

3-4-2016

# Political Authority: Its Collectivist Structure and Juridical Ground

Follow this and additional works at: [http://digitalcommons.osgoode.yorku.ca/  
transnationalism\\_series](http://digitalcommons.osgoode.yorku.ca/transnationalism_series)

---

## Recommended Citation

"Political Authority: Its Collectivist Structure and Juridical Ground" (2016). *Legal Philosophy between State and Transnationalism Seminar Series*. 42.

[http://digitalcommons.osgoode.yorku.ca/transnationalism\\_series/42](http://digitalcommons.osgoode.yorku.ca/transnationalism_series/42)

This Article is brought to you for free and open access by the Seminars at Osgoode Digital Commons. It has been accepted for inclusion in Legal Philosophy between State and Transnationalism Seminar Series by an authorized administrator of Osgoode Digital Commons.

## Political Authority: Its Collectivist Structure and Juridical Ground

By Stefan Sciaraffa (McMaster University)

Many contemporary political philosophers distinguish between an institution's political authority and its political legitimacy. Per this distinction, an institution has *political authority* only if its public is bound by a political obligation to follow the institution's directives, where this obligation entails that the institution's directives are substantial moral content-independent reasons for the members of its public. By contrast, an institution's *political legitimacy* is its moral liberty (1) to prescribe duties to its public and (2) to apply sanctions and incentives to secure its public's compliance with those prescriptions.<sup>1</sup>

Among those who accept the just described framework, there are two main camps. The first queries the conditions in which an institution would enjoy political authority and political legitimacy as described above. A second camp includes Joseph Raz and the many theorists he has influenced. This camp pays little heed to the question of political legitimacy, focusing their inquiries instead on the conditions in which an institution would have political

---

<sup>1</sup> For recent articulations of this distinction (allowing for some differences in terminology), see Christopher Wellman (2001) "Toward a Liberal Theory of Political Obligation", *Ethics* 111: 735-59, 741 (see his fn. 8 for references to yet earlier articulations), Allen Buchanan (2002) "Political Legitimacy and Democracy", *Ethics* 112:689-719, 689-90; David Estlund (2008) *Democratic Authority*, Princeton: Princeton University Press, 41, and; Michael Huemer (2013) *The Problem of Political Authority*, New York: Palgrave-Macmillan, 69. Although his terminology is particularly idiosyncratic, A. John Simmons also observes this same basic distinction. See e.g., (2001) *Justification and Legitimacy*, Cambridge: Cambridge University Press, 137.

authority. Moreover, this set of theorists insists on a slightly more complex account of political authority. On this account, A possesses political authority over B only insofar as A's directives are both substantial moral content-independent reasons and exclusionary reasons for B (i.e. second-order reasons for B not to act for at least some of her reasons).<sup>2</sup> I refer to these camps' rival accounts of political authority as the simple view and the Razian account, respectively.

Here, I argue against the simple view and the Razian account, and I argue for an alternative collectivist conception of political authority. The paper's core argument is threefold. First, the Razian analysis of political authority rests on a key insight about the distinctively preemptive normative force of authoritative directives. Second, a key failing of the simple view is its failure to appreciate this insight. And third, the Razian account mistakenly characterizes preemption and, hence, political authority as a relationship in which the authority performs a deliberative function for individual subjects rather than for a collective considered as a whole. Hence, the Razian account should be rejected in favor of a conception of authority that construes preemption in this latter collectivist sense. This argument proceeds in a number of steps.

In the paper's first section, I explain the basis of the Razian account's key insight about the preemptive force of authoritative directives—namely, the pretheoretical datum that Raz refers to as “the saying that in accepting authority we surrender our judgment to the authority.” Moreover, I explain the connection between this insight and the subsequent

---

<sup>2</sup> For a brief defense of this exclusive focus, see John Tasioulas (2010) “The Legitimacy of International Law”, in *The Philosophy of International Law*, edited by Samantha Besson and John Tasioulas, Oxford: Oxford University Press, 97-99

Razian analysis of authority. I also argue that simple view theorists have good reason not to incorporate the Razian account of preemption into their analysis.

In section two, I explicate the collectivist conception of preemption and authority. That is, I explicate the idea that an authority plays a deliberative role for a collective as whole rather than for individual persons. I then argue that a key failing of the simple view is its failure to incorporate the collectivist analysis of preemption.

In section three, I employ the collectivist conception as a guide for refining and improving upon extant functionalist accounts of the grounds of political authority. The resulting Normal Functionalist Justification Thesis (NFJT) is the juridical ground mentioned in this paper's title.

The fourth section sets out my main argument against the Razian account of authority. Stated briefly, I argue that that Razian account of authority leads to perverse implications about the scope of institutions' political authority and that these implications are emblematic of a deeper failing. Namely, the Razian account specifies the limits of authority in terms of considerations that would justify its playing a deliberative role for individual members of a collective rather than for the collective as whole.

In the fifth and final section, I briefly discuss two issues in contemporary political and legal theory that the collectivist conception of authority and its juridical ground promises to reframe and clarify. As I argue, the collectivist conception reveals a non-parochial kernel of truth at the heart of A. John Simmons's storied particularity requirement, and it promises to guide legal officials' inquiries into the authoritative bases of their legal decisions.

Irrespective of the success of my argument, I hope to call attention to the fact that heretofore few theorists other than Raz have offered sustained and careful analyses of the

preemptive normative character of authoritative directives.<sup>3</sup> Moreover, I hope to illustrate that the analysis of preemption has far-reaching implications for further inquiry into the political authority and political legitimacy of institutions and thereby to convince the reader of the importance of assessing the comparative merit of alternatives to the Razian analysis of authoritative preemption.

## 1. Two Conceptions of Political Authority

Put in terms of the philosophical vernacular that H.L.A. Hart invented, A has political authority over B only insofar as A's directives are content-independent reasons for B.<sup>4</sup> Per Hart's design, this notion is a useful tool for describing one aspect of the distinctive normative force that a political authority claims for its directives—namely, that the directives are in their own right a reason for the subject to act as directed. More carefully stated, a content-independent reason to  $\phi$  is a reason of the following form: An agent intends for the subject to  $\phi$ .<sup>5</sup> Thus, the notion of a content-independent reason enables the theorist to

---

<sup>3</sup> Stephen Perry's (1987) "Judicial Obligation, Precedent and the Common Law", 7 Oxford Journal of Legal Studies: 215 could be construed as a defense and applications of an alternative to Raz's analysis of surrender of judgment. Also, David Enoch offers a friendly reworking and refinement of Raz's analysis of preemption under the name of quasi-exclusionary reasons in his (2014) "Authority and Reason-Giving", *Philosophy and Phenomenological Research* 89: 296-332.

<sup>4</sup> See H.L.A. Hart (1982) *Essays on Bentham*, Oxford: Oxford University Press, 254-255.

<sup>5</sup> See Enoch (2014) for a similar account of this aspect of authoritative directives' normative character, but under the heading of robust reasons rather than content-independent reasons.

distinguish *ordinary* practical reasons that typically inform agents' intentions about their own or others' actions from the *content-independent* reasons that such intentions supply in their own right.

Most contemporary theorists of political authority (including proponents of the simple view and those influenced by Raz) would agree that a political authority's directives are not merely content-independent reasons; they are *substantial moral* content-independent reasons. Once again, we can look to Hart for further details about this widely acknowledged aspect of the directives of political authority.

Hart holds that whereas a gunman's demands oblige their addressees, laws purport to obligate theirs.<sup>6</sup> Accordingly, we can distinguish between obliging and obligating content-independent reasons. A directive is an obliging content-independent reason insofar as the basis of its content-independent force is the sanctioning or (I would add) incentive-giving power of its source. By contrast, a directive is an *obligating content-independent reason* only insofar as its grounds are considerations of substantial moral importance other than the threat of sanction or the promise of rewards. Moreover, by dint of its substantial moral grounds, an obligating content-independent reason is a weighty defeasible requirement,<sup>7</sup> and, hence, it is dispositive in a broad range of circumstances. As I understand it here, the content-independent reason that figures in the simple view and the Razian account is a Hartian obligating content-independent reason.

---

<sup>6</sup> See HLA Hart (1994) *The Concept of Law*, 2<sup>nd</sup> ed., Oxford: Oxford University Press, 80.

<sup>7</sup> Cf. Joshua Gert (2004) *Brute Rationality: Normativity and Human Action*, Cambridge: Cambridge University Press for a cogent discussion and defense of the distinction between reasons that require and reasons that merely permit.

## 1.1 The Razian Analysis of Authority

As noted in the introduction, the Razian account of political authority adds a further element to the simple view, for it holds that in addition to constituting obligating content-independent reasons, the directives of a political authority are exclusionary reasons for their subjects.<sup>8</sup> Raz's argument relies on a methodological commitment that I (and other theorists, e.g., Hart, as suggested above) share. Namely, Raz seeks to provide an account of authority that reflects the understanding that animates the behavior of those who participate in relations of political authority.<sup>9</sup>

In keeping with the just described methodological commitment, Raz's account of political authority rests on various pretheoretical observations of the behavior and attitudes of those who participate in relations of authority. A key observation in this vein is that the directives of political authorities are widely taken to provide reasons that qualitatively differ from those that requests provide. However, as Raz further notes, requests are content-independent reasons.<sup>10</sup> Moreover, I would add that they are obligating content-independent reasons. For example, as Stephen Darwall would agree, a person's demand that I remove my

---

<sup>8</sup> See Joseph Raz (1979) *The Authority of Law*, Oxford: Oxford University Press, 11-16. See also Leslie Green (1990), *The Authority of the State*, Oxford: Oxford University Press, 41-42.

<sup>9</sup> See Joseph Raz (2006) *Between Authority and Interpretation*, Oxford: Oxford University Press, 134.

<sup>10</sup> See Joseph Raz (1979), 11-15 and (1986) *The Morality of Freedom*, Oxford: Oxford University Press, 35-37.

foot from atop hers would be in itself a weighty moral reason for me to remove my foot.<sup>11</sup>

In a similar vein, the requests or demands made by one's counterparts in any number of important relationships, such as friendships, marriages, filial relationships, and so on, are also reasons of this kind. Thus, as Raz concludes, in addition to their obligating content-independent force, authoritative directives must bear yet further normative features that distinguish them from requests and demands of the sort just described.

Raz links the distinctive normative character of authoritative directives to “the saying that in accepting authority we surrender our judgment to the authority.”<sup>12</sup> Raz illustrates this truth by way of the following example:

A man who orders someone else does not regard his order as merely another reason to be added to the balance by which the addressee will determine what to do. He intends the addressee to take his order as a reason on which to act regardless of whatever other conflicting reasons exists....<sup>13</sup>

Raz's claim is that whereas requests are generally regarded as content-independent reasons that weigh in the balance against other reasons, the fact that an authority has issued a

---

<sup>11</sup> See Stephen Darwall (2010) “Authority and Reasons: Exclusionary and Second-Personal”, *Ethics* 120: 257-78, 262. For a discussion in which the affinities between Darwall's idea of a second-personal reason and the idea of a content-independent reason are particularly evident see Darwall (2006) “The Value of Autonomy and Autonomy of the Will,” *Ethics* 116: 263-84, 272-77.

<sup>12</sup> Raz (2006), 142. See also Raz (1986), 38-42. See also Darwall (2010), 272 and Enoch (2014) for recent endorsements of the surrender of judgment pretheoretical datum.

<sup>13</sup> Raz, *The Authority of Law*, 14-15.



directive is generally regarded not only as a reason for acting as directed but also as a reason reasons not to act for (i.e. to exclude) at least some of the reasons against conforming to the directive.<sup>14</sup>

To put the just described distinction in terms that Raz coined, the feature that distinguishes authoritative directives from other content-independent reasons (e.g., requests) is that they are *preemptive*, which for Raz means that they are both content-independent reasons and exclusionary reasons. As Razian theorists sometimes put it, authoritative directives exclude and replace their subjects' reasons.

## 1.2 The Razian Critique of the Simple View and a Rejoinder

We can distinguish two distinct but interrelated lines of criticism that Razian theorists marshal against the simple view.<sup>15</sup> First, the Razian theorist criticizes the simple view's failure to note the exclusionary force of authoritative directives, and, hence, its failure to reflect such directives' distinctive preemptive character. Second, the Razian theorist argues that the simple view's inadequate characterization of the structure of relations of authority impedes further inquiry into the grounds that might justify relations of political authority, for the simple view theorist fails to appreciate that a political institution's directives are preemptive (and hence authoritative) only under very particular conditions. To wit, simple

---

<sup>14</sup> See Raz (1986), 41-42.

<sup>15</sup> See e.g., the criticisms of Buchanan's account of institutional legitimacy in Tasioulas (2010), 97-99. As is well-known, Raz's famed Normal Justification Thesis is his account of the normal way to establish that an authority's directives are content-independent and exclusionary reasons for a subject. See Raz (1986), 53.

view theorists misguidedly consider many candidate grounds of political authority, such as the duty of fair play, the natural duty to support just institutions, associative obligations, consent, and a political institution's capacity to coordinate its citizens' important collective efforts or its democratic pedigree, to name just a few, without assessing whether these considerations would ground the exclusionary and, hence, the preemptive force of the state's directives.<sup>16</sup>

Although proponents of the simple view have surprisingly little to say explicitly in response to the foregoing Razian line of criticism, they have a powerful rejoinder ready to hand. To see this rejoinder, consider first the following two conditions characteristic of most any contemporary political community. The first is that such a community is typically bound together in part by institutions that prescribe and enforce frameworks of rights and duties for the community's members. The second is deep and widespread disagreement among the community's members about these rights and duties.

In such circumstances, whether the relevant political institution's directives are substantial moral content-independent reasons is a highly important question. Its answer marks the difference between a situation in which the threat of sanction is the main reason for an institution's subjects to conform to the many directives that they find disagreeable and one in which there are also substantial moral content-independent reasons to comply with those directives despite objections to their merits. In short, the answer to this question marks the difference between subjugation and at least the possibility of justified dutiful obedience.

---

<sup>16</sup> See e.g., Wellman (2001), Buchanan (2002), Huemer, *The Problem of Political Authority*, and A. John Simmons (2005).

The rejoinder to the Razian critique of the simple view is that although it would be of great moment to learn whether or not an institution's directives are obligating content-independent reasons, the urgency of whether such directives are also exclusionary reasons pales in comparison. Thus, the simple view rather than the Razian account of political authority is the better frame for inquiry into the grounds of relations of political authority, for it directs the theorist's attention to the morally significant aspect of relations of political authority.

## **2. The Collectivist Conception of Authority**

The just described rejoinder generates a puzzle for the Razian account of political authority. If, as this rejoinder claims, the exclusionary force of an authority's directives is a morally unimportant complement to its directives' obligating content-independent force, why do political institutions insist that their directives are preemptive and hence, per the Razian analysis of preemption, both obligating content-independent reasons and exclusionary reasons?

Many complex human practices are fraught with normative commitments that persist only by dint of institutional or cultural inertia. Thus, the puzzle about the motivation of preemption-claiming institutions does not amount to a decisive argument against the Razian analysis of preemption. That said, this puzzle is an occasion to consider the alternative analysis that does not saddle participants in authority relations with such undermotivated normative commitments—namely, the collectivist conception that I now explicate.

From my own introspective and observational perch, I would put the pretheoretical idea of preemption as follows: There are certain decisions about how I (and others as well) must act that are for the relevant authority (e.g., perhaps a court, legislature, managerial

committee, department head, or coach) rather than me (or those others) to make. In this same vein, Stephen Darwall has recently endorsed Raz's formulation of this pretheoretical idea that holds that authorities remove certain decisions from their subjects.<sup>17</sup>

I rehearse the foregoing formulations of the surrender of judgment idea because they are highly suggestive of Raz's key insight about relations of authority. Namely, in such relationships, there is a mutually acknowledged division of labor in which one party, the authority, plays a deliberative role and the subject parties play the complementary executive role.<sup>18</sup>

The collectivist conception of preemption and authority rests on the premise that Raz's insight is the foundation on which any adequate analysis of authority must rest; however, it further holds that the subsequent Razian analysis of preemption and authority conflates levels of analysis. That is, from the perspective of the collectivist conception, the Razian account mistakenly holds that A has political authority over B only insofar as B has reasons that require her to allow A to perform the deliberative role for her as an individual (i.e., B must allow A's directives to exclude and replace some of her reasons). Rather, per the collectivist conception, A has political authority over B insofar as B and the other members of the relevant group have reasons that require them to allow B to play a deliberative role for that group as a whole.

---

<sup>17</sup> See Darwall (2010), 272. Darwall favorably cites Joseph Raz (1990), 193 for this proposition.

<sup>18</sup> See e.g., Joseph Raz (1994) *Ethics in the Public Domain*, Oxford: Oxford University Press, 203-08.

More pointedly, for the collectivist, it is a mistake to hold that allowing an institution to perform a deliberative role for the group as a whole entails allowing it to play this role for each member of the group individually. Accordingly, as the following collectivist account of preemption and political authority illustrates, for an individual to accept that A's directives ought to be allowed to play a deliberative role for the group as a whole does not entail that she must accept that A's directives are exclusionary reasons for her or any other member of the group.

**The Collectivist Conception of Authority:** A has authority over group G only if there is a non-empty set of directives such that should A issue any of them, for each member of G: (a) the directive would be an obligating content-independent reason to act as directed, and (b) the obligating content-independent force of that directive would both defeat without being defeated by the obligating content-independent force of any countervailing directives that the members of group G might issue.

In keeping with the simple view and the Razian account of authority, element (a) of the collectivist account holds that A has authority over a subject only if some of the directives it might issue would be obligating content-independent reasons for that subject. The core idea behind (b) is that a political authority characteristically has greater normative standing than the members of its public. That is, an institution has political authority only if the obligating content-independent force of at least some of its directives would defeat without being defeated by the obligating content-independent force of the countervailing directives that its public might issue.

To help clarify the collectivist conception of preemption, consider that one business partner's expressed wish that she and her fellow partners open up a Mexican restaurant might be an obligating content-independent reason for each of her fellow partners that

defeats without being reciprocally defeated by the obligating content-independent force of her counterparts' expressed wishes that the partnership should sell hamburgers instead. If so, at least with respect to this one issue, the first partner would enjoy (collectivist) preeminent normative standing within the partnership. Perhaps, she is the sole general partner and the rest are limited partners. However, it could be that no partner's expressed intention would be sufficient to defeat the combined obligating content-independent force of the other partners' countervailing directives. In that case, although some partners might have greater say than other partners (e.g., there might be classes of senior and junior partners), no partner's say would have preeminent normative standing within the group, and hence, no single partner's say would be preemptive in the collectivist sense.

In sum, (a) and (b) specify the collectivist account of the pretheoretical idea that an authoritative institution removes certain decisions about how the group as a whole should act. Note further that the idea of the scope of a political authority is implicit in this specification, particularly its claim that the directives of a political authority are obligating content-independent reasons. As noted above, an obligating content-independent reason is a substantial moral content-independent reason that, as such, is dispositive in a wide range of circumstances. The scope of a political authority is the set of circumstances in which its directives are both authoritative and dispositive. Hence, the scope of any political authority is partly a function of the force of the substantial moral grounds of its content-independent reasons, for this force determines the range of circumstances in which an authoritative directive is dispositive.

For example, it could be that although a legislature's property-rule specifying directives satisfy the collectivist conception, those directives would not be dispositive for, say, the bank teller who a gunman has ordered to empty the bank's safe. In that case, the

bank teller's substantial moral reason requiring her to act as directed by the legislature's property rules would likely be defeated by the gunman's clear and present threat to her well-being. If so, the legislature's authority would not encompass that set of circumstances. However, it would still be authoritative, for by dint of their substantial moral weight, its directives would be dispositive in a broad range of less dire circumstances.

To clarify further the collectivist conception of authority and its appeal, consider that although (as discussed above) it is not clear why political institutions would insist that their directives are preemptive in the Razian sense, it is easy to explain why they would insist on collectivist preemption. Allen Buchanan puts his finger on the nub of this explanation.

I have said that for institutions to achieve the coordination needed to provide their benefits, or at least to do so without unacceptable costs, they must have a certain standing, at least in the eyes of sufficiently large numbers of people—people who are in a position either to withhold cooperation or interfere with it.<sup>19</sup>

As noted above, within most any political community, there is pervasive disagreement about the rights and duties of the community's members. Hence, to sustain its capacity to secure its public's conformity to its specifications of these rights and duties, the institution must provide its subjects with reasons to conform despite their inevitable objections to the merits of its rights-and-duty specifying directives. Buchanan's first key point in the passage above is that generally, it is too costly for any institution to rely exclusively on sanctions and rewards to keep its public in line. Thus (and this is Buchanan's second point), to preserve its capacity to coordinate, most any political institution must convince a significant subset of its public

---

<sup>19</sup> Allen Buchanan, *The Heart of Human Rights*, Oxford: Oxford University Press, 184.

that it has a special standing that morally binds them to comply despite doubts about the merits of the institution's directives.

Buchanan nowhere clarifies his insight about political authorities' normative standing. That is, he does not explain what a public accepts when they accept that an institution has such standing. The simple view identifies one key element—i.e. the substantial moral content-independent force of political institutions' directives, and the collectivist conception reveals an indispensable further element. To see this further element, consider first that in many contexts, an agent's well-being would be profoundly affected by the actions of others. In such contexts, the affected agent's directives (e.g. its requests or demands) are *pro tanto* obligating content-independent reasons for those others. For example, as Darwall might put it, by dint of my dignity, my demand that you remove your foot from atop mine is a *pro tanto* reason in itself that requires you to accede to my demand.

Now, consider further that in Darwall's example, we are led to believe that only the well-being and, hence, dignity of the person underfoot is at stake. However, in many strategic contexts, the well-being of all parties is significantly affected by the actions of their strategic counterparts. In such contexts, the expressed intentions of all parties about how other members of the group ought to act are *pro tanto* obligating content-independent reasons for one another by dint of the equal moral importance of the well-being of each. Moreover, in such strategic contexts, there might very well be a cacophony of comparably weighty and conflicting obligating content-independent directives.

The key point for present purposes is that in order for a political institution to sustain its capacity to coordinate, it must do more than convince a sufficient portion of its public that its directives are the *pro tanto* substantial moral content-independent reasons that the simple view describes, for then its directives would be lost in a sea of comparably



normatively forceful countervailing directives. Rather, to govern a group effectively, a political institution must convince a significant portion of that group that its obligating content-independent directives would defeat without being reciprocally defeated by the obligating content-independent force of the countervailing directives that the other members of the group might issue. That is, it must convince them that its directives are preemptive in the collectivist sense.

In sum, the collectivist conception's specification of the preemptive force of authoritative directives is also a specification of the preeminent normative standing such directives must have if they are to coordinate the members of most any contemporary political community. Thus, construed in accordance with the collectivist conception rather than the Razian account, the preemptive force of a political authority's directives is not a morally unimportant complement to their obligating content-independent force. On the contrary, it is a highly important normative feature of authoritative directives—namely, their distinctive preeminent normative standing. In this same vein, it should be noted that a crucial defect of the simple view of political authority is its failure to reflect this highly important feature.

### **3 The Juridical Ground of Collectivist Authority**

The just described collectivist account of political authority invites a functionalist account of the grounds of political authority—i.e. a defense based in the authority's ability to secure morally important forms of social coordination.<sup>20</sup> In what follows, I explicate Kit

---

<sup>20</sup> For recent functionalist defenses of political authority, though not necessarily under that name, see John Finnis (2011) *Natural Law and Natural Rights*, 2<sup>nd</sup> ed., Oxford: Oxford

Wellman's sophisticated functionalist account, and I consider two key objections that A. John Simmons has marshaled against it. As I argue, Simmons's objections are occasions to clarify the functionalist's burden rather than decisive refutations of Wellman's functionalism. By contrast, I argue that that the collectivist conception brings a third objection to the fore that calls for a significant amendment to rather than a restatement of Wellman's defense. I refer to the resulting functionalist ground as the Normal Functionalist Justification Thesis (NFJT).

### 3.1 A Restatement of Wellman's Functionalist Defense of Political Authority

Wellman observes that contemporary states perform the important task of rescuing their publics from the perils of the state of nature. He argues that because and insofar as issuing and enforcing its laws is the necessary means by which any such state effects this rescue, it is justified in doing so.<sup>21</sup> Thus, Wellman advances a functionalist argument in support of states' political legitimacy that rests on what he describes as a samaritan duty of rescue. Wellman further argues that such samaritan duties of rescue are key elements of the justification of the state's political authority.

As I see it, Wellman's samaritan-based defense of political authority rests on four main premises. First, the state's capacity to rescue its public can only be sustained by dint of

---

University Press, 246; David Copp (1999) "The Idea of a Legitimate State", *Philosophy and Public Affairs* 28: 3-45; Christopher Wellman (2001); David Lefkowitz (2005) "A Contractualist Defense of Democratic Authority", *Ratio Juris* 18: 346-64; Annie Stilz (2011) "Nations, States, and Territory", *Ethics* 121: 572-601, and Enoch (2014) 20-22.

<sup>21</sup> Wellman (2001), 747-50.

its public's general conformity to its directives. Second, each member of any such public is morally bound by a positive samaritan duty to contribute to the collective effort that realizes this important benefit of rescue from the state of nature.<sup>22</sup> Crucially, Wellman concedes that rarely would any single citizen's failure to obey the law undercut the state's ability to effect the rescue of its citizenry. Hence, he acknowledges that the samaritan duty of rescue alone does not bind citizens to obey the laws of their state.<sup>23</sup> For this reason, Wellman appeals to a third premise which holds that the principle of fairness requires each citizen to contribute her fair share to the collective effort that sustains the state's ability to rescue its citizens from the state of nature. In Wellman's words:

By invoking fairness in this fashion, we may freely admit that no one would slip into peril if a single individual disobeyed the law. Instead, we point out that it would be unfair to shirk one's share of the samaritan chore. Securing political stability is a communal responsibility that falls upon all of us; it is wrong to leave all the work to others.<sup>24</sup>

Wellman's fourth premise is that the fair contribution to this communal chore is conformity to the state's just laws. In sum, Wellman concludes that a samaritan duty of rescue supplemented by a principle of fairness requires citizens to obey the state's just laws.<sup>25</sup>

A. John Simmons marshals two formidable objections to Wellman's argument. The first is as follows:

---

<sup>22</sup> Id.

<sup>23</sup> Id.

<sup>24</sup> Id. 749.

<sup>25</sup> Id.

It makes sense to speak of an individual owing a fair share of some task, in my view, only if that individual is morally bound to some group or collective entity and its enterprises. Others cannot demand of me that I do my part unless I actually *have* a part in some scheme or enterprise to which I am bound.<sup>26</sup>

I take it that Simmons's point is that persons might devote their finite resources to any of a number of highly important collective efforts and that the communal project of rescuing fellow citizens from the perils of the state of nature is just one of them. Hence, no one is morally required to participate in this collective effort; rather, each is morally permitted to devote their finite resources to this or some other effort of comparable moral importance. In sum, Simmons denies Wellman's claim that sustaining the state's capacity is a *morally mandatory collective effort* for the state's citizens. That is, Simmons denies that the state's citizens are morally required to contribute to this communal chore.

Simmons's second objection grants for the sake of argument that the communal chore of rescuing one's fellow citizens from the perils of the state of nature is morally mandatory. However, it challenges Wellman's further claim that fairness requires each citizen to contribute to this effort by obeying the state's directives.<sup>27</sup> As Simmons puts this point in one passage:

But the good my obedience is supposed to provide to others, remember, is the good of security. And it is not at all clear that such a good could not be provided for another by means other than legal obedience. Since the number of persons needing

---

<sup>26</sup> See A. John Simmons and Christopher Wellman (2005) *Is There a Duty to Obey the Law?*, Cambridge: Cambridge University Press, 185-186.

<sup>27</sup> *Id.* at 187.

security is at worst three or four times greater than the number duty-bound to help provide it, my fair share of helping to provide security could be done by providing security for, say, myself and two or three others. (187)

A tempting rejoinder to Simmons's objection is that should any community heed Simmons's suggestion and dissolve into small groups, each concerned solely with ensuring the security of its members, it would thereby soon find itself in the perilous context of strategic interaction that worried Hobbes. More pointedly, so the rejoinder goes, Simmons's objection illustrates the importance of *public settlements*—i.e. practices in which by and large the members of a community (i) conform to the same set of norms and (ii) they are all aware of (or are at least positioned to learn readily) the content of those norms and the fact that their fellow community members generally conform to them. That is, Simmons's objection illustrates the point that Kant, Hobbes, Locke, and many other theorists have made. Namely, to avoid the perils of the state of nature, persons who regularly interact with one another must reliably observe a number of publicly settled frameworks of rights, powers, duties, and so on.

For illustrative purposes, consider that two oft-discussed publicly settled frameworks of rights are those that regulate the use of external objects (i.e. property rights) and those that specify the conditions in which force may be used against the community's members (e.g., criminal law and procedure). The core functionalist idea is that unless frameworks of rights of the sort just described are publicly settled, then different camps will follow and apply distinct and potentially conflicting norms that guide them in the use of force and their judgments about what belongs to whom. In such a context, the members of such a community would find it difficult to predict either what resources they could use without fearing the interventions of others or when others might use force against them.

As a Hobbesian-minded theorist would emphasize, the just described unpredictability and disagreement would lead to widespread diffidence of one another and, hence, to pervasive physical insecurity, anxiety, and violence. Publicly settling these norms undercuts this vicious Hobbesian logic, thereby holding the promise of significantly advancing the security interests of all members of the community. Moreover, as a Kantian-minded theorist would emphasize, such settlements also further fundamental agency interests, for without the predictability and security they facilitate, the realization of many long-term personal plans of paramount moral importance would be impossible. Moreover, the enormous productive potential of cooperative endeavors that rely on such predictability and security would remain untapped.<sup>28</sup>

Tempting as it is, the foregoing rejoinder misses Simmons's point, for Simmons's objection presupposes a context in which the state has by and large secured the public settlements requisite for the realization of the fundamental security and agency interests described above. Moreover, it presupposes, as Wellman concedes, that no single individual's violation will undercut the state's capacity to rescue its citizens from the state of nature.<sup>29</sup> Simmons's challenge then is as follows: If no individual's deviation from the state-secured public settlement would undercut that settlement, then why does the principle of fairness forbid the individual from discharging her obligation to contribute to the interests the public settlement serves in some way other than strictly conforming to the settlement—say, focusing on the security needs of three or four.

---

<sup>28</sup> See e.g., Stilz (2011) and Arthur Ripstein (2009) "Force and Freedom" Cambridge: Harvard University Press.

<sup>29</sup> See Wellman (2001), 749.

Taken together, Simmons's two objections reveal that the key axis of debate between the functionalist statist and the philosophical anarchist is whether and to what extent the subject of any extant political institution must contribute to morally mandatory collective efforts by strictly conforming to the terms of public settlements secured and specified by a political institution's directives. To put the issue a bit more concisely, the key point of debate is whether any institution satisfies the following Simple Functionalist Condition.

(SFC) The political institution's issuance of directives has secured or would be likely to secure the realization of a morally mandatory public settlement for a group in accordance with those directives.

The functionalist argues that many extant political institutions satisfy (SFC), for at least some of their directives (perhaps, those specifying the community's property regime or regulating the use of force) specify and secure the terms of a group's *morally mandatory public settlement*—i.e. a public settlement the terms of which the members of the group are morally required to observe.

Viewed through the lens of (SFC), Wellman argues that although no one would slip into peril if a single individual violated the terms of a state-specified public settlement that rescued a community from the state of nature, it would be unfair for any citizen to violate the terms of such a settlement. Wellman's key claim is that maintaining such public settlements is a communal moral chore that is equally incumbent on all members of a political community. Hence, any citizen who might deviate from that settlement would thereby unfairly and, hence, wrongly free ride on her fellow citizens' settlement-maintaining compliance.

A key point that Wellman and, *a fortiori*, Simmons seem to overlook is that the principle of fairness is not the only consideration that might ground a weighty moral

requirement to conform strictly to the public settlements that a political institution's directives secure. To wit, the fundamental agency and security interests that many public settlements secure are also grounds of this sort, for in many cases, particular violations of a public settlement would immediately and significantly set back these interests.

For example, I might use something that the regnant property settlement has awarded to you. I might take a significant sum of money from you or occupy an apartment that the settlement deems yours. In so doing, I would upset your long-term plans that relied on the public settlement. I would also upset the plans of others that relied on your having access to the money or the exclusive use of your property. Thus, I would significantly set back your and others' fundamental agency interests. I would also set back the security interests of many, for now, the chances that force will be used to resolve this issue go up tremendously. Moreover, if my actions are done openly, they are likely to provoke fears and uncertainty in others about their physical security and the predictability of their social environment.

No doubt, not all violations of public settlements would directly set back fundamental agency and security interest. For example, the undetected tax cheat might not directly set back anyone's agency interests. And, I might not set these interests back by surreptitiously using your apartment while you are away on a business trip or by ignoring the proverbial stop sign inexplicably placed on a little travelled desert road. However, very many deviations from such settlements would directly set back fundamental agency and security interests in the ways described above. Insofar as they would, persons are bound by a defeasible moral requirement to conform strictly to the settlement's terms.

Yet a fourth ground of a moral requirement to conform strictly to the terms of a public settlement is suggested by a number of theorists' broadly similar accounts of a key



underlying value of democratic governance.<sup>30</sup> Above, I endorsed the first premise of these theorists' account of this underlying value. This premise holds that with respect to terms of social interaction that have significant and comparable implications for the well-being of each member of a group, the say of each member of that group has equal normative standing. Accordingly, so these theorists argue, the specification of such terms should not be determined in a way that gives some members of the group greater say than others. On this basis, these theorists conclude that a key underlying value of democratic decision-making procedures is that they enable the group to specify the terms of such morally important social interactions in a way that accords equal say to each. More pointedly, by violating the democratically enacted terms, the relevant group's members would thereby modify the terms of social interactions in a way that does not give each an equal say.

In accordance with the foregoing account of the value of democratic governance, we might argue as follows: By failing to conform to a democratic institution's public settlement of terms of social interaction that have significant and roughly comparable implications for each member of the institution's public, any member of that public who did not conform to the terms of that settlement would thereby setback the underlying values of democratic governance. Put in David Lefkowitz's terms, she would thereby wrong others by unilaterally imposing on them her conclusions regarding what morality requires, thereby failing to acknowledge the exercise of moral judgment by others and displaying moral immodesty and incivility.<sup>31</sup>

---

<sup>30</sup> See e.g., Lefkowitz (2005); Christiano (2008) and Daniel Viehoff (2014) "Democratic Equality and Political Authority", *Philosophy and Public Affairs*, 42: 337-375, 369.

<sup>31</sup> See Lefkowitz (2005), 364.

A crucial point to note is that all four grounds canvassed above are defeasible. That is, the terms of a public settlement might be so morally egregious that it would be permissible or required to violate them even though by doing so, one would set back the values of democratic civility, fairness, agency, or security. That said, to the extent that these values are not defeated and individual violations of the terms of a public settlement would set them back, these values ground a morally mandatory public settlement. In other words, the foregoing values (and perhaps others not canvassed here) are grounds of a defeasible *juridical duty* to conform strictly to public settlements.

To be clear, my goal here is not to settle decisively the debate between the functionalist apologist for political authority and the anarchist. Rather, it is to clarify the terms of the debate and to emphasize that the functionalist has more resources than Wellman or his anarchist interlocutors seems to recognize. In short, the functionalist's burden is to establish that some public settlements are to a significant extent morally mandatory. And, the core functionalist intuition is that significantly setting back values of the sort just described is a profound moral wrong, and hence, these values have the potential to ground highly expansive though not unlimited claims to political authority.

### 3.2 The Collectivist Modification of Wellman's Functionalism

The collectivist conception brings to the fore yet a third objection that calls for a significant amendment to Wellman's defense of political authority. To see this objection, consider first that a number of critics have argued that functionalist defenses of authority specify considerations that would justify acting as a political institution directs, but they do not specify considerations that would justify acting as the institution directs for the reason

that it so directs.<sup>32</sup> That is, these critics have argued that functionalist defenses fail to furnish grounds of the content-independent force of authoritative directives. To illustrate by reference to the SFC, this criticism holds that although an institution's public would have reason to conform to the institution's directives that secure and specify the terms of a morally mandatory public settlement, it would not be a content-independent reason. That is, their reason to act as directed would be that they must do so to conform to the terms of a morally mandatory settlement, but it would not be the fact that the institution has so directed.

Although correct as far as it goes, the foregoing line of criticism does not identify the key problem with extant functionalist defenses of political authority. To see why, consider first that obligating content-independent reasons are commonplace. For example, legislative enactments are issued by persons, legislators, whose well-being is significantly affected by many of the enactments that they endorse. Thus, establishing the obligating content-independent force of an institution's directives is not the difficult task. Rather, the difficult task is to identify grounds of the preeminent obligating content-independent force of an institution's directives vis-à-vis countervailing directives. More carefully stated, then, the key shortcoming of extant functionalist defenses of political authority, including (SFC), is that they do not specify considerations that would, per the collectivist conception of authority, ground the preeminent obligating content-independent force of authoritative directives.

---

<sup>32</sup> See e.g., Donald Regan "Authority and Value: Reflections on Raz's Morality of Freedom", (1989) *University of Southern California Law Review*: 62: 995-1094,1021-32. Also some passages from Simmons are suggestive of this objection. See e.g., Simmons and Wellman (2005), 188.

To meet this third objection, I add a second element to SFC. The resulting functionalist account of the grounds of political authority holds as follows:

**The Normal Functionalist Justification Thesis (The NFJT).** The normal way to establish that an institution has (collectivist) political authority over a public is to show that:

- (1) The political institution's issuance of directives has secured or would be likely to secure the realization of a morally mandatory public settlement for a group in accordance with those directives, and;
- (2) All things considered, the political institution's issuance of those directives is better than any alternative feasible modality for that group to realize that settlement.

(1) needs no further explanation, for it just restates (SFC); however, (2) introduces the idea of an all things considered better modality and the idea of a feasible alternative modality that do.

Any number of factors might figure in the all things considered assessment of modalities that (2) specifies. Here I enumerate three that are particularly important. The first is an institution's deliberative competence, which refers to the quality of the public settlement (e.g., the justice or efficiency of the terms it specifies) that the institution is likely to implement. A second is the democratic or representative quality of the decision-making procedures that lead to the specification of the public settlement. To see yet a third measure, consider that the members of certain ethnic groups might rarely occupy the highest governmental offices in a given community, and hence, they might experience a sense of alienation from the community's governing institutions despite its high levels of deliberative competence and democratic pedigree. All things being equal, the better modality of public

settlement alienates the relevant public the least. In sum, whether one modality of securing a group's morally mandatory public settlements is better than another turns on the balance of a wide variety of comparative considerations of the sort that I have just described.

An alternative modality is feasible for a group only if, given the relevant institutional, political and sociological facts, that modality would be able to secure and specify the relevant public settlements were it not for the interventions of the regnant modality. Although there are difficult borderline cases, there are also clear examples of feasible alternatives. To name one, in many instances, were it not for the intervention of the Supreme Court, the U.S. Congress's directives rather than the Court's rulings would specify and secure certain aspects of a public settlement for the American community. In such instances, the U.S. Congress is a feasible alternative modality for the American community's realization of the public settlement.

By contrast, it might be that although democratic institutions would in principle be the all things considered best modality for securing a community's morally mandatory public settlements, sociological and political realities (e.g. perhaps the community is riven by ethnic and religious strife) might preclude the near term possibility of democratic governance for that community. In that case, the democratic modality of securing public settlements would not be feasible. Moreover, the regnant non-democratic modality would satisfy (2) so long as its implementation of those settlements did not impede the emergence of the democratic modality or any other better modality.

Note further that alternative modalities need not be institutional. For example, it might be that were it not for the interventions of the legislature, certain public settlements might be specified and secured by way of customary practice. However, for any number of reasons, a community might be unable to sustain the relevant public settlement in this way,

and in that case, this modality would not be a feasible alternative modality for securing that settlement.

With the foregoing details in hand, I can now explain why an institution that satisfies the NFJT would enjoy the preeminent normative standing specified by the collectivist conception. The core idea is that if an institution is better than any feasible alternative modality of specifying and securing its public's realization of a morally mandatory public settlement, then by conforming to that institution's public-settlement specifying directives, the members of its public would sustain the community's capacity to secure its morally mandatory public settlements by way of the best feasible modality. More pointedly, by failing to conform, they would thereby immediately set back this ability. In sum, insofar as an institution satisfies the NFJT, the obligating content-independent force of at least some of the directives of such an institution would be preeminent, for the members of the relevant public must follow its directives rather than the terms specified by any other person or institution in order to sustain and avoid setting back their community's capacity to realize public settlements via the best feasible modality.

#### **4. The Implausibility of the Razian Account of Authority**

I argue in this section that the Razian conception of authority leads to perverse implications about the scope of institutions' political authority. The key point that I hope to establish is that these perverse implications are emblematic of a deeper and fatal flaw of the Razian analysis of authority. Namely, the Razian account mistakenly characterizes preemption and political authority as a dyadic relationship between the authority and the individual subject rather than an irreducibly collectivist relationship. Thus, the Razian account misguidedly directs the theorist to considerations that would ground the

individualistic form of relationship, and it defines the limits of political authority on the basis of those considerations. To make this case, I discuss the Razian account of functionalist and democratic bases of political authority.

#### 4.1 Functionalist Considerations and the Justification of Razian Political Authority

In a number of passages, Raz states that the need to secure important forms of social coordination is one of two key factors most relevant to the justification of political authority. The other is the political authority's expertise.<sup>33</sup> Some of Raz's earliest discussions of the functionalist ground and expertise suggest that the former is a distinct and independent ground of authority. To wit, Raz writes:

Authority can secure co-ordination only if the individuals concerned defer to its judgment and do not act on the balance of reasons but on the authority's instructions. This guarantees that all will participate in one plan of action, that action will be co-ordinated.<sup>34</sup>

In this passage, Raz seems to argue that an authority can secure the social coordination of its subjects only if such subjects accept the exclusionary force of its directives. Hence, given the importance of securing such coordination, the subjects of such an authority must accept the exclusionary force of its directives. However, this functionalist defense of Razian authority is deeply implausible. To see why, consider again a legislature's public settlement of a framework of rights, such as the regime of property rights discussed above.

---

<sup>33</sup> See Joseph Raz (2006) "The Problem of Authority, 153; (1990) *Practical Reasons and Norms*, Oxford: Oxford University Press, 64, and (1986), 75.

<sup>34</sup> Raz (1990), 64.

Public settlements of a community's property rights are coordinated actions in Raz's sense, for they are realized only insofar as the members of the relevant public conform to the very same set of norms, or, in Raz's terms, one plan of action. Accordingly, the just described functionalist argument for authority would fail if, contrary to Raz's key premise, communities could sustain such settlements even though few or none of its members accepted the exclusionary force of the relevant institution's directives. Because it is very likely that many such public settlements have been maintained largely by dint of considerations other than the perceived exclusionary force of an institution's directives, including fear of sanction and the belief that fairness or other moral considerations require conformity, the functionalist defense set out in the passage above is highly dubious.

The foregoing criticism of Raz's functionalist defense of authority is not meant to be completely novel, for Leslie Green has advanced similar objections.<sup>35</sup> Moreover, in response to these objections, Raz has clarified his claims about the connection between a community's need to coordinate and the exclusionary force of the directives that secure such coordination, now arguing that the need to secure coordination in tandem with other considerations grounds (Razian) political authority. As he puts the point:

[I]f the person or organization is less likely to be biased than I am and if they have greater expertise than I concerning the goods and social needs for which coordination may be needed, and the ways of achieving them. In such a case I should adopt a rule to follow the instructions of such a person or body, to regard them as

---

<sup>35</sup> Green develops this argument at length in his (1985) "Authority and Convention", 35 *Philosophical Quarterly* 329 and (1983) "Law, Co-ordination and the Common Good, 3 *Oxford Journal of Legal Studies* 299.



authorities, within certain specified bounds.<sup>36</sup>

Thus, Raz argues that it is not the mere need to achieve important forms of social coordination that grounds the exclusionary force of the state's directives. Rather, it is the imperative to coordinate at the appropriate time and the best way possible combined with the relative deliberative superiority of the state with respect to such matters that grounds the exclusionary force of states' directives, and hence their (Razian) political authority.<sup>37</sup>

To see the perverse implication of Raz's hybrid functionalist and expertise-based account of the grounds of political authority, consider Raz's acknowledgment that authority as he construes it is piecemeal, meaning that an authority's directives might very well be authoritative with respect to some but not all the subjects the authority purports to govern. To use Raz's illustrative example, laws regulating the use of certain drugs might be exclusionary reasons for some of a state's citizens by dint of the state's superior deliberative competence with respect to the reasons relevant to the proper usage of the regulated drugs. However, the exclusionary force of such directives might not extend to all its citizens, perhaps, those who are pharmacologists or doctors, for the pertinent deliberative competence of these citizens might very well equal or exceed the state's.<sup>38</sup>

Now, consider the legislature whose enactments publicly settle a community's framework of property rights. Moreover, for the sake of argument grant that the legislature satisfies the NFJT. If so, then, as I have argued above, the legislature's directives would have

---

<sup>36</sup> Joseph Raz (1989) "Facing Up: A Reply", *University of Southern California Law Review* 62: 1153-1226, 1192.

<sup>37</sup> See also Raz (2010), 153 for a recent condensed statement of this argument.

<sup>38</sup> See Raz (1986), 74.

preeminent normative standing within the relevant political community, for all things considered, it would be better than any feasible alternative modality for securing and specifying a morally mandatory public settlement for the group (the group's settled framework of property rights). Nonetheless, per Raz's amended argument, such a legislature would not necessarily have political authority. On this account, to establish the legislature's authority over any subject, the theorist must further show that the legislature is less likely to be biased than the subject or that it has greater expertise than the subject does concerning the goods and social needs for which the public settlement of the community's framework of property rights is needed. Thus, it might be, per Raz's amended argument, that the NJFT-satisfying legislature's has authority over non-experts like you and me, but not say, Jeremy Waldron or Richard Epstein.

The foregoing conclusion is deeply implausible. Moreover, it is an implausibility that is emblematic of the fundamental flaw in Raz's conception of authority. Namely, the Razian account mistakenly characterizes authority as a relationship in which the authority's directives discharge the deliberative function for each individual subject rather than the group as a whole. As a result, it misguidedly defines the limits of such authority in terms of considerations that would justify the authority's performance of a deliberative function for an individual rather than for the group as whole.

In response to the foregoing criticism, a Razian theorist might note that expertise and lesser bias are not the only grounds of the exclusionary force of an institution's directives. For example, David Enoch has recently refined and extended Raz's claim that avoiding anxiety and the expenditure of finite cognitive resources is an important basis of

exclusionary reasons (more precisely, for Enoch, quasi-exclusionary reasons).<sup>39</sup> However, identifying such further grounds of exclusionary reasons only reinforces rather than undercuts the key criticism of the Razian account, for the boundaries of authority that they imply are no less perverse. To wit, the grounds that Enoch discusses would imply that the authority of the NJFT-satisfying legislature discussed above would extend to those that have reason not to devote cognitive resources to considering the merits of the community's property laws, but not, say, those that enjoy and perform a public service by doing so.

#### 4.2 The Democratic Basis of Razian Authority

To see an instructive variant of this same criticism, consider that a number of theorists working with the Razian framework have argued that the values underlying democratic governance ground the exclusionary force and, hence, the authority of political institutions. Daniel Viehoff recently has offered a sophisticated argument in support of this claim based in the value that he describes as nonsubjection.<sup>40</sup>

For Viehoff, one person subjects others if she has greater power than her counterparts to determine the terms of her social interactions with them, and she exercises that power, thereby (as Lefkowitz would put it) imposing her moral judgment on others. Viehoff adds:

Unless the disputants set aside the considerations of greater and lesser power that they otherwise take into account in determining how best to advance justice or the common good, they cannot hope to realize nonsubjection in their relationship. So

---

<sup>39</sup> See *id.*, 75 and Enoch (2014).

<sup>40</sup> Viehoff (2014), 369.

the concern for nonsubjection explains the exclusionary demands of the directive.<sup>41</sup> Thus, he argues that the value of nonsubjection requires more than refraining from acting in ways that taking advantage of one's great power. It further requires not acting for certain reasons—namely, those that favor acting in ways that would take advantage of one's greater power.

For example, on Viehoff's account, the value of nonsubjection would require the citizen not only to conform to a democratically enacted term of social cooperation, say, the requirement to pay a certain amount in taxes. Moreover, it would further require the citizen to exclude from her consideration at least some of the reasons, perhaps the minor injustice of paying the tax or the prudential benefits of not paying the tax, that favor exercising her unilateral power to modify the terms of social interaction (i.e. her ability to cheat on her taxes without getting caught).

I am not convinced by this argument, for I do not see why placing appropriate first order weight on the value of nonsubjection and acting accordingly would not be enough to pay full homage to that value. For example, I don't see why the citizen who takes the minor injustice of paying a certain tax into consideration when deliberating about whether to pay the tax would thereby fail to heed the value of nonsubjection. To my mind, she would pay full homage to this value if she rightly concluded that the value of nonsubjection requires her to pay the tax despite its minor injustice and for that reason paid the tax.

To be clear, refuting Viehoff is not the primary objective of the foregoing discussion. Rather, I voice doubts about his argument to illustrate the following point. Namely, from the Razian perspective, whether Viehoff has identified grounds of political authority turns on

---

<sup>41</sup> Id. 369.

whether he is right and I am wrong about the exclusionary force of the value of non-subjection. However, it is implausible that the existence and scope of the authority of democratic institutions hinges on the outcome of such an arcane dispute. Moreover, this implausibility is emblematic of the deeper failing of the Razian account described above. Namely, this account defines the scope of political authority in terms of considerations that are relevant to whether the authority would be justified in performing a deliberative function for an individual rather than a group as a whole.

## **5. The Promise of the Collectivist Conception of Authority**

In this section, I recapitulate some of the key features of the collectivist account of the structure and ground of authority that I have defended here. I do this both to clarify this conception and to highlight its appeal and promise. In service of this latter objective, I also briefly discuss two oft-discussed issues in legal and political philosophy that the collectivist conception reframes.

### **5.1 Key Features of the Collectivist Conception**

I have argued that the simple view of political authority problematically fails to reflect the preemptive force of authoritative directives and the Razian account mistakenly construes preemption in individualistic rather than collectivist terms. In this same vein, I have argued that both the simple view and the Razian account fail to appreciate that political authorities characteristically claim that their directives have a preeminent normative standing. As a result, neither account recognizes that the scope and limits of authority are determined by considerations that would justify this standing.

I have further argued that The Normal Functionalist Justification Thesis specifies

the conditions in which a political institution would possess the preeminent normative standing distinctive of political authority. In summary, this thesis holds that if an institution is all things considered better than any alternative feasible modality for specifying and securing the terms of a group's morally mandatory public settlement, then it has political authority over that group.

Note that two distinct civic obligations are implicit in the NFJT: the juridical duty to conform strictly to the terms of a morally mandatory public settlement, and the political obligation to conform to the directives of an institution that secures and specifies the terms of such a settlement. As discussed above, two distinct categories are relevant to the scope of individuals' juridical duties. The first category includes values, such as fairness, democratic civility, agency, and security. Values within this first category morally bind individuals to public settlements; hence, I refer to them as juridical values. The second category comprises ideals of political morality, such as justice, that are the fundamental standards for assessing the moral quality of public settlements (e.g., settled frameworks of property rights). I have argued that the juridical values ground a defeasible moral requirement to conform strictly to the terms of certain public settlements and that a settlement's failure to realize certain highly important ideals of political morality are potential defeaters of that duty. As discussed above, a core functionalist intuition is that by dint of the weight of juridical values, such as democratic civility, agency, security, and fairness, the juridical duty to conform to certain public settlements might be dispositive even with respect to deeply flawed (e.g., significantly but not egregiously unjust) terms of those settlements.

The scope of the second civic obligation, the duty to obey certain political institutions' directives is determined by the balance of the two categories of values just described and yet a third category of values. As discussed above, this third category

comprises values that are relevant to the assessment of the comparative quality of alternative modalities for securing public settlements (e.g., democratic pedigree, deliberative competence, and the degree to which its public identifies with it). In sum, I have argued that an institution's public is bound by a political obligation to obey that institution's directives (or, in other words, the institution has political authority over that public) insofar as (1) by dint of juridical values, its directives specify and secure public settlements that are morally mandatory for its public, (2) the juridical values are not defeated by ideals of political morality that militate against compliance with those settlements, and (3) all things considered, the institution is better than any alternative feasible modality of specifying and securing the settlements.

## 5.2 The Collectivist Conception, Judicial Decision-Making, and the Particularity Requirement

As Raz has noted, a distinctive feature of the courts of any legal system is that they are norm-applying rather than discretionary organs.<sup>42</sup> That is, courts apply norms that they take to be authoritative to decide cases and rely on their own independent deliberative lights only when the authoritative norms are not dispositive. The collectivist suggests a novel and, as I hope the reader will agree, perspicuous account of what it is for a norm to be an authoritative basis of judicial decisions. Namely, in addition to providing the relevant judicial officials with an obligating content-independent reason to decide cases in accordance with the norm, the obligating content-independent force of such norms defeat without being reciprocally defeated by the content-independent force of any countervailing norms.

---

<sup>42</sup> See Raz (1979), 107-11.

Moreover, to be an authoritative basis of a particular legal decision, the norm also must not be defeated by any other countervailing considerations given the facts of the case at hand.

In this same vein, the NFJT is a promising guide for judicial inquiry into the identity and content of the authoritative norms that courts must apply to decide cases. To see this point, consider first that judicial officials confront a vast sea of candidate authoritative norms, for there are myriad potential sources of such norms, including customary practices, courts, legislatures, and administrative bodies at municipal, provincial, federal, international, and transnational levels. Thus, courts face the task of determining which of these candidate norms are authoritative. Moreover, they must consider whether to strike a balance between competing sources of putatively authoritative norms, be it by way of a hierarchical ranking of the sources, a division of domains of authority by subject matter or territorial jurisdiction, an interpretive integration of the directives issued by the competing sources, or some combination of these and perhaps other ways of striking a balance.<sup>43</sup>

A felicitous feature of the collectivist conception is that the NFJT, suitably modified, provides guidance for courts in the just described tasks. That is, it instructs courts to decide cases on the basis of norms that have been specified by the best feasible modality for specifying the morally mandatory public settlements at issue. In this same spirit, it instructs courts to rank and integrate potentially competing modalities of public settlements in the

---

<sup>43</sup> See Nicole Roughan (2013) *Authorities*, Oxford: Oxford University Press for an extended discussion of how authoritative labor might be shared between institutions. Moreover, she offers an account of authority that promises to provide guidance for allocating the division of authoritative labor. See also Anthony Reeves (2015) “Political Reasons and Legality: Instrumental Political Authority without Exclusion,” *Law and Philosophy* 34: 257-98.



way that would constitute the best possible overarching modality of specifying and securing the relevant communities morally mandatory public settlements.

A second noteworthy implication of the collectivist account pertains to the storied particularity requirement. In the words of A. John Simmons, any defense of political authority must:

be able to explain why the moral duty (or obligation) to obey is owed specially to one particular society (or to its subjects or governors) above all others (namely, to “our own” societies), rather than offering only some moral reason for obedience that would bind one equally or more imperatively to obey or support the laws or political institutions of other societies.<sup>44</sup>

On the basis of this requirement, Simmons rejects a number of accounts of the grounds of political authority. For example, he argues that accounts that appeal to a natural duty to support just institutions fail because they justify supporting any just institution rather than one’s own political institutions in particular.<sup>45</sup>

A number of theorists are unmoved by the particularity requirement, arguing in essence that it reflects an ahistorical and parochial prejudice about the nature of political authority.<sup>46</sup> I am sympathetic to this objection; however, I also feel the particularity requirement’s intuitive appeal, as others must as well given the prominence of this line of

---

<sup>44</sup> Simmons and Wellman (2005), 166.

<sup>45</sup> See Simmons and Wellman (2005), 167-79.

<sup>46</sup> See e.g., Kevin Walton (2013) “The Particularities of Legitimacy: John Simmons on Political Obligation,” *Ratio Juris* 26: 1-15, 10-12.

argument. A felicitous feature of the collectivist conception is that it preserves the particularity requirement's kernel of non-parochial truth.

Like the particularity requirement, the collectivist conception holds that the members of a political authority's public have a special duty to obey that authority over and above others. To wit, the collectivist conception holds that the members of an authority's public have greater reason to conform to the say of the authority than they have to conform to the say of any other member of the public. Hewing yet more closely to Simmons's particularity requirement, the collectivist conception allows for the possibility that some political authorities might be supreme within their domain of authority. That is, the directives of some authorities might be obligating content-independent reasons for the members of their public that would defeat without being defeated by the obligating content-independent reasons that any other person or institution might issue, be they a member of the authority's public or not.

However, unlike Simmons's formulation of the particularity requirement, the collectivist conception is not unduly parochial, for it allows that the best all things considered feasible modalities for securing and specifying morally mandatory settlements for a public might include institutions that are not the public's own. For example, the collectivist conception allows that the tax laws of the United States could be supremely authoritative for citizens of other countries across a wide range of circumstances (e.g., when those citizens have significant business dealings in the U.S. or with companies located in the U.S.). Or, to give a second example, the collectivist conception allows that directives issued by international institutions, e.g., human rights law, could be supremely authoritative for U.S. citizens and officials.

In sum, in addition to illustrating the collectivist conception's non-parochial focus, the discussions of the particularity requirement and the authoritative bases of judicial decisions illuminate two further important features. First, the collectivist conception is modular. That is, it allows for the possibility that different political institutions might be authoritative with respect to the same public or overlapping publics, where such authority might be divided in various ways (e.g., hierarchically, by subject matter, or interpretative integration). Second, the collectivist conception promises to guide legal officials in their efforts to integrate and distribute authoritative labor among modalities of public settlement, and similarly, it promises to assist theorists in determining whether and to what extent any extant political institutions, such as legislatures, courts, administrative bodies, international institutions, and so on are authoritative, be it singly or in combination with other modalities of public settlements.

## **Conclusion**

Here, I have defended the collectivist conception of the structure of political authority and its juridical ground, the NFJT, and I have argued against the simple and the Razian account of political authority. I hope these arguments are convincing, but even if not, perhaps one important point would remain. Namely, the analysis of the distinctive preemptive normative character of authoritative directives has far-reaching implications for further inquiry into the authority of political institutions. Hence, developing and considering alternatives to Raz's analysis of preemption is an important and yet surprisingly neglected task.