and Mark C. Murphy's critique of recent efforts to decouple political authority from the duty of obedience. It is this Editor's hope that these discussions show that—while the "last word" has yet to be uttered—the perennial interest of the problem of political obligation has not foreclosed the possibility of incremental progress toward resolution.

Notes

1. The relevant citations for Klosko, and other scholars discussed subsequently, are listed in the selective bibliography below.

2. Narveson contends that it is an error to interpret utilitarianism as requiring that people be made for the sake of happiness, rather than happiness for people. See, e.g., Narveson 1973.

3. Cf. Waldron, "Special Ties," 27, quoted earlier. The italicized passage is the addition I'm recommending to Waldron's original language.

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ARTICLES

Rawls and "Duty-Based" Accounts of Political Obligation

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Since Hobbes at least, all the great political philosophers of the liberal tradition have assumed that humans are in some sense *naturally* politically free and equal. That being the case, how can one legitimately *leave* that state and acquire political obligations to institutions that assign inequalities in political authority among individuals? Two contrasting answers to this question have been offered by the most influential members of the contract tradition, John Locke (in his *Second Treatise on Government*) and Jean-Jacques Rousseau (see especially *The Social Contract*). Locke was a consent theorist, claiming that "no one can be . . . subjected to the political power of another, without his own consent" (*Second Treatise*, §95). Rousseau's theory is what one could call a *self-legislation* account. Notoriously, he argues that with the social contract one remains "as free as before" by becoming part of the general will, obeying the dictates of which makes one both civilly and morally free.

Neither account has many adherents today; no interpreter has managed to remove the sinister connotations from Rousseau's claim that one can legitimately be "forced to be free," while Locke's consent theory either implies that one can consent without realizing it, or that only a small minority of citizens of a society are actually obligated to its government. Can one be true to the social contract tradition and offer a plausible account of political obligation? For the answer, we must turn to the work of John Rawls, who almost single-handedly resurrected the theory of the social contract in the 20th century.[1]

1. Rawls's "Duty-Based" Account of Political Obligation

It might help to contrast Rawls's theory with a crude sketch of Locke's. Locke's theory includes two key claims that Rawls rejects. The first is what I call *constitutive individualism*: the idea that society as a rights-bearing entity is created by the intentional acts of the individuals that found it, and that failing that action, no society can be said to exist. Indeed, the social contract for Locke is (at least in part) this founding act among individuals. Against this Rawls argues that we should take societies' existence as given, a fact of life for each individual. The Rawlsian contract, famously carried out by hypothetical parties in what he calls "the original position" (OP), is instead a way to test whether or not a principle is just for the society that already exists.

Second, Locke assumes that one cannot be bound to any particular society (and thereby obligated to obey its institutions above all others) without an act of consent. Rawls instead claims that we have a "natural duty" to comply with institutions that are "as just as it is reasonable to expect" (TJ, p. 115), where, as mentioned, the justice is determined by whether or not the institutions comply with principles chosen in the OP. Indeed, for Rawls, "natural duties" do not follow from a law of nature. Instead they are duties that follow from the principles chosen by the parties in the OP. But the fact remains that every citizen is bound by them "independent of his voluntary acts." Thus one can be *born* politically obligated and it seems that humans are not naturally politically free in the way that Locke and Rousseau envisaged. Wouldn't it be truer to the assumptions of the social contract tradition to make "the requirement to comply with just institutions conditional on certain voluntary acts,"[2] adding some stipulation of consent to his theory? Wouldn't, in fact, the parties in the OP demand such a proviso?

Rawls concedes that "offhand, a principle with this kind of condition seems more in accordance with the contract idea with its emphasis upon free consent and the protection of liberty," but claims that "in fact, nothing would be gained by this proviso" for two reasons. First, the consent requirement of Locke's theory was intended to ensure that the liberty and equality of the contractors was respected, but this end is better achieved by the principles chosen in the OP, which order the basic structure of a society into which citizens are born. Second, "basing our political ties upon a principle of obligation

would complicate the assurance problem." The "assurance problem" is the challenge of maintaining stability in the face of temptations to freeload on the part of some citizens and the corresponding dislike of being exploited by those citizens initially prepared to contribute their fair share to society as a cooperative enterprise. Rawls believes that a stipulation that one does not assume obligations until one gives consent would exacerbate this problem. It would still be easy to receive many of the benefits of cooperation without assuming the burdens, and the freeloaders who realized this would gall others sufficiently that they too would cease to contribute. For these reasons, the parties in the OP would not choose to make compliance with institutions a voluntary matter, because to do so would not increase respect for the freedom and equality of citizens, but it would compromise the stability of society as a system of cooperation.

Having rejected two key assumptions of Locke's account, has Rawls produced a theory of political obligation that avoids the criticisms usually leveled against contract theories? In his well-known 1979 book,[3] A. John Simmons argues that Rawls's theory is left with worse problems as a result.

2. Simmons's Critique

Simmons argues that to be an adequate account of political obligation a theory must meet what he calls "the particularity requirement." That is, it must explain the *special* bond that a citizen feels to *her* government over and above all others (however just those others might be). Consent theories can easily do this by stipulating, as Locke does, that one is a citizen of the *first* country to which one gives one's consent, and that that first consent binds one in perpetuity (or until that society collapses or expels said citizen). However, while one might accept that there is a "natural duty" to support and comply with just institutions, this applies to *all* just institutions and does not pick out those of my own country as at all special. While this is not a problem for a wide range of phenomena—when I visit another country, I feel a duty to obey its laws just as I would my own, for example—there are many matters (serving in the army, voting, being tried for treason) where it is essential that there be a special bond between myself and one country or set of institutions above all others. The challenge then is to show how the duty-based account can deal with the *particularity* of citizenship.

Rawls writes that the duty of justice requires us to support and comply with just institutions that *apply to us*. This stipulation seems intended to answer the particularity challenge. Simmons seizes on just this clause, however, as the basis of his criticism that Rawls's duty account is inadequate to ground a bond of citizenship. He analyzes the possible senses in which an institution could be said to "apply to" an individual, and suggests that they fall into three rough categories: the "weak" sense, the "territorial" sense, and the "strong" sense. Of these three, Rawls appears to mean the territorial sense.

To illustrate the case of an institution "applying to" an individual in the territorial sense, Simmons gives an example of a reservation for philosophers, where each child born is considered a "philosopher" unless she expressly renounces this status and leaves the reservation. Such philosophers are automatically regarded as members of the "Institute for the Advancement of Philosophers," which campaigns actively on behalf of the beleaguered philosophers, but demands in return that they pay their dues, and hires "hard-nosed Kantians" to enforce these demands. Simmons argues that this is a clear case of an institution (the Institute) "applying" to every person born on the reservation in the "territorial" sense. However, he claims, and I think he is right, that this case shows that the geographical location of my birth is not enough to bind me to whatever institutions are said to apply to inhabitants of that area *whether or not* the institutions are just: no matter that the Institute is just, I am not "duty-bound" to pay its dues merely because I was born within its purview. "Territorial" application does not intuitively distinguish a just institution to which one is not duty-bound from a just institution to which one is. The only way in which a distinction like this can be made is if the institution applies to one *strongly*. The case of the Institute outlined above can be altered to reflect strong application, if in addition to territorial application,

> I am an active participant in the activities of the institution, and am a member in the full sense of the word. I have given my express consent to be governed by its rules, or perhaps I have held office in the Institute, or *accepted* . . . substantial benefits from the institution's workings. (Simmons 1979, p. 150)

However, the reason I am now bound to obey the institution is that I performed some *deliberate consensual act*, and thus, contends Simmons, the duty account collapses into an obligation account once more. Only people who have performed the kind of deliberate consensual act necessary to obligate them to follow the rules of an institution are duty-bound to that institution above all others. Such a collapse is not something Rawls would welcome, because, as we saw, he believes that a stipulation of consent would complicate the "assurance problem," and it would also leave the majority of citizens not bound to obey the just institutions of their own society. Perhaps this collapse can be avoided if the phrase "apply to us" is removed from Rawls's description of the natural duty of justice. That would mean that we have a duty (a) to support and comply with existing just institutions, and (b) to further just arrangements not yet established (when to do so would not incur for us unacceptable costs). Simmons is prepared to concede that we do have a natural duty to do (b),[4] and even (a) to the extent that we should *support* just institutions. But he believes his Institute case shows that, even if the Institute is just, we are not *simply for that reason* bound to *comply* with it. That does not mean that we *won't* comply with it, and for good reasons, but we do not have a duty to comply with it simply because of its justice. Furthermore, of course, this "weakened" duty of justice does not meet the particularity requirement, and thus "no longer looks like an appropriate tool for dealing with problems of political obligation" (Simmons 1979, p. 155).

3. Actual Contract?

Simmons finds compelling the Lockean idea that there are obvious natural moral requirements (even if, unlike Locke, he does not think that they derive from the law of nature),[5] and it is just such a requirement that he has in mind for the (weakened) duty of justice, which would apply universally to all humans in all societies. However, Rawls cannot allow such an assumption to be part of justice as

fairness, because moral realism is part of a comprehensive doctrine of the good and there are reasonable comprehensive doctrines that reject the reality of moral claims (non-cognitivism, pragmatism, e.g.), and his political conception must accommodate both sorts of competing doctrines. This might seem to be a further flaw with Rawls's theory—it cannot even claim a "weakened" duty of justice—but in fact, I would now like to suggest that the fact that the duties of justice must be derived from principles chosen in the OP might provide a way to meet Simmons's particularity requirement in a way that Lockean duties could not.

The original position, Rawls's contract situation, is constructed such that it restricts the possible range of choices the parties in it can make in a way that models certain fairness conditions that Rawls claims are "reasonable and generally acceptable."[6] These intuitions about fairness are "generally acceptable," it turns out in his later work (culminating with 1993's *Political Liberalism*[7]), because they are settled convictions of the shared public political culture of the society the basic structure of which is to be ordered by the principles those in the OP are choosing. Perhaps this fact can meet the particularity requirement. That is, one should already concede that the principles that result from the parties' choice in the OP really apply only to those citizens who share that public political culture. Only those citizens can assuredly acknowledge the ideas of fairness around which the OP is based as *theirs*, in the sense of being part of *their* shared culture.

A second way in which Rawls's theory might meet the particularity requirement also derives from one of its most basic conceptions, that of society as a "fair system of cooperation." With this view of society in mind, it is natural to ask how to arrive at the *fair terms* of cooperation. Rawls writes:

> Are they, for example, laid down by God's law? . . . [or] are they recognized as required by natural law, or by a realm of values known by rational intuition? Or are these terms established by an undertaking among those persons themselves in the light of what they regard as their reciprocal advantage? . . . Justice as fairness recasts the doctrine of the **social contract** and adopts a form of the last answer: the fair terms of social cooperation are conceived as **agreed to by those engaged in it**, that is, by free and equal citizens who are born into the society in which they lead their lives. (PL, pp. 22–3, my emphasis)

As mentioned, Rawls rejects the Constitutive Individualism of Locke and Rousseau, arguing that the analogy between society and association is misleading. However, he claims that a society well ordered by his principles "comes as close as society can to being a voluntary scheme,"

> for it meets the principles which free and equal persons would assent to under circumstances that are fair. In this sense its members are **autonomous** and the obligations they recognize **self-imposed**. (TJ, p. 13)

As Rousseau suggested, if the legislative authority of the state derives directly from the citizens, then this could legitimize that authority in the way that founding or joining consent did for Locke. However, Rousseau's self-legislation account appears totalitarian because it assumes that there is a single common good and that dissenters can be forced to accept this.[8] Rawls, however, is designing a system for a society marked by a pluralism of reasonable comprehensive conceptions of the good, and his self-legislation account must be adapted to acknowledge this.

In a society characterized by a plurality of reasonable comprehensive doctrines, it cannot be that the political conception used to order the basic structure of that society draws on an "independent moral order" for principles, as the truth of that moral order will inevitably be rejected by at least some of the doctrines (and it would be unreasonable to browbeat them into accepting it). Call this the Pluralism Challenge: to meet it, the conception must be *constructed* in a way that all can accept. (Indeed Rawls calls this process "Political Constructivism.") The raw material[9] for this construction will be the "public and shared ideas" common to all the conceptions, most importantly the basic ideas of society and person, the public role of a political conception of justice, and the principles of practical reason. In fact, the principles of practical reason, you might say, are actually the *tools* with which to work the materials of the former, which are *conceptions* of practical reasoning (PL, p. 107). What, then, is practical reasoning?

According to Rawls (who claims to follow Kant in this), practical reasoning is conscious activity by persons according to the relevant principles and with the result of producing "constructs of reason," of which the relevant ones for Rawls's theory are the principles of justice. That practical reasoning is an *activity* is important: in affirming principles that result from one's practical reasoning (rather than principles that are simply imposed on one by others), one is "autonomous, politically speaking" (PL, p. 98). Just as Rousseau argues that the general will ensures self-legislation, so Rawls argues that the use of practical reasoning in political constructivism ensures this "political" autonomy.

To summarize: constructivism has the following implications for political obligation. An organization or institution within a society ordered by principles of justice that are the result of a process of construction like the choice procedure of the OP can legitimately demand compliance of a citizen provided that the law that the institution is enforcing can be derived from the principles of justice by an application of practical reasoning, *because* that citizen can affirm the principles themselves by an application of practical reasoning to the conceptions of practical reasoning (in particular, the ideas of society and citizen) that are part of the shared public political culture of her society.

4. Conclusion: Does It Really Work?

As we have seen, Rawls talks of the obligations that citizens recognize being "self-imposed," as if each citizen her or himself (rather than the hypothetical parties of the OP) *actually partakes* in the construction of the principles of justice. Furthermore, Samuel Freeman, a defender of the Rawlsian social contract, writes:

> In committing themselves to these principles, free and equal **citizens willingly impose upon themselves** certain constraints on future decision-making . . . This precommitment is general, because **it is made by** and applies to everyone.[11]

Presumably this "commitment" must be "partaking in the construction process." However, for Rawls's theory to be plausibly applicable to actual societies, it must be the case that a citizen can commit to a principle merely because her practical reason, *if* applied correctly, would result in the principles, and in that sense she "affirms" them, whether or not she realizes it. But then the account of autonomy inherent in this affirmation account does not seem to respect the sense of freedom of choice that I think is behind the appeal of contract theory in the first place. Contract theory was supposed to provide a conception of political autonomy such that I could say that my obligation to a government or constitution was derived in some way from my free action as an individual among political equals. Autonomy requires that the principles I affirm be the result of my deliberative process. It is not enough simply for it to be the deliberative process that someone *exactly like me* would use, in other words, indicative of my unique experiences and faculties, because this would allow the deliberation of someone who knew me incredibly well to count as mine. It must be the deliberation that I actually intentionally undergo.

To illustrate, consider the following two ways of shopping for goods. In each case I get the goods first and am billed later. The first way is the standard way: I pick the goods out myself. In this case I have to pay the bill when it comes because I have incurred an obligation by my free act. The second way is that (unbeknownst to me) my android double, programmed with all my memories and feelings, who has always chosen exactly as I would choose in similar circumstances, picks the goods out for me. In this latter case, it seems clear that I do *not* have an obligation to pay for the goods, because I did not choose them. I *would* have chosen them, but I actually did not. I did not experience the *phenomenology of choice*: my awareness of making a choice. I think this intuition explains the fact that Locke's contention that we can tacitly consent to laws is almost universally rejected, even if it were the case that *if asked* we would *expressly* consent. The important difference is the actual act of consent, which requires the phenomenology.

Furthermore, Rawls claims that the conceptions of practical reason are drawn from the settled convictions of the shared public culture of our society. Surely one of the *most* settled convictions is that one cannot be held to agreements made by one's android double, that is, one has to have the phenomenology of choice oneself before one can be said to have "self-imposed" obligations.[11] Earlier we saw that Rawls claims that a consent requirement would "complicate the assurance problem" because citizens could not rely on the compliance of others if it were the case that those others felt no obligation without an act of joining consent. For this reason the parties would not choose that the duties of justice require an overt act to apply. This response is weak, however. As Simmons correctly notes, there would be a similar assurance problem with Rawls's duty-based account because citizens will not believe that others will comply simply because the relevant institutions "apply" to them. This is particularly so if I am right that a fundamental intuition of our public political culture is that one cannot be bound to comply with particular demands without an overt act.

A different line of response that Rawls certainly can point to is the idea that the very conception of "citizen" entails each member of society having a sense of justice, and thus each *will* find compelling the demands of duty. He writes:

> We must start with the assumption that a reasonably just political society is possible, and for it to be possible, human beings must have a moral nature, not of course a perfect such nature, yet one that can understand, act on, and be sufficiently moved by a reasonable political conception of right and justice to support a society guided by its ideals and principles. (Introduction to paperback [1996] edition of PL, p. lxii)

However, this response ignores the following points. First, that if, as Rawls himself acknowledges, the public political culture "may be of two minds at a very deep level" (PL, 9), it cannot simply be assumed that a reasonable application of practical reason *would* affirm a duty-based/affirmation account to the exclusion of a consent account.[12] What citizens can be *taken* to affirm cannot thus be narrowed down (and certainly not if most citizens would insist on a consent proviso).

Second, it need not be amorality or a lack of a sense of justice that provokes one to question one's duties to one's "own" country to the exclusion of duties to others. It is a powerful intuition that if one has a duty to someone geographically near one it is because of her humanity[13] rather than that geographical proximity (or, *a fortiori*, the sharing of a public political culture). Thus, one might very well question specifically societal duties not out of selfishness, but out of a suspicion about the validity of societal and cultural demarcations. This, indeed, is a paradigmatically liberal notion: the fellowship of humanity is more important than societal boundaries.

Third, is it really true that every citizen *can* affirm the principles of justice using practical reasoning? Rawls's theory is forbidding even to the most committed student of philosophy (I have little confidence in my own comprehension of his overall theory), and although it might in theory be possible to convey it to the committed everyperson, I have my own doubts. Everyone can vote, that much I can be sure of, but I am far less sure that everyone is capable of constructing principles of justice using their practical reasoning, or even of comprehending the process. Rawls's theory might, then, turn out to be elitist, in rather the way that Plato's is in the *Laws*. While this might not be a bad thing (it is far from clear that everyone *should* vote), it belies his egalitarian intent.

Finally, his theory, in assuming citizenship, rules out by fiat those people born and raised within the boundaries of a society with an identifiable shared public political culture who openly reject that culture, and deny that they owe anything to society, provided that they do not demand anything of it. That is, Rawls's theory, unlike Locke's, denies the possibility of an asocial life. That kind of liberty, that was "natural" for Locke and Rousseau, is not even an option. While I do not myself see this objection as the most damaging to Rawls (I find it hard to sympathize with Idaho separatists), I do not think that it can be ruled out simply by fiat, even for reasons of simplicity.

I therefore conclude that, however powerful his theory of *justice*, Rawls's attempt to provide a social contract theory of political obligation, even when one takes into account his most recent writings, is fatally flawed.

Notes

1. See especially *A Theory of Justice* (Cambridge, Mass.: Belknap Press, 1971). (Referred to hereafter as TJ.)

2. This quote and those that follow (including discussion of the "assurance problem") are from TJ, pp. 335–6.

3. *Moral Principles and Political Obligations* (Princeton: Princeton University Press).

4. "I think that, as Rawls suggests, we do have a natural duty to support and assist in the formation of just institutions, at least so long as no great inconvenience to ourselves is involved" (Simmons 1979, p. 154).

5. See his defense of natural rights in his *The Lockean Theory of Rights* (Princeton: Princeton University Press, 1992), pp. 102–120.

6. Specifically, the intuitions are: "[N]o one should be advantaged or disadvantaged by natural fortune or social circumstance in the choice of principles," "it should be impossible to tailor principles to the circumstances of one's own case," and "we should insure further that particular inclinations and aspirations, and persons' conceptions of their good do not affect the principles adopted" (TJ, p. 18).

7. (New York: Columbia University Press, 1993), henceforth PL.

8. To be fair, Rousseau thought his theory applicable only in small, very homogenous societies; Corsica was the only European country he thought fit for it.

9. "[W]e must have some material, as it were, from which to begin" (PL, p. 104).

10. "Reason and Agreement in Social Contract Views," *Philosophy and Public Affairs* 19, no. 2 (1990): 144. Emphasis added.

11. The clearest illustration of this that I get on a regular basis is how convincing the overwhelming majority of undergraduates find Judith Jarvis Thomson's "Henry Fonda" case in her "A Defense of Abortion." The example is that, if I need only the touch of Henry Fonda's cool hand on my brow to save my life, he is still not required even to cross the room to provide me with it—he is under no *obligation* to do so. A Kantian would no doubt say he has an *imperfect duty* to do so, but try telling that to most undergraduates.

12. As Rawls wryly notes, "many reasonable people seem to disagree with me" [1996, p. xlix].

13. Or, to avoid speciesism, her possession of morally relevant characteristics, such as sentience.