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Political Obligations and Provisional Rights: A Study in Kant's Politics of Freedom

A dissertation submitted in partial satisfaction of the requirements for the degree
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by

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EPIGRAPH

Like the much-cited query "what is truth?" put to the logician, the question "what is Right?" might well embarrass the *jurist* if he does not want to lapse into a tautology or, instead of giving a universal solution, refer to what the laws in some country at some time prescribe. He can indeed state what is laid down as right (*quid sit iuris*), that is, what the laws in a certain place and at a certain time say or have said. But whether what these laws prescribed is also right, and what the universal criterion is by which one could recognize right as well as wrong (*iustum et iniustum)* – this would remain hidden from him unless he leaves those empirical principles behind for a while and seeks the sources of such judgments in reason alone, so as to establish the basis for any possible giving of positive laws (although positive laws can serve as excellent guides to this). Like the wooden head in Phaedrus' fable, a merely empirical doctrine of Right is a head that may be beautiful but unfortunately it has no brain.

—Immanuel Kant, *The Metaphysics of Morals,* 6:229-230

[I]n the face of the omnipotence of nature...the human being is, in his turn, but a trifle. But for the sovereigns of his own species also to consider and treat him as such, whether by burdening him as an animal, regarding him as a mere tool of their designs, or exposing him in their conflicts with one another to have him massacred—that is no trifle, but a subversion of the *final end* of creation itself.

--Immanuel Kant, *The Conflict of the Faculties,* 7:89

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LIST OF ABBREVIATIONS

Kant's texts:

JL:	*Jäsche Logic*
BL:	*Bloomberg Logic*
LE:	*Lectures on Ethics*
NRF:	*Naturrecht Feyerabend*
MdS:	*The Metaphysics of Morals*
GMS:	*The Groundwork of the Metaphysics of Morals*
TP:	*On the Common Saying: That may be true in theory, but it is of no use in practice*
PP:	*Toward Perpetual Peace*
KU:	*Critique of the Power of Judgment*
A:	*Anthropology from a Pragmatic Point of View*
IUH:	*Idea for a Universal History with a Cosmopolitan Aim*
DDR:	Drafts for the *Doctrine of Right*
CF:	*On the Conflict of the Faculties*
WIE:	*An answer to the question: What is Enlightenment?*
KpV:	*The Critique of Practical Reason*
KrV:	*The Critique of Pure Reason*
SRL:	*On the Supposed Right to Lie Because of Philanthropic Concerns*
R:	*Religion within the Bounds of Mere Reason*
Ref.:	*Reflexionen*

NB: Unless otherwise noted, citations to Kant's texts are made in accordance the above abbreviations, and with standard practice of referring to the pagination of the academy edition.

Other Primary Sources:

P:	*Politics* by Aristotle
L:	*Leviathan* by Thomas Hobbes
TPT:	*Theological-Political Treatise* by Baruch Spinoza
STG:	*Second Treatise on Government* by John Locke
SC:	*On the Social Contract* by Jean-Jacques Rousseau

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ABSTRACT OF THE DISSERTATION

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by

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This dissertation argues (with Ellis 2005) that Kant's political philosophy must be re-read in view of his commitment to the Provisionality Thesis (PT). PT states that, in our world, external rights are provisional, never peremptory. In Chapter 1, I lay the grounds for such a reading by showing how Kant's notion of external freedom, properly understood, drives the development of his political theory (by generating duties to leave the state of nature, to form a body of international law, and to respect

each person's cosmopolitan rights). Chapter 2 then establishes (against competitors), that Kant's theory so understood is committed to the Provisionality Thesis. Chapter 3 locates the language of provisionality in the political writings of Leibniz and Rousseau, and shows that Kant's usage differs considerably from his predecessors'. Whereas Chapters 2 and 3 examine the conditions and meaning of provisional right, respectively, it is only in Chapter 4 that I explore PT's full normative implications. I argue (against competing accounts) that we best capture the difference between a provisional and peremptory right by distinguishing between their correlative obligations. Whereas provisional rights correlate with formal obligations, peremptory rights correlate also with material obligations. Chapter 5 reinterprets Kant's position on political authority given that political obligations reduce to formal obligations, and argues that PT places Kant's account nearer to philosophical anarchism than is usually appreciated. Chapter 6 argues that Kant's theory, so understood, sharply distinguishes between two-tiers of normative analysis: One at the level of provisional right (which emphasizes the freedom-relevance of the rule of law), and one at the level of peremptory right (which demands that coercive law itself be deployed only for the sake of rendering freedom mutually consistent). This dual structure affords Kant a response to the objection that his political theory is normatively impoverished. In chapter 7, I argue that Kant's position is closer to "realist" methodological views than has been traditionally supposed, while retaining significant (and attractive) elements of "moralism". Chapter 8 applies this framework to the political problems generated by refugee crises, and argues that its verdicts are more plausible than the standard interpretation's.

Introduction

> Under the government of reason our cognitions cannot at all constitute a rhapsody but must constitute a system, in which alone they can support and advance its essential ends. I understand a system, however, the unity of the manifold of cognitions under one idea.
>
> —Immanuel Kant, *The Critique of Pure Reason,* A832/B860

As Isaiah Berlin noted throughout his career, the human urge for unity is written in black and white and red all over the historical record. Attempts to satisfy it in intellectual domains stain the loosely bound leaves of philosophers and sociologists and psychologists and poets and economists in the East and in the West. The desire to experience oneness drives imbibers of psychedelics, and is reportedly characteristic of the reveries of mystics and shamans and clerics alike. On the practical side, lust after unity has built great cathedrals and great states no less than it has driven them to rubble and relegated them to the mists of memory. It has led to the constitution peoples and cultures and subjected the same to domination and persecution. It has assembled new modes of thought from the dusty materials of ages just as surely as it has driven the old ones into darkness and obscurity. The human urge for unity has cleaved apart at least as much as it has brought together. Berlin is right about this. Is he, then, also right that it is an urge better abandoned?

Kant's thought stands among the deepest attempts in Western intellectual history to avert this conclusion, without denying its motivation. Kant readily admits

that, in striving after systematic unity for its cognitions, reason is led unwittingly to transcend its very limits. Thus we find ourselves living in worlds of illusory unity, worlds in the image of metaphysical systems to which we have no proper warrant. He begins his masterwork by saying just that (KrV Aviii). But despite powerfully articulating this critique of the genesis of traditional metaphysics, Kant wasn't prepared to give up on satisfying reason's needs. Instead, he held that—in practical and theoretical domains alike—we are tasked with pursuing this unification in the world of appearances, tasked, that is, with approaching asymptotically, from a sure foundation, what we can never reach with finality: the unity of our cognitions under one idea (KrV A645/B673, A663/B691).[1] This dissertation is an attempt to show just how seriously Kant took this idea in his political philosophy, on the one hand, and to investigate the contemporary relevance of the resulting theory, on the other. Accordingly, it might well be thought of as divided into two parts.

In the first part, consisting of chapters 1-4, I advance a reading of Kant's political philosophy that is novel along two main dimensions. First, I offer a reinterpretation of the central idea in Kant's political philosophy: the notion of external freedom. I show how this notion of freedom has been misunderstood, and how properly understanding it sheds light upon the structure of Kant's argument for the requirement to leave the state of nature and develop a set of domestic and international republican institutions. In the limit, this process of institution building unifies our exercises of external freedom under a system of public law and constitutes

[1] Only after writing the entirety of this dissertation, including the beginning of this introduction, containing these words, did I discover the excellent work of Luke MacInnis, who is perhaps clearest in acknowledging the important role that these systematic reflections play in structuring, not only Kant's theoretical and moral philosophy, but also his politics. See MacInnis 2015. See also Ellis 2005.

our rightful relations to one another (Chapter 1). Second, I show that our external duties of right remain provisional until this unification is complete. But since the unification of our freedom with others' must always remain imperfect, something that we approach but never realize, our external duties always retain their provisional status. I call this Kant's *provisionality thesis* (Chapter 2). In this sense, our striving after unification is always frustrated, our political lives are meaningfully fractured, in much the same way as our theoretical pursuits are never complete. But this need not leave us despairing or without direction. Chapter 3 shows that the notion of provisionality has a specific meaning in Kant's larger philosophical system. Judgments of right that are provisional are judgments made in the absence of consciousness of their necessity. They are judgments affirmed because there are more grounds for their affirmation than for their rejection, but that may, pending future investigation, need to be overturned because they are inconsistent with the unification of wills that reason sets as a necessary task. Chapter 4 argues that provisional rights, so understood, correlate merely with a formal obligation to remain ready for the rightful condition, and contends that this bare duty and its implications offer us direction in the domain of politics.

The second part of the dissertation, consisting of Chapters 5-8, argues that an interpretation of Kant's political theory along these lines is attractive, and resituates Kant's theory in several contemporary debates. Chapter 5 notes that, whereas Kant's theory is thought to be the most promising refutation of the philosophical anarchist position, the truth is that the best version of the theory is closer to that position than is ordinarily recognized. Chapter 6 argues that although Kant's theory is monistic on

one level (grounded in the spare value of freedom) in a way that has drawn the disdain of theorists at least since Henry Sidgwick, it can admit pluralism on a different level. The advantage of this hybrid account is that it can do justice to pluralist intuitions without giving up on our hope to find a univocal answer to political questions. Chapter 7 argues that whereas Kant is taken to adopt the unrealistic and simplistic position that political philosophy is simply applied moral philosophy, accepting the reading of his work developed in earlier chapters allows Kantians to accept what is true in realist modes of theorizing, while avoiding their excesses. The final chapter takes an applied turn, and argues that a version of Kant's theory along the lines I suggest has considerably more normative resources for understanding the world's current refugee crisis than other (perhaps more natural) readings.

Developing these arguments requires careful examination of Kant's political thought, which is often confusing, obscure and technical. In the process, the forest can seem lost for the trees. It seems fitting, then, in this general introduction, to offer a few words about the project at a coarser level of granularity. Toward that end, I wish to briefly sketch some familiar aspects of Kant's moral theory and its notion of autonomy with a view toward explaining why political demands pose a special problem for a theory like this, and how Kant encouraged us to see our way to a solution. My hope is that beginning here will help readers to track the crucial issues as they develop in the arguments that follow, and to construct a big-picture narrative with reference to which the more technical details can be situated.

* * *

Kant's moral theory starts from the commonsense observation that morality makes demands on us. Among other things, we must keep our promises, refrain from treating people disrespectfully, cultivate our talents, and help other persons where we can. Sometimes we rise to meet these demands, other times not. Whether we do is normally up to us, depending chiefly on whether we overcome the temptations we face to do otherwise. For Kant, this means that we are contingently good. Perhaps there are other (divine) beings whose choosing is infallibly good. For such beings, moral commands would be *subjectively necessary,* which is to say that they would not present themselves as demands or constraints at all. Infallibly good agents would simply do good. By contrast, for us, moral laws are *subjectively necessitating.* That is to say: we ought to comply—they obligate us—but at any given time, we might fail (GMS 4:414). This invites what Korsgaard (1996) has called the *normative question*: In virtue of what are these demands authoritative? In virtue of what do they constrain our free capacity to choose among alternative courses of action?

Some demands have authority over us in virtue of other things we want. If I want to live a healthy life, the requirements to eat well, exercise regularly, and get sufficient sleep have authority over me because they're good ways of realizing my desire. Kant claims—and commonsense agrees—that morality does not have this character. The demand that I help you if you're drowning depends neither upon whether I'll get a reward for my effort, nor upon its capacity to satisfy any of my other desires. I should save you from drowning, whatever else I might want. For Kant, this makes morality *unconditional* with respect to our desires. He expresses this point by

insisting that morality commands in a way that is *categorically necessary* not *hypothetically* or *contingently* necessary.[2] But if morality demands what it demands regardless of what we want, then, in a sense, it demands what it demands regardless of who we are (GMS 4:433).[3] And if moral demands apply regardless of who we are, then they are "universally valid": They require just the same thing of all similarly situated agents (GMS 4:416). These reflections suffice to establish a tight conceptual connection between moral demands and the notion of law. For the notion of law, for Kant, conceptually contains these very notions of universality and unconditional necessity (PP 8:348; Watkins 2014, pp. 475-476, 486-487). How could there be laws like this? How could free beings be subject to demands that take so little account of who they are and what they want?

Kant's answer is that a free being, in being bound by his duties, is "subject *only to laws given by himself but still universal* and that he is bound only to act in conformity with his own will" (GMS 4:432). The language here is difficult, but the idea is simple and elegant. We are subject to unconditional moral demands, because, in a sense, these same demands are implicit in the structure of our rational wills. We ourselves legislate the very laws that command us. Other moral systems search for an account of moral (i.e. categorical) necessity, but arrive only at the hypothetical necessity of an action "from a certain interest" (GMS 4:434). Past systems posit that our wills are necessitated [*genöthigt*] "*by something* else" to moral action (GMS 4:434). That "something else" is alien to our wills, be it the idea of achieving

[2] GMS 4:414-416.
[3] I am assuming that part of what makes us who we are is the different aims that we have, the different things that we want out of life, etc. Kant seems to share this assumption. See: GMS 4:444.

perfection, promoting the general happiness, or avoiding punishment (GMS 4:442). But then we can evade such necessitation simply by giving up the desire for the necessitating object. Kant expresses this point by emphasizing that past moral systems were *heteronomous* moral systems. Insofar as the source of moral demands is found in our own rational will [*Wille*], by contrast, their source is autonomy, i.e., our own positive freedom to act according to principles.

Set aside Kant's challenging argument for this claim, and attend carefully to the claim itself. The claim is that genuine moral demands—demands that are unconditional and universal in the way that commonsense takes moral demands to be—must be rationally self-legislated. When a demand comes from elsewhere, it lacks the features of necessity and universality that genuine moral demands have. In such a case, we may determine that we would rather give up the relevant interest than comply with the demand. Should we decide this way, we are neither irrational nor immoral. Indeed, assuming we don't miscalculate our own preferences, we make no mistake of any kind. Those of us who never had the interest were never bound. By contrast, demands that *bind* our free power of choice are legislated by our own rational capacities. Thus, they are universal, and necessary, i.e., unconditional or non-contingent. Such demands are consistent with our freedom, insofar as compliance with such demands (positive freedom) frees us from slavish dependence upon desired objects (GMS 4:446-447).

But now notice that we typically acknowledge a number of demands that are at least *prima facie* laid down by others' arbitrary and contingent acts of choice. Our political duties form the central case. Such duties are grounded in large part by

legislative choices that have long preceded our birth. The demands that these past and present legislative acts make upon us extend to nearly every aspect of our lives. Must we recognize them as authoritative? Since they seem to have an especially poor claim to being rationally self-legislated, they seem to lack authority over us, their authority limited by our interest in avoiding any associated sanctions. Therefore, Kant's moral theory can seem to entail anarchy. This was Robert Paul Wolff's conclusion in 1970:

> The defining mark of the state is authority, the right to rule. The primary obligation of man is autonomy, the refusal to be ruled. It would seem, then, that there can be no resolution of the conflict between the autonomy of the individual and the putative authority of the state. Insofar as a man fulfills his obligation to make himself the author of his decisions, he will resist the state's claim to have authority over him. That is to say, he will deny that he has a duty to obey the laws of the state *simply because they are the laws.* In that sense, it would seem that anarchism is the only political doctrine consistent with the virtue of autonomy. (1970, p. 18)

An obvious rejoinder is that Kant did not himself see autonomy and political rule as being inconsistent in this way (Waldron 1996, p. 1554). Indeed, for Kant, we are alleged to have an absolute duty to obey the political authorities in whatever does not conflict with "inner morality" (MdS 6:371), and Arthur Ripstein thinks that Kant's approach to political questions leaves no room for any "general objection to authority as such" (2009, p. 326). Perhaps, then, the problem with Wollf's argument is that it places undue emphasis on Kant's ethical writings, to the exclusion of his political writings (Flikschuh 2000, p. 3). If we attend to Kant's political texts, we will find the reconciliation between autonomy and political rule that Wolff cannot see his way to imagining.

But contemporary commentators have despaired of finding anything of the sort in Kant's political tracts. Concerning the question of freedom in politics, Kant seems simply to have changed the subject (e.g., Flikschuh 2000, pp. 83-88). The positive notion of freedom that is identical with the capacity for autonomy receives no treatment in Kant's most systematic political writings. Instead, Kant's focus is on external freedom, a notion of freedom that explicitly denies that acts must be self-legislated to be free. As for Kant's argument for accepting political authority? It ends up resembling Locke's argument to leave an inconvenient state of nature, only without any requirement that the constituted authority be freely consented to (and therefore without one promising resource for reconciling authority and freedom). At least on first pass, then, reading Kant's political philosophy does not solve the puzzle concerning how precisely political authority can be consistent with Kantian autonomy. It amplifies it. Put differently, we might agree with Ripstein that Kant's political theory is such as to allow no general objection to authority as such, and nevertheless worry that his ethical theory poses a powerful general objection to his political theory.

In fact, however, I believe that this sense that Kant's political philosophy is radically discontinuous from his moral theory with respect to freedom has been overstated. It is true that Kant's political philosophy is structured around a notion of freedom that is distinct from his notion of autonomy. Still, the central normative demand of Kant's political philosophy is that each be secure in her innate right to freedom, and this is a demand that seems to follow directly from a concern with autonomy. To see this, consider Kant's formulation of our innate right:

> *Freedom* (independence from another's necessitating power of choice), insofar as it can coexist with the freedom of every other in accordance with a universal law. (MdS 6:237)[4]

Kant says that we are to be free of others' *necessitating powers of choice.* But if to have one's power of choice necessitated is to have it subjected to law (as we have seen above), and we are to be free from such necessitation insofar as it comes from others' acts, rather than our own, then Kant's notion of political freedom demands precisely what Wolff would predict. Namely: We are not to be subject to the lawgiving of others, i.e., we are not to be subject to political authority. Put this way, Kant's statement of our one innate right to freedom fits *perfectly* with a moral theory that begins from a skeptical attitude toward political obligation. Still, it does not move as quickly to the anarchist's conclusion as Wolff does. The catch is in the last clause, which implies that we are rightfully subject to others' lawgiving insofar as our independence from such *cannot* coexist with everyone's freedom under universal law.

Kant's political theory approaches alien legislative activity exactly as a theory concerned with autonomy should: Such legislative activity lacks authority over our wills *except* insofar as it can itself be shown to be a requirement of our own self-legislative capacities. On this account, it is open that each of us is completely free

[4] My translation, reading: "*Freiheit* (Unabhängigkeit von eines Anderen nöthigender Willkür), sofern sie mit jedes Anderen Freiheit nach einem Allgemeinen Gesetz zusammen bestehen kann" (MdS 6:237). Gregor translates *nöthingender* as constraint, and *Willkür* simply as choice. But this conceals the linguistic proximity of the adjective *nöthig* to the noun *Nöthigung,* which is commonly translated into English as *necessitation,* and serves to mark the property of a contingently free power of choice under practical laws. Compare GMS 4:413, 4:439, and MdS 6:379, and refer back to the discussion above, as necessary. It is true that Kant distinguishes between moral and pathological necessitation, and that the latter might seem better fit for his politics. But Kant is also clear that others' acts generate *obligations,* and is consistent in defining obligation as moral necessitation. Thus, I believe we ought to read the necessitation in this passage as referring to the more demanding notion, even if pathological necessitation has a role to play, too.

from standing under obligations that result from others' acts of lawgiving. Anarchism is a genuine option on the Kantian view. But perhaps complete freedom from alien lawgiving cannot be universalized, i.e., cannot coexist with others' freedom under universal law. In that case, it follows that we are rightfully subject to some at least apparently alien lawgiving, and recognizing this removes its alien appearance. In the end, we recognize just as much political authority as is required for our freedom to be consistent with everyone else's freedom. If correct, this has two important implications. First, Wolff may indeed find an answer to his challenge in *The Doctrine of Right.* Second, sympathizers with Kant's political theory ought not to be overly dismissive of the anarchist's challenge. Overcoming it is, after all, the central task of his main political work.[5]

* * *

As I understand it, Kant's argument in the *Doctrine of Right* functions precisely by attempting to show that the amount of external lawgiving that is necessary for rendering our freedom mutually consistent is nonzero.[6] We begin to see this insofar as we observe the structure of the text itself. After an introduction, the *Doctrine of Right* moves from Private Right, to Public Right, to the Right of Nations, and finally to Cosmopolitan Right. Each step in the argument notes a further set of restrictions on freedom that is a requirement of reason itself.

[5] This conclusion is controversial. It meets its full defense in Chapter 1 of this dissertation.
[6] I share this reading with Schaefer 2017.

The section on Private Right establishes that complete independence from others' lawgiving capacity is incompatible with freedom, because freedom requires that we acquire external objects of choice. But acquiring external objects of choice involves imposing obligations on others to refrain from using them simply by one's capacity to choose, which implies that others must indeed be able to necessitate our wills. The fact that reason demands the acquisition of such objects immediately entails that complete independence from others' lawgiving is inconsistent with our own self-legislative capacities. We must accept that others' wills are authoritative for us insofar as they can impose obligations to refrain from using objects that they've acquired.

Transitioning from Private to Public Right, Kant argues that an unregulated authorization to acquire external objects allows persons to impose restrictions on persons' freedom *arbitrarily,* that is, at their discretion. But any such authorization is incapable of coexisting with freedom under universal law, for it generates conflicting duties, which, for formal reasons, are impossible on the Kantian theory (PP 8:377).[7] Therefore, a public authority is required to ensure (1) that there are transparent, promulgated procedures for acquisition and exchange, (2) procedures for resolving disputes, and (3) a mechanism for providing assurance. These measures make it the case that acts of acquisition are no longer wholly up to each individual acting separately, and so can be rendered formally consistent.

Still, such a public authority might be defective, insofar as it allows members to possess more than is compatible with everyone's freedom under universal law, or

[7] I argue for this claim in Ch. 1.

insofar as its legislative capacity extends beyond what's necessary to ensure that everyone's freedom remain mutually consistent. Additionally, domestic states exercise unilateral authority with respect to outsiders. These defects motivate the requirement of an international federation designed to (1) specify norms concerning acquisition of unowned territory, (2) regulate disputes between nations, and (3) enforce the judgments of these disputes through the right of war. Cosmopolitan right enters to ensure that international bodies and nations are constrained to respect each person's right to be somewhere.

It is only insofar as these institutions of external lawgiving are in place and seen to be in place that our exercises of external freedom are mutually consistent. Therefore, these (and only these) restrictions on freedom can be regarded as self-legislated restrictions, and thus consistent with our autonomy. Until bodies of external law limited to these functions are in place, others' authority over us is not conclusively established. Only under the condition that these and only these bodies of law are realized can others' acts of lawgiving be thought of instead as requirements of an *omnilateral will,* in which the separate, lawgiving of activity of each is united in a public giving of law. In this limit case, we restrict others' freedom through their "own will" (DDR 23:277; see also 23:278). Until this uniting of wills is actual, Kant holds that our authority over others—in its various forms—is merely provisional.

To anticipate the argument that I make in Chapter 2, we begin far removed from the unification of powers that this argument demands, and we remain far from having achieved it today. Insofar as this is true, we must seek the unification of wills that reason demands in experience, asymptotically, and our authority over others

remains always provisional. Just as reason sets us the task to unify our manifold cognitions under the guidance of one idea in the theoretical philosophy, pursuing conditions under which our exercises of freedom can be unified under one lawgiving will is a task that "has become a duty" that our political lives demand of us (DDR 23:305). This is not quite the anarchic conclusion Wolff thought Kant's notion of autonomy entailed. But it is also a conclusion that contemporary Kantians appear reluctant to embrace. We will have occasion in Chapters 2-4 to understand their hesitancy, and why they need not hesitate. In chapters 5-8, we will have occasion to see how taking this aspect of Kant's political thought seriously requires re-evaluating the place of his theory (and contemporary versions of it) among contenders.

But enough by way of introduction. Let's begin.

Chapter 1

Kant on Freedom and the Duty to Leave the State of Nature

> He is free who stands under no affirmative obligation.
>
> – Immanuel Kant, *Naturrecht Feyerabend,* 27:1339

> [A] right is the freedom through which the freedom of another is restricted: *jus quaesitum* {acquired right}. *A natura* everyone is free, and only those actions are right which do not restrict the freedom of anyone.
>
> – Immanuel Kant, *Reflexionen,* 6738

> Right is therefore the sum of conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom
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> – Immanuel Kant, *The Doctrine of Right,* 6:230

I. Introduction

Recent attention to Kant's political theory has paid significant dividends in terms of fleshing out the contours of his unique approach to political questions. Still, several central issues remain in need of further clarification. Chief among them is the question of how Kant understands freedom in political contexts, and how precisely this concept drives the development of his theory, from grounding an obligation to leave the state of nature, to the state's authority, to the obligation to move gradually toward international and cosmopolitan justice, and, ultimately, to perpetual peace.

Kant's politics is famously grounded in "external freedom," which, on the consensus view developing in the recent Anglophone literature, is commonly identified with the kind freedom he describes under the heading of our one innate right, namely: "independence from being constrained by another's choice, insofar as it can coexist with the freedom of every other in accordance with a universal law" (MdS 6:237; Ripstein 2009, *passim*, Wood 2014, ch. 3, Uleman 2004, Flikschuh 2010, p. 477, Hodgson 2010b, Flikschuh 2017).[8] External freedom, so understood, is supposed to "carry the justificatory burden of [Kant's] entire argument" (Ripstein 2009, p. 14), and so too the duty to leave the state of nature.[9] Thus, one expects the duty to leave the state of nature to ground out in a clear account of the sense in which external freedom is not realized or is incomplete or conflicts until one exits it. Instead, what one encounters is textually well-grounded discussion of the defects of the state of nature—defects whose particular relationship to external freedom is left imprecise, even if one has a sense that all the details could be filled in.

The state of nature's defects are as follows: (i) in the state of nature we necessarily impose obligations on others by our own particular judgment (*unilaterality*), (ii) in the state of nature, the question of who has rights to what

[8] Importantly, this trend has not enjoyed such popularity among German scholars, who typically associate external freedom with freedom of choice (e.g., Ludwig 1988, Höffe 1989, pp. 163-164, Kühnermund 2008, pp. 25-26, Hirsch 2012, pp. 28-37 et al.). As we will see below, it's not that the Anglophone tradition does without appeals to freedom of choice, but rather that it fails to be clear about the difference between external freedom as it might describe a norm, and external freedom as it describes a capacity of the human will, often running the two problematically together. My sympathy with the German approach should become clear in what follows.

[9] This passage is not an aberration. Some pages later, Ripstein writes, "By making the innate right to freedom the basis for any further rights, Kant imposes an extreme demand for unity on his account of political justice. The rights that each person has against others must be derived from it, as must the fundamental constitutional rights that protect political freedoms and freedom of religion" (2009, p. 31).

(especially in disputes) has no determinate answer (*indeterminacy*), and (iii) in the state of nature our rights lack reliable protection (*lack of assurance*). Here, comparison with Locke is instructive. For he too recognizes each of these problems.[10] But, whereas for Locke, these defects pick out merely so many "inconveniences" that render it prudentially rational to leave the state of nature, Kant's view is usually taken to be these defects somehow compromise our freedom in a way that makes our exit from the state of nature morally obligatory, rather than remedial (Varden 2008). But in the Anglophone literature, the relationship between the state of nature's "defects" and various authors' previously articulated notion(s) of freedom remains imprecise. Though it might be inconvenient to lack assurance over my goods, for example, am I dependent upon another person's choice if I freely choose to remain in a situation where my rights are not assured? How does indeterminacy render me dependent upon another's choice in a problematic way? While others' imposition of obligations on me via their particular judgment does change my normative situation, in what sense does it render me dependent upon them? Indeed, if the obligations are genuine, then there should be no conflict between their constraints and my freedom, on a typical Kantian view. For freedom consists precisely in subordinating one's pursuit of discretionary ends to the moral law. Answering these questions is non-

[10] To be clear, Locke's characterization of the first two inconveniences differs from Kant's: For Locke, unilateral judgment is only a problem to the degree that when we judge unilaterally, we are likely to favor our own case in a way that corrupts our understanding of the natural law, whereas for Kant the problem seems to be that imposing obligations by unilateral judgment violates some a priori practical norm, and moreover, that such is inevitable in the state of nature. Similarly with indeterminacy: whereas for Locke, the natural law is fully determinate, with indeterminacy and disagreement resulting from our bias toward our own case and rendering disputes more common, for Kant there simply is no a priori required answer to many of our questions concerning external right. Finally, while Locke leaves it up to individuals whether to leave the state of nature in light of the fact that one's possessions are more or less insecure, Kant seems to suggest that any insecurity at all requires, as a matter of practical reason, entrance into a coercive state.

optional because, for Kant, the duty to leave the state of nature is a coercible duty, and freedom is alleged to be the sole condition underlying the permissible use of coercion (MdS 6:340).

I argue in what follows that extant Anglophone accounts collapse an important distinction between two senses of external freedom operative in Kant's text, and that it is only by keeping them distinct that we understand the structure of Kant's argument. Once we clearly separate the two understandings of external freedom, we can see how and in what way the problems Kant describes in the state of nature are genuine problems for freedom, rather than mere Lockean inconveniences. Specifically, external freedom can be understood in the following two ways. External freedom may refer to rightful independence, namely independence from being necessitated by another person's choice insofar as it is compatible with the like freedom of others under universal law i.e., that freedom to which we have an innate right. Alternatively, it might refer to what Kant calls freedom in the external use of choice, i.e., basic freedom of action, directed to objects distinct from the agent. The first describes a *relational status* that obtains insofar as one is rightfully independent of all others.[11] The second is a free *capacity* by means of which we are capable of interacting with objects distinct from us (for whatever reasons we might have). Whereas right demands the realization of external freedom understood as status, it is external freedom as capacity that threatens the realization of this demand.

[11] There is also, naturally, the non-moralized notion of independence, where the requirement that independence be consistent with right is dropped. For simplicity and clarity of presentation, I set this to the side.

If Kant's project is successful, then the problems in the state of nature (unilateral judgment, indeterminacy and assurance) should in some way leave us to exercise our *capacity* for external freedom in such a way that our *status* of being externally free is necessarily compromised. I argue in what follows that complete external freedom in status implies that no extended exercise of external freedom is possible because such an extended exercise implies a capacity to necessitate others' wills by imposing obligations on all others by means of one's arbitrary choice. But my authorization to place others under obligation in this way renders others dependent upon me in just the right sense. Therefore, not all can have it reciprocally and it is inconsistent with freedom under universal law. Leaving the state of nature is meant to bring about a mutual dependence upon law that resolves this problem by instantiating conditions under which (1) all are dependent upon the *same* law, and (2) the external obligations thus generated can be seen to derive, not from the arbitrary choice of each, but rather from the universal will of all a priori. Our autonomy is, in the limit, rendered consistent with external obligations that at first appear contingent and alien, insofar as these can be seen to issue from our own capacities for self-legislation.

In outline (as I read it), Kant's argument for the duty to leave the state of nature and establish a state has the following eight steps.

1. My independence is rightful in some condition (*Zustand*) only if it can coexist with the freedom of others in that condition under universal law.

2. If my independence in some condition authorizes my arbitrary necessitation of persons' power of choice, then it fails to coexist with everyone's freedom under universal law.

3. Complete independence in the natural condition (state of nature) authorizes me to necessitate others' powers of choice by mere *Willkür* (arbitrarily).

4. Therefore, complete independence in the natural condition is wrongful (1-3).

5. If complete external freedom in the natural condition is wrongful, then there is a coercible obligation to seek its rightful limitation in a rightful condition.

6. Therefore, there is a coercible obligation to leave the state of nature and enter a rightful condition (4, 5).

7. I can enter a rightful condition only so far as I enter a civil condition.

8. Therefore, there is a coercible obligation to enter the civil condition (6, 7).

According to this argument, it is a duty to enter a civil condition because it presents the minimal set of limitations on freedom under which my independence can coexist with the like independence of others.[12] In what follows, I argue (a) that this argument

[12] Strictly, the argument's conclusion follows only if there are no alternatives to the civil condition available that would also instantiate a rightful condition. Kant posits that there is an exhaustive list of alternatives here: either (1) enter a civil condition, or (2) cease potential interaction with others. Kant narrows the list to one by means of disjunction elimination: because the earth is spherical, it is not available to us to cease interaction with others in the relevant sense. Notice, however, that if I'm right about the rest of the story (below), it's hard to see how even ceasing interaction would eliminate the problem, even in an unbounded world. If the reason that the exercise of external freedom is wrongful in the state of nature is because it constrains others' powers of choice by mere *Willkür,* then this would happen even if the earth were *not* spherical, even if these obligations would not constrain our actions much. Given that it is, anyway, the case against this option is somewhat overdetermined.

allows us to read Kant's *Doctrine of Right* in an especially coherent and unified way, such that the entire weight of Kant's argument really is carried by the fundamental idea of freedom, and (b) that understanding its premises and their grounds allows us to better appreciate the distinctiveness of the Kantian position, as well as its continuity with arguments Kant makes in his moral philosophy. In so arguing, I differentiate the view that develops from other accounts available in the literature, and acknowledge its debts to such accounts where I'm aware of them.

The plan is to establish each step in the argument in turn. Thus § II argues for premise (1), and more precisely distinguishes between the two previously sketched notions of external freedom presupposed by Kant's formulation of our One Innate Right. This paves the way for arguing in § III for premise (2). There we shall see that Kant marks a normative distinction between necessitation by others' freedom that is merely arbitrary and grounded in contingent choice, and necessitation that is grounded instead in a priori and self-legislated practical reason. Moreover, the former restrictions are inconsistent with freedom under universal law, while the latter restrictions consistent with the same. I turn in § IV to arguing that premise (3) is true: our complete independence in the state of nature confers upon individuals a capacity to necessitate others' wills in an arbitrary manner. This entails the argument's first subconclusion (4): complete independence in the state of nature is not rightful. In concluding this section, I argue that the problem of unilaterality carries the weight of Kant's argument against the permissibility of remaining in the state of nature, and that the other "defects" are to be understood in terms of it. In § V, I wrap up the argument by showing that Kant accepted (5) - (7), which logically entail (8). § VI concludes.

While I take the chapter's ambitions to be primarily exegetical (to show that this is indeed the most coherent understanding of Kant's argument in the *Doctrine of Right*), I also motivate the plausibility of the argument's premises along the way.[13]

II. The UPR and Compossible Freedom

As I've construed it, the argument's crucial first premise asserts that a necessary condition of a rightful exercise of freedom that it can coexist with the freedom of others under a universal law. Call this the Compossibility Criterion of Right (CCR).[14] Kant's Universal Principle of Right (UPR) says that satisfying the CCR is *sufficient* for the rightness of an exercise of freedom (an action).

> Any action is right if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law. (MdS 6:230)

In the discussion that follows, Kant makes clear that CCR is also a necessary condition of an action's rightfulness: "If, then, my action or condition can coexist with the freedom of everyone in accordance with a universal law [i.e. if it is right], whoever hinders me in it does me *wrong;* for this hindrance (resistance) *cannot coexist with freedom in accordance with a universal law*" (MdS 6:230-231, emphasis added).

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[13] As I read it, the *Doctrine of Right* is a deeply ambiguous text, with many possible lines of interpretation that are internally consistent, but cannot all be true. Thus, far from claiming that there is no textual evidence that cuts against the interpretation I give here, I claim only that this interpretation captures a great many of Kant's concerns and unifies them in a way that is remarkably consistent.

[14] There is an important question about the source of this criterion, but it is a question that I leave aside for the purposes of this dissertation. Here, I simply wish to take the criterion as a given, in order to understand how Kant's argument proceeds once we've granted it. There are basically two questions: First, what is the status of the UPR: Is it derived from the categorical imperative, or does it have some weaker grounding in Kant's moral outlook? For a version of the first view, Guyer 2016; for somewhat different versions of the second, see Willaschek 1997, 2009 and 2012; Ripstein 2009. The second issue concerns the source of the principle's concern with external freedom by contrast with autonomy. For one story, see Messina 2017, pp. 275-278; for a complimentary account, see Hodgson 2010b.

Here, Kant treats an action's failing to satisfy CCR as a sufficient condition for its being wrong (*Unrecht*). If an action fails to satisfy CCR, then it is wrong. But then an action's compossibility with the freedom of others under universal law is not just sufficient for, but also necessary for, an action's rightness.

Because actions and conditions that are CCR-consistent cannot be hindered by others without wrong-doing, it follows analytically that we have a right to freedom from being hindered by others in our performance of those actions and remaining in those conditions. Indeed, Kant claims that our one innate right is just this, namely:

> *Freedom* (independence from another's necessitating power of choice), insofar as it can coexist with the freedom of every other in accordance with a universal law. (MdS 6:237)[15]

It is now commonplace in the Anglophone literature call the sort of freedom described above as "external freedom," owing to Kant's emphasis in *The Doctrine of Right* on external lawgiving and external actions, and in order to distinguish Kant's political notion of freedom from his ethical notion of internal freedom, or autonomy.[16] For Kant, "anyone can be free" in the sense relevant to Right "as long as I do not impair his freedom by my *external action*" (MdS 6:231). But this implies that although the notion of our innate right describes a status to be respected, it *presupposes* also a capacity of choice which issues in freedom-impairing external

[15] My translation; for an explanation, see the general Introduction to the dissertation.
[16] Ripstein argues that Kant's *Doctrine of Right* is "a doctrine of external freedom" (2009, p. 18), and Byrd and Hrushka characterize our one Innate Right as the "axiom" of external freedom (2010, p. 4, p. 10). Stronger still, others have advanced the claim that Kantian compossible "independence" just is external freedom (Wood 2014, p. 94, Flikschuh 2000, Ebels-Duggan 2011, pp. 551-552 and 2012, p. 897; Maliks 2014, p. 1, Zylberman 2016b, et al.). Though each of these authors develops a somewhat different understanding of the precise contours of external freedom, all accept that our innate right is as a matter of definition a right to external freedom, inviting confusion between external freedom as capacity and external freedom as status.

actions. To properly understand the two notions of external freedom relevant to Kant's political thought, therefore, we must render transparent: (1) a notion of independence, understood specifically as freedom from necessitation by others' powers of choice, and (2) a power of choice that is capable of *necessitating* others, thereby enabling us to make them dependent upon us in the relevant sense. Here, I show that there has been insufficient clarity in the Anglophone literature on the distinction between (1) and (2)—both of which have a claim to being called external freedom. I then proceed to clean things up myself.

For Arthur Ripstein, external freedom represents not only (2) a generic capacity to take up means to pursue purposes, but also a sense of independence (1), according to which such employment is possible for a person without asking anyone else's leave (2009, p. 33). Ripstein glosses Kant's notion of a right to independence as a right to be one's own master as long as others can similarly be their own masters. Others can exercise (2) and inhibit (1) by using another's means for their ends, thereby determining the purposes those others pursue (Ripstein 2004, pp. 8-9, 2009, p. 68; compare Hodgson 2010a and 2010b). In Ripstein's words: "You are dependent on another person's choice if that person gets to decide what purposes you will pursue," be it by enslaving you, assaulting you, or interfering with your property without your consent (2009, p. 15). We have a sense, then, of both external freedom as a status (i.e., being one's own master), and a capacity (i.e., employing means in the pursuit of purposes), although these are not always sharply distinguished. Allen Wood, influenced by Ripstein, claims that (1) "external freedom is the freedom of a person to make choices independently of constraint by the

choices of others," insofar as that freedom is consistent with others' like freedom, while to be constrained by others is to have them (2) use your means in pursuit of their ends (2014 pp. 73-74). But whereas Ripstein's account of what it is to be dependent upon another is somewhat narrow (including literal interferences with bodily freedom as well as property violations and extreme deprivation), Wood takes a wider view, according to which insufficient bargaining power in choice of occupation (for example) could compromise rightful independence (1) (2014, pp. 84-85).[17]

Thus, Ripstein and Wood agree that independence consists in the capacity to pursue one's ends or purposes with one's means, but disagree concerning what means count as your own. For Wood, means that are at your disposal are nevertheless not your own insofar as their possession makes others dependent on your will. For Ripstein, the notion of dependence is parasitic on the prior articulation of what you have a right to.[18] That is, the question of whether an exercise of freedom (as a capacity to pursue ends) subordinates another requires determining who has the right to what. But then some intuitive cases of dependence (e.g., unequal bargaining power) will not satisfy his more technical definition (e.g., when the more powerful

[17] Wood is not alone. Several others have drawn an analogy between Kantian independence and the notion of republican freedom developed, e.g., by Pettit (1997, 2012) and Skinner (1998) (e.g., Forst 2014, p. 77, James 2016, p. 308, Hasan 2018a *passim*). They share with the dominant view the identification between external freedom and independence, but read the latter as recalling the republican idea of freedom from domination by others or one's circumstances. Such commentators note that we can dominate others not just by our actions and status, but also by more elusive means, e.g., simply occupying a better social position. Thus, our freedom is constituted (at least in part) by the institutions that make possible freedom from this kind of domination. This is the interpretation of Kant's work capable of generating the most radical implications, although it is in principle compatible with a wide range of interpretations of what it is to dominate another, some of which might be less radical.

[18] This has led Valentini (2012) to object to Ripstein's account on the grounds of circularity—a charge with which I'm sympathetic, but which Ripstein can avoid by adopting the view developed in this chapter. For Ripstein's own puzzling reply, see Ripstein (2012).

party has a right to his better bargaining situation). So there is some disagreement about which notion is normatively prior: the idea of dependence, or the idea of right.

Though this way of talking captures the dominant view, two additional distinct but somewhat less prominent lines of interpretation are worth mentioning. The first, spatial account, is motivated by the spatial metaphors deployed throughout the *Doctrine of Right*. On this view (proffered by Ebels-Duggan), external freedom (1) consists in our innate right, as above, but cashes (2) out in terms of a freedom to move one's "body around in space" (2014, p. 901, Byrd and Hrushka 2006, p. 275, Hasan 2018b).[19] Again, here, it is clearly possible for others to interfere with this freedom, for example, by getting in your way, or barring you from certain places, and if such restriction of your external freedom is not consistent with freedom under universal law, then your rightful independence is compromised thereby. But what it would be for everyone's freedom in this regard to be compossible is somewhat less clear. To the degree that its proponents clarify, they read Kant's central arguments as requiring the maximization of spatial freedom. So understood, we ought to have a regime of property rights (say), because we have more freedom to move about in space with it than without it (see e.g., Ebels-Duggan 2014, p. 898).[20, 21]

The second minority view, the constitutivist view, understands external freedom as a positive freedom constituted by a priori principles of right, in concert

[19] Varden may accept a similar view. See her 2008, pp. 4-5, although note also that Varden's account shares several affinities with the one I develop in detail below.

[20] It is a bit unclear why we should believe this. Though with respect to *my* property, I need not ask your leave to traverse it as I please, given a regime of private (or even collective) property, there are a great many objects over which I certainly must ask your (or someone's) leave. By contrast, without a property regime, I may go wherever I please. It's true that others may also, but it's hard to see how my specifically spatial freedom is compromised in such a condition. (I will later argue that freedom as I understand it does indeed require property ownership.)

[21] For two additional accounts of external freedom, see: Uleman 2004 and Rostbøll 2016.

with public law (Zylberman 2016b). On this view, external freedom is (1) rightful independence, but since this notion is not prior to public law, but is in part constituted by it, neither does public law enter to limit it (ibid., p. 105). Instead, we realize full external freedom to the degree that we render our will dependent upon positive law (ibid., p. 108). In the state of nature, our external freedom conflicts because it consists only in a dependence upon a priori principles, but even infallibly following these principles leads us to conflict and dependence (ibid., p. 112), rather than to a situation one can "move one's own body in terms of equality and reciprocity with others" (ibid., p. 111). On this account, I (2) *exercise* external freedom insofar as, moving about in space, I "act in a way consistent with your equal freedom," and presumably not otherwise (ibid., p. 109).

Each of these accounts captures something important, but each is equally subject to exegetical difficulties. It's true, as Ripstein and Wood claim, that the notion of means for actions captures something important in Kant's account of external freedom as a capacity, and that the notion of being one's own master is one way of bringing Kant's notion of independence closer to intuition. Still, Kant uses the words "end," "means" and "purposes" seldom in the *Doctrine of Right,* and never in a definition of anything that looks like external freedom. While Kant's notion of external objects of choice might be understood as means, nowhere does he clearly cash independence out in terms of being "the one who decides what ends you will use your means to pursue" (2009, p. 33). It's true, as Wood insists, that it is important to get clear on what we mean by dependence upon another's choice, and that different understandings have different political implications. But Wood's own

treatment of the notion is intuitive, rather than grounded Kant's own characterization of dependence, according to which dependence of one person on another consists *specifically* in the second's *necessitation* of the first's power of choice. It's true (as in the spatiality based account), that, but for a world of shared objects that present themselves to us as part of our option sets, the UPR would find no application. Still, while spatiality is clearly a metaphor deployed throughout the *Doctrine of Right,* Kant never speaks of some basic freedom to move about in space. If this were the fundamental idea supporting his political philosophy, he would have done an astoundingly poor job expressing it. Finally, while it is true, as Zylberman says, that there is a sense of "the right to external freedom" according to which it is a reciprocal status that is constituted—in part—by public law, the idea of external freedom as a capacity of choice either (a) falls out of the picture, or (b) collapses into the Ebbels-Duggan account (see again passage quoted above from Zylberman 2016b, p. 111).

Even if one does not find these criticisms individually compelling, it should by now be clear that there is, in the current Anglophone literature, little agreement on the meaning of external freedom in Kant's political philosophy. To the degree that the notion of external freedom is supposed to serve a foundational role in Kant's argument, this is unfortunate. To set things right, we must revisit the *Doctrine of Right* itself. What I wish to do in the remainder of this section is offer a textually well-grounded account of (1) external freedom as a status of rightful freedom, and (2) external freedom as a capacity for external choice.

(1) External Freedom as Status: Freedom from Necessitation

Recall that our sole innate right is to CCR-consistent independence from being dependent upon another's necessitating power of choice. External freedom as characterized here is not a capacity that we have (e.g., the capacity to pursue purposes or ends, or move about in space), but is instead a relational status between our power of choice and others', one that obtains to the degree that we are not dependent upon their *necessitating* power of choice.

Necessitation is, for Kant, a technical term, introduced in the context of his famous treatment of obligation. Kant uses this term to refer to the free property of human choice insofar as it is not infallibly directed toward rational practical laws, but rather stands under them as imposing obligations upon us. Our freedom of choice is necessitated insofar as what is objectively necessary and ought to be done (directing our actions according to rational principles) is nevertheless subjectively contingent and might not be done (GMS 4:413, 4:439; MdS 6:379). There is a crucial connection between necessitation in this sense and obligation in the sense that all obligation is characterized as necessitation. What's more is that Kant is clear throughout the doctrine of right that others can obligate us through their external actions. Therefore, to be free of others' necessitating power of choice is plausibly to be free of obligations that originate in others' capacity for choice, i.e., to be free from obligations generated by positive law. A positive law requires an *act* to establish it, and is authored by a person, rather than obtaining simply by virtue of the structure of practical reason (MdS 6:224, 6:237). Thus, freedom from necessitation is most plausibly understood as the freedom from others' positive lawgiving.

Kant's statement of our innate right thus invites a question: How far can we

remain free of external positive lawgiving, consistent with everyone's like freedom under universal law? Put differently: How far must we admit a capacity on the part of others to give practical laws that necessitate our own choice? Insofar as we answer this question, we describe a *status* that we have a right to, by virtue of our being free agents. This status consists, namely, in protection from being dependent upon others' choice insofar as is consistent with everyone's freedom under universal law, and dependence on others' choice insofar as it is *required* by the same. The question is salient because Kant's notion of autonomy appears *prima facie* inconsistent with *any* obligation that has its source in the particular will of another. For genuine obligation is always *self-obligation,* i.e., obligation by means of laws generated by our rational will that are universal, necessary, and unconditional, and obligation by others' power of choice appears to be arbitrary, contingent and dependent upon one's desire to avoid sanctions (see again the remarks in the Introduction).

(2) External Freedom as Capacity

While our innate right provides a framework for thinking through the degree to which my freedom from others' lawgiving wills satisfies CCR, it also presupposes *a capacity* by means of which human beings can necessitate each other's powers of choice. Kant makes clear that this is possible by means of our external freedom (*Freiheit in dem "äußeren Gebrauche der Willkür*" (MdS 6:214)). Thus, the all-too-frequent simple identification of external freedom with our One Innate Right is mistaken. Of course, there is no problem with referring to our innate right as picking out a kind of external freedom as status. (There is no sense here fighting about

words.) I want to insist only that we need to be careful not to switch tacitly between this notion of external freedom and a notion of external freedom as a capacity by which that rightful status can be compromised: We must separate external freedom as independence from what Kant calls "freedom in the external use of choice" (MdS 6:214).

Freedom in the external use of choice refers to those determinations of the general free capacity for choice that are directed to objects distinct from us. To see this, begin by recalling Kant's famous argument that the UPR restricts only external actions. In Kant's words, "anyone can be free as long as I do not impair his freedom by my *external action*, even though I am quite indifferent to his freedom or would like in my heart to infringe upon it" (MdS 6:231). Presumably, an external action is the result of an exercise of external freedom of choice. Now, in Kant's metaphysics of action, choice refers to an aspect of the capacity of desire, and is "*the capacity for doing or refraining from doing as one pleases,*" insofar as one is conscious "of the capacity to bring about [one's] object by one's action" (MdS 6:213). It contrasts principally with *wish,* which is the same capacity, lacking only the consciousness of its ability to bring about its object by its action. This notion of choice (and its contrast with wish) plays a crucial role in Kant's broader action theory, which distinguishes between grounds of choice, objects of choice, and uses of choice.

Concerning the first, Kant holds that, in addition to being subject to rational norms, human beings are sensible creatures with inclinations that sometimes conflict with those norms. While our will (*Wille*) infallibly furnishes rational laws as grounds capable of determining choice (so that it does not make sense to speak, for Kant, of

free *willing*: MdS 6:226), our power of choice (*Willkür*, *arbitrium*) is only contingently rational. For it is also affected by sensible inclinations, and is capable of determination through them. Therefore, Kant speaks of two grounds capable of determining choice: rational incentives (which proceed from the will (*Wille*) as practical reason), and pathological incentives (which proceed from sensibility). Whereas there is no free willing for Kant, choice is negatively free when it is not inescapably determined by sensible impulses, and positively free when it is determined instead by the will (*Wille*) as practical reason itself (MdS 6:226).[22]

In addition to types of determining grounds for choice, Kant distinguishes between types of objects of choice. Whereas a determining ground of choice is that which choice is determined *by* (e.g., fear of punishment, or the idea of duty), an object of choice is that which choice is determined *toward,* that which one desires to bring about by choosing.[23] Kant explicitly observes that our power of choice can be determined toward external objects, and it seems plausible to think that it can be directed toward internal objects as well. Such a difference would plausibly explain Kant's further distinction between the two uses of choice. Exercising freedom in the internal use of choice would involve directing choice inwardly, toward internal objects, whereas exercising freedom in the external use of choice would involve directing choice outwardly toward external objects.[24]

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[22] Negative freedom of choice is constitutive of normal human agency. Positive free choice is an achievement.

[23] In *The Critique of Practical Reason*, Kant tells us that every action has a matter (CpV5:34), and that this consists in a desired object (KpV *5*: 21).

[24] There is one other plausible candidate for understanding the difference. Some argue that the distinction between "inner" and "outer" uses of choice is just the difference between *Wille* (inner) and *Willkür* (outer) (e.g, Maliks 2014, p. 66). But this is odd, because Kant speaks of the "äußeren oder inneren Gebrauche der Willkür" (MdS 6:214), not *äußeren Gebrauche der Willkür* and *inneren Gebrauche der Wille*. There is, of course, a central sense in which the obligations issuing from *Wille*

Not only would it be nice if this was how Kant intended things to work, there is some evidence that he really did intend for things to work this way. In its most generic sense, an external object of choice is an object that I have the *physical* capacity to use. After introducing our one innate right to freedom, Kant tells us that "there can be only three external objects of my choice: (1) a (corporeal) *thing* external to me; (2) another's *choice* to perform a specific deed (*praestatio*) (3) another's *status* in relation to me."[25] And though Kant does not provide a list of internal objects of choice, he does note that to set an end is "*an internal act of the mind*" (MdS 6:329, emphasis added). Moreover, Kant suggests that the contrast class with external actions (presumably internal actions) involves maxims (e.g., when I make the UPR "the principle of my action" my "making" is not an external, but an internal act) as well as my ends and attitudes (e.g. "to infringe upon your freedom," and "to be indifferent to it," respectively) (see again MdS 6:231). Therefore, although Kant never explicitly tells us what the objects of internal actions are, since (1) he identifies objects of choice as those things which we would like to bring about by means of the exercise of choice, (2) he claims that we can set ends and adopt maxims by exercising choice (MdS 6:225), and characterizes both having ends and maxims as internal, it is reasonable to infer that (3) objects of an agent's internal choice are (perhaps among other things) ends, maxims, or other mental items. Thus, I can act to bring it about

(rational will) are inner, whereas those issuing from another agent's *Willkür* (arbitrary power of choice) are outer (see LE 27:255). But it is important to avoid confusion here, and, in fact, in his treatment of freedom in Kant's politics, Maliks tacitly appeals to the contrast I've developed here (see e.g., 2014, p. 66, p. 71).

[25] These three external objects of choice divide the three sections of Private Right: property right, contract right, and status right (MdS 6:247). All commentators on Kant's political philosophy recognize that there is some relationship between external freedom and these three objects, but they are frustratingly vague on its precise nature. Though what I say here is reconstructive, and there is, alas, limited textual evidence for it, it makes good sense of what Kant seems to want to say.

that I have a certain end or goal, that this goal plays a certain systematic role in organizing my further actions, etc., and I can bring this about through a determination of my mental faculties, just as I can desire to bring it about that I paint a canvas by setting my body in motion. The first mark internal acts, the second an external, act (though the latter might be partly constituted in part by internal acts that are prior to it).[26]

* * *

Let's take stock. We've seen that Kant upholds premise (1) of the argument sketched in the introduction, namely that an exercise of freedom is rightful if and only if it is capable of coexisting with the freedom of others under universal law. We then attempted to render this notion precise by further defining the reference to freedom in that premise. I've argued there are two distinct notions of external freedom relevant to understanding the one innate right with which it is too-commonly identified: (1) external freedom as independent status (freedom from necessitation), and (2) external freedom as capacity (freedom in the external use of choice). A person is independent in the relevant sense so far as she is not subject to being obligated by others' power of choice, i.e., subject to another's will as a source of practical laws. A person employs freedom in the external use of her choice when she takes up an external object as the object of her choice. When she acts in pursuit of that object, the result is an external action.[27] Now Kant has already told us that our

[26] This implies that any single thing that we are inclined, in natural language, to call an action, is likely to be analyzed in terms of multiple actions, some internal and some external. I do not myself find this implication counterintuitive, but others have reported otherwise.

[27] In what sense(s) can we call external acts free acts? For Kant, all acts, internal and external, are acts of negative freedom (which is just to say that they are not inescapably determined by sensible impulse), because they all issue from a power of choice that is negatively free (it is not determined by sensible

external acts—exercises of freedom in the external use of choice—can interfere with other agents' freedom. Articulating just how this works, and when such interference is inconsistent with CCR, is the task of the next section.

III. Compossible Freedom and Arbitrary Restrictions on Choice

In this section, I argue that my external use of choice (2) renders another's power of choice dependent upon my own insofar as it imposes obligations on her to refrain from using certain external objects of choice. In imposing obligations on others to refrain from using external objects of choice, I reduce the scope of their freedom in the external use of choice by removing objects that they are physically capable of using from their rightful capacity of use by means of moral *necessitation,* i.e., obligation. But necessitation that concerns others is not in general inconsistent with CCR. Indeed, as I will argue, my status as an independent rational agent necessitates others' powers of choice by removing both my person and the things that I'm immediately holding from their rightful capacity of choice by imposing obligations on them, and vice versa, and this trivially satisfies the CCR. For these restrictions on freedom are grounded in *a priori* laws of freedom.[28] CCR, I will argue, is violated only insofar we are left to necessitate others by mere *Willkür* (*arbitrium*),

impulse). Thus all external acts—understood here as determinations of the capacity of choice toward outer objects—instantiate freedom in at least that sense. But, like internal acts, external acts are also candidates for instantiating positive freedom, to the degree that their determining grounds are practical reason, rather than pathological incentives (this is how virtue, acting from the motive of duty, can concern both internal and external actions) (MdS 6:214). Positive freedom characterizes my (internal or external) action whenever I perform it for the sake of some a priori practical principle (MdS 6:214, 6:221).

[28] A more contemporary way of putting this is to say that, insofar as my arbitrary power of choice is involved with the imposition of these obligations at all, it is by altering or activating standing obligations that applied all along (van der Vossen 2015).

i.e., in an arbitrary and contingent manner. This section, then, defends the second premise of the main argument.

We might begin by noticing that, although all accounts of Kant's political philosophy recognize that we can make others' dependent upon us by exercising external freedom, when we bear in mind Kant's technical terminology, it is, at least initially, difficult to see how this is supposed to work. For if we are to compromise another's independence as Kant defines it, we must do so by necessitating her power of choice through our own. But while it's simple enough to say this, it turns out to be difficult to imagine how exactly to tell the story.

Recall that choice is (by definition) my capacity to do as I please, together with the consciousness of being able to bring the object of my choice about by my action. But then it is not clear how *other persons* could interfere with such a capacity at all. Certainly, they have no direct access to my power of choice, and I have no access to theirs. Most accounts solve this problem by arguing that other agents subordinate my power of choice indirectly, by means of their acting with respect to external objects.[29] But it's not so easy to see how this is supposed to work, either. For suppose that I'm looking at an apple in front of me, and I want to eat it. Suppose further that the apple happens to be in your hands. In that case, either I am conscious of my ability to bring it about that I eat the apple (and so it is an object of my choice), or I am not (and it is an object of my wish). If it is an object of my choice, then it's

[29] By using my means for your ends, by dominating you, by restricting your ability to move about in space, etc., according to the above accounts. Thus, e.g., Ripstein takes it that you constrain my power of choice to the degree that you use my means for ends that aren't my own, or to the degree that you use my powers for your purposes. This an instance of interfering with my freedom, to be sure, but it is not the primary case, but a derivative case.

hard to see how your holding the apple affects my freedom to choose. Since the apple is an object of my free power of choice, I can exercise freedom of choice with respect to it—I do not appear to be dependent upon you at all. On the other hand, if I am not conscious that I can bring about my eating the apple by exercising choice (say because you'd overpower me), then it is merely an object of my wish, not an object of my choice. But Kant is clear that right is not concerned with the relationship between choice and wish, or wish and wish, but only with the formal relationship between choice and choice (MdS 6:230). So how exactly is it supposed to be that other agents can necessitate my *choice* through theirs, rather than merely bringing it about that I cannot have something I wish for?[30]

I argue in what follows that others render my power of choice dependent upon their own insofar as they employ external freedom to acquire rights to external objects. For Kant, rights are paradigmatically spheres of "freedom through which the freedom of another is restricted," (see second epigraph). Rights allow one a space for exercising freedom while simultaneously restricting others' external powers of choice by placing them under *obligations* to refrain from using an object that otherwise lies within her physical capacity to use. Rights are either innate or acquired through the exercise of choice. While innate rights satisfy the CCR due to their grounding in a priori principles of practical reason, I argue that there is a CCR-presumption against acquired rights, due to their grounding in agents' arbitrary

[30] By holding the apple, don't you restrict my power of choice in a more basic way, namely by rendering an object an object of my wish that would have been an object of my choice but for your presence or employment of it? In a sense, yes. But the way that we attempt to solve this problem is by asserting rights over objects, and it is here that we assume a kind of authority over other agents that is incompatible with their status as normative equals. This is the central issue, for Kant.

choice. This presumption is overcome if and only if the arbitrary restriction is necessary for rendering further independence from arbitrary restriction consistent under universal law.

To fix ideas, let's begin with innate right. Recall that Kant's most generic notion of an external object of choice is an object which lies within my physical capacity to use. The extreme generality of this definition renders it conspicuous that other *persons* are absent from the more specific list that Kant proceeds to cite, which includes only corporeal objects, others' powers in contract, and others' status. The omission is conspicuous because other persons clearly present themselves as things that lie within a person's *physical* capacity to use (as a long and embarrassing history of human slavery attests). I submit that this is because Kant introduces his specific division between types of objects of choice *after* he has treated our one innate right "in the prolegomena".[31] If I am correct that we restrict others' freedom to the degree that we impose obligations on them to refrain from using objects that lie within their physical capacity to use, then we should expect Kant to describe the innate right of humanity in these terms. He should say that our innate right limits freedom of choice by imposing obligations on others, and this limitation of choice "in the prolegomena" should explain the shortened list of objects of choice in the section on Private Right.

This is just what we find. For Kant, rights in general are understood as "*capacities* for putting others under obligations (i.e., as a lawful basis, *titulum,* for doing so)," and are divided into innate right ("that which belongs to everyone by nature, independently of any act that would establish a right"), and acquired right

[31] Ripstein likewise argues that Kant's list of external objects of choice is only exhaustive if we restrict our attention to *legitimate objects* of choice (2009, pp. 63-65).

("that for which such an act is required") (MdS 6:237). Immediately after introducing the distinction between innate and acquired right, Kant makes his famous claim that our one innate right is a right to freedom as independence consistent with the CCR, and that all rights to external objects are acquired rights (i.e., require some act to establish them). When Kant calls our innate right that which belongs to everyone by nature, his language recalls his language in the *Groundwork,* where he writes that,

> rational beings are called *persons* because their nature already marks them out as an end-in-itself, that is as something that cannot be used merely as a means, *and hence so far limits choice* (and is an object of respect). (GMM 4:428, emphasis added)

Persons are, in virtue of their humanity (their free power of choice), ends-in-themselves (see Wood 1999, p. 118). Something is an end-in-itself so far as it has a special deontic status that entails that it is not to be used merely as means.

I am suggesting that, just as our special deontic status limits our choice of maxims by requiring that they harmonize with and respect the deontic status of humanity, our innate right limits other persons' choice by imposing a domain restriction on the full set of objects that are within my physical capacity to use. In other words, my innate right limits others' *choice* by imposing obligations on them not to use certain objects that are in their physical capacity to use (namely my person). Since innate right has already been treated by the time Kant gives the fine-grained list of external objects of choice, he has already established that every person constrains the choice of every other by nature, independently of any act to establish a right, by making it the case that their person is not available for use. Thus I cannot be used as a means to your ends without your consent, and the only objects rightfully available

to your choice are the ones that Kant mentions.[32]

But notice that, though this is a clear limitation of external freedom, it is not a limit of anyone's external freedom *by me,* except in an extenuated sense. Instead, it is a limitation of external freedom demanded expressly by practical reason itself, which means that it is a limitation of freedom that is essentially self-legislated. As such, it is necessarily consistent with others' freedom under universal laws. The necessitation in question is not arbitrary, but follows from universal principles of reason, namely those that confer on humanity a special status, a property that necessitates choice.[33] The obligations thus imposed by the requirement to respect innate right thus inherit all the features of obligation secured by Kant's general treatment of obligation, which is univocal as between Doctrine of Right and the Doctrine of Virtue (MdS 6:322). Obligations generated by innate right are restrictions on freedom (MdS 6:223) under categorical imperatives (MdS 6:322), which are imperatives that are necessary, universal, and self-legislated (GMS 4:440). The result of this first (compossible) restriction of freedom is that the external freedom of all agents ranges now over the entire set of external objects of choice (objects that lie in my physical capacity to use), other persons excepted (NRF: 27:1319).

If this schema of freedom-restriction is to explain how we restrict others' power of choice more generally, then we should expect to be able to *further* restrict other persons' freedom by exercising freedom in the external use of choice. Moreover, we should expect that these further restrictions by means of these exercises will consist in placing *further* objects that others are physically capable of

[32] For further reflection concerning the exhaustiveness of these categories, see Ripstein 2009, p. 385.
[33] On this point, I agree with Brudner 2011, pp. 309-310.

using beyond their rightful capacity to use, and vice versa.

Let's return to the case with which we concluded the last section, and flesh it out in two variations to see if these further expectations are borne out. In the first variant, you're holding an apple that I covet, and I would have to interfere with your body to take control of it.[34] Suppose I could manage this, and so the apple lies in my physical capacity of use: It is an object of my choice, not my mere wish. Now, it is intuitive that, if I were to go ahead and take control of the apple by wresting it from your hands, I would thereby interfere with your freedom. The difficulty is to show why precisely this is true given Kant's technical understanding of freedom of choice. After all, if I were to succeed in taking the apple from you, it would seem that I have not limited your freedom of choice, but have instead merely demonstrated that your use of the apple is a mere object of your wish. What I want to show is that, for Kant, the fact that I would restrict your freedom by wresting the apple from your hands is parasitic on *your* prior restriction of *my* freedom. That prior restriction consists in your existence as a rational agent (1) placing me under an obligation to refrain from using your person as a mere means to my ends, and (2) your exercising external choice to hold the apple such that now I cannot use it without violating this obligation.[35] The interaction of (1) and (2) makes my exercise of choice dependent upon yours because I now stand under an obligation not to use an object that lies in my physical capacity to use. That is, what other accounts take to be the primary restriction of freedom (my taking the apple that you're holding), Kant's takes to be derivative. For Kant, the primary restriction of freedom is yours: your holding the

[34] Here, compare Ripstein 2009, pp. 60-62.
[35] See Kant's parallel discussion at MdS 6:247-248, and below.

apple and being the kind of being that imposes an obligation on me to refrain from interfering with your person. Moreover, it is precisely that I would violate this rightfully imposed obligation that explains the wrongness of my taking the apple. Since your freedom can coexist with freedom under universal law, my interference with it wrongs you.

Suppose (for the moment) that this general picture is right. Our one innate right is our right to freedom, which includes freedom from interference with our person (LE 27:1339). It thus places others under obligation to refrain from interfering with our person and to refrain from interfering with those objects that are so connected with me that interfering with them would *imply* interfering with my person. (If I can take a bite from the apple without interfering with your person, innate right is silent.[36]) So understood, your innate right to freedom places me under an obligation to refrain from using the apple because I could not now use it without hindering you in something you have a right to, namely your innate freedom over your person. As Kant puts it, in this case, I "wrong [you] with regard to what is *internally* [yours] (freedom)" (MdS 6:247). But if so, then your freedom, together with your possession of the apple, restricts my power of choice. *Ex hypothesi,* the apple is an object of my choice: I could overpower you and take the apple. But although it is true that the apple remains an object of my choice in the physical sense, it is not an object of my rightful choice. Your innate right to freedom, combined with your empirical possession of the apple, restricts the scope of my freedom by removing an object (the apple) that I have the physical capacity to use from my

[36] On this point, compare Ripstein 2009, p. 94.

rightful capacity of use by altering a prior obligation that I not use your person without your consent and making it impossible to comply with that obligation *and* use the apple. There is now an obligation that limits my "authorization" to use the apple that was not in place before your possession of it (MdS 6:223). Thus, the first way that we can restrict others' powers of choice by exercising external freedom is by moving about and occupying physical space and holding physical objects such that others are under obligations to refrain from occupying or using them, because they could not do so without violating our innate right.

Now consider a second variant of the case. You take possession of the apple and give some sign of this with the intention to exclude all others from its use *whether or not you're holding it*. (Perhaps you build a fence around it, or affix a label to it.) In this case, you aim to restrict others' freedom in a manner analogous to the previous case. You aim to restrict the scope of others' powers of choice by removing an object in their physical capacity to use from their rightful capacity to use. But in this case, you wish to do so, not by means of physical possession, but by means of acquiring a right. If this is indeed something that you can do, then others' freedom is restricted consistent with a universal law, and their hindering you in your possession of the apple would wrong you by interfering with something that is yours.[37] But Kant makes clear that this requires marking out a special sense of possession.

> I shall not call an apple mine because I have it in my hand (possess it physically), but only if I can say that I possess it even though I have put it down, no matter where. In the same way, I shall not be able to say that the land on which I have lain down is mine because I am on

[37] For Kant, something external is "*rightfully mine* (meum iuris) with which I am so connected that another's use of it without my consent would wrong me" (MdS 6:245). Notice that this is to say that I have something as my own to the degree that my possession of it satisfies the CCR. For only then is my condition of possession rightful, and only then would another's interference with it be wrongful.

> it, but only if I can assert that it still remains in my possession even though I have left the place. For someone who tried in the first case (of empirical possession) to wrest the apple from my hand or to drag me away from my resting place would indeed wrong me with regard to what is *internally* mine (freedom); but he would not wrong me with regard to what is externally mine unless I could assert that I am in possession of the object even without holding it (MdS 6:247-248).[38]

If I want to show that something distinct from me is mine (i.e., is such that if you interfere with it without my consent, you do me wrong), then I need to do more to demonstrate that you wrong me when you interfere with it when it is in my hands. For innate right—that which is internally mine—already determines that to be the case. Specifically, in order to truly have an external object of choice as my own, I must presuppose a capacity to impose obligations on others by my *mere* power of choice to refrain from using objects that are mine, even though I've left them. In other words, what I must make out is precisely that I have the power to restrict your freedom by removing further external objects of choice (that you have the physical capacity to use) from your rightful capacity of use *by my mere choosing*.[39]

For this reason, the first variant of the case, namely that involving "right with regard to *empirical possession* is *analytic*, for it says nothing more than what follows from empirical possession in accordance with the principle of contradiction, namely that if I am holding a thing (and so physically connected with it), someone who affects it without my consent...affects and diminishes what is internally mine (my freedom)" (MdS 6:249-250). Here, my condition (existence in some place) restricts others' freedom (by rendering their external power of choice dependent upon mine: if I go

[38] Thus for the case of corporeal objects. The case for others' choice and status is directly analogous: see MdS 6:248.
[39] On this point, I disagree with Hodgson 2010a, who writes that "I do not restrict your freedom by making" external objects of my choice "off limits to you" (p. 62).

somewhere, they must not remove me, unless I violate their right) in a way that is *consistent* with the freedom of all others in accordance with a universal law. Contrast this situation, now, with the second case, involving genuine acquired rights.

A claim that something *external* is mine is a claim that it is so connected with me that others would wrong me by interfering with it without my consent, even if it is not within my physical possession. All such claims require an act to establish them (for they are all acquired). If this kind of possession is rightfully possible, then there are further domain restrictions on freedom in the sense that we've developed above. For my intelligible possession of an apple, or your choice in fulfilling a contract, or my status with respect to you, will impose further restrictions on the set of external objects rightfully available to others' rightful capacity to choose. Now, Kant argues that we must be able to make these claims, but he also notes that the obligations that they aspire to impose do not possess the nice features of the restrictions of freedom imposed by innate right. Whereas the last are mandated by practical reason (and are thus necessary, universal and self-legislated), the former must necessarily appear contingent, particular and alien. Necessitation of this kind is *prima facie* inconsistent with everyone's freedom under universal law.

Each time Kant characterizes the restrictions generated by acquired rights, he is at pains to emphasize that the obligations others have to respect them are obligations that they would not have "were it not for this act of mine to establish a right" (MdS 6:255, 6:256). In doing so, he is emphasizing that these are both acquired rights and positive rights. They are acquired, because they proceed from an act that must establish them, and they are positive because they rest not on a priori principles,

but rather on the will of a lawgiver (in this case, the putative possessor). But (as many commentators have noted), it is unclear how someone can lay an obligation on all others in a way that is consistent with their freedom simply by an act of *Willkür*. For the *Willkür* is the capacity to do as one pleases (*arbitrium*), and to have a power to obligate implies having an authority to restrict others' freedom. If we are authorized in this, it must be consistent with CCR to obligate others—i.e., restrict their freedom simply by exercising my capacity to do as I please (MdS 6:254). The trouble is to explain how this is possible. In ordinary circumstances, I cannot place you under obligation simply in the service of doing as I please.[40] As Kant puts it in the *Conflict of the Faculties*, "what someone finds useful for his *private aim* can never qualify as law" (CF 7:32). Insofar as practical laws stand at the foundation of obligations, another's *Willkür* is ill-fit for the imposing of obligations.

The general schema for understanding how acquired rights to external objects restrict the freedom of others is the same as the schema for understanding how innate right and empirical possession do so. Freedom in the external use of choice is restricted by the existence of an obligation to refrain from using an object of choice that otherwise presents itself as available for physical use. Such object is thus removed from the domain over which my rightful freedom ranges. In the case of innate right, the restriction rules out your use of me and my body, and is grounded in a priori,

[40] As usual, Jeremy Waldron says it better than I could hope to myself: "We are familiar with people creating obligations for themselves through unilateral actions (by promising, for example). But acquisition involves one person's creating obligations for others, obligations that are wholly for the benefit of the appropriator. By his own actions, the appropriator purports to acquire not duties but rights against all the world. Thousands of other people, including people he has never met and people who have never even heard of him, suddenly find themselves laboring under obligations that they did not have before. Moreover, the duties that they acquire in this way are potentially onerous ones, affecting, under conditions of scarcity, the material resources that they may use to sustain their lives" (Waldron 1996, p. 1557).

universal laws of practical reason ground the restriction. Hence, there is no question about its consistency with the demands of practical reason.[41] Similarly, in the case of empirical possession, it is these same laws, in concert with circumstance and choice: I pick up the apple and start eating. In neither case do I *simply choose* to put you under obligation. There is rather a prior norm that does so, which my action alters.

By contrast, acquired rights to external objects restrict freedom simply by an act of my *Willkür*: this shall be mine for the pursuit of my arbitrarily chosen ends. But the human *Willkür* is not infallibly directed by a priori principles, let alone being an a priori principle itself. It rather stands between practical reason (as *Wille*) and pathological desires. But that means that the grounds I have for obligating you are wholly up to me, proceeding only from my free choice. They are bound from your perspective to seem arbitrary.[42] But we need not recognize the contingent wills of others as authoritative for us: only universal practical reason is capable of imposing obligations consistent with autonomy.[43] Therefore, unless the restrictions others place upon us by means of their choice can be shown to be ultimately non-arbitrary in the

[41] Again, there may well be questions here, but to address them lies beyond the scope of the paper. I wish only to defend the claim that Kant *thought* that there were no questions here.

[42] Compare Varden (2008): "For Kant, justice requires that universal law rather than anyone's arbitrary choices regulate individuals' external freedom when they interact" (p. 4).

[43] We find additional evidence for the problematic nature of imposing obligations by mere *arbitrium* when we consider Kant's treatment of the ambiguous right of equity, as against his treatment of strict right. Kant's account here is nothing new: Since antiquity, it was thought that there was a gross difference between judging in accordance with equity and judging in accordance with strict right. Indeed, for early legal theorists, this marked the difference between two entirely different ways of adjudicating disputes: adjudication by arbitration and adjudication in the court of law. Arbitration was governed by norms of equity, and it was the arbitrator's *arbitrio,* or free will that issued in the judgment (there being insufficient detail in the contract to determine where right lay), as compared to the judge's judgment issuing from strict law, and determined strictly by the terms of agreement. For Kant, rights of equity are genuine rights, but they are not to be included in strict right, and so are not coercible. And this makes sense if (1) judging according to equity imposes obligations by the judge's free will, rather than by law, and (2) imposing obligations by one's free will involves a normatively problematic kind of arbitrariness.

way our innate rights are, they are inconsistent with the CCR.

Notice that if this is the right story, there is a stark contrast between the way that Kant sees the normative status of acquiring external rights and the way that Locke sees the same. For on Locke's view, acquiring property is in the state of nature is decidedly *not* a matter of imposing obligations on others by mere *Willkür,* but is rather a matter of completing labor-mixing acts that, according to the laws of nature, confer on the actor exclusive rights over things.[44] Acquisition is thus assimilated to the empirical possession case (considered above). But then there is no normative problem with property ownership in the state of nature, and leaving the state of nature is merely prudentially rational. By contrast, for Kant, such rights cannot exist in their full and robust form unless and until the obligations they generate satisfy the CCR. But, again, since reason demands that these rights be fully actualized, leaving the state of nature is rationally non-optional.

In this section, I have provided a general account of how we render others dependent upon our power of choice in a way that is inconsistent with CCR, namely by imposing obligations on others arbitrarily. This section has therefore vindicated premise (2) in the master argument sketched in the Introduction. In the next section, I argue for premise (3).

IV. Independence and Outer Necessitation in the State of Nature

[44] Locke shares this orientation with Pufendorf, according to whom acts that are ordered by the natural law are not entirely arbitrary, insofar as they tend toward sociality, even when they ultimately owe their existence to the will of man. Both acquisition and statehood fit this model, insofar as they are contingent acts in one sense, but have a justification in the natural law. See *The Law of Nature and of Nations*, I.ii, p. 5.

In this section, I wish to show that it is impossible to satisfy CCR in the state of nature. This will vindicate premise (3), which entails premise (4) of the argument introduced in § I. We concluded the last section by noting that claiming external rights to things enables us to render others powers of choice genuinely dependent upon our own, potentially in a way that violates CCR. Practical reason thus finds itself in conflict with respect to them in the state of nature. On the one hand, practical reason seems to demand the possibility of acquiring rights (for these are necessary for our meaningful external exercises of freedom altogether), while on the other, it seems to condemn the acquisition of rights insofar as these presuppose a capacity to restrict the power of choice of another without her consent merely by one's choice. Since neither the acquisition of external rights in the state of nature nor the prohibition on acquiring such rights can coexist with freedom under universal law, however, the state of nature is a condition (*Zustand*) that is incompatible with freedom under universal law.

To see practical reason's ambivalence toward the possibility of acquiring external rights, notice that Kant begins his section on private right by introducing a postulate that states explicitly that "[i]t is possible to for me to have *any* external object of my choice as mine, that is, a maxim by which, if it were to become a law, an object of choice would *in itself* (objectively) have to *belong to no one (res nullius)* is contrary to rights" (MdS 6:246). Kant argues for this claim by *reductio*.

(1) Suppose I had no rightful capacity to use external objects of choice (assumption for proof by contradiction).

(2) But external objects of choice present themselves to my external

use of choice as objects that I have the physical capacity to use for my ends. (def.)

(3) If (1) and (2), then freedom would be directed toward external objects of choice as useful objects, but would also demand that they remained unused, which is a contradiction.

(4) Therefore, the supposition is false. It must be possible to have external objects as my own (by 3, 4)

Kant's interpreters—even the friendliest—point out that this argument's credentials are suspect.[45] Even if we grant the argument's premises (which are anything but straightforward), the move from these crucial premises to the conclusion involves a slide between the *use* of external objects of choice (where this only implies immediate consumption and empirical possession) and their ownership (which includes exclusive rights). But it is important to notice what denying argument's conclusion entails.

Toward this end, notice that although the argument is stated in the first person, it must necessarily be so stated from the perspective of every rational agent, since all, in the state of nature, are equally situated. Thus, to deny its conclusion is to deny that *anyone* has exclusive rights to objects of choice. Without such exclusive rights, an individual's or even a community's permission to use external objects extends only to immediate use and occupation.[46] But this is implausibly restrictive,

[45] For critical discussion of Kant's argument, see Ellis 2005, p. 125 and James 2016. For more sympathetic discussion, see: Ripstein 2009, ch. 4, Flikschuh 2000, ch. 4, and Hodgson 2010a.

[46] Thus the common assertion in the literature that usufruct systems of ownership evade Kant's argument here is false. See, e.g., Ellis 2005, p. 125ff, James 2016, pp. 314-316; for a defense against it, see Ripstein 2009, p. 19, p. 109; for a reply, see James 2016, p. 316n. For such systems require that

and entails that any sort of development and long-term use of external objects of choice is impermissible.[47] It is true that Kant's argument does not yet entail a full system of private property. But nor is it intended to. It is merely intended to establish that every rational agent must have an authorization to obtain exclusive use of external objects of choice, because (1) some rational agent must, all (2) rational agents are symmetrically situated, and (3), freedom must be self-consistent.[48]

To put this point in the language of the third premise of the main argument: If we were not normatively authorized to acquire rights to external things (and thereby to necessitate others' choice through our own (and vice versa), i.e., if we remained fully independent from outer necessitation (as the anarchist claims), then we would not be externally free at all. Our power of choice (in its extended use) would range over an empty domain of external objects. By contrast, if we were left free to acquire rights to extended use of objects as we wished, then we would be subject to others outer necessitation at will. For any alleged capacity to have an external object of choice as our own implies having the authority "to put all others under an obligation, which they would not otherwise have, to refrain from using certain objects of our choice" (MdS 6:247).[49] Insofar as we are authorized to acquire external things by our actions, we are engaged in "a *giving of law* that holds for everyone," by which "an

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their administrators (states, communities, etc.) have exclusive ownership rights to the things that they then must allow others to use in accordance with the rules that they create.

[47] For an excellent discussion of the same point, see Hodgson 2010a, pp. 60-63.

[48] There is, however, in the Kantian system, a strong bias toward individuals: After all, one makes arguments like the one above as a rational agent endowed with a capacity for freedom that imposes obligations on its exercise, and the only such rational agents, initially, anyway, are individuals.

[49] Ripstein observes something subtle and crucial when he notes that the problem of acquiring rights is basically a primitive version of the problem of political authority. See 2009, p. 24. After all, political authority through today is understood to refer to the capacity of some institution or individual to place others under obligation by some positive act, and the *problem* of political authority is that it is unclear just how this is possible.

obligation is laid upon all others which they would not otherwise have, to refrain from using the object" (MdS 6:253). But if I can have such a right, then so can you, and with respect to the same object (NRF 27:1341). But then our freedom is not formally consistent. Let me explain.

Having ruled out that we can be free of outer necessitation completely (since this would entail the annihilation of freedom), we are imagining a situation in which we are left independent to acquire rights as we please. But such a situation is not consistent with CCR. In it, all can impose obligations on all at will. But this generates the possibility of conflicting duties. If both are free to acquire X by mere *Willkür* then both can be obligated to refrain from using X simultaneously. Thus, the state of nature results in either a situation in which no one can deploy external objects for extended purposes, or a situation in which everyone can, but there is a formal conflict between the powers of choice of all. If we deny others *any* capacity for external lawgiving (and are to remain entirely free from necessitation by others), our freedom in the external use of our choice is annihilated: There are no external objects over which its robust exercise ranges. We may merely use objects in our immediate possession. By contrast, if we allow complete independence to mean independence to acquire external rights in the state of nature, we must allow it to everyone equally, for the state of nature just is a situation where there is no natural authority (NRF 27:1338-1339). But allowing to everyone equally the right to acquire external rights is not formally consistent with everyone's freedom under universal law. Therefore, there is, in the state of nature, no way for our independence to satisfy CCR. This establishes our third premise, and the first subconclusion (4) follows by logical

entailment.

If this is the correct account of the normative problem with the state of nature, then it is clear why such a condition is incompatible with our freedom. The state of nature is a condition that fails to satisfy CCR. But Kant seems to describe the problems in the state of nature differently, at least at times. Indeed, Arthur Ripstein points out that, when we scrutinize Kant's rationale for leaving the state of nature, he points to three "defects". The first is that, in the state of nature, rights are indeterminate. Not only do the standards of property acquisition fail to fully determine their application, but also there may also be a range of acceptable standards, about which we disagree. Second, we lack assurance in the state of nature. But I have no obligation to respect your claims to external objects of choice without assurance that you'll respect my claims. Third, obligations are authored by particular agents with the effect that others are supposed to be bound by their particular choices. In the remainder of this section, I argue that the problem of unilateral willing *underlies* the problems of assurance and indeterminacy. But the problem of unilateral willing points out exactly what we have seen in this section so far: Our freedom in the state of nature is not compossible. By showing this, I ultimately aspire to show that Kant's account of the duty to leave the state of nature is unified, and clearly grounded in his treatment of freedom (as explained in § II).

Let's begin, then, by more fully characterizing our position in the state of nature. Kant is clear that in such a state, "each has its own right to do *what seems right and good to it*, and not to be dependent upon another's opinion about this" (MdS 6:312). The state of nature is thus an environment of *equal authority*. I argued

in the Introduction that a requirement like this makes sense for autonomous beings, insofar as such beings acknowledge no law as unconditionally binding except those that stem from their own capacity for self-legislation. Now, we've already seen that practical reason demands that each agent be able to acquire rights to external objects of choice: this is the postulate of practical reason with regard to rights. But this is just to say that we must be permitted to acquire things such that others are under an obligation to refrain from using those things. Such a rightful capacity, however, implies that we can place others under obligations merely by our exercise of our particular power of choice (*Willkür*), i.e., unilaterally.

> When I declare (by word or deed), I will that something external is to be mine, I thereby declare that everyone else is under obligation to refrain from using that object of my choice, an obligation no one would have were it not for this act of mine to establish a right. (MdS 6:255)

Kant emphasizes that the acquisition of rights in the state of nature appears arbitrary and particular in a way that is opposed to law's characteristic necessity and universality. But since an obligation is "the necessity of a free action under a categorical imperative of reason," (MdS 6:222), there's a problem here: after all, that you are required to forebear interfering with my acquisitions appears to be contingent upon my arbitrary power of choice, and accepting the duty appears to involve your will in heteronomy.

As Kant puts it, "a unilateral will cannot serve as a coercive law for everyone with regard to possession that is external *and therefore contingent*, since that would infringe upon freedom in accordance with universal laws" (MdS 6:256, added emphasis). Kant says that a unilateral will cannot put others under obligation because

a unilateral will's exercise is contingent, and restrictions on freedom must be grounded in necessity. He makes clear that such an obligation must be imposed by a will that is *omnilateral,* i.e., a will in which the will of all is united for the giving of law. This is, I think, the principal problem with external freedom in the state of nature: Its exercise appears to impose obligations unilaterally, but genuine obligations must be universal; they must be able to be regarded as legislated by all for all.

It's worth noting that others (e.g., Ripstein 2009, p. 174, Hodgson 2010a, 2010b, Flikschuh 2008, p. 392, Varden 2008) agree that this is the principal problem. But these accounts struggle to establish a tight connection between this problem and the notion of freedom that they explicitly argue for. Thus, Ripstein, for example, notes that the problem with unilateral imposition of obligations is that it "changes the normative situation of another" without her consent. And this is true: after all, it imposes an obligation on her that she didn't previously have. But the reader is left to imagine how this is really a problem with *freedom* as Ripstein has earlier defined it. Does unilaterally imposing an obligation on another thereby use her means for your purposes? It is hard to see how. Does it compromise an agent's quality of being her own master? *Maybe.* But the details of the story would have to be filled in, and anyway it seems plausible that one can be one's own master, even facing demanding obligations, provided those obligations have the right kind of source. By contrast, on my account it is perfectly clear why unilaterally obligating another implies a problematical restriction of freedom. Unilateral acquisition of rights is problematic precisely because it restrains the external freedom of choice of another by arbitrarily removing an object that lies within her physical capacity to use from her rightful

capacity of use. Thus, if Kant had stopped here, we would have a clear understanding concerning why the state of nature is incompatible with freedom, in the relevant sense.

But Kant's characterization of the normative problems in the state of nature doesn't end with appeal to the notion of unilaterality, and this complicates things. Kant *also* asserts that acquired rights are subject to a strong condition of reciprocal assurance.

> I am...not under obligation to leave external objects belonging to others untouched unless everyone else provides me assurance that he will behave in accordance with the same principle with regard to what is mine. This assurance does not require a special act to establish a right, but is already contained in the concept of an obligation corresponding to an external right, since the universality, and with it the reciprocity, of obligation arises from a universal rule. (MdS 6:256).

In this Hobbesian sounding passage, Kant asserts that I have no obligation to respect what's externally yours unless I have assurance that you'll respect what's mine. For some scholars (most prominently Ralf Bader, Sharon Byrd, and Joakhim Hrushka), the argument from the state of nature's lack of assurance bears the entire weight of the conclusion that we must leave the state of nature. For the lack of assurance implies that we are in a state of war, and practical reason demands that there be no war.

In favor of this interpretation is the fact that Kant seems to analyze the inaptness of unilateral willing for the giving of universal law in its incapacity to provide assurance. He moves, e.g., directly from the claim that "a unilateral will cannot serve as a coercive law for everyone" to the claim that "only a will putting everyone under obligation, hence only a collective general (common) and powerful will...can provide this assurance" (MdS 356). In so arguing, Kant makes it appear that the problem with

a unilaterally imposed obligation is just that it cannot provide equal assurance to all because any unilateral will is *too weak* to provide reciprocal assurance. If the problem with unilaterality is simply that unilateral enforcement is insufficiently powerful to provide assurance, then the primary puzzle is to figure out how to constitute a sufficiently powerful body that would then be able to respect preexisting rights.[50]

I admit that the textual evidence here is difficult to sort out—Kant's arguments are rather compressed. But we can note three things. First, there's a way of understanding the problem of assurance such that it marks merely one problem with the unilateral imposition of obligation, and not vice versa. Second, opting for the assurance-first reading has a difficult time explaining why Kant claims that it is only acquired right that raises problems in the state of nature. Finally, reducing the problems with the state of nature to the problem of assurance fails to do justice to one of Kant's central concerns about external freedom in the state of nature: the limits of acquisition.

On the first point, notice *why* the condition of reciprocal assurance obtains. Suppose I acquire a bottle of fine scotch as my own, and you acquire a different bottle as your own. Without assurance that I will respect your bottle, your refraining from taking mine without assurance that I'll reciprocate is to *accept* a restriction on your freedom that stems from my mere *arbitrium.*[51] After all, the only ground for the putative restriction is an act of arbitrary choice on my part, namely to possess that

[50] Bader goes on to solve this puzzle in a promising way, namely by noting that as soon as an agent is sufficiently powerful to provide assurance, the reciprocity condition kicks in to generate full obligations.

[51] This is importantly not to deny that there may be an obligation of virtue to refrain from taking what belongs to another when the other has shown herself to be peaceful. It's only to deny that we have a *duty of right,* i.e., a coercible duty

bottle. As Ripstein puts it:

> If either of us refrains from taking what belongs to the other without assurance, we restrict our choice on the basis of the other's particular choice, rather than according with a universal law. (2009, p. 162)

Though, as Kant puts it, any act of intelligible possession on the part of one person presupposes the recognition of others' like capacities to put us under obligation, this obligation does not impose constraints except insofar as we are assured of the other's compliance. For accepting the constraint in the absence of the assurance is just to admit that another can bind you non-reciprocally—a possibility already ruled out by the stricture against unilateral obligation imposing. Thus, to the degree that the problem of assurance is not merely a problem with self-interest, but a problem with freedom, it seems to be because accepting obligations without assurance leaves one's freedom over external objects vulnerable to arbitrary, one-sided restriction.

On the second point, note that Kant suggests that, but for the possibility of owning external things, there would be no obligation to leave the state of nature: "if external objects were not even *provisionally* mine or yours in the state of nature, there would also be no duties of Right with regard to them and therefore no command to leave the state of nature" (MdS 6:313). Kant says: If we couldn't provisionally acquire rights to external things in the state of nature, then there would be no duty to leave it. But as Bader himself notes, if this is true, then assurance can't be the problem that underlies our duty to leave the state of nature, for we *also* lack assurance over our innate right to freedom in the state of nature (others can murder or assault us, even if they ought not).[52] But if assurance carries the day in terms of our duty to leave the

[52] See Pallikkathayil 2017 for an argument that *all* the problems rendering acquired rights provisional also plague innate right.

state of nature, then Kant should not say what he says at MdS 6:313.[53]

By contrast, on my account of the normative problems with the state of nature, it makes sense for Kant to say that there would be no *duty* to leave the state of nature absent the ability to acquire rights. For innate right does not threaten to impose obligations on others unilaterally, i.e., by mere *abritrium*. It instead imposes constraints simply by practical reason, and satisfies the conditions of universal law characteristic of the latter. Thus, we have a full obligation to refrain from killing innocent others, even if we lack assurance that they will respect our similar rights.[54] Given this, it may be *prudent* to leave the state of nature in order to better protect our innate rights, but it would not be *obligatory.*[55]

Concerning the third point, Kant's description of the problems with rights in the state of nature is implausibly reduced to the problem of assurance, because the latter problem suggests that rights are fully determinate in the state of nature, requiring only enforcement. But at several places, Kant demonstrates a concern not just with the enforcement of rights, but with ensuring that they stay within their proper limitations. The concern here is that, since all are common owners of the earth, it is very difficult to discern how much we are permitted to acquire, consistent with the rights of others. Kant puts the point perhaps most clearly in his *Drafts of the Doctrine of Right,* but he makes the same point (as we will see) in the published version.

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[53] Byrd and Hrushka have tried to solve this problem by insisting that without provisional possession, we would not bring about an original community, and a united will (2006b, p. 161). But this seems to beg the question: It simply asserts what we want to know. Why, if assurance is the fundamental issue, would we not unite our wills to protect against it?

[54] On this point, I agree with Ripstein 2009, p. 179.

[55] Richard Arneson points out that it might well be obligatory, because the fact that others' innate rights in the state of nature might be insecure should concern us.

Principles of pure practical reason are

> insufficient for determining the limits of the empirically-mine and –yours...the determination of this possession in experience merely as its appearance in space and time and hence possible only by dependence upon the connection of the power of choice of a human being with objects or with others' power of choice and hence what and how much of them could actually (in the sensible world) belong to mine and yours cannot be determined through this principle which thus cannot suffice for distinguishing the latter. (DDR 23:214; compare MdS 6:266)

Kant says (a) possession has limits, and (b) practical reason does not specify them. While practical reason wills the division of the earth by generating a permission to acquire, Kant also holds that an unlimited possession on the part of one person in the state of nature would not merely limit, but also "annul" others' freedom (DDR 23:279). For to possess without limit would require others to leave all external objects untouched, or otherwise to ask your leave. But an empty domain of external objects in one's rightful power annuls it. Because (a) we have an authorization to acquire, but that (b) awaits demonstration that what is acquired is consistent with others' like freedom, any rights that we acquire remain merely provisional in the state of nature. But since this has nothing to do with assurance, the latter cannot exhaust the normative problems in the state of nature.[56]

Thus, I think, the attempt to reduce the normative problems with the state of nature to the problem of assurance fails. Now, recall that commentators often cite a

[56] In fairness, Byrd and Hrushka acknowledge that there are limits to possession in the state of nature (2006, p. 265, n. 238). Unfortunately, they do not tell us how these limits are to be determined. Kant seems to suggest that these limits are determined through the actual uniting of persons' powers of choice, in accordance with the idea of the united will. But if so, then positive law does more than simply provide assurance: it also determines the limits of possession, insofar as it represents an attempt in practice to unite the wills of those who fall under it. See Chapters 4-7 for further discussion of this point.

third family of problems that plagues the state of nature. These are the linked problems of indeterminacy and disagreement (see esp. Ripstein 2009, Waldron 1996).

The problem is that in the state of nature, we have differing conceptions of justice, and no one has the natural authority to decide matters of right for anyone else. Depending on who you ask, this conflict can be grounded in the fact that rules, even determinate ones, do not fully determine their application (Ripstein), or alternatively in there being a range of permissible rules over which a decision needs to be made (Waldron).[57] Either one of these problems, together with the fact nobody is bound to accept another's understanding of the right as her own, is sufficient to ensure that we wrong one another in the state of nature. The idea is that in enforcing private judgments of justice when others are not bound to share our view of the matter amounts to wronging them.

But once again, I want to argue that any *normative, non-prudential* problem with disagreement of this kind stems from the fact that we attempt to obligate another person unilaterally by solving the problem on our own. In other words, these are problems with *freedom* to the degree that any resolution to them in the state of nature

[57] In a few places (especially in *Feyerabend's* notes from Kant's course on *Naturrecht,* Kant observes that practical reason underdetermines the procedures of external things. Though there are surely principles of acquisition that are ruled out, there remains, still, a range of permissible principles, and disagreement over which to use (and which are operative), and also their application is likely to be extreme. There are a number of different rules that might reasonably govern acquisition and ownership more generally, and before one of these is selected, each has the right to do what seems right and good. If I e.g. shoot a wild animal and it runs to another's land and dies there, then I believe I have the right to get it from there. The other, however, can say, 'what I find on my land is mine'. Now I cannot will that the other should judge in accordance with my will. (LNR 27:1337) We both appeal to reasonable rules, and are both motivated to respect each other's rights. But we disagree about what those are. The problem is that there is not yet a fact of the matter about how these disputes are to be settled. Multiple arrangements might be reasonable.

ends up violating the CCR. The reason that I can't simply enforce my chosen principles (or my interpretation of their application) on you (even if I sincerely believe that I'm a better judge) is that doing so would place you under obligation arbitrarily, and vice versa. But again, in the state of nature, "each has its own right to do *what seems right and good to it*, and not to be dependent upon another's opinion about this" (MdS 6:312).[58] We are all equally interpreters of right, and have no natural coercible duty to defer to others' judgments in this regard.[59] Of course, it might seem here as if there can be normative expertise, and that Kant should acknowledge as much. But notice that this is to misapprehend the problem of disagreement. Unless I can be brought around to sharing the judgment that you're a moral expert, accepting your rule on the strength of your say-so amounts to my heteronomously subordinating my own will to yours.

In this section, I have argued that our complete independence in the state of nature violates CCR, which is to say that it is wrongful. For in the state of nature, we are subject to arbitrary lawgiving on the part of others, and this is not consistent with our freedom. Once we accept this account, it becomes clear that the principal 'defect' in the state of nature is the fact that we must be subject to outer necessitation, to be free at all, but being subject to outer necessitation in the state of nature entails being subject to *arbitrary* necessitation in the state of nature. Each of the other problems in the state of nature can be understood as specifications of this general problem. Any rights we acquire in the state of nature in accordance with the postulate, then, must

[58] As Richard Arneson has pointed out to me, Kant may be open to the objection here that so long as the agent is judging conscientiously, she is binding the other not by mere *Willkür,* but by *Wille,* i.e., practical reason itself.
[59] Though we may well have a duty of virtue to do so.

remain provisional, and await conditions under which they can be shown to be consistent with the freedom of all.

V. In Search of a Rightful Condition

Our argument this far has taken us through premise (4) of our main argument. This section establishes steps (5)-(8), and thus brings it to a close. Premise (5) states that if our complete independence is wrongful, then there is a coercible obligation to seek a rightful condition. Recalling that we have a right to as much independence from outer necessitation as is consistent with CCR, it is clear that a rightful condition will be one in which this is satisfied. If we have a right to freedom which is not satisfied in the state of nature, then to remain in the state of nature is wrong. Since there is an obligation to avoid wrongdoing, there is an obligation to leave the state of nature. Since ought implies can, there must be a way to do this, to avoid wrongdoing. What we seek is therefore a condition in which we face just that amount of outer necessitation that renders our acquisition of rights CCR consistent.

Kant claims is that it is possible to enter a rightful condition only by entering into a civil condition (although see footnote 5). This is premise (6). Thus Kant's corollary to the postulate reads:

> *Corollary*: If it must be possible, in terms of rights, to have an external object as one's own, the subject must also be permitted to constrain everyone else with whom he comes into conflict about whether an external object is his or another's to enter along with him into a civil constitution. (MdS 6:256)

But this is mere assertion. We want to know: how precisely does entering a civil condition discharge the obligation to enter a rightful condition?

For Kant, a rightful condition is one in which each person is able to *enjoy* her rights (MdS 6:306). The state of nature is not such a condition because (1) the postulate of practical reason requires that external rights be possible, and (2) a reciprocal capacity to acquire such rights implies a capacity to arbitrarily constrain the choices of others, a capacity that not all can have equally without contradiction. But since such a capacity is not consistent with CCR, we must seek the limitations on freedom that are necessary for rendering our independence mutually consistent. These limitations will be *willkürlich* restrictions on freedom in the external use of choice (as they must be insofar as they proceed from the lawgiving activity of human beings) but because *ex hypothesi* they are required by the structure of practical reason itself, they inherit the characteristics of genuine obligations generated by our self-legislative rational capacity. In order to achieve this virtue, they are to be (1) only those restrictions required by the guarantee of a maximum degree of independence, (2) publicly laid down and enforced by one common source and demanded by the will of each, and (3) guaranteed to necessitate all equally and reciprocally.

Thus Kant defines the civil condition as that "in which the will of all is actually united for giving law" (MdS 6:264.). All civil conditions definitionally satisfy "public justice," which Kant describes thusly:

> With reference to either the possibility or the actuality or the necessity of possession of objects (the matter of choice) in accordance with laws, public justice can be divided into *protective justice* (*iustitia tutatrix*), *justice in men's acquiring from one another* (*iustitia commutitiva*), and *distributive justice* (*iustititia distributiva*). In these, the law says, *first*, merely what conduct is intrinsically *right* in terms of its form (*lex iusti*); *second*, what [objects] are capable of being covered externally by law, in terms of their matter...; *third,* what is the decision of a court in a particular case in accordance with the given law under which it falls. (MdS 6:306)

Public justice ensures that persons' acquisitions are *protected,* that the procedures for acquiring objects in contracts and otherwise are specified, and that disputes be regulated by a court that applies the law to particular cases, yielding a particular judgment. More importantly, public justice imposes external constraints on choice, but does so under the idea of a united will. Rather than determining the limits of possession unilaterally, possession of external rights is determined *omnilaterally,* i.e., by the will of all. Insofar as this is so, the obligations imposed under a condition of public justice acquire a grounding in practical reason that renders them consistent with everyone's freedom under universal law. Through a dependence upon "a common power of choice" (DDR 23:214), all are enabled freedom from outer necessitation by all others, the common will excepted.[60]

Freedom in the state of nature, by the postulate, demands that the acquisition of external rights be possible. But any acquisition of corporeal objects must be conceived "as the act of a general will (in idea) giving an external law through which everyone is bound to agree with [your] choice" (MdS 6:259). In other words, each unilateral act of acquisition rationally presupposes its consistency with an omnilateral will: "For only in accordance with this principle of the [omnilateral] will is it possible for the free choice of each to accord with the freedom of all, and therefore possible for there to be any [acquired] right" (MdS 6:263). This presupposition must be met not only for the practice of acquisition, but also for each particular acquisition. It is met for the former insofar as the argument establishing the postulate of practical

[60] Kant appears to use the terms "common will," "general will," "omnilateral will," and "united will a priori" interchangeably. I follow suit.

reason is an argument that each rational agent must represent to herself. More simply, the postulate establishes that all do will the acquisition of external objects.

The remaining puzzle, then, is to discover conditions under which the normative presupposition of each particular act of acquisition is met (Huber 2017). Because we must ensure that our acts of acquisition are compatible with the like acts of others, we must determine how far the possessions of each may permissibly extend. The way to do this is to enter into a civil condition with others where public justice obtains, and what belongs to each can be secured. As Kant usefully puts the point in the *Draft of the Doctrine of Right,* everyone has the "right to coerce anyone who hinders his use [of his possessions] to join with him in entering a contract to determine the limits of permissible possession and to use force if others prevaricate" (23:279-280). We are to determine the limits of possession together by joining together in a contract by which these questions of limits are settled through a public giving of law.

As I understand it, we have the following kind of picture. Because practical reason wills the enforcement of rights over external objects, and because this only appears to be possible unilaterally in the state of nature, there is a puzzle to figure out how such enforcement is compatible with the CCR. But because all will that rights be enforced in this way, it is conceivable that individual persons can unite and collectively enforce laws. In such a case, neither the decision over the rules by which persons can acquire things, nor the question of by whom these rights can be enforced, nor yet their actual enforcement happens by an individual, private person, but rather by public persons acting in the name of the common will (compare Varden 2008).

And though Kant is clear that the act by which a people unites in this way (an original contract) is merely an Idea, it prescribes the form that our rightful relations must take.

Thus it is that Kant arrives at the view that pure practical reason requires a civil condition. By uniting for the purpose of giving law publically, we eliminate, as far as possible, the arbitrary character of positive law when it is given solely by the particular will of an individual. Each of the state's separate functions goes some way toward removing approximating the condition in which external rights are not determined unilaterally. The legislature makes law governing acquisition and transfer in the name of the entire people, whereas the judiciary enforces disputes between persons, so that no one relies purely on their private will (*arbitrium*) in determining the just outcome. Moreover, the enforcement of rights is achieved by an independent executive, and so securing assurance does not depend upon anyone's power of choice, nor does accepting the obligation to respect others' holdings depend on others' choices.

In entering a civil condition so described, we give up our "lawless freedom" and take up the same once again in a dependence on laws.

> In accordance with the original contract, everyone (*omnes et singuli*) within a *people* gives up his external freedom in order to take it up again immediately as a member of a commonwealth, that is of a people considered as a state (*universi*). And one cannot say: the human being in a state has sacrificed a part of his innate outer freedom for the sake of an end, but rather, he has relinquished entirely his wild, lawless freedom in order to find his freedom as such undiminished, in a dependence upon laws, that is, in a rightful condition, since this dependence arises from his own lawgiving will. (MdS 6:315-316)

In these passages, we see Kant claim that what it is to enter a state is to give up our lawless freedom (by which we can by our own *Willkür* establish what is ours), and

regain the same freedom in a dependence on law and external power. Insofar as practical reason demands some dependence upon law, in order for our independence to satisfy CCR, dependence upon the positive lawgiving of the civil condition arises from each person's "own lawgiving will."

Practical reason demands both that (1) we be free to acquire external things as our own, and (2) that we not be placed under obligations by others arbitrarily, but rather have reasons for accepting these obligations grounded in our own freedom. But because (1) implies the negation of (2) in the state of nature, practical reason requires that we usher in a condition in which we are instead placed under obligation in a lawlike way, i.e., in a way that realizes the conditions of necessity, universality and self-imposition characteristic of restraints consistent with freedom. This is the civil condition, and it is a condition in which the will of all is represented through public lawgiving.[61]

When we put the last point this way, we can get a grip on what precisely is the relationship between the laws of the state and Kant's notions of external freedom. For there are, in the literature, two competing accounts of this. On some accounts, external freedom comes first, and the state merely secures it or extends it. These are the freedom-first views. On other accounts, external freedom is incomplete, incoherent, or non-existent in the state of nature, and the laws of the state so described *constitute* external freedom. But since the notion of external freedom is ambiguous, both accounts might be true.

Freedom-first views are correct that insofar as we mean by external freedom

[61] That isn't to say, however, that anything an entity calling itself a state does thereby achieve this, as we will have occasion to note in later chapters.

merely freedom external use of choice. After all, in that state, all have a free *Willkür*. (This is a metaphysical point, and entails that we have, in the state of nature, a full capacity for external freedom understood in this sense.) Still, in the state of nature, the way that we are to exercise the external use of choice can restrict the freedom as independence of others. That is to say, rightful freedom is not possible in the state of nature, but rather requires a civil condition, insofar as the latter can be identified with omnilateral lawgiving. Thus, understood as compossible independence, external freedom is lacking in the state of nature, and comes into existence only when it is *public law* rather than *Willkür* that restrains choice. So understood, the constitutivists are correct about external freedom in this sense. This is in fact constituted by public law (insofar as this instantiates an a priori united will), without which it would not exist (because all would be dependent on the arbitrary will of all others).[62]

In this section, I've argued that the civil condition counts as a rightful condition to the degree that it approximates conditions of omnilateral lawgiving—lawgiving that shows external rights and duties to precede from the will of each, to the will of all. Thus, premise (7) holds. Once we see that the civil condition has this feature, then it is clear why we must enter into it, for it is the condition under which external obligations can be shown to be consistent with our capacity as autonomous lawgivers. With that, step (8), the argument's main conclusion is securely established.

VI. Conclusion

[62] I would, however, want to resist any tendency on the part of constitutivists to make the claim that we exercise external freedom in the positive sense to the degree that we make public law the determining ground of our choice (Zylberman 2016a, p. 111). This is to violate the non-prescriptivity of Right (see Willaschek 2002), and such a notion of positive freedom belongs squarely in the *Doctrine of Virtue*.

In this chapter, I have argued that we must distinguish between two senses of external freedom in Kant's political philosophy. Only by keeping this distinction firmly in mind can we see clearly how we threaten one another's freedom in the state of nature (as opposed to simply making their lives inconvenient). Indeed, so far as we are left independent to acquire rights in the state of nature, we have a capacity to bind others by mere *Willkür,* which violates the CCR. This then demonstrates what the rest of Kant's account must achieve: it must show that the obligations generated by our provisionally acquired rights can accord with the possibility of being united under universal law, i.e., with the omnilateral will. Only insofar as we can realize this possibility are positive obligations clearly shown to be of genuine character, compatible with, and indeed required by, our self-legislative capacities as autonomous agents.

The astute reader will have noticed that so far as we understand the civil condition to be the solution to the problems plaguing the state of nature, however, it suffers two potential defects. First, it appears that, at least in international contexts, any given state's territory is unilateral and arbitrary with respect to outside states. Thus, there are outstanding problems of unilaterality, even after persons in a determinate geographical region have entered a civil condition. Kant states the problem in two passages in the *Doctrine of Right*:

> Since the earth's surface is not unlimited but closed, the concepts of the Right of a state and of a Right of nations lead inevitably to the idea of a *Right for all nations (ius gentium*) or *cosmopolitan Right* (*ius cosmopoliticum*). So if the principle of outer freedom limited by law is lacking in any one of these three possible forms of rightful condition, the framework of all the others is unavoidably undermined and must finally collapse. (MdS 6:311)

> [E]ven if [the problem of the limits of acquisition] is solved through the original contract, such acquisition will always remain only provisional unless this contact extends to the entire human race. (MdS 6:266)

Since neither cosmopolitan right nor international right is plausibly realized in our world, it follows that domestic states here and now are insufficient to guarantee our rightful freedom.

Second, the civil condition is described in highly idealized terms, requiring not only a specific institutional structure, but also a principled commitment to make freedom the only permissible ground of coercion. To the degree that these conditions aren't satisfied in our world, we do not have a civil condition, even domestically. Once again, Kant recognizes the problem:

> [T]he *spirit* of the original contract (*anima macti originarii*) involves an obligation on the part of the constituting authority to make the *kind of government* suited to the idea of the original contract. Accordingly, even if this cannot be done all at once, it is under obligation to change the kind of government gradually and continually so that it harmonizes *in its effect* with the only constitution that accords with right, that of a pure republic, in such a way that the old (empirical) statutory forms, which served merely to bring about the *submission* of the people, are replaced by the original (rational) form, the only form which makes *freedom* the principle and indeed the condition for any exercise of *coercion*, as is required by a rightful constitution of a state in the strict sense of the word. (MdS 6:340-341)

Here, Kant our civil institutions are required to make "[f]reedom the principle and indeed the condition for any exercise of coercion." Further down the page, he says that until this happens, "no absolutely rightful condition of civil society can be acknowledged, but only *provisional* right within it" (ibid.).

These passages—and the problems they raise—form the motivation for the rest of this dissertation. Indeed, I shall argue that we never quite solve these

problems: Although reason requires a rightful condition, such a condition requires a genuinely united will and this process of unifying our contingent powers of choice is never complete. But if a rightful condition is nowhere realized, what sense can we make of our political lives, on a Kantian account? Must we regard our external duties as inconsistent with our freedom as autonomous beings? Must we regard our normative situation as inherently wrongful? In these passages Kant says that our circumstances—in the absence of a rightful condition—are governed by the notion of provisional right. If we want to know, then, what to make of our political condition in such circumstances, we must investigate what this entails. This is the work of chapters 2-4.

Chapter 2

Kant and the Provisionality Thesis

> Possession in anticipation of and preparation for the civil condition, which can be based only on a law of a common will, possession which therefore accords with the *possibility* of such a condition is *provisionally rightful* possession, whereas possession found in an *actual* civil condition would be *conclusive* possession.
>
> —Immanuel Kant, *The Metaphysics of Morals*: 6:257

> That among human beings whose powers of choice stand in outer relations there must be a right (and indeed a public right), i.e. that they must will that there should be such a right so that one can presuppose this as their will, lies in the concept of the human being as a person regarding whom my freedom is limited and whose freedom I must secure. – Yet for that reason that unification of powers of choice is not always actual. Hence mine and yours is only provisional until this unification is established, although it is of course subject to inner laws of right, namely to limit the freedom of rightful possession to the condition that it make possible that unification.
>
> —Immanuel Kant, *Draft of The Doctrine of Right*: 23:278

I. Introduction

The previous chapter attempted to get clear on the relationship between the notions of freedom in Kant's politics and the civil condition. There, we found that external freedom is ambiguous in the *Doctrine of Right*. External freedom may be taken to mean (1) the kind of compossible independence that obtains to the degree that right is realized, or (2) freedom in the external use of choice—the exercise of

choice so far as it takes as its object something distinct from me, that lies in my physical capacity to use. (1) is identical with our One Innate Right, whereas (2) refers to that capacity by which we are capable of rendering others' dependent upon our choices, and by means of which we are capable of violating their rights. We have also seen that dependence is wrongful to the degree that it arises from our arbitrary choices, and that positive law (that which depends in some sense precisely upon such choice) is authoritative to the degree that it satisfies the condition of omnilaterality.

Although we have seen that there is some disagreement concerning the relationship Kant intends between law and freedom, it is universally acknowledged that the relationship is intimate, and that its intimacy derives from public law's ability to solve certain problems that are endemic to the state of nature, where all rights have a merely provisional status. Recall that they have provisional status because their conclusive status in the state of nature would conflict with laws of universal freedom by allowing each a power to arbitrarily constrain the choice of others by placing obligations on them unilaterally. Entering the civil condition is obligatory because only in such a condition does the source of these obligations lose its unilateral flavor. Rather than springing from each individual's particular will, external duties are imposed on each by the will of all, united under a power capable of enforcing them.

This general picture has quite naturally led many scholars to suppose that anywhere there is public, coercive law (especially when there is an institutional distinction between the legislative, judiciary and executive powers), the state of nature is no longer: One has entered into a rightful condition. One's rights are delineated by the law of the land, and are no longer provisional. In other words, where there is

law, there is conclusive (alternatively, peremptory) right, and what one has a right to coincides with what is laid down as right by the relevant public authorities (for support for the received position, so understood, see MdS 6:312). This view is plausible to the degree that it perhaps best captures Kant's claims that (1) there is an absolute obligation to obey whatever public authority you find yourself under (MdS 6:371), (2) inquiring into the history of a state with the intention to uncover its injustice is wrong (MdS 6:318), and (3) a people "has a duty to put up with even what is held to be an unbearable abuse of supreme authority" (MdS 6:320). Of course, scholars acknowledge that there is no duty to put up with barbaric exercises of power, where the minimal conditions of law are not met (Ripstein 2012, pp. 66-68), and that when these are identified, the duty is still to establish a civil condition. But the appeal to the difference between barbarism and despotism sets a low bar. As surely as it rules out (1)-(3) with respect to the situation under the world's most brutal dictators does it rule *in* the existing governments in the developed world.[63]

It is the aim of this chapter to challenge this view, and to establish that, in a spherical world like ours, all external rights are necessarily provisional. To the degree that we leave the state of nature, we do not straightforwardly enter a rightful condition, but find ourselves in so many conditions of despotism (a technical term for Kant), which uphold freedom only to greater or lesser degrees. In such conditions, we are enmeshed (with our compatriots, with foreign nations, and with individuals outside

[63] For discussion, see Ripstein 2009, p. 22, p. 90, p. 165, p. 173, p. 176, p. 184, p. 190, p. 341. In each of these places, Ripstein ties the provisionality of right to the presence of the state of nature or the absence of a rightful condition. Moreover, because he believes (1) that provisional rights are simply unenforceable, and (2) that there are enforceable rights in the legal regime as we know it, he must take it that at least some states instantiate rightful conditions in the relevant sense. Ripstein's treatment of the matter is typical in this respect.

the state to which we belong) in circumstances where our independence is not yet consistent with the like independence of all. But if so, I argue, the best way to understand the status of our external rights is as provisional, not conclusive. The role of peremptory right, on this account, becomes aspirational, rather than constitutive of our practical relations. Though Kant seems in various places to deny this conclusion, the structure of his argument implies it, and his theory is more illuminating for accepting it.

The chapter proceeds as follows. In § II, I introduce the distinction between provisional and conclusive right, and the grounds for thinking (as most do) that provisional right holds only in circumstances where there are no states. I argue against this position in § III and § IV by providing two arguments (grounded in Kant's texts) that entail what I'll call the provisionality thesis (henceforth, PT). PT holds that all external rights are necessarily provisional in a world like ours (i.e., a world composed of contingently rational beings, dispersed across a bounded space, where any realization of the conditions of external rights' compossibility is highly improbable), however replete with states it may be. In § V, I argue that PT emerges in Kant's account from a concern about the limits of acquisition, and the degree to acquiring rights leaves our freedom in the external use of choice at the mercy of other persons' arbitrary choices. Moreover, PT responds to such concerns in a way that does not conflict with Kant's anti-welfarist normative orientation, according to which realizing compossible independence is the sole political value. § VI concludes by way of responding to a serious exegetical challenge.

II. Provisional Right and the State: The Standard View

This section introduces the distinction between provisional and conclusive right with a view toward showing (in later sections) that PT holds, i.e., that at least according to one prominent line of argument in Kant's texts, human circumstances are circumstances of provisional right. I begin by noting that Kant introduces the distinction between provisional and peremptory right when discussing the transition between the state of nature and the civil condition. I then lay out the standard view according to which its normative relevance is restricted to stateless societies, or societies in which the use of force is barbaric, and not meaningfully governed by law.

To begin, recall that Kant's political philosophy is organized around the Universal Principle of Right (UPR). The UPR imposes a compossibility constraint on rightful freedom, and generates the idea of a political wrong (a hindrance to a rightful exercise of freedom). We have seen the state of nature either allows restrictions on others' freedom that are unilateral and arbitrary, or fails to allow the acquisition of external rights altogether. Therefore, we have an obligation to leave the state of nature and enter into a civil condition. Kant calls the obligation to enter a civil condition the "Postulate of Public Right" (PPuR).

Recall from the last chapter that a civil condition is that in which everyone is under "a general external (i.e., public) lawgiving accompanied with power" (MdS 6:256), in which "the will of all is actually united for giving law" (MdS 6:265). Kant has already argued that exercises of freedom that arbitrarily, i.e., unilaterally impose obligations on others violate the compossibility requirement of right. The civil condition is therefore supposed to be that condition under which persons are

necessitated by others' power of choice only to the degree that their further independence from constraint by arbitrary will is rendered mutually consistent. Whereas the imposition of external duties in the state of nature falls short of consistency with the omnilateral will, the civil condition represents just such a will. PPuR demands that we enter such a condition.

But notice that we cannot discharge PPuR's requirement alone.[64] Realizing a civil condition that instantiates the requirements of the omnilateral will requires several external preconditions, among them coordination with numerous other persons and institutions: we must be subjected to common laws that are made by the right kind of representative body, resolve that our disputes under these laws be judged by a common arbiter, and we must ensure that these judgments are enforced by a sufficiently powerful executive. But it is important to notice that failure to coordinate on these points—failure to enter a civil condition—does not leave us completely without rights claims. Note this chapter's first epigraph, quoted at length below.

> Possession in anticipation of and preparation for the civil condition, which can be based only on a law of a common will, possession which therefore accords with the *possibility* of such a condition is *provisionally rightful* possession, whereas possession found in an actual civil condition would be *conclusive* possession. Prior to entering such a condition, a subject who is ready for it resists with right those who are not willing to submit to it and who want to interfere with his present possession; for the will of all others except himself, which proposes to put him under an obligation is merely *unilateral*, and hence has as little lawful force in denying him possession as he has in asserting it (since this can be found only in a general will)... (MdS 6:257)

[64] Indeed, it is sometimes difficult to realize how it could come into being at all. Kant is clear that it has not (perhaps cannot) come into being contractually. But then it's not clear what exactly our options are. Bader (unpublished MS) suggests that it might occur by simply being imposed: an entity becomes sufficiently powerful to secure its rights against others, and then has assurance in fact that its rights will not be violated. Since that's so, it acquires an obligation to respect the rights of those subject to its power.

There's a lot packed into this passage, but two claims are immediately relevant. First, possession is conclusively justifiable only in an "actual civil condition". Given what has come before, this means in a condition in which the omnilateral will is in fact unified for lawgiving under an adequate power. Second, in advance of securing coordination for entering a civil condition, unilateral claims to possess external objects have provisional status so long as they "accord with the possibility" of a rightful condition, and the law of a common will. Thus Kant introduces the distinction between provisional and conclusive right.

The distinction's introduction in this context reinforces the standard view that the distinction loses practical relevance once states come to be. For if (1) right is conclusive (read: not provisional) wherever there is an actual civil condition, and (2) states are civil conditions, then (3) where there are states, there are sites of conclusive rights. Put differently, if (i) provisional possession is possession that accords with the mere possibility of a civil condition,[65] whereas conclusive possession is possession given the actuality of such a condition and (ii) the state just is the actuality of a civil condition, then (iii) where there are states, there just is conclusive right. But since our

[65] It is thus a important question to ask: what sort of possession is possession that "accords with the possibility of a civil condition". I take it that Kant lays out the answer in ch. 2 of *The Doctrine of Right*. The basic answer is that one has taken something under one's control with the intent to exclude others only to the degree that it is consistent with their rights, and has a maxim according to which he is prepared to test his claim against a possible united will. In Kant's words, "That is mine which I bring under my *control* (in accordance with the law of outer *freedom*); which, as an object of my choice, is something that I have the capacity to use (in accordance with the postulate of practical reason; and which, finally, I *will* to be mine (in conformity with the Idea of a possible united *will*)" (MdS 6258). Kant goes on to make this general schema more specific in each of the three cases of external objects of choice. For property right, see MdS 6:260-270, for contract right, see MdS 6:271-276, and for status right, see MdS 6:276-284. We will have occasion to treat these sections in greater detail in what follows.

world is replete with states, PT is false, and the interesting political questions we face are questions of conclusive right.

This is to move too quickly. We should slow down, and get clear on what exactly an omnilateral will *is.* Certainly, it helps to have the contrast case with the particular or unilateral will. But this is to leave out entirely any positive characterization. The first thing we might notice is that Kant uses this term interchangeably with three others: a general will (*allgemeine Wille*), a common will (*gemeinsame Wille*), and the unified will of all (*vereingte Wille*). The first should recall, of course, Rousseau's *Social Contract,* where the general will plays a central normative role. But to say that its role is central is not to say that its interpretation is straightforward. Instead, scholars have distinguished between three interpretive options. According to the first, the general will is a pure proceduralist notion (see e.g., SC II.vi.5, II.vi.7,). Once a people chooses a decision rule (e.g., majoritarian rule, dictatorial rule, etc.) to govern their interactions, the outcome of that rule with respect to a particular issue just is identical with the general will. The second option is a pure substantivist position, according to which the general will corresponds to an objective common good (see e.g., II.iv.7, II.vi.2). The third option, a mixed view, becomes plausible once one realizes that there is textual evidence for both of the pure options. On such a mixed view, an objective common good imposes constraints on either the outcome or the inputs of the community's decision procedures to ensure that they remain within certain bounds.[66] But procedures within these permissible bounds are authoritative. Whereas it is uncertain which of these views

[66] For an interpretation of Rousseau along these lines, see Sreenivasan 2000.

Rousseau goes in for, Kant's characterization of this will seems to imply that he goes in for the either the second or the third understanding (on this point, see Flickschuh 2008, p. 34, pp. 38-41).[67]

Kant rules out a pure proceduralist notion when he writes that the omnilateral will is "united not contingently but a priori and therefore necessarily" (MdS 6:293), and contrasts it with other kinds of willings: unilateral, bilateral and multilateral. Any actual procedure will typically be contingently multilateral (as in majority rule), but will even in the best case exhibit contingent unanimity. By contrast, Kant holds that the united will's necessary *a priori* unity renders it "the only will that is lawgiving" (ibid.). Kant treats the omnilateral will as a law antecedent to any positive assertion of an external right or any positive institution (even if it must in the end be represented by one). More specifically, he treats it as an idea—a regulative concept that cannot be met with anywhere in experience (NRF 27:1393, DDR 23:220, DDR 23:276, DDR 23:321, DDR 23:342, MdS 6:258, MdS 6:265; MdS 6:274, MdS 6:306). From the perspective of Kant's omnilateral will, even overwhelming majorities ("the will of everyone but one") are merely unilateral with respect to the one they exclude. But because a unilateral will cannot serve as a law to an autonomous agent, and because the acquisition of external rights in the state of nature must appear to give law precisely on this basis, the permissible acquisition of such rights has its "rational title"

[67] Byrd and Hrushka (2006b), argue that Kant's notion of the a priori united will shares with Rousseau's notion of the general will nothing more than a name: "Außer einem vergleichbaren Namen haben der usrprünglich vereinigte Wille der *Rechtslehre* und Roussaus volenté générale deshalb wenig mit einander zu tun" (p. 143-144). Whereas Rousseaus general will is supposed to serve as a governing notion of legitimacy, Kant's united a priori will is tasked with the specific job of accounting for the task of original acquisition (ibid., 145-148), and ultimately the division of the earth (p. 156). As we will see, I agree with them in large part.

in the idea of its being united or compatible with the dictates of such an omnilateral will. Such a will can be united a priori because it is based on principles of pure practical reason (e.g., PPuR and UPR). The civil condition represents an external lawgiving that actually realizes these principles, and it is in such a condition that possession becomes conclusive.

But although there are strong reasons for rejecting proceduralism as specifying the content of the general will, we must nevertheless ask, as Jerome Michael Nance does in his excellent dissertation on the topic, "what the general will wills" (Nance 2011). And the standard view regarding the status of provisional right is at its strongest when it provides a particular answer to this question. For according to that view, the general will wills only (a) that acquisition be permissible, (b) that it be governed by domestic institutions of a certain kind. On the standard view, we leave the state of nature so far as we find ourselves under a government that specifies one law to govern all, adjudicates disputes solely on its basis, and enforces the decisions and the laws through irresistible force.[68] The standard view holds that there are no substantive constraints that the state must meet in order to satisfy Kant's omnilateral will, just so long as it is characterized by minimal lawfulness, and purports to act in the public interest, as a representative of such a will. Whereas in the state of nature, what is externally right is provisional and determined by each person's desires, judgments and power, in the civil condition what is externally right is laid down by a legislature, enforced by an executive, and judged by a judiciary. The transition from

[68] Byrd and Hrushka (2006) are major defenders of this view, despite their substantive disagreements with others who hold the view, concerning, e.g., the status of property rights in the state of nature.

a situation of provisional to a situation of conclusive right occurs just as soon as these institutions are realized.

This view is plausible to the degree that we identify a civil condition with a state of public justice—a state in which what belongs to each is determined by a court of law. After all, most existing states are in fact sites of public justice in Kant's rather technical sense (see ch. 1 for discussion). But then it is plausible to think that conclusive possession and conclusive right is widely actualized in our world. This is precisely how dominant accounts of Kant's political philosophy carve up the landscape. It is difficult to show this, but the quick way to do so is to note that none of the major accounts accord to the idea of provisional right more than passing attention in their remarks on the transition between the state of nature and the civil condition (the major exception is the groundbreaking work of Ellis 2005, who has since walked back from PT as an interpretation of Kant).[69] Why? As far as I can tell, they read the notion as only applicable in pre-political circumstances, circumstances quite unlike our own. For example, Ripstein claims that we leave the state of nature and enter into a rightful condition "simply by being subject to laws" (2009, p. 198; compare p. 225). The idea is that authority is conferred on existing law by the PPuR: since we all will together that there be a representative of the omnilateral will, so far as someone gains sufficient power and support to create public offices which are structurally able to do so, those offices are imbued with authority. As Ripstein later puts the point, "when a civil condition exists, everyone in it can be taken to have authorized the state to act for them" (2012, p. 65). But notice that for this

[69] See, for example Ripstein (2009), pp. 173-174, Byrd and Hrushka (2006), pp. 280-282, Varden (2008), pp. 14-18, Hodgson (2010a), pp. 74-78, Kersting (1993), pp. 263-264.

characterization to apply to existing states, it would have to be the case that the latter are in no respects unilateral (with respect, e.g., to outsiders), and that the omnilateral will imposes *merely* formal constraints. As I argue below, however, both of these points are mistaken.

To resist the standard view—as a reading of Kant—one has to show instead that the standard reading of the omnilateral will is incorrect (consistency with the omnilateral is more demanding than the standard view suggests). In what follows, I argue that there are in fact two kinds of considerations that militate against the mainstream view. The first is that there are internal (domestic) requirements of conclusive right that are not plausibly satisfied by existing states, and the second is that there are external requirements of the same that are *certainly* not satisfied with respect to existing states. I isolate passages in Kant's texts where he explicitly commits to arguments in both directions (§ III and § IV). The results of these sections show that Kant is aware that existing states suffer these two problems, and that his awareness of these problems led him to commit to a series of claims that entail PT.[70]

III. The True Republic and the Right of States

On the received view, existing states that meet certain formal conditions satisfy Kant's characterization of the civil condition as the condition in which all are united for the purpose of giving law. In other words, the state satisfies the condition

[70] As I will later emphasize, I do not mean to argue that Kant accepted PT as a conclusion (although I think that he may have). Philosophers can accept propositions that logically entail a conclusion without accepting it, provided they are unaware of the entailment, or think they have an argument against its obtaining. Still, that several arguments in Kant's corpus do entail the conclusion, and since those arguments are compelling, there is considerable philosophical and historical interest in uncovering them and assessing their meaning.

of rightful external freedom, namely obligations imposed omnilaterally. But we might ask how this could be, given that the state comes into being through force, giving it a distinctively unilateral flavor: In what way is the state coming to power and simply laying down rights different than a particularly powerful individual doing the same? Certainly if I were to approach you with my army, and demand that you give me a substantial portion of what you take to be yours in return for the protection of the rest, it would seem that the condition of mutual assurance would be lacking. Moreover, in taking myself to be obliged to accept such an arrangement, I would be accepting an obligation grounded merely in your unilateral *Willkür.*

One common answer to this objection observes that genuine states avoid this description by virtue of their pursuing only public, rather than private, purposes. As Ripstein puts it:

> The public nature of the state limits the purposes for which it can act to those that are properly public, that is, sustaining its character as a rightful condition. (2009, p. 228)
>
> [A]s a condition of public right, a state is only entitled to act for public purposes, rather than for the private purposes of its rulers or officials. (2009, p. 29, see also p. 31, p. 193, p. 208)
>
> [Public officials] are also constrained in distinctive ways: they can only act within their offices, which are in turn specified by law...These familiar powers and restrictions reflect the ways in which properly constituted powers are able to act on behalf of everyone, making their actions exercises of the citizens as a collective body rather than as their own private acts. (2012, p. 59)

But the state's publicity is better thought of as an ideal than as something which actual states achieve. The historical record is replete with abuses of power, where public offices are used to pursue private purposes. If so, however, it is hard to see how the fact that an ideal state should act publicly, should give actual states (that do not so act)

the right to lay down peremptory rights and duties. Now I'll show that Kant shares this first worry.

In his "Idea for a Universal History" essay, Kant makes a somewhat Hobbesian observation: if human beings are not subject to a master laying down law for all backed with sanctions (i.e., a sovereign), they tend to abuse and dominate others (IUH 8:23). But any master that we can envision empowering is human, and so is likely to abuse her power unless she is subject to yet another master. But that master must also be a human being, and so requires a master, and so on.[71] Though public offices might be theoretically constrained to pursue public purposes, this by no means ensures that the individuals occupying those offices will constrain their behavior to such (a long history of abuse and corruption testifies to this fact). Kant observes that this makes the problem of rightful governance at the level of the right of states structurally very difficult, if not actually impossible to solve. But it also implies that Kant is under no illusions about the motives of those in power. Their purposes ought to be public; in practice, they're anything but. Not only do state officials frequently have private motives to act (vainglory, e.g.), they also require external constraint to curtail those motives, and the latter can only be imperfect. What these considerations make clear is that, though the state's purposes ought to

[71] According to Kleingeld (2011, p. 66), Kant's later work solves this problem by introducing checks and balances via the republican constitution. Three things to say here. First, as we shall see (in the next subsection), even if achieving perfect domestic governance is possible (only very difficult), other structural issues preclude our entering a conclusively rightful condition. Second, whatever Kant himself thought, H.L.A Hart clearly establishes that even institutional restraints on the exercise of power rely on "rules of recognition" for their efficacy, and these must be acknowledged by those over whom they claim authority (1961, pp. 106-146). Thus, a system of republican checks and balances is likely to be insufficient in solving the problem Kant astutely identifies, though it might go some way toward providing the kind of external constraint Kant thought necessary. (On this point, see my unpublished MS, "The Problem of Limited Government".) Third, as we are about to see in the main text, it is unclear, really, that Kant did walk back from the problem he identified in IUH.

be public, this is a normative claim, and the descriptive reality is otherwise. Thus, it is at least strange to interpret Kant as claiming that there is a rightful condition wherever there is law, where law means something like it does in everyday discourse, such that it picks out the legislative activities of existing states. Instead, a rightful condition demands legislation of a certain type, and existing states do not plausibly meet these demands.

For the above reasons, I take it that, concerning actual states' capacity to satisfy the constraint of publicity, Kant sides with me, rather than with the mainstream view. Structural problems (e.g., the fact that we can only ever imperfectly constrain public officials to comply with their duty to pursue by means of their coercive power only public purposes) render it unlikely that most state actors proceed for purely the narrowly defined public good of ensuring everyone's mutual freedom, even when they are constrained by a constitution, and even when they are subject to sanctions for noncompliance.

Now, a defender of the standard view might argue that I've missed the point. The point isn't that state agents invariably act publicly in the common interest, but that to have a state is in the common interest, and this suffices to render it true that any actual state represents a condition where the will of all is actually united (e.g., Flikschuh 2008, *passim*). We can flesh out the idea as follows: For Kant, the UPR is a law of reason and generates the PPuR. What this means is that these principles issue infallibly from the will of every individual. Since all human beings have a will that legislates the UPR, and since the UPR requires a state (by way of the PPuR), any actual state can be identified as the object of omnilateral agreement (provided it solves

the problems identified in the state of nature). Provided that a state issues determinate norms concerning property acquisition and transfer, as long as it adjudicates disputes in a court of law, and enforces the decisions of that court irresistibly, there is a civil condition and, with it, conclusive right. There may be obligations to bring the laws closer to what justice requires, but that's no argument against identifying a rightful condition. So understood, the view isn't so much that the state is bound always to act in line with the omnilateral will (though this is true as an ideal), but that it is always in line with the omnilateral will to have a state. Because this is so, every state that meets minimal conditions satisfies the description of a civil condition, and every such state is a site of conclusive right.

This view appears plausible, and it's certainly true that Kant thinks that something normatively important happens insofar as power is consolidated in a domestic state (Huber 2017). But the claim in question here is that what happens in these cases is that provisional rights become peremptory, and alas, there is strong textual evidence against this claim. Consider the following passage, which directly follows Kant's claim that changes to the form of the existing constitution need to be brought about, not through revolution, but rather through reform by the sovereign, to avoid instability resulting from a constitution that "the people itself could abhor" (MdS 6:340). There, he writes:

> [T]he *spirit* of the original contract (*anima macti originarii*) involves an obligation on the part of the constituting authority to make the *kind of government* suited to the idea of the original contract. Accordingly, even if this cannot be done all at once, it is under obligation to change the kind of government gradually and continually so that it harmonizes *in its effect* with the only constitution that accords with right, that of a pure republic, in such a way that the old (empirical) statutory forms, which served merely to bring about the *submission*

> of the people, are replaced by the original (rational) form, the only form which makes *freedom* the principle and indeed the condition for any exercise of *coercion*, as is required by a rightful constitution of a state in the strict sense of the word. Only it will finally lead to what is literally a state...It is the final end of all pubiic [*sic*] right, the only condition in which each can be assigned *conclusively* what is his; on the other hand, so long as those other forms of state are supposed to represent literally just so many different moral persons invested with supreme authority, no absolutely rightful condition of civil society can be acknowledged, but only *provisional* right within it. (MdS 6:340-341)

Here, Kant makes clear that the idea of the original contract constrains "the constituting authority" to gradually bring about the kind of government required by reason. For Kant, the original contract is the idea of a people unifying itself for the giving of law (MdS 6:316). Following the social contract tradition that he inherits, he deems the original contract the sole criterion of the legitimacy of the state (ibid.). But unlike his predecessors, Kant does not think that this contract is an actual historical event—it is, as Helga Varden convincingly argues "non-voluntarist" in that way. Instead, history gives us good reason to believe that governments as we know them originated in force "to bring about the *submission* of the people." Governments begin when power is concentrated in a sufficiently high degree to force coordination on one set of solutions to the problems that exist in the state of nature (though Kant believes that these solutions are so far all defective). So far as this is true (that all existing solutions are defective), the idea of the original contract makes a stringent demand: such governments, having achieved this submission, must make "*freedom* the principle and indeed the condition for any exercise of *coercion,* as is required by a rightful constitution of a state in the strict sense of the word". Only a rightful constitution, that is, one that grounds coercion solely in freedom, is literally a state.

Such a state, Kant says, "is the final end of all public right", and until it is realized, "no absolutely rightful condition of civil society can be acknowledged, but only *provisional* right within it". Until states instantiate the form of the ideal republic, external rights have only provisional status. On its face, this conflicts with the standard view, which would have it that the mere exit from a condition of complete external lawlessness is sufficient for entering a rightful condition. Though it may be true that the omnilateral will requires a state, it also requires a particular kind of state, namely a pure republic. Attention to Kant's definition of the pure republic reinforces just how demanding the conditions of conclusive right are.

The pure republic is one of four 'conditions' or 'states' [*Zustände*] that Kant identifies in the *Anthropology* (see also: Ellis 2005, p. 114; Ripstein 2009, p. 338; and Wood 2014, p. 98).

> (1) The pure state of nature, which is characterized by law and freedom, but no power; (2) Barbarism, which is characterized by the privation of freedom and law, and the presence of power; (3) despotism, which is characterized by law and power, but lacks freedom; and (4) a pure republic, which is characterized by all three, and lacks nothing. (A 7:330)

That Kant conceives of the pure republic in these terms explains why, in the passage above, he takes the liberty to move freely between the idea of a pure republic (which is a merely rational form of a state), and the idea of a condition where freedom is "the condition for any exercise of *coercion*". For the pure republic just is a condition of law, backed by power, where freedom reigns. The surrounding text in the

Anthropology makes clear that (1) and (4) are mere ideas, where to be an idea is to be an archetype that is never actually realized in experience. Kant thus commits himself to saying that existing persons find themselves only in despotic and barbaric conditions, and never in a pure republic or a pure state of nature. Thus they find themselves never under an omnilateral will, since the pure republic is the condition under which external lawgiving is genuinely compatible with the latter.

(1) is a mere idea, presumably, because even the most disorderly human experience will be characterized by some power structures, even if these do not include anything resembling law. But why so with (4)? One answer, we have seen, is given in the universal history essay. The pure republic is an unrealizable idea because human nature renders it impossible that any system of governance could genuinely make it the case that coercion is conditioned merely on freedom. Kant says that the absence of the pure republic implies that "no absolutely rightful condition of civil society can be acknowledged, but only provisional right within it" (once again quoting MdS 6:341). Since the absence of a pure republic is (apparently) part of the human condition (it is a mere idea), it follows that so too is merely provisional right. Thus the existence of states (that is, states that are not "literally state[s]," namely those that we find in experience) is not a sufficient condition for the existence of a civil condition, in which what belongs to each is conclusively secured. Indeed, the pure republic is both necessary and sufficient for the existence of such a condition, and it is beyond our grasp. Kant was apparently serious when he spoke of crooked timber.[72]

[72] "{[O]ut of such crooked timber as the human being is made, nothing entirely straight can be fabricated" (IUH 8:23).

At this point, one might press the objection that Kant is simply wrong on this point: there is reason to believe that the pure republic can be realized in experience. At least, we seem to be able to approximate it. And as long as we can do so, we should admit that a civil condition exists, and that the conditions of provisional right are overcome after all. I admit that this is a serious worry. But it is one that is best put off until an account of provisional rights and duties can be offered. Only then (after chapters 3 and 4) will we be in a position to evaluate the overall plausibility of PT. Even if this objection can be met later on, it's important to note that the standard view is defeated by other considerations, which I turn now to articulating.

IV. International Congress and the Right of Nations

The second worry that we raised about the idea that actual states could be civil conditions, i.e., actualized omnilateral willings, was that the activity of a given state is bound to look unilateral or multilateral with respect to outsiders.[73] Even if the worries raised in the first subsection could be overcome, and we could find grounds for saying that actual states represent and act (at least approximately) in the interests of all their citizens, that they coerce only when doing so is consistent with citizens' freedom, Kant does not restrict his focus to citizens, and with respect to non-citizens,

[73] As Peter Niesen so eloquently puts the point in an unpublished manuscript: "Both cosmopolitan right and unilateral acquisition thus go back to the same root: the conditioning of all annexation to its compatibility with a general will. Cosmopolitan right just serves to remind us that it is not only compatriots to whom the generality of the general will needs to extend. The very problem to which cosmopolitan right is the answer would not arise were it not for the fact that earth dwellers claimed exclusive use of territory: Under what conditions is it legitimate for inhabitants of the earth to impact upon others in the acquisition of territory, disregarding the boundaries of state and private territories? All unilateral drawing of territorial lines in order to claim exclusivity of use, from domestic acquisition to state dominion, is therefore dependent on its redemption as compatible with a "general", i.e., in the case of cosmopolitan right, omnilateral will" (p. 20).

state-activity looks purely unilateral (pace Huber 2017). For Kant, all human beings are common owners of the earth, and any right to possess is based on this idea. (As Kant puts it: a possessor "bases his act on an innate *possession in common* of the surface of the earth and on a general will corresponding a priori to it, which permits *private possession* on it" (MdS 6:250).) Putting aside the worries from the previous section, the state might succeed in rendering its citizens' claims to external rights compatible with other citizens' claims. But that clearly leaves open questions about those claims' consistency with the claims of outsiders. But since Kant is quite clear that it is *human beings,* not *conationals,* that own the earth in common, satisfying the omniilateral will with respect to such common possession requires that our claims be consistent with theirs.[74] It is thus that Kant holds that nations' claims to land, resources, etc., cannot be conclusively justified until every nation belongs to a global congress of nations that extends to the "entire human race" (MdS 6:266, 6:311). Kant's argument is that if coordination on right does not fully extend across the globe, then it remains open that current claims to ownership, to governance, etc., are incompatible with a perfectly general and common will, and, since such a will is the result of each individual's free self-legislation, so too with the freedom of each.

Now, perhaps the standard view would wish to assert that the omnilateral will wills only acquisition and state formation, and that so long as things are moving along in this way, the claims of each state to its land are compatible with the claims of every

[74] One might argue that what it is for our domestic claims to be consistent with the claims of outsiders is only for us to respect their right to develop national sovereignty. For reasons suggested by Kant's reflections on cosmopolitan right and the common possession of the earth, I do not think this gets things right. Thanks to Eric Watkins for pressing me to address this point.

other state and their claims to their land.[75] But again, this response is at odds with the way Kant explicitly argues. To see this, we need look no further than a lucid passage in which Kant lays out the structure of public right.

> [U]nder the general concept of public right we are led to think not only of the right of a state but also of *a right of nations* (*ius gentium*) or *cosmopolitan right* (*ius cosmopoliticum*). So if the principle of outer freedom limited by law is lacking in any one of these three possible forms of rightful condition, the framework of all the others is unavoidably undermined and must finally collapse. (MdS 3:611)

Kant says: the general concept of right contains not only the idea of the right of a state (domestic right), but also the right of nations and cosmopolitan right. He says: if the principle of outer freedom (the UPR) limited by law is lacking at any point, then the framework of the others is undermined. On a natural reading, he means: even if we can work out a domestic situation in which the UPR seems to be satisfied, our work is not done. For if the UPR is not satisfied with respect to relations between nations (international right) or between individuals and nations (cosmopolitan right), then this reveals problems at the domestic level as well—the domestic state's claim to satisfying the UPR is undermined ("the framework of the others is unavoidably undermined and must finally collapse"), and its being undermined means that rights under the relevant institutions are provisional. Kant says that a problem at the international or cosmopolitan level forces the solutions at the domestic level to "collapse" for good reason. For working out the problems at the international and cosmopolitan level will necessarily require adjustments at the domestic level.

[75] I could imagine Byrd and Hrushka going this way.

If this is right, there is a question about why it is right, and there is a question about what its being right amounts to. In the remainder of this section, I argue that problems at the cosmopolitan and international levels matter for the domestic level because they raise sensible questions about the degree to which the rights at the domestic level reflect an omnilateral will. From what has come before, it should be clear why this is a problem: to the degree that our institutions do not represent an omnilateral will, autonomous agents do not have conclusive reason to accept their distributions of rights as authoritative, for they appear to lack the characteristics of genuine obligations.

Above, we saw that Kant defined a civil condition as one in which the will of all is actually united for the giving of law. That this is the only condition in which conclusive possession of external objects of choice is possible results from the fact that the earth is originally possessed in common. "The [first] possessor", Kant writes, "*bases his act on an innate possession in common* of the surface of the earth and on a general will corresponding a priori to it" (MdS 6:250). The idea of original possession in common provides "a priori the basis on which any private possession is possible" (MdS 6:251).[76] The idea of common possession of the earth is one of the substantive constraints packed into the idea of consistency with the omnilateral will. Private possession is dubiously consistent with the idea of an omnilateral will because all are originally common owners of the earth, and so appear to have standing to

[76] The idea of common possession of the earth is an old one, tracing all the way back to Aristotle, and has been widely held to constrain the acquisition of private property. Aristotle held that property, "in the sense of a bare livelihood, seems to be given by nature herself to all, both when they are first born, and when they are grown up" (*Politics*, 1256b5-20). For some differences between Kant's notion and that found in the natural law tradition preceding him, see: Walla 2016 and Huber 2016.

reject any given instance of private possession. Since the state's territory is composed of the union of its citizens' property (plus its public property which derives from theirs), then those external to states (the stateless and those in other states) can make claims against nations, not just against individuals, based on this title of common possession.

If this is Kant's view, then any individual nation's actions will indeed look unilateral with respect to the rest. For it will be an open question whether that nation's holdings (through its citizens') are compatible with the idea of common possession. The view seems to predict that Kant would have seen this as a problem requiring a solution structurally similar to the solution he offers in the individual case. In fact, this is just what we find. Moreover, we find Kant employing the language of provisionality here, too. Here's what he says.

> Since a state of nature among nations, like a state of nature among individual human beings, is a condition that one ought to leave in order to enter a lawful condition, before this happens any rights of nations, and anything external that is mine or yours which states can acquire or retain by war, are merely *provisional*. 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. (MdS 6:350)

To summarize: individuals and nations are structurally analogous, and face similar problems, to which they require similar solutions. Whereas individuals ought to enter into a state, states ought to enter into an association of states.[77] But it's not that their

[77] There is thus an important asymmetry between individuals and nations. It is unclear what could justify such an asymmetry, but the point is irrelevant for my purposes here. For one possible justification, see Kleingeld 2011, p. 54.

claims to things in the absence of those solutions are meaningless. Instead, they hold as provisionally rightful.[78]

On the standard view, once states erect some legal institutions for governing their relations between one another, the conditions of provisional right are overcome, at least within their jurisdiction. Might the standard view respond that the international institutions (the WTO, the UN, the EU, etc.) that we have are sufficient for rendering rights peremptory? There is reason to think not. Kant was pessimistic that sufficiently strong and stable international institutions could be brought into being.

> 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 its members would have to become impossible, while several such corporations would again bring on a state of war. (MdS 6:350)

Kant is not satisfied with just any international legal institutions, but requires that they be (1) genuinely universal, (2) stable and (3) they offer protection to all their members (where protection is to be understood in terms of the protection of rights). Put simply, Kant doubts our prospects for realizing the conditions of international right. Yet he upholds such realization as a necessary condition of conclusive right. Until it is realized, all claims to right are merely provisional—even those that appeared to have been solved by domestic institutions. Our current international institutions fall short.

Similarly with Kantian cosmopolitan right: until it is satisfied, all claims to right are merely provisional. Recall that cosmopolitan right concerns relations

[78] Compare Gregor 1996, pp 15-16.

between individuals and states to which they do not belong. There are, then, two cases of cosmopolitan right. The one is when the relevant individual belongs to a different state, and the other is when the relevant individual is stateless. Nations have obligations to allow such individuals to offer themselves as partners in trade, and, in emergency situations, have duties to support their lives. If I wind up on the shores of state A, for example, and its turning me away would kill me, it does not act with right if it turns me away. In this case, it is particularly easy to see why its doing so is inconsistent with conclusive right: its authority and possessions are based on the law of a common will, and yet its actions are incompatible with such a law. When states fail in their cosmopolitan duties, their other claims are, at best, provisionally rightful.

V. Provisional Right and Welfarist Provisos

For Kant, the acquisition of external rights is normatively problematic insofar as they restrict others' freedom arbitrarily. Without being subject to limitation, our capacity to bind others by acquiring rights leaves others subject to restrictions on their freedom that are arbitrary, and in the limit annul their freedom. To correct this, individuals arbitrary power of choice must be united by means of dependence on an omnilateral will. But this dependence must be (1) grounded in the proper normative concerns, and (2) extend to all human beings, even if it stops short of the world state. In advance of this, acquisition of rights is provisional. What I want to suggest in this section is that PT is motivated in part by concerns that motivated other philosophers to impose provisos on acquisition.[79] But whereas these "provisos" limiting acquisition

[79] This is where my disagreement with Byrd and Hrushka is starkest.

of external rights appeal to welfare, Kant's understanding of the limitations of acquisition is grounded only in consideration of when and how far others can restrict a person's freedom. This enables Kant to accommodate the intuition that acquiring rights is subject to one or more provisos without subtly importing welfarist constraints on freedom.

For many thinkers in the modern period, there was an understanding that individuals' rights to acquisition could not be unlimited, but faced some sort of constraint. In fact, given their assumption of common ownership of the earth, it was a puzzle how *private* ownership was possible at all (Locke, 1690 [1980], § 25, p. 18).[80] For Grotius and Pufendorf, the story of moving away from common ownership crucially involved tacit consent. Since private acquisition often advanced the common good, all could be presumed to consent to a scheme of acquiring out of the commons (Grotius 1712 [2005], II.2.II.1). For Grotius, as for Pufendorf after him, sovereignty is constrained by a law that demands that "the people's welfare be the supreme law" (*On the Law of Nature and of Nations,* Vii.9.1, p. 242). For Locke, the story was told by the special connection between labor and things, and the natural law imperative to preserve one's existence through the earth's common bounty (Locke, 1690 [1980], § 26, p. 19). For all three, private ownership manifested only as ownership under constraint. Grotius and Pufendorf agree, for example, that there is no right to ownership that trumps the right of necessity. That is, rights to private ownership meet their limit when another's existence cannot be preserved without violating them. Second, there is no claim to ownership over unused or vacant land: others are free

[80] For a longer history of this question, see Tierney 2001, pp. 383-388.

to appropriate whatever is not being used by others. Finally, since property is grounded in the fact that, on the whole, the system advances the common good better than common ownership, it can be regulated and limited so as to optimize along these dimensions. For Locke, the constraint is captured by his two provisos, the first demanding that there be no waste, and the second demanding that enough and as good be left for others, so that one person's acquisition does not leave others worse off.

If he admits them, Kant's understanding of the limits of acquisition—both by states and individuals—must differ from these understandings in significant ways. He cannot admit with Grotius a ground for limiting rights in the pursuit of the common good, for the purpose of collective activity is not to pursue the common good (*pace* Pufendorf, and Grotius), but rather to protect rights. Similarly, Kant's understanding of the limits to acquisition must differ from Locke's insofar as the grounds of acquisition aren't to advance one's well-being, but are instead to exercise one's freedom. We aren't, in acquiring things, required to leave others enough and as good, nor are we required to ensure that our acquisition does not leave them worse off compared with some baseline. Indeed, Kant expresses skepticism that theory can settle the limits of acquisition (DDR 23:279). Still, in acquiring objects, we presuppose that our external rights can be united with theirs in an act of common lawgiving, and Kant acknowledges that an unregulated capacity to acquire rights does not merely limit but annuls others' external freedom. The solution is to seek the conditions of compossible limitation by unifying our wills by submitting to law. But this unification of wills that is supposed to play out is, as our second epigraph makes

clear, "not always actual" (MdS 6:257; DDR 23:278). For this reason, our acquired rights are subject to a kind of proviso, namely, that they be shown consistent with the rights of others through an actual unification of wills, grounded in the common ownership of the earth. Until that proviso is satisfied, our rights claims are inconclusive. Precisely what specific normative implications this inconclusivity carries along with it, I leave to subsequent chapters. For now, it is enough to notice that its capacity to make room for constraints on acquisition on distinctively Kantian grounds gives the distinction between provisional and conclusive right considerable appeal.

VI. Conclusion

I've argued that Kant is committed to PT on the basis of textual considerations. I want to conclude by reflecting on some text that pulls in the other direction. Consider the following passage.

> Every actual deed (fact) is an object in appearance (to the senses). On the other hand, what can be represented only by pure reason and must be counted among ideas, to which no object given in experience can be adequate—and a perfectly rightful constitution among men is of this sort—is the thing in itself.
>
> If then a people united by laws under an authority exists, it is given as an object of experience in conformity with the idea of the unity of a people as such under a powerful supreme will, though it is indeed given only in appearance, that is, a rightful constitution in the general sense of the term exists. And even though this constitution may be afflicted with great defects and gross faults and be in need eventually of important improvements, it is still absolutely unpermitted and punishable to resist it. For if the people should hold that it is justified in opposing force to this constitution, however faulty, and to the supreme authority, it would think that it had the right to put force in the place of the supreme legislation that prescribes all rights, which would result in a supreme will that destroys itself. (MdS 6:371-2)

Here, Kant appears to be explicit: The fact that there is no fully just state, the fact that the idea of the republican constitution cannot be instantiated in experience, the fact that international institutions are bound to be imperfect, these are no grounds for concluding that no civil condition exists. Instead, if the stately forms with which we meet in the world of experience are approximately close to the idea of a state, then there is a civil condition. But since there is conclusive right wherever there is a civil condition, there is conclusive right whenever we identify, in experience, "a people united by laws under an authority". Even though such a constitution "may be afflicted with great defects and gross faults and be in need eventually of important improvements" it still holds in general as a "rightful constitution in the general sense of the term."

But though Kant makes clear that revolting against such a rightful constitution in the general sense of the term is wrongful, he never says that it is sufficient for ushering in conditions of conclusive right. That is, it might be true that we ought not to resist existing governments, and false that such governments are sufficient for rendering rights peremptory. So, there are two options here, and it seems to me that the textual evidence, however strongly stated, underdetermines which view Kant held: (1) a rightful condition in the general sense of the term is sufficient for conclusive right, or (2) a rightful condition in the general sense of the term suffices to oblige citizens to obey, but does so through a provisional right.[81, 82] Of course, to say that provisional right carries with it an unconditional obligation of obedience is a

[81] Ripstein, of course, cannot go this way. As we will soon see, for him, to have a provisional right just is to have a coercible right that no one is entitled to enforce.
[82] This is precisely how Elisabeth Ellis argues in *Kant's Politics: Provisional Theory for an Uncertain World.*

substantive claim that requires unpacking (and it is not clear that it fits with everything Kant wants to say about provisional normativity). But since the textual evidence doesn't dictate that we accept (1), this passage is not by itself be dispositive with respect to PT. Moreover, since there is strong evidence for PT throughout the *Doctrine of Right* I believe that we do better to read this passage in light of it, and opt for (2).[83]

I argued in the Introduction and in Chapter 1 that Kant's political theory is, in some sense, an attempt to come to terms with how our external obligations are not alien to us, and are consistent with our free self-legislative capacities as rational agents. Toward this end, he structures his theory in stages. First, there is the Universal Principle of Right and the Postulates of Right, which provide an a priori structure and demand that agents be able to acquire external rights in the first place. Kant's analysis of the demand to acquire such rights shows that worries about the status of these rights and their consistency with our freedom are well-founded. For even if external, positive rights in general must be possible, the particular distribution of such rights must inevitably be determined by human agents, whose powers of choice stand arbitrarily between pathological and rational determination. But to accept obligations from another agent's arbitrary power of choice does not appear obligatory for agents who are themselves free and self-determining.

[83] Of course, this project is only worth undertaking if the other side of the inconsistency contains a plausible position. As it was at the end of the last subsection, then, so too here: one might worry that the arguments I've offered for PT here are simply implausible. They appear to require perfect governance at every level for conclusive right to obtain. Once we relax these aspirations a bit, the objection goes, it becomes clear that we can do well enough (perhaps have done well enough) to usher in conditions of conclusive right. Alas, I must delay responding to this objection until the notion of provisional right is fully spelled out. For there is no credible way of evaluating the degree to which an argument's conclusion is supported by its premises before knowing what the argument's conclusion means.

Kant's arguments for PT are motivated by the ideas that, on the one hand, the acquisition of external rights is rationally required, and that they are normatively suspicious on the other. Provisional rights are external rights that look forward to conditions under which they can be shown genuinely capable of coexisting with the freedom of all, at which point they adopt the characteristics of full obligations, compliance with which is demanded unconditionally. These conditions are spelled out as Kant develops a proposal for an ideal institutional structure that, at each stage, ensures that others' wills are subject to external necessitation only for the sake of rendering their independence compossible. Until these conditions are met, our claims to right must be characterized as provisional, not peremptory.

The standard strategy for dismissing the normative relevance of provisional right in circumstances like ours holds that the concept of provisional right is only at home in the state of nature, a condition where there are no states. But since that is not our world, the concept of provisional right is not at home in our world. We have seen that there is strong textual evidence against this view. I have reconstructed two arguments that motivate PT both grounded in the very structure of Kant's political theory. What I have not done in this chapter is defend PT on philosophical grounds. For to do so requires understanding what it means for a right to be provisional. Let's turn to developing that understanding now.

Chapter 3

Provisional and Peremptory Right: Historical and Philosophical Foundations

I. Introduction

If what I've been arguing is correct, Kant's arguments entail that external rights are not conclusive in our world. This required obtaining clarity about the conditions under which rights are provisional and under what conditions they are conclusive. Rights are provisional, namely, when they are held under the condition that they will be made consistent with the omnilateral will, but at present leave us free to arbitrarily restrict one another's freedom, which is inconsistent with everyone's freedom under universal law. By contrast, external rights are conclusive to the degree that we stand under outer necessitation exactly insofar as such is required for our freedom to mutually coexist under universal law. Insofar as this condition is met, the outer necessitation is not contingent, alien and arbitrary, but a requirement of practical reason itself. Meeting this condition requires not only institutions of a certain formal structure (an independent legislature, judiciary and executive), but also robust international institutions and adherence to a substantive norm that requires that outer necessitation be precisely limited to the condition of its consistency with everyone's freedom. This requires, Kant claims, a system of pure republics. But such a system

is a mere idea that cannot be realized in experience. Thus not only do such conditions not obtain in our world, this is also not a contingent feature of *our world*.

But though we've gotten clear on conclusive right's necessary and sufficient conditions, and have understood that provisional right obtains to the degree that these are lacking, we haven't yet gotten a clear sense of what we're saying when we judge that the conditions of peremptory (*peremptorische*) right don't obtain, or when we judge that external rights in our world are provisionally (*provisorische*) rightful. There are two outstanding questions. First, what, as a matter of analysis, does it mean to judge that external rights are provisional? Second, how precisely are we to understand our normative situation when provisional, but not conclusive, rights to external things obtain? This chapter addresses the first question by contextualizing Kant's distinction both within his broader philosophical system and against the backdrop of others writing in the tradition, while Chapter 4 addresses the second question.

I begin in § II by noting Leibniz's and Rousseau's usage of the language of provisionality in political contexts, noting that both employ the notion to indicate that the conferral of political authority on particular governing bodies is revocable. § III asks whether this also tracks Kant's usage, arguing for a qualified negative answer. § IV steps back from the political case and shows that, in his logic lectures, Kant developed a sophisticated distinction between provisional and conclusive judgment.[84] I argue that this distinction provides an important clue for characterizing the difference between provisional and peremptory right. I argue that provisional rights

[84] Thanks to Eric Watkins for pointing me toward the relevant passages in the *Lectures on Logic*.

are to be understood as provisional judgments of rights: Judgments of right that fundamentally admit the possibility that they're false because they're made in the absence of consciousness of their necessity (one crucial mark of obligations consistent with freedom: see the Introduction, and ch. 4). Because external rights in the absence of the conditions of their peremptory status inevitably involve arbitrary and unilateral necessitation, and because such necessitation is not authoritative for our autonomous wills, it makes sense that such rights would lack precisely the sort of necessity that characterizes internal rights (those issued by pure practical reason itself). § V sums up.

II. Leibniz and Rousseau: Strict Right and the Provisional Contract

Leibniz is one of at least two figures in Kant's philosophical ancestry who actually uses the language of provisionality in his political writing.[85] In his essay, "The Common Concept of Justice," Leibniz's sole use of the provisionality concept arises in the context of pointing out an inconsistency in Hobbes's theory of political obligation.[86] On the one hand, Hobbes argues that a criminal, having not "lost the right to judge of what suits him best," may do what he can to save himself in the face of the guillotine. He need not submit to punishment if he can escape it. This implies that the right to self-preservation trumps the duty to obey the law. By contrast, in

[85] My research has not yet taken me beyond the moral and political writings of the figures that I've canvassed. It is of course possible that the distinction comes from theoretical writings.
[86] Although this piece was published posthumously and so Kant would not have had access to a published version, it is possible that it was part of the larger philosophical conversation.

ordinary (non-criminal cases), citizens must restrain themselves according to the judgment of the state, even when they judge that it is not in their interests to do so.[87] There is, from this angle, an unconditional duty to obey the law. Leibniz objects as follows:

> [Hobbes] will also be obliged to recognize, however, that these same citizens, not having lost their judgment either, cannot allow their security to be endangered, when some of them are mistreated, such that at bottom, whatever Hobbes says, each has retained his right and his liberty regardless of the transfer made to the state, *which will be limited and provisional*, that is, it will last as long as we believe that our security lasts. (Leibniz 1988, p. 61)

According to Leibniz, Hobbes must recognize that the transfer of our right to the sovereign is provisional and contingent on the latter's capacity to protect us. The sovereign has authority only insofar as we believe that we do better by submitting to it than by remaining in the state of nature. But then we submit to the sovereign only insofar as we believe in its ability to provide us with security.[88] To the degree that Hobbes's arguments against a right to disobey are good arguments, they are grounded in self-interest. It must be that the evils of resistance often outweigh the good that can be gained by it. Hobbes's other in-principle argument, that there is no right to resist because enforcement for such a right lacks "a judge" and a body to enforce it, runs into a different problem. For, according to Leibniz, Hobbes fails to recognize that

[87] Leibniz (1988), p. 61, citing Hobbes (1994), v.8.

[88] Leibniz might seem here to commit to the claim that it is only our subjective states (our belief that we do better by disobeying than by obeying) that is relevant for justification. But this would be surprising for someone who otherwise holds that good action is determined by conformity with the common good, as determined by natural law. Don Rutherford has helpfully suggested to me that the subjectivism in this passage is likely of an *ad hominem* nature. Given that he is offering an internal critique of the Hobbesian position, he is simply taking on Hobbes's subjectivism. Thus there is reason to read Leibniz's considered view as one in which the contract in which authority is conferred on the sovereign to the degree that it has certain objective features (security, conduciveness to the common good), and provisional in the sense that it is revocable when it lacks those features.

lacking the necessary conditions for putting a right into practice need not compromise the existence of that right: "although there are cases, where one cannot exercise his rights for lack of a judge and of enforcement, the right does not cease to exist" (ibid.).

What is important in this dispute for our purposes is Leibniz's claim that our transfer of powers and rights to the state is provisional, and that the provisionality stems from the fact that we retain the right to revoke the transfer when the conditions of the contract are not upheld. When the sovereign power ceases to provide protection, citizens have a right to resist, canceled neither by the fact that there is no judge or enforcement mechanism for the right, nor by the fact that the powers that be may compel obedience.[89] The first set of considerations only implies (1) that the right is not coercible, and (2) that there is no person competent to decide who in the conflict is right; the second implies only that it might not be prudent to exercise it.

The second figure who explicitly employs the language of provisionality in his political writings is Rousseau.[90] Rousseau uses the language of provisionality (a) to describe the move from *association* (the act which gives rise to the general will) to government (the act by which the general will selects a form of government and

[89] On this point, compare a famous passage in Locke: "If a controversy arise betwixt a prince and some of the people in a matter where the law is silent or doubtful, and the thing be of great consequence, I should think the proper umpire in such a case should be the body of the people; for in cases where the prince has a trust reposed in him and is dispensed from the common ordinary rules of the law, there, if any men find themselves aggrieved and think the prince acts contrary to or beyond that trust, who so proper to judge as the body of the people (who, at first, lodged that trust in him) how far they meant it should extend? But if the prince, or whoever they be in the administration, decline that way of determination, the appeal then lies nowhere but to heaven; force between either persons who have no known superior on earth, or which permits no appeal to a judge on earth, being properly a state of war wherein the appeal lies only to heaven; and in that state the injured party must judge for himself when he will think fit to make use of that appeal and put himself upon it" (STG § 242).

[90] It is true, however, that Kant and Rousseau share an important example of a provisional right: the right on the part of a state to carry on with a hereditary nobility, despite its being strictly unjust.

magistrates), and (b) to capture the sense in which magistrates are the officers, not the masters, of the people (SC III.xviii.2-4).

Regarding (a), Rousseau notes that the only way to describe the transition from association to government is by appealing to the idea that, in associating, a democratic government is *de facto* instituted, which then either becomes the more permanent form, or is replaced with something else (a monarchy or aristocracy, say): "It is the distinctive advantage of Democratic Government that it can be established in fact by a simple act of the general will. After which this provisional government either remains in office if such is the form that is adopted, or it establishes in the name of the Sovereign the government prescribed by law" (SC III.xvii.7). So understood, provisional government is the means by which a people assigns itself the form of governance it wishes to assign itself. Immediately after associating and forming a general will, rule by majority takes over as a provisional matter, and either remains in force, or does not. Whether it does or not, provisional government in this sense begins and ends with the selection of the more permanent form of government. Here, provisional simply means temporary.

Regarding (b), Rousseau maintains that at every point, the magistrates are officers of the people, and that their authority, as well as the forms that organize it, are revocable (SC III.xviii.9). The authority vested in them is to that degree merely provisional.

> Thus when it happens that the People institutes a hereditary Government, either monarchical in one family, or aristocratic in one order of Citizens, this is not an engagement it enters into; it is a provisional form it gives to the administration, until it pleases to order it differently.

> It is true that such changes are always dangerous, and that one should never touch an established Government unless it becomes incompatible with the public good; but this circumspection is a maxim of politics and not a rule of right, and the State is no more bound to leave the civil authority to its [current] chiefs, than it is to leave the military authority to its [current] generals. (SC III.xviii.2-3)

Rousseau maintains that the form of government is always revocable, and that this is to be judged by the people itself, insofar as their decisions are vested with supreme authority and form the general will. Like Leibniz, then, Rousseau takes provisionality to denote revocability, and like Leibniz he notes that the considerations in favor of thinking that these acts are not in fact revocable are grounded in considerations of prudence ("maxims of politics"), not in considerations ("rules") of right. As far as right is concerned, the transfer of authority that persons make in order to avoid "the obstacles that are harmful to their maintenance in the state of nature," is always revocable, because it was originally grounded in their self-interest (SC I.vi.1). But if Kant uses the same language of these figures in describing circumstances of provisional right, he puts them to different uses. I turn to explaining the differences in the next section.

III. Kant, Provisional Right and Revocability

So far, I've argued that the language of provisionality was used primarily by Kant's predecessors to pick out transfers of authority that are always revocable. In advancing PT, does Kant mean that external rights are always in principle revocable? On this question, there are opposing views in the existing literature. In this section, I argue that the truth of the matter lies between them.

On Elizabeth Ellis's reading of Kant, the provisionality of right implies that governments have *irrevocable* authority so long as they leave open the possibility of progress. On this understanding, Kant inverts the understanding of provisionality advanced by Rousseau and Leibniz. Once we've come far enough from the state of nature to have a stable (non-barbaric) form of government, that government's provisional right implies its authority to obligate citizens unconditionally, and progress toward conclusive right is then to be carried out exclusively through the public sphere. For Ellis, provisional right provides "the standard of justice applicable" during the transition from less to more just institutions (eventually to conclusive right) and allows us to see Kant as a dynamic, rather than a static political theoretician (2005, p. 114). To develop her generic notion of a provisional right, she relies extensively on Kant's essay, *Toward Perpetual Peace*, where he develops, in detail, a notion of a permissive law (*lex permissiva*). A permissive law of reason allows a

> situation of a public law marred by injustice remain for so long as complete transformation of everything either comes by itself or matures through peaceful means because any *juridical* constitution, albeit only in a small degree in accord with right, is better than no constitution at all, which fate (anarchy) would meet with too *rash* of a reform (PP 8:373)[91]

[91] Note that Kant's use of the term "permissive law" seems different here than in the *Metaphysics of Morals,* where Kant raises the question as to whether there ought to be a class of laws governing morally indifferent actions. See MdS 6:223, 6:453. It also differs from the use of permissive law in the *Doctrine of Right,* according to which the postulate of practical reason with regard to rights (the postulate allowing us to acquire external objects as our own) is a *lex permissiva.* Here, the idea isn't that we allow a situation of injustice to persist for the sake of realizing eventual reform, nor is it that we might need laws to tell us when and under what conditions we may do what we please. Instead (and interestingly) the idea is that we have "an authorization that could not be got from mere concepts of Right" (MdS 6:247, 6:266). For this reason, Byrd (2010) argues that it is a mistake to read Kant's claims about property in the *Doctrine of Right* in the way that Ellis and many others) as a simple invocation of the notion in *Perpetual Peace* (see esp. pp. 97-103). Kant's usage of the term in *Perpetual Peace* seems to correspond most closely with his usage of the term in *The Doctrine of Virtue,* where he wonders whether reason can make sexual indulgence not for the purpose of procreation permissible "in order to prevent a still greater violation" of the moral law (MdS 6: 426). Perhaps these various uses can be brought together (PP 8:347-8n is suggestive on this point); I make no attempt to do so here. For more on this issue, see the discussion in the main text below.

Ellis takes a state's provisional right to be a permissive law in this sense when she writes that Kant's notion of provisional right distinguishes between injustices "that must be corrected immediately and those that may rightly allowed to persist for a while even though they are unjust" (p. 70, p. 110).[92] Though the conditions of conclusive right are, in existing states, lacking, Kant's arguments show that a state's having a merely provisional right does not entail that citizens are capable of removing themselves from submission to it, neither when they judge it to be in their advantage, nor when it is in fact in their advantage.[93] Perhaps the greatest point in favor of this interpretation is that it allows Ellis to accept the arguments I made in the last chapter, but also furnishes her with a compelling reply to their primary counterevidence: Kant can claim that all acquired rights are provisional, and also claim that we can identify a rightful condition in the general sense of the term to which we are obligated, without any contradiction (see ch. 2, above; also MdS 6:371-2 and Ellis 2005, p. 116). So understood, what Kant identifies as a "rightful condition in the general sense of the term" is a defective state, which nevertheless must be obeyed absolutely; changes must be sought gradually within the existing rules.

On this analysis, a provisional right is to be analyzed as a permissive law, which allows an injustice to remain until it can be eliminated without violating the existing legal order. But notice that there are two ways in which provisional rights function in Kant's political philosophy. According to the first, consistency with the limits on acquisition and others' freedom of a particular acquisition is still merely

[92] Ellis is not alone; compare Flikschuh 2000, pp. 134-137

[93] Compare here Ypi (2014). For Ypi, provisional rights are held contingent on the holder's willingness to eventually enter a world state.

anticipated. The judgment that something is mine, or that some territory belongs to a state, is something that the postulate of practical reason with regard to right allows me to make for now—but I must then test its consistency against the rights of others, as we attempt to work out a civil condition.[94] Second, inconsistency with the omnilateral will is known—a hereditary nobility is incompatible with freedom under universal laws—and yet injustices are temporarily allowed to persist in spite of that fact.[95] Ellis's account assimilates the first to the second. It isn't that we are uncertain about a given property right's consistency with the omnilateral will: It's that we know they are not compatible with the latter. Nevertheless, "possession ought to be respected if it promotes the possibility of eventual rightful (*rechtlich*) possession under a just civil authority (2005, p. 131).[96] Against this, Sharon Byrd provides convincing evidence that the notion of permissive law in the *Doctrine of Right* is different from the one that Kant offers in *Perpetual Peace,* and that the first kind of case ought not to be assimilated to the second.

Whereas the notion of permissive law in *Perpetual Peace* provides moral politicians an *excuse* to delay reform toward justice when the latter would be imprudent, the permissive law as it operates in the case of the postulate is to provide an "*authorization* that could not be got from mere concepts of Right" (MdS 6:247

[94] Note that this already departs from the way that permissive law was understood by Kant's predecessors: For Christian Wolff, for example, everything that a permissive law permits is licit, rather than illicit or unjust (see *Institutiones juris naturae et getium*, ed. M. Thommann in *Christian Wolff, Gesammelte Werke,* Abt.2.26 (Hildesheim, 1969) (reprint of the 1750 edition), § 47, p. 24; § 49, p. 25, cited in Tierney 2001, p. 393.

[95] Tierney traces the first understanding back to medieval debates concerning the permissibility of acquisition given common ownership of the earth, and the second understanding to Reformation era efforts to understand how tolerating religious pluralism might be consistent with duty (2001, pp. 383-393).

[96] This is because the general standard of provisional right is to "always leave open the possibility of...entering a rightful condition" (p. 112).

(emphasis added), 6:266). It is thus to be understood along the lines of Achenwall's notion of a faculty conferring law. The permissive law that generates provisional rights in the property case (and in the state sovereignty case) confers an authorization for doing something (acquiring property or a civil condition), that cannot be *deduced* from the mere concept of right. For Byrd, the postulate confers a rightful power on us to impose external duties on others unilaterally. She reads Kant's claim that such is possible in line with the omnilateral will as being secured by the postulate itself: since each person's capacity for practical reason provides the same authorization, the will of all renders it permissible to acquire things, period: "the taking and using of such [external] objects of choice is *not wrongful* and thus in no need of justification" (Byrd 2010, p. 100).

So understood, while Ellis's analysis of provisional right as permissive law might get precisely right Kant's treatment of institutions like the hereditary nobility, it fails to capture the meaning of provisional property rights in the state of nature, because acquiring these really is authorized by a permissive law, namely the postulate. (Similarly with state territory.) Moreover, political authorities have their rights provisionally insofar as they secure these provisional property rights. Insofar as they do not offer protection on this front, their authority can be revoked. On this point, I agree with Byrd that the case of property (as well as the case of domestic right) is importantly different from the cases of permissive law covered in *Perpetual Peace*. At the same time, it should be clear from ch. 1 that we disagree that possession in the state of nature is entirely unproblematic from a normative point of view—that it stands in no need of justification. Kant is less sanguine than Achenwall about the normative

situation that results from particular acquisitions out of the commons, even if the practice as a whole is justified.[97]

Kant's arguments regarding the transition from the state of nature to civil society turn on noting that, whereas we restrict another person's freedom rightfully so far as our existence imposes obligations on them to refrain using us as mere means, there is a genuine question about whether we restrict others' freedom rightfully or arbitrarily when we acquire rights to external things in the state of nature. On the one hand, the practice of acquisition is authorized by practical reason; on the other hand, an unregulated version of the practice leaves us authorized to restrict others' freedom in a way inconsistent with universal law. This leaves open the possibility that our particular acquisitions exceed their rightful limits, and until this possibility is ruled out, the imposition of external rights must remain provisional. Kant's point is that for this to be rightful, it would have to be as if these impositions were imposed not by mere *Willkür,* but rather by an omnilateral will.

Kant's claim is that this condition is met only insofar as we enter with others into a rightful condition, where public institutions help us sort things out, where those institutions are truly grounded in making freedom the grounds of any possible use of coercion. To the degree that these institutions do not obtain, we do not know whether our particular acquisitions exceed their rightful limits, and so we do not know if they genuinely obligate others (or if we are genuinely obligated by others' like acquisitions). Thus, where Ellis wants to say that rights to external things are positively wrongful in the state of nature, but are nevertheless irrevocable except through the

[97] Here, compare Tierney 2001, p. 399.

public sphere, and Byrd wants to say that they're fully rightful (wanting only war-preventing assurance), and thus that authorities that do not respect them need not be respected, I want to say that we are uncertain about their status. We know that the natural condition leaves us in a condition where our independence does not satisfy CCR because it leaves us free to arbitrarily restrict others' freedom. What we do not know is whether our attempts at acquiring can be made compossible through public lawgiving. Still, *pace* Rousseau and Leibniz, provisionality in this context doesn't *mean* revocability. It might rather mean something like uncertainty, or "standing still in need of justification." And while Kant never says this in his political writings, this understanding of provisionality finds some support in the one other place he uses the language of provisionality: his lectures on logic. I turn in the next section to showing this.

IV. Provisional Judgment and Provisional Right

While Kant employs the distinction between provisional-peremptory distinction in his legal philosophy, it does not originate there. He employs strikingly similar language earlier, in his lectures on logic. Here, I argue that if we take his remarks on provisionality in that context to be a clue for interpreting his remarks on provisionality in contexts of right, we find additional motivation for accepting the middle course between the two existing views introduced at the end of the previous section.

In the logic lectures, the language of provisionality is employed in characterizing a particular form of judgment. In general, for Kant, judgment is a

faculty, which consists in "**subsuming** under rules" (KrV A132/B171). *Judgments,* by contrast, are acts of this faculty, by means of which "one thinks of two representations as they are combined together and together constitute one cognition (VL 928; compare JL § 17, 101). Practical judgments achieve this unity by means of an 'ought,' whereas theoretical judgments achieve the same by means of an 'is.' The judgment "Man is mortal" brings together the concepts of "man" and "mortality" by subsuming the first to the second. Provisional judgments contrast with definitive or determining judgments, on the one side, and with prejudicial judgments on the other.

Whereas a judgment from prejudice issues from an *inclination* to affirm or reject a proposition prior to reflection (perhaps due to a desire to imitate others), a provisional judgment is a holding-to-be-true grounded in reflection, such that "more grounds are available for the acceptance of one thing than for its rejection and for maintaining the opposite of that thing" (*Blomberg Logic* 161). Similarly, in the *Jäsche Logic,* Kant writes:

> A provisional judgment is one in which I represent that while there are more grounds for the truth of a thing than against it, these grounds do not suffice for a determining or definitive judgment, through which I simply declare the truth. (JL IX:74)

In both places, Kant presents a provisional judgment as one in which (1) there are objective grounds for making it, and (2) to the degree that there are objective grounds telling in favor of its negation, these are outweighed by the grounds in favor of its affirmation. We cannot simply declare the truth through them, but must remain open to the possibility of the opposite. So understood, provisional judgments represent a mode of uncertain, or *skeptical,* holding-to-be-true. Whereas certain holding-to-be-true, or certainty, "is combined with consciousness of necessity," uncertain holding-

to-be-true, or uncertainty is "combined with consciousness of the contingency or the possibility of the opposite" (JL X:66).[98, 99]

This suggests the following analysis. Perhaps what it is to say that such and such conditions allow only provisional, but not conclusive right to external things, is to say that all of our judgments of right are bound to be merely provisional judgments of right, that is, uncertain judgments in which we affirm, e.g., that x has a right to y, because there are more grounds in favor of such than there are against, but according to which we do not hold the judgment to be associated with necessity. Does this analysis fit?

Kant's simplest statement of what conclusive right requires is that any obligations imposed on others be consistent with having been imposed by an omnilateral will, rather than unilaterally. For Kant, again, the omnilateral will is an idea of reason—it is nowhere to be found in experience. Kant goes on to suggest that we can approximate this idea (and hence approximate conclusive right) only if certain kinds of institutions are realized. Now, such institutions might play various roles. One possibility is that they themselves determine what is consistent with the omnilateral will, and by giving law, then obligate persons accordingly. But there's another role they might play. They might instead serve, not a determining role, but an epistemic one, insofar as they are the means through which we discover whether our claims to things possess necessity by being, in fact, compatible with the omnilateral will. If this

[98] It is worth noting that the contrast class with provisional judgment is not *peremptorische Urteil*, but *definitive* or *bistimmende Urteil.*

[99] Kant's treatment of these issues recalls Descartes' distinction (in *Principles of Philosophy* between absolute certainty (which accompanies a judgment that *p* such that "it is wholly impossible" that *not p,* and moral certainty, which accompanies a judgment that *p*, sufficient for practical purposes, but which always admits the possibility that *not p* (1647, §§ 205-206).

were the picture, then it would make sense to say that a provisional right is a provisional judgment of right. It is a judgment that we have a right to a thing or office, but without consciousness of its necessity. Why would rights be provisional in this sense? Because although such the acquisition of such rights must be possible, they are held in conditions where our freedom has not yet been rendered capable of coexistence under universal law. Under those conditions, we have some reasons in support of our judgment that we have a right to some land, say (namely that we arrived first, and that we left a sign to acquire it, and that there was no similar sign by anyone else, etc.), but another might make a similar judgment, or might make a claim that my possession leaves his freedom not limited but annulled. Because our acquisition of the right has its rational title in its consistency with the omnilateral will, and because this consistency has not yet been demonstrated, we must necessarily lack consciousness of the right's necessity—necessity that would be conferred precisely if it were issued by a priori omnilateral legislation.

One might notice that if this is the right picture, then the middle position between the standard view (according to which external rights are wrongful in the state of nature) and the minority view (according to which external rights are fully determinate in the state of nature) begins to look attractive. As we have seen, there is significant disagreement in the secondary literature about whether or to what degree it is possible to have rights to external things in the state of nature. For many Kant scholars, provisional rights merely mark a defective normative situation that is corrected in a civil condition, which then fully determines who has rights to what. Such rights do not meaningfully constrain the distribution of rights to things in the

civil condition. Kant is no Lockean. In support of this reading are the kinds of claims Kant makes about the wrongfulness of inquiring into the origins of a civil condition with any sort of practical aim, and about the claim that after a revolution, one must simply accept the new existing order. For others, rights are fully determinate in the state of nature, and institutions merely provide some role in securing them (Byrd 2010, Bader UPMS). In support of this reading are Kant's claims that authorities in the civil condition do not "settle and determine" the distribution of rights, but only secure those rights, and that right in a civil condition presupposes that persons already have right to things (MdS 6:256).

But between these views, I've suggested, there is space to argue that, in addition to providing security, Kant held that political interaction was crucial to giving individuals grounds to obtain consciousness that their claims to external things are indeed aligned with the omnilateral will, and to take steps toward showing that our external obligations are no less arbitrary than our internal obligations. Political interaction achieves this, namely, by promulgating rules concerning the signs that one needs to give to possess a corporeal object, to conclude a contract, and to enter a particular civil status with another person. It also provides people with sustained modes of interaction, under which they can make claims on one another in courts. Finally, it ensures that people don't incur non-reciprocal obligations by enforcing the obligation to respect external rights equally. As these institutions reach farther across the globe, we attain a greater consciousness of the degree to which our claims are (in)consistent with a united will of all.[100] But this consciousness is always imperfect—

[100] On this point, I agree with Szymkowiak 2009, p. 587.

and requires that we "acknowledge the possibility of the opposite" until the conditions laid out in ch. 2 obtain.

Conclusive rights obtain under the condition that their lawgiving proceeds from an omnilateral, rather than a unilateral or multilateral will, a will which is "united not contingently but a priori and therefore necessarily" (MdS 6:293). If finality or conclusiveness in the political domain is characterized by a consciousness of the necessity of the obligations imposed in that domain, rather than their contingent arbitrariness, then it would be no surprise that Kant emphasizes the a priori necessity of the sole condition of conclusive right (consistency with the omnilateral will). By contrast, it is clear that a large part of the problem with rights to external things in the state of nature is that such impose obligations on others in by an arbitrary and contingent (*willkürlich*) power of choice that lacks the features that confer lawgiving authority, including necessity. After all, actual acquisitions must be carried out in time.

Because authoritative law is marked by necessity and universality, and *willkürliche* law is instead characterized by contingency and particularity, the latter lacks full authority (so long as those conditions continue to characterize it). On the other hand, because freedom demands that we have the capacity to exclude others from external things (and the postulate confers upon us this power), it must be possible for externally imposed obligations to inherit the qualities of authoritative law despite their contingent orientation in time by some particular agent (compare Byrd 2010, p. 103). As Szymkowiak puts the point, "[p]rinciples for possession must square with the possibility of universal recognition, which simply means that we must

respect some temporal beginning" (2009, p. 591). Put differently: Given that acquisition must take place under empirical conditions, and given that conceptually, acquiring imposes obligations on others, they must admit some contingency. On this picture, rather than having a judgment that acquiring external objects is wrongful, we have a judgment that acquiring them is provisionally rightful. If so, we have a preliminary analysis of what it is for a right to be provisional: it is for it to be imposed in such a way that we lack the consciousness of its lawlike necessity and universality because of its adventitious beginning. Instead, so far as we are conscious of the external rights of others as obligatory, they have a particular, contingent, and arbitrary character. Such rights approach peremptory status insofar as consciousness of their necessity is revealed in the movement from the state of nature, to the domestic civil condition, and finally to the realization of cosmopolitan right, as the outer necessitation that there gradually satisfies the norm expressed by our one innate right.

There is a further commonality between Kant's treatment of provisional judgment and his treatment of provisional right. Provisional judgments are necessary, Kant tells us, for conducting any inquiry. They serve as initial points of departure for orienting ourselves in thinking, but require the idea of a "certain postponement" before we can comfortably endorse them (BL X: 160). Until we are conscious of their necessity, we must continue inquiring as to the legitimacy of the initial judgment, acknowledging all along that it may require revision. Similarly with a provisional right: we judge that we have a right to exclude others from an object, say, but are as yet unsure as to whether or not this exclusion is compatible with the will of all. Being open to entering a civil condition where this can be ascertained is part of what it is to

recognize the lack of necessity that comes with the current holding. But taking ourselves to be justified in particular holdings is the starting point for working out problems of justice.

Of course, one might here object that arguing in this way leaves Kant's notion of provisional right divided. For in some contexts (e.g., when referring to the provisional right of the hereditary nobility to maintain its offices), the notion of provisional right would be identical with the notion of permissive law in *Perpetual Peace:* it would pick out an injustice that is tolerated until it can be fixed. But in others (e.g., when referring to the sense in which exclusive external rights are provisional), provisionality would pick out a judgment that some action is right, that merely awaits demonstration. Whereas the latter would involve a provisional judgment of right (maintained given uncertain consistency with the omnilateral will), the former would involve a conclusive judgment of wrong, given inconsistency with the UPR and the idea of the original contract, but some sort of permission to continue ruling in spite of the latter.

I want to make two points in reply. The first is that we shouldn't insist on unity when there really are different phenomena at stake—to do so is to allow our aesthetic preferences authority in the wrong domain. Moreover, it really does seem that there's a difference between an acquisition that is perhaps fully above board in terms of its extension, but requires only further conditions be met for others' accepting its authority, and a mode of governance that is intrinsically incompatible with freedom. The second is that we might expect unity to result from developing the normative implications of provisional right as I've developed it here. If, for example,

states' permission to allow unjust legislation to persist were somehow *explained by* the normative situation that results from our authorization to acquire rights to external things (as, indeed, I argue is the case in the next chapter), then the account would be unified, just not in the way we might have initially expected.

I've argued that Kant's logic lectures contain a clue for understanding what it means to say that the conditions of conclusive right don't hold. To say that a right is provisional is to say that, insofar as we judge that we have a right, we make our judgment without the consciousness of its necessity. This allowed us to carve out a moderate position between those who claim that external rights are fully determinate in the state of nature, and those who argue instead that they don't properly exist at all. This account has the advantage of connecting the account of the problems in the state of nature in the first chapter with the issue of provisionality in the second. For the very same arbitrariness and contingency of an obligation imposed by acquiring a right to a thing by another's mere *Willkür* that violates CCR also implies straightaway said rights and obligations cannot be conclusive. Because exercising external freedom to create such obligations must nevertheless be possible (due to the postulate of practical reason), Kant says that these obligations are provisional, which is to say that we lack consciousness of their practical necessity (although we have grounds for holding them, namely in the postulate and our priority in time), rather than that they don't exist at all.

V. Conclusion

This chapter has explained the meaning and presuppositions of Kant's distinction between provisional and conclusive right. I located the language of provisionality in Rousseau's and Leibniz's political writing, and noted that the notion seemed to stand merely for a revocable act conferring authority. I then presented evidence that this was unlikely to fully capture the nuance of Kant's deployment of the same language. Specifically, I argued that to say that all external rights are provisional is to say that all judgments of external right are made in the absence of consciousness of their necessity. We also noticed that there was a second class of judgments that this analysis did not quite seem to fit. For Kant employs the term provisional right also to refer to a situation in which the status quo is unjust but allowed to persist temporarily until it can be changed without compromising progress toward right (just as his predecessors used the notion of permissive law to do the same work). I have suggested that these notions can be unified, but to do so requires that we begin to characterize the sort of normative situation that obtains when we make judgments of right in the absence of consciousness of their necessity.

Though we have, therefore, come some way toward better understanding Kant's position, there is still substantial work to be done in coming to grips with PT. In particular, we still are yet to have a clear sense of its *normative implications.* It is the task of the next chapter to specify the normative structure of PT. There, I will argue (following Ralf Bader) that to the degree that we make a provisional, rather than conclusive, judgment that we have a right to this or that external thing, we impose only formal obligations on others. Formal obligations are obligations to enter with others into a rightful condition, and carry with them a permission to force others to

enter into such a condition. By contrast, the coercive rights that follow from material obligations are rights to necessitate others to leave what is yours alone, and to coerce them accordingly. It is the goal of the next chapter to specify just what PT, so understood, implies for our political lives.

Chapter 4

Provisional Normativity

> Prior to entering...a [rightful] condition, a subject who is ready for it resists with right those who are not willing to submit to it and who want to interfere with his present possession; for the will of all others except for himself, which proposes to put him under obligation to give up a certain possession, is merely *unilateral,* and hence has as little lawful force in denying him the possession as he has in asserting it (since this can be found only in a general will), whereas he at least has the advantage of being compatible with the introduction and establishment of a civil condition.
>
> —Immanuel Kant, MdS 6:257

I. Introduction

I argued in Chapter 2 that Kant offers compelling reasons for accepting PT—for thinking that all rights and obligations are provisional, and in Chapter 3 that the provisional-conclusive distinction finds a systematic place in Kant's theory that sets his usage of the term apart from his predecessors' usage. For Kant, to say that a right is provisional is to say that the judgment which asserts the right is a provisional judgment—a judgment made absent consciousness of its necessity. Such necessity would be encountered only insofar as such rights could both proceed and be seen as proceeding from an omnilateral will, a will which, owing to its a priori unity, is the only will which is lawgiving. The condition under which such conformity obtains and is known to obtain is the rightful condition, which is, for Kant, a mere idea around which various appearances in the empirical world can be regulated. Although Kant

considered conflicting lines of argument regarding PT (sometimes seeming to accept it as an implication of his view, and other times seeming to reject it), his account is most consistent and attractive when he accepts it. Or so I want to argue. But this conclusion depends on the assumption that good sense can be made of our normative situation in circumstances of provisional right. This chapter takes up arguing this point. We are asking the question: what are the normative implications of affirming that we can make only provisional judgments of right?

At the end of the last chapter, I suggested that we follow Bader in construing the normative difference between provisional and conclusive right in terms of Kant's distinction between formal and material obligations. To the degree that we make provisional judgments of right, our rights correlate with merely formal obligations (which have an anticipatory character); by contrast, were our judgments conclusive, they would correlate in addition with material obligations of right. This is a promising line, because it marks the normative difference between provisional and conclusive rights in terms of a difference in the correlative obligation that the rights generate, and Kant asserts that to "every right there is a corresponding obligation of another not to hinder that right in practice" (Ref. 3350).[101] Thus, in trying to mark out a difference between the normative situation under conditions of conclusive and provisional right respectively, it makes sense to look for the difference in a difference in the type of obligations correlated with such rights. More importantly, however, Kant's treatment of formal wrongs and formal obligations closely matches his limited

[101] On this point, Kant's account anticipates the Hohfeldian orthodoxy according to which the strict sense of right is that of a claim that correlates with another's obligation (1913, p. 31). This seems to follow from Kant's general account of a right as a moral capacity to put others under obligation (MdS 6:237).

discussion of provisional rights and the duties surrounding them.

In this chapter, I'd like to argue for the abstract claim that provisional rights impose merely formal obligations, whereas conclusive rights would impose material obligations, and to show what follows. In § II, I adjudicate a debate concerning the normativity of provisional rights in the state of nature, arguing in the end that it is bound up with avoiding doing *formal* wrongdoing (whereas conclusive rights in a civil condition are normative insofar as they demand refraining from both formal and material wrongdoing). This section argues that formal obligations demand specifically that one adopt the maxim to enter a rightful condition with others, where one's rights can be secured. By contrast material obligations constrain one's *actions,* and require specifically that others refrain from interfering with an object that has an intelligible connection to some person. In § III, I consider the objection that such an account sits uneasily in a framework that accepts PT, and respond by providing an account of how to discharge one's formal duties in advance of a condition of conclusive right. § IV articulates the implications of the account as regards the transition to a civil condition, and § V treats the same question concerning conditions of despotism (that is, conditions (like ours) in which there is a defective state). § VI concludes.

II. Provisional Rights and Formal Obligations

There is a small, but growing literature concerning the normativity of provisional rights. Understandably (given the standard view canvassed in Chapter 2), much of this literature involves the constraints that such rights place on authorities in the civil condition (the topic of § III). Less has been written concerning the normative

implications of provisional rights in abstraction from the civil condition. Still, there are three existing interpretations. On the first, provisional right demands respecting an unjust order insofar as doing so maintains the possibility of, or promotes the advent of, a rightful condition. On the second, provisional rights generate non-coercible titles to coerce. Finally, on the third (favored) interpretation, provisional rights are correlated with formal obligations. I consider each in turn.

For Elisabeth Ellis, provisional right demands that we always act so as to maintain the possibility of entering a situation of conclusive right, but that we ought not always try to bring this about immediately. The notion of provisional right, on this account, allows us to tease apart two classes of injustices: "those that must be corrected immediately and those that may rightly allowed to persist for a while even though they are unjust" (p. 70).[102] Thus, the paradigm cases of provisional right for Ellis are things like nationhood (there really ought to be a world state), hereditary nobilities (there ought not to be any), and unjust property schemes (they ought to be egalitarian): These are things that are unjust and ought to be replaced, but only when we can do so without contravening the rule of law.

Sometimes, Ellis formulates our duty under provisional circumstances of right by averting to the language of maintaining the possibility of entering a rightful

[102] The strongest textual evidence for this idea comes from *Toward Perpetual Peace*. There, Kant writes that there are "permissive laws of reason that allow a situation of public right afflicted with injustice to continue until everything has either of itself become ripe for a complete overthrow or has been made almost ripe by peaceful means; for some *rightful* constitution or other, even if it is only to a small degree in conformity with right, is better than none at all, which latter fate (anarchy) a *premature* reform would meet with. Thus political wisdom, in the condition in which things are at present, will make reforms in keeping with the ideal of public right its duty; but it will use revolutions, where nature of itself has brought them about, not to gloss over an even greater oppression, but as a call of nature to bring about by fundamental reforms a lawful constitution based on principles of freedom, the only kind that endures" (PP 8:374n).

condition:

> PPR$_1$: Always so act that you maintain the possibility of entering a rightful condition.[103]

But, so formulated, PPR$_1$ looks impossible to violate (given a sufficiently long time-horizon). Even wars of extermination strictly speaking maintain the bare possibility of entering a rightful condition later (so long as someone survives), and it is implausible that such wars are consistent with our duties of right, even if they are taken to be provisional. To provide a concrete sense of what it is to violate PPR$_1$, Ellis appeals to Kant's principle of publicity in *Toward Perpetual Peace*. There are some acts, e.g., assassination, that make it the case that the victim(s) have strong reason to carry on hostilities, rather than ceasing them. In general:

> [A] maxim that I cannot *divulge* without thereby defeating my own purpose, one that absolutely must *be kept secret* if it is to succeed and that I cannot *publicly acknowledge* without unavoidably arousing everyone's opposition to my project, can derive this necessary and universal, and hence a priori foreseeable, resistance of everyone to me only from the injustice with which it threatens everyone. (PP 8:381)

There are, however, two problems with this line.

First, it won't help us in interpreting the *Doctrine of Right,* given that Kant abandons the principle of publicity (as formulated in *Perpetual Peace*) by the time he writes that book (Byrd and Hruschka 2010, p. 14). Second, and more importantly, inconsistency with the principle doesn't obviously track impermissibility. To see this, notice that Kant provides two formulations of the principle, one in terms of its being impossible to announce my maxim without my purpose being defeated, and the

[103] Ellis 2005, p. 112, 114.

second in terms of my announcement's rousing "everyone's opposition" to my project. The first formulation is subject to a famous class of counterexamples (including surprise parties),[104] whereas the second either actually requires *everyone's opposition* or it doesn't. If it does, then it probably doesn't rule much out: there are few cases where *everyone* opposes some course of action when made public. Certainly, most acts of revolution are permissible on this interpretation, since they are seldom taken by one individual, and require at least a sizable minority to move forward. If it doesn't, then there is a question about where to set the boundary, and why actual opposition should matter (especially in unjust circumstances, where what is opposed might precisely be actions that promote perpetual peace. For these reasons, I think we should reject any account of provisional normativity in terms of PPR_1.[105]

Fortunately, Ellis sometimes formulates the principle differently. Consider:

PPR_2: Always so act that you promote the advent of the just republic.[106]

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[104] What's more: Even if we disregard these counterexamples, it doesn't seem that Kant's own application of the principle works. Consider that he thinks that it rules out revolution. It's easy to imagine situations where revolution is compatible with announcing one's purposes. Indeed, one famous model of revolution in the political science literature *relies* on the purposes of some being made public (Kuran 1991). Of course it's true that this risks alerting the authorities, who will seek to put the revolution down. But it's hard to see how that matters. For the revolutionary efforts might still succeed.

[105] It doesn't help to distinguish various senses of possibility. PPR_1 has least bite, of course, under the logical interpretation of possibility, with increasing bite as we move from there to metaphysical possibility, and from metaphysical possibility to physical possibility. Thus, it is most charitable to read "possibility" in PPR_1 under its physical interpretation. Still, however, since we are in the realm of human action, virtually anything we do will be consistent with maintaining the future possibility of entering a rightful condition. Future free people (including future time slices of us) could simply reorient their actions toward a better course later on. (If it turns out that a rightful condition is *never* possible for creatures like us, approximating it is, and then the relevant possibility to maintain is the possibility of best approximating the rightful condition. But then the same considerations apply: even if we restrict our attention to empirical possibility, a sufficiently long time horizon renders PPR_1 normatively inert.

[106] Ellis 2005, p. 144.

The language of promoting the advent of the just state fares better than the language of maintaining the possibility of realizing it. Plausibly one promotes the advent of the just state insofar as one increases the probability that it eventuates. Thus, suppose there is some probability p of realizing a rightful condition, given some course of action *a,* while under some other course of action a^*, the probability rises to p^*, with $p^* > p$, and both p and $p^* > 0$. Since both a and a^* both maintain a positive probability of realizing the rightful condition, PPR_1 sanctions taking either action. By contrast, a fails to satisfy PPR_2, given that a^* is available. Unfortunately, though it seems to have a bit more bite than our first principle, PPR_2 is not without its own problems. Consider two.

First, Ellis takes Kant at his word when he says that resistance to a legal order is never permitted. Such resistance always violates PPR_2. But it is not plausible to think that, given any conceivable minimally acceptable regime, there is no act of resistance to that order that realizes the rightful condition with higher probability than compliance with it. In response, Ellis appeals to Kant's extreme strictures on making empirical predictions, arguing that "our reason can never tell us anything about the pragmatic path toward a better world" (2005, p. 141). Suppose not. But then, our reason can never tell us that obeying the status quo regime and seeking reform

represents such a path either.[107, 108] Ellis's Kant, then, is on the horns of a dilemma. Either our epistemic situation implies an inability to judge the effects of revolutionary activity, in which case it also implies an inability to see that gradual reform is the way forward, or it succeeds in demonstrating that obeying the existing legal order is often the way forward, but is incapable of telling us that we can never resist unjust legal orders.

The second problem is that PPR_2 makes Kant's politics consequentialist in a way that seems to sit uneasily with his broader theory. If to have a provisional right is to be part of a legal order that raises the probability of approximating the rightful condition when compared to the feasible alternatives, then it is conceptually possible (even if unlikely) that a regime satisfies this condition, but violates every single one of Kant's constraints on right action. For example, it might be that a slave system turns

[107] The tension I'm pointing out in Ellis's account may simply be a tension in Kant's own position. Note, for example, that he writes: "The attempt to realize this idea [of the best constitution] should not be made by way of revolution, by a leap, that is, by violent overthrow of an already existing defective constitution (for there would then be an intervening moment in which any rightful condition would be annihilated). But if it is attempted and carried out by gradual reform in accordance with firm principles, it can lead to continual approximation to the highest political good, perpetual peace" (MdS 6:355). It is worth noting that the difficulty arises precisely in a passage where Kant appears to *deny* PT.

[108] It does not help to note that, for Kant, we are supposed to have a perfectly clear idea of what our duty is, and it is supposed to be merely uncertain how to realize our happiness (Ellis 2005, p. 141). For our duty is to enter a rightful condition. Thus it seems that, if we are to follow our duty without regard for the empirical consequences, we should disregard the existing order if doing so is the way forward. For example, if there is a hereditary nobility, and this is repugnant to principles of right (as Kant says it is), then we ought to remove the hereditary nobility, regardless of the effects this might have on its supporters (keeping in mind that our actions must always be consistent with "inner morality"). What could be the Kantian case for doing otherwise? I suspect it would have to involve a claim that there is an a priori principle to obey the authority above you, and that this constrains even the pursuit of perpetual peace. Indeed, sometimes Ellis puts the point this way: Pursue the ideal of the republic maximally, without violating the existing order. But, given that the former is the highest end in Kant's political philosophy, this is structurally somewhat odd, and seems to get the priority the wrong way around. Perpetual peace should not be subordinated to authority-obeying; the latter should be subordinated to the former (Forst 2014).

out empirically to best promote the eventual realization of the Kantian republic.[109] Still, it seems strange to think that a Kantian can countenance the permissibility (let alone obligatoriness) of slave systems. The point isn't that these empirical scenarios are likely. The point is that, on Ellis's account, the conceptual space is open, and Kant's broader philosophical framework seems rather to slam the door shut.

Of course, Kant *does* say that nations ought always to maintain the possibility of "leaving the state of nature among states...and entering a rightful condition" (MdS 6:347). Ellis is not making this up. Still, Kant does not offer this remark as a definition of provisional right, nor does he hang much, argumentatively speaking, on its interpretation. Instead, this is the closest he can come to make sense of the perplexing idea of a "right in war". Ellis is *right* that provisional normativity is normativity under the obligation to enter a rightful condition. But we need a way of capturing this idea without consequentializing Kant's account or running into the kinds of epistemic problems introduced above. I shall argue that the third account, properly fleshed out, does just this. But first, consider the second interpretation, advanced by Ripstein.

According to Ripstein, until there is a rightful condition, rights are provisional, which is to say, not coercible (2009, p. 90, p. 350). Although we have rights to use objects that are in our immediate physical possession (predicated upon our innate right), we cannot coerce others in accordance with provisional rights that go beyond rights of use (ibid., p. 165). So far as our external rights strive to obligate others even when we *don't* possess them, they are non-coercible in the state of nature:

[109] Though Rawls himself was willing to suspend the lexical priority of liberty in situations where the circumstances of justice were especially dire, it is unlikely that Kant would have followed him on that point. See Rawls 1971, pp. 217-218.

Use of force to secure them is wrongful. But recall that, for Kant, that provisional possession holds "*comparatively* as rightful possession," justifies me in preventing you, "from usurping the use of" what I judge to be mine, in so far as you are not willing to enter with me into a civil condition (MdS 6:257). These claims to justified resistance (i.e., coercion) do not seem to be captured by saying, as Ripstein says darkly, that provisional rights are "titles to coerce that no one is entitled to enforce coercively" (2009, p. 165). Rather, we enforce provisional rights coercively, but what we can coerce others to do on the basis of these claims is to enter into a rightful condition. When this fails, we resist others with right.

Like Ellis's, Ripstein's account of provisional normativity gets something substantially right: provisional rights do not generate coercible obligations *of the same kind* as do conclusive rights. But they generate coercible obligations nevertheless. Specifically, provisional rights generate coercible (formal) obligations to enter into a rightful condition with another and to coerce those who refuse to refrain from interfering with what you take to be yours, whereas conclusive rights generate coercible (material) obligations to refrain from using what's concretely yours. As far as I'm aware, Ripstein might simply accept this point—nothing in his broader theory requires rejecting it. Still, clarity demands making this explicit. We should say that the authorization to coerce has different content in the case of provisional than in the case of conclusive right, not that provisional rights are not coercible. Moreover, the third account is capable of capturing this difference, for, as we will see, the right to coerce in line with a formal obligation is to coerce to leave or to enter a rightful condition, but the right to coerce in line with a material obligation is a right to

forbearance from interference with one's possession and compensation in the case of violation, etc., *within* a rightful condition. I want to turn now to showing this.

A proponent of the third account, Ralf Bader argues that, prior to the civil condition, our rights are not materially valid, and impose only formal constraints. For Bader, insofar as we lack assurance that others will respect our rights, rights in the state of nature lack material validity (since rights are subject to an assurance condition). "It is in this sense," Bader writes, "that rights are provisional in the state of nature, namely that they lack validity and do not impose [material] constraints" (UPMS, p. 2).[110] The lack of material constraint implies that each is justified in aggressing and resisting, and neither does the other wrong in so acting. Importantly, in advance of a civil condition, it is not that anything goes. There are, rather, restrictions "on what means one can permissibly employ," but these restrictions "are not explained in terms of certain actions being materially wrong, given that there is no right materialiter in war, but in terms of them being formally wrong" (ibid.).[111] Bader's account thus suggests that, to the degree that we find ourselves in circumstances of provisional right, we do wrong only formally, not materially. But since to do wrong is to commit a deed which is "contrary to" duty (MdS 6:224), then Kant must distinguish also between formal and material duties, and it must be that in circumstances of provisional right, our duties of right reduce to formal duties of right.

[110] In my version of his paper, Bader alternates freely between formulations according to which provisional rights do not impose constraints (full stop), and saying that they do not impose *material* constraints. I take the latter to represent his considered view. Similarly, in a forthcoming article, Christine Korsgaard writes that provisional rights are rights that we are permitted to defend, but that "no one has a duty to respect" (forthcoming).

[111] This is an unfortunate way of formulating the point, although it finds support in Kant's essay on *Perpetual Peace,* and also in various *Reflexionen.* It is unfortunate because it is not clear that any actions really violate the constraint, given a sufficiently long time-horizon.

What, then, is a formal duty of right?[112]

Kant suggests that a formal wrong occurs to the degree that one does not wrong any particular person with respect to something they own, but rather does wrong in the highest degree (SRL 8:429, compare Weinrib 2008, *passim*).[113] Thus, for example, in refusing to leave the state of nature and enter a rightful condition, "men do *one another* no wrong at all when they feud among themselves...But in general they do wrong in the highest degree by wanting to be and to remain in a condition that is not rightful" (MdS 6:307-308). In the footnote to this passage, Kant remarks that this "distinction between what is merely formally wrong and what is also materially wrong has many applications in the doctrine of Right" (ibid., note). This gives the appearance that this is the paradigm case of a formal wrong: we do wrong, but we do not wrong any particular other, and this wrong gives rise to a right on the part of others to coerce us to enter a rightful condition. Similarly, Kant says that nations that remain in the state of war rather than joining a league of nations do formal wrong—commit wrong in the highest degree—insofar as they fail to enter a rightful condition. This suggests that violating a formal obligation involves doing wrong in the highest degree, but not to any particular person, whereas doing particular others

[112] The *Vigilantius* notes seem to support the reading of the difference between formal and material duties that follows below. See 27:544.

[113] In his draft for the doctrine of right, Kant writes: "Considered *formaliter* {formally} is the relation of one person to an action in accordance with which the person through this relation is authorized to compel someone else in accordance with laws of freedom (*facultatem habet* {authorized}). If the person is authorized only to compel herself then it is the right of humanity regarding one's own human person, i.e. inner right; if the person is authorized to compel others then the person's right is an outer right the former belongs to ethics the latter to jus. Regarded *materialiter* a right (which constitutes part of what one has) is the relation of one person to an object of that person's power of choice outside her according to which that person can exercise coercion against others in accordance with laws of freedom in order to possess the object" (23:276-23:277).

wrong violates a material obligation toward them.[114]

In violating a formal obligation, persons "take away any validity from the concept of Right itself and hand everything over to savage violence, as if by law, and so subvert the Right of men as such," though they do not wrong anyone in particular (ibid.).[115] Jacob Weinrib (2008) argues that formal wrongs issue from failures to discharge the postulate of public right, which imposes a duty to leave the state of nature or cease interaction with others. The suggestion is plausible, insofar as other formal political wrongs explicitly treated by Kant (e.g., violating the constraints (no assassinations, etc.) on just warfare and undertaking a revolution) have explicitly to do with acting in a way that is inconsistent with one's duty to enter a rightful condition.[116] Thus, I suggest that we follow Weinrib in characterizing formal duties this way.

In what sense do *provisional rights* generate *formal obligations*? Recall Kant's somewhat puzzling claim that without provisional rights to external things, there would be no obligation whatsoever to leave the state of nature. The idea seems to be as follows. Innate rights are conclusive even in the state of nature, because they follow

[114] "The necessity of an action on account of the rule of right is called formal obligation, on account of the right of another, however, material obligation. The rule, which depends necessarily upon this common will in general, is found by seeking the condition of the will which is necessary, so that it will be universally valid." (Ref. 6667, 19:128).

[115] Bader argues that because all duties are either duties to self or duties to others, any tendency on Kant's part to talk of undifferentiated "free floating" wrongs must be resisted. But since Kant is clear that formal wrongs do *not* wrong particular others, they must constitute a wrong to oneself—there is no third class of obligations that our actions can flout. By contrast, Jacob Weinrib argues that the wrong is precisely to humanity in general, here understood as a totality (2008, pp. 150-151). I take it that the text does not necessitate either reading. Though it is true that Kant typically divides duties into duties to self and duties to others, he also very frequently talks about subverting the right of humanity as such, and sometimes seems to treat human inviolability in terms of its instantiating the property of humanity. The strongest evidence for Weinrib's position is in the *Feyerabend* lecture notes, at 27:1352.

[116] It is of course possible that there are other formal duties in the context of right, but if there are, Kant is silent about them.

merely from our capacity for practical reasoning alone—they are self-legislated in the right kind of way, and transparently so (Chapter 1).[117] By contrast, external rights require an act of choice to establish them, an act that proceeds from a power of choice arbitrarily situated between reason and desire. Though the postulate of practical reason implies an authorization to acquire objects through such an act, any particular act of acquisition's validity awaits its demonstration of consistency with the omnilateral will. It demands such consistency because then even obligations imposed unilaterally by others approach genuine necessitation (which in the standard case is possible only through one's own *Wille,* rather than through someone else's *Willkür*). As Kant puts it in the *Reflexionen,* one "has a [material] right with respect to another if one's private will *can be seen as* identical with the common will" (Ref. 6667, emphasis added). But we obtain such consciousness only through interaction with others and an effort to join with them into a rightful condition.[118] Thus, though the postulate of practical reason with regard to rights demands that we be able to acquire things, because the acquisition of things cannot rightfully stem from a unilateral will, and because the consistency of any particular acquisition with an omnilateral will is uncertain, such acquisitions are provisional until consciousness of their necessity is secured through a rightful condition. But then the possession of provisional rights

[117] This is not to deny that there can be boundary disputes over innate rights, nor is it to deny that public institutions might have some role in determining them. On this point, see Niesen, UPMS.

[118] "That among human beings whose powers of choice stand in outer relations there must be a right (and indeed a public right), i.e. that they must will that there should be such a right so that one can presuppose this as their will, lies in the concept of the human being as a person regarding whom my freedom is limited and whose freedom I must secure. – Yet for that reason that unification of powers of choice is not always actual. Hence mine and yours is only provisional until this unification is established, although it is of course subject to inner laws of right, namely to limit the freedom of rightful possession to the condition that it make possible that unification." (Draft of the Doctrine of Right, 23:278)

generates an obligation to enter a rightful condition, or else cease interaction with others, i.e., a formal obligation.

Here it will be helpful to say a bit more about Kant's account of original acquisition in the state of nature, since it is the paradigmatic way of generating provisional rights. In the course of his discussion, he lays out three conditions that such acquisition must meet.

> (1) *Apprehension* of an object that belongs to no one; otherwise it would conflict with another's freedom in accordance with universal laws. This *apprehension* is taking possession of an object of choice in space and time, so that the possession in which I put myself is *possessio phaenomenon.*
> (2) *Giving a sign (declaration*) of my possession of this object and of my act of choice to exclude everyone else from it.
> (3) *Appropriation (appropriatio*), as the act of a general will (in Idea) giving an external law through which everyone is bound to agree with my choice. The validity of this last aspect of acquisition on which rests the conclusion "this external object is *mine*," that is, the conclusion that my possession holds as possession *merely by right* (*possessio noumenon*), is based on this: Since all these acts *have to do with a right* and so proceed from practical reason, in the question of what is laid down as right abstraction can be made from the empirical conditions of possession, so that the conclusion, "the external object is mine," is correctly drawn from sensible to intelligible possession. (MdS 6:258-259)[119]

First, we must "take possession" of an unowned object of choice. Second, we must give a sign that we intend to possess it as our own. Finally, the general will must give a law "in idea," "through which everyone is bound to agree with my choice". Immediately after stating these conditions, Kant states that following this procedure implies "a rightful *capacity* of the will to bind everyone to recognize the act of taking possession and of appropriation as valid, even though it is only unilateral." But this

[119] Such an act of provisional appropriation carries with it all the relevant "rightful consequences" of possession in general (MdS 6: 267).

is puzzling. The appropriation step quoted above explicitly requires that we impose the obligation "as the act of a general will," not as a unilateral act. I take it that here, Kant means that the empirical act of taking control is merely unilateral, but that its practical presupposition is that it meets its limits at its consistency with the omnilateral will.[120] In making my claim in the absence of the realization of the latter, I am not certain that it does not exceed its limits. So understood, I am ready for the civil condition so far as I recognize that others' like claims are also grounded in the omnilateral will, and that either or both of us may need to compromise, that neither is guaranteed to receive everything to which we take ourselves to have a right.

Now, recall from Chapter Two that, on certain readings, all it takes to discharge the obligation to render one's possessions compatible with this requirement is to find oneself in a state that satisfies certain institutional requirements. But there, I argued that this reading was mistaken. Acquisition can be justified conclusively "only insofar as it is included in a will that is united a priori (i.e., only through the union of the choice of all who can come into practical relations with one another) and that commands absolutely," and this requires not only legislation in lines with freedom, but also rightful international and cosmopolitan relations (ibid). While the postulate of practical reason with regard to rights establishes that we have a general capacity to acquire things, it leaves undetermined what the limits of this acquisition are, and these we need to discover through an actual process of institution building.

In slogan form, reason determines that we are permitted to acquire, but not

[120] Thus it makes sense to say with Hasan (2018a, § 5) that such a claim to bind others "anticipates" the civil condition.

when our acquisitions are consistent with others' freedom. Kant makes this point by emphasizing that the law of reason is

> insufficient for determining the limits of the empirically-mine and –yours...the determination of this possession in experience merely as its appearance in space and time and hence possible only by dependence upon the connection of the power of choice of a human being with objects or with others' power of choice and hence what and how much of them could actually (in the sensible world) belong to mine and yours cannot be determined through this principle which thus cannot suffice for distinguishing the latter. (DDR 23:214)

> under the presupposition of the possibility of an outer mine and yours, the condition of their possible agreement in accordance with laws of freedom in the synthetic unity of their powers of choice is the idea in relation to which determination of the limits of mine and yours outside me and thus on which alone can be based all outer contingent right: i.e. only through the idea of a unified power of choice can we acquire (DDR 23:215)

> [H]ow much I may acquire remains thereby undetermined, for if I could acquire everything altogether then my freedom would not limit others' freedom but rather annul it...Only the *a priori* necessary unification of the will for the sake of freedom and certain determinate laws of their agreement can make acquisition possible...and this unified power of choice determines for each what is his (DDR 23:279)

> Every human being has an innate right to be on some place on earth, since his existence is not a *factum* and hence not an *injustum*...However, because everyone else also has this right the *prior occupans* has the provisional right to coerce anyone who hinders his use to join with him in entering a contract to determine the limits of permissible possession and to use force if others prevaricate. (DDR 23:279-280)

Passages like these make clear that the limits of permissible acquisition in the state of nature are not determinate and are given determinately only by the *actual* unification of powers of choice in a united will. The postulate entails that *some* possession must be possible (otherwise, freedom would annihilate itself). But since everyone has a share in such possession that limits the share of others (my possessing everything

would annul, not limit, others' freedom), any given contingent act of possession is uncertainly consistent with others' freedom (compare MdS 6:261-267).[121] But if the limits of my possession are not determinate, then they cannot generate material constraints on others (e.g., to respect precisely as much land as I've taken under my control). The idea seems to be that if I am not conscious that my claim to an external right is compatible with its normative presupposition, then I cannot justifiably coerce you to respect it; approached from the other side, if you are not conscious of the necessity of my right, then its authority to limit your own freedom is suspect. The best, normatively speaking, that a rights-holder can do is "necessitate others to unite together with him in a universal will in order to specify for each the limits of the land each has" (DDR 23:285).

Now, if provisional rights generate obligations to do just this, namely to necessitate them to unite their powers of choice in a universal will, and if, again, the rightful condition is a situation where the will of all is actually united, then this allows us to make sense of the first two proposals introduced above. For if provisional rights generate formal obligations in this precise sense, then they are clearly connected with the demand to enter a rightful condition, as Ellis demands. Similarly, the provisional rights generate formal obligations interpretation captures the sense in which provisional rights are not coercible *in the same way* as conclusive rights, as Ripstein

[121] Appropriation of land, Kant writes, "is an act of private choice, without being *unsanctioned.* The possessor bases his act on an innate *possession in common* of the surface of the earth and on a general will corresponding a priori to it, which permits *private possession* on it (otherwise, unoccupied things would in themselves and in accordance with a law be made things that be- long to no one). By being the first to take possession he originally acquires a definite piece of land and resists with right *(iure)* any- one else who would prevent him from making private use of it. Yet since he is in a state of nature, he cannot do so by legal proceedings *[von rechtswegen] (de iure)* because there does not exist any public law in this state" (MdS 6:250).

rightly holds. Because formal obligations permit coercion only to enter into a rightful condition, not to respect one's exact claims to external objects, whereas material obligations presuppose a rightful condition and *do* require non-interference with one's claims, there is a clear difference with respect to the enforceability of these norms. Having shown this much I want to pause to consider an objection to the effect that, despite its advantages, this reading is in tension with PT. This is the task of the next section.

III. Formal Obligations and the Provisionality Thesis

PT states that all external rights are necessarily provisional in our world. But this thesis appears unsustainable in light of an interpretation according to which provisional rights correlate with *only* formal obligations. For on this analysis, our obligations of right reduce forever to the formal obligation to enter into a rightful condition. But PT is a claim about the *necessary* provisionality of rights, and thus entails the strict impossibility of discharging the duty that they are associated with. For if we cannot ever enter into a rightful condition so as to make rights peremptory, nor can we discharge our obligations of provisional right. But then a Kantian theory of right that hopes to guide action can at best accept either PT or the proferred analysis of provisional rights, but not both.

One response simply grants the objection and reject PT on the strength of the interpretation of provisional rights as generating formal obligations. Clearly in the context of this project, that option is a non-starter. A second accepts PT and reject the analysis of provisional rights as generating mere formal constraints. Here, one

would have to work out a sense in which provisional rights develop other kinds of constraints, and one could either develop a revisionist account (that accepts that the best reading of Kant's texts has these rights developing more than formal constraints but nevertheless rejects this in favor of a different understanding of provisionality), or one could look for resources elsewhere in Kant's practical philosophy for understanding the degree to which provisional rights generate duties. Perhaps, for example, we have no duties of right to respect others' provisional rights, but merely duties of virtue. I want to pursue a third option that (a) preserves the strongest interpretation of PT, (b) preserves the analysis according to which there are only formal duties under circumstances of provisional right, and (c) marks out a sense in which provisional rights can guide our political lives, even if conclusive right cannot be realized.

The problem is that, if it is impossible to enter a conclusively rightful condition, provisional rights are incapable of guiding action. For one discharges one's formal obligations to the degree that one enters a rightful condition, which, given PT, one cannot do. Since there are only formal obligations of right given PT, then Kant's political theory is incapable of guiding action. But here I think it's important to remember that there are two ways to fail to comply with one's duties in the context of right, both of which are explicitly mentioned in right's foundational principle (UPR). The first is by committing an *action* that is not capable of coexisting with universal freedom. The second, however, is by adopting a *maxim* on which the

freedom of choice of each cannot coexist with everyone's freedom.[122] With this in mind, recall what Kant says about the situation obtaining in advance of the rightful condition:

> Prior to entering such a [rightful] condition, *a subject who is ready for it* resists with right those who are not willing to submit to it and who want to interfere with his present possession; for the will of all others except for himself, which proposes to put him under obligation to give up a certain possession, is merely *unilateral,* and hence has as little lawful force in denying him the possession as he has in asserting it (since this can be found only in a general will), whereas *he at least has the advantage of being compatible with the introduction and establishment of a civil condition.* (MdS 6:257, emphasis added)

Kant suggests that, in advance of a rightful condition, there are two ways for persons to comport themselves: either they are ready for such a condition or not. Provided that they are ready for such a condition, their possession has a presumption in its favor. But how can one ensure that one is ready for the rightful condition? I submit that one is "ready" for the rightful condition, that one's possession is limited to the condition that makes "unification" of our powers of choice possible, i.e., so far as one is *disposed* to enter into it, i.e., so far as one's maxim to rightfully relate to others as far as they can.[123] On this account, the unification of the will that would reveal the necessity of our outer duties is a *task* set by reason, which we discharge by being ready for it and taking whatever practical steps are required by our being so ready. Although one might not be able to enter a rightful condition once and for all, it remains in one's power to develop what we might call a *rightful disposition* by adopting the

[122] Marie E. Newhouse (2015) indeed reads the UPR as prescribing two standards, one to govern actions and material wrongs, and the other to govern maxims and formal wrongs. See also her dissertation on the topic.
[123] For Kant, a disposition (*Gesinnung*) can be understood as a foundational maxim. See Coble 2003.

maxim to relate rightfully to others so far as one can.[124] Moreover, one can, through one's actions, reveal the presence or absence of this maxim (MdS 6:349).

Of course, it is true that developing such a disposition and working to discharge the task of unifying our powers of choice in the empirical world has an uncertain connection with concrete actions. It is plausible, however, that there are some actions I must perform if it's to be at all credible that I have such a maxim. In this context, accepting others' good faith efforts to enter into a civil condition, treating my claims to external objects as vulnerable to demands to justify those claims to others, and sometimes ceding one's current possession to the degree that an adequate justification cannot be offered, seem like good examples. Given these possibilities, it seems that the we *can* discharge our duties of right, and there is a meaningful sense in which they guide action. Now it is true that the uncertain link between maxims and external actions[125] makes it difficult to determine whether one person coerces another wrongfully. Here, one is always unsure if the person with whom she is in a dispute is ready for a rightful condition or not, and so whether your exercising force to protect your possession is wrongful. But difficulties in judgment aside, it comes out on this account that not all assertions of provisional right will be on a par.

For Kant, insofar as I am ready for a rightful condition, I resist others with right, and not otherwise. For example, suppose I acquire a piece of land with a view toward entering a rightful condition, in accordance with the Kantian procedure. I apprehend an object, give a sign that I intend to have it as my own, and I intend that

[124] Provided states are also to be guided by provisional rights, it ought to be the case that something similar can be said of their readiness for a rightful condition.
[125] See: R 6:47.

my possession be compatible with the omnilateral will. If you try to interfere with my possession with no attempt to enter into a civil condition with me, I am entitled to use "coercion" to force you to recognize our mutual claims in a civil condition, or (if I cannot) to leave me and my present possession alone. Of course, the provisional rights as formal rights interpretation does imply that you would not be wronging *me* by interfering with my possession. But you would be doing wrong, and that wrong would be described in part by observing that my possession, but not yours, has the favor of law, and so right lies with me, rather than you. Moreover, the formal wrong you commit by wishing to remain in the state of nature authorizes me to coerce you to do what you are yourself unwilling to do. Thus it is possible to develop an account of our duties of right that accepts both PT (and so the idea that all claims to right are provisional) and the claim that circumstances to provisional right are such that our duties of right are exhausted by formal obligations.

But there is a further question concerning how our assertions of provisional rights govern our efforts to realize rightful conditions, granting that we have adopted a rightful disposition. For Bader, although provisional rights do not materially constrain behavior in the state of nature, except insofar as they generate formal obligations to leave it, they nevertheless "determine what constraints will obtain in the civil condition" (Bader UPMS, p. 2).[126] Put differently, although provisional rights

[126] For this reason, Christoph Hanisch assimilates provisional rights to David Enoch's notion of robust reason-giving, which is grounded in his account of "conditional reasons". Such reasons are normatively inert until they are "activated" by their conditions, normative and descriptive. So understood, a provisional right gives reasons for persons to respect acquired external objects of choice conditional on there being a civil condition governed by an omnilateral will. In so arguing, he takes himself to chart a middle course between positivist readings (like Brudner's), which emphasize that the omnilateral will cannot be sensibly constrained by pre-political norms, and natural law readings (like Sharon Byrd's) which assimilate Kant's view to a Lockean view, according to which the only thing incomplete about acquired rights in the state of nature is their lack of security. Interestingly, he notes

generate only formal obligations on other individuals, they generate material obligations on the part of collective entities with the attributes relevant to statehood. But although all parties to the debate over the normativity of provisional right can accept that provisional rights generate only formal obligations for individuals, the idea that they materially constrain collective entities is very controversial. The next section examines this controversy.

IV. Provisional rights in Transition: prima facie, absolute or pro tanto?

So far I've argued that provisional possession generates a formal obligation to enter into a rightful condition with others who are ready for such a condition, and a right of resistance against others who are not ready for this condition. Kant is clear that "provisional acquisition is true acquisition," and "by the postulate of practical reason with regard to rights," he continues, "acquiring something external in whatever condition men may live together (and so also in a state of nature) is a principle of private Right, in accordance with which each is justified in using that coercion which is necessary if men are to leave the state of nature and enter the civil condition" (MdS 6:265). The possessor who acquires with a view toward eventually entering a rightful condition is entitled to "resist" those who exercise freedom to resist their right to make free, private use of their property. Notice that in none of this does Kant say that our provisional rights are rights to coerce others to refrain from using the objects

that if we take it that the conditions of peremptory right cannot require the full instantiation of the ideal of justice that Kant paints, then we must take it that simply being on the road to such a condition is sufficient to trigger the rights' normativity. But then it's difficult to rule out that acquisition in the state of nature will count, and there should be at least some fully determinate rights in the state of nature—namely those acquired in line with Kant's procedures. See also Enoch 2014.

full stop. Rather, since "this acquisition precedes a rightful condition and, as only leading to it, is not yet conclusive" (MdS 6:267). Having seen this much already, we must now ask how we are to understand the normativity of provisional rights insofar as they constrain movement toward the rightful condition.

On this question, there are broadly three lines of interpretation. According to the first, provisional rights impose absolute material constraints on legislators in a civil condition: to the degree that they are not taken up in a putative civil condition, the latter is merely a continuation of the state of war (only with a now more powerful agent making unilateral claims) (Bader UPMS, Byrd and Hrushka 2006a, Byrd 2010). According to the second, provisional rights generate *prima facie*—apparent—duties on the part of constituting authorities: entering a civil condition involves erecting (or submitting to) a political authority, which is then fully charged with determining the limits of possession as a representative of the omnilateral will (see e.g., Brudner 2011)[127]. To the degree that said authority does not recognize a right, there was no right there after all (but only its appearance), and it disappears without residue. According to the third, provisional rights have *pro tanto* force: to the degree that they are to be defeated in the move toward a rightful condition, they must be overridden in the least onerous way possible, and even then they'll leave normative residue and perhaps demand compensation from the authority (Stiltz 2014, Hasan 2018b). I follow Hasan in referring to these three readings as the weak provisionality reading, the strong provisionality reading, and the anticipatory provisionality reading

[127] Flikschuh's recent relational reading of Kant's *Doctrine of Right* may exert pressure upon her to side with Brudner on this point (see Flikschuh 2018, *passim*).

respectively.[128] According to the account developed in ch. 3, provisional rights are to be understood as provisional judgments of right. We might begin our analysis of these three options by observing how each treats the *truth-maker* of provisional judgments of right (e.g.: I have a right to *x*). On one level of analysis (and somewhat superficially), the three accounts agree: a provisional judgment of right is true just in case it is consistent with the omnilateral will. But disagreement on the nature of the omnilateral will reveals disagreement at a deeper level of analysis, as I will now show.

On the strong provisionality account, the omnilateral will is constituted by the judgment of a public authority; thus just such a judgment renders a provisional judgment true or false. If the authority concurs with my judgment that I have a right to *x*, then the judgment I made provisionally is true, and the claim to the right becomes conclusive.[129] If the provisional authority does not concur, then the provisional judgment is false. As one proponent of this view puts the point, "private rights to acquired things are but unilaterally asserted claims. Hence they hold only provisionally, and when at last they come before the tribunal of public distributive justice, they are judged. If found wanting, they disappear. Without a trace." (Brudner 2011, p. 305). A legislator in a civil condition has "no, not even a defeasible, duty to respect the distribution of holdings brought about by first acquisition and bilateral exchange" (ibid., p. 297). Since the public authority's judgment constitutes the truth concerning right, it is not true that provisional rights constrain distributions of rights in the civil condition. Provisional rights in the state of nature merely provide structural reason to leave that state—they do not constrain the constituting authority's judgment,

[128] For a slightly different taxonomy, see Niesen UPMS.
[129] There is space here for allowing international institutions express the omnilateral will.

they simply await it. It is possible, on this reading, that no provisionally asserted claims end up being true. It is also possible that they all end up true. It simply depends.

On the weak provisionality account, by contrast, an individual's unilateral will comes to represent the omnilateral will, so far as it proceeds in accordance with the authorization to divide the earth granted by the Postulate of Practical Reason with Regard to Rights (Byrd and Hrushka 2006, pp. 265-266). Therefore, the truth maker regarding the provisional judgment that I have a right to *x* is the facts on the ground: Was I the first to acquire *x* in accordance with the Kantian procedure laid out above? Since the omnilateral will on this account is not understood as something that is actualized by the civil condition, but as an a priori principle that demands only that the earth (originally owned in common) be divided, the actual division made by agents exercising external freedom is then the rightful division, excepting whatever taxes are necessary for the support of the protection of those claims when they are secured in the civil condition (Byrd and Hrushka 2006, pp. 266-274).[130] To the degree that a strong, unilateral power claiming to be a state does not respect these claims, it is a mere Augustinian den of thieves.[131]

The anticipatory account is a hybrid account, motivated in part by observing that both extreme positions appear to find their textual support. According to the anticipatory account, the truth of provisional judgments of rights depends upon a

[130] There is a puzzle on this account concerning how precisely to fix the distribution of provisional rights. For if it takes literally the procedure of first acquisition as the starting point, then it looks like civil conditions will face absolute historical constraints, which is clearly at odds with some of Kant's anti-historical impulses.

[131] As we will see, there is a problem here, insofar as this appears to require going back to the first division and tracing the legitimacy of transfers in order to ascertain what any given public authority ought to do.

combination of factors. This view acknowledges that we begin by staking out various claims to things, which we implicitly understand to be limited by conditions of omnilaterality, and we make our claims in anticipation that they will be so consistent. These judgments are, therefore, made true by the facts on the ground in a way that combines the normative resources of the first and second accounts. Here, facts about first acquisition (who acquired what first), in concert a judgment concerning which of these acquisitions are actually consistent with universal freedom (and which are not) combine to decide the truth of provisional claims. Legal authorities on this account have obligations to respect the existing distribution as far as they can. But because pure reason is by itself inadequate to set the limits of acquisition, and such limits must be set, the public authority does some work in determining the truth value of provisional claims. As Hasan puts it, if "the current distribution of property threatens external freedom," as judged by the state, then the state ought to redistribute (perhaps providing compensation where deviations from the status quo distribution are deemed necessary) (2018b, p. 20).

The anticipatory account appears best positioned to capture the various things Kant says about provisional rights. To see this, suppose I acquire a piece of land. I apprehend the object by taking control of it, I give a sign that I intend to exclude others from it, and I mean for my act to serve as an external law for others, and thus presuppose that my act is compatible with the general will in Idea. You and your friends have acquired an adjacent tract of land under similar circumstances. You come to the boundary of our properties, armed, and offer a set of laws, distributing property between us, a proposal for enforcement, etc. (Stipulate that you are

positioned to enforce public justice, so understood.) I look over the documents and find that, although the laws promise protection of my rights to bodily integrity, the proposed distribution of external rights leaves me with almost none of the land to which I took myself to have a provisional right, and provisions for the defense of property are to come almost entirely at my expense. Not only this, but I am offered no justification or compensation. Do I have to accept the terms you propose? Let's examine the answer on each account.

On the strong provisionality account, the answer seems to be yes. So far as you are acting in the name of a public authority, and so far as my possession was really only awaiting the judgment of such an authority, your determination falsifies my provisional claims to external right. Now, if PT holds, it's true that my new holdings will also be merely provisional (awaiting the judgment of an international authority), but the point stands: my provisional judgments of right must now fall into line with your judgment. Not only does this appear philosophically unpalatable (implying that a state could disregard property that has long been held and incorporated into its citizens' plans provided the public lawgiver were to deem it necessary for compliance with the omnilateral will), it also seems to run into textual difficulties. For Kant is clear that "[p]rovisional right persists in the civil condition in its consequences and is taken up into civil right to the extent that it does not contradict the latter's nature" (DDR 23:293). As long as my provisional judgments to right do not conflict with the nature of a civil condition, their effects carry over into the civil condition. But then, minimally, I am owed some kind of account of why the things I've appropriated (in line with the procedure outlined) are incompatible with the will

of all.

The weak provisionality account rightly generates a negative answer, but does so in a way that is at odds with other things Kant says about rights in dynamic circumstances. According to the weak provisionality account, to enter a civil condition with another is to accept common laws according to which *each* is secure in what is hers, where what belongs to each is determined by each in the natural condition, according to her unilateral judgment (as authorized by the postulate). Your merely laying down something that claims to be distributive law, in contradiction to my own provisional judgments of right, is not enough to obligate me. Though it might be instrumentally rational for me to go along with your scheme, I am not *obligated* to do so. But while this appears to be the proper response to the case at hand, it also makes the question of who has a right to what a purely historical matter. If provisional rights are fully determinate even if grounded only on a unilateral will, then it matters a great deal to trace acquisition to its historical origins, to ensure that current institutions are not violating provisional rights, understood as past unilateral willings.

But Kant is clear that tracing possession back to its origins is not only not necessary for realizing right, but is actually at odds with the requirement to make rights peremptory (MdS 6:292). To see this, suppose that against my judgment, you manage to gain sufficient power to maintain your proposed distribution through the exercise of force. Over time, the population within the relevant territory grows. The initial distribution was unjust (because it did not respect my provisional rights), but suppose that circumstances have been happy ones, and things get better over time. Residents come to develop settled and stable expectations over their current

holdings, and everyone has at least enough to get by. A careful reading of the *Doctrine of Right* suggests that if I were to take myself to be in a state of war here because my provisional rights qua absolute constraints had been flouted in the past, I could scarcely be said to maintain a rightful disposition (ibid.; compare MdS 6:371). I would rather be committing a formal wrong.

Moreover, the weak provisionality reading is difficult to square with Kant's treatment of rights-allocation after a revolution. To see this, suppose now that everything goes right as regards the incorporation of provisional rights into the civil condition. Your terms now respect all provisional claims to right, so far as they are actually compatible. Still, there is civil unrest: Although the rights recognized by the civil condition are precisely the ones that ought to be so recognized, a significant subset of the population—heavily armed—objects. They revolt and institute a new order. The weak-provisionality reading must take it that the new order remains always illegitimate. But Kant says just the opposite: "once a revolution has succeeded and a new constitution has been established, the lack of legitimacy with which it began and has been implemented cannot release the citizens from the obligation to obey the new order of things" (MdS 6:322-323).[132]

How does the aspirational account handle these cases? Here, it is clear that you and your friends have an obligation to consider my claims in settling upon a distribution. Moreover, since provisional rights have a presumption in their favor, I am owed justification and compensation in the case of deviation from these

[132] Kant does say that the dethroned government, since it was unjustly overthrown, can pursue its right by force. But this seems equally to cast aspersions on the absolute-constraints reading. For if provisional rights impose absolute constraints, then there should be an *obligation,* not merely a *permission* to restore the old order.

provisional rights. Thus, it appears to give the right answer in the first case at hand: provided no justification of the right kind is forthcoming, I have no obligation to respect your terms. We then fill this in with an account of what class justifications are of the right kind. These will, plausibly, be (i) that a person's holdings in fact violate another person's documented prior claim (or that, because there's a disagreement, some sort of compromise had to be made); (ii) that a person's provisional rights are inconsistent with a functioning state's continued existence because, e.g., their being honored would perpetuate a state of war or result in extreme instability; and (iii) that a person's provisional judgment that they have a right to *x* does not limit, but rather annuls the scope of others' (including outsiders') freedom over external objects of choice.

That those in charge have recourse to these kinds of justifications explains why distributions of provisional rights are bound to change with the circumstances (and so better matches Kant's text than the weak-provisionality account). For as expectations stabilize surrounding the imposition of an order, persons will develop new judgments of their rights, as dictated by the institutional rules governing acquisition and transfer. Thus, in attempting to respect citizens' provisional judgments of right, authorities must mind not only the claims historically made, but also those generated by the specific institutional rules. In cases of conflict, a judgment will have to be made about the relative weight of these claims, and the 'losers' can be offered justification (i): that there was a conflict about the right in question, and that the weight of the evidence was on one side rather than the other. Following a revolution, justification (ii) is readily available: Respecting the old order of things once

the new order has consolidated perpetuates war. Finally, as new claimants come to the table (either new persons or outsiders), and there are disputes about the degree to which current holdings stay within their normative limits, those whose provisional rights are unable to be upheld can be offered justification (iii).

What the anticipatory reading leaves open is the status of these justifications, whether they obtain (or not) independently of anyone's judgment about the matter, or whether they are constituted by the judgment of a public authority. We can perhaps get a bit clearer on this point by considering what Kant says about prosecuting one's right in the state of nature. Here, he distinguishes between certain and uncertain rights. The former obtain only in the conclusively rightful condition (where we are conscious of the necessity of our obligations), and are for that reason immediately coercible.[133] There can be no dispute with respect to these (after all, they're certain), and any dispute is straightforwardly a wrong, the costs of which are to be paid by the unjust claimant (NRF 27:1376). By contrast, in the absence of a rightful condition, rights are uncertain, and can be in dispute. Moreover, no one is obligated to defer to anyone else's judgment about right, for to accept such an obligation would be to accept an obligation unilaterally. Still, Kant makes clear that parties ought to seek a peaceful means of conflict resolution, for example, through arbitration. In this way, they attempt to bilaterally secure one another's rights. But

[133] Recall that in the last chapter, I argued that a provisional right is a provisional judgment of right—a judgment of right made in the absence of conditions that allow for consciousness of its necessity. If, in general, a right is a title to impose obligations on others, and we cannot judge whether the conditions are such that our acquisitions oblige others (namely they're consistent with the omnilateral will), then it would make sense that, absent those conditions, others would have no reason of right to respect our holdings. After all, they're precisely unconscious of their necessity to do so, which is a crucial mark of obligation.

they cannot be obligated to accept the results of that arbitration, and, if it fails to decide the right to both parties' satisfaction, then war ensues. "In the *status naturlis* it [war] is legitimate since neither of them [the parties] is obligated to let it rest on the judgment of another. Then no other judgment remains except the use of force" (NRF 27: 1377).

Now, as an objective matter, it might be that one party is being unreasonable, but given that there is no natural authority in the state of nature, parties can dispute their rights so far as their power allows. In doing this, they either do formal wrong, or they do not. If they do, it is because they fail to have a rightful disposition, at which point they can be coerced. Thus, at least in advance of a rightful condition and proper authority, each judges the matter of whether or the proposed reallocations are justified by her own lights, but also acknowledges that the outcome of war must be eventual cooperation (Ripstein 2016; compare Maliks 2013).

Perhaps these reflections can help us to come to grips with one of Kant's more puzzling claims concerning provisional normativity. He writes:

> Provisional acquisition, however, needs and gains the favor of a principle (*lex permissiva*) for determining the limits of possible rightful possession. Since this acquisition precedes a rightful condition and, as only leading to it, is not yet conclusive, this favor does not extend beyond the point at which *others* (participants) consent to its establishment. But if they are opposed to entering it (the civil condition), and as long as their opposition lasts, this favor carries with it all the effects of acquisition in conformity with right, since leaving the state of nature is based upon duty. (MdS: 6:267)

On the one hand, our provisionally acquired rights extend only so far as others *consent* to their establishment. On the other hand, if others "are opposed" to entering into a civil condition with us, we may enforce our rights (presumably without

their consent). I believe the picture is supposed to be something like this: In the state of nature, we all have our claims to own things, and a duty to avoid adopting a maxim on which the conclusive ownership of things is impossible. In interacting with others, we seek to test our claims against their claims. We can defend these by the right of war, but we ought to be disposed to enter into conditions in which each can have what is hers secured to her, and being so disposed indicates a willingness to cede ground where necessary. That is to say that we ought to be disposed to consent to others' possessions and they to ours. Where we disagree because we think we possess the same object, we ought to submit to arbitration, and we morally ought to accept the results, although we cannot be bound as a matter of right to do so.[134] When peaceful resolution fails, we prosecute our rights through war. When our resources for prosecuting our dispute in this way run out, we ought finally to accept the result and reach agreement, which is to say something like we might not have a choice, but it is also to say more than that. For once we have lost in arbitration and in war, and cannot cease interaction, it looks like the other's capacity to force us to enter into a civil condition wins out, and once a distribution therefrom eventuates, one does not credibly have a rightful disposition insofar as she re-raises hostilities. As Ripstein (2016) puts the point, peace "is only possible if the results of war are accepted," in spite of the fact that war places force where right belongs. For in waging war, Kant claims that we tacitly consent to accepting the results as binding (MdS 6:346; compare 6:307). But then if, following a war, we resist when we regain power, our claim to be

[134] This explains why Kant would have characterized the system of natural right in advance of a proper civil constitution as "merely a doctrine of virtue" (*Refl.* 7084, 19:245).

generally ready for the civil condition loses credibility.[135]

If the above is on the right track, authorities that are constituted as a result of this struggle are licensed all the more in deploying coercion, for they are themselves the equilibrium outcomes of war. Indeed, once hostilities have ceased, a new distribution of what was under dispute is ushered in, and over time, prolonged possession grounds new provisional rights, which then form the material for future moves toward the rightful condition.[136] At every stage, when attempting to secure to each what is his, then, individuals ought to do as much as is possible to recognize individuals' actual claims, but at no point (given the provisionality thesis) are these claims made fully conclusive. Strictly, then, each retains her right of war. But it becomes increasingly incredible to prosecute one's right by means of war *and also* to claim that you are genuinely ready for a rightful condition. So far as that is so, others resist you with right.

What I think these considerations show is that, to a degree that is perhaps frustrating to theorists, the distributions of rights in the move to a civil condition depends to a large degree on actual political struggle. Authorities offer justifications when overriding provisional rights, and these justifications sometimes ought to be accepted. Still, it isn't, as the strong provisionality account suggests, that any public

[135] Kant is clearly uncomfortable with this conclusion, but he sees no alternative to it. See NRF 27:1377.
[136] Kant's remarks on prolonged possession are fascinating. He seems to grant that there is a right to acquire new rights in this way because otherwise rights would always remain provisional: this, then, is one of the places he most strongly resists the provisionality thesis, and it shows that a great deal of the reason for this is to avoid conflicts in respect of rights claims, which are always threats to perpetual peace. Two things to observe: First, if there are independently good reasons for thinking that there should be conflicts in terms of rights claims, a desire to avoid them seems to have questionable authority in overriding them. Second, there are normative resources in the account of provisional right that I'm developing here to avoid the instability Kant worries about: as long as prolonged possession generates new provisional rights, which can gain the favor of law, then the original possessor who has no evidence of his past ownership appears to be on shaky grounds.

authority simply gets to redistribute as it sees fit (although if it attempts to do so and cannot be rightfully resisted, it might give rise to a new distribution of provisional rights, which it will then be in a position to enforce).[137] Nor is it that provisional rights are fully determinate and constrain what anything calling itself a state might do, as the weak provisionality account suggests. The truth is rather that provisional rights ground out in a right of war, where one attempts to assert one's own interpretation of one's right against others when necessary, but also seeks to respect others' claims where possible, where one's rightful actions are dictated by the disposition to enter into a rightful condition with others, as circumstances determine the requirements of this disposition further.

What that means is that all who are acting in good faith will strive as far as possible to incorporate actually asserted provisional claims, that uncontested claims be honored until they are contested on some rightful basis, and that contested regions be divided in a way justifiable to each, awaiting justification to newcomers (future generations) and those outside one's state. In the ideal case, this will issue in a distribution that maps on to the anticipatory view, but in human affairs, there is no guarantee that the ideal case will eventuate, and provisional claims are not fixed forever throughout time. There is no tracing back to first acquisition. Eventually, provisional legitimation succeeds, more or less consistently with whatever distribution of rights and, what then? To answer this question is the task of the next section.

[137] To put the point into contemporary language: Although property has a conventional component, insofar as we try to work its implications out institutionally, the way the institution is worked out is precisely by attempting to incorporate and respect persons' pre-institutional claims to things. (See Murphy and Nagel 2002).

V. Provisional Right in Defective Civil Constitutions

David Schmidtz expresses a truism when he notes that we arrive in a world in which the pie is already divided, where things are already claimed by others, at least some of whom have worked to produce at least some of them (2005, pp. 111-112). We do not begin from scratch, where external objects are largely unowned awaiting our acquisition. Rather, as beginners, we find ourselves in a world in which others have already proceeded to divide the commons, without our input. This raises questions about how to discharge our duty to relate rightfully with others—to remain ready for a rightful condition. In conditions like these, we do not appropriate out of the commons, but rather inherit goods, exchange our labor for them, or receive them from the state. According to my interpretation, Kant accepts that these too are circumstances of provisional right. And if provisional rights impose only formal obligations, then it should be the case that we don't violate another's rights when we take their property (that we merely do wrong in the highest degree), and that we have no material obligation to accept the judgments of the courts when they decide these matters.

But it might be objected that reading Kant in this way radicalizes his position beyond recognition. While Bader's interpretation is perhaps plausible in a reading of Kant's philosophy that denies PT, it must render a theory that accepts PT implausible, even if we've seen that there is no further contradiction here. For if all it takes to undermine a provisional claim to right is to produce a clear reason for thinking the authorization is incompatible with the general will, then clear reasons abound, and we are left with anarchism—a position that Kant clearly wishes to resist.

Fully squaring up to this worry will require tackling Kant's controversial views on resisting tyranny (the full task of the next chapter). But for now, I want to argue that the appearance of an inconsistency here is mitigated by carefully taking account of our duty to enter a rightful condition. I want to argue, in particular, that there are circumstances (among them a range of defective civil constitutions) such that, when in them, one cannot credibly claim to have the maxim to enter with others into a rightful condition without obeying the law of the land, at least concerning a range of matters concerning external rights. To the degree that this is so, those who *do* acquire in line with the norms of the state *resist with right* those who are in violation of its procedures, which isn't to say that there are material obligations on the part of the latter that are violated. As we move increasingly toward justice, discharging one's formal duties requires acting *as though* others have material rights, but those material rights do not actually obtain until their necessary conditions do.

Provisional rights presuppose their consistency with the omnilateral will and with the freedom of all under universal law. This means that if clear reasons can be produced for thinking that this presupposition is not met, the judgment of right needs revision. Moreover, Kant provides some guidance concerning what the constraints on objections to provisional rights look like. To really assert that a person's claim to possession, or a state's claim to territory, is incompatible with the general will, you need to do more than just complain. You need to produce some sort of reason for thinking that a prior and valid claim to possession of the property or territory preceded in time the individual's or state's possession, or that it is incompatible with everyone's freedom, or that amounts to a wrongful perpetuation of war (§ IV). In

doing so, you might appeal to a sign that you yourself offered in order to declare the property yours, or you might appeal to your original right to the earth's bounty. If you proceed in this way, what you show is that though the possession incompatible with yours was *bona fide* (in good faith), and generated a provisional right, the provisional right is not compatible with the omnilateral will—there was, after all, your conflicting right. In that case, the property or territory must be given up—the provisional judgment is shown false.[138] Provisional rights are coupled with a "presumption" that they "will be...united with the will of all" (MdS 6:257).[139] Although this presumption can be overridden by the right kinds of reasons, it authorizes activities, the full justifiability of which is merely anticipated. These activities are to

[138] Importantly, this is not to say that the conflicting judgment is shown true; it remains provisional.

[139] Kant's claim that provisional rights are associated with a *presumption* [*Präsumtion*] that they will be made consistent with the omnilateral will is striking. In the context of Roman Law, "presumptions" were norms encoded in legal practice that shifted the burden of proof concerning various issues (from testamentary law to contract law) from claimant to defendant. According to the dominant view, they achieved this function by setting the default judgment in the direction of the likely legal fact, and requiring that defendants show that the fact does not (as is likely) obtain. (Put differently, evidence is not required to establish legal fact, but legal fact is assumed, and evidence is required to rebut it.) This effectively forces the holder of the controversial legal position to make her case first and convincingly, but it also opens up the possibility for doubt by establishing a clear burden that such doubts must meet. On a minority view, presumptions were established owing, not to the independent probability that legal fact obtains, but owing rather to various policy concerns, the idea being that presumptions were set in a way that would advance our policy objectives (Hohman 2001). In both cases, presumptions set the burden of proof in one direction rather than the other. Similarly, Leibniz uses the concept in both religious and political contexts to characterize the normative status of the actions of earthly authorities (the Church and the State). The actions of such authorities were to be *presumed* just as a default matter. Departures from this default are possible, but the burden of proof is against them: Challengers to authority must produce clear and compelling authority-defeating justification if they are to deny the authority's judgment. Such a presumption reduces the need for citizens to rely on their particular judgment in routine cases, but also suggests the relevant criteria for raising doubts (Lærke *forthcoming*). As Byrd and Hrushka have pointed out, Leibniz treated presumptions as capable of generating provisional truths, so long as "the contrary cannot be proved" (2010, p. 190, n. 12). In the Kantian case, the fact that provisional acquisitions are associated with presumptions has a similar significance. The claim to possess an external right is to be assumed consistent with the omnilateral will until a compelling objection can be raised. The burden of proof is on the person denying the right. Given our innate right to be free from unnecessary outer necessitation that burden is initially on the external-rights' claimant: The denier of the right can simply stand on his right to be free from outer necessitation (MdS 6:238). The postulate shifts that burden back to the person who disputes such rights, namely it establishes a presumption in their favor.

be taken to be undertaken in good faith unless an objection of the right kind is provided. I begin with a brief discussion of Kant's treatment of *bona fide* i.e., good faith, possession. I then show that, very often, one cannot claim to possess a thing in good faith while contravening the laws of an existing civil constitution. But when one does contravene those laws nevertheless, one subjects oneself to coercion (because one violates a formal obligation).[140]

For Kant, one possesses something in good faith either in circumstances of certain or uncertain right. (1) In the case of certain right one acquires an owned object (wrongfully) but does so in a way that does not compromise his maxim to relate rightfully to others. (2) By contrast, in the case of uncertain right, one is unsure about whether the extent of possession exceeds its rightful limits, where this might be for any variety of reasons. In a (1)-type case, one materially wrongs the other (which requires peremptory right), but commits no formal wrong. Kant's example is as follows. Another person's hawk escapes from its cage, and I shoot it. In doing so, I wrong its owner materially, but not formally—I remain ready for the rightful condition (NRF 27:1344-1345). My possession of the hawk is *bona fide,* namely, in good faith, because my maxim can coexist with the freedom of others—I do not have any reason for believing that it belongs to someone. But my action cannot so coexist, because it

[140] Though this is true, however, Kant is clear that there is a difference between mere coercion and punishment, and it may matter significantly that, on my reading, the defective state might not yet have the authority to *punish* for property related crimes (where punishment means something other than "coerce against". For example, Kant writes that "Punishment is the coercive means to obtain respect for the law. Wrongs to a person are resisted but not punished in *status naturalis* {state of nature} because in it there is no outer law," and so perhaps he should say that the defective state should not punish (Ref. 8026). On the other hand, "All punishment is coercion but not all coercion is punishment. Punishment is coercion which is under the *auctoritas* {authority} of a law. Every wrong is deserving of punishment. Punishment is a cessation of someone's freedom. I put him in a condition he has not willed to be in, for to resist actions that contradict universal freedom is to promote universal freedom" (27:1333).

is inconsistent with your (peremptory) right to the hawk. As soon as you produce grounds to show me that the hawk belongs to you, however, I do not just material but also formal wrong so far as I keep it. By contrast, in (2)-type cases, we claim an external right in line with the postulate, but we don't yet know whether it can be made compatible with the omnilateral will. Our judgment that we have the right is provisional in the sense developed in Chapter 3, i.e., it is made in absence of consciousness of its necessity. We don't know whether our holding the right is consistent with others' rights to be *somewhere,* with their claims to shares of the bounty of the earth as its original common owners, and ultimately with their right to freedom. We do, however, know that there are no immediate objections in the case of there being an evident first owner. In these cases, we possess what we possess in good faith unless we develop pressing reasons for thinking that our possessions are incompatible with the rights of others.

When we possess in the *state of nature,* we possess with a view toward the mere *possibility* of conditions existing where the will of all is unified in an actual giving of law. We possess here in good faith when we are ready to join others in cooperative arrangements designed to mutually secure rights. When others "refuse to consent" to our possession, we ought to try to get them to enter with us into a condition where each of our respective holdings can be secure. To the degree that they do not do this willingly, their unwillingness is either in good faith or bad faith. Objectively speaking, if they possess and resist bad faith, right is on the side of our resistance, with our compelling them. On the other hand, if we're both acting in good faith, both of our acts of resistance are formally right (DDR 23:305).

When actual legal institutions have been set up, we possess what we possess due to their rules, however defective they might be, and with a view toward the *necessity* of their obligations, but as yet under their mere *actuality.* Their *necessity* obtains only to the degree that we could be certain that the state's (and our own) claims under the institutional rules as consistent with the will of all other extant persons. We possess what we possess in good faith when we try to improve these institutions, when we refrain from putting force where right belongs (as Kant puts it in TP). It is only upon undertaking to unifying our powers of choice, and ensuring that they respect their limits that such rights can be shown to be consistent with the freedom of all (see Chapter 1).

Given PT, actual conditions of legality (but not rightful legality), are conditions where rights are still provisional, including the right to rule. That means that our obligations of right in those conditions are simply to remain ready to enter a rightful condition in the strict sense, and that others' rights (including the right to rule) have a mere presumption in their favor. It isn't simply by saying that we want to enter a rightful condition that we discharge our formal duties of right, but by demonstrating a willingness to secure others in their rights. Since the omnilateral will does not specify determinately, in a way accessible to human reason, who is entitled to what stuff, the task that reason sets is a demanding one, one that can be solved only through future interaction, guided by the demand to *uphold one's rightful honor* and to *do no wrong* (MdS 6:236-237). We cannot credibly claim to do no wrong when we patently ignore the established ways of making contingent claims to things. Still, since these claims are only provisional, it follows that we do not technically wrong when we

do so. After all, something is rightfully mine only when it is so connected with my person that someone would wrong *me* by using it without my consent. But the sole condition for this is consistency with others' freedom, and we simply do not know, in any given case, whether this condition is met. But we can be given reasons for doubting that a claim is met. If, e.g., I wish to claim the laptop you obtained by following the relevant civil procedures for acquisition, the latter procedures give me a strong reason to doubt my claim. Still, we should understand that possession has uncertain limits, and all have a right to a share of the earth's bounty, and we should recognize that others' claims constrain the ones that we too are entitled to make. We are, in this way, susceptible to others' demands for justification, and we cannot simply beg off by citing the laws as they stand, as if they were peremptory.

In the previous chapter, we observed two ways that Kant seems to use the language of provisional right. In the first, the limits of possession are unclear, and we are not certain if the obligations we seek to place upon others are consistent with the idea of a common lawgiving. The second case, by contrast, is when a government arrangement is known to be unjust, but is allowed to persist until it can be made rightful without making things worse.[141] Our analysis of the normative situation of provisional right fits the first kind of case. For there, it is plausible that we bring about the necessary unification by further interaction, and attempts to answer others' demands for justification. How does the account under consideration handle the

[141] E.g.: The only way the state can then gradually correct this mistake it has made, of conferring hereditary privileges contrary to right, is by letting them lapse and not filling vacancies in these positions. So it has a provisional right to let these titled positions of dignity continue until even in public opinion the division into sovereign, nobility, and commoners has been replaced by the only natural division into sovereign and people. (MdS 6:329).

second sort of case?

If to have a provisional right to x is to have a formal right with respect to x, then the state's provisional right to let these titled positions of dignity continue is to have a formal right to allow these titled positions of dignity to continue. Moreover, to have that kind of formal right is to have an authorization to compel someone in accordance with laws of freedom to enter into a rightful condition. But the puzzle here is that we *know* that a rightful condition is being *compromised* by the authorization to allow the hereditary nobility to persist. We are dealing in circumstances where a people thinks itself justified in allowing a hereditary nobility. Under such conditions, they set one up. Then, the state is authorized to coercively secure the nobility its privileges because what?

Kant does not make himself clear. Kant's claim that these persist until "public opinion" (MdS 6:229) comes around suggests that the laws of the land are successfully legitimating: They are perceived by a significant enough number of those under them to be authoritative, and so they serve as a credible focal point of collective activity, even if they fall short at the bar of justice. To change the laws immediately is, by *hypothesis,* to undermine this legitimation: to produce a sense in citizens of these states that the laws are *unjust* (even though aside from the hereditary nobility, they move objectively toward justice). But since the rule of law represents a condition under which persons are reconciled to recognizing one another's mutual claims of right, and are assured of their possessions, the resulting dip back into a situation where all of these claims are in question is worse by the lights of right, it would compromise the goal of approaching perpetual peace to prematurely reform the laws.

I think the thing to say here is that progress toward a rightful condition is not necessarily linear. We might take some steps back in the course of taking other steps forward. Perhaps Kant thought of the hereditary nobility like this: We might take a step forward in eliminating a hereditary nobility, but in doing so, we would also render it the case that people want an uprising. But if we bring about those kinds of conditions, then we are taking steps *back* by eliminating progress toward the unification of our powers of choice into an omnilateral will (Weinrib 2013). Thus the way to handle these cases is to remove the noble distinctions without moving away from a rightful condition, as soon as this is possible.

I think then, that we need to understand this second sort of provisional normativity (that involved with stability) as derivative. If (1) our freedom demands that we have outer things as mine and yours, and (2) the conditions of our doing this are that the limits of our possessions extend no farther than is consistent with the omnilateral will, then (3) actual attempts to realize this consistency are owed deference. But since the raison d'être of the state is to move toward instantiating an omnilateral will, it must eliminate these deformities as quickly as it can, without compromising its overall goal.[142] Thus, if the state cannot get rid of a hereditary nobility, say, without compromising the stability of the legal framework itself, then it has a permission to allow it to persist as long as is truly necessary to continue to move toward its goals.[143] But just as individuals' claims to property can be in good or bad

[142] Here, I agree with Weinrib (2013), and with many remarks in Ellis 2005.

[143] The only way the state can then gradually correct this mistake it has made, of conferring hereditary privileges contrary to right, is by letting them lapse and not filling vacancies in these positions. So it has a provisional right to let these titled positions of dignity continue until even in public opinion the division into sovereign, nobility, and commoners has been replaced by the only natural division into sovereign and people. (MdS 6:329).

faith, so too can a government's holding onto a clearly unjust form, and when it does so, others may prosecute their right by war.

By contrast, in the case of international law, as in the case of property, the authorization to coerce in accordance with the idea of the civil condition is not based merely on empirical considerations of stability and the immediate alternatives, which are less likely to move in the right direction. Instead, the authorization is based on the idea that nations and persons authoritatively possess external rights on the presupposition that they are omnilaterally sanctioned, and there are no clear reasons for thinking that the authorization is incompatible with the general will, relative to the alternatives. As soon as there are such clear reasons, the provisional right ceases, and any reasons for allowing the authorization to persist are prudential reasons, and might well conflict with our formal duty to enter a civil condition.

I have argued in this section that the account of provisional rights as imposing only formal duties can accommodate many of Kant's claims about rights in the civil condition, despite appearances to the contrary. A full defense of this claim awaits careful examination of Kant's treatment of the right to resist sovereign power. But we have seen that the simple demand to relate rightfully to others (a demand that can be backed by coercion) can plausibly generate derivative duties to comply with the laws of the land—even if these laws lack conclusive authority, and even if they're defective from the point of view of justice.

VI. Conclusion

In this chapter, I have argued that provisional rights impose only formal obligations, whereas conclusive rights impose material obligations as well. This makes sense of PT's significance: our political duty is to approximate perpetual peace without compromising freedom, i.e., to enter a rightful condition with others. In the light of arguments for PT, it becomes clear why external rights cannot be conclusive in our world. For conclusive rights imply not just formal, but material obligations, and these latter imply rights with respect to specific objects, and a permission to coerce to exclude others from them. But our rights to objects receive their "rational title" from their presumed compatibility with the general will, and given our spatio-temporal boundedness, this can never be simply taken for granted. In some sense, our provisional claims to possess are always subject to revision, because others are always arriving, and the natural environment is always changing. But that doesn't mean anything goes. Our possessions, when held in good faith, give us an authorization to take objects to be ours. But since this authorization is predicated on a readiness to enter a civil condition with others, their objections matter, especially where their own innate and provisional rights are at stake.

The account I'm attributing to Kant analyzes our current political situation as one in which we are still trying to work out a rightful condition with others. Though we can develop claims to things in that context, the presupposition to our doing so is that they be compatible with living on rightful terms with others. To the degree that our circumstances do not allow this (there is extreme scarcity, say), the world is to that degree unjust. We don't wrong anyone by living in it, because, by hypothesis, we did not cause it to exist. But one might worry that much of what I say here is simply

incompatible with Kant's claims about political resistance. The next chapter squares up to this objection by providing a detailed account of political resistance under provisional modes of normativity.

Chapter 5

Political Authority, Political Obligation, and the Right to Resist

> [A] people cannot offer any resistance to the legislative head of a state that would be consistent with right, since a rightful condition is possible only by submission to its general legislative will. There is, therefore, no right to *sedition* (*seditio*), still less to *rebellion* (*rebellio*), and least of all is there a right against the head of state as an individual person (the monarch) *to attack his person* or even his life (*monarchmachismus sub specie tyrannicidii*) on the pretext that he has abused his authority (*tyrannis*)...The reason a people has a duty to put up with even what is held to be an unbearable abuse of supreme authority is that its resistance to the highest legislation can never be regarded as other than contrary to law, and indeed as abolishing the entire legal constitution. For a people to be authorized to resist, there would have to be a public law permitting it to resist, that is, the highest legislation would have to contain a provision that it is not the highest and that makes the people, as subject, by one and the same judgment sovereign over him to whom it is subject. This is self-contradictory, and the contradiction is evident as soon as one asks who is to be the judge in this dispute between people and sovereign (for, considered in terms of rights, these are always two distinct moral persons). For it is then apparent that the people wants to judge in its own suit.
>
> --Immanuel Kant, *The Metaphysics of Morals* 6:320

I. Introduction

Kant's political philosophy is lauded for its compelling approach to outstanding problems in the contemporary landscape despite its particularly austere foundation. Chief among the virtues of his theory, for sympathizers, is its answer to the philosophical anarchist. Philosophical anarchism is a skeptical position regarding the existence of political authority and therefore regarding political obligation. On this view, although there are often good reasons to obey the law—there is no

immediate inference from a lack of political authority to a permission to throw bricks through windows—these reasons do not stem from the law's authority,[144] but rather from the independent desirability of the acts prescribed.[145]

Against this position, Kant's is alleged to hold that "even the most basic rights presuppose a public authority," and so "there can be no objection to authority as such" (Ripstein 2009, p. 326). Since private rights instantiate a primitive version of the problem of political authority (by appearing to arbitrarily restrict others' freedom through mere choice), and state authority emerges as the unique solution to this problem, the grounds of our political obligations in our external freedom emerge clearly (ibid., pp. 23-24). And since for this solution to *be* a solution to the problems in the state of nature, a public authority must have the final say concerning what is "laid down as right" (MdS 6:267), our political obligations imply that we are never justified in actively resisting the supreme authority. For to actively resist is to revert to a state of nature, where unilateral, rather than omnilateral judgment, reigns supreme.[146]

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[144] There are a priori and a posteriori brands of philosophical anarchism. For the a priori philosophical anarchist (often inspired, as it were, by Kant's own writings on autonomy), there are a priori reasons for which no state could ever be authoritative (e.g., their generating obligations would always involve the will in heteronomy: Wolff 1970). By contrast, for a posteriori philosophical anarchists (like Simmons), there are conditions that states could meet such that they would then have the authority to impose political obligations, but no existing state actually meets those conditions.

[145] This is why the position is philosophical, rather than practical: The practical anarchist moves too readily from the claim that the state is not legitimate to the claim that the state ought to be disobeyed.

[146] Treatments of Kant on the topic of political resistance have tended to take one of two forms. First, there are those treatments that undertake to *clarify* and *defend* Kant's position in terms of consistency, normative attractiveness, or both (see: Nicholson 1976, Korsgaard 1997, Flikschuh 2008, Ripstein 2009, and Surprenant 2005, 2015). Second, there are those that describe Kant's view, note its profound unattractiveness, and proceed to lay out an independently normatively attractive Kantian view on resistance, against Kant's actual views, often relying on material from his ethical thought (see: Grcic 1986, Hill 1997, Wit 1999, and Formosa 2008). Despite doing much to clarify both the relevant normative issues and Kant's own view of them, there is reason for dissatisfaction with the treatments on offer so far.

This chapter examines this reply under the assumption that the provisionality thesis holds. Recall that chapters (2-4) have argued that (1) the best reading of Kant's political philosophy upholds the provisionality thesis, namely that in our world all external rights are provisional; (2) that to say that all external rights are provisional is to say that all judgments of right are provisional judgments of right—judgments that hold in the absence of consciousness of their necessity—and (3) that this implies that our rights generate merely formal, rather than material, obligations. I have, in these early chapters, tried to say something about how a reading of Kant along these lines might recast his claims that political authority, even when imperfect, is inviolable. But there is much more to be said on this point, and in this chapter, I argue that, whereas the standard view has it that the gulf between Kant's position and philosophical anarchism is wide, the most attractive version of Kant's theory shares much more

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Views in the second camp despair of finding anything attractive in Kant's juridical views on this point, and seek refuge in Kant's ethical views. This is fair enough, and it might in the end be the only way of reaching a cogent Kantian understanding of these matters. Still, a readiness to collapse important distinctions that Kant was at pains to draw (e.g., that between *Recht* and *Ethik*) should be an exegetical last resort in attempting to uncover an attractive Kantian view.

By contrast (Nicholson 1976 excepted), accounts in the first camp generally respect this distinction, But the resulting accounts are divided amongst themselves concerning both the permissibility of revolutionary acts and its grounds. For Cummiskey (2014) and Korsgaard (1997), revolution is never justified as a matter of right, but sometimes in circumstances in which one is prepared to take the law into one's own hands as a virtuous agent. Against these accounts, it has been emphasized that for Kant all duties or right are indirectly duties of virtue (MdS 6:221), and so it is unclear how this is consistent with the spirit or letter of Kant's account. In a more promising direction, Surprenant (2015), Maliks (2013) and Byrd and Hrushka (2006, pp. 242-244) agree that there is sometimes a moral right to revolt, but deny that it has anything to do with virtuous agency as such. Rather, there is such a right when the state is not upholding the demands of justice. But even on these accounts, the "right to revolt" is not a right against a state, but against a state-like entity. As long as there is a genuine state, Kant's claims hold up. Similarly, Ripstein (2009), Wood (2014), Varden (2007), and Flikschuh (2008), also uphold Kant's view that there is never a right to revolt, arguing that Kant's public notion of right (as against a natural or private notion) rules this out by default. But there is less distance between these latter two families of accounts than one might initially suppose. For the latter family of accounts are at pains to avoid identifying the strongest unilateral will in the neighborhood with a public will that cannot be opposed: merely barbaric exercises of power approximate the state of nature, and the duty there is to establish a rightful condition. Plausibly, the accounts of Surprenant, Maliks, Byrd and Hrushka, Ripstein, Wood and Flikschuh differ concerning the identification of a state. But all agree that it is *only* when something deserves the name that Kant's position entails that it is always wrong to resist.

than is commonly supposed with this skeptical view. Where the Kantian and the philosophical anarchist part ways, the differences are instructive.

Recall: In circumstances of provisional right, our political duties are exhausted by our obligation to enter into a rightful condition with others, or to adopt only those maxims that do not conflict with our rightful relation to them. I have argued that discharging this obligation implies deferring to existing legal institutions when there is broad coordination around them, provided they are non-barbaric. But, importantly, it does not mean that we must see such institutions as peremptory authorities—entities that by their nature cannot do wrong, that impose necessary obligations that exclude our other reasons for action. After all, their rights, like ours under them, are merely provisional, and it is only by means of their power and their instantiating the rule of law that following their orders discharges our primary duty (to maintain a preparedness to enter a rightful condition with others).

By contrast, true political authorities (in the contemporary sense) generate *pro tanto* obligations on the part of their subjects to obey their law simply because they've issued it, and these obligations are generally thought to be exclusionary, i.e., to block other normative considerations from an agents' deliberation (Raz 1979, pp. 16-19). But only when a rightful condition obtains, and the omnilateral will is satisfied, do institutions become true authorities in this sense. Although provisional obligations often resolve themselves into obligations to act *as if* the condition in which we find ourselves were conclusively rightful, that's not the same thing as to say that they are conclusively rightful. What this means is that, although Kant at times sought an argument showing that resistance to existing political authorities was always all

things considered wrongful, the best version of his theory cannot bear the weight of this conclusion. Moreover, reading Kant's theory in light of the arguments pursued in earlier chapter helps to make sense of acts of political violence and resistance, and of a proper ambivalence to those acts.

The paper proceeds in five further parts. § II articulates (1) the notions of political obligation and authority as they are currently employed in contemporary debates, and (2) the philosophical anarchist's challenge. § III articulates the standard account of Kant's reply, and argues that the provisionality thesis complicates this reply, pushing Kant's position closer to the philosophical anarchist than is commonly supposed. § IV argues more systematically that we will do better by the lights of our formal obligations by acting in accordance with existing legal and social norms than by flouting them, and so establishes a sort of quasi-political authority. § V argues that understanding Kant's position in this way implies significantly softening his strictures against active resistance to the existing legal authorities, and § VI concludes by way of some reflections on the relationship between political resistance and freedom.

II. The Challenge of Philosophical Anarchism

It is widely held that political authorities are special entities, insofar as they have powers that no private person could have. They can impose obligations on citizens, punish them when they do not comply, and deploy force to collect funds to support their activities. Moreover, they are generally held to be *the only entities* endowed with these powers.[147] To see more clearly the gross gulf that separates the

[147] Although see Anderson 2017.

normative powers possessed by political authorities and other individuals, consider an example (due to Huemer 2013):

> You live in a small village with a crime problem. Vandals roam the village, stealing and destroying people's property. No one seems to be doing anything about it. So one day, you and your family decide to put a stop to it. You take your guns and go looking for vandals. Periodically, you catch one, take him back to your house at gunpoint, and lock him in the basement. You provide the prisoners with food so they don't starve, but you plan to keep them locked in the basement for a few years to teach them a lesson.
>
> After operating in this way for a few weeks, you decide to make the rounds of the neighborhood, starting with your next door neighbor. As he answers the door, you ask, 'have you noticed the reduction in crime in the last few weeks?' He nods. 'Well, that is thanks to me.' You explain your anticrime program. Noting the wary look on your neighbor's face, you continue. 'Anyway, I'm here because it's time to collect your contribution to the crime prevention fund. Your bill for the month is $100.' (p. 3)

There are two things to notice about the case just described. First, there are significant similarities between the ordinary activity of political authorities (e.g., states) and your family's behavior in the example. Like you and your family, the state claims to be solving a problem that would otherwise remain unaddressed. Like you and your family, the state punishes wrongdoers, for both forward and backward looking reasons. Like you and your family, the state demands payment for its services. Second, however, things seem *different* when the state is the relevant actor: When the state does these things, that is, common sense says that it is justified in doing them. When private individuals do them, they are thugs, and others are entitled, perhaps obligated, to resist them. What could explain the difference?

Huemer suggests two possibilities: First, it might be that the difference lies in the *actions* taken. That is, despite apparent similarities, it might be that your kidnapping is different than the state's imprisonment because the latter, but not the

former, is, say, grounded in promulgated laws and is carried out only after the promise of a fair trial has been fulfilled. However, it appears that even if you and your family delay your activities until the rules are promulgated, and even if you force a jury of each criminal's peers to judge his guilt according to the evidence, your behavior does not become permissible. Indeed, it might look simply more ridiculous, given the further ways in which you take yourself to be entitled to restrict others' freedom (e.g., by obliging them to serve on juries: Huemer 2013, pp. 7-8). The second possibility, then, is that the state is, whereas you are not, a *legitimate political authority* (Huemer 2013, pp. 8-14). That is, the difference in normative valence between what you and your family do and what the state does is to be explained by the different kinds of agents that you are.

Political authority in general refers to the right on the part of an agent to rule, which amounts to a capacity to impose *obligations* on others simply by issuing commands, and to enforce these commands through coercion.[148] So understood, political authorities are either *de facto* or *de jure*. They are authorities *de facto* if they in fact behave as if they have the right to rule and claim such a right (even when their authority is defective from a normative point of view). They are authorities *de jure*

[148] Note that this is at odds with how Ladenson (1980) employs the term: For him, an agent's right to rule need not imply any correlative obligation on anyone else to obey. Rather, political authority is to be understood as a justification right: a right that allows an agent to do something that it would be normally impermissible to do (p. 139). By contrast, Simmons (2001) accepts the correlativity thesis: an agent's authority (Simmons speaks of legitimacy) is logically correlated with duties on the part of those subject to the authority's duty to obey. It is important to see, however, that even though Ladeson denies that political authority implies an obligation to obey the law because it's the law, he suggests elsewhere that it does imply an obligation not to interfere with the operation of law because it's the law. So there's a genuine question about the distance between these views: see Ladenson 1971, p. 382). (Ladenson may have changed his view in 1980, where he presses a line according to which a political entity can possess authority even in cases where citizens are permitted or obliged to resist. I have to admit that I find this logically coherent, but not very plausible. See Ladenson 1980, p. 143.) See also Raz 1986, pp. 25-28.

insofar as they are legitimate, *and ought* to be recognized as authorities (even when perhaps they are not so recognized) (Raz 1979, pp. 5-7). Legitimacy, then, refers to the normative properties or procedures that existing authorities possess if they are to be *de jure,* not merely *de facto*. An authority can be *legitimate* either (a) normatively, namely by satisfying normative constraints on the right to rule, whatever they are, or (b) descriptively,[149] by producing the sense that important normative criteria are satisfied (even when they aren't, or even when they're the false criteria).[150, 151]

What explains the difference between the behavior described in the example and the state's activity (which otherwise looks similar), then, is that the state is, whereas you and your family are not, eligible to possess legitimate authority. It is, whereas you are not, capable of imposing obligations on others and enforcing these obligations through coercion. It is worth saying something about the nature of both these obligations and the authority that is said to generate them. It is widely agreed that it does not suffice to show that one is subject to an authority to show that one has obligations to perform or omit the same actions that the authority commands. For example, most *de facto* authorities prohibit murder, and we surely have an obligation to omit murdering. But the latter need not have anything to do with the former: we would have an obligation to omit murdering even if it were not against the law. We

[149] The dominant account of descriptive legitimacy is given by Weber 1947.

[150] (a) is the only way of creating a *de jure* authority, whereas (b) is but one way of creating a *de facto* authority—the latter need not be underwritten by descriptive legitimacy. A *de facto* political authority might rather exist insofar as the governing body possesses adequate force to carry out the functions of a political authority, claiming legitimacy for itself, even when these latter are recognized to be false by the lights of the population.

[151] These definitions are not especially idiosyncratic. For example, when Simmons (2001) writes that "a state's (or government's) legitimacy is the complex moral right it possesses to be the exclusive imposer of binding [political] duties on its subjects, to have its subjects comply with these duties, and to use coercion to enforce these duties," he seems to accept the general account above. Legitimacy (as a normative concept) explains a state's authority to impose duties on citizens and to coerce accordingly.

have political obligations only to the degree that we have an obligation to obey they law *because it's the law* (Huemer 2013, Raz 1986, Simmons 2001).

Beyond this, most agree that a claim to authority in the relevant sense involves the following further conditions:[152]

(1) Generality: the authority's capacity to impose and enforce obligations is general (it extends to most of the population).

(2) Particularity: the authority obligates citizens *locally* (in other words, I do not have a political obligation insofar as I have obligations to contribute to organizations that satisfy certain structural criteria, wherever they might be, but insofar as I have obligations to obey the commands of a *particular* organization, namely the state to which I am subject).

(3) Content Independence: the agent's authority does not depend on its satisfying substantive content-based criteria of correctness (in other words, authorities can generate obligations to obey bad or wrong laws, at least within a certain range).

(4) Comprehensiveness: the authority has jurisdiction over a wide sphere of human activities (in other words, though it need not have unlimited jurisdiction, genuine political authority governs a substantial range of human activities).

[152] The first five conditions are taken from Huemer 2013, pp. 12-13, but are typical in the literature on political authority and legitimacy. The sixth is due to Raz's famous treatment (1986, pp. 23-24). Not everyone will agree that the six conditions reasonably constrain an adequate notion of political authority. Perhaps the particularity or generality constraint or exclusionariness are overly stringent. There are reasonable concerns in this neighborhood that I largely disregard. For, although I cannot argue for this conclusion here, I take the constraints to be reasonable. There is considerable linguistic oddity in acknowledging a political authority that does not satisfy one or more of these conditions.

(5) Supremacy: within the authority's legitimate sphere of activity, it is supreme (in other words, there is no authority equal to it or above it that is capable of contradicting its commands, within its sphere.

(6) Exclusionariness: the obligations generated are pre-emptory (that is, they aim to "pre-empt or replace individuals' judgment on the merits of a case" (Raz 1986, p. 48).

What renders an entity's claim to possessing this kind of authority in this sense normatively legitimate? In other words, under what conditions is an agent's authority *de jure,* rather than simply *de facto*?

The a posteriori philosophical anarchist occupies a skeptical position, according to which all existing accounts of political authority either (a) fail to satisfy one of the above conditions, or (b) satisfy them all, but do not adequately characterize any existing state. The result is that all existing states lack legitimacy. So far as we can judge at present (awaiting better accounts of political authority) existing states are merely so many *de facto* authorities (Simmons 2001, p. 104). Still:

> Philosophical anarchists hold that there may be good moral reasons not to oppose or disrupt at least some kinds of illegitimate states, reasons that outweigh any right or obligation of opposition. The practical stance with respect to the state, the philosophical anarchist maintains, should be one of careful consideration and thoughtful weighing of all of the reasons that bear on action in a particular set of political circumstances. The illegitimacy of a state (and the absence of binding political obligations that it entails) is just one moral factor among many bearing on how persons in that state should (or are permitted to) act. Even illegitimate states, for instance, may have virtues, unaffected by the defects that undermine their legitimacy, that are relevant considerations in determining how we ought to act with respect to those states, and the refusal to do what the law requires is, at least in most (even illegitimate) states, often wrong on independent moral grounds. (Simmons 2001, p. 109)

Although the philosophical anarchist believes she possesses arguments that show all existing states to be illegitimate, she stops well shy of arguing that there is a moral duty to dismantle the state. Instead, philosophical anarchists can consistently regard states as genuine forces for good in the world (so that many of their behaviors might be justified), even if they fail to be of the proper structure as to generate binding duties on citizens to obey their laws *simply because they are the laws.*

III. A Kantian Rejoinder

On the standard view, Kant's reply to the philosophical anarchist's position is roughly as follows. There is an obligation to obey the law because the law is (at least) a condition of the possibility of our rightfully relating to others, and because establishing political authority is a necessary condition of solving the problem of unilateral judgment that plagues the state of nature (see Chapter 1). To the degree that we do not comport ourselves according to the judgments of the authority, we act on our own private judgment,[153] which is to say that we revert to the state of nature, which is to say that we do wrong in the highest degree.[154] Moreover, Kant's account promises to satisfy each of the six further conditions on the existence of a genuine political authority.

[153] The standard reading of Kant's account of political authority is thus quite similar in terms of its normative concerns to the accounts of democratic authority recently advocated by Kolodny 2014 and Viehoff 2014.

[154] Note that this does not require that we do what we're required to do out of the motive of duty. We can comply with our legal obligations, on the Kantian account, merely by outward conformity with their requirements. There is, however, always the non-juridical duty to perform one's juridical duties from (not merely in accordance with) the motive of duty.

First, it plausibly satisfies generality: All individuals have a duty to simply obey the supreme authority over them, and so the condition that political obligation applies to a majority of citizens is easily satisfied. Second, it satisfies particularity: individuals' duties are to obey the specific authorities they're under. It is only insofar as that's true that the problem of unilateral judgment is genuinely solved: if I owe duties to another state, then questions about priority arise, and if it's ever possible that the duties to my own state do not trump duties to other states, then conflicts can arise, and we have, again, a plurality of judgment. Moreover, since a system of states ensures, through the exercise of its members' coercive powers, that we cannot avoid interaction by claiming some new territory for ourselves, and since we cannot (without violating existing states and persons' rights) claim new territory to start a new state, the only options that remain are to join the state that claims our allegiance or find some other state to accept us as members.[155] To the degree that we do so it is that state that binds us: the "laws of one's own country allow one to rightfully possess things...without subjecting others to one's unilateral will" (Schaefer 2017, pp. 259-260). Third, it satisfies content-independence: the duty to obey the law extends even to despotic conditions, and "a people has a duty to even what is held to be an unbearable abuse of supreme authority," and to endure bad policy when it's made.[156] Fourth, it satisfies comprehensiveness: the sovereign power includes the power to tax citizens, to regulate foreign trade, to make war, to establish welfare programs for those

[155] See Simmons 2013, p. 337.

[156] Though here it is worth remembering: our innate right is conclusive, and entails a right against slavery or maiming. Moreover, barbaric exercises of power do not generate political obligations. But the existence of legitimate political authority is generally compatible with there being limits to its exercise (provided only that there is a sufficiently wide range of issues over which it is decisive).

who would otherwise be destitute, etc. Fifth, it satisfies supremacy: Kant's skepticism about the possibility of a right to resist the sovereign authority is grounded precisely in the argument that any such right would presuppose a power capable of limiting the sovereign, which would therefore either (a) reproduce the state of nature (by having two authorities of roughly equal power with no common judge between them), or (b) imply that the limiting body (not the limited body) was the sovereign, and that it could not be limited. Thus, political authority is supreme. Finally, the obligations generated are meant to be pre-emptive in Raz's sense: the public authority is precisely there to pre-empt citizens private judgments concerning what is right and good, and to coerce citizens accordingly. It is only in doing so that it is able to avoid the problem of unilaterality in the state of nature (Waldron 1999).

However, this response may be too quick. For Simmons (2013, 2016) has argued the Kantian account falters against the particularity requirement, because its way of satisfying it generates a "boundary problem." The boundary problem is a "problem of *over*-inclusiveness for theories of political authority" which "explains the special obligations of those who are naturally identified as members only in a way that also implies political obligations for persons who are plainly *not* bound by members' obligations" (2013, p. 329). The boundary problem arises for Kantian accounts along the lines just described because such accounts understand political authority to be *structural,* rather than *historical.*[157] An account of political authority is

[157] The distinction is due to Nozick's famous criticism of Rawls's structural or "patterned" notion of justice (Nozick 1974). Whereas structural considerations refer to questions about the general desirability of a distribution of goods at a particular time, historical considerations refer to how distributions are brought about (by what processes). Simmons makes clear that the upshot of the Rawls-Nozick dispute is that plausible theories will be hybrid theories, incorporating both structural and historical elements.

structural if authority derives from the kinds of problems political authorities solve, rather than some legitimacy-conferring acts that lie at their foundation. The boundary problem is a special difficulty for those working in the Kantian tradition because

> When asked why I should regard as having legitimate authority over me this particular political society in which I was simply born and raised—that is, why I should accept the "conservative conclusion" about political authority—the Kantian answer is simply that justice requires it... in order to avoid being unjust threats to those around us, in order for all to enjoy non-provisional rights, we must accept the authority of the justice-administering institutions at work where we happen to find ourselves. (ibid.)

This is a *structural* answer to the particularity requirement, because it appeals to general features of states (their capacity to solve the problems facing interacting individuals) to explain their obligation to obey: it expressly does *not* refer to historical considerations concerning how the authority came to be.[158]

But Simmons argues that because the account does not refer to historical considerations, it generates implausible implications. To illustrate, consider an example.

> Imagine that, perhaps citing concerns about national security, the United States somehow managed to move its southern border barriers further south by several miles, declaring the newly enclosed territory to now be part of the United States. The U.S. commences to effectively and fairly administer justice in this new territory and extends full U.S. citizenship rights to all of the (former Mexican) residents of the territory. Mexico of course vigorously objects, but it is unable to do more than that; and after a suitable period of international mourning, this attempted expansion of territorial jurisdiction begins to look successful.
>
> How should we understand the moral position of these newly minted U.S. citizens? Are they bound to support and comply with the basic institutions of the United States, just as we take native-born U.S. citizens to be? (Simmons 2013, p. 341)

[158] As we have seen, Kant actually *bars* these kinds of considerations from view: we are not, in assessing how we ought to relate to political authorities to engage in inquiries concerning the way the authority came to power.

Simmons thinks not: "regardless of the new citizens' feelings about the matter, the unilateral, coercive seizure by the U.S. of the acknowledged territory and subjects of another sovereign state surely constitutes a clear wrong against that state and a clear wrong against those forcibly subjected citizens" (ibid.). Moreover, the "natural moral conclusion to reach about this case is that coercively subjected citizens are not bound by the…laws of their new country" (ibid., p. 342). But Kantian views—because of their pure structuralism—are committed to giving the reverse answer. They are committed to judging, that is, that the new U.S. citizens have political obligations to their new state, and have them just as soon as they find themselves under the rule of its law. Simmons notes that many Kantians would be eager to deny such a conclusion, citing Stiltz (2011) and Waldron (2002), but argues that their theory seems to imply it (Simmons 2013, p. 343). And given Kant's claims about the existence of political obligations to the existing order after revolutions, and his prohibitions on even asking questions about unjustly acquired territory, Simmons is right to worry.[159]

The toy example matters because territorial boundaries in our world were set not simply arbitrarily but in clear and flagrant violation of others' rights (analogously to the example above). Thus the intuitive verdict in the case of the new Americans should lead us to a similar verdict "in the case of many nations' suppression or resistance to secessionist…movements by groups claiming to have been illegitimately

[159] He is also right to note that this conclusion cannot be avoided by arguing that native citizens are but new citizens are not included in the public authority's omnilateral will. Because this is either a formal matter (in which case they are just in case they have full citizenship rights), or a substantive matter (in which case they are just in case as they sign on voluntarily). But then if it's a formal matter, they *are* so included, and if it's a substantive matter, then they aren't, but neither are most citizens (2013, p. 342) If the first is true, then the implausible result is saddled to the Kantian account. If the second is true, then the Kantian account of political authority collapses into the Lockean consent-based account.

subjected to their states' power," and if we do go that way, then it looks like we're going to have to acknowledge that many if not all states are illegitimate (ibid., p. 344). The worry here is that this leaves the Kantian without a clear response to the philosophical anarchist after all. In seeking to provide an account of political authority that vindicates the idea that most of us are obliged to our states, Kantians provide a structuralist account which denies the relevance of historical considerations. But then their theory appears unpalatable. If they revise their theory in a historicist direction (or claim that the structuralist bit of the theory includes historical considerations itself), then they lose out on their desired "conservative" conclusion.

But perhaps Simmons is too quick to deny that the standard Kantian view can acknowledge wrongdoing on the part of the U.S. For even on the purest of structuralist Kantian views, the U.S. does wrong in violating Mexico's territorial rights, as well as individuals' property rights (and possibly the innate right) of the citizens in the region it annexes.[160] But when rights are violated in this way, the entities on the receiving end of the violation have a right of war to resist, and others in the international community may be obliged to support their efforts in resisting. Now, Simmons stipulates that any attempts at resistance fail. The real problem then is that when war fails to secure restitution, it aggrieved citizens can only press to return to their home country through the acceptable channels of reform, but not through further acts of resistance.[161] For war to count as a procedure for dispute resolution, as

[160] Simmons may mean to stipulate that individuals' property rights are respected in the takeover. This would presumably be necessary for the U.S. to then administer justice.

[161] Can they attempt to secede? Here, it depends on the account in question. On many accounts (namely those, like Flikschuh's, Brudner's and Waldron's), the answer will be an institutional one.

Arthur Ripstein puts it, everyone must "accept that past disputes our [*sic.*] fully and adequately resolved, even though their resolution was through force" (2016, pp. 192-193). As a result, if the U.S. declares war on Mexico and takes their territory citing its own national security as a concern, thereby acquiring new citizens, and Mexico exhausts its resources of war, then the new status quo represents the new starting point of right. That should mean that the new U.S. citizens have full political obligations, despite the way they came to be included in the state.

The standard view of Kantian theory, then, has different verdicts pre- and post-hoc. Pre-hoc, the United States is obligated not to extend its territory, and this obligation, if violated, can lead to war. Post-hoc, if the U.S. succeeds and war fails, political obligations will obtain on the part of the new citizens, unjust unilateral acquisition aside.[162] Though this dual aspect can seem puzzling, the idea seems to be: in moving toward conditions of perpetual peace, we need to start somewhere. And if we fail to acknowledge—in perpetuity—that there can be legitimate procedures for adjudicating claims after acts of injustice, then we will fail—in perpetuity—to relate rightfully with one another. But although this might be true, Simmons notes that good sense about having to start somewhere "does not entail that the place we have to start must be one that gives a moral free pass to states for the past wrongs they have done" (ibid., p. 351).

Since they are now under the authority of the new regime, their rights to secession (if they have any) will be delimited in the relevant political constitution (in the actual U.S., matters are notoriously complicated here).

[162] Far from finding this claim puzzling, Ladenson (1980) takes it as a *datum* that authority shakes out like this after serious insurrection: pp. 150-151.

It seems to me that this last point hits home. If states that meet certain structural criteria instantiate peremptory right, then the new U.S. citizens ought to immediately have material obligations to their new state post-war, and obligations equally as strong as the native-born. Following the war, the U.S. obtains a right to defend their new territory coercively, and their right is really a right to the thing. Just as soon as the U.S. manages to bring the new territory under its control, its judgments concerning right are peremptory for its citizens, and they have material obligations to obey its demands.

By contrast, if the U.S.'s claim to have a right to rule is merely provisional (as I have argued), then its rights and obligations are to remain ready for the rightful condition, which means that they are held against others to the degree that they can be justified to them in actual interactions. There are no material obligations to obey the law because it's the law. For recall that to say that a judgment of right is provisional is to say that it holds in the absence of consciousness of its necessity. We take ourselves to be justified to hold property, even though we do not know if our holdings respect the limits on acquisition imposed by the omnilateral will and common ownership of the earth's surface. States take themselves to be justified in holding territories, but are not certain that the obligations they impose are consistent with the omnilateral will. Both individuals and states have duties to remain ready for the rightful condition, and ought to recognize that this opens them up to demands for practical justification. In the case of violating other persons' prior possession, it clearly fails in this. Thus any right that it has to continue governing is grounded in the fact

that we do better by the lights of our duty to remain ready for the rightful condition by allowing it to do so.

It is a necessary truth that we must remain ready for a rightful condition, and a contingent (but robust truth) that falling in line with existing institutions is the best way of discharging this requirement. Concerning the new U.S. citizens, it might be prudent for the new citizens to comply with the existing legal order, and though it might be the case that they have independent obligations to respect their new fellow-citizens' claims, this will be because it is demanded by the readiness for a rightful condition, *not* because it's the law of the land. Indeed, the authority they are now subject to has compromised its claim to even provisional rightfulness by unjustly pursuing its ends. This is a contingent matter, on which citizens are entitled to judge. Thus if there comes a time when, without compromising the order that facilitates further future rightful relations, these prior provisional claims can be respected, then so should they be. The U.S.'s claim to continue to allow the current distribution to continue is on a par with the hereditary nobility's claim to continue until it can be replaced with something rightful. Of course, it is true that, eventually, resistance to the current distributions will become incompatible with a rightful disposition. The point is just that this need not happen immediately.

If this picture is sustainable as a Kantian position, then Kantians need not despair over a failure to establish the "conservative conclusion" about political authority that many Kantians have historically attempted to establish. For a Kantian can gladly admit a qualified affinity with the philosophical anarchist. The first thing to note in this respect is that there is not, on such an account, genuine political

obligation. For if our political duties are exhausted by the duty to remain ready to enter a rightful condition with others and whatever duties derive from that duty (e.g., to obey the law when doing so is required by having such a maxim), then the source of the duties is not the law itself, but something pre-institutional: the postulate of public right and its demand to enter a civil condition. Because genuine obligation in the Kantian system has the marks of a priori necessity and universality, and anything that looks like a political obligation in our world is marred by contingency and particularity, political obligations in our world—to the degree that they exist—are defective qua obligations. Moreover, their being defective matters: For if an obligation does not have the mark of necessity and universality, then compliance with it is uncertainly consistent with our freedom.

The perspective of conclusive right asserts that the finality of political obligations (which belong to the broader class of positive (i.e., not natural) external duties) demands consistency with universal freedom. This means that arbitrary necessitation is to be permitted only to the degree that it is necessary to render further freedom from necessitation compossible. To the degree that this demand is not met, any obligations others claim to place on us are normatively imperfect. On this point, Kant's position shares more, perhaps, with philosophical anarchism than is commonly supposed. Moreover, although we may lack genuinely political obligations—obligations owed to authorities *because* they're authorities, Kant's account shares with the philosophical anarchist the view that, nevertheless, we often have good reasons for complying with *de facto* authorities' dictates. Indeed, as I interpret him, Kant goes further yet: our duty to remain ready for a rightful condition

will imply derivative duties to comply with provisional political authorities, to the degree that doing so is the best way of discharging our obligation to remain ready for a rightful condition. In remaining so ready, we agree that, in general, war is a barbaric way of resolving disputes, even though it remains at our disposal as a means, when necessary. It is true even on a Kantian account that accepts PT, then, that eventually historical claims to possession that have long gone unrecognized will fade into normative irrelevance. But insofar as this is true, it is because it will look less and less plausible that their continued assertion as a ground for upsetting other persons' claims is compatible with a readiness to enter a rightful condition. For as we saw in the previous chapter, life under institutions, once these consolidate, generates new grounds for asserting provisional judgments of right under institutional rules.

Still, many of the doctrines that Kantians wish to accept remain in force, although in a qualified way. The quasi-political obligations generated by the demand to remain ready for a rightful condition satisfy generality, because all seeking to relate rightfully to one another under a political authority will achieve this best by coordinating around the laws of the land, especially those governing acquisition and exchange. If you and I have a dispute over our provisional rights, but both are genuinely ready for a rightful condition, we have a mechanism before us to resolve our disputes without resort to barbaric war. Of course it is true that if you know that the laws will all but guarantee my victory because (e.g.) they're racist, or for some other reason favor me, then you have no material *obligation* to obey the court ruling, and your resorting to force may well be compatible with your readiness to enter a rightful condition. To determine whether this is true, you need to consider whether,

overall, with respect to your formal obligation, you do better to resist or obey. This requires thinking through the implications of resistance: is it better characterized as an assertion of your rightful honor in the face of unjust overreach (as in the toy-example above)? Or is it more accurately characterized as an obstinate insistence on receiving more, where this involves a failure to secure to each what is hers. In all of this there is, of course, the issue of prudence: authorities claiming legitimacy are likely to have a *capacity* to coercively exact their claims, which will often result in a pathologically compelled acquiescence to the current institutions. This will allow the institutions to function, and those subject to them will develop claims to things under them. As those claims develop, it will increasingly be true (at some to-be-specified rate) that one does better to by the lights of one's readiness for a rightful condition to recognize these duties, and to restore to the authority a presumption in its favor, thereby moving pathologically imposed agreement toward agreement consistent with right.

Obligations that derive from our duty to enter a rightful condition satisfy many, but not all, requirements of political obligations. We've seen that they are not genuine obligations to obey the law because it's the law. But because it will often be the case that you relate rightfully to others around you only by respecting the things that they've acquired under the local laws, the account appears to satisfy particularity after all, without generating the severest problems of overinclusiveness. Even if it is strictly impossible, given the provisionality thesis, to do away with the plurality of judgments (the only thing that could do this is their being accompanied by the consciousness of the necessity of some of these), agents disposed to enter a rightful

condition ought to peacefully pursue disagreements over rights. Of course, insofar as they are no more conscious of the necessity of the state's judgment about right than about their own, there may well be conditions under which relying on one's own judgment is the best way of being ready for a rightful condition (e.g., in the case of unjust annexation). Still, as the state trends in closer conformity with the demands of reason, these conditions will necessarily be increasingly infrequent.

Such obligations satisfy content-independence because the provisional authority, we know, will not always legislate in lines with perfect justice, and there will still be good reasons to obey its dictates. In particular, though imperfect, there will be many coordination problems that even defective states can solve through clear decrees (e.g., traffic laws; compare Raz 1986, p. 30). Now it's true that the level of content independence is here less determinate than in the typical Kantian picture. For much hangs on the difficult question of how far compliance with a provisional authority's unjust commands is necessary to maintain one's rightful disposition. There is room here for alternative accounts to develop in different directions. Still, we can be confident that some degree of content-independence will be achieved.

Provisional obligations are comprehensive because, once there is a provisional authority, it has jurisdiction to make and enforce laws concerning a wide range of human activities (especially concerning acquisition and exchange), even if it must remain open to outside justification, and even if the obligations that it imposes fail to hold with material necessity. Despite failing in its internal obligations to its citizens (to legislate in line with the original contract) or its external obligations with respect to outsiders (to voluntarily enter an international association of nations, and

to comply with duties of cosmopolitan right), a state can begin to legitimate in one of two ways: (1) it can genuinely begin to solve some of the problems in the state of nature: it can be a genuine site of the unification of wills, and it can amass its power through more or less legitimate channels; alternatively, (2), it can simply come into being through force (this is the way Kant thinks things have actually gone). In so coming about, it doesn't thereby acquire legitimate authority, but it can bring about a people's submission to law. So far as it does so, there will be no obligation to obey, and it might even be that one has an obligation to resist. But so far as one pathologically complies with such an entity, over time, its subjects develop claims through prolonged possession, and it begins to transform into the kind of entity, the subjects of which do better by the lights of their duties to reform it rather than to continue to assert their own provisional rights against it.

Similarly, provisional authority satisfies supremacy in the sense that, over a particular geographical region, as long as the state's presumption to rule stands, other provisional authorities have duties not to interfere with its internal affairs. This duty derives from the fact that they receive their provisional right to rule from its being the best way to discharge the obligation to remain ready for the rightful condition, and a large part of what it is to discharge this obligation is to refuse to adjudicate disputes with force, and to maintain a commitment to securing each in what belongs to her. Therefore, under normal circumstances, attempts to challenge the provisional authority will be put down, and justifiably so insofar as these are not compatible with maintaining a rightful disposition.

What about premptiveness? While the obligations the authority imposes are imperfect, they will *claim* to pre-empt individual judgment on matters, and do this through their providing coercive incentives for compliance. Provisional authorities coerce individuals to adjudicate their disputes by the laws of the land, etc. Thus, though the provisionality thesis entails that our freedom is always in certain ways imperfect, and though our obligations have a different character under it (derived as they are merely from our duty to discharge the postulate of public right, rather than the peremptory right to rule on the part of the public authority), their scope and practical requirements are on the whole, similar. But all this might seem to have been put forward in a somewhat assertoric mood, and has turned crucially on the assumption that we always do best by the lights of the latter duty by obeying the constituting authority. Have I really given much of a reason for thinking this is true?

IV. Readiness for a Rightful Condition and the Duty to Obey

In this section, I want to try to substantiate the claim that we very often do better by the lights of our duty to enter a rightful condition by acknowledging the provisional authority of those over us than by not doing so. This task will require saying some things about the nature of *de facto* authority, and its being a precondition for *de jure* authority, and it also requires, I think, going beyond anything Kant said. It is clear how provisional authority mitigates (though it does not solve) the problem of unilateral judgment among domestic citizens by laying down law according to (even if it is unilateral with respect to outsiders, and even if, indeed, it does itself originate merely in a unilateral exercise of force), and it is clear how it further solves that

problem by providing assurance that distribution will be according to those laws that are laid down, enforced as a mechanism for conflict resolution. But it does these things, apparently, in part by assuming sufficient power to legiti*mate* (descriptively speaking), and this raises questions about its (normative) *legitimacy.* Kant seems to hold, with Raz, that although assuming *de facto* authority is a precondition for establishing *de jure* authority, it is not a sufficient condition (Raz 1986, p. 75).

Still, Kant's view seems to be that when there exists a *de facto* authority, we do best by the lights of our need to usher in a *de jure* authority to respect it as provisionally rightful. The goal of so acting is to begin

> the foundation of a mode of thought which can with time transform the rude natural predisposition to make moral distinctions into determinate practical principles and hence transform a *pathologically* compelled agreement to form a society finally into a *moral* whole. (IUH 8:21)

Because we find ourselves in circumstances of barbarism or despotism, where freedom is realized imperfectly if it is realized at all, we find ourselves in *pathological conditions.* For Kant, a pathological condition is opposed to a condition of freedom (GMS 4:413, KpV 5:20-21). In ethics, the paradigm case of a pathological condition is when one's will is determined by the object of one's sensible desire. In existing civil societies, our 'agreement' is pathologically compelled owing to its origins in force and contingency, rather than freedom. In acknowledging a duty to obey these structures nonetheless, one commits oneself to move beyond pathology to freedom, even if a complete transition must remain impossible. By acting under the idea of a rightful civil constitution, one refuses to see all relations between human beings in terms of power relations, and refuses to act as though any one unilateral will is binding on

others.[163] By so ensuring one's disposition to enter a rightful condition, one thereby discharges one's obligation of provisional right. Kant's view is that (1) our acting as though the object of an idea of reason were before us is a necessary condition of (2) the transition from a social body that exists due to pathological conditions (like power relations) to one that is constituted by relations of right. But because the omnilateral will is something we approach only through political action, and because we never realize a situation in which our duties are seen to fully accord with this idea, we never quite make the transition.

Kant's claim that we are to obey whatever legal authority we find over us might seem puzzling in light of this: If such authorities do not even clearly represent the omnilateral will, what claim could they have to our acting in line with their laws? First, note that, despite failing to secure conditions of freedom, any place where there is law,[164] there is at least some degree of assurance that what is recognized to be yours will remain yours, and a number of institutional bodies to which you can appeal should the institutional rules not be complied with.[165] Thus, any instance of stable (innate right respecting) law provides recourse for resolving disputes and some distribution of claims. This means that when I find myself in a dispute with fellow citizens, there is some place (beyond our disagreement) to which we are able to turn, and so we need not merely trade unilateral claims. This is a necessary condition of right.

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[163] Of course, the paradox that Kant's reviewer and his readers since have recognized is that the very means of refusing to recognize the authority of a unilateral will is *exactly* to recognize the authority of a unilateral will, acting as though it is something otherwise.

[164] Here, Kant employs a technical sense of law, according to which it is universal and non-arbitrary.

[165] This makes clear that tyrannies that arbitrarily take citizens' property do not count as lawful in the relevant sense, and must be described as barbaric.

Of course, any existent legal order might be very unjust—it might fail to respect provisional claims to right, and it might fail to respect the freedom of the press, and it might fail in any number of other ways. But notice (and this is the second point): establishing a stable legal regime depends in a non-trivial sense on making that legal regime acceptable to citizens (else they would continue to fight back, and forego submission). Now, it's true that this is a thin protection against tyranny, but it is important that the shape of the emerging legal order must make a degree of sense to those subject to it: It must succeed in (descriptive) *legitimation,* if it is ever to succeed in achieving *de facto* authority, or else it will rule *merely* by force, in which case it will be barbaric. Moreover, those legal orders that will make sense to individuals will be those that do a tolerable (even if highly imperfect) job respecting their claims to right, provide a framework for their pursuing their purposes (jointly with others or alone) and provide justification or compensation where they cannot be upheld. There is no guarantee here that citizens' good-faith claims end up fully respected. But, and here's the crucial point: if those good faith claims (those put forward in view of their aspirational compatibility with the general will) were *not* protected by the (now stable) existing regime to some degree, that regime would be acting wrongfully, and would have an obligation to bring itself in line with these claims as soon as doing so would not be counterproductive relative to its other aims (Weinrib 2013). It's only that this wrongfulness would not change the fact that individuals might do better by the light of the full scope of their duty to enter a rightful condition to treat it as rightful, rather than by resort to war. But Kant is clear that as long as it is *solely* force that motivates

the putative authority, it is perfectly consistent with one's material duties to respond in kind (TP 8:306). For then it is the putative authority that violates its formal duties.

If we begin with the idea that our social origins are barbaric (where natural normative equals are engaged in relations of domination and subordination, where freedom as independence is not widespread, if it exists at all), despotism takes on a different light. Here, though the law does not guarantee universal freedom, at least there *is* law backed by force—there is some promulgated verdict on what ought to be done, and so expectations can be settled, and there is a framework for reform; disagreement does not issue in chaos.[166] The point isn't that "lawlike" conditions can never be worse than anarchic ones. The point is that these features of even despotic law instantiate necessary conditions of the idea that reason makes it a duty to approximate. For recall: the problem that a civil condition is supposed is that our complete independence is not compossible in the state of nature. In order to render it compossible, we need mutual assurance, we need a way of resolving disagreement concerning rules of acquisition, and we need these goods to be provided in such a way that they issue meaningfully from a public will. The concentration of power that characterizes even despotic states begins to address the assurance problem,[167] and their forcing coordination on one set of laws begins to solve the indeterminacy problem.[168] What a despotic state assures us of is not our rights as they might be

[166] On this point, see Waldron (1996).
[167] I take it that a perfect solution to the assurance problem is practically impossible. As long as human beings must apply and execute law, there will always be inequalities of assurance and gaps in assurance.
[168] For reasons that H.L.A. Hart makes clear in *The Concept of Law,* I take it that positive law is never fully determinate. Moreover, this might be a good thing. For this reason, the fact that determinacy comes in degrees and is unlikely to be fully instantiated does not incline me to think that positive law cannot provide a fully satisfactory solution to the indeterminacy problem. This makes it rather unlike the assurance problem, although Kant treats positive law as a panacea for both.

determined abstractly, but our rights as actually determined by positive law. But because we have not—most of us—been able to claim things in ways other than those determined by positive law, most of us do not have a claim to external rights that the state is not respecting. Despotic conditions may be imperfect, they may be, indeed, rife with injustice, but to the degree that they possess basic features of lawfulness that also happen to be requirements of a regulative idea that we must approximate, they provide the necessary scaffolding for building a just constitution.

Moreover, the mere presence of law is associated with a particular sort of universality, i.e., a sense that like cases ought to be treated alike, and that what holds for one ought to hold equally for another in similar circumstances, and universality is a clear requirement of right on the Kantian account. There may, of course, be laws that insist that certain morally irrelevant features can ground distinctions between persons, and that may treat cases which are really alike differently on the basis of those distinctions. Still, granting the spurious distinctions, cases that are alike under them must be treated as such. Otherwise, there is no law, but merely arbitrary power. Moreover, for there to be law at all, there needs to be social control of a certain kind, and this sort of control has certain preconditions. As H.L.A Hart put it:

> If social control of this sort is to function, the rules must satisfy certain conditions: they must be intelligible and within the capacity of most to obey, and in general they must not be retrospective, though exceptionally they may be. This means that, for the most part, those who are eventually punished for breach of the rules will have had the ability and opportunity to obey. Plainly these features of control by rule are closely related to the requirements of justice which lawyers term principles of legality. (1961, p. 207; compare Fuller 1964, *passim*)

On the Hartian view, there is less distance between the positivist and anti-positivist views than there might have otherwise seemed. That's because the very normative

conditions that anti-positivists take to be requisite for there being law are also the kinds of social facts constitutive of positivistic Hartian legal orders.[169] But to the degree that this is so, we might recognize that there are significant justice-related benefits of the existing legal order, even if this legal order is not the one that would be chosen in abstract, idealized circumstances. In other words, we can grant that a regime falls short of our normative goals while denying that this is a sufficient reason for going another way. Kant seemed to think along Hartian lines: conditions of despotism, even when they're quite bad, begin to approach republicanism; as they improve gradually, all the better.

Now, these reflections, with their emphasis on outcomes might seem to be out of place in Kantian system that is distinctly anti-consequentialist. But when those outcomes possibly involve compromising a framework that allows rational progress toward perpetual peace and lasting rightful relations, and respect for duties of right, their relevance becomes salient. It's not only that law is instrumental to some goods. Rather, it's that law of some shape or other is a necessary condition of ensuring

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[169] Of course, Hart is clear that these social conditions are compatible with gross injustice. But this actually gets things right: as we move from a lawless situation, we stand to gain certain benefits, but these are not *gratis*.

> Reflection on this aspect of things reveals a sobering truth: the step from the simple form of society, where primary rules of obligation are the only means of social control, into the legal world with its centrally organized legislature, courts, officials, and sanctions brings its solid gains at a certain const. The gains are those of adaptability to change, certainty, and efficiency, and these are immense[169]; the cost is the risk that the centrally organized power may well be used for the oppression of numbers with whose support it can dispense, in a way that the simpler regime of primary rules could not. (ibid., p. 202)

Once this threat is introduced, it is clear that while a society must offer "*some* of its members a system of mutual forbearances, it need not, unfortunately, offer them to all" (p. 201). But as I have stressed, so far as it does not offer these forbearances, it will not be the case that the oppressed do better by the lights of their duty to remain ready for the rightful condition to submit than to resist (though they still may (or may not) do better by the lights of prudence), and similarly with respect to the dominant. Indeed, it might be that insofar as they recognize ill-gotten gains from the oppression of others, they do wrong to keep them.

compossible freedom.[170] But though it's surely true that *de facto* law is a necessary condition of *de jure* law, it is not a sufficient condition. Law must meet certain substantive criteria and given that there are other conditions, we must ask: is it never rational to fail to comply with an existing system of law for the sake of bringing into existence a new regime that is more in line with these further conditions? I take it that on my reading, the point is not that such is never rational. The point is to direct our attention to the *achievement* that it is to have a body of coercive law in the first place (Huber 2017). For this does represent a step out of the state of nature, and there is a single focal point with respect to which to direct reforms. To undermine these kinds of structures is to have an extraordinarily high degree of confidence that the result of undertaking an act with very uncertain consequences will result in a state of affairs that is not only also legal, but also better by the lights of right, and that does not tacitly authorize dissenters to do the same. Moreover, it will almost certainly result in wrongs to particular persons, insofar as revolt is violent, and innate right imposes material obligations to refrain from violent acts.

Still, it's not the case that the status quo is particularly special: if we are confident that things might improve, we ought to move in that direction. Kant agrees: Citizens have a duty to push for reforms in the direction of pure republicanism, and those in charge have an obligation to give way as soon as doing so is compatible with

[170] Does this commit to an implausible view about the normative place of a certain set of necessary conditions (e.g., law) over other necessary conditions (e.g., freedom, respect for provisional rights)? No. The question of when, all things considered, one discharges one's duty to remain ready for a rightful condition requires a complex judgment. My claim in this section is only that there are good reasons for doubting that unlawful behavior is often compatible with discharging this duty. It is not my claim (as it sometimes appears to be Kant's claim) that as a matter of a priori necessity, obeying the lawful order allows you to do best by the lights of your duties of right.

the stable persistence of the first steps taken. If the latter fail in this, allowing injustice to persist longer than necessary, we may still have reason to uphold the stability of the status quo (to the degree that in doing so one is less likely to be wrongfully related to others by doing so), and doing so may be instrumentally rational (to the degree that compliance with the existing legal order allows one to avoid certain costs). For Kant existing legal orders possess normative features according to which they provide necessary preconditions for the realization of right. This suffices to make them sites of provisional rights, just as conditioning my possession in the state of nature on its compatibility with the omnilateral will makes that possession provisionally rightful.[171] But any duty we have to uphold an unjust status quo (where a path to reform exists) is a duty grounded not in the fact that the sovereign can do no wrong, but rather in the fact that reform through alternative means is highly uncertain, and that one cannot undertake alternative means without upsetting at least some provisional claims oneself.

If what I've been arguing is correct, then one reason that we will often do better by the lights of our duty to remain ready for a rightful condition by following the positive law of the land is that the latter instantiates necessary conditions of right. Still, the fact that the rule of law represents a necessary condition of right action does not mean that anything which compromises it (no matter how little) must be prohibited. Indeed, what you should do when you've got merely necessary conditions of right on hand is a complicated question, involving a number of factors, the importance of which the Kantian theory highlights well: has the existing regime

[171] That isn't to say that they any particular arrangement is necessary, but that there are formal constraints that are necessary, and that legal orders satisfy these.

recently violated provisional rights? Do the laws protect everyone over whom they have authority? Is there a way from where we are to a fuller realization of just political principles? Although my own judgment is that things are unjust, do I have in this set of laws a meaningful framework for reform? If others were entitled to disrupt the legal order for these kinds of reasons, could stability ever result, or would we merely trade periods of time in power? Etc.

As fellow traveler James Buchanan has it, to the degree that answers to these questions favor the existing regime, we ought to have "legitimate faith in...improvement within limits, faith in progress tempered by reason," while avoiding a temptation to romanticize the political sphere (Buchanan 1975, p. 118). To the degree that persons succeed in regarding our institutions in this way, they learn to "live with the institutions they have while seeking change in orderly and systematic fashion" (ibid.). To grip on to this hope for improvement is to do one's part in transforming pathological conditions to moral ones. We de-romanticize the sphere of politics, look at it with a clear head, and see that even under those conditions, there's something worthy of our effort.

V. Political Obligation and the Right to Resist

Although I think the account thus far developed makes good sense of many of Kant's positions, it is beyond question that he regarded any active resistance, even to defective political authorities as being wrongful, claiming that there is an absolute duty to obey the authority one finds oneself under. And indeed, sympathizers with the Kantian position on this front are likely to object that this account leaves far too

much to individual judgment. Not only does do these considerations cast aspersions on the exegetical work undertaken earlier in this dissertation, but they also raise important philosophical objections to a Kantian account developed along these lines. In this section, I argue that Kant's arguments cannot support the weight of the conclusions regarding the necessary wrongness of active resistance that he seems to wish to rest upon them.

To get a grip on Kant's views concerning political resistance, it is helpful (following Nicholson 1976) to pose two questions. First, we might ask if there is a (legal) right to resist the sovereign authority. Second, we might ask if it is ever (morally) right to resist the sovereign authority.[172] Kant answers both questions in the negative. On the first point, Kant offers the following *reductio* argument.[173]

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[172] Though Kant's general answer to this question is no, it is important to note two caveats. The first is that citizens are at liberty (and are plausible obligated) to disobey any orders that require them to do anything in itself immoral (MdS 6:381, *pace* Wit 1999). Such disobedience is *passive,* for (like critiquing the legislative body with the pen) it does not involve taking active steps to compromise the rightful condition (if it exists). Thus it is only active resistance to which Kant objects. (This, of course, is of little comfort for those who wish Kant had espoused more liberal views concerning the right to revolt.) The second is there may be situations in which the "*dethronement* of a monarch can still be thought of as if he had *voluntarily* laid aside the crown and abdicated his authority...the people who extorted this from him have at least the pretext of *a right of necessity*" (MdS 6:320n). This suggests that there are certain conditions in which things get so bad that the dethronement of a monarch is possible. But notice: This right of necessity presupposes that the sovereign has acted in such a way that he has given up his sovereignty. Thus, allowing dethronement in these circumstances does not amount to allowing revolution *against the sovereign* (*pace* Surprenant 2005).

[173] It is worth noting that the remarks quoted below on the wrongness of resisting the sovereign authority are contained in the section of the *Doctrine of Right* labeled "General Remark" (*Allgemeine Anmerkung*). For Kant introduces the *Doctrine of Right* with the disclaimer that the "remarks" in the *Doctrine of Right* (*Anmerkungen*) will contain treatments of "rights taken from particular cases of experience," whereas the main text will contain discussion of rights that can be given an a priori foundation. This is to allow the reader more easily to distinguish "what is metaphysics here from what is empirical application of rights" (MdS 6:205-206). In addition to the bulk of Kant's remarks on revolution, the following topics fall into this category: (1) the prohibition against inquiring into the origin of supreme authority (MdS 6:318); (2) regarding the head of state as having only rights against subjects and not vice versa (MdS 6:319); (3) the fact that after a successful revolution duties are owed to the new powers that be (MdS 6:323); (4) the duty to regard the sovereign as the supreme proprietor of the land (MdS 6:323-324); (5) the right to tax (MdS 6:325); (6) police power (ibid.); (7) the right to found programs for provision for the poor (MdS 6:326); (8) distributions of offices, dignities and the right to punish (MdS 6:328). How precisely Kant takes these cases to be related to experience, rather than metaphysics, is not exactly clear. But perhaps, in the case of revolution, this provides some reason

> For a people to be authorized to resist [the sovereign authority], there would have to be a public law permitting it to resist, that is, the highest legislation [the sovereign] would have to contain a provision that it is not the highest and that makes the people, as subject, by one and the same judgment sovereign over him to whom it is subject. (MdS 6:320; compare: MdS 6: 319, TP 8:302-303, Ref.: 7769)

To see the force of this argument, it is important to note that, for Kant, the sovereign is the highest legislator. The *reductio* functions by supposing for the sake of argument that the people have a right to resist the sovereign understood in this way. Now, to think of a people's right to resistance against the sovereign is to think of an authorization to limit the sovereign by coercive means, for to have such an authorization just is to have a right (MdS 6:231). But any agent X that possesses such an authorization over another Y would have to have a kind of legislative superiority over Y. Whatever kind of entity Y might be, then, it certainly cannot be a sovereign entity.[174] For the sovereign is—*ex hypothesi*—the highest legislative authority.[175] Of course, as Kant acknowledges, Y may well be the head of state and X well may be the people. But he is clear: if (under these conditions) the people can resist, dethrone, or reform the policies of the head of state, the people—not its head—must be sovereign (MdS 6:317).[176] But then their resisting the head of state consists not in their revolting against him, but in their exercise of sovereign authority.

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for thinking that Kant's considered view is closer to the one I develop here than I am willing to suggest in the main text.

[174] This assumes, of course, that there can only be one sovereign authority. If sovereignty could be divided (x is sovereign with respect to domain A, y is sovereign with respect to domain B) then Kant's argument would not follow.

[175] One reply to this argument, suggested in some of Vattel's remarks about sovereignty, is to simply deny that there can or ought to be a highest legislative authority so understood.

[176] It is thus that Kant thinks democratic governments necessarily despotic, for they do not (as republican governments do) separate the legislative, executive and judicial authorities in the right way (see: TP 8:352).

In advancing this argument, Kant owes a considerable debt to Hobbes, who claims that the concept of limited sovereignty involves one in an infinite regress: For to "setteth...Lawes above the Soveraign," requires setting "also a Judge above him, and a Power to punish him; which is to make a new Soveraign; and again for the same reason a third, to punish the second; and so continually without end" (L XXIX, 170). Kant and Hobbes agree that in any case where it appears that the people can limit the sovereign, they simply *are* sovereign limiting a monarch who is not herself sovereign (L XXVIII, 93). Vattel and others (e.g., Beck 1971, Hill 1997) criticize this argument for being overly legalistic. At best, it appears to secure only the limited point that there can be no formal law permitting revolution or resistance. But for his part, Kant is clear that his remarks on resistance do not end with the observation that a legally recognized right to resist is absurd. For Kant, "a people has a duty to put up with even what is held to be an unbearable abuse of supreme authority" (MdS 6:320).

To secure this further conclusion (a negative answer to Nicholson's second question above), Kant appeals to the fact that a unilateral will cannot (with right) place others under constraint (Korsgaard 1997, Flikschuh 2008, Ripstein 2009).[177] This is because absent some common authority, each individual is at liberty to "do *what seems right and good to it* and not to be dependent upon another's opinion about this" (MdS 6:313). But since (i) even well-meaning individuals will disagree about what is right and good, and (ii) each needs to appeal to what is right and good in

[177] Strictly speaking, the passage at MdS 6:320 admits of a reading according to which the duty to endure abuses by a sovereign authority does not rule out an all things considered moral permission or obligation to resist. According to that reading, the duty to put up with abuses of authority is a *pro tanto* duty that might be outweighed by other (moral) considerations. This reading is hard to square with the way Kant expresses himself, however. He never acknowledges that the duty might be weighed in this way.

justifying her other-regarding actions, (iii) individuals will disagree about the justifiability of their actions. And because (iv) even well-meaning individuals who disagree with one another but are committed to rightful resolutions of their conflicts must eventually resort to force to protect their claims, (v) unless each enters into a condition in which "what is to be recognized as belonging to [each]" is determined by someone other than the interested parties themselves, the lives and possessions of all will be insecure.[178]

Notice: A unilateral will cannot determine what belongs to each, for if it could, this would involve one person determining for all others what is right and good with respect to possession, which (per ch. 1) would amount to an arbitrary restriction of freedom. But this violates the natural equality between human beings that stipulates that none is born subservient to any other. For Kant, the only thing that can possibly represent more than a unilateral will is an individual or group of individuals that purports to *represent* the collective will of all individuals that might interact. But in our imperfect world, the closest fit is the states under which individuals find themselves and the claims that individuals make to things presupposing their consistency with such a general will. And though Kant thinks that states vary greatly in terms of legitimacy, he also thinks that citizens lack standing to make actionable judgments[179] about their states' legitimacy (TP 8:299; compare Hobbes, L XXII, 115).

[178] Kant notices two problems here: the first is the traditional assurance problem, the second is a problem about the conditions of imposing obligations on others. Since there is no natural authority to which we owe allegiance, any obligations we accept must be reciprocal obligations. But in order to recognize reciprocal obligations to respect the property of others, we need to know where their rightful claims begin and end.

[179] By actionable judgments I mean judgments that can serve at the basis of practical activity, particularly activity that can bind others, including but not limited to active resistance. Kant cannot hold that individuals lose their right to judge their governments full stop, for otherwise his comments in the same piece concerning the freedom of the pen would be impossible to account for.

What this means is that it is not available to Kant to allow that it can be right to revolt when and only when an individual judges her government to be illegitimate, or even when and only when they all agree in this (*pace* Formosa 2008). For even when they all agree (i.e., even in the best case scenario), their resistance amounts to unilateral action. Thus, right must condemn such resistance. And since it is a duty of virtue to comply with all of one's duties of right, Kant cannot hold that the virtuous person, *as such,* resists the sovereign power under these conditions, even though she might do wrong thereby (*pace* Korsgaard 1997). Kant concludes that human beings have a duty to obey whatever power they find above them (MdS 6:319).

On this account, it is not because individuals transfer their rights by some voluntary act that they lack a right to judge the legitimacy of their governments with a view toward resisting them. Instead, we lack a right judge in this way because our reserving that right typically undermines the rightful condition that depends for its ability to solve the problems in the state of nature on its capacity to replace individual judgment. If our interactions are regulated by certain institutions, and I always reserve for myself the right to defect when things don't go my way, I reveal a wish to remain in a state where private judgment is authoritative. To reserve a right to judge actionably the sovereign is to reserve the right to refuse to acknowledge its judgment as final, and, on the basis of that refusal, to retain one's own freedom to do what seems right and good. But that is to guarantee that one remains in the state of nature.

But things, I want to argue, look different if it turns out that the sovereign state does not actually represent the omnilateral will, but is merely an attempt to get closer to it. For under those circumstances its right to rule is not judged to obtain in a

peremptory manner—that is, in a manner that renders all conscious that its claims about rights and duties are necessary. Still, so far as we ought to enter a rightful condition, and so far as states represent structures by means of which we can avoid some of the problems in the state of nature—without solving them for all, a Kantian account that accepts PT ought also to accept considerable, but derivative, obligations to affirm the existing authorities.

In particular, although Kant seems to be on fairly solid ground in thinking that our duty to progress toward conditions such that we bind one another arbitrarily as little as possible, I want to argue that he is not on similarly solid ground in holding that citizens lack standing to make actionable judgments[180] about their states' legitimacy (TP 8:299; compare Hobbes, L XXII, 115). It is true that any such judgment would be unilateral. But if what matters for securing omnilaterality is subscription only to those constraints on freedom that enable our independence to be compossible, then there is no conceptual guarantee that a despotic state satisfies this requirement. But if a despotic state does not necessarily satisfy this requirement, then one effectively has two options: one can defer to the authority, in which case one is relying on a multilateral judgment that is not one's own, or one can decline to do so and rely on one's own unilateral judgment. But in selecting the latter course, it is false that one must will that private judgments continue to be authoritative. One might instead will that the omnilateral will be authoritative, but deny that the state is a representative, because, e.g., it denies one's rights. Given that all action in the realm

[180] By actionable judgments I mean judgments that can serve at the basis of practical activity, particularly activity that can bind others, including but not limited to active resistance. Kant cannot hold that individuals lose their right to judge their governments full stop, for otherwise his comments in the same piece concerning the freedom of the pen would be impossible to account for.

of appearances begins by being unilateral (varying only in its degree of generality), the best that can be made of Kant's position against revolution is that we should take the bar of justification in taking unilateral action that compromises already achieved unity to be very high. The bar is high because provisional authorities, like provisional property, have a presumption in their favor. This presumption is not absolute, however, and is always predicated upon on the authority's willingness to secure the rights of all.

It is important to notice that this high bar is not high because individuals transfer their rights by some voluntary act.[181] Instead, the bar is high because moving

[181] In dissociating our reasons to respect the sovereignty from the state's contractual origin and functioning, Kant sides with Hume and parts company with Locke and Vattel, both of whom think that the authority of the sovereign is tied to its moral personality, which is in turn contingent on its upholding the original contract. For these authors, the sovereign of a nation becomes so when a political body transfers its understanding and its will to some individual or group of individuals, thereby constituting a new moral person (*The Law of Nations or the Principles of Natural Law,* Ch. IV, § 40). Vattel describes the sovereign as "[t]he soul of society," and the appropriate object of deference and veneration (ibid.; compare: Locke STG § 212). For "if he be not held in veneration by the people and his life placed in perfect security, the public peace, the prosperity, and the safety of the State are in continual danger" (Ch. IV, § 50). The person of the sovereign must be "sacred and inviolable" because if individuals take themselves to be permitted to act against its decrees, instability and insecurity will result (ibid.). Still, this does not stop Vattel (as it did not stop Pufendorf or Locke before him) from affirming that the people are justified in restraining a sovereign "whenever he goes beyond the limits prescribed to him" in the fundamental constitutional laws issuing from the original contract (Ch. IV, § 51). For then, the sovereign has in a genuine sense lost its moral personality.

The reason is as follows. In deciding to appoint a head for the purpose of their better preservation, the people choose also to subject themselves to a constitution. Once in place, that constitution determines how laws governing the political body are to be made. As long as those fundamental laws are upheld to a greater or lesser degree, the people's pact generates an obligation to comply with the laws, even when the particular (civil or public) laws do not align with the public's own judgments concerning justice and injustice. But when the sovereign breaks the fundamental, constitutional laws, he thereby breaks the contract and invalidates the promise that grounded their obligation to obey. For these reasons, Vattel asserts that no "thinking writer whose pen is not under the influence of fear or of self-interest" would deny either the people's power to limit the sovereign authority or the right to revolt that is consequent on the same grounds. Of course, being familiar with Hobbes, he must have been aware of the literal falsity in this statement, and indeed goes on to note that those that *do* deny the possibility of limited sovereignty, do so under the auspices of conceptual arguments like those advanced by Kant and Hobbes (see above). But since those arguments rely on a notion of sovereignty as being absolute, he sees that the best solution to it is to deny that concept of sovereignty (*The Law of Nations or the Principles of Natural Law* § 51). Instead, sovereignty has two aspects, for Vattel. First, sovereignty is that authority in an association that "regulates and prescribe[s] the duties of each member with respect to the object [read: purpose] of [their] association" (§ 51). Second, every *nation* is a *sovereign nation* that "governs itself...and...does not depend on any other

ever closer to omnilaterally imposed obligations requires coordination on a single set of norms, commonly enforced, even if it requires things beyond this. If our interactions are regulated by certain institutions, and I never accept the rules as authoritative, it is possible that my maxim is to remain in a situation in which private judgment reigns supreme. But it is also possible that my maxim is to enter a rightful condition, and the current arrangements do not secure me in what is mine. Still, so far as we ought to enter a rightful condition, and so far as states represent structures by means of which we can begin to overcome the problem in the state of nature—without solving it once and for all, a Kantian account that accepts PT ought also to accept considerable, but derivative, obligations to affirm the existing authorities.

This isn't, of course, to deny that Kant appeared to want to derive a stronger conclusion. Indeed, an early reviewer of *The Doctrine of Right* (to whom he

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nation" (*The Law of Nations or the Principles of Natural Law,* Ch. 1 § 4). But neither of these aspects rules out that the sovereign of a nation or a sovereign nation might be limited (internally or externally, respectively).

Without trying to completely resolve this disagreement between Kant and Vattel, we can at least note why Kant does not find this picture wholly satisfactory. For Kant, what's essential in having a sovereign authority is its aspiration to represent the united will (a will which is in fact united a priori). Now, recall Vattel's claim that the sovereign authority is the authority that gets to prescribe to citizens their duties. Kant agrees, but thinks that if the sovereignty can be limited by another body that assigns to citizens duties concerning the common good (namely when it is permissible or obligatory to revolt), then there is no one authority that tells them what they ought to do. One, by its nature, says obey; the other, disobey (under such and such circumstances). If neither has priority over the other, then it appears that to resolve the conflict, there would have to be some third authority to which each body (the people on the one hand and their sovereign on the other) could appeal to decide matters of right. Either there is such an authority or there is not. If there is, then *it* is the sovereign authority. If, on the other hand, it is not, there is no body that represents the united will, but only two bodies that purport to do so. Vattel would likely reply by noting that this is to miss the point. To admit a limited sovereignty is precisely to admit a conditional sovereignty. The existing authority is supreme, except under such and such conditions. The problem is to specify who decides when those conditions obtain and how (compare: Locke, STG § 240). For an argument that 'decentralizing' sovereignty can solve this problem, see Smith (2008). Interestingly, the situation in 17th century England might illustrate Kant's point against this response. Here, the Parliament began to assume the authority of the people, against the crown. Eventually, it was able to get the military on its side and stage a revolt against the crown for failing to represent the sovereign will of the people. But it's hard to see this event as a case of limited sovereignty, but rather as one in which sovereignty is divided in a struggle for power. See Morgan 1988, pp. 17-121.

responds in its concluding section) raises the concern that it is odd to think oneself duty bound to respect and obey an authority that is not in fact rightful as though it *were* rightful. For the idea of authority seems to have both a *de facto* and *de jure* sense (as we've noted above). But Kant implausibly collapses the distinction, or at least holds that all *de facto* authorities, i.e., through power, ought to be treated as authorities *de jure,* i.e., by right. Kant's reply is that because a "perfectly *rightful constitution*" is an idea "to which no object given in experience can be adequate," the best one can do is locate "a people united by laws under an authority" as "a rightful constitution in the general sense of the term" and to find oneself bound absolutely under its laws (MdS 6:371-372). In other words: though existing states are imperfect, they bear sufficient structural similarities to our idea of the state (namely the concentration of power or *de facto* authority, and the promulgation of law) to render our calling them "rightful constitutions" appropriate.[182] Moreover, since reason commands that we establish a rightful condition, and since the only means we have for reliably bringing this about is to act according to the idea of sovereignty, we must do so wherever we find in experience such constitutions (ibid.). Applying this concept of "rightful constitution" to an existing authority recognizes that authority as a genuine source of law, combined with enough power to enforce its laws. To act against such a body is to prosecute one's right by means of war, which (while strictly open to one in circumstances of provisional right) is to be avoided.

[182] Here (and the reasons for this will become manifest later) it is important to note that the notion of a rightful constitution is equivocal between a provisionally rightful constitution and a conclusively rightful constitution.

It is true that very often, the requirement to be ready for a rightful condition demonstrates such prosecution of one's right by means of war to demonstrate a willingness to put force where right belongs, which is incompatible with complying with one's formal obligations. But since this is to make it impossible to live on rightful terms with others, and since living on rightful terms with others is a bedrock requirement of fulfilling one's obligations toward them, one has an obligation to refrain from actively resisting the sovereign. But though this is very often true, it is difficult to see how Kant could have arrived at the conclusion that it is necessarily true. For example, it might well be that the existing norms of acquisition give you no right to your current holding, but that nevertheless, I ought to respect it, rather than turning you into the authorities. A lot will depend upon the details, but so too should it. I submit that we do better to re-read Kant's position on this point in light of the provisionality thesis: Kant's claims about an absolute and overriding duty to obey the sovereign authority are best understood as claims about what would be true under conditions of conclusive right, insofar as sovereign authorities commands issued in material obligations. Given that such rights are provisional, and generate merely formal obligations, it is a matter of some complexity to determine what precisely they demand of us.

VI. Conclusion: Freedom and Natural Revolution

So far, I've argued that the provisionality thesis complicates in certain respects some of Kant's arguments against revolution. While it is true that a right to revolution will introduce some meaningful sense of disunity into the polity, it is also true that

PT maintains that our very station is in some significant sense not unified. This means that Kant's objections to recognizing a legal right of resistance are stronger than those that preclude a moral right. It is in some sense incompatible with the state's claiming authority that it contains provisions for its dissolution, since its authority is grounded in its capacity to unify and move toward conditions of conclusive right. But it is not necessarily true that we do best by the lights of our duty to enter a rightful condition always and everywhere by obeying its laws. Thus while progress toward conclusive right often requires deference to actual constitutions, this cannot require us to give up the right to actionable judgment, even if it does suggest that the occasions to act on our judgment are narrowly constrained. By way of conclusion, I want to emphasize various ways in which a Kantian position, so understood, can explain and support a properly ambivalent attitude toward active political resistance.

I wish to direct your attention to a passage in Kant's writings that struck Lewis White Beck rather curiously some decades ago. In *Toward Perpetual Peace,* Kant notes that when "nature herself produces revolutions," a wise response is to see them as calls "for fundamental reforms" based on freedom (PP 8:373n). What Beck found so amusing about this passage is Kant's claim that *nature* produces revolutions. But revolutions seem to come about because of free beings' dissatisfaction with the institutions to which they are subject. So Kant—to Beck—appears to be making something of a category mistake (see Beck 1971, p. 418). Despite Beck's own bemusement, I believe that understanding this oft-overlooked passage in *Perpetual Peace* can help us grasp the significance of Kant's position on the right to resist.

What could it mean to hold that nature itself produces revolutions? Recall that for Kant the guiding idea of our political lives is the idea of the original contract, i.e., the rightful constitution. It is this idea that—at once—directs individuals to obey existing authorities and demands that those authorities themselves bring their laws in line with the constraints of legitimacy. For Kant, finite rational agents are constrained but not determined to direct their actions as reason requires, and (since moral demands are demands of reason) so are constrained but not determined to do the right thing (Kant calls this property *necessitation* G 4:413; cf. MdS 6:379; see also the general Introduction). Because reason is pitted in us against sensible inclinations and our desire to be happy, there is no guarantee that we will do what we ought to do. Right (a sphere of morals: MdS 6:205) is, as its students will recognize, no different. Though we ought to realize certain institutions and obey them when they exist, there is no guarantee that we will do so.[183]

I suggest that for nature to bring about revolutions is for human beings (rulers or subjects) to succumb to their inclinations against the demands of reason, and to act to compromise or overthrow existing regimes that are worthy of deference. When revolutions come about, they are unfree (and so acts of nature in this sense) because freedom consists in obeying universal commands of reason. Though the individuals involved may be morally motivated (Korsgaard 1997, Holtman 2008), their acts are unilateral, and since they are coercive, and unilateral coercion is wrongful, their acts

[183] Fortunately, in the case of politics, force steps in where our moral motivations are insufficient.

are wrongful.[184] So understood, no revolutions are acts of freedom in the full sense.[185] In circumstances where the authority had instantiated necessary conditions of right, revolutionary activity often involves flouting one's formal duty to remain ready for conditions of conclusive right. In these conditions, there is an authority to which one can appeal to resolve one's disputes with others, and one forgoes making that appeal, and takes matters into one's own hands. While the longterm effects of such actions are unclear,[186] their immediate effect is to trade law for power. But this isn't the only way in which nature acts in bringing about revolutions.

Indeed, the sovereign's *failure* to legislate in line with right is also—and in the same respect—an act of nature in just the same sense. Recall: conditions of despotism are *pathological.* They are pathological not just because citizens agreement is compelled rather than freely given, but also because the possessor of provisional sovereignty has an *obligation* to bring his rule in line with the requirements of the original contract, an obligation he fails to discharge insofar as his own inclinations are given undue authority over his actions. Considering both the revolutionary and the head of state as in some relevant respect unfree invites reflection on the sorts of things that bring revolution about.

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[184] Notice: It does not follow that attempting to leave a state of barbarism is unfree. Instead, there is a universal obligation to exit this condition, and enter into a civil condition. To comply with this obligation is the one circumstance in which an apparently unilateral act can be reciprocally binding, and to comply with it is an instance of freedom, and not nature. Thus a great many uprisings colloquially referred to as revolutions will not count as revolutions for Kant. For a revolution is always against a sovereign, and the idea of sovereignty is not applicable in conditions of barbarism.

[185] I say in the full sense to connote positive rather than merely negative freedom. Negative freedom is that freedom that all rational agents are endowed with that leaves them able to choose between doing the good and doing the bad. All human actions are acts of freedom in this sense (save circumstances where significant incapacity or immaturity win the day).

[186] Kant suggests that they might be quite positive, but that from our point of view, their being so is unpredictable.

We can conceive of active, wrongful resistance as occurring on a spectrum with two poles. At one extreme, such resistance might result primarily from the poor exercise of despotic power. These will be circumstances where there is law and power but very little freedom. Imagine the sort of tyranny that Kant implausibly takes us to be absolutely obliged to submit to. It is revolutions that seek to overturn such regimes with which we have sympathy, and that lead us to wish Kant had been a better Lockean. Here, the tyrant neglects his duty, and that causes conditions to be so bad as to issue in a popular uprising. The latter is of course itself an effect of the people's not being any longer able to bear abuse and comply with their duties of right, but it is important to note that there is unfreedom all around. At the other end sit those revolutions where the sovereign authority is approximates the demands of justice, but the citizens do not recognize this, or wish, for reasons of vainglory to rule.

Somewhere in the middle sit those revolutions that come about in circumstances where governing bodies have done many things right, ensuring to some degree that their rule is grounded in freedom, but external circumstances do not cooperate: the economy is a wreck—through no fault of its own; the state has been harassed by outside powers who raise tariffs on its goods, and make constant threats to interfere if their unjust terms of trade are not accepted. The population is unable to see that there is nothing to be done about this, and wishes to try its own hand at ruling. This too might lead to uprising, but here it is clear that nature is mostly responsible on the side of the circumstances, which place the subjects in a position of where the only hope for relief seems to lie in seeking radical political change.

The orthodox Kantian view on these matters (against which I have been arguing) holds that in each case, there is an overriding duty not to resist. But though this position is unsustainable, we should nevertheless note that revolutions are complicated things: they are often (but not always) violent and moreover they necessarily lack unity. There are always opposed coalitions some of which support the status quo, and others (the revolutionaries) that do not. As a result, even when, in the end, we approve of such revolutions, our approval should be uncertain. We should be ambivalent precisely because by its nature revolution involves a struggle for power that results in some being subjected to others. It involves a willingness to seek right through war, to agree that might will, at least this time, make right. For this reason alone, it seems that there is something about genuine revolutions that is incompatible with the universal freedom of all. If we were living in circumstances in which our freedom was respected and we respected the conditions that make that respect possible, there would be no need for revolutions. In at least that far, the felt need to revolt is natural in a sense that is precisely opposed to our being free. And, in Kantian fashion, it seems that the best we can hope for when they naturally result is that their consequences, so hard to foresee, are themselves for the best.

We might rest this hope as Kant does in some moods on our conviction that nature is driven for progress. Or we might hope that *at the minimum,* rulers themselves will take seriously realist arguments from the likes of Seneca and Spinoza to the effect that tyranny compromises the stability of rule (Spinoza 2002 (TPP ch. 16), p. 530). We might hope that from there things get better still and these self-interested motives for avoiding tyranny are replaced with nobler ones, that morality

progresses thereby, and that we learn from all the carnage of the past more peaceful ways in the future. If we see revolutions in this way, bound up with these hopes, we see revolutions as Kant predicts that we will, even if we do not follow him all the way to his conclusions.

When contemplating active resistance, it is important to conceive of our duties to forego such resistance not duties *to* oppressors, but as to our fellow human beings and to ourselves, aimed ultimately at bringing about conclusive right, i.e., a situation of compossible freedom. This is what I mean when I say that failing to take account of Kant's account of provisional right leads one to misconstrue the character of our political obligations. Rather than seeing such obligations as *in the direction of right,* one is led to see them as obligations that obtain by virtue of actually existing conditions, and as owed *to* the corrupt officials that are instrumental in making those conditions what they are. When one is so led, and those conditions are bad, Kant's view can seem not only uncompromising, but harsh and normatively implausible. Recognizing the provisional content of these obligations goes some way of ameliorating this harshness and implausibility.

It is therefore not all that puzzling that, for Kant, after a revolution, and despite the fact that the revolutionaries have acted wrongfully, our obligations are to the new emergent order. For after an existing regime has become destabilized, human beings again find themselves in a condition that resembles most closely the state of nature. In such a state, each has the right to do what seems right and good to it without deferring to the judgment of any other. Here, we can imagine a number of individuals and groups making various claims to things, protections, offices, etc.

under the title of right without there being any common authority to adjudicate these competing claims. As such an authority takes hold, claims that are made in good faith ought to be respected in the process by which the rule of law is reestablished.[187] But to adjudicate competing claims will consist in an irreducibly political process of negotiation. At each stage, offers will be made, and individuals will be faced with a choice: Submit to law under under such and such terms, or don't. If the latter, individuals choose to remain in a state of nature, and so can either be forced to comply (if they exhibit unreadiness for rightful relations), or leave. In reconsolidating power in this way, it is true that it is unlikely that anything recognizable as an ideal state of affairs will result. But what will result is something stable, and once stability emerges that makes sense to people, the thing for all to do is attempt gradual reform.

For the most part, those sympathetic with Kant's political thought celebrate his distance from Locke. A rare exception concerns Kant's position on political obligation and political resistance; on these matters, commentators yearn for a more Lockean Kant. I have argued that the position Kant holds is perhaps more in sympathy with Locke than is commonly supposed. For once we recognize the provisional status of our obligations, it becomes clear that their grounds do not lie in mere deference to authority, but rather in doing what we can to secure the conditions necessary for ensuring that we do not unilaterally subject other people to our will. But I have also spent some time arguing that some of Kant's conservative conclusions follow even given the provisionality thesis.

[187] Good faith claims must have their basis in an intention that the claim is in accordance with the general will.

Very often it will be the case that we do best by the lights of our remaining ready for a rightful condition by constraining ourselves to give up our claims to right when they are not upheld in the public judgment. While this can seem sometimes a Herculean task, it is one by which we hope to move from pathological conditions of unfreedom to moral conditions of freedom. On this point, I could only offer a glimpse of what a Kantian account has to offer. But it is my sense that a Kantian account of provisional right can be developed in a way that shows him to have a distinctive view of the role of ideals in directing political action, and the role of theory in politics, and it is the role of the next two chapters to argue for these conclusions.

Chapter 6

Freedom, Institutional Evaluation and the Pluralist Thesis

> [A]n equal distribution of freedom does not seem to exhaust our notion of justice. Ideal justice seems to demand that not only freedom but all other benefits and burdens should be distributed, if not equally, at any rate justly.
>
> —Henry Sidgwick, *The Methods of Ethics,* pp. 278-279

I. Introduction

Among other things, political philosophers are interested in evaluating institutions, namely those "humanly devised constraints that structure political, economic and social interaction," that "consist of both informal constraints (sanctions, taboos, customs, traditions, and codes of conduct), and formal rules (constitutions, laws, property rights)" (North 1991, p. 97). Although North claims that institutions are "humanly devised," we should not take this to entail too much overt intentionality. Many institutions are in large part the "result of human action, but not the execution of human design" (Ferguson 1767 III.i, p. 205).[188]

The political philosopher's interest in institutions derives considerably from the profound ways in which they influence human life prospects, and her focus is

[188] Nor (*pace* Hayek 1982 Vol. 2, p. 78) does being the mere result of human action, their being, in Hayek's phraseology, *spontaneous orders*, render them beyond the reach of rational evaluation (although there is reason for caution here).

thus frequently directed to those institutions that exert the most force in this regard. Rawls referred to this especially important constellation of institutions as society's "basic structure," and took it to comprise the "political constitution and the principal economic and social arrangements" (1971, p. 6).[189] This chapter's references to institutions should be taken in this sense, of referring to society's basic coercive structure. Given these institutions' profound influence on human life, their evaluation matters. Negative evaluation can be the point of departure for positive change, whereas positive post-theoretical evaluation can help us to reconcile ourselves to a situation that, pre-theoretically, may have seemed suboptimal, arbitrary, or unjust (Rawls 2001, pp. 2-3).

But there is reason to worry that Kantian theories of various stripes are bound to get this important task wrong. For plausible institutional evaluation requires the balancing of plural values[190] (equality, liberty, welfare, security, privacy, autonomy, responsibility, merit, to name just a few), and Kant appears to offer up a monistic theory, according to which institutions are to be evaluated solely along the lines of one criterion: freedom. But as Sidgwick puts the point in the epigraph, we care about more, in thinking about justice, than the distribution of freedom.[191] Moreover, the single value to which it appeals does not appear well-suited to be a fundamental value

[189] There is some controversy concerning how well Rawls keeps to this general account. For example, the vast majority of his work in *Theory* and later in *Justice as Fairness* and *Political Liberalism* concerns coercive political institutions exclusively, to the neglect of other important social institutions (e.g., the family) that (in his words) have effects that are at least as "profound and present from the start" of a person's life as coercive institutions are (1971, p. 7). See esp. Okin 1991.

[190] Here there are two versions of the objection. According to the first, there is metaphysical pluralism, which the Kantian account cannot capture. According to the second, we have pluralism as an epistemic position, given the actual disagreements concerning values.

[191] Valentini and List (2016) agree: "A good theory of political morality should explain how to balance multiple competing values, rather than shift the all-things-considered solution into the definition of freedom itself" (pp. 1067-1068).

at all. For whereas other monistic theories (like utilitarianism) can offer plausible reductions of other values to utility (and can develop an associationist psychology to explain our strong attachment to other values), it's not clear that a freedom-based theory has similar resources for explaining and accounting for the many things we at least seem, pre-reflectively, to value. The problem is worse yet. For as Arneson puts it, "[f]reedom, even on its most morally adequate interpretation, is not an absolute value that trumps all others" (2000, p. 345). It rings false that every time an institution does better against alternatives along the lines of freedom, we must prefer it, even at the expense of other values.[192]

Sometimes, at least, it is plausible to think that freedom can be permissibly traded against other values. For example, if freedom leads to severe inequality, perhaps institutions that leave freedom unrestricted should be less favorably evaluated than those that restrict freedom for the sake of reducing inequality. Or if people will make decisions that set back their long-term real interests when left free, then perhaps institutions ought to leave less room for free choice. Or if freedom leads to inefficiencies, insofar as it allows some to impose costs on others by their free

[192] To put the worry in social scientific terms, the principle of freedom has, in Kant's theory of institutional evaluation, *dictatorial status.* Dictatorial principles are not subject to the Arrow impossibility results in social choice theory, and so can guarantee a rational ordering, while accepting Arrow's other constraints: "one way to guarantee that the aggregation rule returns a Pareto efficient transitive ordering is to simply pick one criterion...and use that ordering as the collective ordering in all situations, regardless of how the alternatives are ranked by the other criteria (Patty and Penn 2014, p. 66). (Selecting a dictatorial principle (in effect denying the non-dictatorship axiom) is not, of course, the only way of avoiding these impossibility results: One can do this by denying one or more of the other axioms that generate the results.) If external freedom is dictatorial, its ranking of institutions is decisive. But: "it may be the case that the top-ranked alternative" according to a dictatorial rule is "simultaneously the *bottom*-ranked alternative by some other principle," e.g., the principle of efficiency, or equality or virtue. But since these other principles matter to actual people, a theory of social evaluation that accepts a dictatorial principle is implausible. As we will see, given that they matter to actual people, attempting reform only according to a principle of external freedom is likely to fail to enjoy stability and support.

action, one task of well-functioning institutions appears to be to bring about a more efficient distribution. Ultimately, the case for freedom-based monism hangs on the positive arguments that can be provided for the importance of the relevant sense of freedom (arguments to which I've gestured in the Introduction and Chapter 1, which I've defended at greater length elsewhere (Messina 2017), and which require fuller defense still), as against competing concerns. I do not offer such a positive argument here, but argue instead that the theory developed in previous chapters suggests a two-tiered account of institutional evaluation grounded in the distinction between provisional and peremptory right that can soften the blow of the above criticisms.

The argument is roughly as follows. The standpoint of conclusive right sets a highly demanding monistic standard with reference to which institutional alternatives ought to be judged and reformed (in accordance with the idea of the original contract). By contrast, the standpoint of provisional right provides resources for understanding the ways in which the plurality of things that persons value can be constitutive of the kind of activity that coordination around the rule of law requires. While ultimately institutions grounded in values other than freedom are to be repudiated from the standpoint of conclusive right, things look otherwise given their provisional status: such values can aid us in coordinating around institutions that are necessary conditions of rightful relations. The chapter proceeds in four further sections. § II attributes the monist view of institutional evaluation to Kant, and § III more fully articulates the pluralist challenge. Next, § IV articulates a Kantian reply, which distinguishes between two levels of institutional evaluation. Each level is grounded in a principle that is, by now, familiar to us: the postulate of public reason

(provisional right) and the idea of the original contract (conclusive right). § V concludes.

II. Kant's Monism

In this section, I want to further motivate the view that Kant's theory, on a natural reading, is a non-starter concerning the task of institutional evaluation. Recall in the introduction that there were three objections on this front. The first consisted simply in the theory's monism. The second was its inability to explain or otherwise account for the importance of other values. The third consisted in the fact that the value grounds Kant's political theory is not plausibly a trumping value. I begin by motivating the view that the Kantian theory is monistic in the way that these criticisms presuppose.

Although Kant is clear that freedom is the sole value relevant to institutional evaluation, the precise contours of the view are unclear. For, as we have seen elsewhere, freedom demands a state with a certain structure. But it seems equally clear that adequately structured states can be better or worse, and Kant's theory ought to be able to make distinctions between them. For his part, Kant says that this task of evaluating existing institutions is to be carried out with reference to the "Idea of the original contract".

> The act by which a people forms itself into a state is the *original contract.* Properly speaking, the original contract is only the idea of this act, in terms of which alone we can think of the legitimacy of a state. (MdS 6:315; compare TP 8:302)

Kant says that the original contract offers the criterion for legitimacy. But what does the idea of the original contract demand? We can get some grip on the question by considering Kant's treatment of the idea in the *Doctrine of right* and in its draft.

> [T]he *spirit* of the original contract (*anima pacti originarii*) involves an obligation on the part of the constituting authority to make the kind of government suited to the idea of the original contract. Accordingly, even if this cannot be done all at once, it is under obligation to change the kind of government gradually and continually so that it harmonizes *in its effect* with the only constitution that accords with right, that of a pure republic...the only form which makes *freedom* the principle and indeed the condition for any exercise of *coercion,* as is required by a rightful constitution of a state in the strict sense of the word. (MdS 6:340)[193]

> An original contract, which is an idea that lies necessarily in reason, grounds all civil unions. One must represent all laws in a civil society as given through the consent of all. The *contractus originarius* {original contract} is an idea of the agreement of all who are subject to the law. One must test whether the law could have arisen from the agreement of all, if so then the law is right (DDR 27:1382)[194]

These passages make clear that the idea of the original contract has three characteristics. First, it is an idea of reason. Second, the idea of the contract is grounded in a notion of possible consent, insofar as testing a law's conformity with this idea requires one to "test whether the law could have arisen from the agreement of all." Finally, there is a kind of government "suited to the idea of the original contract," which is republican, and this form makes freedom "the principle and indeed the condition of any exercise of *coercion*." But whereas the first and third

[193] Kant describes the republican constitution this way: "A constitution established, first on principles of the *freedom* of the members of a society (as individuals), second on principles of the *dependence* of all upon a single common legislation (as subjects) and third on the law of their *equality* (*as citizens of a state*)—the sole constitution that issues from the idea of the original contract, on which all rightful legislation of a people must be based—is a *republican* constitution" (PP 8:349-350).

[194] Here, compare TP 8:297, where Kant says that the "touchstone of any public law's conformity with right" is that it be so constituted that it is "*only possible* that a people could agree to it, it is a duty to consider the law just, even if the people is at present in such a situation or frame of mind that, if consulted about it, it would probably refuse its consent."

characteristics suggest a *demanding* notion of the original contract, the second can suggest a very undemanding notion.

To see the tension between the first and third characteristics on the one hand and the second on the other, notice, first, that, by characterizing the original contract as an idea, Kant implies that it cannot be realized in experience. Yet it is quite clear that a legislative authority in the world of experience can legislate in such a way that its laws satisfy the test of possible consent, at least as Kant seems to understand the test. Indeed, both Kant and Kant scholars take the latter test to be relatively undemanding.[195] Thus, Kant argues that citizens cannot object to a proportionately imposed war tax because "the war may be unnecessary; for they are not entitled to appraise this but instead, because it is still always *possible* that the war is unavoidable and the tax indispensable, the tax must hold in a subject's judgment as in conformity with right" (TP 8:298n). Citizens' only grounds for objection is concerning things like the tax's proportionality and generality.[196] But *most laws* satisfy these criteria, merely in virtue of aiming to achieve a certain kind of social control (see Chapter 5). Now, it is of course possible that Kant only deems the original contract an idea of reason insofar as the *act of contracting,* of which it is an idea, has not, will not, and cannot transpire. But there are other reasons to think that it picks out a rather demanding notion.

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[195] O'Neill (2012) is perhaps an exception, who reads the idea of the original contract as demanding the realization of the republican constitution itself.

[196] Thus, against O'Neill (2012, pp. 30-36), Kant seems *reluctant* to build much substance into the idea of the original contract. Whereas O'Neill claims that the only institutions that could be consented to are republican institutions that enshrine civil freedom, equality and independence, Kant clearly sees the space of modal consent as more capacious than that. Whereas O'Neill holds that "[n]onrepublican institutions are nonstarters for universal consent," Kant (at least in the early works) appears to think otherwise; despotic conditions can indeed be the objects of possible consent, and if this were not the case, then we would never leave the state of nature (ibid., p. 38).

For example, second, Kant makes very clear that (i) the original contract demands a republican constitution,[197] and (ii) that this latter is an idea of reason, which, again, means that it cannot be realized in experience. But, again, a constitution that satisfies the condition of possible agreement *can* be realized in experience. Moreover, in the very same passage that Kant says that the original contract requires a republican way of government that makes freedom the condition of the exercise of any use of coercion, this appears to be a rather demanding idea.

To see this, notice that most laws of all existing states have as their conditions something other than freedom (e.g., welfare). And though Kant toyed with a notion of external freedom as simply being identical with obeying only those laws that pass the standard of possible consent,[198] he seemed to abandon this idea by the time he wrote the *Doctrine of Right.* There, though Kant continues to treat the *impossibility* of consent as a sufficient condition for the illegitimacy of a law (e.g., in his treatment of the hereditary nobility: MdS 6:329), he seems to abandon the idea that the bare *possibility* of consent to a law suffices for its legitimacy (as he held in the *Draft of the Doctrine of Right*). Therefore (against Kant's claim in PP), it is implausible that external freedom is identical with the warrant to obey only those laws that pass the

[197] It is important to keep in mind that Kant's usage of the republican language is peculiar. He distinguishes between the form of sovereignty (monarchy, aristocracy or democracy), and the form of government (republican or despotic). Kant's political philosophy demands a republican form of government, namely one that uses its "plenary power" for the public purposes of its constituents, rather than for its own private purposes (PP 8:352), and leaves open the form of sovereignty, ruling out only direct democracy as necessarily despotic as to the form of its governance.

[198] See esp. PP 8:350n: "My external (rightful) *freedom* is, instead to be defined as follows: it is the warrant to obey no other external laws than those to which I could have given my consent."

bar of possible consent.[199] At least some such laws restrict external freedom by restricting the domain of objects within one's rightful power arbitrarily.

Why, then, was Kant (especially in the early works), content to hold that meeting the condition of possible consent was both necessary and sufficient for satisfying the idea of the original contract? Why would he later insist on a more demanding standard? I suspect that he wanted the notion of the original contract to achieve two distinct tasks, and struggled to come up with a single idea that was adequate to both. First, he needed his theory to ensure that citizens would have duties to obey most existing states. By imposing a relatively undemanding standard of evaluation and making it the only standard of institutional evaluation, Kant could readily secure this conclusion. (See here, especially, those passages in TP where Kant ties satisfying the criterion of possible consent to the impermissibility of revolution.) Second, however, Kant wanted the idea to serve as a criterion for reform—a common currency in terms of which citizens could voice objections to the constituting authority in line with their inalienable right to freedom of the pen.[200] But there is a tension between these two tasks: The former requires a minimal standard, but the latter requires as demanding a standard as our concept of justice affords. For Kant, a

[199] The passage that comes closest to affirming this old idea now requires actual consent: The attribute of civil freedom, Kant writes, involves the freedom to obey no law except for those to which he has given his consent ["*keinem anderen Gesetz zu gehorchen, als zu welchem er seine Beistimmung gegeben hat*"] (MdS 6:314). On the development of Kant's view here, see Kleingeld 2017.

[200] "[A] citizen must have...the authorization to make known publicly his opinions about what it is in the ruler's arrangements that seems to him to be a wrong against the commonwealth. For, to assume that the head of state could never err or to be ignorant of something would be to represent him as favored with divine inspiration and raised above humanity. Thus *freedom of the pen*...is the sole palladium of the people's rights. For to what to deny them this freedom is not only tantamount to taking from them any claim to a right with respect to the supreme commander (according to Hobbes), but is also to withhold from the latter – whose will gives order to the subjects as citizens only by representing the general will of the people – all knowledge of matters that he himself would change if he knew about them and to put him in contradiction with himself" (TP 8:304). Kant then observes that these judgments are to be made only in line with the idea of possible consent.

monist who thinks that human freedom is the sole political value, that demanding standard ought to be grounded in a notion of freedom that is normatively attractive, rather than one tailored to be identical with the minimalist standard required for the first task.

Perhaps this explains why Kant treats consistency with the idea of the people's giving a law to itself as a mere necessary, but not sufficient condition, of legitimacy in the final version of the *Doctrine of Right.* Perhaps he recognized that there were additional criteria (e.g., the degree to which a pre-political notion of freedom is made the condition for any possible exercise of coercion) for judging a constitution. But this doesn't mean he abandoned the hope of demonstrating that most people most of the time have good reason to obey the existing authority. It's only to say that he placed the burden of establishing this argument elsewhere than in the original contract, namely in the postulate of public Right, and the idea of the civil constitution. The first says: "When you cannot avoid living side by side with all others, you ought to leave the state of nature and proceed with them into a rightful condition, that is a condition of distributive justice" (MdS 6:307). The second is a Platonic idea that nevertheless admits of approximation in experience. The idea of a civil constitution allows us to recognize approximations to the rightful condition in experience, and to recognize that we do better by the duty that the postulate imposes upon us to obey existing institutions than otherwise, insofar as that is true.[201] Since he no longer

[201] "If then a people united by laws under an authority exists, it is given as an object of experience in conformity with the Idea of the unity of a people *as such* under a supreme will, though it is indeed given only in appearance, that is, a rightful constitution in the general sense of the term exists. And even though this constitution may be afflicted with great defects and gross faults and be in need eventually of important improvements, it is still absolutely unpermitted and punishable to resist

required the idea of the original contract to do the double duty of securing a reason to obey existing constitutions and seek reform gradually and set the standards of the latter reform, he no longer needed the idea of the original contract to be a minimalist notion. But if we have found so far reasons to think that the idea of the original contract demands more than the possibility of consenting to its laws, and that a substantial part of this demand consists in the requirement that the only grounds for coercion be freedom, we have still only a murky notion of what that means.

It is clear from Chapter 1 that a legitimate constitution must protect our innate right, which includes our freedom to dispose over our bodies.[202, 203] This should rule out paternalistic interference as an unjustified restriction of freedom, and Kant indeed calls paternalistic government (that which aims at securing the welfare, rather than freedom, of its citizens) the worst kind of despotism.[204] Since, by hypothesis, we

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it...The *Idea* of a civil constitution as such, which is also an absolute command that practical reason, judging according to concepts of Right, gives to every people, is *sacred* and irresistible" (MdS 6:372).

[202] This right to dispose over one's body meets its limits at the slave contract, where such contract would give others the right to end your life by putting your powers completely under their control. Whether Kant's position is that the state ought not to enforce such a contract, or that such a contract is null and void is a little bit less clear. He does note that the issue has to do with the "right of humanity" in one's own person, not the right of men (MdS 6:270), which can suggest that the ideal state cannot coerce persons not to use their powers of contract in this way. But Kant also suggests that such an act of voluntarily abdicating one's humanity is impossible (MdS 6:331).

[203] Richard Arneson has asked whether innate right protects against others' activities that might damage my body as a side-effect (e.g., pollution). Insofar as the state is to protect our rights to bodily integrity, there will be a question about how best to institutionalize these rights in practice, a question Kant never considered, but that we must. But part of the way this question is answered will depend upon how to trade off one's freedom to move about unhindered by others against the freedom to have one's body in an undamaged state. Arneson worries: Doesn't this invite pluralism? The question is deep, important, and underexplored. For the purposes of this chapter, however, I wish to set it aside. Even if there is some pluralism (in the form of different notions of freedom) slipping into Kant's account here, Kant's theory nevertheless remains fairly normatively restrictive.

[204] Kant's objection to paternalism is an objection to *legal* paternalism, coercive laws made solely for the purpose of securing another person's welfare and happiness. Against this, Kant writes that "each may seek his happiness in the way that seems good to him," even if it seems or genuinely is bad for him (TP 8:290). The reason is clear: paternalist laws are laws given by others that place us under new obligations. But such laws are not required for my freedom to be consistent with the freedom of others (see Chapter 1). Therefore, there is no sense in which obligations of this kind can be made out to be consistent with our autonomy. By contrast, Kant's objections to paternalism need not commit him to an opposition to all paternalism in non-legal contexts. Consider Mill's famous bridge case, in which

have a right to bodily integrity, which includes how to take care of ourselves, others ought to be under a conclusive obligation (in the state of nature or elsewhere) to refrain from interfering with us insofar as our actions only concern ourselves.

It is also clear that the republican constitution should respect—as far as possible—the provisional claims to external rights that members assert, granting, of course, that it must take a stand on who wins in disputes, and whether these claims respect the limitations on first acquisition. For the republican constitution (the ideal form of the state) to interfere with others' possessions would materially wrong them. This material wrong would amount to a restriction of their freedom because it would be constituted by violating a right, and as Kant puts the point, "a right is the freedom through which the freedom of another is restricted" (Ref. 6738). When I violate your right to a thing, I wrong you insofar as I violate a constraint on my action, which is imposed by the right that you have, that gives you the freedom to dispose over the thing in question free from my interference. Additionally, the just state will impose standards (e.g., in specifying lawful contractual procedure) for acquiring further rights

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we observe "a person [attempting to cross a bridge which had been ascertained to be unsafe" and intervene because there is no time to warn him verbally (OL, p. 165). Here, there is no question of the bridge-crosser's accepting an obligation from an alien source. If this sort of activity is ruled out by Kant's account, it is because someone else is interfering with my body without my consent, therefore violating their duty to leave my body under my powers. But whether this is always wrongful is, I think, underdetermined by Kant's texts, which relegate consideration of innate right to "the prolegomena". It might well be that the notion of hypothetical consent can be brought in to deal with the bridge-style cases in which the immediacy of the harm and the agent's poor epistemic position render the permissibility of interference most plausible. Insofar as these conditions do not hold, and the person wishes to undertake the self-harming activity, by contrast, it seems clear that the Kantian account must tolerate it, after attempts at rational persuasion fail. (This, even if the agent seems to be reasoning poorly.) Similarly, there is some room for Kantian theories to accept "nudging" policies on the part of government agencies, insofar as these simply involve manipulating default options that must be set in one way rather than another. (By contrast, government agencies cannot coerce private operations to set their default policies in one way rather than another, for the sake of citizen well-being.) There is here a clear line between manipulation and coercion, even if there are sound ethical worries concerning the former as well as the latter. (On nudging, see Sunstein and Thaler 2008.)

through the exercise of external freedom, and will set limits to further acquisitions by marking out public spaces that are not subject to private acquisition, insofar as the absence of these restrictions is incompatible with universal freedom (Ripstein 2009, ch. 8).[205]

Thus, states ought to be evaluated in terms of (a) how well they respect our innate right, and (b) how well they respect our claims to acquired rights in determining a scheme of rights and duties, and finally, (c) how well they respect our freedom to dispose over our acquired rights.[206] The requirements that the fully just state respect our freedom in this way entails that it must leave us free to act viciously, self-destructively, unfairly, and sub-optimally. Since the state's authority is grounded in its capacity to render our exercises of freedom compossible the state can be evaluated in terms of its success in doing so. By contrast, its authority cannot be evaluated in terms of its making us secure beyond those things to which we have a right, nor can it be evaluated in terms of its maximization of our welfare, or its capacity

[205] I take this to be the picture that roughly follows from the interpretation of external freedom in ch. 1, although it is true that I have not yet done the very important work of showing as much. Although the picture is relatively austere, I take it to be roughly the same picture as the picture Ripstein develops in *Force and Freedom*.

[206] See esp. TP 8:292-293. The state must also do what it can to ensure the continued existence of its members, and its own continued existence: 6:326; compare LeBar 1999; Kleingeld 2012, Allais 2015. Given all that a commitment to freedom entails, Richard Arneson has expressed the worry that the Kantian view gets to call itself a monist view only insofar as it smuggles other values into its notion of freedom. But as Valentini and List argue, a "good theory of political morality should explain how to balance multiple competing values, rather than shift the all-things-considered solution into the definition of freedom itself" (2016, pp. 1067-1068). Here I am less concerned to attribute monism to Kant and more concerned to attribute to him a view upon which the task of institutional evaluation is to be pursued in a highly restricted way. Perhaps in the end he should admit that values other than freedom are at play in the task of institutional evaluation, because his treatment of external freedom already contains other values. I do not myself think that this is right (for reasons I've tried to specify in Chapter 1). But for the purposes of this Chapter's argument, nothing much turns on this issue. For the central problem is that Kant's theory remains normatively impoverished, insofar as it narrowly construes the values available for institutional evaluation.

to equalize our positions,[207] or anything else. Having shown that (1) Kant accepts a monist theory concerning the evaluation of political institutions, and (2) arrived at a clearer idea of what it is to say that laws ought to be grounded solely in freedom, I want to raise some serious worries about the adequacy of a theory that maintains as much.

III. Against Kantian Monism

Common sense says that there are many things that matter for evaluating political institutions: equality, fairness, efficiency, real freedom, liberty, welfare, etc.. Call this the pluralist thesis.[208] A sound theory will find an attractive way to balance these values, accepting less along some dimensions to have more along others.[209] But insofar as Kant's theory denies the pluralist thesis, it makes the task of institutional

[207] Kant famously says that there is a sense of equality that his politics enshrines. But he also says that this notion is not distinct from the relevant notion of freedom. See MdS 6:237-238.

[208] We should distinguish the pluralist thesis from a metaphysical thesis about the plural structure of values, upon which it does not depend, and which it does not entail. Metaphysical pluralism holds that ethical inquiry does not yield a single "*scheme of values* for all—not even for a single individual," let alone a society of individuals (Gray 2000, p. 5). Not only are ethical values various, they are also "rival," in the sense that "no single life can reconcile all of them" (ibid., emphasis mine). Metaphysical Pluralism implies that when rival values conflict, there is often no *one* right solution to a dilemma that requires choices among values (ibid., p. 6). Two solutions can conflict, and "both may be right" in the sense that each realizes a separate but incompatible demand of justice (ibid.).

[209] Isaiah Berlin puts the commonsense position better than I could ever hope to: "The extent of a man's, or a people's, liberty to choose to live as he or they desire must be weighed against the claims of many other values, of which equality, or justice, or happiness, or security, or public order are perhaps the most obvious examples...That we cannot have everything is a necessary, not a contingent, truth. Burke's plea for the constant need to compensate, to reconcile, to balance; Mill's plea for novel 'experiments in living' with their permanent possibility of error—the knowledge that it is not merely in practice but in principle impossible to reach clear-cut and certain answers, even in an ideal world of wholly good and rational men and wholly clear ideas—may madden those who seek for final solutions and single, all-embracing systems, guaranteed to be eternal" (Berlin 2002, p. 215). Interestingly, Berlin ends the passage on a Kantian note: "Nevertheless, it is a conclusion that cannot be escaped by those who, with Kant, have learnt the truth that 'Out of the crooked timber of humanity no straight thing was ever made.' (ibid., p. 216).

evaluation too easy: there is nothing to be balanced, nothing to be traded off against anything else, only a demand to realize freedom to the maximum degree possible.

Consider how (a characterization of) the dominant (Rawlsian) view handles institutional evaluation in a way that is intuitively more satisfying than the picture developed in the last section. On the Rawlsian account, we must find a theoretical procedure that can bring together the many values that appear relevant to the task of institutional evaluation in the form of principles. Said principles are then applied to society's basic structure, and issue a verdict concerning their justness. Rawls aimed to deliver principles that would capture "commonly shared presumptions" about the content of justice (1971, p. 16), particularly its impartiality, its concern for fairness, its concern for equality, its concern for liberty, and its concern for welfare.[210] To account for justice's impartiality, principles are to be selected behind a veil of ignorance, such that no one can favor her own position in selecting the principles of justice (1971, pp. 16-17). To capture a concern for fairness, principles of justice are not to be sensitive to arbitrary facts that reduce to one's genetics and upbringing. Equality is modeled by modeling agents occupying the original position as having a self-conception as equal agents. This means that they will not accept a principle that assigns them less of what matters than others unless this makes them better off than

[210] G.A. Cohen, who rejects Rawlsian constructivism for the purposes of articulating the concept of *justice*, nevertheless agrees that sound principles of institutional evaluation will involve setting tradeoff rates among our fundamental convictions and evaluating institutions according to how well they realize the balance of these values, and that Rawls's procedure might be sensible for that important task (2008, p. 4, p. 272). Whether this is best done by means of constructivist methodology or by means of an intuitionist balancing of values is a separate question, on which Cohen and Rawls disagree. As Cohen saw it, Rawls was a Harvard man, optimistic about the rational capacity to systematize, and to arrive at ordered principles for the evaluation of institutions (with clear priority relations obtaining between them), whereas Cohen himself is an Oxford man, skeptical about our ability to get beyond rough and ready intuitive judgments, which appeal to a plurality of values, and are then patched together to yield assessments of institutions (Cohen 2008, pp. 3-6; compare Ross 1930).

rival principles. The concern for liberty is captured by modeling persons as free, with a preference to secure certain liberties even at the cost of well-being. Rawls models the concern for welfare by assuming there are certain goods that everyone wants, whatever else they want, and that persons generally want to secure more of these all-purpose means than fewer.

Rawls famously argues that in the original position so described, bargainers would settle on two principles of justice, with the first ordered lexically prior to the second. These are: (1) the liberty principle: each is to have "an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all" and (2) the difference principle: "social and economic inequalities are to be arranged so that they are both: (a) to the greatest benefit of the least advantaged…and (b) attached to offices and positions open to all under conditions of fair equality of opportunity" (ibid., p. 266). (2b) is to be satisfied lexically prior to (2a). That's to say that (1) is to be satisfied first, (2b) second, and only after these two principles are satisfied can we satisfy (2a).[211, 212] Institutional performance is assessed by the lights of these principles, ordered in this way.

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[211] While Rawls never exactly gave up on the notion of justice as fairness as developed in *Theory*, he became increasingly worried about matters of public justification given the problem of deep disagreement. Since persons in liberal democracies are free and equal exercisers of reason in a world characterized by the "burdens of judgment," we should expect wide-ranging and reasonable disagreement, not just with respect to religious and philosophical doctrines, but also with respect to comprehensive doctrines and conceptions of justice. But this undermines the plausibility of the claim made in *Theory* that all would come to endorse justice as fairness on the basis of a "comprehensive doctrine" that best embodied our considered judgments about the good life (Rawls 1993, p. xvii; Gaus and van Schoelandt 2017, pp. 147-155). Although the later Rawls assigns greater theoretical importance to the role of disagreement than the earlier Rawls, many have thought he does not go far enough (Muldoon 2016, Moehler 2018, Gaus 2016, van Schoelandt 2014, et. al).

[212] It is to be stressed that these priority relations only hold in the "special" conception of justice, where conditions are reasonably favorable. In the general conception, there are "no restrictions on what sort of inequalities are permissible; it only requires that everyone's position is improved" (1971, p. 54).

We might reasonably disagree about the various weights that Rawls attaches to these values, whether the precise way he models them is appropriate, and whether they entail the principles he accepts. But insofar as the pluralist thesis is correct, what Rawls does *right* is to try to come up with a method of institutional evaluation that can capture the many things that we think matter when appraising the institutions to which we are subject. Where Rawls goes right, monist views in general go wrong. But not all monist views are situated equally in this regard. Consider that welfarist views are at least capable of producing an error theory that reduces the bite of the worry. Although it seems that we value things other than welfare when evaluating the institutions to which we are subject, we value at least some of these things because they produce welfare. We might, for example, observe that freedom is important for the well-being of a rational agent, or how security and privacy can make people better off. By contrast, these other values are not plausibly understood as somehow important for producing freedom. It is implausible that we value welfare because it produces freedom, or that we value privacy because it is instrumental to freedom, or that we value security because it is instrumental to freedom, especially when freedom is understood in the sense trotted out above.[213] Thus, Kant's theory seems to fare particularly badly in explaining why we value these other things. Indeed, it seems to suggest that, insofar as persons value things other than freedom in the context of evaluating coercive institutions, they must simply be mistaken.[214] Moreover, it doesn't

[213] Perhaps one finds these reductions plausible. So much the better for the Kantian theory. I simply presuppose here that they are not.

[214] This is perhaps too strong: Kantians can acknowledge that these other values can serve as tools for institutional evaluation in cases of ties along the dimension of freedom. This is cold comfort.

appear to have any resources for explaining the mistake non-Kantians are making (aside from self-deception or self-interest, neither of which seems plausible here).

Now, perhaps this wouldn't be such a significant problem if, despite valuing things other than freedom, we nevertheless valued freedom above other things, such that, given a conflict between freedom and other values, freedom always—or except in exceptional circumstances—won out. I myself think that this might be true, but it is a *deeply* unpopular position. Contemporary philosophers take it that freedom can be meaningfully restricted for all kinds of other reasons. People's freedom, it is held, can be restricted to promote their health, their wealth, their happiness, and their intelligence;[215] it can be restricted to force them to internalize the costs their behavior imposes on others;[216] and it can be restricted for many reasons besides. Therefore, the idea that a regime's protection of freedom is the only thing that ultimately matters for assessing its quality must seem to ring false; at least, we need to see a particularly strong argument for the claim. Having now motivated this criticism, I proceed in the remainder of this chapter to offer a response that is grounded in the distinction between provisional and conclusive right developed in earlier chapters.

IV. Two-tiered institutional evaluation

In this section, I argue that the perspectives of provisional and conclusive right produce a picture of institutional evaluation that is two- rather than one-tiered, and that gives Kantians who are ultimately committed to the ideal that coercion ought

[215] See, e.g., Arneson 2005, Scoccia 2008, Conly 2012.
[216] Hausman 1992, et al.

to be grounded in freedom a line of response to the worries raised in the last section. On the one hand, there is conclusive right, which, demands that institutions reflect the idea of the original contract (which contains the ideal of the republican constitution), and that coercive institutions find their grounds wholly in freedom. The conclusive right tier sets both the direction of reform and the standard for appraising the degree to which the existing institutional framework generates peremptory duties. This standard is monistic, grounded in freedom, and highly demanding. On the other hand, there are the various claims to right that we judge provisionally in the meantime. We make these claims in contexts where we are not (all) committed Kantians, and might take the grounds of our rights to be various values. We assert them nevertheless in various contingent and historically dependent ways, in actual systems of law.

Given our duty to remain ready for the rightful condition, we recognize that these legal systems provide standards in accordance with which new provisional rights to objects are acquired (standards of acquisition and exchange), and that insofar as this is true, having adopted the policy to remain ready for the rightful condition will require respecting others' acquisitions. That is to say, we do better by the lights of discharging our obligation to relate rightfully to others by conforming to the existing institutions than by contravening them. Still, given that we judge their rights without consciousness that they necessitate our wills, we lack material obligations to respect others' claims to those objects. Therefore, although conclusive right's standards are monistic, insofar as they are grounded only in freedom, circumstances of provisional right are often circumstances where rights are generated by other values, and coercive

laws that have provisional authority are not grounded in freedom (except in the minimal sense that law is a necessary condition for freedom).

To see this, notice that, from the perspective of provisional right, we are to remain ready for a rightful condition, which requires reproducing the formal condition of right—namely the existence of a stable set of norms around which to structure behavior and adjudicate disputes. However, power is often consolidated insofar as that power allows persons to resolve disputes over things that they care about, and we care about many things besides freedom. The standard of provisional right builds in sensitivity to the values around which persons order their lives precisely because it considers questions like: Is the rule of law here realized? Are people around me seeking their rights in ways aside from force? Thus, although the Kantian theory must hold (to the consternation of thinkers like Sidgwick) that freedom is the sole political value from a certain point of view, the two-level structure of Kant's theory provides resources for explaining and justifying a proper political concern with a plurality of values. Let's do a little bit more work in sketching how this is supposed to go.

We are required to enter a rightful condition, a condition in which our external rights and duties can be seen as issuing from an omnilateral will. This involves working to build a certain institutional structure (a domestic republic and an international federation of states), but it also demands that the limits on acquisition not be exceeded, and that the only grounds of coercion be freedom. A precondition of discharging this duty is the constitution of a supreme power, and a scheme of positive rights enshrined in law and enforced by a power that claims to be public.

Thus, our duty to realize a rightful condition in peremptory fashion provides a demanding set of criteria for criticizing existing institutions, while our duties of provisional right allow us to differentiate between those institutions that meet minimal standards to begin the process of reform and those that do not. These are the two levels of Kantian institutional evaluation.

What precisely is the relationship between these two levels? Provisional rights and duties have two aspects. In the first instance, they are judgments of right asserted without consciousness of their necessity. Thus, their primary aspect concerns cases in which we are simply not aware of their consistency with the ideas of reason, when they do not possess the marks of genuine obligations, but are affirmed because we judge that there are further grounds for accepting them than rejecting them. For this reason, we do best by the lights of our duty to enter a rightful condition to respect them as far as possible (for our provisional judgment implies that failing to do will result in revealing a willingness to remain in a non-rightful condition). Although this is true, we can be given grounds for reversing our judgment of their rightfulness, and to remain open to this possibility is a presupposition of their assertion (given their necessary compatibility with others' claims).

As a secondary matter, we can be aware of claims to rights as being *inconsistency* with the ideas of reason (e.g., when they could not be consented to by all, as in the case of the hereditary nobility), and thus judge them unjust, but nevertheless judge that we do better by the lights of our duty to enter a rightful condition by respecting them, until the relevant changes are feasible. Respecting these norms now will allow us to avoid large setbacks in terms of our overall duty to realize

a rightful condition. But insofar as this is true, we can recognize the actual values around which political activity is organized as being worthy, in some qualified sense, of celebration. Insofar as they ground coercion in values other than freedom, they really are unjust. On the other hand, insofar as, without them, we might not be able to even realize the necessary institutions of right that are the various components of the rule of law, they are worthy of deference. Perhaps a pair of examples will help to clarify the way these 'tiers of evaluation' interact.

First, imagine a highly idealized case in which a group of people are asserting (conflicting) claims to external rights against one another. Let these claims be judged provisionally rightful. Now an authority instantiates the domestic institutional conditions, and ensures—by adjudicating competing claims in good faith—that the claims to right are consistent with everyone's claim to be somewhere, and there is a process of negotiation according to which common owners' claims are reconciled. It sets norms for contract and further acquisition. It ensures that no one is without the basic necessities, and defends its citizens from external attacks. There are here no paternalistic laws, no laws that interfere with property to maximize welfare (as under current abuses of U.S. policies of eminent domain), no laws that coerce citizens for the sake of promoting their virtue, etc. Let its authority within its borders therefore be judged provisionally rightful, awaiting consciousness of its conformity with outsiders' rights. Let it participate voluntarily in an international federation of nations to determine this matter. Briefly, then, it coerces internally and externally in accordance with, and only in accordance with freedom.

In this (ideal) case, claims to right are enforced by the provisional authority, and the demanding ideal of the original contract merely imposes obligations on the part of the constituting authority to continue governing in this way, and to ensure, when conflicts with outsiders arise, that it comports itself according to the ideals that confer upon it provisional authority. In particular, it must remain open to external demands for justifications of its (and hence its citizens') claims to right (for these depend for their material validity on not exceeding certain limits that can only be ascertained through interaction with outsiders), and it must seek to discharge these justifications peaceably by joining an international order. As circumstances change (say for example because outsiders' property becomes uninhabitable, leaving them with no place to be), domestic citizens have to consider the possibility that their rights, at this later time, have become inconsistent with an omnilateral lawgiving. Provided the constituting authority does what it can in response to these contingencies, it approximates, as best as we could imagine any state approximating, the conditions of conclusive right. The obligations imposed lose much of their contingent, arbitrary and alien appearance, even if full consciousness of their necessity still elides us. In this case, then, the distribution of provisional rights nearly converges with the demands of peremptory right.

But now imagine a case where things are substantially less rosy, and more familiar for that. Here, the constituting power ran roughshod over provisional rights in establishing order, although through a series of acts of resistance, a stable order resulted, and citizens believe that the order is acceptable (even if it is not perfectly just). The governing body, to maintain the support of the citizens, governs not for the

sake of protecting freedom, but for the sake of ensuring citizens' happiness. Thus when citizens have disputes over rights, instead of simply trying to understand where those rights shake out, they attempt to realize a distribution of rights and burdens that maximizes welfare. The result of this is that though some citizens wish to smoke in restaurants, and some restaurant owners wish to allow customers to smoke, a majority of citizens complain that allowing this arrangement harms them. The constituting authority, seeing an opportunity to gain further support, outlaws smoking in private commercial spaces. Some citizens wish to marry members of the same sex. Others complain that this violates their religious convictions and imposes costs upon them, or that it simply makes them feel uncomfortable. The dissenters form a majority, and the constituting authority, not wanting to usher in instability, outlaws unions of the relevant kind.[217] Finally, to borrow an example due to Arthur Ripstein (modified slightly: see 2009, p. 78), a large apartment building casts a deep shadow across about a dozen properties during the sunniest parts of the day. Given the lack of tree-cover in the relevant region, such properties have been bought up by a group of mushroom-enthusiasts who hope to exploit the shade for their mushrooms. Later, the owner of the apartment building announces the demolition of the building. Being a small group of motivated citizens, the mushroom enthusiasts' efforts to stop its demolition succeed.[218]

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[217] Although the laws surrounding same sex marriage seemed to trend in the right direction (from a narrow conception of marriage to a more inclusive one), there is nothing in how standard analyses of externalities that entails that it must have gone this way. See Hatzis 2006.

[218] This last case is purely imaginary, but it need not have been. U.S. and especially English civil law is replete with cases of citizens disagreeing over the ways in which others' use of *their* property unjustly renders less valuable their use of their own property. Courts are then charged with deciding which is liable for the imposition of harm. But if (non-moralized) harm is not a permissible ground of coercion, then this is not an appropriate function of the courts. For a fascinating discussion of several real cases of this sort (in the English context), see Coase 1960, pp. 8-15. Coase argues that in a world without no

How ought these patterns of governance be assessed by the lights of the Kantian theory? From the perspective of conclusive right, it must fully reject these legislative measures as unjust (to the degree that it is accurate to say, as I think it is in each case, that the grounds of the legislation is not the extension of freedom, but its restriction).[219] Thus, for Ripstein, although the owner of the apartment building performs "an affirmative act that worsens" the situation of the mushroom enthusiasts, the latter "do not have a right…that what [they] have remains in a particular condition" (2009 p. 78). We can imagine similar responses in the other cases: Although the opponents of same sex marriage see their situation worsened to the degree that same sex marriage is tolerated, they do not have a right against having their situation worsened in this way (so far as the freedom of others demands it).[220] Although anti-smoking patrons see their situations worsened insofar as smoking is tolerated, they do not have a right to a situation in which owners of private property use that property in a way that maximizes their enjoyment of it.[221]

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transaction costs, the assignment of rights would not be necessary for reaching an efficient (welfare maximizing) distribution. But in a world with those costs, the initial assignment of rights will matter (ibid., p .16).

[219] I presuppose rather than argue for this claim here. Given a pre-political notion of freedom like the one developed above, there ought to be some cases where the courts/legislature decides in ways that are inconsistent with it, and so I invite the reader to come up with cases that she finds plausibly in violation of the relevant notion of freedom here.

[220] Importantly, for Kant, the right to marry appears to be an implication of innate right (NRF 27:1338).

[221] In general, for Ripstein: positive and negative "externalities as such generate no issues of right; I do not need to pay you for the customers that come into my restaurant because of your nearby hotel, or the bees that pollinate my flowers because of your garden. The mere fact that problems of collective action may lead to an undersupply of a certain good, relative to people's willingness to pay for it, does not underwrite mandatory contribution. The mere fact that a group of people are not able to coordinate to guarantee the production or preservation of something that they value does not entitle them to use the coercive apparatus of the state to compel others to join them in their efforts at producing it" (2009, p. 260). Moreover: "The freedom-based approach…denies that the state has a general mandate to balance interests, and so does not set aside a special class of interests that are exempt from ordinary balancing. Instead, it requires that the same innate right of humanity that structures the state's police power also serve as its limit… All of this could, with some distortion, be translated into the vocabulary of interests: in order to justify the use of coercive power by the state,

Stipulating, then, that the relevant notion of freedom entails judging the cases in this way, Kantian citizens must judge the constituting authority in flagrant violation of its founding principles (i.e., the original contract). It is irrelevant from this point of view that many people think otherwise, that many of the imagined state's attempts to advance their citizens' welfare are taken to be paradigm cases of legal activity. The point to see for now is that the answer to the question of institutional evaluation seems as clear here as it did in the first case: You apply the idea of the original contract to the institutions, and come up with a judgment concerning how closely the latter approximate the former. There is a sense in which this is right, however an important sense in which it is not. Let me explain.

For Kant, the rule of law is not merely instrumental to maximizing welfare, but is rather a necessary condition of ensuring that our exercises of freedom are compossible. Not only does positive law render principles concerning mine and yours increasingly determinate, it provides assurance that those claims will be respected (as to eliminate unilateral enforcement), and it provides a forum for adjudicating rights claims in a way that does not allow individuals' particular judgments to suffice for restricting others' freedom. When everyone's actions are legally constrained in these ways private purposes are pursued only insofar as they are compatible with others like pursuit of the same, under positive law. In this way, persons' powers of choice are united, however imperfectly.

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freedom, understood as independence of another person's choice, is the only interest that matters" (ibid., p. 266).

But it is a sobering fact that the rule of law does not come for free. It requires an incredible, although not always intentional, coordination among human agents whose purposes are not in natural harmony with one another. It requires a consolidation of power that must necessarily threaten to undermine freedom as much as it promises to advance it.[222] Therefore, the payoffs of constituting such an authority must be significant. Given that human beings do not simply care about freedom, but also care about myriad other things, a regime that merely respected freedom and did not, through its collective activity achieve other ends demanded by its citizens would to that degree enjoy less support. So far as it is right, as an empirical matter, that human agents care about a great many things, they will care to see these things reflected in the institutions that they take part in constructing. Their disputes about what matters not only threaten to undermine the stability of an existing order, but can also come to constitute it.

The cases above, though they are regrettably at odds with the spirit of the original contract, are cases such that a substantial number of citizens perceive as issues of justice, and are pressing the bodies of the state to recognize them as such. Given The Kantian Truth about justice, such citizens are mistaken. Still, although regimes can maintain normative legitimacy simply by refusing to exercise coercion except for the sake of freedom, attempting to legislate in such a way does not guarantee descriptive legitimacy. Moreover, descriptive legitimacy (i.e., the belief on the part of a sizeable majority of citizens that the law of the land is authoritative) is a necessary

[222] Berlin points out that, for Benjamin Constant, the protest on the part of most against "this or that set of governors as oppressive" was misguided—for the "real cause of oppression lay in the mere fact of the accumulation of power itself" (2002, p. 209).

condition of normative legitimacy. Although a regime may maintain descriptive legitimacy by ignoring a great many of its citizens' actual concerns, as brought before the public sphere, it is unlikely to be able to do so by ignoring all of them. So far as it is able to maintain control while doing so, it will likely do so merely by force, without the assent of those subject to its power. But this itself wholly undermines that subjects will have any—even formal—obligation to defer to the existing order.[223] Moreover, so far as citizens really are motivated by things other than the protection of freedom, they might (however pathologically) attempt to oust a regime that didn't give hearing to these other values.

Kantian justice is monistic, true. But one of its necessary conditions is coordination around positive law, and it is difficult to secure this except by deference to people's actual preferences, and their (mis)conceptions about justice. We can judge defective institutions provisionally rightful, insofar as we do better by discharging our duty to remain ready for a truly rightful condition by complying and attempting to press for freedom friendly reforms through the press and through discourse than by attempting to institute justice—even true justice—by fiat. It isn't simply that we notice that we cannot do better by the lights of justice starting where we are, and so must delay its realization. It's that even institutions like these, coercive though they are, and coordinated around values other than freedom, in addition to being constituted in these ways, really are the beginnings of preconditions of our freedom's compossibility.

[223] I am reminded here of Kant's claim that the constituting authority cannot institute a change to the form of government by mere force, because the people might abhor the new constitution.

Our first case was a case in which our circumstances as closely as possible reflect the standard of conclusive right, namely consistency with the original contract. In such circumstances, our institutions remain merely provisionally rightful, so far as they could in the future be revealed to be inconsistent with the idea of the original contract (as new persons arise, and circumstances change). Nevertheless, they satisfy the condition of provisional right insofar as we have far more reasons for thinking the right to rule is exercised in good faith than for thinking the reverse. The two tiers of evaluation nearly converge. In the second case, institutions were strictly speaking defective with respect to the standard of conclusive right. Nevertheless, we were able to tell a story about the way in which institutions must remain sensitive to persons' actual preferences in order to secure descriptive legitimacy, and to move toward normative legitimacy precisely thereby.

In closing this section, I want to consider an objection to my treatment of the second case. The objection runs like this: though I've stipulated that these cases run afoul of freedom, there is good reason for thinking otherwise. That reason is as follows: The constituting authority *defines* rights, and even in a defective civil constitution, our external freedom consists in our rights. Since rights are simply bundles of permissions and authorizations, and the particular bundle depends upon the particular way in which rights are distributed in a particular context, any legal order that legislates in a sufficiently general way satisfies the constraint of legislating in line with freedom (e.g., Wood 1992, p. 540). Whether I have a right to make noise (such that to avoid it, you must install heavy insulation or suffer my inept clarinet playing), or you have a right to quiet (such that I have to invest in the insulation, or

forgo practicing my instrument), just depends on how rights are specified, which zoning restrictions the authority goes in for, etc. When citizens press for particular assignments of rights as they have in the above examples (be it through the courts, in the case of nuisance law, or through the legislative arm of the state), they are *defining* rights that are otherwise indeterminate, as problems and conflicts arise. So far as this is true, and so far as our legitimate freedom consists in our external rights, there is no sense to be made of the fact that these changes run afoul of freedom. On this account, our freedom is a political, not a pre-political notion. And on this account, the entire problem that motivated this chapter is nothing beyond a pseudo-problem: insofar as our external freedom in the civil condition is constituted by our rights, and insofar as our rights are the outputs of actual political processes, and insofar as actual political processes are governed by a plurality of values, rights will reflect a plurality of values, and it will suffice to legislate in line with freedom to protect these rights. Thus Kant's account is actually deeply pluralistic, as a substantive matter. Its apparent monism is a mere formality.

In response: If correct, the Kantian theory must inevitably favor the distributions of rights that arise from *Realpolitik*. If the political apparatus is in charge of defining the things that we have rights to, and so defining the sphere of our freedom, then we lose any perspective from the point of the view of the theory from which to evaluate those institutions. For any freedom that consists in rights is a political matter. Importantly, this implies that the theory lacks normative resources to distinguish between, say, a regime in the first kind of case and a regime in the second kind of case discussed above. Although this might be the right reading of Kant

(I have my doubts), it is clearly not an attractive view. The normative gulf between regimes of the first type and regimes of the second is wide, rather than narrow, let alone non-existent. Rather than bundles of permissions and authorizations, to have a right to a thing is to have it solely under your discretion, and to be able to exclude others from it, to the degree that such exclusion is compatible with others' freedom (Ripstein 2009, pp. 88-89).[224] There is on this account a morally significant difference between zoning regulations and mutually beneficial contracts that can often (under certain conditions) come to the same distributions.[225]

Second, there are reasons to think that Kant really did want institutions that respected freedom in a substantive, prepolitical sense. We find evidence for this desire in Kant's description of the just state as one that fosters mutual antagonism and diversity, and that is able to foster their benefits for culture and human progress. Thus, in the universal history essay, Kant writes:

> *The greatest problem for the human species, to which nature compels him, is the achievement of a civil society universally administering right.* Since only in society, and indeed *that society which has the greatest freedom, hence one in which there is a thoroughgoing antagonism of its members and yet the most precise determination and security of the boundaries of this freedom so that the latter can coexist with the freedom of others—since only in it can the highest aim of nature be attained, namely, the development of all the predispositions in humanity*, and since nature also wills that humanity by itself should procure this along with all the ends of its vocation: therefore a society in which *freedom under external laws* can be encountered combined in the greatest possible degree with irresistible power, i.e., a perfectly *just civil constitution,* must be the supreme problem of nature for the human species, because only by means of its solution and execution can nature achieve its remaining aims for our species. (IUH 8:22, emphasis added)

[224] It is not clear that Ripstein would take things so far as I do here.
[225] Kant accepted this. See NRF 27:1349.

The substantive notion of freedom that Kant is working with is supposed to allow a "thoroughgoing antagonism" between its members, albeit one that respects their compossible freedom. Allowing antagonism (limited by the rights of others) is supposed to make possible the development of our predispositions, which grow up best in situations of disagreement and diversity. Allowing people inviolable spheres within which to conduct their activity that is compatible with the free activity of others gives persons maximal space to pursue their goals, some of which might seem awful or misguided given our conservative attachment to the status quo, even if they are later revealed to be brilliant innovations that improve the quality of life for all, by setting a new example. This line of argumentation recalls J.S. Mill's idea that freedom is valuable insofar as it allows persons spheres to undertake 'experiments in living' without being subject to the tyranny of the majority, to advance the "permanent interests of man as a progressive being" (OL, p. 95). But it is clearly possible to have delineations of rights that do not allow this kind of diversity and antagonism. Therefore, either (i) Kant's view changed by the time he wrote *The Doctrine of Right,* or (ii) the objection misconstrues the relationship between positive rights and external freedom.

Now, of course, the story I've offered here will not likely convince skeptics of Kantian right that they ought to adopt his standard of institutional evaluation. Such skeptics are likely to remain worried that the picture leaves the legal system too little authority to adjudicate conflicts in line with other values. On many views, the legal system is there *precisely* to adjudicate claims in ways that help citizens arrive at efficient allocations that are impossible given the market failures that will result if

transaction costs are sufficiently high to prevent individuals from making mutually beneficial arrangements. All of this is right: The Kantian has much normative work to do in convincing others that her interpretation of freedom is the sole value of relevance when determining coercive policy.

Nevertheless, the committed Kantian can take solace here in reconciling herself to her legal circumstances so far as she accepts the arguments of this section. Moreover, second, the account here does, at least, offer the Kantian resources for acknowledging a limited space for other values, and provides explanatory resources not unlike those available to welfarist views when it comes to understanding actual legal activity's grounding in values other than freedom. These resources may not rescue the Kantian theory from having to reckon with the pluralist thesis more directly, but they do allow the Kantian view to avoid denying basic facts of politics and psychology. Still, the Kantian must continue work to defend the view that, as a matter of strict justice, externalities and harms to others are relevant for coercive policy only insofar as they are inconsistent with freedom. Her position in this regard is not unique. Every plausible theory must have an account of when externalities are justice-relevant. For a racist majority's frustrated preference to not see racial mixing in romantic settings fits the definition of externality, even though it is clearly not justice-relevant.[226]

[226] Hausman (1992) argues that deontological theories of rights in general are ill-positioned to handle the problem externalities. The problem is, "If Jack and Jill are entitled to what they have and make a deal, then they are entitled to what they get as a result. And if Sally had no claim on their holdings before the deal, she has no claim on their holdings afterward" (p. 99). The problem is that this appears false: negative externalities can have profound impacts on individuals, and any theory that doesn't recognize as much is to that degree impoverished. But if people have a right against having their property affected by externalities, then "there would appear to be little I would be free to do even on my own property. Can I build a fire if soot will land next door? Can I use fertilizer if any will leach into the ground water and affect your wells or lakes? Can I build a house, if doing so will limit your

Although Kantian theory at the level of conclusive right must ultimately defend a controversial position on the relevance of positive and negative externalities for *coercive* policy, this does not preclude her from denying their fully legitimate role in non-coercive forms of collective activity. Indeed, insofar as Kant thinks that free citizens are capable of and responsible for pursuing their own welfare, and insofar as non-coercive collective activity can help in this regard, she ought to be fully motivated to participate in and design schemes of this kind. There is, on the Kantian proposal, a large difference between a homeowners' association which determines limits on persons' property, but depends upon owners' consent, and coercive zoning policy that is often successfully put into by a small group of politically activated citizens organize into bodies to impose their preferences on others who seldom share them. Kantian theorists, then, should be enthusiastic about exploring non-state based alternatives to disputes over rights. It is true, as Coase demonstrated, that such alternatives are difficult to get off the ground in circumstances where transaction costs

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sunlight? Can I plant sunflowers if the pollen will make you sneeze? It would seem that I would have to get the consent of my many neighbors at every turn." (p. 100). Hausman notes that you can appeal to the doctrine of double effect to try to limit some of these things, so that only intentional violations of rights count, but the doctrine of double effect is a controversial doctrine. The alternative to acknowledging widespread rights violations seems equally unacceptable, which would be to hold that people don't have a right against having their property affected by externalities. For then deontological theories refuse to recognize a substantial amount of injustice. The Kantian response to this first problem is to rely on the central notion of exclusion. If the externality affects the value of my right without undermining my exclusive right to use it for my purposes, then it is not justice-relevant. A second problem is that deontological theories like Kant's have difficulties in "generating the precise property rights that are needed to regulate people's conduct toward one another." For if "one sets aside consequentialist accounts of rights, then one is left with an account of natural rights" which is too general to "derive detailed and precise specifications of property rights" (p. 102). The Kantian response is to this last problem is to observe that people's claims to specific objects are historically grounded: either by taking control in the state of nature, or by complying with an institutional process of acquisition, people come to acquire claims to specific things. But these rights also have a normative structure (grounded in Kant's reductio argument for the postulate), insofar as they are meant to imply full exclusion, insofar as the latter is compatible with the freedom of others. Thus, the distribution of rights receives its content historically, while their normativity is a conceptual matter.

are high, and the orthodoxy correctly reminds us that there are a number of incentive problems (e.g., free-riding, compliance, and supply) that attend non-coercive alternatives to many of our legal institutions. But as Elinor Ostrom (1990) and others in the Bloomington school have been at pains to point out, that these theoretical problems are insurmountable is belied by the solutions that real-world communities have developed in response. So far as this is true, Kantians about justice should encourage their community oriented neighbors to pursue their collective aims in ways that do not violate others' rights, and should take steps to ensure that this is reflected in legal practice so far as she can.

V. Conclusion

In this chapter, I have developed an interpretation of Kant's political philosophy according to which it is monistic, and thus subject to an important family of objections, and have articulated a two-tiered alternative reading of Kant's political philosophy that was supposed to soften the blow of some of these criticisms. I want to conclude by acknowledging that there is plenty in Kant's theory—even so interpreted—that might plausibly worry those motivated by the pluralist thesis. For even so interpreted, non-freedom based values have no legitimate place in determining coercive policy at the theory's highest level of idealization. At that highest level, freedom is a trumping value. But such continued disagreement only shows how much work—in the marketplace of ideas—defenders of a Kantian theory have before them, work that we cannot well shy away from, and that must take new forms if we are to move ever closer to a condition where rights are stable, and freedom reigns.

Chapter 7

Between Moralism and Realism: Method in Kant's Politics

> I identify the "first" political question in Hobbesian terms as the securing of order, protection, safety, trust, and the conditions of cooperation. It is "first" because solving it is the condition of solving, indeed posing, any others. It is not (unhappily) first in the sense that once solved, it never has to be solved again. This is particularly important because, a solution to the first question being required *all the time,* it is affected by historical circumstances; it is not a matter of arriving at a solution to the first question at the level of state-of-nature theory and then going on to the rest of the agenda.
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> Political moralism, particularly in its Kantian forms, has a universalistic tendency which encourages it to inform past societies about their failings. It is not that these judgements are, exactly, meaningless—one can imagine oneself as Kant at the court of King Arthur if one wants to—but they are useless and do not help one to understand anything.
>
> —Bernard Williams, *In the Beginning, There Was the Deed*

I. Introduction

So far I've argued for a number of unorthodox claims: (1) that Kant accepts PT; (2) that accepting PT implies that in our world our political obligations are to be reduced to the duty to remain ready for the rightful condition; (3) that so understood, Kant's position is somewhat closer to philosophical anarchism than has commonly been supposed; and (4) that the Kantian position so described can recognize a limited role for plural values in a way that is not commonly appreciated. I argue in this

chapter that the resulting picture allows Kant to steer an attractive middle course between so-called Political Realism (PR) and Political Moralism (PM).

The distinction between PR and PM is due to Bernard Williams. Toward the end of his life (in a collection of essays published posthumously), Williams professed deep dissatisfaction with the status quo in political philosophy. As Williams saw it, much theorizing about politics was based on a tacit acceptance of a model on which the political philosopher articulates a standard or ideal structure (often a priori) that is to be applied to political institutions for their evaluation. In slogan form, PM takes political philosophy to be applied moral philosophy, whereas PR denies this, claiming autonomy for the political domain. This greater autonomy consists in recognizing that answers to political questions depend in part on establishing order over anarchy. But if so, then its answers will be, in important ways, tied to the particular contexts in which order is established. A priori moral principles will therefore be of limited value in answering political questions.

If Jacob Weinrib and Paul Formosa are correct, Kant's politics falls squarely in the PM camp. For Weinrib, Kant never abandoned the view (developed in *Perpetual Peace)* that the ideal legislator is a "moral politician," i.e., the one who makes it out that politics must everywhere conform to morality (even if this must be achieved gradually) (Weinrib 2013, p. 124). And this is not an implausible view. For Kant does affirm that politics must everywhere bend its knee before right (PP 8:380), and that there is some significant truth in the idea that justice must be done though the heavens may fall: "if justice goes, then there is no longer any value in men's living on earth" (MdS 6:332). By contrast, Formosa argues that Kantian politics is

comprised by a rule of right that is entailed by morality, but not identical to it. Since the two cannot conflict, neither trumps the other. Still, the most crucial political questions are determined by moral reasoning about the proper rule of right (for Formosa, this happens by considering which rules conduce to our autonomy) (Formosa 2008, pp. 174-180). This too finds some support: the standards of right (the idea of the original contract, the postulates, the universal principle of right, etc.) are largely given a priori, and are described at times in a language that gives rise to the impression that they are tightly connected to his moral philosophy.[227] Moreover, Kant explicitly denies the possibility of conflict with morality (PP 8:370). Despite their disagreement, Formosa and Weinrib agree that answers to *the most central political questions* are given by consulting morality—whether this is to derive independent principles of politics that cannot conflict with it, or instead to demand that political solutions be brought eventually into line with moral demands. Thus perhaps the pejorative reference to moralistic Kantianism in nearly every realist classic is well-founded.[228]

Although there is therefore much to recommend a moralist reading of Kant, I argue in what follows that his view is more closely aligned with the emerging realist position than it has been taken to be (both by its proponents and by its critics). Precisely because central political questions (e.g., the distribution of external rights) are to be answered historically by agents asserting provisional claims and trying to constitute an authority that protects them, such questions are answered in substantial part by the development of actual politics. That said, PR cannot itself provide fully

[227] I myself argue that there is an important sense in which this is true in this dissertation's introduction.
[228] For two representative examples, see Geuss 2008, p. 1, and Williams 2005, p. 10.

attractive answers to political questions, and where it fails, the remaining moralist aspects of Kant's theory (in particular its universalism) emerge as clear virtues. I begin in § II by spelling out PR's critique of PM, and claim that there are at several points regarding which political realists are dissatisfied with the methodological status quo. In the process, I observe that chief among the challenges faced by PR is to articulate a standard of legitimacy that does not involve a subtle lapse into PM, but that maintains sufficient distance from the status quo to avoid an unreflective affirmation of *Realpolitik*. In § III, I raise some moralist doubts concerning the attractiveness of the realist position, and indicate some ways in which the moralist can incorporate the realist's insights without a fundamental change in approach. § IV then pieces these two sections together, arguing that Kant's theory as developed in earlier chapters can avoid the objections realists raise against moralists. A Kantian theory that has the rough contours of the position I develop in earlier chapters issues in a theory that can give realists much of what they want without sacrificing the well-founded universalism of the moralist position. § V concludes.

II. Realism: Polemical and Constructive

In this section, I briefly characterize realism in both its polemical and its constructive moods, beginning with the former. Perhaps the first thing is to admit that there may not be any such thing as *the* realist position. Perhaps, indeed, the label instead picks out a number of views unified by overlapping "strands of family resemblance" (e.g., Coady 2008, p. 12).[229] For the purposes of this paper, I wish to

[229] The idea of family resemblance is originally due to Wittgenstein.

focus on four complaints that are nearly universally raised by realist theorists. For realists, much moralist theorizing fails to:

1. Begin from and pose compelling answers to the "first question" of politics, namely, how order is to be secured (Williams 2005, p. 2; Waldron 2012, p. 7; Geuss 2008, p. 22).
2. Face up to the cooperative problems posed by, *inter alia,* real-world disagreement about normative and empirical matters (Waldron 1999; Galston 2010, p. 396; Larmore 2013, p. 279;[230] Rossi 2012, p. 150; Sleat 2014, p. 315; Williams 2005, p. 13).
3. Attend to the dangers of utopianism (Coady 2008, p. 12; Galston 2010, p. 394; Rossi & Sleat 2014, pp. 691-692).
4. Engage with history and social science, in order to understand the extent to which current standards are not universal, but are rather products of history and circumstance, and come to understand that our institutional solutions are not appropriate for all times and all places (Williams 2005, pp. 12-13, 17; Rossi & Sleat 2014, p. 695; Geuss 2008, p. 28).[231]

Realists claim that each failure indicates a serious problem with the methodological status quo because each ignores something central to the political domain, which is characterized by its own kind of normativity, and is not reducible to or strictly limited by other normative domains (like morality).

[230] Though Larmore is likely best classified as a moralist, he shares many of the concerns of realists, and attempts to qualify their position in certain ways.

[231] Realists are also concerned that much moralism inadequately considers the role that power relations play in structuring society (Geuss 2008, p. 25). For the purposes of clarity of presentation, I leave this aside.

One begins down the realist road once one realizes that we have politics to the extent that we have or are in search of an answer to what Bernard Williams calls the 'first question' of politics. In Hobbesian spirit, the first question demands to know how "the securing of order, protection, safety, trust, and the conditions of cooperation" is possible in circumstances like ours (2005, p. 3). This is the first question of politics, because having a good answer to it (one well positioned to secure such conditions) is itself a presupposition of solving any other political problem.[232] If trust is lacking altogether, then we simply cannot begin to address questions concerning *how* political order ought to be established. But the question of how to secure and maintain trust and order is not clearly addressed by proponents of PM, and many of their answers can seem to undermine our ability to arrive at an answer to this first question.

The centrality of this first question to realist thought illuminates the distinct way in which each of the other problems for PM listed above counts as a failure. The problem of disagreement (2.) is relevant in light of the first question because disagreement poses powerful coordination problems, and in light of the fact that there is no natural authority for resolving them. Disagreement may (and often does) incite violence, undermining an existing answer to the first question of politics.[233] So, to the degree that the methodological status quo brackets real world disagreement—acknowledging perhaps only the relevance of 'reasonable disagreement'—it fails to

[232] Importantly, the question is never answered once and for all. The importance of this is that *all* future political decisions must be made in the view of sustaining cooperation, a point to which we will return later.

[233] Here, realists like Williams remind us that we ought to consider the extent to which we are *fortunate* to enjoy what Rawls derides as mere *modus vivendi*.

confront the sphere of politics head-on, and its principles are thus unlikely to help us navigate our world. What it is reasonable to disagree about is contested, and so it will not do to assume that we can settle on a notion of reasonableness and move from there to solutions to political problems (*pace* political liberalism). If many people unreasonably disagree, then the theory will not answer politics' first question. One will worry about utopianism (3.) to the extent that utopian aims may undermine an existing stable order. If persons are given to think that nothing short of moral perfection will do for the legitimation of coercion, they are likely to inadvertently treat the perfect (ideal justice, say) as the enemy of the good (*modus vivendi*). Finally, if the central practical question of politics concerns order and stability, it will become clear that different groups of people will address it in different ways, and their answers will be overwritten by their own historical contingencies (4.). Not only that, however: We misunderstand ourselves to the degree that we conceive of our own political beliefs as essentially ahistorical, and this matters for the way that we understand their bearing on securing or undermining order.

In general, realists claim that by ignoring these kinds of questions, much political philosophy and political theory sees itself as being both capable of and rightly directed at freeing "modern subjects and their sets of arrangements [from] political conflict and instability" (Honig 1993, p. 2). Contemporary theorists do this by attempting to establish—in the abstract—moral conditions of legitimacy for any normative order, and proceed to use those conditions as critical principles across the board in order to justify a number of practical requirements. But, realists urge, there is no escape from politics, even for theorists. Politics has its own norms, and those

norms may not align with the partisan moral ideals that theorists put forward as authoritative. Indeed, theorists ought to do a better job recognizing "their own partisan and non-neutral status as interested agents in the real-world struggle for legitimation" (Rossi & Sleat 2014, p. 695).

More constructively, PR seeks a norm of legitimacy that possesses sufficient normative resources to maintain a distance from the status quo, but that derives from politics itself,[234] and that thus avoids the above problems. For realists (following Williams), a regime is legitimate only if it provides an answer to the first question of politics, namely an answer to the question of how to secure conditions of cooperation and order. This is of course only a necessary condition of legitimacy.

It must also be the case that (a) the solution does not amount to another version of the problem it is designed to solve (it is not mere force), and (b) it meets what Williams calls the "Basic Legitimation Demand" (BLD). BLD requires that the solution to the first question be acceptable to each person falling under the regime in question, with reference to her actual (i.e., not idealized) beliefs,[235] subject only to the requirement that this acceptability cannot depend upon the exercise of force itself

[234] Moralists (e.g. Estlund 2017) have expressed puzzlement over what exactly this means. I take it that the idea is twofold: There is a norm (in Williams' case, a legitimation norm) that arises merely from the distinction between mere force and political rule, and the fact that some power hierarchy is necessary for solving the first political question. To the degree that realists accept a pre-political norm, it is this. Still, this norm is *essential* to the existence of politics. Additional norms governing the shape of *de facto* power structures (e.g. liberal norms of legitimacy), by contrast, arise from particular contexts and situations in which agents seek to understand the power they are subject to (and in which those in power provide justifications in the service of such understanding). Whereas the first norm is political insofar as it is conceptually inseparable from it, the second kind of norm is political in the sense that it is the output of actual political processes. The realist makes the further claim that *external* norms are only inappropriately applied to political situations. We will have occasion below to subject each of these claims to greater scrutiny.

[235] Different realist accounts answer the question of how to specify BLD in somewhat different ways. It is clear that no plausible realist view can require that each member actually accepts the rule. Beyond this, there is significant room for disagreement among realist ranks.

(2005, p. 4). It is thus crucial that on a realist picture, *de facto* power does not legitimate; might does not make right; political legitimacy is not *Realpolitik*. Politics is indeed norm-governed, but its norms are embodied in the BLD or arise from it, and are "internal" to politics. Realists urge that there is something inappropriate about applying alien norms to such a domain.[236] The chief challenge of articulating a distinctly realist position therefore is to understand political norms in such a way that affords sufficient normative distance from actual conditions as to plausibly maintain its stance against *Realpolitik*, while avoiding importing too many normative resources (or incorporating them in the wrong way), as to avoid conceding the game to PM (Sleat 2014, p. 315).

To see how realists have gone about this, consider Williams' account of how an authority discharges its BLD. At first it does so by demonstrating that it solves a practical problem for those subject to its authority, by e.g., securing order in a way that "makes sense" (in Williams' language) to those subject to that authority (2005, p. 11). Order secured by mere force is domination, and there is a crucial distinction between political rule and successful domination. But what precisely marks the difference depends on the attitudes of those subject to political rule in a given place, at a given time. Since an authority discharges its BLD by exercising power in ways

[236] It is worth noting that actual requests for the justification of the use of power are insufficient for generating a burden on the putative authority to provide justification. This is because any grievance can ground such a request, and "there is always some place for grievance" (2005, p. 6). Nor is an actual request for justification necessary for generating an obligation on behalf of the authority to provide one. This latter idea gives rise to Williams' critical theory principle: "the acceptance of a justification does not count if the acceptance itself is produced by the coercive power which is supposedly being justified" (2005, p. 6). Of course, it is difficult to specify exactly when acceptance is produced by coercive power in the relevant sense, but Williams sets this issue aside. He notes only that it is a sufficient condition for there "being a genuine demand for justification" that A coerces B and claims that it would be *wrong* of B to fight back. In so doing, A claims that his behavior toward B transcends the conditions of warfare. And that claim stands in need of justification.

that makes sense to those over whom the power is exercised, and since different orders will make sense under different historical conditions, manifold ways of structuring authority may count as legitimate at different times, in different places.[237]

To illustrate the point, Williams explains how, by raising the relevant standards for legitimation, post-enlightenment liberals have made it more difficult for power to be legitimated. No longer can justifications which appeal to innate hierarchies and distinctions between persons legitimate. Instead, modern conditions and understandings of the workings of political power combine with realist methodology to generate stringent, liberal constraints on legitimacy. Here and now, only liberal orders (those that enshrine respect for persons as equals) are legitimate. For Williams, the distinctly liberal notion of legitimacy, where regimes are legitimate only if they respect and enshrine liberal rights, generates genuine constraints on the exercise of political power, just given the demands made in times where claims to those rights was asserted (2005, p. 7-8). But Williams is at pains to note that these new liberal standards are grounded, not in a priori standards, but in the development of historically conditioned attempts at legitimation. How does this work?

These relatively new constraints came into being through contest, argumentation, and protest—in other words, by the political process itself. In being subject to regimes that attempted to legitimate on other grounds, individuals developed objections, and eventually a firm understanding of why power legitimated by appealing to hierarchy did not make sense to them. It is important that these

[237] Here, it is helpful to note that that standards of legitimacy are local in the sense that each locality will have them, and they will vary according to locality. It is a further step (one that we will see that Williams at times seems tempted to take, and other times seems tempted to resist) to hold that they are local in the sense of applying merely locally.

understandings are not simply read off of a conception of the person in (Rawlsian) moralist fashion. Instead, they emerge from the attempts—successful, but especially unsuccessful—at legitimation itself, along with a developing sense that some historical attempts have been merely ideological. Put differently, our understanding of what makes sense as a legitimation of power is in part the result of historical politics—of individuals and groups asserting their claims against each other. The result of the way things have politically played out is that now, in circumstances like ours, legitimation requires liberal rights. Thus, Williams writes: "the BLD together with historical conditions permits *only a liberal solution*: other forms of answer are unacceptable" (2005, p. 8).

Williams famously chastises moralists' eagerness to criticize past attempts at legitimation (second epigraph). Thus, one might expect Williams to extend his attitude about judging past societies and their political arrangements to present illiberal and hierarchical societies. Not so. Although the historical embeddedness of the liberal notion of legitimacy implies that we would be foolish to extend that notion to critically evaluate the past, that does not imply that we are unable to extend it to societies contemporaneous with our own. Instead, he writes that the "idea of [legitimacy as liberalism] is normative for us as applied to our own society; *so it is also normative in relation to other societies which co-exist with ours…They cannot be separated from us by the relativism of distance*" (2005, p. 14, emphasis added). Thus, to the extent that we liberals think legitimation requires liberal rights, we are justified in applying that standard of legitimacy elsewhere, where it may not be accepted by locals. If Williams is right that, by our post-enlightenment lights, any

attempt at legitimation that falls short of liberalism is inadequate, then it isn't quite that the methodological status quo has gotten its normative conclusions wrong. Rather, it has misunderstood itself in arriving at them. As he puts the point, "one can invoke a liberal conception of the person in justifying features of the liberal state (they fit together), but one cannot go all the way down and start from the bottom" (2005, pp. 8-9). To the extent that **PM** starts from the bottom, it misunderstands itself. But for all that, it may make the right prescriptions regarding our duties.

PM will make the right prescriptions by **PR** lights to the degree that the **BLD** is understood in distinctly liberal terms. But it's also true that these prescriptions will not be universalistic, for "the liberal project *in this particular* [universalistic] *form,* does not in fact any longer make sense" (2005, p. 25). Whether prescriptions approach the universality they once claimed to satisfy will depend "to an indefinite degree on other people's actions" and how they understand the social world they inhabit (ibid.). Recognizing this fact about the historical contingency of legitimation demands can help us to develop an interpretation of alien practices of legitimation as being something other than brute coercion. In that case, although we will have various things to say against them, and although we see the decline of these practices as representing a form of liberation, we may be less eager to insist that they constitute a violation of universal human rights.

So far, we've seen that **PR** is unified around a number of concerns about a methodological status quo that is dangerously utopian, unfortunately ahistorical, and too far removed from political practice. More positively, it attempts to understand politics in a way that respects its autonomy as a normative domain. Insofar as it is

successful, it draws the concepts relevant to the legitimation of power from the structure and historical practice of politics itself. The political standards it accepts—drawn as they are from political practice—are likely to be anti-utopian, and to recognize *modus vivendi* as a genuine accomplishment. I want to turn now to considering how moralists are likely to respond to the charges that Williams and others raise against it, and how they themselves receive (and ought to receive) the realist understanding of legitimacy. We will see that some of these concerns are reasonable, and, later, that the Kantian theory developed in earlier chapters captures the truth in PR's critique of the status quo, without falling victim to sound moralist objections.

III. Moralism Redeemed?

PM is typically identified by its opponents with the methodological status quo as it exists in mainstream (often Rawlsian) analytic philosophy. In response to realist critiques, moralists hold that realists' genuine normative insights (e.g. concerning the importance of securing order, the importance of remaining historically grounded, the importance of attending to power relations) are compatible with sophisticated versions of moralism. More damningly, doing moralist political theory is to some degree *unavoidable* if one hopes to do political theory that is normatively plausible and not overly deferential to the status quo. In this section, I argue that moralists are right about this: even if good political philosophy needs to do more to remain

grounded in the realities of political practice, realists are too quick to give up on the universalism that characterizes the theories they criticize.[238]

Realists point out that much PM is parochial, reflecting peculiarities of one historical moment, while nevertheless claiming a timeless, universalist perspective. Instead, we should predict that just as the political understandings of the past gave way to our contemporary understandings, so too might our contemporary understandings be replaced by newer understandings. But although it may be true in some ultimate sense that our political norms (perhaps all our norms) originate in practice, so too is it true that not everything that looks normative and emerges from practice is worthy of our appreciation.[239]

While it makes good sense to study history, and to understand the way our norms developed, the result of such study may well be that we affirm them all the more deeply—that they make sense, not just to us, but as appropriate for the types of beings that humans are. We ought to take care to recognize which aspects of our moral views are merely the product of tradition. James Rachels famously pointed out that funeral rituals were probably like this. But this does not mean giving up the view that some aspects of our moral view apply universally: That persons are owed respect, that slavery is always and everywhere wrong, that human freedom is valuable—these are not *mere* traditions. They have a claim to our full allegiance, whoever we might be.

Realists respond that this is a misunderstanding, an impression generated by the historical fact that we have reached a point according to which claims involving

[238] Moralism need not be universalistic, but the dominant accounts are. I set aside relativistic moralism.
[239] Compare Estlund 2017, p. 397.

basic rights are now beyond dispute, a sort of bedrock in terms of which legitimation attempts can be evaluated (Williams 2005, pp. 62-63). The realist thought is that there are certain attempts at legitimation that are now sufficiently recognized to simply reproduce the problem they are supposed to solve to be non-starters. But here realists are making assertions where they want to be making arguments. Realism assumes, rather than shows, that politics now must be emancipatory; it assumes, rather than shows that might does not make right; it assumes, rather than shows, that power cannot justifiably produce its own justification. But as a study of the history of ideas reveals, these are not unimportant assumptions, and they are not universally shared. Where they are denied, they ought to be accepted, and not just because we say so, but because there is something true in them. It is true that *we* see hierarchical attempts at legitimation as failures (many of us do, anyway). But others (even others among us) do not, have not, and if we have nothing to say to them other than "we do it differently here; that doesn't *go* for us," then we have little to say indeed.

The realist is at pains to reiterate that she is not a relativist. For the realist, relativism must always come "too early" or "too late" (Williams 2005, p. 69). Relativism comes too early before interaction because it states that the truth of moral claims depends on a culture's practices or beliefs, and here, before interaction, there is only one such set of practices and beliefs. It must, then, inevitably appear universal, and so accepting the theory makes no practical difference. It comes too late after interaction, because there will always be a sense in which "they" count as "us," and so, by the relativist's own lights, what is needed is a way of negotiating the norms by which we will live our lives, whether that entails a regime of mutual non-interference,

or not. It is telling that Williams characterizes the relativist position as "useless," rather than "false."

Disagreements between groups present practical problems. Eventually, we hope that they will ultimately be "solved" through practice (in which we reach equilibrium both on an understanding of who counts as "us", and which norms govern "us"). But the realist has given up too quickly on the resources in universalistic moral theory to aid with this process. Indeed, the very process of negotiation is likely to be couched expressly in universalistic terms. The reasons offered will be reasons that do not appeal to particularities of our circumstances, but rather apply to others in their circumstances by means of our common humanity; the denials will be that common humanity does not require what we say it does. If we are convinced in one direction rather than another, we are convinced not that the solution is right for us, but that it is right for anyone similarly situated. Relativism might be useless. But it's also false. Some normative demands are firmly based in consistent reasoning and sound values; others are not. Again, while securing order is a central problem, not every order-sustaining equilibrium is on a par, and we have the resources for recognizing this—however imperfectly. To the degree that theorists can, by means of moralistic theorizing, push things toward a better equilibrium, so much the better. Nothing about this means that we shouldn't listen to others, and attend to unique features of their own circumstances; nothing about this means that we must be rash.

The realist may object that moralist universalism is inherently likely to push us away from solutions to the first political question and toward further problems. But it's hard to see how such a general claim could be supported. Indeed, in most

cases, realist argument begins and ends in pointing a skeptical finger at the (recent) history of moralist thought and indicating the ways in which real solutions to the first political question are distant from such thought. To the degree that the realist convinces us that there are good reasons for taking politics' first question seriously, and for realizing the degree to which real solutions to it are never "for all time," but rather are constantly at risk of being undermined, the moralist can simply accept that future versions of PM must be sensitive to this fact. So the moralist can grant the importance of the first political question, in which case the most pressing realist objection entails merely a friendly amendment to moralism, rather than a change in approach altogether. (The amendment may be costly and demanding for being friendly. The point is only that it need not entail a fundamentally different way of doing theory.) But for all this, the realist should grant that we want a standard for deciding when a "renegotiation" of a "we" is successful and when not, and we want this standard to pick out not mere empirical, but also normative success.[240] To think that normative success is likely to emerge seamlessly from politics is to romanticize that sphere of human activity, even if ignoring it's the ways in which it generates outcomes and norms is likely to fail to give it its due.

While I think, then, that we should this accept some of the realist's complaints as pointing to genuine insights, we should stop short of admitting the view's anti-universalistic claims. It is true that the first political question is of chief importance. It is true that we want a solution to it always and at all times, and that there would be no political sphere without having an answer to it. It is true that we

[240] Compare Larmore 2013.

have imperfect access to the moral truth, that we will make mistakes, and that progress is neither inevitable nor linear. But all of this should be acceptable to the moralist, to the person who thinks that there is an answer, and a universalistic one, concerning what human beings are owed in terms of legitimation.[241]

IV. Moralism without Romance:[242] A Kantian Alternative

I believe that the version of Kant's political philosophy articulated in previous chapters is well-suited to take the realist critique of political philosophy seriously without giving up on sensible moralist universalism. It is the task of this section to show as much. We simply need to make explicit the points at which the Kantian theory so developed is not vulnerable to, but rather develops, various aspects of the realist critique and to show that it does so despite maintaining moralism's sound commitment to universalism.

The first question of politics

The first question of politics asks how order is to be secured. We have seen that several sympathetic commentators have objected to Kant's own Hobbesian sounding remarks on the importance of securing order, which seem to involve the

[241] In previous work, I have argued that positive realist proposals are ambiguous between those that see the problem of the status quo in political philosophy as primarily methodological, involving the wrong way of doing theory, and those that see the same as primarily normative, involving the wrong conclusions arrived at through theory. The latter kind of realist theories, I believe, actually agree with this moralist reply, and simply advocate a kind of minimalism about legitimacy, in order to secure *modus vivendi*. Compare Estlund 2017, pp. 395-399.

[242] This title is inspired by James Buchanan's own efforts to develop a conception of "Politics Without Romance".

questionable view that any level of despotism is necessarily preferable to anarchy.[243] Not only is Kant at pains to emphasize the virtues of even highly defective answers to the first question, he emphasizes that the eventual securing of order, and citizens' interests in securing order, can, after significant processes of negotiation, issue in new assignments of provisional rights (e.g., after revolutions). We must imagine that this is because eventually it fails to be credible that one is rightfully disposed and at the same time refuses to accept the solutions on offer. In such cases, citizens comply with these normative orders not because they are conclusively legitimate, but because their compliance is a condition of movement toward full legitimacy. Not only that, but we've seen that despite demanding that the coercion can only be legitimately exercised for the sake of protecting freedom, the values around which legitimation attempts are actually organized provide steps toward a world in which our external obligations have the character of material obligations consistent with freedom. In these ways, Kant is deeply attentive to politics' first question, and so to realism's primary concern. Kant's theory is positively *unlike* the "Kantian" theories that realists rebuke.

But for all this, Kant's theory affirms universalism. The fact that one tier of institutional evaluation (provisional right) views imperfect institutions as important in their own right does not entail that the theory as a whole condones them in their present form. Indeed, insofar as persons' rights are not upheld, insofar as power is exercised arbitrarily, insofar as freedom is restricted for reasons other than freedom

[243] For a reading of Kant that firmly subordinates this first question to the question of securing justice, see Forst 2014.

itself, there is work to be done—work that we should not shy away from due to unwarranted fear of failure. As Kant puts it in his famous essay on enlightenment:

> That by far the greatest part of humankind...should hold the step toward majority to be not only troublesome but also highly dangerous will soon be seen to by these guardians who have kindly taken it upon themselves to supervise them; after they have made their domesticated animals dumb and carefully prevented these placid creatures from daring to step without the walking cart in which they have confined them, they then show them the danger that threatens them if they try to walk alone. Now this danger is not in fact so great, for by a few falls they would eventually learn to walk; but an example of this kind makes them timid and usually frightens them away from any further attempt. (WIE 8:35)

Having been brought up under unjust institutions, subjects will often fear of the consequences of independence in thought and action.[244] While establishing order is important, so too is ensuring that order respects the demand to leave us free in what does not compromise the freedom of others: "The right of human beings must be held sacred, however great a sacrifice this may cost the ruling power" (PP 8:380). This is not treated as a matter of temporal or locational contingency. To the degree that others, subject to despotic rule, do not value our right to independence, Kant has an error theory: The institutions under which their preferences have developed have blocked its value from their view. To be motivated to fight for universal independence against despotism, the Kantian need not deny that we might come to learn that freedom as she understands it is not valued by others; she only need to deny that she has been given reason for thinking it not valuable, that many reasons proffered appear to rest on confusion or error, and that freedom so understood

[244] Kant expresses a similar worry in *The Conflict of the Faculties,* where he argues that chains of a certain kind can provoke revolt, whereas a government that respects human beings' interest in freedom would enjoy greater stability (CF 7:80).

presents itself as a genuine value for beings like us. Were she to realize that it was *she* who was confused or in error, she would recognize this for *reasons,* not merely because circumstances have changed (unless the relevance of the circumstances were itself grounded in reasons prior to it).[245] In this way, her universalism about their being a true answer to questions of legitimation is prior to the particular views that she holds to be universally true.[246] Nevertheless, she does hold them to be universally true.

For Kant, answering the first question of politics matters because rendering our freedom compossible is impossible without an answer (for reasons adduced in Chapter 1). In this way, there are notions in the form of principles and ideas that are prior to politics (freedom, the concept of right itself, etc.), that explain why its various features matter, and that, in this case, join forces with realists to indicate the failure of several moralist projects to take the first question of politics seriously. Insofar as realism is *essentially* about insisting that politics produces its own norms, themselves not dependent on moral norms, however, Kant seems to disagree.

In response: it does not seem plausible in the first place to claim that politics is fully autonomous from other domains of practical inquiry. While realists might say that the only translocational, transhistorical norm is the norm that distinguishes *in some way* the exercise of force from the exercise of political rule, it is a short step from here to thinking that there are also translocational, transhistorical standards for what counts as a *good* distinction between force and legitimate political rule. Moreover, taking that short step is fully compatible with acknowledging that the

[245] This view recalls Cohen's argument that reasons are fact-insensitive, an argument that I have always found persuasive. See Cohen 2008.
[246] This follows from Kant's general account of judgment, which aspires to universality. See KU 20:243; Arendt (2006), p. 217.

results of actual political processes themselves matter. This is so in Kant's case insofar as the actual patterns of acquisition, so far as they generate provisional rights, determine, in part, the distributions that must be recognized as just. If we have a provisional distribution of rights that is not subject to decisive objection grounded in consistency with others' freedom, but might be better along the lines of some a priori distributive criteria, the distribution should, by the lights of Kant's theory, stand. To do otherwise is to fail to respect persons' claims to things when they are not inconsistent with others' freedom, and to give them grounds to retaliate. History matters.

For Kant, as we have seen, history matters for determining legitimate distributions of rights and duties because history involves attempting to reconcile persons' actual claims to external rights. Political solutions must be worked out in practice because a priori principles do not fully determine the limits of how far concrete external rights might extend, without violating others' rights. Thus, as we interact with new-comers (the just-born or the previously foreign), the judgment that we have a right to exclude must be reassessed. New-comers' rights to common ownership and to being governed only by an omnilateral will must be found consistent with our right to exclude them from our corners of the earth by our not-yet omnilateral lawgiving. Theory can here only provide a framework for such justifications. There is no sense of optimism that we can work out from the armchair a conception of what counts as "enough and as good," and apply this standard in the context of political contestation to distinguish between claims that ought and ought not be upheld, and to simply proceed coercively accordingly.

But concerning the value of freedom as such—which first rationalizes the acquisition of rights to things and bodily integrity—it seems that Kantians are right to hold fast against the realist insistence that if the norms haven't come directly out of a particular political struggle, they are inapt. The importance of history here meets its limits. If these ideals are attractive, if they appeal to people, it is strange to say: they didn't come from *everyone's* attempt at legitimation, they came around at a particular time in a particular place. It is true that we ought to be careful here, that others may have the right to govern differently, according to different norms (at least temporarily). But Kant's account explains this: they have provisional rights to territory, and the very thing that explains those provisional rights is the anticipation that they will be made consistent with everyone's freedom (see the previous chapter). In the end, I think the realist should be satisfied with a theory that affords *greater* autonomy to the political than the methodological status quo. And surely Kant's theory does this much, even if it is true that the normative importance of political processes is limited in clear respects by a priori principles.

The problem of disagreement

In Chapter 1, I argued that the issue of disagreement about normative ideals is a derivative but central motivation for Kant's argument to leave the state of nature. Because we disagree about what fundamental justice requires, and because there is no authority in the state of nature, we must resolve to constitute a public authority for governing our disputes. To do otherwise is to imply an authority to unilaterally bind others. No one has done more to showcase this aspect of Kant's thought than Jeremy

Waldron. If Waldron exaggerates the importance of matters of disagreement for Kantian theories (in a way that generates a positivistic account at odds with Kant's foundational principles), it is a fine corrective to readings of Kant's philosophy (e.g., that of Rawls) that seem to underplay real disagreement's importance.

I emphasized in the last chapter that Kant's theory is a two-tiered theory. Modern versions of two-tiered theories distinguish between justice (which is demanding) and legitimacy (which is less demanding).[247] Accepting a less demanding notion of legitimacy allows us to cooperate while we work out disagreements about complete justice. For interactional purposes, however, these disagreements are largely bracketed. Similarly, Kant distinguishes between provisional and conclusive right. Provisional rights are those rights that we assert in the absence of consciousness of their necessity, and our practical activity is organized around their assertion. Still, they have normative presuppositions, and different allocations of provisional rights do better or worse at approximating their instantiation. From the perspective of first level theory, we recognize that the Kantian view about those presuppositions is only one option among many for understanding the conditions of conclusive right, or ideal justice (although we hold that it is the true view nonetheless). But since we recognize that others disagree, and that nevertheless order must be secured, we address second level disagreements through the procedures settled upon in the first level. If we are not willing to bracket these disagreements, we will—at least in some circumstances—be guilty of formal wrongdoing, insofar as we undermine an answer to politics' first question in a way that reveals that we are simply not ready for a rightful condition. In

[247] For an argument that Kant has no theory of justice, but *only* a theory of legitimacy, see Hodgson (UPMS). Hodgson argues that Kant's central insights therefore can be read as being consistent

this sense, resolving disagreement on this first level takes priority to resolving disagreement on the second level.

Once we reach a first-level solution—i.e., once power is consolidated and a distribution of provisional rights enjoys stability—disagreement on the second-level will persist (as indeed it persists in every political society). What this means is that the Kantian theory of justice, with its emphasis and grounding in freedom, becomes a competitor on the stage of reform of first-tier institutions. The person who accepts such a theory accepts the outcome on the first level, because she accepts that, at a certain point, she can only claim in good faith to comply with her political duties by accepting a solution to first-order problems, that the way forward is to attempt marginal reform. Thus, though Hodgson (UPMS) is correct that Kant's two-tiered theory makes room for someone who accepts the Kantian story about the first-tier, but a Rawlsian theory about the second tier, this is not because Kant possesses no theory at the second level. It is rather because one can accept the insight of the logic of provisional right without accepting the particular demands Kant imposes on conclusive right.

Kant's theory, then, as developed here, has much to say about problems of disagreement, and distinguishes between different levels at which we may disagree, and what their normative relevance is. We must accept the solutions at the first level to be action-guiding, in a range of circumstances. As Waldron explains, "it is law's function to supersede" second level disagreements: "law must be such that its content and validity can be determined without reproducing disagreements about rights and justice" at the second level (1996, p. 1540). Legal decisions can and do reproduce

disagreements, and it is not the function of law to avoid this. It is rather the sign of a healthy solution to the first political question that these disagreements themselves are to be set aside for the purposes of determining what the law says on the matter.

There is another way in which, although it takes disagreement seriously, the Kantian theory doesn't make such heavy weather of it as Waldron sometimes thinks he does. Whereas Waldron's Kant rejects that "in a society like ours, citizens are entitled to form and to act upon the judgment that they have certain fundamental rights, even when the highest competent court has rejected such rights" (1996, p. 1543), Kant should rather accept that they can form judgments on such matters, and can even act upon them. There are certain first-order arrangements that one is simply not under any obligation to submit to. Here are conditions under which a person can resist in a way that does not reveal a maxim to remain in a wrongful condition with others.

We must, it is true, contend with a great deal of disagreement, of both the reasonable and the unreasonable varieties. When someone persists in disagreement with us, however, mistaken they might be, this poses a problem: We must either continue our efforts of persuasion, or we must act in contradiction to what they find just, and coerce them against their will. The first question of politics makes clear why constructing theories of legitimacy without clear eyes about the nature of disagreement is perilous. But realist theories give up too quickly, insofar as they suggest that disagreement now rules out that agreement later is an ideal worth aspiring to. As MacInnis summarizes the Kantian position, "Practical reasoning presupposes that there are unique answers to any particular normative question, that practical

reason ultimately speaks in one voice, not many inconsistent voices, and that practical deliberation gropes, though tentatively and uncertainly toward those answers using different strategies for refining values" (2015, p. 618). Insofar as moralist theory is understood as somehow implying that we can subvert real political disagreement by escaping politics, moralist theory is mistaken. By contrast, insofar as moralist theory is pitched at the level of refining and cleaning up such disagreement, such that we might approach better answers to our questions—answers that are more consistent, better grounded in proper values, etc., however, the realist should have no objection to it. The Kantian theory has just this structure.

Anti-utopianism

In the post-cold-war political climate, utopianism has fallen on hard times. Not one but two major methodological debates in political philosophy at the moment directly concern this issue: The debate between realists and moralists (here under consideration), and the debate between ideal and non-ideal theorists. While utopianism has its defenders (David Estlund chief among them), it is probably safe to say that, since Karl Popper's *The Open Society and its Enemies,* anything more optimistic than the realistic utopianism of John Rawls has been placed on the defensive.[248] There is a sense in which Kant's political thought is deeply, unapologetically utopian. For he writes that perpetual peace, though it is indeed an unrealizable goal (through purely human powers), "constitutes not merely a part of the Doctrine of Right but rather the entire final end of the doctrine of Right within

[248] This includes especially Cohen's own views about the non-dependence of justice upon considerations of feasibility (2008).

the limits of reason alone; for the condition of peace is the only condition in which what is mine and what is yours are secured under *laws* for a multitude of men living in proximity to one another, and therefore under a constitution" (MdS 6:355). However, I think that utopianism of this kind need not present a problem for his theory. For Kant's utopianism is all isolated to its second tier, and that tier ought to guide action only to the degree that this can be done without compromising first tier solutions. To pursue utopian aims, we must have good reason for believing that the system as a whole approaches conditions of right by our action, and that it does not involve unjustifiable setbacks to others' provisional rights. But then one of the main objections to utopianism—that it compromises stability—clearly doesn't apply to Kant's theory.

Still, we must be careful with a view like Kant's. Although we have a duty to approach conditions of conclusive right, this does not necessarily mean following Kant's institutional prescriptions whenever any of them become feasible. For as the general theory of the second best shows, even if we grant that some description of the social world is optimal, our ability to realize one aspect of it in the absence of the others is not guaranteed to be an improvement, but might indeed constitute a set-back (Lipsey and Lancaster 1956; Wiens 2016). We are, now, at a point of theoretical sophistication that requires us to step beyond merely articulating generic prescriptions, and to turn toward questions concerning the implementations of the same.

Thus Kant prescribes perpetual peace, he prescribes a republican constitution, he prescribes constitutionally enshrining innate rights, he prescribes

certain powers on the part of various political actors. These prescriptions might be taken to be categorical. But Kant's notion of provisional right indicates that there is room in his theory for asking questions like: Would the eradication of an unjust form of government advance or frustrate our long-term ultimate political aims? Would constitutional limitations of a particular shape lead to more violations under the guise of legitimacy, or would they rather provide an important fulcrum for the protection of certain rights? Supposing that justice indeed requires universal poverty relief: Are there ways of implementing this that compromise our goals? Would allowing states control over their borders in the absence of being sure that the limits of acquisition were respected advance perpetual peace or undermine it? These questions cannot be answered without undertaking careful empirical inquiry, but a Kantian can grant that answering them matters crucially for developing action-guiding prescriptions. This admission is not compromised by the fact that the Kantian framework is a priori. For once the operations of politics are off the ground, we need to consider carefully how best to move from where we are to where we want to be. This is not, I think, to say that we should give up our ideals, even if this is something that we could in practice do. Instead, these check us against ignoring the empirical realities, and motivate us to do what we can here and now to render it the case that things not now feasible might be feasible in the future (compare Huber 2016).

Anti-historicism and anti-empiricism

Realists worry that much moralist theorizing stands outside history. By treating questions of legitimacy in abstraction from history, they can give the sense of

forgetting that the norms they accept have been articulated in the process of political struggle against actual attempts at legitimation. The best version of the criticism says that something is lost, I think, concerning our understanding of various ideals if we forget their sources. The worry here, expressed now against the Kantian theory is that its notion of what it is to legitimate political power (for it to be grounded merely in freedom) is the historical artifact of a particular time and place. Whereas Kant says that the universal principle of right and the notion of freedom he emphasizes is a product of "pure reason" Williams and other realists accuse him of misunderstanding himself.

But we might understand this realist accusation in either of two ways. It might be a claim to the effect that this notion wouldn't have arisen but for historical circumstances that obtained in the 18th century. It is difficult to assess counterfactuals like this, but there is, in principle, no reason to refrain from acknowledging that ideas arise in a particular historical context, and that contexts shape ideas. But the criticism could also mean that the normative notions so developed are appropriate only in a context like the one in which they developed. To the degree that our circumstances are different, these concepts are no longer normatively appropriate. This is a possible criticism of the Kantian position, but critics should be clearer about its support.

It's possible, for example, to cite the fact that there are now different notions of freedom that are operative in current debates. Realists might cite various notions of real freedom (e.g., freedom as capability), or freedom as republican freedom as examples. These notions, too, they'll say, are time-bound. But they are responsive to problems that we now face in a way that past notions no longer are. While this

impulse seems reasonable, so too is it possible to take it too far. For progress in our development of normative concepts is not linear, and to the degree that changing circumstances produce different normative concepts, it is always an open question whether these are steps forward or steps backward. Perhaps, for example, the notion of liberty (as the mere absence of constraint) adopted by individualist philosophical outlooks was made possible in reaction against a particular experience of constraint in a particular historical period (Dewey 1926, pp. 100-109).[249] Perhaps as those constraints faded, they would later be replaced by a notion of freedom as action in the common interest. But it is much less clear to me that the later notion would have to be superior to the older one. At least, this is still a matter of substantial debate.

Applied to the case at hand: to the degree that persons living now see the Kantian notion of freedom as normatively attractive, it is something strange to tell them that the time for that notion of freedom has passed, that they misunderstand their own times to the degree that they haven't abandoned it for something more appropriate to them—at least without saying more.[250] It is of course true that something better might come along. But there is here no substitute for good normative theory: What are the various options? What are the normative implications of each? What are the grounds (historical and philosophical) of each? How might they direct our action? There is no question that genealogy can help answer these questions. But it is not sufficient for answering them. Realists should admit this. By contrast, Kantians should and often do admit that changing circumstances might alert us to alterations required in our normative schema. Kant himself never ruled out that one could

[249] Thanks to David Wiens for alerting me to these passages.
[250] Dewey for example says more.

remain under the idea of a philosophy, even while making adjustments that its founder would have, perhaps, rejected.[251]

V. Conclusion

In this chapter, I have tried to situate the version of Kant's theory developed earlier within a central methodological debate in political philosophy. In the process of doing so, I have argued that Kant's position captures the truth in both positions, such that it might be congenial to both realists and moralists. To the degree that these conclusions are well-supported, those moved by realist critiques of the methodological status quo, but not yet on board with its more positive offerings might find Kant's an attractive theory. Of course, not everyone will think so. Realists will likely object on the grounds that Kant's theory retains too much utopianism and universalism to really take politics seriously. Moralists will claim that it affords too much normative weight to the status quo, and continues to underestimate the power of theorizing. Partisans of other views that are capable of doing justice to realist views without giving up moralistic foundations will find other reasons to object. Such is life as a political philosopher. Still, I have argued that the extension of the Kantian view in this chapter is among its virtues.

[251] Sorin Baiasu gave a very provocative paper at the 2017 meeting of the *European Constortium for Political Research* in which he argued against a certain existentialist objection to accepting a doctrine like transcendental idealism. Existentialists bristle at the thought of accepting such a system because it compromises their radical freedom, but Kant never meant to deny future adopters of the system considerable freedom in assessing its central doctrines critically and revising accordingly.

Chapter 8

Politics in a Changing World: A Case Study

> Cosmopolitan right shall be limited to conditions of universal *hospitality.* Here, as in the preceding articles, it is not a question of philanthropy but of *right,* so that *hospitality* (hospitableness) means the right of a foreigner not to be treated with hostility because he has arrived on the land of another. The other can turn him away, if this can be done without destroying him, but as long as he behaves peaceably where he is, he cannot be treated with hostility. What he can claim is not the *right to be a guest...*but the *right to visit,* to present oneself for society, belongs to all human beings by virtue of the right of possession in common of the earth's surface, on which, as a sphere, they cannot disperse infinitely but must finally put up with being near one another.
>
> —Immanuel Kant, *Toward Perpetual Peace:* 8:358

> Both philanthropy and respect for the *rights* of the human being are duties: but the former is only *conditional* duty whereas the latter is *unconditional* duty, commanding absolutely, and whoever wants to give himself up to the sweet feeling of beneficence must first be completely assured that he has not transgressed this unconditional duty.
>
> —Immanuel Kant, *Toward Perpetual Peace:* 8:386

I. Introduction

This dissertation has operated on a level of abstraction that seems, even to its author, ill-suited to its subject matter. In politics, so too in political philosophy, we deal in real problems that real people face daily. It is a great privilege to be able to think them through carefully, and to try to come to a considered view as to the grounds of the positions we ought to hold, as it is a great privilege—one that is valuable for its own sake—to spend one's time with the words of others, some long passed

from this world, who have spent substantial parts of their lives doing the same. Still, I am not myself enough a partisan of pure intellectual virtue to keep from thinking that it would all be a somewhat hollow exercise if there wasn't, in the end, a point to it all, beyond pure understanding.

In this chapter, I want to show the preceding somewhat less hollow than it might otherwise seem by demonstrating the way in which the Kantian theory developed there can helpfully guide our thinking concerning a pressing issue in our own political world. I should say in advance that readers expecting strident and determinate policy prescriptions will be inevitably disappointed in my work toward that end. For those content with something less, with a framework for thinking things through, or as Jakob Huber recently so well put it, with a "certain way of framing [a] problem," I hope that the following will be of some use. Aside from bringing an abstract theory down to earth, I hope that thinking through a concrete problem in terms of it can shed further light on the structure of the theory itself.

While there are many interesting practical political problems at the level of the nation-state, contemporary political philosophers have been centrally occupied with working out solutions to them for the better part of five decades. It is only in the past twenty or thirty years that the discipline has spilt any significant ink thinking through issues of international moment—issues beyond those that naturally arise in a closed and stable democratic society that, by everyone's admission, has nowhere existed. So to the degree that one chooses one's topic merely to avoid further wearing out something already worn threadbare, it follows that one is well advised to step past problems internal to the nation-state. But it is also here—beyond these internal

problems, and beyond typical assumptions of the stability of the same—that the Kantian theory here developed has the most to teach us, and that best showcases its powers of illumination.

I focus in this chapter on an issue of pressing global importance, where the boundaries of existing rights are bound to seem particularly hazy: the problem of asylum seekers and refugees. That this problem has been the topic of books and dissertations and compilations of essays and special issues of journals testifies plenty well to its complexity. I do not, then, hope to show what is defective in previous attempts and to emerge with The Solution to the problem. Instead, I want to take this opportunity to think through the way the theory I've developed here has resources for capturing the concerns on both sides of this debate, and for helping political actors better imagine a constructive way forward.

I begin in § II by sketching the nature of the refugee problem facing every industrialized and reasonably peaceful country to this day, and many that are less fortunate. This includes not only picking up the various normative concerns and canvassing the dominant views in the literature, but in the first instance considering briefly a controversy concerning the very concept of a refugee. § III sketches what I take to be a pretty straightforward (and unsatisfying) Kantian response to the problem of refugees. § IV argues that the theory here complicates this straightforward picture considerably, yielding something more satisfying, and considers a powerful objection from the Cambridge-contextualists concerning the suitability of the Kantian framework for addressing these kinds of contemporary problems. The objection can

be answered, but requires that I square up to some methodological questions concerning my employment of Kant's texts. § V concludes.

II. The Shape of the Problem

By current estimates, there are roughly 22,500,000 refugees world-wide,[252] and 728,470 current seekers of asylum.[253] These figures are calculated on the basis of the United Nations Refugee Convention (UNRC) definition, according to which a refugee is any person who

> owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[254]

A person seeking asylum, by contrast, is a person seeking protection under refugee status. Thus, while all refugees were once seekers of asylum, it is not the case that all seekers of asylum are refugees. Some seekers of asylum may not satisfy the definition, which is not to say that they are not facing severe problems.[255] Indeed, very many are so-called economic migrants, persons fleeing (sometimes awful) economic conditions, but not fearing persecution "for reasons of race, religion, nationality

[252] http://www.unhcr.org/figures-at-a-glance.html
[253] http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_asyappctza&lang=en
[254] http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf
[255] There is perhaps some confusion concerning the meaning of these terms in the philosophical literature, but it's hard to say. Carens (1992), referencing Walzer (1983), notes that asylum seekers might have a greater claim to assistance than other badly off persons, and the discussion strongly suggests that the relevant class of badly off persons is refugees. This would mark a confusion insofar as refugees are simply successful applicants under asylum. Further discussion, I think, makes clear that the relevant distinction is between asylum seekers that so qualify because they've crossed borders and would have to be forcibly turned away, and other badly off persons that are in refugee camps, but still quite badly off (see Carens 1992, pp. 32-35; compare p. 38).

membership of a particular social group," etc. Those asylum seekers who never qualify are sent back to where they came from, and must pursue legal means of migration, or risk illegal means of migration. As for those who do qualify, many find themselves in camps where they face no grave danger, but which are not exactly ready sites for the living of good lives either. (Most refugees are in camps close to the borders of the countries they fled, in African countries and in the Middle East.) Resettlement is a time-consuming and costly process, the urgency of which drops once the threat of immediate danger is removed.

This criterion for identifying refugees has come under the scrutiny of philosophers, and it isn't hard to see why. For consider simply what we've already noted: some seekers of asylum will be turned away, in spite of fleeing conditions that are genuinely horrific (Shacknove 1985, Pogge 1997, Miller 2007). For the current international legal regime distinguishes between three classes of migrants. There are, first, genuine refugees, who stand under an international norm of non-refoulement, according to which they have sought asylum, have been found to meet the above criteria and hence *cannot* be sent back to their land of origin. There are, second, economic migrants, who fear not persecution or violence, but rather deprivation in terms of material resources, who apply for asylum, but have not faced "persecution," and so *can* be returned to their land of origin. There are, third, immigrants, who simply seek a better life, but face neither persecution, nor deprivation. In addition to these three kinds of migrants, there are those who would perhaps qualify for refugee status (or would, if they had the resources, apply for refugee status), but are so badly

persecuted that they cannot attain sufficient distance from the persecution or deprivation they face to even seek a special international status.

Since (1) it is only to the first class of persons that special duties of aid arise under the current legal regime, but (2) at least economic migrants and persons incapable of escaping their situation without help can sometimes be no better off than refugees, it would seem that, (3) from a moral perspective, there is considerable arbitrariness in the current system. For it seems possible for economic migrants to face equally bad prospects in their home countries than some who qualify as refugees. Moreover, if all persons' interests matter equally, then it shouldn't matter, morally speaking, whether one has actually made an application for asylum (except insofar as it is easier and more efficient to help those at your doorstep than far away). Indeed, those who can make such applications are likely to be the better off among the persecuted and deprived, and so given standard assumptions about diminishing marginal utility, we might in some cases do good more efficiently by seeking out those who cannot themselves make applications (Singer and Singer 1988). As Shacknove puts it:

> An overly narrow conception of "refugee" will contribute to the denial of international protection to countless people in dire circumstances whose claim to assistance is impeccable. Ironically, for many persons on the brink of disaster, refugee status is a privileged position. In contrast to other destitute people, the refugee is eligible for many forms of international assistance, including material relief, asylum, and permanent resettlement. (1985, p. 276)

Of course, it is similarly important to avoid an overly broad conception of 'refugee,' for then their protection becomes infeasible (as their numbers grow from a small fraction to a sizable percentage of the world's population). Still, many have followed Shacknove's broadening of the concept to include any person whose state fails in its

"protection of the citizen's basic needs" (ibid., p. 277), and it seems, in any case, perverse, to regard its capacity to limit the extent of our duties as a reason for choosing a narrow rather than a wide definition.[256]

But though there is a considerable push among philosophers to adopt a more inclusive definition, not everyone agrees. In a recent piece, Cherem argues for maintaining the narrow definition currently operative. He begins from the observation that there are two frameworks for understanding international crises—the humanitarian framework surrounding the standards of *jus in bello* (as constituted in part by the first Geneva convention in 1864), and the framework of human rights (as constituted by the 1948 Universal Declaration of Human Rights) (2016, p. 185). Whereas the former framework evokes considerations of charity, the latter evokes considerations of justice or right, with all of the typical baggage that these different spheres of practical activity typically carry with them (both in common sense and in (non-act-utilitarian) philosophy). But widening the concept of a refugee to include any person whose interests are not well-protected by her state will be overly broad insofar as it includes persons whose rights are not violated, and to with respect to whom the framework of justice is less appropriate than the humanitarian framework. Not only that: because one's rights can be violated by economic deprivation (and so one can be persecuted by the same, says Cherem), the standard definition is not as narrow as it might seem. Thus, where the widening seems most appropriate (to cases of extreme material deprivation), it is not necessary (because the deprivation violates

[256] This definition is compatible with each nation's giving a certain priority to those refugees that present them at its borders (the importance of which both Carens and Walzer have been at pains to stress); figuring out who has priority among refugees is a separate question from figuring out who counts as one.

rights). But moreover, where the widening of the definition seems necessary to include cases not covered by the standard definition, it is not appropriate. Deprivation falling short of a rights violation should not a refugee make (ibid., p. 190).

Cherem notes in addition that, because the status of a refugee is institutionally rightly tethered to a specific means of institutional response, namely resettlement and non-refoulement, expanding the definition is inappropriate. For under the expanded definition, persons would qualify to whom justice could be done by means other than resettlement. This is plausible given the standard definition of refugee, for on that definition resettlement seems to be the only appropriately fast and adequate response to the situation faced by the person involved, at least at the time she flees her circumstances.[257] Even if one could reform the institutions responsible for the refugee's persecution, it is not plausible to think that justice would be done. For then the refugee would still be subordinate to the political authority of his or her persecutor, a transparent injustice. Would things change if the institutional reform included removing the persecuting parties from office? If institutions survive in a meaningful sense the particular occupants of their offices, perhaps not. It is reasonable to think that forced return to the place of their persecution is an injustice. By contrast, in the case of migrants seeking to avoid (non-rights-violating) deprivation, it seems that foreign aid and institutional reform might suffice as a response—

[257] It is true that given a sufficiently long time horizon, and sufficiently friendly circumstances, it is in principle always available to one to solve another's problem by spending resources in her state.

provided such aid and reforms function as advertised (Cherem 2016, p. 192).[258] At least, there would be fewer concerns about going this way.

However, I take it that these points aren't decisive in favor of maintaining the current definition. First, although it is possible to think of socio-economic depravation as a rights-violating type of persecution, it is an open question—one I think Cherem never adequately squares up to—whether this possibility is reflected in institutional practice. His footnote on the topic (2016, p. 190, n. 42) cites as evidence the fact that the "severe discrimination against stateless Palestinians in Kuwait after the Gulf War" was recognized "as persecution". But it's not clear that this case supports his point to the satisfaction of those who seek a broader understanding of refugee. For severe discrimination is not the same thing as material deprivation. But then that the former can be plausibly classified as persecution (and so plausibly fits the current definition exactly) does not imply that the latter fits as well. Thus it may well be that we do better by the lights of respecting persons' rights to insist upon a wider conception of refugee.[259] Of course, this is compatible with maintaining a distinction between economic refugees and economic migrants (where the former would face socio-economic persecution, whereas the latter seek simply better economic prospects). Moreover, this is compatible with distinguishing among types of refugees and the remedies available to those responsible for dealing with them. It might be that some classes of refugees must be resettled, whereas other refugee

[258] Much turns on the feasibility of reform and the degree to which nations' alleged rights to self-determination allow them broad rights of exclusion.

[259] It might instead be that we ought to attempt to change institutional practice to be more sensitive to asylum applications that claim rights-violating deprivation. It is, in the end, an empirical question which of these will be more effective, considering the full range of their effects.

situations can be solved by supporting their home institutions. But foreign aid efforts are notoriously costly without always solving the problems they are designed to solve. Although resettlement is costly, by contrast, it has a higher probability of getting the suffering party out of the circumstances of her suffering. Perhaps, then, resettlement is nevertheless the *best* response to these kinds of cases. I take it that by pursuing this route, we can achieve the sort of precision that Cherem wants, while avoiding the kind of moral arbitrariness that others have seen framework embodied in the status quo.

In closing this section, I want to characterize a number normative issues that attend refugee crises like the one we currently face. First, though we understand a person to be a refugee insofar as she fears persecution of certain kinds and on certain grounds, there is the question of how precisely we should understand her normative situation. Is a person only a refugee if she faces severe risks to her life? Or are lesser rights violations also grounds for attaining refugee status? Second, there is the issue of national self-determination and its limits. For if nations have general rights of self-determination that allow them to control their borders, then there is a question about how far these rights extend, and whether they ever extend so far as to allow the exclusion of (even genuine) refugees (as Walzer indicates they can). Third, there is the issue of on whom precisely the obligation of resettlement falls. For if, as we've said, refoulement constitutes a rights violation (for at least refugees of a certain kind), then refugee status must impose an obligation against refoulement, and it matters to consider on whom the relevant obligations fall (as Carens 1992 and Lenard 2016 stress). Is it merely nations, or also individuals who have duties in the face of rights

violations? Is it always the case that the country (or its citizens) at which a seeker of asylum arrives has the obligation to take them in? Can countries participate in an international 'cap and trade' system, which involves their paying a sum of money to another country who will then agree to take in the refugees they would otherwise be obliged to take in (Cherem 2016, Lenard 2016)? If so, does this indicate that the obligation is a collective one, shared equally (or proportionately, or in line with other principles of distributive justice) by all nations, rather than one that falls on particular nations (namely those at whose borders the refugee appears)? (These second and third issues are related insofar as they may introduce conflicts of rights.) Finally, given that some nations are indeed obliged to take in refugees, are they indeed obliged (or permitted) to take them in as citizens, or are they entitled (or obligated) to afford them a lesser status? Getting the answers to these questions right marks the difference between rising to meet one of the greatest challenges of the globalized world, on the one hand, and collapsing before it, on the other. I turn in the next section to sketching what I take to be the natural application of Kant's political theory to this problem. I show not only that Kant can appear to commit to a conception of refugee yet narrower than that embodied in current international law, but also that the theory can appear to grant nations implausibly strong rights to exclusion in the face of what look like valid claims.

III. Kant, National Sovereignty and International Emergency

Kant's political philosophy is developmental in at least the following respect. It begins from a universal principle that reason presents a priori, namely the UPR,

according to which actions are right if and only if they are consistent with the rightful freedom of all others. It then proceeds in various stages to show that it is only under institutions of a certain type that this principle can be satisfied (even if these institutions aren't sufficient for satisfaction). The principle is violated in the state of nature insofar as our complete independence is not compatible with the freedom of *any* others. It is violated in the domestic state insofar as the national independence is uncertainly consistent with *outsiders'* freedom, even if the domestic state achieves what it can only approximate: legislation perfectly in line with freedom. It is violated in an international community insofar as the independence of the international order is uncertainly consistent with stateless persons' rights, and insofar as it underdetermines the consistency of the freedom of citizens of one nation with the freedom of other nations. It is satisfied to the degree that persons' cosmopolitan rights are respected, and stand under an international order that instantiates a will that is genuinely omnilateral. What can a theory of this type tell us about refugee crises?

Given that refugee crises take place on an international stage, it is plausible to look for an answer in the domains of the right of nations or cosmopolitan right. Since Kant seems to treat the right of nations as governing the right to go to war (and not much else) perhaps we do best with respect to our goal of understanding our position regarding refugees by turning directly to cosmopolitan right, which has its grounds in our common ownership of the earth's surface.[260] The notion that all own the earth in

[260] Kant is consistent in deriving the primary normative implications of the former from the resources of the latter in both *Toward Perpetual Peace* and *The Doctrine of Right.* While it might seem odd to make the refugee question turn on issues related to common ownership of the earth insofar as the latter has to do with appropriation out of the commons, and refugees' claims do not necessarily

common has a long history in Western thought, arguably tracing to Aristotle's *Politics.* In spite of its long history, however, the normative implications of common ownership (or a natural community in the earth's resources) remain obscure. Following Simmons (1992), we might distinguish between four understandings of common ownership.

> (1) *Negative community*: all persons are at liberty (morally) to use the world and its products, but none has a protected liberty or exclusive right to anything...Pufendorf accepts a version of this, as does Hobbes (whose "right to everything" is simply an unprotected moral liberty). This has been the standard interpretation of Locke's "original community"
> (2) *Joint positive community*: all persons jointly own the world, each holding an undivided proportional share...Grotius may have this idea in mind, and Locke is occasionally read as intending this form of "original community."
> (3) *Inclusive positive community*: each person holds an inclusive use right to the common; the common belongs to all only in the sense that each has a protected right (a claim right) to free use of the common for support and comfort.
> (4) *Divisible positive community*: each person has a (claim) right to a share of the earth and its products equal to that of every other person. Each may take an equal share independent of the decisions of the other commoners; each has property in the sense of a claim on an equal share (but not possession of or a claim on any particular share. (Simmons 1992, p. 238)

Whereas (1) allows each a right to the commons that amounts to little more than the claim that no one has a natural right to exclude others from using some part of it, until they acquire it as their own property, (2)-(4) interpret common ownership more robustly. (2) assigns to each some share proportionate to some value (merit, material subsistence, etc.), (3) assigns to all mere use-rights to be guaranteed by some

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concern residents' private property claims, it is crucial to recognize that the state's territory, for Kant, has the same normative structure, and thus derives ultimately from common ownership of the earth. Here, I agree with Stilz (UPMS).

authority, and (4) assigns to each a strictly equal share.[261] Does Kant's notion of common ownership of the earth map on to any of these?

Kant introduces the concept of common possession of the earth as an original claim to possession (MdS 6:267). To say of a claim that it is original is to say that it is not "derived from what is another's" (MdS 6:258), and also to say that it holds independently of "any act of choice that establishes a right" (MdS 6:262). Thus, we should not think of common ownership as involving any actual institutions—involving a historical community—because any such community would have to be derived from the consent of its members. But how then precisely to understand it? Perhaps we best get a grip on this question by considering the function it plays in his thought.

Kant appears to think that the idea of common ownership serves a dual function. In the first instance, it provides a conceptual framework for understanding how it is possible that we are entitled to sustain ourselves by the earth's resources. Second and perhaps more significantly, however, the idea of common ownership is supposed to make intelligible what initially seems impossible, namely how to acquire exclusionary rights to external things. As Kant has it:

> [P]ossession in common is the only condition under which it is possible for me to exclude every other possessor from the private use of a thing...since, unless such a possession in common is assumed, it is inconceivable how I, who am not in possession of the thing, could still be wronged by others who are in possession of it and are using it. –By my unilateral choice I cannot bind another to refrain from using a thing, an obligation he would not otherwise have; hence I can do this only through the united choice of all who possess it in common. Otherwise I would have to think of a right to a thing as if the thing had an obligation to me, from which my right against every other

[261] Stillz (UMPS) carves up the landscape in a similar way. (1)-(4) is not an exhaustive list. There are other ways of interpreting the distributive share that common possession entitles common possessors to.

> possessor of it is then derived; and this is an absurd way of representing it (6:261)

Kant begins this difficult passage by claiming that original common possession is what makes sense of our rights to exclude others from parts of the earth's surface. We cannot exclude others unilaterally (see ch. 1), but instead only in accordance with the idea that all of the earth's inhabitants have authorized our appropriative act.[262] Thinking of the earth as if it was possessed in common allows us to think of the commons as governed by the choice of all.

This idea is useful because it gives us a way of seeing the obligations generated from the acquisition of external objects as being voluntarily conferred (on the model of contractual obligations), despite appearing to be generated by a foreign unilateral will. But this idea of common possession is just that: an Idea. It isn't that we have to actually ask everyone else's leave to acquire an object, but rather that, in acquiring, we view our authority to acquire as one that would be shared by similarly positioned others, and that meets its limits in their well-grounded objections. As Kant puts it, common ownership of the earth is "a practical rational concept which contains a priori the principle in accordance with which alone people can use a place on the earth in accordance with principles of right" (MdS 6:263). As *owners in common,* each of us everywhere has the same rational title for possession, which implies that the same reason I can take from the commons, implies that you can take from the commons. The very same grounds that entitle you to exclude me, entitle me to

[262] As Pufendorf puts the worry, "upon supposition that all men had originally an equal power over things, we cannot apprehend how a bare corporal act, such as seizure is, should be able to prejudice the right and power of others, unless their consent be added to confirm it; that is, unless a covenant intervene" (*Of the law of Nature and Nations*, 4.4.12).

exclude you. The original community of land therefore implies not only that all have a right "to be wherever nature or chance (apart from their will) has placed them," but also that all can acquire rights to further external objects (ibid.).[263]

By the time Kant's theory moves from private right (where the passages concerning common possession first appear) to public right, and finally to cosmopolitan right, this right to be wherever nature or chance places one resolves itself into a duty of hospitality on the part of nations and individuals (PP 8:358). If someone washes up on your shores, you may not kill or punish them, and you must ensure that turning them away will not lead to their destruction. In *Perpetual Peace,* so too in *The Doctrine of Right*:

> since possession of the land, on which an inhabitant of the earth can live, can only be thought of as possession of a part of a determinate whole, and so as possession of that to which each of them originally has a right, it follows that all nations stand *originally* in a community of land, though not of *rightful* community of possession (*communio*) and so of use of it, or of property in it; instead they stand in a community of possible physical interaction (*commercium*), that is in a thoroughgoing relation of each to all the others of *offering to engage in commerce* with any other, and each has a right to make this attempt without the other being authorized to behave toward it as an enemy because it has made this attempt. –This right, since it has to do with the possible union of all nations with a view toward certain universal laws for their possible commerce, can be called *cosmopolitan right* (MdS 6:353).

If someone wishes to trade with you, you may turn them away, as long as it doesn't deprive them of their right to be somewhere. What this means is that Kant's

[263] Huber 2017 argues that the original, common possession of the earth does not readily fit into either innate or acquired right. In a way, I think this is correct. It is clearly not acquired, because it doesn't arise from an act of choice. But there can only be one innate right, and it is clear that Kant takes this to be freedom. As I read it, the original claim to possession of the earth's surface in common with all others follows from our innate right in concert with our occupying a spherical earth. Once we must inevitably interact with others, and given that no one has chosen this situation, no one can be excluded from a claim to possessing the earth's surface, except through further acts, and something resembling consent.

understanding of common ownership is weaker than any of (2)-(4), but stronger than (1), concerning its normative demands. It doesn't demand a proportionate share for each (2), nor does it rule out exclusive use altogether (3), and, finally, it doesn't demand an equal share (4). In the end, what it appears to demand is only that persons and nations are not prevented from seeking commerce with one another, and that should they turn up absent their will, they should not be treated as an enemy or returned to destruction. Thus, it isn't quite that everyone has a right to acquire anything (grounded in the idea of common ownership), per (1), but that they have such a right, reaching its limits so far as it is incompatible with each person's right to be some place.[264]

This picture may make Kant's theory seem particularly inhospitable to refugees. For on this theory, existing nations have rather limited obligations to outsiders. The demand of non-refoulement holds only under the most extreme conditions—namely the agent's actual destruction when the persecuted individuals are actually at your border. In light of this, it might indeed seem that much of international law on this matter is unjust, but unjust in quite a surprising way: states are held by the international community to *too stringent* duties regarding refugees.

[264] This appears to be the reading that Arthur Ripstein defends in *Force and Freedom:* "If your own state will not take you back, because it has stripped you of your citizenship, or you cannot safely return because its rulers are making war on their own people in some other way, the right of any other state to exclude you runs up against its own internal limit. Your ability to do anything at all—to use your own bodily powers or whatever personal property you have with you—is entirely subject to the choice of the officials of the state you seek to enter. As a foreigner, you do not need to share a general will with the officials, or with the legislature that sets their mandate, but any power they exercise over you must finally be consistent with your innate right of humanity in your own person, which includes the right to "disjunctive" possession of the Earth's surface, the right to be wherever nature or chance has placed you. Just as property in land is consistent with this innate right provided that it does not give another person the right to decide whether you may occupy space, so, too, the establishment of national borders is consistent with your innate right provided that you have someplace else to go. Only if you have nowhere else to go does the state's right to restrict your entry make you subject to the choice of another" (2009, p. 298).

They are not permitted enough refoulement insofar as one can fear persecution without being destroyed. Of course, even on the relatively lax standard the Kantian theory so-developed holds true (namely that non-refoulement is required only under conditions of expected destruction), many kinds of refoulement that have, historically, been permitted (e.g., the exclusion of migrant Jews during Hitler's reign) would be condemned. So it isn't as if the standard is entirely uncritical. And though it draws the line between refugee and economic migrant in a different place, such a line isn't absent altogether. Still, it seems reasonable to think that the criterion of facing destruction is too weak, and that the current regime's "fear of persecution" standard gets things closer to correct. Moreover, although it is true that even on Kant's theory so-described, nothing prevents a willing nation from adopting a policy more friendly to refugees. But that nothing obligates nations to do more—as a matter of right—might seem to get things wrong.[265]

In defense of the Kantian view as developed here, one might observe that asylum seekers that don't face destruction upon leaving have the same obligation to enter a rightful condition with others as we do, and that their efforts should perhaps be directed at attempting to realize one in their own locality, or in convincing extant nations that they are worthy of entry. But since extant nations *have* entered a rightful condition, they have rights to control their borders.[266] It's true that persons can leave

[265] Insofar as human freedom is constrained not only perfect duties of right, but also perfect and imperfect duties of right, it is clear that the Kantian account can say more about this matter by drawing on resources in the broader practical philosophy. Still, it's important that the refugee problem is usually situated within the discourse on rights (which Kant insists are perfect duties), not humanitarian responsibility (which plausibly admit of imperfect duties).

[266] Compare Ripstein: "By restricting cosmopolitan right to the right to visit, Kant rejects the more expansive versions of cosmopolitan right that had been put forward in early modern defenses of European colonialism. His rejection is rooted in the distinctively public nature of a rightful condition: individuals who go to another nation must take account of its status as a rightful condition. They are

their current states, but they need to gain the permission of existing states for that right to be effective. And Kant's account seems to ground very extensive rights on the part of states to say, "No." After all, the creation of the state was in part precisely intended to protect against threats to our external claim, and nations have, we might say, rights to decide what counts as an outside threat.

Let's wrap up this section by getting somewhat greater purchase on the theory's implications by imagining how precisely this interpretation answers the four questions raised at the end of last section. Regarding the normative status of the refugee, this Kantian view sees her as a person who has left her state because her rights have been violated to the point that she faces the realistic prospect of destruction. To the degree that things are otherwise, she may have problems, but they are not problems that extant nations are obliged to solve for her; rather she should seek a rightful condition with willing partners. Concerning the question of whether nations have broad, exclusionary rights of self-determination, the answer is Yes. Moreover, taken by the letter, these rights are sufficiently strong to exclude some persons who must be admitted under current international law. Concerning the question of who bears the obligations, the answer is: the state that receives the refugee.[267] There is, here, no cause for involving the international congress of nations,

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not entitled to regard its inhabitants as a state of nature, and their own settlement of its land as the setting up of a rightful condition. Instead, the host nation alone is entitled to decide whether to accept them as settlers" (2009, p. 296). Compare O'Neill (2015), p. 207.

[267] Of course, as things get less abstract and closer to the real world, various factors—especially existing states' complicity in causing instability (by supporting insurrection), or in persecution (by supporting or propping up dictators), then the obligations to take in refugees plausibly fall on the nations responsible for these violations of international law. Nor are these mere theoretical possibilities. Indeed, perhaps the most prominent refugee crisis of the last decade (that involving the Syrian civil war) involves precisely these additional issues. (The case is more complicated still since it involves not only genuine persecution, but also economic deprivation due to an extreme drought, lasting five years.) Indeed, the history of the region now known as Syria is a fascinating one. Early in its history, it was

under the control of the Ottoman Empire. Although it was an overwhelmingly Muslim region, it was also a place of significant religious diversity, and under Ottoman rule, persons in the region were largely left to live according to their own standards. Small non-Muslim enclaves were self-governed, appointing their own officials who were in charge of a number of important affairs (including public provision of welfare) within their jurisdiction, and were responsible for collecting taxes, payable to the empire. Thus, when the Syrian state would take shape in the 20th century, one observer notes that it would inherit "a rich, diverse, and tolerant social tradition" (Polk 2013). But outside political actors would soon upset this social tradition, beginning shortly after the first world war, which saw the signing of the Sykes-Picot agreement—a treaty between Britain and France, which divided control of the Middle East between them. France, as it would happen, would receive control over Syria, and would immediately attempt to create a Christian stronghold by combining two formerly autonomous provinces to form what was known as "Greater Lebanon". When their efforts to sustain a large enough population for independent statehood ran up against their efforts to sustain a Christian majority, they reunited Syria, and attempted merely to change its socio-cultural orientation, in part by thrusting regime changes on the region in 1920, 1925, 1926 and 1945. Not only were these moves recognized as failures by the French government, but they also ushered in a spirit of xenophobia among local people, which would later bring questions of Syrian identity into sharp relief after France, frustrated by its failures, granted it independence in 1946. As Polk has it, "It is not unfair to characterize the impact of the 26 years of French rule thus: the "peace" the French achieved was little more than a sullen and frustrated quiescence; while they did not create dissension among the religious and ethnic communities, the French certainly magnified it and while they did not create hostility to foreigners, they have the native population a target that fostered the growth of nationalism" (ibid.). By 1961—after a failure to achieve stability by submitting to Egyptian rule—questions of national identity loomed large. While between 70 and 80 percent identified as Muslim, the population's diversity began to seem to many a source of weakness, and leaders sought further solidarity. This desire for unity helped lay the ground for Hafez al-Assad's ascent to power as a representative of the Baath Party. The secular nationalist Baath party was organized around the goal of overcoming disunity by bridging gaps between rich and poor and combining a broadly modern agenda (sex equality, secularism) with a "culture of Arabism". Assad's rule infuriated the Muslim Brotherhood for its various conciliatory stances. These tensions led to an uprising in 1982, which was put down, and out of which stability would emerge. Still, Assad's monopoly on power "was stern and sometimes brutal" (ibid.). At this time, more than 15,000 foreign supplied machine guns were captured, along with para-military forces trained by the CIA to sow dissention in the region. When his father died in 2000, Bashar al-Assad ascended to power, and adopted his father's mode of rule, insisting on unconditional obedience, but allowing citizens largely to "run [their] own lives privately" (ibid.). Syrians became increasingly prosperous (achieving, e.g., literacy rates between 80 and 90% and $5,000 per capita GDP) until natural conditions cut GDP nearly in half. During this time, those formerly attaining a livelihood through agriculture moved to urban areas to compete for jobs there. As economic conditions worsened, Assad's attempt to legitimate his rule by holding elections began to fail. Political participation dropped, and Assad would sometimes resort to brutal police measures; meanwhile, in 2002 the Bush administration accused Syria of promoting terrorism, and supported an Israeli airstrike outside of Demascus. Democrats sponsored and passed the Syria Accountability Act. So both internal and external pressures combined to lead to social unrest, leading to crackdowns by the *de facto* power. What started as a conflict over resources (due to drought and foreign intervention) began to take on a religious and political flavor, and intensified significantly resulting in a brutal civil war between disunified insurgent groups, which were supported up by aid from the E.U. and the U.S., and the Assad regime. By 2013, 2 million refugees fled the war-torn country, and an estimated 4 million more remained behind, most ending up in neighboring countries like Turkey, Lebanon, Iraq and Egypt. Given the history of the region, it is quite clear that even if such neighboring countries have duties of non-refoulement, there is an obligation on the part of Western nations involved to assume a significant amount of the costs of this crisis.

which is merely supposed to regulate states' claims against one another through means other than warfare.[268] Moreover, individuals apparently have no duties of right to those appearing on their shores unless their states indicate as much, and if their state refuses the asylum claimant, then individual citizens would do wrong to offer her refuge.

Concerning the fourth issue—namely the status of those brought in—we might imagine positions dividing according to the degree to which they seek Kant's theory rather than a Kantian theory, and according to the way that they understand Kant's notion of freedom (i.e., whether their understanding implies that creating a second class of refugee citizens would involve a wrongful restriction of freedom).[269] But those who seek Kant's own view will likely deny that the domestic state needs to allow accepted refugees rights of citizenship. For Kant accepts a notorious distinction between active and passive citizenship, which holds that distinctions with respect to citizens' political participation are not inconsistent with their rights.[270] Thus, those who are not self-sufficient are justifiably excluded from the process of actual lawmaking.

In the next section, I argue that a version of Kant's theory that accepts the provisionality thesis sees things differently. Bringing the provisionality thesis to bear

[268] There is of course space in the Kantian theory so understood for negotiating with another state to take in the refugee (for then turning her away would not lead to her destruction).

[269] Ripstein goes in for this kind of view, when he argues that once refugees are in, they are subject to the local laws, and as such owed active citizenship: "Once you are in, you are subject to their laws, and so to the preconditions of lawmaking powers, even to the point of being provided for if you are unable to provide for yourself, and being entitled to become an active citizen rather than merely a passive resident" (Ripstein 2009, p. 298).

[270] Of course, Kant may have simply misapplied his own theory. Thus some invoke the claim that Kant's notion of freedom is republican, insofar as it repudiates arrangements that involve the dependence of the will of one person on the will of another, and observe that a second class of citizens at once subject to laws and passive would, in clear ways, be dependent on the wills of active citizens. Thus, properly applied, the Kantian theory repudiates such arrangements.

on this question makes sense of any discomfort we might feel with respect to the picture sketched in this section. I turn to that task now.

IV. Refugee Status and Provisional Rights

I have argued in earlier chapters of this dissertation that, for Kant, all acquired rights (rights to external objects of choice, understood in Kant's technical sense) are provisional until a robust set of institutions guaranteeing rights stretches stably across the surface of the earth. Central to this account is a notion of provisional right as a claim to such an object that is prospective, in the sense that it awaits the realization of these conditions, and meets its limits in its inconsistency with them (Hasan 2018b). Such rights to objects are rights to exclude others, to the degree that they are not ready for a rightful condition. But they also carry with them a requirement to resolve disputes rightfully when such a means of dispute resolution is available (when they are so ready). What it is to resolve disputes in this way, rather than by way of war, is to see your claims to exclude others from external objects as having a common basis that generates simultaneously a burden of justification, and a ground for mutual respect for each persons' respective claims. If you cannot legitimate your holding of the right to the external object in ways that they accept, they have no obligation *to you* to respect your claim. Indeed, provided that their refusal is not grounded in an unreadiness to enter a rightful condition, they do no wrong (*Unrecht*) by failing to take it as a constraint. Your bad terms perhaps indicate *you* are not ready for a rightful condition, and if so, you do wrong in the highest degree. Provided you are so ready, others—in refusing to take your provisional right as action guiding—violate not a

material obligation to respect your possession, but a formal obligation to adopt what I've called a rightful disposition.

Now, recall from previous chapters that any kind of external right must anticipate its consistency with the omnilateral will. It is only under the idea of all giving law in common that the unilateral flavor of such rights disappears, and they impose genuine constraints capable of binding autonomous agents. Kant's political theory, as we have seen, has institutional requirements, which might lead one to believe that, to the degree that one violates institutions that satisfy these requirements at some level of description, one is simply by virtue of that fact failing in one's duty to adopt a rightful disposition. And it will, indeed, often be the case that one does best by the lights of one's duty to relate rightfully to others to respect institutions that are broadly successful in their legitimation attempts (see chapter 5). But we have also seen that the omnilateral will imposes requirements beyond mere formal, institutional requirements. In addition to these institutional demands, we recognize that too extensive rights of acquisition would not simply limit others' external freedom, but "annul" it. However, rather than presenting a norm *a priori* that is to govern acquisition (*a la* Locke's Proviso), Kant argues that the a priori principles of practical reason do not determine these limits, but are to be worked out in practice, in a process involving the assertion and eventual reconciliations of rights-claims.

As a result of this further requirement, it is possible to have a world that looks like it instantiates the Kantian ideal (it is populated by republican states that have all entered into a voluntary congress of nations, and that respects the right of hospitality), but that still involves injustice. This will be the case when it turns out that an allocation

of external rights too severely restricts the external freedom of some persons. Once we are live to this possibility I think it becomes clear that the Kantian need not accept the picture developed in the last section. For many claims that asylum seekers make (including claims by those currently not granted refugee status under current norms) have fully intelligible claims to right under this Kantian framework, even when they involve claims to enter a sovereign country. They are not making mere claims to humanitarian intervention, even if they do not face literal destruction in returning to the land from which they fled. Rather, insofar as we are reflective, we tend to see our own claims to right coming up against their limits in the claims of persons facing socio-economic depravation. For they are not well able to sustain themselves, and this appears to us (as holders of exclusionary rights) as inconsistent with the grounds of those rights (common ownership of the earth). Insofar as this is true, outsiders do not have a material obligation to respect state borders in seeking their rights (although it may be prudent for them to do so). Instead, their obligations are exhausted by their formal obligation to adopt a rightful disposition and to perform those acts and forbearances required of the same.

This does not mean that persons in an extant country never have valid normative concerns about the coming of outsiders, even those that are badly off and facing persecution. These concerns are grounded in the fact that we cannot make policy addressing injustice by trying to eliminate every token injustice without attention to the conditions that enable us to move forward on the whole. Thus, to the extent that a nation takes itself to have reasons to exclude in the face of such objections, these worries (in order to ground legitimate exclusion) must be grounded

in considerations of the instability of home institutions, and there has to be a real, not merely a perceived, threat to their institutions from their admission. Mere threats to national culture and national identity are insufficient to ground a right to exclude (*pace* Miller 2017, pp. 4-7). Still, admitting a right to exclude even those subject to persecution completely does not absolve the excluding nation of responsibility, and nor does it seem to me that our political obligations are exhausted, on this account, by what general policy our nation should adopt. I want to take each of these points in turn.

I have argued so far that a nation may have a right to exclude a person facing persecution in her homeland owing to reasons of being unable to sustain institutions the existence of which moves closer to a rightful condition. But a right to exclude does not imply a right to refoulement—to send the persons back to the place of their persecution. For having a right to exclude is compatible with having obligations to allow the persons safe passage to another land, and even to provide resources for making such passage. Moreover securing such a right to safe passage to persons is one of the very conditions that makes it credible that a nation is worthy of a provisional right to rule. Moreover, to the degree that this is so, and to the degree that the person asserting her rights against a nation asserting its rights is analyzed by the Kantian theory as a circumstance of war, it will be correspondingly the case that there ought to be international institutions to govern these disputes, and perhaps to distribute the burdens of refugee crises in a manner consistent with right, not war.

Moreover, that a nation adopts a restrictive policy with respect to refugees facing, not destruction, but persecution or socio-economic depravation, need not

imply that *individuals* have no further obligations to them. Indeed, to the degree that refugees show up on their private property, they might have duties to aid them, and these duties might be stronger than the duty to support the restrictions on migration that make the residing of the refugees on their property illegal. Such duties are possible insofar as it can make sense for a state to adopt restrictive *general* policies, while its simultaneously being true that violations of these general policies by individuals do not destabilize the relevant institutions. For both the individuals' duty and the state's duty have a common source in the duty to adopt a rightful disposition with respect to others. And it is possible that the nation does best by this duty by adopting a policy of exclusion, at the same time that an individual does best by the lights of this duty by admitting refugees and giving them a share of her property. All the more when the nation's exclusionary policy is not in fact justified, and insofar as the nation does not voluntarily submit to the international league of nations.

Finally, I think it's true that nations aware of crises in other regions involving violations of human rights must consider that their own success at erecting functioning institutions is a significant success and luxury, explaining significant differences in standards of well being. Insofar as this is true, members and authorities of wealthy, well-functioning nations ought to take it that their rights to the prosperity they enjoy may be inconsistent with others' persecution and deprivation, even when they do not manage to show up on our border. Individuals may have further duties of right to cede some of their bounty to badly off persons by sponsoring the migration of badly off foreigners, and states will have duties to admit these offers when they occur (to the degree that it is compatible with the maintenance of the rule of law).

Because each person has a right to be somewhere, and this right can be asserted against others insofar as one's rightful honor is at stake, we who are well-off ought to see conditions like this as conditions in which our rights run up against their limits. Of course, that they do so still underdetermines the proper response.

Now, it is true that this leaves a great deal to the actual judgment of individuals as asserters of rights. And it may of course be objected that this is to reintroduce the problem of disagreement that political institutions are supposed to solve. But this seems to me to be the genuine stuff of politics (ch. 7), and theory can tell us here only so much in general and in the abstract, before the particulars of a case are fleshed out. Moreover, what from one angle looks to be indeterminacy, from another angle appears as flexibility to a political world that is driven by norms and values that even a true theory ignores at its peril (chs. 6 and 7). Though it is true that we get less from this Kantian theory in terms of determinate prescriptions of what we ought to do, no matter who or where we are than we did from the interpretation developed in the last section, we may well get more in terms of a self-understanding that is realistic about what it is to assert and reconcile claims in the political realm.

There is an objection to applying Kant's theory in the way I have here applied it. According to the objection, Kant's notion of cosmopolitan right was designed to *reduce* rightful grounds for conflicts, not for ensuring any particular distributive end (which can increase such grounds). As Meckstroth (2017) puts it, contrary "to what is almost universally supposed, the point of this [cosmopolitan right] for Kant was not to secure a positive right to *anything,* but simply to rule out familiar justifications for declaring others "enemies" and thereby overriding their provisional rights—

holding already in the state of nature—to defend themselves and their possessions from attack" (p. 3). To the degree that Meckstroth is correct, and cosmopolitan right is unenforceable, carefully "framed just so that it could never be invoked to start a new war in the name of pursuing one's rights" (ibid.), the Kantian view I've developed above is not only not Kant's (since it goes against the letter of his theory), but also not very Kantian, to the degree that it is incompatible with its very spirit. For on that view, not only does a person's assertion of her cosmopolitan right provide grounds for a right to war, so too does more general persecution that is expressly not covered by that right.

Perhaps the first thing to say is that I agree with Meckstroth that much of Kant's normative framework is geared at reducing further grounds for war. It is thus plausible that cosmopolitan right is framed to achieve this end. But it is also in the spirit of Kant's texts to acknowledge the inevitability of war, but with a hopeful disposition that the war machine eventually wears itself out, that its burdens are felt widely enough to reduce the incentives to it, and that avoiding war without also being concerned for the rights of persons results in a kind of peace through despotic rule, which Kant dramatically describes as guaranteeing only a "graveyard of freedom" (PP 8: 368).[271] Therefore, it is by no means obvious that conflict reduction was Kant's sole motivation. For also vexing to him, as I have argued at length earlier in this dissertation, was the question of the limitations of acquisition more generally, and the question of how free beings can relate to one another without compromising their

[271] Here I agree with (and borrow significantly from) Rainer Forst's excellent essay, "The Normative Order of Justice and Peace".

rightful honor. Sometimes we find in these considerations grounds for war, and sometimes our rights can only be defended by such means (PP 8:379-381).

V. Conclusion

I have argued in this chapter that (1) the case against a broader definition of refugee is not necessarily well-motivated, and that there are substantial reasons for a broader definition; that (2) a natural reading of Kant's texts pushes us in precisely the opposite direction, and is plausibly too restrictive concerning when nations have duties to allow needy outsiders entry; and (3) that a Kantian theory along the lines developed in previous chapters provides a flexible and plausible framework for understanding the limitations of our exclusionary rights. Here, as elsewhere, much more on each of these three points of contention could be said. But I hope that what has here been said goes some way toward illuminating the theoretical commitments developed earlier in this project, and demonstrates, to some degree, their power and aptness to address political problems of great moment.

Conclusion

If readers walk away from the above pages with a more vivid sense of two things, I hope they will be these. First that, although Kant's is a demanding political theory—requiring no less than perpetual peace in a system of universal freedom—he was under no illusions that its demands would be fulfilled in practice. As his acceptance of PT shows (perhaps more clearly than any other aspect of his work), he was instead convinced from firm grounds that these demands simply could not be fulfilled by beings like us in a world like ours. But Kant was adamant that such a conclusion ought not to invite despair, and indeed that its aspirations should rather provide hope for continual progress in the right direction. The second is that, understanding Kant's theory through the lens of PT encourages us to rethink Kant's legacy and the usefulness of a theory like this for our practical lives. By way of conclusion, I want to say a bit more on each of these points.

Progressive Politics and the Ends of History

For Kant, "establishing universal and lasting peace constitutes not merely a part of the doctrine of Right but rather the entire final end of the doctrine of Right within the limits of reason alone" (MdS 6:355). While this is an end that we cannot hope to realize in practice, we have a duty always to approximate it. For only under the condition of perpetual peace (which is distinct from a mere cessation of hostilities) are the rights of humanity finally on a secure footing. Kant's distinction between provisional and conclusive right makes sense in a system that has aspirations like this.

The beginnings of human civilization and culture described in Kant's essay on universal history are characterized by a sort of contingency that it is the purpose of history and politics to overcome, and the notion of provisional right provides conceptual resources for doing just this.

In IUH, a speculative essay concerning the moral and political development of humankind, Kant notes that, provided we adopt a certain perspective, we can understand even the folly of human action on the world stage as leading toward the end of perpetual peace. Though it's true, as we have seen, that human societies are despotic, that law has arisen from the historically contingent use of force, that we are competitive and often uncooperative creatures,[272] there is a perspective from which we can think of all of this as necessary to building

> the foundation of a mode of thought which can with time transform the rude natural predisposition to make moral distinctions into determinate practical principles and hence transform a *pathologically* compelled agreement to form a society finally into a *moral* whole. (IUH 8:21)

We begin with a "crude predisposition" to distinguish between ourselves and others on moral terms. With time, the crude social distinctions of rank that we are inclined to make rise to the level of genuine principle, and these principles serve as the basis for associations to transition from pathologically compelled hierarchies of power based on need to hierarchies based on right. If conclusive right is a sphere of lawgiving characterized in the ideal case by its necessity, then we need a way of seeing the defective forms of it as somehow leading toward that goal. At the limit, the "moral whole" Kant mentions in the above passage just is the pure republic: "a society in

[272] Kant calls this our unsocial sociability. For helpful discussion, see Wood 1999, chs. 6-8.

which *freedom under external laws* can be encountered combined with the greatest possible degree of irresistible power, i.e., a *perfectly just civil constitution*" (IUH 8:22). This perfectly just constitution is an idea of reason that lays out the conditions under which human beings, prone to disagreement and conflict, grow best,[273] consistent with the rights of others. It is also the domestic, or internal condition of conclusive right, while an association of such republics (unified under universal hospitality) is the international, or external condition. The notion of provisional right provides a perspective from which we can (and must) view degenerate forms as stepping stones toward the realization of such conditions. Only by accepting that a starting point that is contingent and arbitrary can eventually be transformed can we overcome the conclusion that our political lives are hopelessly fragmented.

Kant's picture is that nature, through war, contest, and debt, encourages us to realize that when we associate, we ought to allow each to go her own way, provided only that she upholds the rights of others to do the same, that they ought to avoid violence, that "there is to be no war" (MdS 6:355). This teleological picture has led some to think that his views about progress are unsuited to those of us who have abandoned teleological thinking in the political domain, and who think reform ought to proceed from freedom, not natural necessity. Elizabeth Ellis, for instance, notes that Kant relies on two quite different strategies for the mechanism of progress (2005,

[273] In this, Kant's thought anticipates Nietzsche's in *Beyond Good and Evil:* "We...have kept an eye and a conscience open to the question of where and how the plant "man" has grown the strongest, and we think this has always happened in conditions" of "harshness, violence, slavery, danger in the streets and in the heart, concealment, Stoicism, the art of experiment, and devilry of every sort; that everything evil, terrible, tyrannical, predatory, and snakelike in humanity serves just as well as its opposite to enhance the species "humanity"" (BGE, § 44). Here's Kant: "Thanks be to nature, therefore, for the incompatibility, for the spiteful competitive vanity, for the insatiable desire to possess, or even to dominate! For without them all the excellent predispositions in humanity would eternally slumber undeveloped" (IUH 8:21).

ch. 2). Sometimes, Kant indicates that progress eventuates from our freely willed actions, and is contingent on our doing the right thing. In other places, though, Kant indicates that progress is the inevitable result of nature's pursuit of certain ends. Ellis argues that Kant's teleological remarks are both deeply implausible and in the finally analysis incompatible with his critical system. For Kant's considered, critical view is that we are responsible for the results of our actions, and that these are the constituents of history. We act badly so far as we leave things up to nature. Of course, Ellis is right about this. But is it incompatible with Kant's affording a role to teleology? Is his view simply implausible so far as he does?

In the Universal History essay, Kant himself acknowledges the worry that his "history" is really just a strange kind of fiction.

> It is, to be sure, a strange and apparently an absurd stroke, to want to write a *history* in accordance with an idea of how the course of the world would have to go if it were to conform to certain rational ends; it appears that with such an aim only a *novel* could be brought about. (8:29)

Still, he thinks that this admittedly strange exercise can serve a purpose. For example, it might encourage us to avoid despairing over the fact that

> one sees [human] doings and refrainings on the great stage of the world and finds that despite the wisdom appearing now and then in individual cases, everything in the large is woven together out of folly, childish vanity, often also out of childish malice and the rage to destruction; so that in the end one does not know what concept to make of our species, with its smug imaginings about its excellences. (8:17-8)

Kant appears to think that without reason to think that history will unfold for the better—that the work that we put into developing the better side of our natures (and to squelching the worse) will issue in real effects for the future—we would become

dejected. Our political lives in that case certainly would be full of sound and fury, but just as certainly, they would signify nothing. Understood this way, the rationale underlying Kant's idea for a universal history would be somewhat like the rationale for the postulates.

Believing that all the war and bloodshed and unfreedom with which we meet in our political lives can serve as an inducement to perpetual peace (or at least toward the external appearance of it) is useful for creatures like us. Perhaps telling ourselves this kind of story doesn't ascend to the level of practical necessity (as Kant thought the postulates did), but having it available to us can help us as we fulfill our duties, and to avoid sinking into misanthropy.

> Such a *justification* of nature…is no unimportant motive for choosing a particular viewpoint for considering the world. For what does it help to praise the splendor and wisdom of creation in the nonrational realm of nature, and to recommend it to our consideration, if that part of the great showplace of the highest wisdom that contains the end of all this—the history of humankind—is to remain a ceaseless objection against it, the prospect of which necessitates our turning our eyes away from it in disgust and, in despair of ever encountering a completed rational aim in it, to hope for the latter only in another world? (IUH 8:30)

Without a more optimistic, progressive perspective on politics, our faith in other rational pursuits will wither. At times, Ellis seems to think that the teleological overtones of these earlier essays encourage the neglect of our agency through free action (e.g. 2005, p. 61, p. 65). If nature will solve our problems anyway, why bother engaging ourselves? But for Kant there would be something untoward about this. For earlier in the essay under consideration, he claims the human being is such that "he should produce everything out of himself," and that his social progress must be the result of his freely willing it (IUH 8:20).

Even in this essay, focused as it is on ways in which nature might be leading us where we want to go unbeknownst to us, Kant holds fast to the idea that the "moral whole" that is the ideal republic depends for its realization upon the perfection of humanity's predispositions, among them morality and rationality, and the idea that this kind of perfection forms a major part of the human vocation. He seems never to think that we should sit back and let nature take the reins. Rather, adopting the teleological standpoint helps us to take this vocation seriously, even in the face of persistent objections in the world of appearances, and even when, far from being conscious of the necessity of our external duties, they appear to us alien and arbitrary. In this way, Kant takes seriously and in a new direction his suggestion in the first *Critique* that one legitimate aim of philosophical thinking is to answer the question of what we might legitimately hope (KrV A805/B833).

The objects of our hope (perpetual peace, and a collection of pure republics existing together in a voluntary congress of such republics) are mere ideas, in Kant's technical sense, according to which they are distinct from concepts. Whereas concepts are the workings of the understanding, and serve to determine objects of possible experience, ideas are the workings of reason itself, and have, at best, a regulative importance for experience itself. Kant describes them in the first *Critique* in this way. An idea is "something that not only could never be borrowed from the senses, but that even goes far beyond the concepts of the understanding....since nothing in experience could ever be congruent to it" (A313/B370). An idea is a kind of archetype that has regulative or normative force, but that we can never arise in

experience.[274] The picture of perfect justice is perhaps even better than the picture of perfect virtue in offering a case study of the degree to which our ideas outstrip the reality they're to regulate. The regulative force of an idea instructs one to approximate it so far as that's possible. So, regardless of nature's plans, given that we have an idea of the pure republic, we must approximate it.[275]

If what we hope for in the political realm is a republic that makes freedom the condition of any exercise of coercion, and an international sphere where nations relate rightfully with one another, we should notice that these are not only ideas that form the conditions of perpetual peace, but that they are also the conditions that we would need to realize if we were to be certain that our external rights were consistent with everyone's freedom. Whereas things in our world begin with contingent exercises of force, it must be the case that they are, in time, brought into line with reason's demands. Though it's true that, in the advance of the realization of those demands, we find ourselves enmeshed in circumstances where we are subject to demands that are not fully consistent with universal freedom, Kant seeks a means of understanding our normative situation as defective, but directed toward an important

[274] Kant isolates at least ten "ideas" that are at home in the political context.
(1) Perpetual peace (23:192, MdS 6:350)
(2) The pure republic (23:163, A316/B373)
(3) The state (MdS 6:313)
(4) The original contract (R 7737, R 7960, 27:1382, MdS 6:315, MdS 6:344)
(5) The civil condition (MdS 6:265, MdS 6:324)
(6) The world state (23:169)
(7) Freedom (23:240)
(8) The communal or general or omnilateral will (27:1393, 23:220, 23:276, 23:321, 23:342, MdS 6:258, MdS 6:265; MdS 6:274, 6:306)
(9) Common possession of the earth (23:232-234, MdS 6:261)
(10) The head of state (MdS 6:339)

[275] [T]hat condition in which [the state's] constitution conforms most fully to principles of Right; it is that condition which reason, *by a categorical imperative,* makes it obligatory for us to strive after. (MdS 6:318)

end, and according to which it can proceed rationally toward that end, rather than through randomness. Rights in advance of its realization (but with a view toward the latter) are provisional rights: rights held "in anticipation of and preparation for the civil condition, which can be based only on a law of a common will, possession which therefore accords with the possibility [therefore not actuality] of such a condition" (MdS 6:257). Because the civil condition can be based only on the idea of a common will united a priori and necessarily, any judgment that we have a right to an external thing, is indeed one that must be made in the absence of consciousness that it coheres with that idea. But as I hope that Chapters 1-4 have shown, squaring up to this fact need not provide grounds for despair.

Kant's Legacy and the Aims of Political Philosophy

Starting late in the 20th century, much political philosophy turned reflective. In addition to carrying on with considering the first and second order normative questions that had occupied them in the past, debates raged concerning how political philosophers ought to spend their time. In part, this was because, in the wake of the 20th century's political catastrophes, theorists began to worry about the pernicious influence of certain modes of thinking on the public sphere. The Kantian theory's role in these discussions was often as a useful foil, a guidebook on how political philosophy ought not to be done. Good political philosophy is modest in what it can achieve, and attentive to empirical considerations about what works and to the origins and perilous nature of political power. Kant's theory, it is often held, falls short on each point. Of course, this narrative is not without its challengers, and as Kant's

political philosophy continues its resurgence, compelling challenges will continue to come forth. I want to close this concluding chapter with a reflection on the usefulness of the theory just developed in terms of the goals of political philosophy, and a call for Kantian theorists to take certain questions yet more seriously as they move forward.

In *Justice as Fairness,* Rawls observes three things that sound political philosophy might achieve.[276] First, philosophy can reconcile us to the fact that the social world we inhabit "is not, and cannot be, an association. We do not enter it voluntarily. Rather we find ourselves in a particular political society at a certain moment in historical time," and it is one role of political philosophy to render perspicuous in what sense we can conceive of our political lives as free in light of these facts (ibid., pp. 3-4). Second, in times of deep disagreement, it has the practical role of directing us to deeper and more fundamental levels on which, perhaps, we actually agree (or ought to agree), or at least in narrowing down some of our most significant disagreements (2001, p. 2). Finally, Rawls argues that political philosophy, in evaluating our institutions can help us to "probe the limits of practical possibility" by settling our expectations concerning what it is reasonable to hope for (ibid.). In each of these tasks, a Kantian theory as I've developed it here offers considerable resources.

Reconciliation

[276] In fact, he describes four, but the second is irrelevant for my purposes here.

I have framed the discussion in this dissertation around the observation that, by Kant's own admission, our political lives involve duties that appear alien and arbitrary, and therefore inconsistent with our capacities as rational self-legislators. Moreover, any progress toward institutions that render them consistent with our self-legislative capacities is imperfect, fragmented, and non-linear. Precisely because we enter a social and political environment that we did not choose, a social and political environment characterized by arbitrary force and contingency, rather than freedom, the world that it presents us with clear challenges. In Chapter 5, I argued that the seriousness with which Kant approaches this problem places his legacy perhaps closer to the philosophical anarchist position, to which it is often thought the best alternative, than is often appreciated. Institutions that we could not have chosen, and that lay great claim over our persons and lives, appear to make great demands on our freedom. The anarchist is right to wonder how such a world could be consistent with our status as free and autonomous persons. Kant's notion of provisional right goes some way to providing an answer, but it stops full of the complete answer his followers have thought to possess.

Kant's partial answer involves recognizing that, despite the foreign nature of our obligations in the political realm, there are raw materials there for improvement, and we can work—indeed, must work—to build and reform institutions that eliminate, as far as possible, arbitrary lawgiving by external powers (including merely other private persons). It is true that we want to move beyond an institutional scheme to the degree that it is incompatible with freedom. But because the conditions instantiated by the actual regimes under which we live, imperfect though they are,

usher in a formal condition of our discharging our duty to enter a rightful condition, we can reconcile to them in a unique kind of way. Although it is true that we did not choose them, although it is true that they are not such as we *would* have chosen or *should* have chosen, given a choice we were never given, we can nevertheless come to see them as raw materials for bringing the political world we live in into line with the political world reason demands.

Disagreement

The second aim political philosophy might facilitate is in helping us to approach and resolve the disagreements that we face. As we saw in Chapter 6, Kant's avowal of a monistic theory of institutional evaluation can make it seem that his theory is in a uniquely *bad* position concerning this second aim. Surely a theory that claims that justice is grounded solely in freedom cannot account for the way that we in fact disagree, let alone have a plausible solution to our disagreement.

But this is wrong. The Kantian theory as here developed is at least no worse off than other theories, and indeed is better off than at least some. Indeed, an interpretation of his thought that emphasizes the role of provisional right in progressing toward universal freedom is plausible *precisely* because the provisional right tier allows Kant to afford some normative weight to the plurality of projects and values that organize political activity and the consolidation and stabilization of power in the world we live in, even while maintaining a firm conviction that there is one political order that is superior to the others, that is worth striving after, and that promises, in the end, to be capable of generating convergence. Insofar as being ready

for a rightful condition requires bracketing our second-tier disagreements about the conditions of conclusive right in favor of respecting persons' provisional claims, it allows that disagreement is to be filtered through the political processes that generate them. Though Kant's theory of institutional evaluation is monistic on the highest level, it is not deaf to the concerns that motivate persons to choose radically different ways of living. Moreover, the higher level monism provides some hope that we will indeed be able to find common ground, and that, if only we can come to agree on the appropriate use of coercion, all of our values might have their place (as we've seen in Chapter 7).

Additionally, it is important to note that the value in terms of which institutions are to be evaluated is the degree to which they secure for citizens their rights, and leave them to pursue their other projects as they see fit, just as long as they leave space for others to do the same. But insofar as persons are allowed significant space to pursue their projects, independent of others' interference, the many things that they value (even if they all come roughly under the heading of welfare or happiness) will be reflected in the kinds of projects they undertake. Moreover, many of these projects will be precisely geared toward voluntary forms of community that pursue collective goals over and above what right requires. Even at the ideal level, then, Kant's theory is deeply concerned to ensure that the many ways of living a human life have a place to flourish. Indeed, only by letting plural ways of living flourish (against the background of secure rights) can we hope for genuine cultural progress.

In a way, then, Kant's theory—read in just the right way—anticipates one of Robert Nozick's deepest insights, namely that utopia, properly conceived, "will consist of utopias, of many different and divergent communities in which people lead different kinds of lives under different institutions" (1974, p. 312). A system which enshrines freedom as a right, but leaves persons to pursue their other goals as they see fit acknowledges the sense in which true utopia—the highest political good—is really "a framework for utopias, a place where people are at liberty to join together voluntarily to pursue and attempt to realize their own vision of the good life in the ideal community but where no one can impose his own utopian vision upon others" (1974, p. 312).

The Limits of Practical Possibility

The third aim that a productive political philosophy achieves is to properly "probe the limits of practical possibility," allowing us a clear view of what we can reasonably hope for. The Rawlsian theories achieve this goal by conceiving of the principles of justice as spelling out a realistic utopia. Constraints concerning the laws of nature and the basic psychology of agents are, to some degree, incorporated in the derivation of principles of justice, and so one can reasonably hope, "taking men as they are and laws as they might be" that institutions may be brought in line with these principles.

Kant's theory is in certain respects more ambitious. For him, perpetual peace under principles of freedom is an idea of reason. Although it cannot be realized in experience, it is nevertheless the proper object of our political hope.

We must be careful here, however, and avoid thinking that this means pressing as hard as politically feasible for reforms that appear to move us in the direction of this ideal. The general theory of the second best (Lipsey and Lancaster 1956) is a cautionary tale in this respect. For as one commentator puts it, the theorem derived by Lipsey and Lancaster implies

> that we can have no reasonable expectation that the best state of affairs short of fully realizing an ideal is a state that approximates an ideal as far as possible. Thus absent credible evidence that the ideal is sufficiently likely to be realized, we have no reason to expect that a political ideal presents an appropriate target for real-world reform efforts.
>
> In view of this anti-approximation warning, those who wish to uphold a particular ideal as an appropriate reform target must adopt one of two strategies...First one can *circumvent* the second best theorem by presenting credible evidence for optimism about the prospects of realizing the proposed ideal...Second, in lieu of presenting credible evidence that the proposed ideal is sufficiently likely to be realized, an ideal theorist might *counter* the second best theorem by demonstrating that, among the feasible alternatives, the best state of affairs (from the standpoint of justice) is the state most likely to emerge from efforts to realize the ideal as closely as possible. (Wiens 2016, p. 143)

The general theory of the second best implies that a theory that demands the realization of an ideal can sensibly guide action in two ways. First, insofar as we have reason to believe that the ideal can be realized, and it can encourage us to seek the conditions of its realizability. In remaining generally pessimistic about the likelihood of our realizing the demands of conclusive right, Kant seems to rule this course out. Instead, he holds that we must merely approximate perfect justice. Kantians must then pursue the second way—namely, they must argue that adopting the stance of always approximating conclusive right, in the expected absence of its realization, will be optimal from the standpoint of justice. Insofar as arguments to this effect are

implausible, Kantians must abandon either Kant's approximationist claims, or develop a theory of institutional evaluation that captures the spirit, if not the letter of his theory.

Kant holds for example that perfect justice requires certain coercive institutions. A naïve way of reading the claim that we must approximate perfect justice is to take it that whenever we can move from a status quo that lacks one these institutions (an independent judiciary, say) to a future that has it, we ought to do it. The general theory of the second best shows that this is a mistake, and a reading of Kant's political philosophy that emphasizes the fractured nature of our pursuit of ideal conditions forces us to square up to this point at every level of analysis. It is true that reason demands a state, but it is false that *any time* we can move from a stateless society to one that has statelike structures, we must do it. It is true that reason demands a republican constitution, but it is false that *any time* we can make a move toward realizing some aspect of it, we must do it. Perhaps we should make these moves, perhaps not. It just depends. For if we cannot guarantee the realization of the entire set of conditions, then, even granting that they would—if realized—constitute perfect justice, we cannot guarantee that the transition is optimal, in terms of our political values. We must instead argue that particular moves best discharge our duty to remain ready for a rightful condition. Insofar as thinking Kant's theory through in this way is precisely to encourage reflection on the limits of practical possibility—and the implications of these limits for the entire theoretical enterprise—Kant's theory is well positioned with respect to Rawls's third aim for political philosophy.

* * *

If the arguments of this dissertation are correct, Kant offers a richer, more complex theory than is often appreciated. Such a theory allows us to maintain much of the important work that has been done in the past twenty years to bring Kant's political philosophy back into the mainstream conversation, but it also narrows the distance between Kant and his critics. Although Kantians have sometimes been quick to prescribe institutions of a certain kind, shrugging off the need for institutional analysis as a burden they do not need to take on themselves, this dissertation is, like Ellis's great book before it, a significant counterweight to this approach. Our political duties are grounded in a duty to remain ready for a rightful condition—a condition that we never quite reach. What this duty requires of us in terms of specific actions is a question the answer to which I have only gestured at imprecisely. Future Kantian work might develop detailed accounts of the demands in action of adopting a maxim to remain ready for the rightful condition in any number of ways, and some of which may be at odds with my suggestions here. In making these arguments, they will likely have to move, in significant ways, beyond the Kantian texts. Still, if I am correct, these very texts provide an attractive framework for thinking through just why and to what degree we find ourselves politically bound to one another, and how to restructure those binds in a way that better respects our free rational agency.

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