it will only be possible under very select circumstances²³⁶. Second, and as a consequence of the first, international-revolutionary action *cannot* operate according to the logic of domestic civil disobedience; the needed institutions, shared understandings, and civil society simply do not exist. To put it in Rawlsian terms, a sense of justice concerns a willingness to be motivated to fairly distribute the burdens and advantages of social cooperation, but the international realm—at least for the moment—lacks a shared understanding that there is a global system of cooperation and that there are principles of justice that ought to regulate it. Thirdly, and finally, changes in international law are unlikely—in and of themselves—to ultimately resolve the problem of international domination. Accomplishing that goal will almost certainly require substantial changes in how coercive power is arranged and how political authority is structured. International revolutions, then, represent a 'leap into darkness' to an even greater experience than domestic revolutions.

²³⁵ Ethnic conflict and insurgencies are a complication as often they involve those who want to completely destroy the current order and build a new one with different members.

²³⁶ Blake (2012) aptly describes the ways in which the international is different from the domestic and the need for a fully understanding of how international politics in fact works for us to truly grasp questions of global justice. I think an understanding of these questions in political science will also be important when it comes to deploying effective and revolutionary interventions in international politics.

One consequence of these complications concerns how we think about the externalist conditions necessary for revolution. Recall, a justified revolution will be justice-enhancing and a necessary means to that enhancement. But in the case of domestic revolution, the revolution tends to succeed within a relatively short time (within a lifetime). Of course, long term political projects to reform a domestic political order may take decades and centuries ('the arc of history is long, but it bends towards justice'), but those political movements and projects can be differentiated from discrete moments of revolutionary activity. Thus, abolitionism took nearly a century to succeed in America, but it remains true that John Brown's revolution was a failure and that Lincoln's *quasi*-revolutionary actions during the American Civil War were successful.²³⁷ International revolutions, on the other hand, are much more likely to be long, drawn out affairs rather than comparatively short disruptions, for the reasons discussed above. The *creation* of institutions is likely to be piecemeal, graduated, and step by step; there is no capital city to seize, monarch to dethrone, or civil service to purge. Also, the development of globally oriented motivations and political allegiances will not occur quickly, just as the development of nationalist sentiments took generations of both elite and popular agitation before individuals citizens came to self-identify with the relevant group. So, unlike domestic revolutions, international revolutions will likely go beyond our individual lifetimes. As a consequence, we are genuinely taking a leap. Not only are we unsure, in an epistemic sense, how these institutions will turn out and how we will get there, but there is an important sense in which the ultimate result will be beyond our control and beyond the control of the groups that we act with to reform the

²³⁷ I say *quasi*-revolutionary because the legality of his actions was subject to reasonable disagreement and the relevant legal questions were not resolved until after the war. See Farber (2004).

system. Our actions may be retroactively justified, but they will only be so justified by the actions of those who come much later and after we are gone.

This looks like a serious problem. After all, how can the revolutionary be confident that the externalist conditions have been or will be met if any possible satisfaction of those conditions will require the work of generations? I think that, in the domestic context, this represents a decisive objection to many 'insurgencies' that use their revolutionary agenda as 'open-ended' excuse for warlordism/banditry, but I am less sure this applies with equal force in the international context. The difference lies in the nature of the illegitimate political order: the domestic order is one that *happens* to be dominating, the international order is one that is *necessarily* dominating. Constitutional orders must be treated as legitimate and only the extraordinary moral step of revolution can succeed in undermining that claim, but the international world is not a constitutional order at all. It is anarchy. As a result, there is no sovereign that can claim authority in the first place. The revolutionary act in the international context is twofold. First, the revolutionary who works to instill a new constitutional order is purporting, even in its nascent form, to create an institution or set of institutions that speak for and have authority over everyone (or more likely in the beginning, over an extended *demos* still being created). Second, when she does the first, the international revolutionary claims the right to set aside, ignore, and violate the sovereignty and internal workings of constitutional orders that generate non-dominating political relations amongst their citizenry. So, in one way, the international revolutionary is doing something even more radical than the domestic; the domestic revolutionary only wants to topple an illegitimate government, but the international revolutionary wants to topple governments that even she acknowledges are *internally* legitimate. The reason she may do this is the *necessity* of the external illegitimacy of each state and necessarily dominating nature of international politics.

Still, I believe we need to *tweak* the externalist conditions for revolution in order for them to apply to the somewhat different case of international politics. First, we need to alter, and make somewhat more permissive, the requirement that the result of revolutionary action be justice-enhancing²³⁸. Of course, it would be excellent if the revolutionary could avoid undermining the internal legitimacy of domestic orders until the very end and manage to create the relevant global institutions in one fell swoop so that every single step performed by the revolutionary increases overall justice, but this likely to be impossible and setting it as an externalist requirement would much too easy for recalcitrant nationalisms to maintain the dominating *status quo*. It seems possible that some revolutionary steps towards a non-dominating order will lead to temporary situations where the relevant principles of justice are less fully instantiated than they were before. This is likely to be true in the case of domestic revolutions too, as the initial fighting and chaos frequently leads to greater rights violations in the near term, but these moments are supposed to be short and completed by the time the revolution is over. But international revolutions might well require deeper, more fundamental and longer term undermining of the internally legitimate institutions of domestic political orders. So, it seems that the proposed revolutionary action should be as justice enhancing as possible (or injustice minimizing as the case may be) given the need to satisfy the second condition. So, of two equally significant contributions to the project of global non-domination, revolutionaries should select the course of action that undermines rightful relations to the least extent. And again, this relaxed requirement is rooted in and justified by the fact that these internally legitimate orders are themselves embedded in a

²³⁸ Of course, *in the long run*, international revolution needs to be justice-enhancing as its purpose is to create a non-dominating political order that makes possible rightful relations between all people. What is meant here is that not *every revolutionary step* need be individually justice-enhancing: it is possible that going backwards on one front is needed to make progress on others.

broader, necessarily dominating political order. Second, it will probably be necessary to relax the 'necessary means' condition since it will be almost impossible to coordinate across generations in the way that could guarantee that this or that particular revolutionary action will be the only way to produce the relevant kinds of institutional formation. Changes in the environment, political institutions, or the nature of various kinds of global problems or threats could alter the appropriateness or the necessity of a revolutionary action after the fact in a way that is unlikely to obtain during the course of a domestic revolution. The temporally extended nature of international revolutions and the need to coordinate with future actors suggests that the relevant instrumentalist condition should be more like the following: the revolutionary action must make a meaningful contribution to the creation of a non-dominating constitutional order that *can* be built upon by later revolutionary reformers.²³⁹ Later reformers may, if presented with new opportunities, ultimately refrain from taking advantage of these revolutionary reforms, but it seems accurate to say that as long as the revolutionary reform could potentially act as a *substantial step* that, when combined with others, could lead to a non-dominating order. The fundamental idea here is that revolutionary action can be justified if that action would play a key role when coordinated with future reformers. In other words, revolutionary action must represent an important *contribution* to the project of creating a non-dominating global order. So, we have relaxed the externalist conditions: justified revolutionary action need only be a substantial contribution to a coordinated set of steps that would achieve non-domination and it needs to be the most justice-enhancing option from among those available to the revolutionaries.

²³⁹ It should be noted here that this is *still* instrumentalist and retroactive in orientation. If one attempts an intervention that, at least potentially, could serve as an important step towards a world state but that attempt *fails* to achieve the relevant intervention, then one was not justified in one's revolutionary activity.

These 'tweaks' give rise to a serious worry. My account might make it *too easy* to justify violations of individual rights and disruption of rightful relations amongst citizens of internally legitimate states. Unlike domestic revolutionaries, international revolutionaries might do all that damage in exchange for no actual benefits in their lifetimes. A leap into darkness is one thing; a leap into darkness in the name of justice that does quite a bit of moral damage seems like something else entirely. The latter just looks perverse: revolution is a dangerous tactic and it seems irresponsible to make it so easy to justify. Does this not open up the possibility of some kind of grand, Napoleonic imperialism? A reforming crusade that readily tosses aside fundamental human rights in quixotic pursuit of a world state or its federalist equivalent?

I think there are three replies to this worry. The first two are predicated on the idea that the externalist requirements are a bit more demanding than they, at first, appear. In order to satisfy the need for a particular revolutionary action to represent a genuine contribution that can be built upon by future reformers, it would seem that the changes in the international system it aims at must be relatively stable over time. Yet, one of the things that recent political events in Iraq and Afghanistan seems to have shown us (or perhaps less charitably, reminded us of what we should have known) is that institutional reform imposed from above in ways that lack a domestic constituency are not likely to be stable. What's more, external coercion and pressure tends to create a 'rally around the flag' effect that ultimately undermines attempts at both domestic and international reform. Part of what needs to be created is a global political consciousness, but it is likely that the development of that sort of consciousness will ultimately be undermined by an excessive reliance on top-down coercive measures. And even if these actions are *initially* successful, coercive imposition can frequently create revanchist blowback that can have the overall effect of

undermining the forces of reform. As a consequence, imperialistic projects to build more powerful international institutions are likely to self-defeating. On relatively straightforward instrumentalist grounds, those who take the 'leap into darkness' should have a very strong presumption in favor of comparatively nonviolent and nonmilitary reforms. This is not to say that military power cannot or should not play a role in any international revolution, but it is the case that uses of it should be comparatively last resort. This is due to the greater stability of organic and grassroots reforms that are consistent with the constituencies of internally legitimate states: a reliance on state consent and delegation is a useful, yet clearly defeasible, presumption.

This presumption can be made yet stronger by appeal to other considerations besides stability. Military conquest can generate balancing coalitions among those nations that have no wish to be conquered. What's more revanchist blowback and resistance often tends to grow over time while military occupation and resources have a tendency to become more expensive and entrenched. As a consequence, there is a serious danger that military conquest will, over time, narrow and constrain the options of future reformers both by creating progressively stronger resistance and by progressively consuming greater resources. This can be problem *even if* the changes made possible by the military conquest or forcible reordering of the system are themselves fairly stable: stability does not imply fecundity when it comes to future reforms. In other words, reform strategies can create path dependent dynamics, and while this is not necessarily a bad thing, military conquest seems disproportionately likely to generate path dependencies that end up being cul-de-sacs. So, again, this creates a strong presumption against using tactics that *forcibly* disrupt rightful domestic relations even though the contractual, legal, or delegatory disruption of those

relations is also wrongful. The latter strategies are both more likely to be stable and are easier to build upon.

However, it will be the case that sometimes coercive action will be both necessary and justified in order to reshape the international order and that these actions will sometime be contrary to the claims of substantive justice. Now, I think the windows for that sort of action are likely to be quite small and infrequent. In fact, they are mostly likely to occur when the international system is in moments of particularly great flux. In this, I follow John Ikenberry in his work, *After Victory* (2001), where he argues that there are moments, especially those after decisive victories in hegemonic wars, where the international system can be more readily reshaped. Ikenberry describes how the United States used its dominant position after both world wars in order to create a new, constitutional order that was designed to guarantee the position of the United States in exchange for the US giving up some of its freedom of action. Without endorsing every particular of Ikenberry's argument, I want to suggest that there are particularly fertile moments for revolutionary activity that make possible justified and explicit violations of international law and revolutionary violence; for the sake of brevity, I will call these moments *revolutionary periods*.²⁴⁰ These revolutionary periods are specific windows where the general presumptions against more radical alterations of the system, for whatever reason, no longer apply and it is possible that even rightful relations may be broken up and reconceived. Generally speaking, Ikenberry argues²⁴¹ that

²⁴⁰ There are certainly domestic analogues to these, where the constitutional order is especially open to extensive reform: economic depression, civil war, and substantial elite and popular cleavages orthogonal to traditional parties (such as the cleavages concerning segregation during the Civil Rights Era). According to Ikenberry, there are two significant variables for when a revolutionary period will be especially fertile for institution building: the level of institutional agreement among the international actors and the relative strength of the hegemon.

²⁴¹ Ikenberry (2001), 72-79.

these *revolutionary* periods are more fertile when there is a *greater power disparity* between the hegemon and the rest of the actors of the system and when there is institutional agreement amongst the actors. He thinks these trends will be *especially* encouraged when the institutional agreement is upon democratic, domestic institutions.

One constraint on international revolution is that revolutionary periods are relatively infrequent and short. In other words, the levers of international, institutional reform are either so fragile (international law) or so dangerous (hegemonic conflict) that the possibility for genuine, revolutionary steps are comparatively rare. However, even if we find ourselves in a revolutionary period, it is important to see that there are *internalist* constraints that apply with no less force to the international revolutionary as the domestic. Recall, the revolutionary is subject to internalist constraints in virtue of her need to be appropriately *representative* of the constitutional order they hope to create or replace. So, the international revolutionary must act accordingly to publicly promulgated principles that characterize the global order they are trying to produce. Second, the revolutionary coalition²⁴² must be appropriately open, both in terms of its membership and to dissenting views, and can only exclude members in light of their unwillingness to participate in the revolution and not as a result of arbitrary factors. Finally, the political operation of the revolutionary coalition internally must be consistent with the constitutional order they wish to create externally. These internalist constraints remain in place even, and especially during revolutionary periods and play a large role in preventing international revolution from simply being a moral free-for-all.

So, the international revolutionary must satisfy the following conditions in order to be morally justified. First, the eventual institutional end state must be one that resolves the

²⁴² One feature of international revolution is that revolutionary coalition is likely to be much more diverse and may themselves lack robust shared institutions.

problem of international domination. Second, her individual action must be a genuine contribution and stepping stone for future reforms for achieving that end state. As a consequence, the international revolutionary should refrain from using methods of coercive imposition outside of revolutionary periods. But even within revolutionary periods, the international revolutionary should make sure that their actions are justified according to public principles and that their coalitions—in terms of their internal politics, membership, and openness to dissent—must match the kind of constitutional order they wish to install. Now I would to look at a couple of case studies.

Nuremberg: A Case of Justified Revolutionary Activity

The Nuremberg Trial of the Major War Criminals (or the International Military Tribunal, henceforth the IMT), along with the lesser tribunals, represents a significant breaking point in international politics²⁴³. The *legal* basis for the IMT is that Allied Control Council was given sovereign authority over Germany as part of the surrender agreement (a surrender that occurred only once much of Germany had become occupied by several million Allied troops and Germany's ability to resist had essentially evaporated). In the IMT, 23 of the most important surviving Nazi officials were prosecuted for some or all of the following four crimes: waging aggressive war, conspiracy to commit the prior, war crimes, and crimes against humanity. The trials contained many due process safeguards, not every member tried was indicted for all four counts, and defendants were found not guilty in virtue of the defenses they mounted. On the other hand, there were no appeals, defense counsel was not allowed to play a role in judge selection, judges were not accountable to the German people or appointed by their representatives, and the crimes for which individuals were

²⁴³ Discussions of the origin, direction, outcome, and influence of Nuremberg in international law can be found in Buchanan (2010, especially 305 and 326n8), Powers (2002, especially Chapters 2-4), and Ignatieff (2003).

prosecuted were, at least in some cases, *ex post* crimes or were only crimes on the basis of treaties that Germany did not sign. In some cases, Germans were convicted of crimes for performing actions that the Allies themselves did, yet the IMT explicitly prohibited the use of 'tu quoque' defenses.

There are two things to note. World politics at the time of the IMT represents a clear case of a revolutionary period. The United States was, in 1945, the preponderant military and industrial power and there was a clear sense that the interwar system had failed. What's more, there was considerable institutional agreement among three of the four major powers that ran the tribunal. The late war and postwar period was one characterized by actors both having the power and political will to make significant changes. It is unsurprising that, in the context of global conflict, significant *institutional* changes to international politics were possible. Second, it should be clear that, on my view, the imposition of the IMT and the execution and imprisonment of most of the surviving members of the Nazi high command is an obvious case of international domination. Of course, it is certainly true that the Nazi high command ordered atrocities that shock the conscience and that they *deserved* to be punished, but this does not mean that the *Allies* had the relevant authority to do so. Those Germans who complained that the IMT and the subsequent tribunals were 'victor's justice' were accurately picking out an important normative element of the Allied action. The legal order created at Nuremberg was not importantly subject to German contestation and the legal basis for that order was predicated on the coerced consent of a dictated peace under military occupation. There was no real sense in which the defendants in particular or the German people in general exercised any kind of control or could demand legal justification from the Allies. In fact, many in the Allied camp argued for the summary execution of the Nazi high command and saw little difference, morally speaking, between the possible

policies²⁴⁴. Finally, it is true that the crimes and indictments themselves could, in many cases, be reasonably characterized as *ex post*. In fact, conspiracy is not crime even today in many European jurisdictions, yet many Nazi officials were indicted and convicted for precisely that.

What the critics of the IMT fail to see, is that the IMT was an act of revolutionary *law-making* despite its illegality. And while it is true that the IMT is a case of international domination, *refusing* to punish the Nazis does not change the underlying dynamic of domination between the Allies and the surrendered Germany: it may change the *character* of the domination, but the arbitrary, superior power of the Allies was ineliminable. So, the Allies were presented with a *moral tragedy*: they dominated no matter what they did, so they had no little option but to decide upon the nature of their wrongdoing. And in *that* context, the Allies decided to engage in, what I would interpret, as an act of revolution. The Allies *could* have adopted a fully nihilistic viewpoint and subjected their judgments about who was to be punished and how much entirely to the bar of their own geopolitical interests²⁴⁵. Or they could have adopted a right-forfeiture view and simply executed the guilty. What is interesting about the IMT is not *simply* that the Nazi high command was punished, but the *juridical nature* of that punishment even in the context of an inchoate (essentially non-existent) legal order.

²⁴⁴ On the right forfeiture view, it isn't clear that there *is* much of the difference.

²⁴⁵ It is undeniable that geopolitical considerations played some role in the trials. Some were not prosecuted because they would be useful for the rebuilding of Germany or because they might be useful in the burgeoning rivalry between the US and the USSR (e.g., Werner von Braun). What's more, the de-Nazification of Germany was not as extensive as it could have been because the trials were deeply unpopular in Germany. Despite this, it seems clear that geopolitical considerations were not the only ones at play and that the prosecutions were much more extensive than those considerations would indicate.

That juridical nature, I would suggest, plays an important role in its justification as revolutionary act.²⁴⁶

So, was the IMT justified? I would argue that it was. Or more accurately, it has *come* to be justified. Or perhaps even more distantly, its prospects for justification look quite good. Let's first consider the externalist conditions. It seems plausible that the IMT played a major role in leading to major developments in international law, human rights norms, and international adjudicative institutions. In each of those areas, future reforms are hard to imagine without the public commitment that the IMT represents: the Nuremberg Principles served as one of the foundations for international humanitarian law, while other reforms like the Genocide Treaty and the International Criminal Court were based on the IMT. One should not mistake my claim, made throughout this dissertation, that international humanitarian law and the ICC are *insufficient* to resolve the problem of international domination for the claim that they do not represent steps in the *right direction*. What's more, while this is more speculative, holding Germans accountable for the crimes committed during the Second World War probably played some role in changing the public culture of Germany, which was itself key to the ultimate success (if we might call it a success) of the EU project. So, insofar as the IMT contributes to that success, we have better reason to think the externalist conditions have been satisfied.

The Allied satisfaction of the internalist conditions is a little bit more problematic, but it appears adequate. First, the legal principles and criminal prosecutions that the Allies used as the basis of their tribunals were publicly promulgated at several points, most prominently via the London Charter. The Allies were at least somewhat willing to bring in

²⁴⁶ It is precisely this feature where the International Military Tribunal-Far East, where Japanese war criminals were prosecuted, was substantially inferior. And this played a role in the IMT-FE's lesser influence.

representatives of affected parties, with the move towards tribunals being initiated by the Polish government in exile and representatives of the nine occupied countries all argued that the primary aim of the war would be 'punishment through the channel of organized justice of those guilty and responsible for their these crimes...' *Some* of the parties were open to dissent in virtue of their internal structure, but the revolutionary coalition was open to dissent as a result of their consensus oriented decision-making structures, with Churchill playing an especially important role in ensuring that trials occurred. Finally, the due process and publicity of the trials served as a model of the sort of constitutional order that the revolutionary coalition was trying to create.²⁴⁷ It is true that all of these elements only represented the *self-constraint* of the Allied powers, but in the revolutionary context only self-constraint is really possible. And if the self-constraint is of the appropriate kind, then the coalition can *at least potentially* justify its actions. It offers a possibly permissible way out of a moral tragedy. The juridical nature of the revolutionary act itself also helps compensate for weaknesses within the revolutionary coalition itself in terms of the internalist conditions: the Soviet Union was not open to dissent, but its participation in a tribunal with comparatively robust due process made that *particular* revolutionary action much more open than the actor.

Just as importantly, it also offers a way of criticizing those revolutionary actions. We might think that the Allies *adequately* satisfied those internalist conditions, but the Allied coalition fell short in important ways. The IMT could have benefited from more robust due process protections and from German representation. For example, the IMT would have been more just if the defense counsel was able to play a role in the selection process and the symbolic effect would have been greater if Germans, perhaps members of whatever

²⁴⁷ With the notable exception of Stalin and the Soviet Union.

resistance groups that still existed, had been allowed to participate as judges²⁴⁸. The Allies were correct to avoid the problems with prosecuting war crimes after the First World War, where war criminals were turned over for trial in Germany and were swiftly released. However, creating a situation where there could be some modicum of German input into the process over and above the due process protections and defense counsel would have improved the legitimacy of the revolutionary act by aligning their revolutionary act more closely with the constitutional order they were acting to produce. What's more, final decisions about how the trials would be conducted were ultimately made at conferences where only "The Big Four" of Britain, France, the Soviet Union, and the United States had a voice, even though other powers were able to add their input at other points in the process. Setting up some kind of temporary deliberative body amongst the Allied and occupied powers would likely have improved the way the courts were structured (it would have given the Poles an opportunity to dissent from the Soviet attempt to charge Germans for the Katyn massacre, for example) and would have generated a more cosmopolitan global order. Finally, the military tribunals for the Far East lacked many of the elements that made the IMT even minimally acceptable: the trials were characterized by due process protections that were leaner, by less public deliberation, by geopolitical considerations to a greater extent, and by deeper legal disagreements.²⁴⁹ So, my account allows us to criticize these revolutionary

²⁴⁸ But there are considerable political difficulties with this approach. First, the IMT was quite unpopular in Germany and it is less than clear that impartial judges with the relevant authority and prestige would have been unavailable. Furthermore, participation by Germans as prosecutors or as judges might have tainted them as 'collaborators' with 'hostile occupying powers.'

²⁴⁹ The reasons for this are complex: racism, European imperialism, the relatively fewer number of Great Powers involved and correspondingly less competition, and the less spectacular and public nature of Japanese atrocities all certainly played a role.

actions as well as justify them. Now, I wish to turn to a more controversial case: the NATO intervention in Kosovo.

*Kosovo*²⁵⁰

NATO's military intervention to stop what they judged to be a humanitarian catastrophe in the Kosovo region of the Serbian dominated Federal Republic of Yugoslavia (FRY) has been widely, though not universally, judged to be illegal. Primarily due to a Russian veto, the UN Security Council refused to authorize NATO's military action to enforce previous UNSC resolutions concerning the breakdown of law and order, the growing threat of ethnic cleansing, and the increase in both internal and external displaced persons. What's more, it was not clear that the UNSC was mandated under the UN Charter to authorize military interventions to handle internal state disputes. In any case, the consensus view at the time was that the NATO intervention violated international law. It also, quite clearly, represented the domination of Serbian interests by NATO. NATO possessed vastly superior power and NATO's decision to forego UNSC authorization voided the one, deeply inadequate, arena by which Serbia could contest the NATO decision. Of course, the FRY was also clearly dominating the ethnic Albanians that made up a large majority of the Kosovo region as a consequence of the Serbian control of the state, the military, and the media. Completely inadequate rights protections of ethnic Albanians characterized FRY's constitutional order. It should also be noted that the period *after* the Cold War, especially in the 90s, appears to represent a revolutionary period: American military predominance was pronounced and there has come to be quite extensive institutional agreement, particularly in Europe.

²⁵⁰ Pond (2006 and 2008) provide a good background on the Balkans, the Kosovo War, and subsequent international missions.

Part of the argument in favor of NATO's intervention, as described by Buchanan, is that it would represent an illegal law-making that would undermine the customary norms concerning state sovereignty and the appropriateness of foreign intervention. These theories argued that the NATO intervention was supposed to undermine the general norm that states may behave as they please as long as they do not act aggressively against other states and begin to form a more interventionist norm that predicated the state's right against intervention on its ability and will to protect the fundamental human rights of its citizenry. Furthermore, the NATO intervention also undermined the norm that the use of military force in order to stop significant rights violations requires UNSC authorization. According to this view, the problem with the UNSC requirement is that it involves a fundamentally inegalitarian political process that ultimately introduces illegitimate geopolitical considerations: all and only the five permanent members of the Security Council have a veto when it comes to UNSC authorizations and resolutions. Generally, the NATO intervention attempted to replace a customary norm that emphasized the status of states and, especially, the Great Powers with a norm that emphasized the fundamental human rights of individual people. So, on an instrumentalist view, this illegal law-making has much going for it; it seems plausible that the NATO intervention could be justified despite its illegality.

Buchanan, however, rejects this view of the Kosovo intervention. He argues the NATO action would not substantially improve the international system. In particular, Buchanan emphasizes that this was a *NATO* intervention. The *real* norm established by the Kosovo war was that *regional, collective security* organizations could intervene independently of UNSC authorization if they deemed that a humanitarian emergency required it. Buchanan says:

So the question remains: would a new customary norm permitting regional military organizations, or those that qualified as such under Article 52,

be a moral improvement in the international legal system? The answer to this question is almost certainly negative. A military alliance such as NATO is not the sort of entity that would be a plausible candidate for having a right under international law to intervene without UN authorization.²⁵¹

This is a deeply problematic customary norm to try to imbed into international politics.

Buchanan imagines the following hypothetical in order to illustrate the worry:

The chief difficulty is that such a norm would be too liable to abuse. To appreciate this fact, suppose that China and Pakistan formed a regional security alliance than appealed to the new customary law whose creation NATO's intervention was supposed to initiate to justify intervening in Kashmir to stop Hindus from violating Muslims' rights in the part of the region controlled by India.²⁵²

The norm that regional, collective security organizations could intervene without the relevant kind of global authorization is susceptible to abuse and geopolitical exploitation. That is, it is easy to imagine the humanitarian justification becoming a fig leaf, especially when there is no need to present one's views before the United Nations. It will also encourage large-scale Great Power conflicts because military action will not require the consent of the Great Powers as represented by permanent membership on the UNSC. In other words, Buchanan argues that the norm that the NATO intervention is attempting to institute is not a sufficiently large improvement (if it is an improvement at all) that would justify illegal action. As a consequence, he concludes that the Kosovo intervention is not a justified act of illegal law-making.

I will argue that Buchanan is incorrect, and that the Kosovo intervention has much to recommend it as an act of international revolution. Why the difference? First, Buchanan's objection to the Kosovo intervention has serious problems: it is predicated on a quite particular understanding of the norm being generated by the actions in Kosovo, yet what

²⁵¹ Buchanan (2010), 324

²⁵² Buchanan (2010), 324

constitutes the relevant norm being established by the illegal lawmaker is vague, nonspecific, and subject to the interpretation of other actors. In other words, the content of the norm the illegal lawmaker creates with their illegal action is based upon the equilibrium amongst the actors in the system that results after the disruption. But very few, if any, would-be lawmakers are capable of unilaterally imposing an interpretation on other actors. This has several consequences. It means that the illegal lawmaker's justification is, on Buchanan's view, ultimately outside of the lawmaker's control; it depends both on whether the other actors accept the customary change and *what* change they take to be occurring. It also means that the content of customary norm being made is *radically underdetermined* at the time of the law-breaking. When NATO acts in Kosovo, what constitutes the norm? Is it the norm that is *intended* by NATO, or the actual custom that follows from the lawmaking disruption? Buchanan is silent, but both interpretations have their problems. Intended customary norms don't *actually* improve the international system, and how does one characterize the intended norm absent public mechanisms of deliberation and adjudication? Are Tony Blair's public statements sufficient? But if Buchanan wants to rely on the *actual* customary norm that results, then we simply don't know what that is in 1999 and it is ultimately dependent on the action of other members in the system.

Yet, this kind of under-determinacy does not sit well with Buchanan's view or his objection. His objection depends on the norm authorizing collective security organizations *in general* to engage in humanitarian interventions of a particular kind. So, the norm NATO is developing would *include* a Chinese-Pakistan collective security as an appropriate intervener arrangement as well as the current situation in Kashmir as an appropriate humanitarian crisis. But is this true? Perhaps the relevant norm is that only collective security organizations composed of democracies can engage in humanitarian intervention, which would exclude the

China-Pakistan alliance from acting. Or perhaps the norm includes the rider that none of the interveners should be a party to the territorial, geopolitical, or religious dispute with the intervened upon country, which would exclude both China and Pakistan from the intervening coalition. Or perhaps the norm is that humanitarian intervention should only occur in order to enforce prior UNSC resolutions and where there is *majority* UNSC support for action. Or *supermajority* support. None of which would justify the hypothetical Chinese-Pakistani intervention.²⁵³ The point is that Buchanan's objection to the intervention in Kosovo is predicated on *specific* claims about the customary norm being developed by that illegal action: the NATO intervention is purporting (or causally affecting) a particular norm to be instantiated. Yet, there are other norms that *both* appear consistent with the Kosovo intervention and are not subject to Buchanan's objections. It is quite unclear what the appropriate characterization of the norm is supposed to be. Lastly, Buchanan's view seems to generate relatively perverse incentives for bad actors. For example, if the justification of Kosovo depends on the nature of the improvement of the relevant customary norms, then a state like Russia can undermine the justification of a humanitarian intervention by *either* their later bad acts or their avowed commitment to abuse the precedent should the illegal lawmakers so act. So, if the illegal lawmakers could reasonably foresee²⁵⁴ that bad actors will use the norm as a pretext, then this can have the affect of making what would normally be good behavior unjustified. So, a NATO force considering intervention in, say, Bosnia-Herzegovina might have to stay their hand because they know that Russia will abuse the precedent in the context of Georgia. This seems like an odd result. Of course, anybody can

²⁵³ UNSC resolution 1244 authorized NATO KFOR after the war ended, and a Russian attempt to condemn the bombings in the UNSC was defeated 12-3.

²⁵⁴ Similar points apply to actual equilibrium analysis: the behavior of bad actors changes the actual equilibrium as well as the equilibria the lawmakers could foresee.

abuse a precedent, and we might need to take that into account when acting, but the oddness is that Russia is not pretextually *abusing* a norm but rather *defining* the norm through its actions. And in particular, defining the norm in a way that can undermine *conscientious* applications of a better legal order.

What this shows, I should think, is that focusing revolutionary action on the *content* of international law is a mistake as long as we operate in our current institutional context. Rather than focus our revolutionary attention on law-making in the relatively narrow sense of changing what international law says, revolutionary activity should concentrate on making the *mechanisms* of law-making, law-judging, and law-enforcing non-dominating. So, I'd like to now turn to my view and evaluate the Kosovo intervention.

The revolutionary coalition seems to score fairly well on the internalist measures and does so in ways that productively respond to Buchanan's worries about less virtuous coalitions. First, the internal constituents of the revolutionary coalition (the NATO membership) consists mostly of what are now more or less internally legitimate states that are comparatively open to dissent both domestically and internationally. For example, NATO airstrikes were, at least formally, subject to review by the International Criminal Tribunal-Yugoslavia. In other words, the components of the revolutionary coalition are at least somewhat virtuous in the epistemic sense. Second, NATO itself is consensus based and relatively open to dissent from its member nations and member nations were able to register their dissent by opting out of the military campaign. Third, NATO was publicly committed to enforcing UNSCR 1199, which directed both Kosovo and Serbian forces to ceasefire. Fourth, the reduction of geopolitical tensions as a result of the collapse of the Soviet Union motivated a change in NATO's mission towards a broader mandate of maintaining a Europe-wide collective security umbrella. As a consequence, NATO membership had just

begun to expand. This means that there was both a *formal* possibility within the NATO charter of any European state joining NATO, but that this formal possibility was in the process of becoming more substantial at the time of the NATO intervention. Poland, the Czech Republic, and Hungary became NATO members at essentially the same time as the intervention. These new members represent the most significant expansion of NATO since the inclusion of West Germany. Even more groundbreaking, the new NATO countries in 1999 were former Warsaw Pact members, the very countries NATO was initially created to fight. This means that NATO was taking steps to adopt a broader European security mandate rather than simply an alliance of powers to contain the Soviet Union. Its membership was becoming more open, an important element of a justified revolutionary coalition.

Initially, it seems less plausible that the NATO intervention satisfies the externalist conditions. After all, *merely* changing the norms of status quo international institutions does not, by itself, bring us closer to a non-dominating constitutional order. Does the NATO intervention change or contribute to a change of that institutional structure? I argue that, appearances to the contrary, the NATO intervention *did* contribute to important changes in the structure of international politics. The descriptive accounts of the NATO intervention focus on two motivations: an humanitarian impulse, especially in the face of the failure to act to stop the ethnic cleansing in Bosnia, and a desire to demonstrate 'credibility' in NATO's new conceptualization of its European mandate.²⁵⁵ One might think that the latter motivation is illegitimate, representing an attempt by the United States and Great Britain to extend or maintain hegemony over the European continent. However, I think it is a mistake to conceive of this need to establish credibility as the institution undergirding collective

²⁵⁵ See Roberts (2009)

security within Europe in imperialist terms. Part of what NATO was accomplishing with its intervention in Kosovo was establishing a kind of political authority concerning a particular subset of political questions in the European context. This act was revolutionary, ignoring international law and disrupting the constitutional order of the FRY in the name of claiming a new right to make political determinations concerning particular security issues. This is especially true given the fact that NATO was coming to militarily intervene in a context that moved beyond its initial purpose as a defensive alliance. NATO does not, by itself, have the internal political structure needed to avoid domination even if it can successfully claim the relevant authority over security questions in virtue of its substantively multilateral structure. Yet, the notion that this European-wide collective security institution could make and enforce determinations concerning the domestic policy of another state represents an important change in its institutional structure and in the distribution of political power within Europe.

Of course, this might be only a somewhat marginal change, involving a *reorientation* of existing institutions that are substantively multilateral but not fully adequate for the reasons discussed in Chapter Four. However, the key feature of the externalist condition is that it can be satisfied by the way a revolutionary action can be built upon by later reformers. NATO intervention opened up an opportunity for the European Union to develop an organic, executive capacity that is not reducible to the power and authority of particular member states. The legislative and judicial institutions of the European Union had already claimed the authority to legislate European-wide statutes and to issue binding judicial directives to domestic courts and executives. Yet, the European Union lacked an inherent executive capability, relying on the coercive power of member states for the actual enforcement of its

directives. The European Union has lacked, at the general level, the ability to tax and to enforce its pronouncements through equivalent versions of the IRS, Marshal Service, or FBI.

The European Union has used the opportunity presented by the Kosovo intervention to develop that inherent, organic executive capacity. Starting in 2006, the EU began planning a mission that would be tasked with building, advising, and enforcing the rule of law in Kosovo. This mission, called the European Union Rule of Law Mission in Kosovo (EULEX²⁵⁶), consists of roughly 2,000 individuals who have served a panoply of coercive, legal and political functions: judges, prosecutors, defense attorneys, border control officers, corrections officers, and law enforcement officers. The primary purpose of EULEX is to help the newly independent Republic of Kosovo develop its own domestic rule of law and attendant institutional capabilities, but EULEX has—when it deems it needs to—exercised those capabilities itself as a 'police executive,' sometimes beyond what might have been considered its initial mandate²⁵⁷. EULEX is approved by the European Council, directed by the High Commissioner of the Union for Foreign Policy and Security Policy, and supported by common, EU-wide command and control resources via the Common Foreign and Security Policy and the European Defense Agency. EULEX has a problematic legal relationship with both the Kosovo government and the United Nations Mission in Kosovo (UNMIKS), but works closely with those groups as well as NATO's Kosovo force (KFOR)

²⁵⁶ Pond (2008), Tansey and Zaum (2009) and de Wet (2009) provide the relevant details concerning the EULEX mission and capacities. See also <http://www.eulex-kosovo.eu/en/info/whatisEulex.php>. On limitations and worries, see Greicevci (2011).

²⁵⁷ The legal status of EULEX is very complex, and I don't wish to litigate these issues. But the gist seems to be the following: EULEX is in a legal paradox. EULEX's status as legitimate under international law is predicated on the UNSCR 1244 and its subordination for the UNMIKS. Yet, the Kosovo Declaration of Independence appears to vitiate the authority of UNSCR 1244 and the UNMIKS, but the Kosovo Constitution endorses EULEX as an independent international participant in Kosovo's development. As a consequence, EULEX's presence can *either* be made consistent with international law or Kosovo's now recognized sovereignty. See De Wet (2009), Visoka and Bolton (2011) and Muharremi (2010).

to develop domestic justice capacities and institutions for the Republic of Kosovo. Generally speaking, KFOR is tasked with the protection of Kosovo from external pressure potentially exerted by the Republic of Serbia while EULEX is tasked with provisioning domestic rule of law, but these mandates frequently overlap, particularly in the disputed northern border region that possesses a substantial ethnic Serb population.

EULEX, I suggest, represents a substantial development from previous missions created by the European Council. First, EULEX is, by far, the largest and most ambitious mission undertaken by the EU as most such missions focus on peace-keeping, monitoring, or advising duties. EULEX represents a substantial effort to fundamentally reform, remake, and create from scratch institutions in an impoverished and war-torn area and unlike peace-keeping and monitoring missions, EULEX possesses significant police powers, especially when it comes to ethnic, serious, or organized crime. Second, the long-term goal of EULEX is to prepare Kosovo for EU membership; unlike essentially all other missions, the explicit point of the EU intervention is to prepare the polity and its citizens to join their organization. Finally, the EULEX represents the creation of a new institutional structure with coercive powers. The primary constitutive elements of the other large-scale, coercive EU missions (which usually with a humanitarian or peace-keeping focus) are the military units of the participant-nations. In other words, EU missions with significant coercive power usually had some command and control or representative body married *on top of* military units with their own command structures and loyalties: the EU contribution to institutional capacities on top of those military units was and is comparatively minimal. In some cases, there is essentially no difference in the actual troops and their command relations: some EU missions are simply a renamed NATO force with different stationery. In the case of EULEX, the 'police executives' are constituted by their participation in the EULEX mission:

the coercive institutions that make up EULEX are, essentially, *built from scratch* with the direct command authority of the head of the mission and the high commissioner. Of course, there is some sense in which individual members of the mission are accountable to their member nations, but it is not nearly so robust as an active duty member of the armed forces acting under and receiving orders from their own commanders. So, unlike previous missions that essentially relied on the coercive capabilities of member states, EULEX involves the EU developing its own capabilities and possessing much more direct authority over them.²⁵⁸

In other words, EULEX represents an unprecedented combination of size, power, political authority, and directness when compared to other EU missions. Furthermore, this power is deployed within a territory and a polity that is a potential and future member of the EU that has been carved out a state as a result of a *European-wide* institution intervening directly in the domestic politics of another state. This can be productively compared to the United States in the first half of 19th century, when the vast majority of the federal government's coercive power was used in the administration of territories that had the potential to become full-fledged members of the polity. What's more, we can see similarities in how the Union army was created during the American Civil War: only states raised regiments of soldiers under the orders of the Lincoln, but these regiments were then placed under the direct administration and command of the federal government, which generated significant common resources for logistical support as well as command and control under the pressures of the war. In the EU context, the European Council can claim certain resources from the member states in order to develop organic and new coercive capacities in certain contexts that are under the authority of the higher level of governance. Of course,

²⁵⁸ As a potential next step, there are plans to develop a standing EU rapid reaction force of 60,000 soldiers, sustainable for one year, that can be directed by the European Council and the high commissioner. This would decrease EU dependence on NATO for high intensity kinetic operations.

there are important disanalogies that prevent the European Union from being a truly unified coercive actor. The EU operates by consensus on foreign policy matters and only fairly creative uses of abstentions and significant changes in the relationship between UNMIKS and EULEX made the mission possible in light of serious concerns²⁵⁹ about the legality of the mission. Given the *de facto* veto that member states have over EU policy, the possibility that the EU might, as in the Civil War, use its newfound coercive capacities in order to enforce a European wide policy against a member state or EU citizens who profoundly dissents (as occurred, for example during the Whiskey Rebellion or the American Civil War) is, at least for the moment, remote. But this just to say that the revolutionary actions that created a more powerful centralized executive in the American case will take longer and occur through a more circuitous route in the European, which is unsurprising given the long history of member sovereignty and the comparatively larger political, cultural, and linguistic differences that constrain the latter project of state-building.

This is relevant to our evaluation of NATO's intervention in Kosovo because it presents an additional path for the reform of international politics. It does this in two ways. First, the success of EULEX would have the effect of increasing the number of people who live in *internally* legitimate states where co-citizens can have non-dominating relations. And we might think that those sort of improvements contribute, at least marginally, to a more just system of international politics. But the second pathway is also important: the Kosovo intervention made possible the development of EULEX, which represents a substantial *jump* in the coercive capacity of the EU and *therefore* its ability to make non-dominating relations between EU member nations and citizens possible. What's more, the precedent set by NATO where they intervened in internal politics might be combined with the new

²⁵⁹ See Muharremi (2010), 366.

enforcement capacities to the EU to create a European state. These developments will usually be partial and gradual, but it seems clear that Kosovo presented an opportunity for EU policymakers to further develop the external, foreign policy capacities of the EU; an opportunity they seized to concretize and create institutions that many²⁶⁰ had been calling for. But without the NATO action and without the willingness of EU actors to operate in a legal 'grey zone', these *institutional* improvements would not have been possible.

This, as well as the weakness of Buchanan's negative case, explains why I judge the Kosovo intervention to have ultimately been a justified act of international revolution, regardless of whether it was an act of legitimate yet illegal law-making. NATO forces satisfy the internalist requirements and the externalist conditions are met by NATO's contribution to both the attempts to create a non-dominating domestic order in Kosovo (and perhaps Serbia) and the contribution to the development of a pan-European non-dominating order through the development of a EU that possesses organic and robust enforcement capacities. Of course, the EU action to create and then deploy EULEX is *itself* another action of international revolution which, I would argue, needs to be (and is) justified.²⁶¹ The NATO intervention in Kosovo was both made possible by, and itself made possible, a revolutionary period. Both NATO and the EU took advantage of that to improve the international system in a way that looks likely to retroactively justify their actions.

Conclusion

²⁶⁰ Both the United Kingdom and France jointly called for the development of greater EU military resources. See Greicevci (2011), 284

²⁶¹ My account would also justify EULEX as a revolutionary action as well as the initial Kosovo intervention. The EU's mission involves a more representative body (since Kosovo is being set up for membership), operates publicly and is working to establish rule of law norms which it endorses. And for reasons made clear above, it satisfies externalist conditions by contributing to the project of improving EU executive capabilities.

International politics is a moral tragedy. While our actions to reform the system are initially wrongful, they can be retroactively justified if they meet certain internalist and externalist conditions. The former are predicated on the fundamentally *representative* nature of revolutionary activity while the latter are based on the fact that one needs to actually *succeed* in order actually achieve retroactive justification. This means that we can take actions in the international arena that violate international law and even undermine the sovereignty or internal legitimacy of other states if those conditions are satisfied. Yet, contrary to domestic revolutions, international revolutions focuses to a much greater extent on *institutional creation*. As a consequence, international revolutions are longer term, piecemeal, and gradual affairs that require the coordinated efforts across many polities and generations, efforts where we will never know whether they come to fruition. International reform requires a leap into darkness.

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