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1
Varieties of Authority

Most people have mixed feelings about authority. On the one hand, submission to authorities seems to conflict with our freedom and autonomy, and we regard it as an important youthful instinct to challenge authorities and to sometimes rebel against them. On the other hand, we have great respect for many authorities and we see the usefulness of complying with authorities. An explanation for these mixed feelings is that there are different types of authority, and that only some authorities are legitimate. In this first chapter, I explain what different types of authority there are, and I set the stage for later chapters (which will mostly focus on political authority).

Theoretical and practical authorities

Some people are authorities because they are experts on something. For example, Carolyn Abbate and Roger Parker have written a book called *A History of Opera*, and so arguably they are authorities when it comes to opera. On opera-related questions, their judgment should count. When we would like to know something about opera, it is probably a good idea to consult them (or their book). Let us call such authorities *theoretical authorities*, because they know more than others in a certain field. *Practical authorities* are

different. A police officer's authority is not based on any special knowledge or expertise. A police officer can tell you what to do because she has the *right* to tell you what to do, not because she has expertise. Parents are another example of practical authorities. They have the right to tell their kids what to do, but their authority is not based on any special knowledge or expertise.

So what do theoretical and practical authorities have in common? One might be tempted to say that both provide other people with *reasons*, the difference being that they provide different *kinds* of reasons (Raz 1985: 211). Theoretical authorities are in a position to provide *reasons for belief*, while practical authorities are in a position to provide *reasons for action*. But this is not so. When Carolyn Abbate and Roger Parker say something about Verdi operas, others have good reason to believe that they are right. But theoretical authorities often provide reasons for action as well. Take physicians, as a paradigmatic example. Of course your dentist knows more about teeth than you do, and so if you would like to better understand the physiology of teeth, it is certainly a good idea to ask your dentist. In that sense your dentist is a theoretical authority. But, of course, you usually do not go to a dentist to gain knowledge, but to let him control the health of your teeth. During that process, you do what the dentist says. When the dentist tells you to open your mouth wide, then you have good reason to do so, because you want him to have a look and see whether you have caries or periodontitis. When your dentist gives you advice on how to use dental floss, then you have good reason to follow his advice, because you care about your teeth. Thus your dentist is in a position to provide reasons for action *and* for belief. This holds for most theoretical authorities. If you are unsure what recording of Verdi's *Falstaff* you should purchase, you probably should follow the advice of Carolyn Abbate and Roger Parker. Experts on opera are in a position to provide reasons for action, too. Conversely, practical authorities provide not only reasons for action, but also reasons for belief; when they tell you what to do, then you have reason to believe that you ought to do it.

Moreover, providing others with reasons for belief or action is not sufficient for being an authority. We all provide

reasons for belief and for action all the time. When I bring a surfboard to the beach, others have reason to believe that I will go surfing. And when I start surfing and drown, others have reason to save me (which is a reason for action). This does not make me an authority.

So what is the mark of authority? What do theoretical and practical authorities have in common? Authorities provide reasons for belief and action because they have a certain superior *standing*. Theoretical authorities have a superior standing because they are experts on something, because they know more in a certain field. Due to this superior standing, what they do or think is "authoritative," not on a par with what others do or think. In the case of practical authorities, the superior standing is constituted not by special knowledge, but by having certain *rights*. The police officer, for example, has the right to make us stop and show her our driver's license. This constitutes her "superior position," since normal people do not have the right to make other people show them their driving license. The notion of "superior standing" is deliberately vague, but I think it is important to an understanding of authority. Not all forms of superior standing constitute authority, though. Being rich or powerful is not a source of authority, for example. The reason is that these forms of "superiority" do not constitute superior "standing." The superiority of having more power or money than others gives one more opportunities, but no standing.

I mentioned state officials and parents as examples of practical (i.e. rights-based) authorities. In the case of parents, one may ask whether they are not better understood as theoretical authorities. Compared to their children, parents certainly have greater expertise in most areas. Yet this is arguably not the only reason why they have authority over their children and it is not what marks their specific parental authority. After all, *all* adults have more knowledge and practical skills than children, and yet it is only the kids' parents that have parental authority over them. Like police officers, parents have authority because they have certain rights over a certain class of subjects, namely their children. (Of course, they also have certain duties toward their children, but these duties do not constitute their authority.) In fact, the authority of the state and the authority of parents have sometimes been

thought to be similar or even identical. Robert Filmer, a major English political theorist in the seventeenth century, argued that the authority of absolute monarchs is based on the parental authority Adam had over his children (1680). John Locke put great efforts into showing that Filmer's theory does not work because there are important differences between the authority of the state and the authority of parents (1689). In the present context, the important point simply is that both the authority of the state and the authority of parents are constituted by a special set of rights. This set of rights marks their superior position, not some superior knowledge. For that reason, they both represent forms of practical authority, not theoretical authority.

Besides parents and the state and its officials, there are other authorities that have certain rights that put them in a superior position over others, i.e. other practical authorities. Bosses are such authorities. Maybe some bosses are also theoretical authorities, but again this is not what marks their authority. What marks their authority is their right to give orders, to fire employees, etc. The same holds for religious authorities like the Pope or the Dalai Lama. Religious authorities are often conceived as theoretical authorities as well, but what makes them a religious authority (at least as I would like to understand the term here) is not their knowledge, but their rights vis-à-vis the relative religious community. They may put believers under certain obligations, excommunicate people, etc. Teachers are another example. Teachers should really be theoretical authorities, at least in relation to their students. If they are not, they will not be good teachers. But their theoretical authority is not what makes them teachers. The authority of teachers is constituted by the rights they have over their students. For example, they have the right to grade them, give them homework, etc.

De facto authorities and legitimate authorities

As we all know, there are charlatans among authorities. This is especially so in the case of theoretical authorities. Some merely pretend to have the expertise that makes them

authorities. In that sense, they are not *really* authorities. Now of course it happens sometimes that people are unaware that these are charlatans and still treat them as authorities. In a different sense, then, they *are* authorities. They are treated as authorities, even though they do not have the superior standing that people believe them to have. Accordingly, we should distinguish between mere *de facto authorities* and *legitimate authorities*. De facto authorities are treated as authorities; people believe that they have a superior standing. Legitimate authorities, on the other hand, really have that superior standing. Successful charlatans are de facto authorities, but not legitimate authorities. Conversely, unfortunately some legitimate authorities may fail to be de facto authorities. Sometimes people do not get the respect and acknowledgment they deserve as authorities in their field. Think of philosophers or scientists who explore radically new and much better theories, but are not taken seriously by their colleagues. Even worse, they may be treated as heretics at their time. When we are lucky, authorities are both de facto and legitimate authorities. Authorities that are only de facto authorities are problematic because people take them to provide reasons for action or belief that they are not in a position to provide. Mere legitimate authorities are unfortunate because they provide reasons for action or belief, but people fail to appreciate it. In this book, my main focus will be on legitimate authority. When I say "authority," I will usually mean "legitimate authority" (unless the context suggests otherwise).

The distinction between de facto and legitimate authorities applies not only to theoretical authorities, but also to practical authorities. Here we might not speak of "charlatans," but still there could be persons who are treated as practical authorities without actually having the rights that are needed to really have that practical authority. Think of the tale of "The Emperor's New Clothes." The Emperor is treated is if he wore his beautiful new clothes, but in fact he is naked. Some think that this is similar with the authority of states. They are treated as if they had practical authority, but they do not have it.

It is sometimes said that an authority has to be a de facto authority before it can adequately be called a legitimate

or illegitimate authority. Talk of being a legitimate or illegitimate authority presupposes that one *is* a (de facto) authority. And there is certainly some truth to this. Yet there are counterexamples. There can be excellent scientists who are dismissed by the scientific community; they could be described as legitimate authorities in their field who are not de facto authorities. The same holds for practical authorities. A government in exile no longer has de facto authority, but could still be considered to have legitimate authority.

Political authority

The rest of the book will mainly be devoted to the authority of the state, although I will talk about other types of authority as well. The state's authority can also be called *political authority*. It is a specific type of practical authority, besides parental authority, the authority of bosses, the authority of teachers, and the authority of religious leaders. As a type of practical authority, it is constituted by a special set of rights.

Note that governments and states are not the same thing. Governments are one institution within the institutional structure of the state. It might be possible to have an illegitimate government within a legitimate state, for example when it came to power by usurpation. I will mostly deal with the legitimate authority of states, not governments.

For a start, we should get a clear picture of the rights that states and their officials claim to have. The right of police officers to make citizens stop and show them their driver's license is only a derivative right (i.e. a right that is derived from more basic rights). On a more abstract level, states claim to have the right to *make laws*, first of all. Laws apply to a certain territory and to a certain group of subjects. Some laws apply to everyone who happens to be in the territory, including tourists, exchange students, and asylum seekers. The criminal law is a prominent example. Other laws only apply to the citizens of the state, no matter if they live in the state's territory or not. For example, states often allow their citizens to vote, even if they live in another country. What is important to bear in mind, though, is that states

claim to have authority over *all* citizens and over *all* people in their territory. Political authority has a "holistic" nature, in that sense (Christiano 2004: 267–8). A state that merely has the right to enact laws with regard to some citizens, but not with regard to others, or with regard to some people in its territory, but not with regard to others, would not have political authority as we conceive it.

Second, states claim to have the right to coercively enforce these laws. This is what the police officer from our example does, and so her right is derived from this more abstract right to coercively enforce laws. Of course the right to coercively enforce laws can also be seen at work in the praxis of punishment, for example. It should be noted, though, that not all laws are coercive in this way. Laws regulating marriage, for example, or laws regulating parliamentary elections, are not coercive in the same way that the criminal law is. They simply enable people to get married or to vote. It is true that even these laws have a connection to state coercion, since being married opens the possibility of filing new types of lawsuits against one's spouse, and these lawsuits can result in judgments that are coercively enforced. This fact is emphasized by Hans Kelsen (1934), who treats a connection to coercion as the essence of the law. On the other hand, this connection to coercion does not seem to be the *point* of laws that regulate marriage or parliamentary elections, as H. L. A. Hart (1961) points out against Kelsen. Be that as it may; in any case, states claim the right to coercively enforce laws, even if coercion is not the point of all laws.

Third, states not only enact and coercively enforce laws, they also claim that no *other* institution may enact and enforce laws in the state's territory without the state's permission. States, in other words, claim a *monopoly on the use of force*. The state may put a murderer in jail, but you may not lock a murderer in your cellar. Max Weber saw this as the essence of the state (1921), and many have followed him on this point. To claim a monopoly on the use of force means to claim an *exclusive* right to enact and enforce laws. It should be noted, though, that of course states usually allow individual self-defense, and so sometimes citizens may indeed use force. But this does not contradict the state's claim to a monopoly on the use of force. The claim to a monopoly on

the use of force is just the claim that no one may use force without the state's permission. The example of self-defense shows that states regularly give such permission for specific occasions or situations. On the other hand, a state that permitted everyone to use force whenever one sees fit would stop being a state. States claim a monopoly on the use of force *and uphold it* to a considerable degree.

To summarize, then, states claim and uphold the exclusive and holistic right to enact and enforce laws for their territory and their citizens. This complex right can be called the *right to rule*.

The right to rule

But talk of rights is ambiguous. We should further specify what kind of right the right to rule is. It is helpful to follow Wesley Newcomb Hohfeld's distinction between different kinds of rights (1913). There are claim-rights, liberty-rights, powers, and immunities.

Claim-rights correlate with duties. When a person has a claim-right to something, then others have a duty to respect it. For example, I have a claim-right that others do not fondle my nose (without my permission), and this claim-right implies that others have a duty not to fondle my nose (without my permission). In that sense, claim-rights correlate with other people's duties.

Liberty-rights – Hohfeld calls them "privileges" – are very different from claim-rights. When I have a liberty-right to do something, then this means that I do not have duties that would stand in the way of doing it. When I have the liberty-right to grow tomatoes in my garden, this means that I do not have any duties not to grow tomatoes in my garden. Nothing is said about *other* people's duties here.

Of course, often claim-rights and liberty-rights go hand in hand. In addition to my liberty-right to grow tomatoes in my garden, I might also have the claim-right that others do not interfere with my growing tomatoes in my garden. But there can be liberty-rights that are not accompanied by claim-rights. For example, I have the liberty-right to park my car at a particular public parking spot, while you also have a liberty-right to park your car at that very same public parking spot. None of us has a duty to grant precedence to the other, and accordingly none of us has a claim-right that the other one does not use the spot.

Powers are second-order rights. They mean the ability to alter one's own or other people's rights and duties. For example, I have the power to sell my home-grown tomatoes and thereby confer my rights in my tomatoes on the buyer. I give the buyer new claim-rights, liberty-rights, powers, etc. with regard to the tomatoes. Promising is another example where a power is at work. If I promise to take care of your tomatoes, I thereby incur a duty to take care of your tomatoes and I give you a claim-right that I take care of your tomatoes.

Immunities protect one's rights from being altered by someone else. Thus when I have an immunity with regard to my tomatoes, then this means that you lack the power to alter the rights I have with regard to my tomatoes. You cannot sell them for me, for example.

So what kind of right is the state's right to rule? It is a bundle of rights. Some ingredients of the bundle are rather uncontroversial, others are more controversial. What is uncontroversial is that a state with political authority has a liberty-right to enact and coercively enforce laws (in its territory and for its citizens). Yet traditionally, the core of the right to rule and hence of political authority was seen in the state's claim-right to be obeyed. Whether this right is really essential to the right to rule has become controversial, and so I will not presuppose that the right to rule includes this claim-right. I thus work with a moderate conception of the right to rule.

Yet what cannot be left out – and arguably forms the core of the right to rule – is the state's *power to impose duties* on citizens and on people in its territory (see Copp 1999: 18–21; Perry 2005: 273, 286; Applbaum 2010: 221–2; Enoch 2014: 300, 306; Schmelzle 2015: 60–5). This power seems essential to what states do: Enacting laws simply means putting citizens under a duty to respect these laws. (In Chapter 7, I will briefly discuss conceptions of legitimacy that attempt to do without the power to impose duties.) One may wonder whether it is conceivable that a state has the power to impose

duties, but not a claim-right to be obeyed. It is: When a state imposes duties on citizens, these duties need not be owed to the state. They can be owed to other citizens.

Besides the liberty-right to enact and enforce laws and the power to thereby impose duties, there may well be other rights, like a claim-right against interference by other states and an immunity against the state's rights being expunged or changed by other states. But the core of the right to rule is the power to impose duties.

Three clarificatory notes

Before moving on, let me add three clarificatory notes. First of all, it is important to distinguish powers in the proper sense from what can be called "side-effect powers" (see Raz 1975: 98–104; Estlund 2008: 118–19, 142–4; Edmundson 2010: 181–3; 2011: 345; Enoch 2011: 4–6; 2014: 299; Essert 2015). For example, when I am drowning and cry for help, I can thereby put a passerby under a duty to help me. This is not a power in the proper sense, but a mere side-effect power. But it is not so easy to say what the difference between proper powers and side-effect powers really is.

David Estlund remarks that side-effect cases are cases where "a requirement or prohibition is the result of certain acts of mine but where they are no part of the point of the act" (2008: 143). It is not part of the point of my going swimming to put you under a duty to rescue me. But, on the other hand, maybe it *could* be the point of my going swimming (it may really be my intention to put you under a duty to rescue me). Even if it were the point of my going swimming, this would arguably not constitute a power in the sense we are after here.

So there must be something else that is distinctive about proper powers. Maybe it is one's ability to create *new* reasons for action "by mere say-so." In the drowning example, my drowning and crying merely *triggers* reasons that had been there independently of my action. Your moral duty to help others in emergency situations (when possible without unreasonable costs) is triggered by my drowning. In other words, in a side-effect case I do something that causally changes the world such that a reason that applies to you independently of my action becomes relevant. With proper powers, this is different. Here my action – usually my uttering of words – brings a new reason into existence, by mere say-so. If I promise to take care of your tomatoes, I thereby create a new reason for action, namely a moral reason for me to take care of your tomatoes. Now one might be tempted to think that this is not so different from side-effect cases. Why not say that by promising I merely trigger a reason that was there all along, namely the reason to keep my promises?

Here is the third and most promising candidate for distinguishing proper powers from side-effect powers: Only proper powers create "content-independent" reasons for action. The mere fact that I promised something gives a reason for action (namely to do the thing that is to be done if I am to keep the promise), no matter what the content of the promise was. Of course, there are things that I cannot promise; a promise to kill someone is not valid. But a valid promise creates a reason to do the thing that was promised, simply because it was promised, and in that sense it creates a reason for action independently of the content of the promise. Going swimming and drowning does *not* create content-independent reasons for action in that sense.

The state's power to impose duties is a proper power in that it is supposed to create content-independent reasons for action, just like promising. Enacting laws means imposing legal duties and thereby creating reasons for action independently of the law's content. As with promises, this does not imply that there are no moral limits on the kinds of duties the state can impose. Even states with political authority do not have the right to order a genocide. The power to impose duties is a power to create content-independent reasons for action within the range of morally permissible legislation.

The second clarificatory note is that the state's right to rule is a *moral* right. Trivially, states have the *legal* rights to do all the things they do. In particular, states have the legal power to impose legal duties on citizens and on everyone in their territories. The interesting question is whether states also have the moral right to do the things they do. If they do, then they have *legitimate authority*. In particular, it is interesting

whether states also have the moral power to impose legal duties or, if you prefer, whether they have the moral liberty-right to exercise their legal power to impose legal duties on others. It should be mentioned that Hohfeld's classification of rights was meant for rights in legal talk, but one can use his distinctions for rights in the moral realm as well.

Third, a few words on the relation between political authority and what is often called "political obligation." Just as political authority is a moral notion, political obligation also is a moral notion. Political obligations refer to the moral duties or obligations citizens have by virtue of being members of their political community. Political obligations include the duty to obey the law, to pay taxes, to serve in the military, etc. Usually, political authority and political obligations have been regarded as very closely related, as two sides of the same coin. If political authority contains a claim-right to be obeyed, then citizens have political obligations insofar as they have a duty to obey that correlates with this claim-right. But, as I said, I work with a moderate account of political authority that does not include a claim-right to be obeyed. Yet there is still a close connection between political authority and political obligations on this account, since states with political authority are said to have the power to impose duties on citizens, including duties to pay taxes, to serve in the military, and to respect the law. Now these duties are *legal* duties, first of all. But if the state has the *moral* power to impose these duties, then arguably citizens also have *moral* duties to follow their legal duties. Nevertheless, it is important to see that not all political obligations need to be connected to political authority. Maybe some political obligations are simply owed to other citizens independently of whether the state has any moral powers to impose duties (see also Raz 2006: 1004).

Many of the theories discussed in this book have been advanced to justify political obligations as well as political authority. I will usually try to focus on political authority, but talking about political obligations as well will be unavoidable. Sometimes (in Chapters 5 and 6) I have to reconstruct the theories in two steps: In a first step, the theory tries to justify political obligations; in a second step, it tries to move on to political authority. Sometimes (in Chapters 2, 3, and 4) it is possible to more directly focus on political authority.

A final remark on the terminology of "duty" and "obligation": Many authors use the term "obligation" for obligations that are created by voluntary acts like promises, contracts, etc. They use the term "duties" for natural duties that we have independently of such voluntary acts, like the duty not to kill people or the duty not to lie. Although not much hinges on this, I will usually try to follow this convention. But sometimes one needs an expression that covers both duties and obligations in this narrower sense. An example is my reference to "political obligations" right here in the last two paragraphs. I take it as an open question whether political obligations are duties or obligations in the narrower sense. Another example was my earlier exposition of Hohfeld's typology of rights. Claim-rights, I said, correlate with duties. If we follow the narrower terminology, we should say that they correlate with duties *or obligations*.

Theories of political authority

Different theories of political authority provide different accounts of how and why (some) states have political authority. Political authority initially looks more problematic than other forms of authority. It does not seem problematic that some people are authorities when it comes to opera, for example. What looks problematic about political authority is that the state's superior standing is marked by a specific set of rights that normal people lack. This seems morally dubious because we tend to think that all sane adults have *equal* rights. No one naturally has a right that other persons lack, and certainly not the right to rule over others. There are no natural relations of authority and subordination among persons. How then could state officials have rights that normal people lack? Political authority is such a deep and pressing question because it appears to be a violation of the equality of persons.

As we have seen, political authority is not the only kind of practical authority. Parents, bosses, teachers, and religious leaders are other examples of rights-based authorities.

Indeed the justification of the authority of parents, bosses, teachers, and religious leaders is important, too, and I will occasionally talk about them in the upcoming chapters on theories of political authority. But political authority looks more problematic than the authority of parents, bosses, teachers, and religious leaders, since the authority of the latter is not a violation of equality in the same way that political authority is. Children are not equals and so parental authority and the authority of school teachers is not an authority among equals. The authority of bosses is based on voluntary contracts and therefore arguably not a violation of equality. Likewise, I can escape the authority of religious leaders if I want to, and I need not submit to any teachers when I am an adult person.

Now one could object that political authority does not bring any new inequality between persons since the state *is not a person*, even though we treat it as an agent. But, in reply, while it is true that states are merely an institutional structure, real persons have to fill certain roles within this structure. The state is not a computer or a robot; human beings are necessary to bring life to the state. In the end, it is indeed particular persons that have the rights that constitute the state's right to rule. One such person is the police officer. She has the right to stop drivers and make them show her their driver's license, and this is a right that normal persons lack. One cannot discuss the right to rule of the state without discussing the right to rule that persons have over other persons.

It is true, though, that the police officer has only a small share of the state's right to rule. The right to rule is dispersed over different roles within the institutional structure of the state and hence over different persons. Most importantly, one part of the institutional structure of a state will be the legislature, which has the right to enact laws and thereby impose duties on citizens. Members of the legislature (be it members of a parliament, be it an absolute monarch) thus command the most important part of the right to rule.

The task of a theory of political authority is to explain how and why states (and the particular persons who fill certain roles within the state) could have political authority. What makes a good and successful theory of political authority?

Obviously, it should actually explain how and why the state could have the right to rule. It is not enough to simply stipulate that it has political authority when certain conditions are met; we want a meaningful explanation, and one that is based on plausible and widely shared moral premises. It is also not enough to merely identify conditions that may sometimes be relevant to political authority, but sometimes not; what we want to know is what the necessary and sufficient conditions for political authority are. Let us call this the *explanation condition*.

If the theory can also account for other forms of authority, be it the authority of parents, bosses, teachers, religious leaders, or theoretical authorities, then this is certainly a great advantage. It gives the theory some unifying power. If the theory cannot account for other forms of authority, it should have an explanation of why these other forms of authority are too different to be accounted for. In other words, a theory should be able to specify its target and its limits. Let us call this the *target condition*.

A theory could be correct as an account of the conditions that would make a state have political authority, while as a matter of fact no states meet these conditions. If we have to conclude that all existing and very probably all future states actually lack political authority, then the theory is unsuccessful. Of course, this does not imply that the theory is false; but it means that the theory cannot show that any states have political authority. A successful theory, in contrast, allows at least some actual or feasible future states to actually have political authority. Let us call this the *success condition*.

In the following five chapters, I will discuss five prominent theories of political authority. I will refer back to the *explanation*, *target*, and *success conditions* and examine whether the theories meet them. Of course, my answers will only be tentative. This is a short book and I cannot claim to provide a final assessment of the prospects of the five theories. Yet I do think that I can show how hard it is for them to convincingly explain political authority. In fact, I am skeptical that any one of the five theories could succeed. In the last chapter, I will therefore discuss what we are to conclude if they all fail.

Summary

The superior standing of theoretical authorities is constituted by their knowledge; the superior standing of practical authorities is constituted by their rights. Mere de facto authorities are treated as if they had such superior standing; legitimate authorities actually have it. Political authority is the type of practical authority that states claim to have. It means the holistic and exclusive right to enact and enforce laws in a certain territory and for a set of citizens. To show that states actually have political authority, a theory must meet the *explanation*, *target*, and *success conditions*.

2
Consent and Authority

Consent theory takes states to have political authority if and only if they have the consent of the governed. It has a great history in Western philosophy: Thomas Hobbes, John Locke, and Jean-Jacques Rousseau all argued that the state is founded in an original contract among the governed and in that sense based on people's consent. The roots of this view go as far back as Plato's *Crito*.

Explicit consent

It is clear that consent matters morally. It can turn something morally impermissible into something morally permissible. For example, it is morally impermissible for me to bring some scissors to my next ride in a crowded subway and cut other people's hair when they do not notice. But if I am a hairdresser, then of course people can come to my barbershop and give me permission to do exactly that, when they consent to let me cut their hair. Their consent to have their hair cut by me turns a morally impermissible action into a morally permissible action. Similarly, one can consent to surgery, sex, and many other things, and thereby turn something impermissible into something permissible.

Consent can do this because it is the exercise of a

Hohfeldian power (see p. 9). It can create new liberty-rights. When a customer comes to my barbershop and consents to have her hair cut, she thereby gives me the moral liberty-right to cut her hair. But consent can also give rise to new duties, claim-rights, and powers. When a customer comes to my barbershop and consents to have her hair cut, she thereby also incurs a duty to pay me afterwards, and I get a claim-right to be paid. I also get the power to waive my claim-right to be paid.

In general, then, consent can explain how new rights can come into existence. That consent has this power is a widely accepted and commonsensical moral idea. Since explaining political authority means explaining how and why the state could have the *right* to rule, consent certainly is a highly promising candidate for explaining political authority. It can explain how the powers and liberty-rights that form the state's right to rule can come into being and thus meets the *explanation condition* (see p. 15).

In the first chapter, I said that political authority is particularly puzzling because it constitutes an inequality in rights. Consent theory could nicely explain and justify that inequality. Since consent can create new rights, it can obviously result in an unequal distribution of rights. If political authority is grounded in consent, then the inequality that comes with political authority no longer looks problematic.

In a way, consent theory tries to assimilate the authority of the state to the authority of bosses in the economic sphere. The authority of bosses initially looks less problematic than political authority because people voluntarily accept jobs and are free to leave their jobs. Their contract usually specifies that the boss has the rights to give (certain kinds of) orders. This does not mean that there are no moral requirements for the exercise of authority in firms (see McMahon 1994; Anderson 2017), but still the authority of bosses is consensual in an important sense. The authority of religious leaders and the authority of teachers who teach adult persons can arguably be explained as consensual as well. Consent theory tries to show that the authority of the state is based on consent, too.

It is clear that theoretical authorities – for example the authority of physicians – need not be based on consent, since

their authority does not constitute any inequality of rights. So consent theory does not account for all kinds of authority, but it has a good explanation for that: It wants to explain the rise of new rights, and so it does not apply to theoretical authorities. But why should the authority of parents not be based on consent as well? As mentioned earlier, the assumed equality of rights holds among sane adults, not among all human beings including small children or human embryos. Small children and human embryos do not even have the power to give consent to the state's or their parents' authority. Human embryos and small children do not have the power to give or withhold consent to anything. Slightly older children have the power to give or withhold consent to little things they understand, like whether they would like to go to the zoo, whether they want to have some chocolate ice cream, etc. But they do not have the power to give or withhold consent to authority. For that reason, the authority of parents (and the authority of school teachers) cannot and need not be based on voluntary consent, even though it is a form of practical authority. Consent theory meets the *target condition*.

Do states have our explicit consent?

Now the question is whether consent theory can show that any real states actually *have* political authority. It is one thing to claim that states need the consent of the governed in order to have authority; it is quite another to show that any states actually received that consent. But before asking whether some states actually have authority based on consent, I would like to briefly discuss two fundamental objections to consent theory as applied to political authority.

One is that consent cannot be sufficient for political authority, because there are some things – namely grossly immoral things – that no government can require us to do, no matter if we consented to its authority or not (Buchanan 2002: 702). In reply, it is true that one has to invoke moral principles to determine the *limits* of legitimate authority. But this does not undermine the claim that consent is sufficient for

political authority, whatever the limits of political authority are. Similarly, of course there are limits to what a surgeon may do to us, but this does not undermine the claim that consent to undergo surgery is sufficient for making this surgery permissible.

A second fundamental objection is that consent to the state must in the end be based on nonconsensual foundations: We need state institutions to determine what constitutes valid consent to the state, and we need state institutions to determine what precisely one consents to when consenting to the state (see Horton 1992: 42–3; Buchanan 2002: 700–2; Christiano 2004: 283–4). But a defender of consent theory can and should deny that one needs state institutions or any other nonconsensual authorities for expressing valid and determinate consent. Without such institutions, it may be harder to have precise rules for the practice of consent, but it is not impossible. Moreover, even if consent to the state did presuppose state institutions, this would not undermine consent theory. It would still make sense to claim that state institutions need our consent in order to have legitimate authority.

So let us get back to the question of whether any states have the consent of the governed. Locke thinks that some states do indeed have political authority. Let us take a quick look at his theory. Locke makes clear that – in contrast to the authority of parents – the authority of states can only be based on consent because adult persons are equals:

> Men being [...], by Nature, all free, equal and independent, no one can be put out of this Estate, and subjected to the Political Power of another, without his own *Consent*. The only way whereby any one devests himself of his Natural Liberty, and *puts on the bonds of Civil Society* is by agreeing with other Men to joyn and unite into a Community, for their comfortable, safe, and peaceable living one amongst another, in a secure Enjoyment of their Properties, and a greater Security against any that are not of it. (1689: §95)

He imagines a pre-political state of nature in which all persons are free and equal, albeit governed by a "law of nature" (which is given by God). This law of nature, among other things, grants people equal natural rights including the right

to acquire private property (1689: §§25–7). Accordingly, it also gives everyone natural duties not to harm others in their life, liberty, or possessions (1689: §§6, 87). In the American Declaration of Independence, one of the most famous phrases sounds very Lockean: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." The inequality in rights that comes with political society can thus only be vindicated by consent.

But do states have our consent? Locke seemed to assume that some states indeed were *founded* consensually, and he mentions Rome, Venice, and Peru as examples (1689: §§102–3). But, first of all, this is quite implausible (with some rare and small-scale exceptions like the Mayflower Compact from 1620). States are usually imposed on at least some non-consenting adults. Even the United States of America of course were not founded on actual consent. The Declaration of Independence was not signed by all residents, even though it declares that governments derive "their just powers from the consent of the governed." Of course the Declaration of Independence was signed by *delegates* of all colonies who claimed to represent their citizens. But not everyone consented to let the delegates speak for him or her. Moreover, slaves and Native Americans were not represented at all.

Second, and this is a problem Locke recognized as well (1689: §116), even if states were *founded* consensually, this consent could not bind later generations. Think of yourself: Did you ever give consent to the authority of the state you are living in? You did not. You were not even asked whether you would like to give consent or withhold consent. Consent theory might be the correct theory of political authority: It might specify the correct necessary and sufficient conditions for state authority (namely: everyone's consent is required). But if this is correct, we have to conclude that all actual states and very probably all future states *lack* political authority. In that sense it fails as a theory of political authority: It does not meet the *success condition*.

Tacit consent

But maybe the idea of *tacit consent* can help. The difference between explicit and tacit consent is not that one utters words in the former type of consent. One can give explicit consent by simply nodding one's head or raising one's hand. The difference between explicit and tacit consent is that in the former type of consent one performs an action whose only standard public purpose is to give consent (see also Simmons 1998: 166). When giving tacit consent, one gives consent without performing an action whose only standard public purpose is to give consent. In any case, both explicit and tacit consent *are* consent and as such they are morally transformative; they can create new rights.

But tacit consent is trickier, of course, because it seems unclear both under what conditions tacit consent is given and what exactly one consents *to* when tacit consent is given. Conventions are crucial here. For example, one gives tacit consent to pay the bill once one takes a seat and orders a meal in a restaurant. One need not explicitly say that one will later pay the bill.

There are some general rules that conventions about tacit consent ought to follow (and in fact tend to follow). First, John Simmons points out that "*all* consent [...] should be understood to be consent *to* all and only that which is necessary to the *purpose* for which the consent is given, unless other terms are *explicitly* stated" (1998: 167). In the restaurant example, the purpose is to get dinner in a smooth market transaction. That is why ordering a meal is taken as consent to do one's part in the transaction, i.e. pay the check, and nothing more. One does not thereby consent to return to the restaurant in the future, to support it with a donation, etc.

Second, another plausible general rule for conventions governing tacit consent is that they should track what people want. People should normally approve of the things they are taken to have consented to. This does not mean that one cannot give tacit consent when choosing among two evils. It is certainly possible to give valid consent in choice situations where one likes neither of the options. For example, I might dislike the only two hairdressers in town and dream

of a better hairdresser, and yet I can give valid consent that allows one of them to cut my hair. Given the tragic situation, I want that hairdresser to cut my hair. Approval thus means something like "given the circumstances, the person really wants to give the consent he is taken to give." Conventions governing tacit consent should be approval-tracking in that sense. This does not mean that consent is invalid when a person gave consent to something she does not approve of. People sometimes act irrationally or suffer from weakness of will. The general rule should be understood as saying that insofar the conventions governing tacit consent *generally* fail to be approval-tracking, they should be rejected.

Third, another general rule for conventions governing tacit consent is that tacit consent can only be given by people who are in a clear choice situation. People should be aware that they can either give tacit consent or do something else to express dissent. They should be able to *control* whether they give consent or not. Conventions that do not allow the subjects to control whether they consent or not are dysfunctional, since consent is to be an expression of the will. It should be given knowingly and intentionally.

Fourth, conventions governing tacit consent should require that people are not coerced to refrain from expressing dissent. This does not mean that dissent cannot be costly. One may have to make a hard choice and in the end give valid consent to undergo some medical procedure, even though the costs are very painful side-effects. What the fourth rule is to rule out is that coerced consent counts as valid consent. To understand what coerced consent is, it might be worth taking a look at Hobbes's theory.

The state of nature as Hobbes describes it is quite different from Locke's. There are no natural rights to life, liberty, and property in the state of nature, merely one liberty-right, namely "the liberty each man hath, to use his own power, as he will himself, for the preservation of his own nature, that is to say, of his own life" (1651: Ch. 14). Hobbes also speaks of a "right to every thing, even to one another's body." Evidently, this liberty-right does not correlate with any duties. Under these conditions, it is rational for every individual to preventively attack others to preserve his own life and possessions, and so the state of nature becomes a

state of war, according to Hobbes (1651: Ch. 13). To achieve peace, people create the state in an original contract in which they renounce their right to everything. In this covenant, it is "as if every man should say to every man, *I authorize and give up my right of governing myself, to this man, or to this assembly of men, on the condition, that thou give up thy right to him, and authorize all his actions in like manner*" (1651: Ch. 17).

Yet later in the book, Hobbes surprisingly argues that a state in which "the sovereign power is acquired by force" has exactly the same rights as a state "by institution" (1651: Ch. 20). Does that mean that the state's authority need *not* be based on consent after all? No, Hobbes seems to think that even conquerors who acquire their position by force have authority by consent. A sovereign by acquisition differs from a sovereign by institution "only in this, that men who choose their sovereign, do it for fear of one another, and not him whom they institute: but in this case, they subject themselves, to him they are afraid of. In both cases they do it for fear" (1651: Ch. 20). The problem with Hobbes's proposal is that consent is invalidated when it is coerced. Gregory Kavka helpfully distinguishes forced consent from coerced consent (1986: 396): You can indeed give valid consent when you are in unfortunate circumstances that force you to choose between two bad options and give consent to one of them. To claim otherwise would mean to disallow people to try to make the best of their situation. Forced consent, therefore, is valid. But things are different when the party you are dealing with has *put* you in the unfortunate circumstances *in order* to make you consent to something. Take the case of a saboteur who manipulates a woman's car in order to later be able to offer her to repair it if she sleeps with him (say in the desert, where nobody else is around). Here, it seems that the woman does not incur any obligations when she gives consent to his proposal and the saboteur does not receive a right to have sex with her. Coerced consent is invalid and does not give rise to new rights and obligations. For the same reason, Hobbesian sovereigns by acquisition cannot get the right to rule when people surrender to them. Conventions governing tacit consent should thus make sure that they do not sanction coerced consent.

Do states have our tacit consent?

All four general rules should govern social conventions about tacit consent, and it seems that they in fact *do* govern social conventions about tacit consent. But when we want to know if the state's authority is based on tacit consent, what matters is whether there are any conventions actually in place. What could these conventions be? I will discuss three possibilities: (1) that people give tacit consent to the state when they inherit property in line with the laws of the state; (2) that people give tacit consent to the state when they do not emigrate; and (3) that people give tacit consent to the state when they vote.

Locke, as pointed out earlier, believes that states are often founded on explicit consent. But the problem, as he sees it, is that later generations cannot be bound by the founding fathers' explicit consent. His answer is that later generations give tacit consent when they inherit property from their fathers (1689: §§117–22). Yet it seems quite clear that, as a matter of fact, there are no conventions according to which one gives tacit consent to the state and its right to rule by inheriting property. Think back to the case of tacit consent given in the restaurant. The key point here was that there are clear-cut conventions about what counts as tacit consent (it is not entering a restaurant, but ordering a meal) and what is given consent *to* (it is paying the bill, not cleaning up). There are no such conventions regarding the inheritance of property.

And it is not surprising that there are no such conventions. The fourth general rule is quite clearly violated. If refusing one's bequest were required to express dissent, we would have a case of coerced consent: In order to make us "consent" to its authority, the state would put us in the situation where we have to choose between submitting to its authority and obtaining our bequest on the one hand and not submitting to its authority and forgoing our bequest on the other hand. Moreover, the second general rule is also violated, since a convention that would count inheriting property as tacit consent to the state would certainly not be approval-tracking. What inheritors approve of is their bequest (compared to not having it), but this does not imply that they approve of

the state (compared to living under no state or living under a different kind of state). Finally, the first general rule also is violated, since the purpose of accepting inherited property is just to receive one's bequest and nothing else.

Does non-emigration fare any better? Harry Beran argues that it does:

> Adults in contemporary states with universal education do know the following propositions. 1. In remaining within the territory of a state when one comes of age one accepts full membership in it. 2. In accepting membership in a rule-governed association (in the absence of coercion, deception, etc.,) one puts oneself under an obligation to obey its rules. 3. The state is a rule-governed association. From 1–3 it follows that 4. In remaining within the territory of a state when one comes of age (in the absence of coercion, deception, etc.) one puts oneself under an obligation to obey its rules. (Beran 1977: 270)

But, as a matter of fact, there are no conventions that count non-emigration as tacit consent to state authority. People are not aware that there is a choice to be made and that they have to emigrate in order to express dissent (Gans 1992: 52; Horton 1992: 33; Simmons 1993: 226–32). The problem thus is the third general rule for conventions governing tacit consent. You are born at a particular place and there is no specific time-point where you are forced to decide whether you would like to stay or go. There is no clear choice situation for anyone.

But, of course, one may try to establish a convention as Beran envisages it and create a clear choice situation. (Beran in later works seems to concede that there *actually* is no such convention.) One could make TV spots that try to establish that accepting the right to vote at age 16 (or some other age) implies accepting membership in the political community and counts as tacit consent to political authority. But there is a problem that speaks against establishing such a convention, and this has to do with the fourth general rule for conventions governing tacit consent. If such a convention were established, one would get coerced consent (Simmons 1979: 95–100; 1993: 232–42; Gans 1992: 53–6; Horton 1992: 34–6; Klosko 2005: 125–9). This point had basically

been made by David Hume with a famous analogy (1748): Imagine you are kidnapped and brought on board a ship. Once the ship is far away from the shore in the middle of the ocean, only water and sharks all around, the captain says: "I see that you are still here. If you didn't love it, you'd leave it, and so I take the fact that you're here to be tacit consent to my authority." Obviously, something has gone wrong here, and what is wrong is that we have a case of coerced consent again. The analogy should be clear: The sea and the sharks are not a real option, and while emigration may be an option for some, it involves high financial and emotional costs, costs that are too high for many. Now of course drowning at sea is more costly than emigrating, and there are other important differences between the cases, too. (For example, one is usually not brought to a country against one's will.) But this does not change the main point, which is not so much that the costs are too high, but that we would have a case of coerced consent: In order to make you "consent," the state put you in the situation where you have to choose between either bearing the costs of emigration or submitting to its authority. This is coercive and invalidates any consent the state could get. As Michael Huemer puts it, when we think that the state may ask dissenters to leave, then we presuppose that the state already has political authority in a certain territory; but this cannot be presupposed since it would already need everyone's tacit consent in order to have such authority (2013: 28–30).

Beran has a reply, though. He concedes that a convention that requires emigration to express dissent would be coercive for people who would like to express dissent. But he argues that it is not coercive for everyone who is willing to give consent to political authority anyway, which is the great majority (1987: 101–3). This reply is not convincing, however. First of all, it matters if a minority is coerced into giving invalid consent. It means that the state has no political authority over them, and so we would not be able to explain the holistic nature of political authority (it is to apply to all citizens and everyone in the territory; see p. 7). Second, it may be true that those who would like to give consent anyway are not coerced into giving consent by making emigration the only way to express dissent. But this does not change the fact

that the convention for giving tacit consent to the state would be coercive and result in invalid consent.

Beran also proposes to install so-called "dissenters' territories" within a country's borders to make emigration easier and to deal with cases where willing emigrants are not able to find some other country that allows them to immigrate (1977: 269; 1987: 32, 104, 125). Forcing someone to move to a dissenters' territory may be less bad than forcing someone to move to a foreign country. The problem is that it does not make the imposed choice any less coercive. I conclude that one cannot regard continued residence as a sign for tacit consent to political authority.

Voting – and other forms of political participation – is another promising candidate for the locus of tacit consent to political authority (Plamenatz 1938: 167–72; Singer 1974: 45–59; Steinberger 2004: 218–22; Knowles 2010: 113–16). But again there are serious problems (Smith 1973: 962–3; Pateman 1979: 83–91; Beran 1987: 70–7; Greenawalt 1987: 70–3; Horton 1992: 36–8; Klosko 1992: 144–5; Simmons 1993: 218–24). First of all, many people do not vote, and so even if voting could count as tacit consent to the state's authority (Singer calls it "quasi-consent"), a considerable percentage of the population usually does not give that tacit consent. Second, and more importantly, as a matter of fact there are no social conventions according to which voting counts as tacit consent to the state. Again, there are good reasons why there are no such conventions, because such conventions would violate the first general rule. By voting, one may support a certain candidate or a party program and express that one prefers them to alternative candidates or programs; but to express this, one need not take a stance on the very principled question of whether the state should exist at all or whether its claims to authority are warranted.

Summing up, then, there certainly is such a thing as tacit consent, and tacit consent indeed has the power to give rise to new rights (the *explanation condition* is met). But there are no social conventions that would allow people to give the state its right to rule via tacit consent. (Also, there should not be such conventions.) Tacit consent does not help consent theory to meet the *success condition*.

Hypothetical consent

Maybe there is yet another way to ground political authority on consent. Maybe it is sufficient if there is a *hypothetical* storyline in which everyone gives consent (Pitkin 1965; Kavka 1986: Ch. 10; Gaus 2011: 465–70; Weale 2017). A state would then have authority not because people have actually consented, but because they *would* consent in some appropriate hypothetical scenario.

Now at first sight, the proposal to rely on hypothetical consent may seem absurd. Hypothetical consent is obviously very different from real consent, just like hypothetical food is very different from real food. Hypothetical food cannot feed the hungry, and my hypothetical selling of my car cannot actually sell my car. As Ronald Dworkin famously points out, a "hypothetical contract is not simply a pale form of an actual contract; it is no contract at all" (1973: 501).

And yet hypothetical consent matters. It matters because it shows that people would have excellent *reasons* to give consent – even if, as a matter of fact, they do not give consent. As Jeremy Waldron puts it, "we shift our emphasis away from the will and focus on the reasons that people might have for exercising their will in one way rather than another" (1987: 144). So in fact hypothetical consent is not about consent at all. It shows that people would have good reason to give consent to X and that therefore X is *acceptable* to them.

But can the acceptability of the state – or the acceptability of certain kinds of states – explain why these states have the right to rule? It cannot. First of all, it is doubtful that any states enjoy the hypothetical consent of everyone (Horton 1992: 85; Huemer 2013: 48–50). In deeply diverse societies, no type of state will be acceptable to all. The mere fact that there are reasonable anarchists is enough to prove this. Of course one might be able to claim that states have the hypothetical consent of everyone when one uses highly idealized counterparts of real persons in the hypothetical scenario. But such hypothetical consent would no longer tell us much about what is acceptable for real persons.

Second, acceptability can sometimes turn something morally impermissible into something morally permissible.

For example, a physician may proceed with some medical procedure when the patient is in a coma, but would presumably give his consent (if he could). But hypothetical consent rarely grounds duties or obligations (Horton 1992: 85–6; Huemer 2013: 43–5). A job offer might be acceptable for me, and I might have very good reason to accept it, but this does not mean that I have a duty to accept it. If that is so, it is hard to see how it could ground political authority with the power to impose duties on people.

Kavka thinks that an inference from hypothetical consent to certain social arrangements to obligations to comply with the rules of these arrangements works when the hypothetical consent shows not merely that it is acceptable to have these arrangements, but that they are *required* by reason (1986: 401). But, again, even though it may be required by reason for me to accept a job offer, I have no obligation to do so. Maybe this is different when submitting to some arrangement is required by reason because it is my moral duty to submit? This might be a promising thought, but what matters, then, is my moral duty to submit to the arrangement, not the acceptability of the arrangement. I will discuss natural duty-based accounts in Chapter 5.

So let us get back to hypothetical consent as indicating acceptability. Some may still wonder why hypothetical consent cannot ground moral powers, if on the other hand it can sometimes turn something morally impermissible into something morally permissible. Well, that it is acceptable for others if I work on my laptop on the train partly explains why it is permissible for me to do it, but it does not show anything about my powers to impose duties on others. That some medical treatment is acceptable to an unconscious victim of a car accident explains why it is permissible to provide that medical treatment, but it does not tell us anything about powers to impose duties on the victim. And so on. That it is permissible to do these things means that one has liberty-rights to do these things, but liberty-rights are quite different from powers to impose duties on others.

The same holds when we consider not acceptable actions, but acceptable institutions. Imagine an acceptable (or even good) institution, like Oxfam. Its acceptability can show that it would be nice and certainly morally permissible to support

Oxfam, and it can also show that Oxfam permissibly does what it does. But the acceptability of Oxfam does not show that Oxfam has any powers to impose duties on me, for example duties to support them with money.

Having political authority means having powers to impose duties. Without the power to impose duties, states cannot do what they do. Because the acceptability of (certain kinds of) states cannot show that these states have such powers, it cannot establish the state's authority. In other words, hypothetical consent theory does not meet the *explanation condition*.

It should be noted that these problems with hypothetical consent come up when it is used to explain political obligations or political authority. It is much more common to employ the idea of hypothetical consent to justify principles of justice (Rawls 1971) or principles of intersubjective morality more generally (Gauthier 1986; Scanlon 1998), and nothing I have said here is an argument against doing this.

Normative consent

A sophisticated new variant of a hypothetical consent theory has recently been advanced by David Estlund (2008: Ch. 7). Maybe his theory can overcome the problems of traditional hypothetical consent theory. Estlund starts with the observation that consent can sometimes be invalid or "nullified," for example in cases of coerced consent. If consent is invalid, one can proceed as if no consent had been given. Now if consent can sometimes be invalid, *non-consent* might sometimes be invalid as well. One reason why a person's non-consent could be invalid, says Estlund, is that she was morally required to give consent. When a person does not give consent, even though she is morally required to give consent, then her non-consent is nullified and we can proceed as if she had given consent. Instead of saying that people give "nullified non-consent," one can also say that they give "normative consent" (because they were morally required to give consent, but did not do so).

Here is Estlund's example (2008: 124). After an airplane crash, the flight attendant wants to help the injured and

says "You! I need you to do as I say!" Because coordinated action is required and the flight attendant is experienced and competent, you are morally required to consent to her authority and to do what she says. Even if you in fact do not consent to her authority, you arguably cannot escape the obligation to do as she says. Whether you consent or not, you have the same obligation as if you had actually given consent, simply because you were morally required to give consent.

The basic idea of normative consent theory can be traced back to Immanuel Kant. Kant is clear that there is no actual consent required for state authority. The "original contract" is an "idea of reason" that both justifies state authority and sets limits to justifiable exercises of state power. The idea of the original contract justifies state authority since everyone has a *moral duty* to enter civil society and realize equal freedom and the rule of law (1793: Sec. 2; 1797: Part I §42). Actual non-consent to the state or particular laws is therefore nullified.

How convincing is Estlund's theory? First, one may doubt that Estlund has given any examples where nullified non-consent establishes authority. In the flight attendant case, for example, it has been argued that the flight attendant does not really have authority, but merely "leadership"; leadership involves a power to impose duties, but with less error tolerance than proper authority (Edmundson 2011: 344–6). I am not sure whether this hits the mark. What seems special about the authority or leadership of the flight attendant is that it is strictly limited in both content and time. It is a very "local" form of practical authority. This is true, but the authority of bosses is usually also more limited than the authority of states, for example. There are different forms of authority and it would be sufficiently interesting if nullified non-consent could establish such limited forms of authority.

A second objection says that the reasons why withholding consent is wrongful are by themselves sufficient to establish authority, such that the idea of nullified non-consent becomes superfluous (Sreenivasan 2009; Koltonski 2013). Why is it wrong to withhold consent to the authority of the flight attendant? Because we have a moral duty to help and submitting to the authority of the flight attendant is necessary to help in an efficient way. If that is so, why not directly say that the flight attendant has authority simply because we have a moral duty to help and submitting to her authority is necessary to help in an efficient way? In other words, Estlund's theory seems to collapse into a natural duty-based account (see Chapter 5).

A third problem for normative consent theory is that an obligation to give consent sometimes quite clearly does *not* nullify non-consent. This is a point Estlund explicitly acknowledges (2008: 126). If, for some reason, I would be morally required to consent to sex (say because I promised to do so), this fact cannot nullify wrongful actual non-consent. My *actual* consent is needed to allow another person to have sex with me, no matter if I am morally required to give such consent or not. It is unclear under what conditions a moral obligation to give consent can nullify actual non-consent and under what conditions it cannot. One idea Estlund tries out is that *A*'s moral obligation to consent to *X* can only nullify actual non-consent when *X* does not involve interference with *A*'s person or property. But if that were true, then certainly an obligation to consent to state authority could not ground state authority, since state authority involves the right to coercively enforce laws, which quite clearly means an interference with person and property.

Estlund, though, is prepared to endorse an extremely thin conception of authority. He writes:

> [T]he nullity of nonconsent to authority does not permit anyone to do anything. It does not even permit anyone to issue commands, since all it does is put someone under a duty to obey them if they are issued. Whether it is permissible to issue the commands is a separate question. Since null non-consent to authority only creates authority, and does not permit any actions, then a fortiori it does not permit interference in my person or property. (2008: 127)

But this kind of authority has nothing much to do with political authority. Having political authority means having the liberty-right to enact and coercively enforce laws and the power to impose duties, and if an obligation to consent to coercion cannot help to nullify non-consent to coercion, then it cannot help to establish political authority. Normative consent thus does not help consent theory to meet the *explanation condition*, at least with regard to political authority.

Making states voluntary?

Hypothetical consent cannot establish political authority, but actual consent certainly can. As we have seen, the problem simply is that our states do not have the actual consent of the governed (be it explicit or tacit consent). But would it be possible to rearrange our institutions such that states could actually gain the consent of the governed? Some think it would (de Puydt 1860; Beran 1987: Ch. 7; Simmons 1993: 241–4; Dietrich 2014: 75–6). First of all, the state would have to actually ask citizens whether they would like to consent to the state's authority or not. Once a year, or once in five years, citizens could be required to answer the question whether they give consent to the state's authority, with a "yes" or "no" alternative. This might be done online or with voting machines in regular election offices. The difficulty is to avoid getting invalid coerced consent. To coerce non-consenters to leave the country would invalidate any consent the state could achieve. Thus non-consent has to be made a reasonable alternative. One has to create real exit options *within the state*, so that people can express dissent without having to emigrate or move to "dissenters' territories."

A basic problem is that once you allow exit options within the state, the state will not be able to achieve political authority in the holistic sense; it will not have authority over *all* people in its territory. But let us neglect that problem for a second. What could exit options within the state look like? Non-consenters should be released from legal obligations, as far as possible. So non-consenters would not have to pay taxes, they would not have to serve in the military, they would not have to obey the law on their private ground (they could smoke marijuana even if this is against the law, for example). On the other hand, of course the state could exclude non-consenters from the benefits it provides, as far as this is possible. With non-excludable goods it is not possible. When the state provides national defense, for example, everyone in the territory will benefit from this and no one can be excluded. But some goods are excludable, of course. Thus non-consenters would not be allowed to vote, they would not be allowed to use public transportation, and they would not be allowed to get public health insurance or to attend public universities. Arguably, though, the state would in turn have to allow them to use privately owned public transportation, to build and use private roads, to get private health insurance, and to attend private schools and universities. Otherwise it would coerce people into consenting and thereby invalidate all the consent it could get.

So far, so good. Would a voluntary state also have to allow dissenters to use private police forces and private courts? If it does *not* allow for private police companies and private courts, then it has two options in how to deal with crimes against non-consenters. First, it could leave them unprotected and not allow them to bring their case to state courts. If the state did that, then of course non-consent to the state would not be a viable option, and all the consent the state could get would again become coerced consent and thus invalid. Second, it could grant normal police protection and access to courts for non-consenters. But this would make it highly attractive for citizens to leave the state in order to get peace, security, and law and order for free. For that reason, probably very many people would not give consent to the state and thus would leave it without financial support, and this would probably mean that the state would eventually collapse (see Klosko 2005: 132, 136, 138–40).

So it seems that a voluntary state indeed has to allow for private police forces and private courts for non-consenters. But if the state allows for private police forces and courts, then it not only gives up any claims to holistic political authority, it also renounces its monopoly on the use of force. It thereby *stops being a state* and becomes one service provider among others.

Making our states consensual organizations via institutional reform is therefore illusionary. If consent is really required for having states with legitimate political authority, then we have to conclude that our present and very probably all future states lack legitimate political authority. What to make of this conclusion will be discussed in Chapter 7.

One final thought: There might be a very different way to make states consensual, at least to a certain degree. One could relax the requirement of consent and treat it not as a strict requirement for state authority, but as an *ideal*. Amanda Greene explains why a consensual state is an ideal

(2016: 92): "When voluntary rule is achieved, there is at least some partial alignment between what an individual values and what goods are promoted by the political order to which he is subject." States, according to her, can be more or less legitimate, depending on the proportion of people that consent (2016: 87). Grossly uninformed consent does not count, though, because it does not achieve the said alignment between what an individual values and what the state actually does (2016: 85).

Now the first thing to note is that rights are not scalar, but binary; one either has a right or one lacks it. So if the ideal of a voluntary state is to explain the right to rule and hence political authority, there has to be a threshold of support at which the state gets the right to rule. But every such threshold would look arbitrary; why should a state that enjoys the consent of 67 percent of its subjects have the right to rule, while a state that enjoys the consent of 66 percent does not, for example? Second, treating consent as a mere ideal simply does not explain how some people can come to have the right to rule over non-consenting equals. Accordingly, some advocates of the ideal of a consensual state feel free to simply ascribe political obligations to those who do not consent (Walzer 1970), or regard them as "political children" that may be governed without consent (Tussman 1960: 36–7). I conclude that treating consent as an ideal does not meet the *explanation condition*.

Summary

Consent could well explain how new rights and hence political authority have come into being. Unfortunately, our states actually do not have everyone's consent (whether explicit or tacit). If consent were necessary for state authority, all states would therefore lack political authority. Neither is it possible to achieve consensual states via institutional reform. Mere hypothetical consent or normative consent, on the other hand, cannot explain political authority.

3

The Service Conception of Authority

The service conception of authority has been devised by Joseph Raz. Its basic idea is to conceive authorities as a service for those who submit to them. It is an intriguing theory because it promises to account for all sorts of authority, from the authority of experts to the authority of parents and state officials. The service conception encompasses a theory about how authority should be exercised, a theory about how authority-based reasons work, and a theory about the justification of authority.

How to exercise authority

I start with the first part of the theory, how authority should be exercised. Authority, according to the service conception, is to be understood as a valuable *instrument* for those subject to it. They do better by following the advice or command of the authority. According to the service conception, the role and primary function of authorities is "to serve the governed" (Raz 1986: 56). It is to serve them by helping them to believe or do what they have reason to believe or do. Accordingly, authority should be exercised in line with the reasons that