

Political Legitimacy and the Value of Consent

1. Abstract and Introduction

Abstract

Political legitimacy is often understood as ‘the right to rule,’ where this right depends on the consent of the governed in some sense. Two approaches to theorizing about why consent matters for legitimacy have been dominant: the hypothetical consent approach, which argues that a regime is legitimate insofar as all of its subjects would agree to it under idealized conditions, and the express consent approach, which argues that a regime is legitimate insofar as each subject obligates himself through his individual consent. In this paper I criticize current views for neglecting the significance of actual consent, and for importing liberal and democratic presumptions into evaluations of legitimacy. I propose a new conception of political legitimacy based on actual consent to governance outcomes. On this ‘sovereignty conception,’ political legitimacy corresponds to the degree of willing acceptance of the regime among subjects, provided that this consent is based on positive governance assessments. The sovereignty conception, therefore, values consent to rule in a novel way, permitting it to count in favor of legitimacy even when it is not unanimous.

Introduction

Philosophers tend to agree that consent matters for political legitimacy. Both hypothetical consent theories and express consent theories affirm that consent is a necessary condition for the legitimacy of a regime with respect to its subjects. In this paper, I will defend a novel kind of consent-based theory of political legitimacy, called the personal sovereignty conception. The view claims that regimes are legitimate insofar as they achieve *quality consent* to rule. The view’s emphasis on actual rather than hypothetical consent exhibits respect for each individual’s interest in voluntary rule. At the same time, the view requires *quality consent*, because the relevance of consent for legitimacy depends on the consent’s being based on the right sort of considerations. That is, not all consent matters for legitimacy — only quality consent, i.e. consent based on positive governance assessments. Furthermore, the personal

sovereignty conception is concerned with legitimacy at the level of the citizenry as a whole. It recognizes that consent can never be unanimous, and so it takes a proportional approach to achieving actual consent among subjects. The sovereignty conception, therefore, stakes out a new position in theorizing about how consent relates to legitimacy: a regime is legitimate insofar as it achieves actual consent that is (a) actual rather than idealized, (b) partial rather than unanimous, and (c) based on positive governance assessments.

One aim in this paper is to develop a conception of legitimacy that doesn't presuppose that some form of government is superior to others.¹ This conception would be distinct from justice, but compatible with various theories of justice, and it could be applied to non-liberal and non-democratic states. For instance, it seems plausible that there could be regimes that are legitimate but not democratic; conversely, there could be regimes that are democratic but not legitimate. It would be useful to have a conception of legitimacy that can help us understand why things like liberal rights, equality, and democracy *contribute* to legitimacy (if they do), without building those political ideals into our definition of legitimacy. For purposes of this paper, I take legitimacy assessments to be addressing the question of when a regime or political order has the appropriate standing to rule its subjects. I take the paradigmatic object of legitimacy assessments to be political orders broadly construed. We may also assess the legitimacy of ruling parties, policies, of laws, and even particular actions, but I take the paradigmatic instance to be the overall political or constitutional order.

The paper will proceed as follows. In §2, I will set forth the elements of the view. In §3, I will present some shortcomings in two prominent approaches to legitimacy in which consent

¹ The concept of legitimacy has a variety of meanings in various disciplines, but even in philosophy, legitimacy has conceptual boundaries that are less well-defined than those of

looms large: hypothetical consent theories and express consent theories. In light of these shortcomings, in §4 I will argue that the sovereignty conception is a compelling alternative to the hypothetical and express consent conceptions of political legitimacy. I argue that it better addresses the problems with the other views, and it better fits the kinds of normative judgments we want to be able to make in the practice of assessing legitimacy.

2. Voluntary Rule

The conception of legitimacy I defend bases legitimacy on individual acceptance of the exercise of political authority. Let us begin with the perspective of the individual and imagine him or her as a subject of a political order. I claim that each individual has an interest in being ruled voluntarily.² To be ruled voluntarily is to willingly consent to the particular system of rule to which one is subject. Individuals have an interest in being a *willing* subject, as opposed to an *unwilling* subject. One is being ruled voluntarily when one is willing to remain a subject of one's particular political order, all things considered. To posit such an interest is to claim that when a subject is being ruled involuntarily, it is in some sense bad for her.³

With this idea in view, the first question is: why is this sort of voluntariness valuable—that is, why is actual consent to a political order of *any* moral significance for the question of legitimacy? After all, we do not think that every voluntary act of an individual has a moral

welfare, equality, or distributive justice. See Applbaum, Arthur Isak. 2010. "Legitimacy Without the Duty to Obey." *Philosophy & Public Affairs* 38(3): 215–39.

² It is likely that other consent theorists would agree with the interest in voluntary rule, but I will not argue that here.

³ I employ the term interest rather than right in order to avert any misapprehensions that I am positing a natural right existing in the state of nature, as a sort of pre-political moral requirement that cannot be trumped or traded off against other interests. However, if one held a view of rights that did not involve construing them as "trumps" or always imposing correlative duties

validity simply because it is freely chosen – there are conditions that must be met. Likewise, consent-to-rule is only morally valuable when conditions are met: (a) the object of consent has value⁴ and (b) the consent is based on the right sort of reasons. These are necessary conditions of the *value* of consent for legitimacy, and their necessity shows that consent is a dependent good, a good whose value depends on other things. Since consent has value only when it meets these conditions, call instances of consent that meet these conditions ‘quality consent.’

To illustrate, consider a polity in which the constitution and rulers perform the functions of governance well enough, *and* there is unanimous actual consent to rule among the subjects. But now suppose that these are unrelated: the unanimous consent is not at all sensitive to government performance – perhaps it is based on government propaganda, or based on the false beliefs of several ethnic groups that each is dominating the others, etc. On my view, the unanimous consent is not valuable in such a way as to contribute normatively to legitimacy.⁵

While government performance is critical, it is not the whole story. When quality consent to a particular regime’s use of authority is present, it has a value that cannot be reduced or made instrumental to the quality of the regime’s rule. The regime may be performing its governance functions at a very high level, and it may ultimately achieve very high levels of welfare and justice among its subjects. However, the actual levels of quality consent among subjects to this regime have a non-instrumental value that cannot be reduced to the quality of the outcomes of the regime’s rule.

(such as an interest theory of rights), then I would not object to characterizing the interest in voluntary rule as a right.

⁴ I am non-committal about value here: many things could be employed as candidate functions of government (welfare, justice, equality).

⁵ The unanimous consent, however, may contribute to other factors relevant for legitimacy, such as compliance or stability.

How should we understand this kind of good, something that has dependent non-instrumental value? Joseph Raz describes the structure of a dependent, non-instrumental good when he discusses the concept of autonomy:

There is no contradiction in claiming both that autonomy is intrinsically valuable and that the fact that people's lives are autonomous contributes to their well-being only to the extent that they engage in worthwhile pursuits. What is intrinsically valuable can be, and in the case of autonomy is, valuable as a constituent of a good in itself. Remove other elements of the good in itself and it may turn worthless, or even bad.⁶

For Raz, autonomous choice has non-instrumental but dependent value: when what is chosen is valuable (e.g. a musical project), the fact that it is autonomously chosen contributes non-instrumentally to its value in an organic way. But if the object of choice is not valuable (e.g. an assassination project), then something that would otherwise be of value has no value.⁷ In an analogous way, the consent to rule contributes non-instrumentally and organically to the legitimacy of the rule.

What is the relationship between quality consent and personal sovereignty? The aim of quality consent recognizes the interest each person has in consenting to the particular system of rule to which she is subject, and it seeks to achieve the fulfillment of this interest. While the interest is in consenting to rule, there is a derivative interest in having the opportunity or possibility of consenting to rule, as well as a derivative interest in being treated as someone for whom consent-to-rule is non-instrumentally valuable. The term ‘personal sovereignty’ refers to this set of interests. When a regime aims at quality consent, it is seeking to promote, advance,

⁶ Raz, J. 1988. “Facing Up: A Reply.” *S. Cal. L. Rev.* 62: 1228-9 (especially footnote 162).

⁷ A similar point has been made by Amartya Sen regarding comprehensive vs. culmination outcomes, where — even assuming the end-state is identical — the former are valued for some aspect of how they are achieved, i.e. involving agency. Sen, Amartya. 1997. “Maximization and the Act of Choice.” *Econometrica* 65(4): 745–79.

and fulfill the set of interests involved in personal sovereignty. Therefore, when a regime aims at quality consent, it is respecting personal sovereignty.

Accordingly, the sovereignty conception claims that a regime is legitimate insofar as it achieves stable and widespread consent to rule among subjects, where this consent is based on governance assessments. Legitimacy thus corresponds to the proportion of individuals who accept: the greater the proportion of free submission to ‘rule’ under the authority, the more legitimate is the rule.⁸

2.1 Respect for Personal Sovereignty

I have claimed that respect for personal sovereignty requires that each individual be treated as the kind of being for whom it is non-instrumentally valuable to accept rule in the political domain. What does respect for personal sovereignty imply for a political order, and how is it to be weighed against the other interests at stake in politics? The personal sovereignty conception implies that a constitutional order, in order to be legitimate, must treat citizens in a certain kind of way. It must view their interest in voluntary rule as an interests worthy of being acknowledged and promoted. It must orient itself to the ideal of personal sovereignty by recognizing each person’s potential to manifest quality consent to rule. Its modes of governance, therefore, must be organized around recognizing this ideal. To be thus organized, I claim, is to “aim” at citizens’ consent on the basis of positive governance assessments. This imperative

⁸ This proportional view implies that the limit case is an imagined ‘legitimacy utopia,’ a voluntary association of individuals whose activities are just and welfare-enhancing. In this imaginary association, to the degree that its activities require the exercise of power and authority, each individual affirms his voluntary subjection to the governing order. The unanimous consent in a legitimacy utopia reflects our intuition that, when fully informed and morally sensitive, citizens’ acceptance of rule reliably tracks whether the rule is just and welfare-enhancing.

generates a political (not natural) right of each citizen to have his political judgments treated in a certain kind of way:

1. Each citizen's political judgments are recognized as having intrinsic importance to that citizen, and the ability to express and debate them is explicitly guaranteed;
2. Each citizen's political judgments are periodically queried, and the aggregated results are made public; and
3. Levels of consent and non-consent expressed through political participation can alter aspects of the exercise of power (persons in office, hierarchy of offices, the existence of power-conferring norms themselves, etc.).

Taken together, these amount to recognition of a certain political status, with the corresponding political right to have one's expressed judgments sought and heard as relevant for governance.

I have claimed that instances of quality consent to rule form the normative basis for assessments of legitimacy. But a further question arises: is a constitution or government more legitimate to the degree that it *achieves* instances of quality consent to rule, or more legitimate to the degree that it *aims* to do so? The sovereignty conception claims that the ultimate source of legitimacy is *achieved instances* of quality consent, and this criterion is not in the end procedural – rather, it is the index according to which procedures are deemed better or worse. Nevertheless, we can distinguish standards from criteria, allowing us to establish procedural features that serve as standards of legitimacy, although their normative status is derivative. Procedures oriented towards responsiveness to expressed indications of consent can count as standards of legitimacy, because they indicate and attest to what the constitution or government is aiming to achieve. My understanding of aim is not based on a fictional 'lawgiver' or ideal justification. Rather, my view is concerned with the way in which the functional operation of a system is sensitive to

some inputs and not others. The mechanisms and norms of the exercise of power exhibit their ‘aims’ through differential sensitivity to various inputs, where this differential sensitivity indicates a social recognition of relative importance.⁹ Though aim is not the ultimate criterion, it remains important.

One may be concerned that aiming at consent licenses propaganda or indoctrination. Is the government permitted to aim at quality consent in any way *other* than by its policies? The sovereignty conception permits the regime to go beyond governance only in a very limited way: it can engage in various publicity and educational activities aimed at achieving citizens’ full understanding of its policies’ effects on the citizenry, since quality consent requires the citizenry to grasp some facts about welfare and governance outcomes.¹⁰

2.2 Quality Consent

If not all forms of consent count in favor of legitimacy, then how do we distinguish the forms that do and don’t, i.e. how do we distinguish quality consent? First, consent-to-rule which is brought about by fear and intimidation does not count: it does not qualify as consent-to-rule as I have articulated it, which is the voluntary acceptance of a system of rule. But as long as the consent is not based on fear, it can be considered consent-to-rule.¹¹ Of the remaining cases of genuine consent, which ones are excluded for not meeting the quality requirement?

⁹ I have in mind Searle’s account of institutional facts, which involve collective intentionality, the assignment of function, and status (recognitional) functions. See Searle, John R. 2005. “What Is an Institution?” *Journal of Institutional Economics* 1(01): 1–22.

¹⁰ Perhaps it might also permit very limited values-based information campaigns, to root out pernicious values. But then, one might object, if the consent arises because of government ‘re-education,’ is it still relevant for legitimacy? The response is that it doesn’t matter how the consent arose causally; what matters is whether the consent is based on assessments that meet certain conditions.

¹¹ Not all sources of fear are the same, and I distinguish some as morally relevant.

Let me begin the explication with three paradigmatic cases of consenting subjects whose consent, at least intuitively, should *not* count in favor of legitimacy: the dominator, the underling, and the culpably ignorant.

a) The dominator is someone who consents to rule on the basis of a judgment that it is acceptable to deprive others of basic security.

b) The underling is someone who consents to rule on the basis of a judgment that it is acceptable to deprive himself of basic security.

c) The culpably ignorant is someone whose consent to rule is strongly insensitive to facts about whether some subjects are being deprived of basic security (for example, false consciousness).

These three cases are characterized in terms of basic security, and they raise important questions. How is the threshold for basic security determined? Why set the bar in one place and not somewhere else?

The personal sovereignty view, as defended here, sets the bar for quality consent at a very low level, where ‘basic security’ means minimal physical protection from violence and minimal order. One variation on the view that may be more attractive to some readers is to set the bar higher, such as protection of human rights, or provision of basic capabilities. This is an option, but the philosophical rationale for locating the bar low is to depend on a standard with minimal normative commitments.¹² All governments claim to ensure the basic security of their subjects, whether or not they succeed, and so it is a standard arising from the practice of political rule. If we were to examine instances of political orders across time and space — honor-based tribal communities, medieval feudal systems, fundamentalist theocracies, modern liberal democracies

— we find that virtually every system of political rule advances the claim that it (at least) provides for the basic security of those it addresses as its subjects.¹³ I call this the claim of minimally competent government (CMCG). Insofar as a regime claims to rule, it makes this claim of minimal competence.

From the claim of minimally competent government, we may derive the quality filter for consent to be valuable. Consent counts as quality consent when it is based on governance assessments that meet two conditions:

I. The assessments do not explicitly contradict the claim of minimally competent government. That is, the governance assessments do not contain judgments that explicitly deny that each subject's basic security is to be ensured by the regime.

II. The assessments are weakly truth-tracking regarding whether the claim of minimally competent government is being met. That is, the governance assessments exhibit some weak counterfactual sensitivity to governance outcomes, namely those facts about whether all subjects' basic security is being ensured.

These conditions suffice to exclude the dominator, the underling, and the culpably ignorant. One implication of this approach to defining the quality requirement is that legitimacy largely becomes a matter of what people *believe* about outcomes. Strictly speaking, there is no 'welfare outcomes floor' built into the theory, and I believe this result is apt. However, while it's true that failures of governance (failure to fulfill CMCG) do not directly reduce legitimacy, they do reliably undermine it by making quality consent far less likely.

¹² The motivation here is to construct an account of legitimacy which is more agnostic about other political values, so that it has a wider application than liberal democratic legitimacy.

¹³ I wish to thank R.J. Leland for helpful discussion of this question.

I construe quality consent as depending on positive governance assessments. I view consent to rule as a complex inference arising from a cognitive grasp of facts and assessments occurring on several levels: welfare outcomes, governance outcomes, governance assessments, and the well-groundedness of these assessments. In the ideal instance, a subject avows quality consent based on a high degree of cognitive achievement on each of these levels. He ascertains the relevant welfare facts; on that basis he determines the relevant governance facts; and he forms an overall assessment of governance that issues in quality consent to rule. Cases short of the ideal but still deemed to be quality consent include: the consenting libertarian who thinks he is better off than he would be otherwise (but cares little for distributive justice), the consenting egalitarian who thinks the least well off are better off than they otherwise would be, and the consenting religious believer who thinks governance adequately enables the welfare conditions for spiritual development of his co-religionists (but cares little for outsiders). These qualify because they meet the requirements for the consent to be based on positive governance assessments, i.e. assessments based on perceived values that do not fall afoul of (I) and (II) above. This laxity in the ‘quality filter’ is designed to allow even minimal awareness of governance success to qualify the consent as relevant for legitimacy. This latitude is appropriate in order to balance out the fact that non-consent bears (negatively) on legitimacy whether or not it is warranted by the governance facts.

To summarize thus far: the sovereignty conception claims that regimes are legitimate insofar as they achieve *actual quality consent* to rule. The idea of *actual quality consent* conveys the idea that individual consent to rule is non-instrumentally valuable, but that its value is conditional on being based on the right sort of considerations. Consent to rule, in order to contribute to legitimacy, must be based on positive governance assessments. When it is, it is

quality consent. The sovereignty view takes a proportional approach to actual quality consent: the more, the better (provided it is quality).

3. Other Consent Theories

Now I turn to other views that articulate how consent might matter for legitimacy: views based on the express consent of subjects (hereafter called voluntarism) and views based on the hypothetical consent of subjects (hereafter called contractualism).

3.1 Voluntarism: Legitimacy based on Express Consent

On the express consent view, a regime is legitimate insofar as each subject actually consents to it – on the basis of whatever considerations the subject judges relevant by her own lights. The express consent approach to legitimacy characterizes it as a voluntary transfer of rights through individual consent. This approach, advanced recently by John Simmons, argues that the legitimacy of the state arises only from the consent of the individual.¹⁴ This consent then is binding in two ways: the state is bound to exercise authority within the limits of the expressed consent, and the individual is bound to obey the authority to which it has consented. On this view, the actual consent of the individual is both necessary and sufficient for the state to possess legitimacy with respect to that citizen. The picture relies on a notion of natural rights as pre-political moral entitlements,¹⁵ such that each person has a right to defend their entitlements against encroachments by others. The state’s authority arises from the *deliberate transfer* of this right to a single authority, who makes determinations and exercises coercion in order to enforce

¹⁴ Simmons, A. John. 1999. “Justification and Legitimacy.” *Ethics* 109(4): 739–71.

¹⁵ The idea of pre-political moral entitlements against state coercion features prominently in self-ownership accounts of legitimacy. For the seminal statement, see Nozick, Robert. 1974. *Anarchy, State, and Utopia*. Basic Books. For a more contemporary version, see Huemer,

each individual's rights. This view construes legitimacy as a property of the relationship between the state and *an individual*, meaning that the state can be legitimate with respect to one citizen and illegitimate with respect to another. I call this view voluntarism because it so closely tailors legitimacy assessments to facts about the will of the individual.¹⁶

The major dilemma confronting this view is well known. One must either stretch the definition of consent so far that it is imputed on the basis of factors that we would not otherwise consider to be consent-indicating (e.g. Locke implausibly claimed that remaining in a regime's territory counted as tacitly consenting to its authority), or one must admit that the required consent standard cannot be met, and so legitimacy is virtually unattainable. Indeed, Simmons bites the bullet and embraces the latter consequence.¹⁷ This dilemma arises because the express consent view is sensitive to the moral significance of consent, but it is sensitive in such a way as to make unanimous consent necessary for legitimacy. But there is another view available that is sensitive to actual consent but nevertheless allows for legitimacy without unanimity.

The sovereignty conception differs from strong voluntarism in that legitimacy is construed as an assessment of a regime with respect to its subjects *collectively*. So while the presence of non-consenting individuals makes a difference for legitimacy overall, it does not have the result of making the state illegitimate for *those particular citizens* who are non-

Michael. 2012. *The Problem of Political Authority: An Examination of the Right to Coerce and the Duty to Obey*. Palgrave Macmillan.

¹⁶ However, Simmons has his own quality filter: "We cannot bind ourselves by consent to immoral arrangements." Simmons, A. John. 1999. "Justification and Legitimacy." *Ethics* 109(4): 746, fn 18.

¹⁷ He says, "Because I subscribe to political voluntarism as the correct account of these transactional grounds for legitimacy, and because I believe no actual states satisfy the requirements of this voluntarism, I also believe that no existing states are legitimate." However, Simmons goes on to say that he thinks states that are neither justified nor legitimate can nevertheless *act in ways that are justified* (e.g. to prevent violent crime). Simmons, A. John. 1999. "Justification and Legitimacy." *Ethics* 109(4): 769-770.

consenting. This contrast is an advantage because it allows for legitimacy in the absence of unanimous express consent, while nevertheless retaining sensitivity to actual consent.

3.2 Contractualism: Legitimacy based on Hypothetical Consent

I turn now to contractualism, which employs the idea of a hypothetical contract, or unforced agreement among free and equal persons. The contractualist claims, very roughly, that a regime gains legitimacy by organizing institutions around principles of justification that all citizens would freely accept under certain conditions. The construction of the hypothetical choice situation employs a variety of idealizations and assumptions, including citizens' willingness to cooperate on fair terms, the reasonableness of citizens' value judgments, the common interest in membership in a group on terms of equal standing, etc. There is actually a two-fold basis for legitimacy: the hypothetical acceptability, and the *justificatory grounds* of the hypothetical acceptability. I will focus on the formal feature of the hypothetical acceptability itself, targeting the following thesis: regimes are legitimate because their justification is hypothetically acceptable to all citizens.¹⁸ I will very quickly sketch what I think are the two shortcomings of contractualism as a theory of legitimacy: the problem of involuntary rule, and the problem of partisan evaluation.

3.2.1. Problem of Involuntary Rule: Collective Recognition

First, contractualism faces a difficulty in explaining some basic intuitions we have about voluntary and involuntary rule. Consider the tendency we have to associate popular acceptance with legitimacy, or to associate popular rejection with a lack of legitimacy. We seem to think

¹⁸ Of the theorists who think hypothetical acceptability is necessary for legitimacy, some also think it is sufficient, or that it is sufficient in combination with other factors related to hypothetical acceptability. See Cohen, Joshua. 1997. "Procedure and Substance in Deliberative Democracy." In *Deliberative Democracy*, Eds. James Bohman and William Rehg. Cambridge: MIT Press, 407–37.

there is something problematic or amiss when the subjects do not affirm the regime and government that claims authority over them.¹⁹ To make this point vivid, consider the following illustration: imagine there are two political communities that have a similar constitution and government, but in one case 80% of the subjects affirm the regime, and in the other case, 30% affirm the regime. (Assume that both regimes are justified by publicly acceptable reasons.) It seems natural and intuitive to say that a government garnering the support of 30% of its subjects is *less* legitimate than one garnering 80% support. How might this intuition be explained?

Even if we were to stipulate a parity of consequences in terms of welfare and stability, some intuitive unease remains. Consider the non-supporting portions of the population: in the 30% case, a large majority of the population (70%) is involuntarily subject to a government they do not support — though it may be due to lacking the cognitive or epistemic capacities to see that it is worthy of their support. In the 80% case, this subjection is true of only a small minority of the population (20%). When a group of subjects does not reconcile themselves to their regime, this situation is to be regretted and avoided if possible, and at the very least it ought to be minimized. We have a general aversion to having a government or regime deliberately forced upon us, and we infer that others are similarly averse to this treatment. The 30/80 illustration alerts us to a concern about involuntary subjection to a political order, no matter the merits of that order. It seems like widespread popular rejection of rule ought to bear directly on legitimacy assessments. Contractualism, however, is ill-suited for accommodating the way in which actual popular acceptance or rejection matter, because it locates all the facts relevant for legitimacy within the *hypothetical* choice situation.

¹⁹ When I describe a citizen as “not affirming the regime and government that claims authority over her,” I mean something quite strong: she disavows being ruled to such a degree that she is

According to the contractualist, legitimacy arises from the unanimous consent of parties who are idealized in certain kinds of ways: *if* a person's deliberation were to meet certain stipulated conditions, *then* she would consent to a political order with certain features. Thus the stipulations contained in the hypothetical choice situation are paramount in determining when and how consent bears on legitimacy. The stipulations mediate, structure, and constrain the way consent can alter legitimacy assessments.

The difficulty with forcing consent's significance to be mediated by hypothetical idealizations is that we begin to attenuate the moral force of consent, and in particular the moral force of non-consent. Rousseau vividly describes this in *The Social Contract*, saying, "In the state there is no fundamental law that cannot be revoked, not even the social compact. For if all the citizens were to assemble in order to break this compact by common agreement, no one could doubt that it was legitimately broken."²⁰ According to Rousseau, the form of government is always *provisional* under a social contract, so any regime relying on agreement for its legitimacy is thereby liable to lose its legitimacy if the agreement is revoked.

Within the framework of contractualism, we lack a *principled* way to integrate the hypothetical consent of the governed and the actual consent of the governed – but they both seem to matter for legitimacy.²¹ If the contractualist approach does not accommodate a sensitivity to

willing to engage in disruptive resistance (if it stands a chance of being effective) in order to change the constitutional order or the basic norms governing the use of power within that order.

²⁰ Rousseau, Jean-Jacques. 1987. *Basic Political Writings*. Hackett. *The Social Contract*, III.xviii.

²¹ It may be objected that the tension between hypothetical and actual voluntarism is an illusion, because the whole point of a hypothetical choice situation is that it can be engineered to account for any number of actual circumstances as they arise. This objection construes hypothetical consent as a representational device in a wider system of moral justification. As I argue elsewhere, such a justification reduces the significance of facts about actual consent to their status as an object of unanimous hypothetical consent.

actual consent to rule on the part of the subjects, then it is hard to see how it can address the concern about involuntary rule at the collective level.

3.2.2 Problem of Involuntary Rule: Individual Recognition

There is another facet to the problem of involuntary rule: sensitivity to each individual's standing as a recognizer of valid claims. Individuals possess a moral power to determine what they do and don't recognize, beyond the facts about what they *would* recognize under certain conditions. A contractualist defense of political legitimacy compromises individuals' standing as independent *recognizers* of claims that are made in the justification of rule. They have standing as independent recognizers only if they may succeed or fail in recognizing something even when it is fully warranted *and* the failure matters independent of this warrant. For a contractualist, it does not matter for legitimacy whether an individual *does* recognize (or consent) to rule, as long as he *would* recognize (or consent) to rule. There is something morally troubling when an individual is treated as though her actual non-consent does not matter for legitimacy, as long as her hypothetical consent has been obtained. One familiar example of the way in which we acknowledge this moral unease is 'informed consent' requirements in medical treatment, where actual non-consent settles the matter even when there are very good justifications for consent. In order to preserve the individual's 'standing-as-recognizer,' it is necessary to separate the *validity* of a regime's claims from the *recognition* of a regime's claims.²²

Preserving the possibility of independent recognition requires that the content of subjects' actual political evaluations remain open: subjects are able to pronounce correctly and incorrectly. This openness is entirely in order, so that recognition based on these judgments may

²² It is important to be mindful of the distinction between a person's standing to declare his actual judgments concerning government's performance of its functions and the status of these

be freely given or freely withheld. When recognition is correct, and it is actually freely given, it adds something *beyond* hypothetical recognition, and it thereby does justice to the individual's standing as recognizer. But in a contractualist framework, the *free* granting of recognition to a regime cannot bear directly on legitimacy, because the normative space required in order for free recognition of the individual to *matter for legitimacy* (i.e. to alter legitimacy assessments) is eliminated whenever the regime's own claim to be contractually justified is true.

3.2.3. Challenge of Partisan Evaluation

A further challenge for a contractualist approach to political legitimacy is the problem of partisan evaluation. The problem, very briefly, is that a contractualist conception of political legitimacy prejudices which categories of political facts are relevant and which are not, thereby committing to a partisan approach to political evaluation. On my view, it ought to be possible to identify the objects of evaluation – in this case, political orders – without yet committing to the terms in which we are going to evaluate them. But contractualism applies a kind of moral ‘measurement,’ to what is essentially a political question: when does rule, *being altogether such as it is*, merit a positive or negative evaluation?²³ However the hypothetical choice situation is constructed, it must commit to some conditions being necessary and sufficient for the imputation of universal agreement. The articulation of these conditions amounts to stipulating *the* moral measuring stick for evaluating political orders.²⁴ Contractualism must, therefore, import a

judgments concerning *the truth* about government's performance. The government's performance is not constituted by the citizens' judgments thereof.

²³ Bernard Williams argued that this evaluative mode ought to be understood in terms of historical interpretation, i.e. what “makes sense” in a given set of historical circumstances. My view does not permit as much relativizing to historical circumstances as Williams appears to advocate. Williams, Bernard. 2007. *In the Beginning Was the Deed: Realism and Moralism in Political Argument*. Princeton University Press.

²⁴ For a discussion of the way in which our conception of legitimacy ought to accommodate the fact that it is evaluated differently in different historical circumstances, see Horton, John. 2012.

‘partisan’ view of *which* moral facts are relevant for political evaluation and *how* they are to be assessed (i.e. by what universal standard). It determines in advance which moral considerations do and don’t matter for legitimacy. Contractualism has yet to defend its particular partisan reliance on presumed moral standards of political evaluation in its conception of *legitimacy*.

4. Personal Sovereignty Conception

In this section I will outline the advantages of the personal sovereignty conception by comparing it to other consent-based views. Here is a summary of the three views:

Voluntarism: Regime is legitimate for each subject insofar as that subject has expressly consented to it.

Contractualism: Regime is legitimate insofar as every subject could consent under idealized conditions.

Sovereignty: Regime is legitimate to the degree that it achieves individual instances of quality consent.

The following chart indicates how different kinds of consent and non-consent bear on legitimacy

(“X bears on Y” means that when present, X makes a difference in the assessment of Y):

<i>Bears on legitimacy?</i>	<i>Quality²⁵ consent</i>	<i>Non-quality consent</i>	<i>Quality non-consent</i>	<i>Non-quality non-consent</i>
Voluntarism	Only for that individual	No bearing	Only for that individual	Only for that individual
Contractualism	Only in idealized form	No bearing	Only in idealized form	No bearing
Sovereignty	Yes, directly	Yes, directly	Yes, directly	Yes, directly

Two contrasts are worth special emphasis. It is characteristic of contractualist views to say that certain cases of non-consent (e.g. when it is unreasonable) do not bear on the legitimacy

“Political Legitimacy, Justice and Consent.” *Critical Review of International Social and Political Philosophy* 15(2): 129–48.

²⁵ The criterion of quality consent differs on each view: for Contractualism, it is public conception of justice / public reason; for Sovereignty it is well-groundedness on facts about governance; for Voluntarism it is (Lockean) natural rights.

of the state. The sovereignty view denies this: legitimacy *is* reduced whenever non-consent occurs, whether or not it is reasonable or well-grounded. This feature may make legitimacy harder to achieve, but I think it is the right result in order to distinguish legitimacy from justice and from liberalism, which contractualism fails to do adequately. On the other hand, the sovereignty conception takes issue with the voluntarist claim that non-consent is sufficient to undermine legitimacy assessments on a subject-by-subject basis, and so it denies that unanimity is necessary. It thereby distinguishes political legitimacy from individual political obligation and the morality of rightful coercion, which voluntarism fails to do adequately.

4.1. The Problem of Involuntary Rule Revisited

How does the personal sovereignty conception fare with respect to the problem of involuntary rule we outlined earlier? Consider two examples in which the personal sovereignty conception is more sensitive to the problem of involuntary rule. (And by examples I mean imaginary thought experiments.) a decent hierarchy, and a dictatorship of Platonic guardians.

Consider a decent hierarchy. Imagine that a particular community contains a small linguistic/religious/cultural minority, wholly located on a political border shared with neighbors. This minority group is small and actively disliked by every political community in the region. By remaining a part of the original community, they believe (say, truly) that they are better off than in any alternative community, including if they were to secede. Although their basic security is guaranteed, they are not treated as full political equals. A contractualist account would typically deny legitimacy, as agreement is based on some presumption of recognition of full equality. But to deny that actual consent bears positively on legitimacy in this case seems to tacitly assume that meaningful consent requires full equality. Given that we do not require full equality for consent to be legitimating in other spheres such as commercial exchange and

medical care (though we may make other requirements), this assumption is questionable. Many people are not treated equally in their political orders, but they nevertheless consent to their regime on other plausible grounds.

The second example is rule by Platonic guardians, as described in the Republic. Imagine a particular community organized around a highly secretive meritocratic hierarchy, such that those who rule are selected non-transparently and permanently, and they tend to enjoy a higher level of wellbeing because of their high social standing. Say that the society meets a very high standard of justice, which is that everyone is as well off as they could have possibly been, due to the rulers' wisdom and virtue. It seems that hypothetical consent ought to be imputed to everyone, since not only is everyone better off than some alternative scenarios, everyone is better off than *all* alternative scenarios. However, say that the people do not *believe* that powers of office are assigned for the general good, because the inequality in welfare tracks relative power, and this welfare-determining status is awarded non-transparently. And so, 95% of the subjects do not consent to rule, and a significant proportion actively seeks revolution. It seems that, while there may be some welfare-based or justice-based argument for the regime, the assessment of its legitimacy is pretty low if not *nil*. This is because the rule is involuntary at the collective level and at the individual level. This example illustrates that the sovereignty conception fits our intuitions about voluntary rule better than the contractualist approach to legitimacy.

4.2 The Problem of Partisan Evaluation Revisited

Earlier I criticized contractualism for reliance on partisan assumptions about what are and are not relevant factors in political evaluation. How does my view fare on this dimension? There is one sense in which it is clearly better: it accepts without qualification the significance of instances of non-consent to rule, admitting that individual instances of non-consent undermine

legitimacy. Even if the individual's judgments are unjustified or grossly immoral, there is no tidying things up with ideal theory. Regarding how to regard instances of consent: the sovereignty conception's imposition of a quality filter does introduce some value judgments about political evaluation, but I believe the restrictions are still far less partisan than a contractualist view. The sovereignty conception is extremely permissive about the relevant factors in political evaluation, and it does not rely on assumptions about a pre-political morality. For this reason, it can be used to argue for the legitimacy of non-liberal states, demonstrating that it is less partisan.²⁶ However, one might still argue that the sovereignty conception does not escape partisanship entirely, because it has claimed that *quality consent* is what matters for legitimacy, thereby excluding factors other than consent as appropriate factors in political evaluation. I acknowledge the validity of this complaint, though I believe a response is available. It begins with the observation that we find it useful to have several different registers or rubrics for political evaluation, such as justice, utility, solidarity, etc. Identifying consent as the criterion for legitimacy has to do with the way we use legitimacy assessments and the consequences of these assessments, a subject I address elsewhere.²⁷

4.3. Legitimacy in Action

Legitimacy judgments play a role in our wider social practices of political discourse and political action. Considerations of this role gives us reason to favor two conceptual features of the sovereignty view: construing legitimacy as a matter of degree, and construing legitimacy collectively rather than individually. I will close with a few words about these features.

²⁶ Interestingly, depending on how you construe the historical record, the sovereignty conception may imply that some of the most legitimate political orders in human history are systems of indigenous tribal governance.

Legitimacy ought to be understood as a feature of a political order with respect to its subjects as a whole. It ought not be construed as a separate feature attaching to each subject's relationship with his or her political order, such that a regime may be legitimate for one subject and not for another. But one may argue that we find the individualistic construal useful when some individuals or groups are consistently treated much worse than others, e.g. their minimum security is not guaranteed. One may say that, in these conditions, the individual construal of legitimacy captures something that would be lost if legitimacy were assessed at the collective level. But this is not true, because we can continue to capture the significance of these governance failures. These differentially worse outcomes for some individuals ought not just affect the legitimacy of the regime for those individuals while permitting the legitimacy of the regime for other individuals to be unaffected. The welfare outcomes for the neglected individuals are part of the total facts about governance, and each subject's quality consent must be weakly sensitive to these facts. With this in mind, we see that construing legitimacy at the collective rather than individual level does not force us to give up the moral significance of governance failures that are limited to certain individuals.

A second insight arising from considerations of the social practice is that legitimacy ought to be understood as a feature of a political order whose assessment comes in degrees. Consider the set of practical, action-oriented judgments that naturally arise from assessments of legitimacy. There are both threshold actions (to intervene or not) and non-threshold actions (how much economic aid to give this year, how severe a set of economic sanctions to impose) that rest on assessments of legitimacy. A scalar model of legitimacy easily permits the overlay

²⁷ For a rich discussion of the way the functional role of legitimacy assessments affects how we theorize about legitimacy, see Buchanan, Allen. 2011. "Towards a Constructivist Functionalist Theory of Legitimacy." Unpublished manuscript.

of various action thresholds (e.g. we invade only if legitimacy drops below a certain level), but the reverse overlay of scalar-type actions onto a binary concept of legitimacy is more difficult. While a scalar conception is not logically necessary in order to engage in scalar-type actions, the granularity of a scalar conception better facilitates these gradient types of judgments, while permitting binary judgments to be made just as easily.

5. Conclusion

The outline in this paper only gestures towards a fuller account of the personal sovereignty conception of political legitimacy. The central insight of the sovereignty conception is that the interest in voluntary rule implies that legitimacy is a matter of *actual quality consent*. In order to be legitimate, a regime ought to seek free popular approval through its performance – that is, it ought to seek actual quality consent on the basis of positive governance assessments. Other consent-based theories lack sensitivity to factors whose significance matters for voluntary rule – namely, non-idealized and non-unanimous forms of consent. Therefore, I have argued that we ought to move away from contractualist and voluntarist accounts of the role of consent in legitimacy. Instead, we ought to base legitimacy on the proportion of actual quality consent among subjects in a regime. If we adopt an approach based on actual quality consent, then we will have in hand a theory of political legitimacy that is both conceptually distinct from justice and liberalism and fits naturally with elements of our social practice.

<<<<>>>>