Consensualism, Voluntarism, and Democratic Authority

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Democracy is a term routinely employed by philosophers, political scientists, sociologists, and non-experts in the confident conviction that its meaning is unambiguous. Even a superficial examination of the literature relating to democracy, however, suggests that this confidence is unfounded. The idea of democracy is equivocal, and its meaning is contested. A number of distinct and inconsistent conceptions of democracy are widely accepted—often simultaneously by the same persons. Writing in 1958, S. I. Benn and R. S. Peters cited international survey data indicating that, while the idea of democracy was widely accepted as the ideal form for political institutions, respondents reported considerable uncertainty regarding the precise meaning of the term *democracy.*[1] A review of the current literature provides no reason to conclude that general understanding of the theory and practice of democracy has improved.

The most fundamental element of ambiguity in discussions of democracy is generated by a general failure to distinguish carefully between two ideas that I will, following Christopher Morris,[2] call *consensualism* —the view that political institutions derive legitimate authority only from the consent of the people, and *voluntarism*[3]—the view that valid legislation may only be generated by the will of the people or their elected representatives. The two views are related, but far from identical. Consensualism addresses concerns regarding the legitimacy of political authority, while voluntarism provides an account of the necessary foundation of legitimate legislation. More particularly, consensualism sets out a criterion for assessing the legitimacy of basic political institutions, while voluntarism provides an account of the basis of legitimate legislation.

It is important to emphasize the substantive distance between these two notions. *Voluntarism* requires that the will of the people must govern the legislative process: legitimate legislation must flow from the will of the people. *Consensualism*, however, requires only that

legitimate political institutions must derive their authority from the people's consent. Popular consent may authorize institutions that are neither majoritarian nor representative. A people may conceivably consent to absolute sovereignty, limited monarchy, oligarchy, and many other non-majoritarian forms of government. Unlike voluntarism, then, consensualism provides only limited support for arguments for purely majoritarian institutions. Yet the classic contractarian arguments that provide the intellectual foundation for modern democracy are primarily consensualist rather than voluntarist. The western background political tradition thus provides a less solid intellectual foundation for purely majoritarian democracy—and certainly less guidance as to the best understanding of the concept of democracy—than might have been expected.

Disagreement regarding the relative importance of voluntarism and consensualism in the democratic tradition parallels disagreement regarding the nature of a legitimate legislative process in a democracy. Democratic theorists who assign priority to voluntarism assign fundamental importance to the relation between legislation and the will of the majority. Two interpretations of voluntarism—a strong and a weak interpretation—are both influential in democratic and legal theory. The *weak interpretation* holds that authorization by the majority is a necessary condition for the enactment of valid law. According to this view, institutions—such as the courts—that do not express the will of the majority may not legitimately determine the content of the law (see Waldron 2006; Waldron 1999; Bellamy and Castiglione 1997; Allan 1996; Bellamy 1996; Tully 1995; Waldron 1993). If this view is accepted, the conclusion necessarily follows that the will of the majority cannot be constrained by provisions of higher law such as those set out in a constitution. If no institution that does not express the will of the majority may determine the content of the law, then no institution possesses the power to enforce

constitutional provisions against the majority or its representatives. The weak interpretation thus rejects the process of judicial review as fundamentally undemocratic.

The *strong interpretation* requires that authorization by the majority constitutes both the necessary and the sufficient conditions for legal validity. According to this view, then, the vote of a majority of the people or their representatives is, in itself, sufficient to authorize any and all uses of coercive force by the state (Bickel (1970); Ely (1980)). According to this view, any proposition that achieves majority support possesses a fully democratic pedigree, regardless of its content. If a majority votes to restore slavery, according to this view, then legislation requiring the reintroduction of slavery possesses democratic legitimacy. Note that both the strong and the weak interpretations of voluntarism require that the will of the majority may not be restricted by institutions—such as the courts—whose purpose is to enforce higher law.

Theorists who view consensualism, rather than voluntarism, as the moral foundation of democracy generally argue that the vote of the majority, alone, is often not sufficient to generate valid law. Rather, this second set of theorists argue, an acceptable account of democratic authorization must describe conditions within which the vote of the majority constitutes a legitimate authorization of law (see Cohen 1998; Elster 1986; Dworkin 1986; Dworkin 1979). Such conditions necessarily include entrenched constitutional provisions that protect fundamental liberties and the right to participate in political institutions.

Most significantly, the voluntarist understanding of democracy has provided the foundation for leading critiques of judicial review (See Waldron 2006; Waldron 1999; Bellamy and Castiglione 1997; Allan 1996). According to these critiques, a practice that authorizes unelected judges to restrict the power of the majority weakens democracy *simply* because the practice denies the majority legislative authority. If voluntarism is required neither by a sound

reading of the western liberal tradition nor by persuasive philosophical argument, then these critiques of judicial review rest on a flawed theoretical foundation.

The voluntarist view has been widely influential both because of its conceptual clarity and because of its formal tractability (See Waldron 1999, 256; Hardin 1999, 152; Pennock 1979, 7). Moreover, the voluntarist requirement that the majority should possess ultimate legislative authority might seem to be a corollary of consensualism's consent criterion of legitimacy. If voluntarism could be shown to follow from consensualism, majoritarian legal theorists could argue that their theory constitutes an extremely close fit with the core elements of the modern western democratic tradition. An examination of the relation between the voluntarist and consensualist views thus has the potential to enhance our understanding of the nature of legitimate law-making within a democracy.

In this chapter, I will assess the persuasiveness of the view that consensualist assumptions justify voluntarism. First, I will examine consensualist elements from contractarian and Federalist political thought that are generally recognized as foundational elements of the democratic tradition. I will argue that the central elements of these traditions provide little support for a voluntarist conception of democracy—in either its strong or in its weak interpretation. While a reexamination of arguments from these traditions necessarily revisits much familiar territory, I hope to demonstrate that these arguments yield fresh insights when examined with the consensualist/voluntarist distinction firmly in mind. Second, I will examine the claim that a voluntarist conception provides the most philosophically attractive interpretation of democratic theory. I will argue that this claim is unpersuasive; unqualified voluntarist conceptions, rather, constitute unacceptable interpretations of democracy.

1. Consensualism, Social Contract, and Sovereignty.

Modern democratic theory emerged in the context of early modern efforts to reconsider the concepts of sovereignty and legitimacy. If the divine authority of the monarch no longer provided a plausible justification for the legitimacy of political authority, some new justification was required. The classic social contract tradition supplied such a justification, arguing that legitimate political power derives its authority from consent. Thus, social contract theory develops a consensualist account of legitimate political power: such power is simply the power of institutions that derive their authority from the consent of the governed.

Since the most reliable evidence that a person has consented to an exercise of power is the fact that the person has voted to authorize that exercise of power, it might seem reasonable to expect that contractarian theory should argue for the unconditioned sovereign power of the majority and its representatives. Classic contractarian theory fails to satisfy this expectation. The major contributors to this literature in fact assign higher priority to ensuring the security and liberty of the subjects than to ensuring the political or legislative authority of the majority. Hobbes, who provides the first of the classic accounts of social contract theory, assigns the concern to secure safety and security clear priority over concerns regarding liberty, self-determination, or any other value. A concern to ensure security and liberty plays the dominant role in the thought of Locke and Rousseau.

In this section, I will argue that: (i) the principal contractarians assign central priority to liberty and security interests but not to the legislative authority of the majority; and therefore that (ii) the voluntarist conception of democracy fails the test of fit with the central elements of the western democratic tradition. If—as I will argue—the principal contractarians (and federalists, as I will argue in the next section) consistently assign greater priority to liberty and security

interests than to the legislative authority of the majority, then the voluntarist view is profoundly incompatible with the western tradition of democracy.

A. Consensualism, Security, and Liberty. The central commitment of consensualist theories is to the protection of security and liberty. This commitment reflects the Lockean view that no rational person would consent to accept the authority of institutions that failed to ensure the security of citizens or to respect basic rights and liberties. The consensualist commitment to security and liberty necessarily implies a rejection of the voluntarist commitment to the unconditioned sovereign power of the majority and its representatives, since the protection of liberty requires the imposition of limits on the power of the majority.

(i) Hobbes. The goal of ensuring the safety and security of the subjects is of central importance to each of the classic contractarians. Hobbes assigns decisive weight to this goal. Once established, the Hobbesian sovereign's task is to ensure safety and security. While Hobbes assigns a lower priority to the goal of liberty, he argues that his favored account of sovereignty also provides adequate protection to liberty interests.

Security. Hobbes justifies the assignment of absolute priority to security interests through an analysis of the concerns that would motivate any rational person reflecting on the form of state to which he or she should consent. Hobbes argues from the assumption that the desire for "present means to obtain some future apparent good" (L X: 50, 58) [4] constitutes the dominant human motivation. Since the "condition of mere nature" (L XXXI: 233) would be characterized by extreme scarcity of resources, humans in such a condition would be in perpetual and intense conflict over resources, so that each person would at all times be "in continual fear

and danger of violent death" (L XIII: 76). The essential role of the social institutions to which a rational person should consent must therefore be to protect each person from violent death or serious injury—that is, to secure the safety and security of each subject (L XVII: 106). Hobbes thus establishes from the start the centrality of security concerns to the social contract tradition.

In Hobbes's account, the forces generating violent conflict in the absence of adequate political institutions are overwhelmingly powerful (L XVII: 106). A form of state adequate to the task of securing public order must therefore possess absolute power (L XVII: 109; XVIII: 113; XX: 135), unconstrained by concerns regarding liberty or self-determination. Life under an absolute sovereign may be miserable, Hobbes concedes, but the greatest inconveniences of absolute sovereignty are "scarce sensible [in comparison to] the miseries and calamities that accompany" the violent conflict that would persist in the absence of the absolute sovereign (L XVIII: 117, see XX: 135). A rational person reflecting on the form of state to which he or she should consent, Hobbes concludes, would (i) necessarily assign absolute priority to concerns regarding safety and security and (ii) consent to absolute sovereignty based on the most persuasive argument grounded in those concerns.

Moreover, while the concern to realize security justifies Hobbes's argument for the assignment of extraordinary powers to the sovereign, that same concern justifies; an important qualification of those powers: the subjects are obligated to obey the sovereign only while s/he retains sufficient power to maintain public order. When "the power of [the sovereign] is once suppressed, the right of the same perisheth utterly" (L XXIX: 219). If the sovereign is unable to exercise sufficient power to secure the safety of the people, "the commonwealth is thereby dissolved" (L XXX: 219).

While Hobbes assigns absolute priority to his concerns regarding security in his account of the nature of legitimate sovereignty, then, Hobbes's overriding concern with security also leads him to qualify his case for the sovereign's authority. While the authoritarian character of Hobbes's theory obscures the implications of this view for contractarian theory, those implications become clear in the work of Locke and Rousseau.

Liberty. Since Hobbes argues for absolute sovereignty, it would seem that his theory could hardly aim to ensure expansive liberties to its subjects. Hobbes, however, argues forcefully that the form of sovereignty that he advocates does in fact guarantee to the subjects the only form of liberty that is of real importance. Liberty as exemption from the authority of the law or the sovereign, Hobbes argues, is an "absurd" (L XXI: 138) aim. The only form of liberty of real importance and value is "corporal liberty…that is to say, liberty from chains and prison" (L XXI: 138). Absolute sovereignty, because it secures social order, minimizes the likelihood that citizens will suffer interference with their corporal liberty. While Hobbes's understanding of a subject's of liberty interests is extremely narrow, his concern to assure his audience that his theory takes adequate account of individual liberty is striking. In contrast, a defender of a royalist theory of sovereignty would recognize no need to demonstrate that his theory shows adequate respect for the liberty of the individual. A royalist theory, rather, works from the assumption that individuals possess no right to liberty. All persons, according to such a theory, are entirely and properly subject to the sovereign's will. Hobbes's concern to reassure his audience that his theory shows adequate respect for liberty, then, reflects the centrality of liberty to any plausible consensualist theory.

(ii) Locke. Hobbes's successors, while less single-minded about the importance of safety and security, restrict legitimate legislation to laws that are consistent with this goal. After

Hobbes, however., the major contractarians assign the highest priority to the goal of securing individual liberty. In Locke's account of legitimate sovereignty, the goal of liberty is assigned significantly higher priority than the goal of securing security.

Security. Locke argues that the need to secure safety and security is one of the central concerns that justifies consent to the authority of the state: conflict in nature is sufficiently disruptive to motivate individuals to consent to surrender their right to use coercive force to the state. The creation of the state guarantees "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 [their community]" (ST III: 331[5]).

Conflict in Locke's state of nature, however, is limited in scope. Locke describes that condition as a state of liberty but "*not a State of Licence"* (ST II: 270), since "[t]he *State of Nature* has a Law of Nature to govern it" (ST II: 271). Since the Lockean state of nature also provides abundant resources[6]—sufficient to assure that "enough and as good" (ST IV: 291) is left for all others after each individual's appropriation—Locke's account of nature eliminates the motivation that drives the extreme conflict in Hobbes's account of nature. Since nature provides abundant resources, and persons in nature respect the law of nature, the Lockean state of nature seems unlikely to generate sufficient instability and conflict to motivate consent to the extraordinary powers conferred upon the sovereign in Hobbes.

Lacking an urgent need to generate a government of enormous power, parties to the social contract aim to create a limited government that will secure order while respecting the rights to security and liberty guaranteed by the law of nature. No one, Locke argues, would consent to a social contract that failed to secure order and to require respect for the rights guaranteed by natural law.[7] Such a contract would make them worse off.[8] Parties to the social

contract would, rather, consent only to institutions that will secure the "Peace and *Preservation of all Mankind"* (ST II: 271) as required by the law of nature. In fact, as Locke emphasizes, government is authorized to employ coercive power only to enforce the requirements of natural law (ST VII: 323-25). Since persons in nature would consent only to institutions that secured the safety and security of the subjects, only institutions that ensure safety and security can be legitimate.

While Locke's argument regarding the political implications of the issue of security is less extreme than Hobbes's view, this issue is clearly central to Locke's account of the foundation and proper function of the state. A sovereign who fails to ensure the security of the subjects has failed to respect the requirements of the law of nature and is therefore either unjust or inadequate. The subjects have the right to correct or—in extreme cases—resist and replace such a sovereign.[9] Locke thus clarifies an implication of contractarian thought that was obscured in Hobbes: the justification and definition of the power of the sovereign is only one of the central concerns of classic contractarian theory. Both Hobbes and Locke significantly qualify the powers of the sovereign in order to ensure the safety and security of the subjects. From Locke on, sovereign power is restricted when necessary to realize security *and* to preserve liberty.

Liberty. In Locke, the concern to protect liberty becomes central and fundamental to the legitimacy of political institutions.[10] Before the formation of civil society, Locke asserts, man possesses "a Title to perfect Freedom" (ST VII: 323) and possesses the power and right to preserve his "Life, Liberty, and Estate" (ST VII: 323). Men in nature are therefore "all free, equal and independent" (ST VIII: 330). Persons who *are* free, equal, and independent, Locke argues, can only be subjected to the political power of another "by agreeing with other Men to

joyn and unite into a Community" (ST VIII: 331). The authority of the state, then, is grounded in the consent given when persons unite into a community.

In consenting to join, however, persons assign *only* their Executive Power of the Law of Nature to the state. This Executive Power is simply the "Power to punish Offenses against the Law of Nature" (ST VII: 324). The state's power, thus, is limited to the enforcement of the law of nature.[11] The law of nature assigns to individuals pre-social rights to reparation, restraint, property, as well as other rights to liberty and security. Since legitimate power derives from consent, and the consent that authorizes the state is consent only to institutions that implement the law of nature, any legitimate state must respect the rights to liberty and security guaranteed by that law. Locke's theory thus makes respect for rights—and the associated liberties of the individual—a foundational element of political legitimacy. A legitimate legislature possesses *no right* to enact legislation that compromises those rights and liberties. Since Locke, social contract theory has been recognized as essentially committed to the protection of rights.

(iii) Rousseau. Rousseau assigns less importance to the pursuit of security than either Hobbes or Locke, but Rousseau does, nevertheless, describe this goal as a central concern of the social contract. While Rousseau's argument for the social contract gives central emphasis to his principal goals of autonomy and freedom—it is an essential feature of such a contract that each subject "obeys only himself and remains as free as before" (SC I/6: 53[12])—Rousseau also emphasizes that an acceptable social contract "defends the person and goods of each associate with all common force" (SC I/6: 53).

Security. The *form* of legitimate sovereignty, Rousseau argues, itself ensures the safety and security of the subjects. A legitimate form of sovereignty, Rousseau argues, involves "a reciprocal engagement" in which each individual "is doubly engaged, namely toward private

individuals as a member of the sovereign and toward the sovereign as a member of the state" (SC I/7 54). The sovereign that results from this double engagement is "formed solely by the private individuals composing it" (SC I/7 55). Such a sovereign, made up entirely of the private individuals composing the society, "does not and cannot have any interest contrary to theirs." Such an arrangement, Rousseau asserts, ensures that the sovereign will respect the fundamental interests of the citizens viewed as a whole, since "it is impossible for the body ever to want to harm all of its members" (SC I/7: 55).

Moreover, Rousseau argues, the sovereign general will formed by the social contract necessarily respects and protects the fundamental interests of *each individual*. Such a sovereign will is "general in its object as well as in its essence… [it] come[s] from all and appl[ies] to all." As a result, "there is no one who does not apply this word *each* to himself, and does not think of himself as he votes for all" (SC II/4: 62). The sovereign will cannot, therefore, "harm any of [the subjects] as an individual" (SC I/7: 55). Rather, the form of legitimate sovereignty ensures that the sovereign must protect the fundamental interests of each individual and—in fact—necessarily "constantly want[s] the happiness of each" (SC II/4: 62). Rousseau's account of the form of legitimate sovereignty thus ensures that legitimate exercises of sovereign power will promote the safety and security of the subjects. Only legislation that satisfies the requirement of double generality—generality of both essence and object—can be legitimate; and legislation that satisfies this constraint necessarily aims to secure the safety and security of each subject.[13] Rousseau thus goes far beyond Locke in restricting sovereign power in order to secure safety and security—in Rousseau's theory, any law that harms the fundamental interests of members of society is not law; any institution that attempts to enact such law fails the test of double generality and therefore cannot be legitimate.

Liberty. Like Locke, Rousseau makes the liberty or freedom of the individual a foundational element of a legitimate state. Such a state must, while protecting the person and goods of each associate, ensure that each subject "obeys only himself and remains as free as before" (SC I/6: 53). Since Rousseau defines freedom as "obedience to the law one has prescribed for oneself" (SC I/8: 56), a legitimate state ensures freedom by ensuring that each person is a member of the sovereign general will that generates fundamental social legislation. The commitment to freedom is thus constitutive of a legitimate state in Rousseau's theory.

Paradoxically, a legitimate (freedom-preserving) form of society requires "the total alienation of each associate, with all his rights, to the whole community" (SC I/6: 53). Freedom is preserved in the arrangement that Rousseau contemplates, however, because "[a]s each gives himself to all, he gives himself to no one...since there is no associate over whom one does not acquire the same right one grants him over oneself, one gains the equivalent of everything one loses" (SC I/6: 53). This mutuality of obligation, Rousseau argues, will ensure that legislation generated will be just and will necessarily respect the rights and liberties of the individual. Thus, as discussed above, Rousseau's double generality requirement thus ensures respect for liberty. Since this requirement limits any possible output of the general will, a legitimate Rousseauean state cannot invade fundamental liberty interests.

B. The Rejection of Unconditioned Majority Power. While the major contractarian theorists disagree regarding many of the practical implications of consent theory, none of the leading contractarians argue from the premise that legitimate political institutions must derive their authority from consent to the claim that the will of the majority must exercise effectively unconditioned control over the legislature. Hobbes rejects the view that authorization by the

majority grounds legitimate political power. Locke and Rousseau share Hobbes's assumption that legitimate power must be grounded in consent, but reject Hobbes's argument that this consensualist assumption grounds a plausible justification for the absolute power of the sovereign. Rather, both argue that an acceptable form of political theory could only justify institutions in which the will of the majority exercises a significant impact on legislation. Both stop far short, however, of accepting the voluntarist conclusion that the will of the majority must determine the content of valid law. Rather, Locke and Rousseau insist that the will of the majority legislates legitimately only to the extent that its political power is restricted in a manner that ensures respect for individual rights.

Hobbes. Hobbes rejects the idea that political institutions derive their authority from authorization by the majority. Authority is conferred upon the sovereign through the original covenant. Persons in nature enter this covenant to end the state of war that exists in nature, and the sovereign sustains its authority by securing public order and security (L XIV: 84; XVII: 106; XVII: 109; XXX: 219[14]). In order to perform this role, the sovereign must possess absolute power (L XVII: 109; XVIII: 113; XX: 135). If the sovereign possesses sufficient power and exercises that power to secure peace and order, the sovereign justifies its legitimate political authority. If the sovereign fails to secure public order, however, it forfeits its power and ceases to be sovereign (L XXIX: 219).[15]

Hobbes notes that the sovereign may take the form of a monarchy, an aristocracy, or a democracy. He argues that monarchy is the best form of sovereignty because a single monarch will most effectively promote the public interest and—in particular—will prevent the formation of factions that undermine public order (L XIX: 120-22; DC[16] X/15: 231-35; EL[17] XXIV: 140). In *De Cive* and the *Elements of Law*, Hobbes does concede that democracy may be as acceptable

as monarchy *if* the powers of the democratic government are curtailed in a manner that is conducive to the maintenance of public order, but the restrictions on the power of the majority that Hobbes recommends for an acceptable form of democracy would deprive the majority of *any* power over legislation. In particular, Hobbes argues that democracy might be acceptable if deliberation in the assembly were strictly curtailed and if "the *people* were to concentrate deliberations about war and peace and legislation in the hands of just one man…and were…content to have authority without executive power" (DC X/15: 233). The form of democracy that Hobbes finds acceptable thus involves a *rejection* of voluntarism, since it denies the majority legislative power.

Hobbes, in addition, notes that the earliest forms of political activity may have been democratic in character (DC VII/5: 195-96). While Hobbes's discussion of democracy as the hypothetical foundation of political activity might suggest that Hobbes—at least in his early writings—views democracy as at least an essential developmental element of civil society, these writings offer no support for a voluntarist theory of democracy. Even when describing democracy as a possibly universal practice in the formation of political societies, Hobbes never suggests that the majority has in the past exercised or should in the present or future exercise legislative power. Rather, he describes early exercises in democracy as functioning to establish the foundations for the legitimate transfer of sovereignty from the people to a monarch. Hobbes discusses a number of hypothetical cases of the operation of democracy in early societies, all of which involve the people transferring power to a monarch. In some cases, the majority transfers sovereignty to a king (with exclusive executive and legislative power), and in other cases the majority transfers sovereignty to a time-limited monarch (with exclusive executive and legislative power) (EL II/7; DC VII/15-17: 199-203; see Tuck 2016: 86-111). As Arash

Abizadeh summarizes Hobbes's view, "In an instituted [Hobbesian] commonwealth, a monarch or aristocratic assembly can become sovereign only after an already-constituted democratic sovereign assembly transfers its sovereignty to a monarch or aristocratic assembly by majority vote" (Azibadeh 2016: 413). In no case discussed by Hobbes, however, does the majority possess or exercise the power to legislate. While the majority authorizes the monarch's legislative power, the majority never exercises that power—it remains, in Richard Tuck's sense, a "sleeping sovereign" (see Tuck 2016: 86-91) possessing power to be exercised primarily by another on its behalf. Hobbes's discussion of democratic activity in early societies thus provides *no* support for voluntarism in either its strong or the weak interpretation.

Finally, it is important to note that when Hobbes does argue that a legitimate sovereign may take the form of a democracy, the legitimate power of such a sovereign does not derive from the fact that the person(s) occupying the position of sovereign can claim to represent the will of a majority of subjects. Whether the form of government is dictatorship, aristocracy, or democracy, the sovereign's authority (i) derives from its ability to secure peace and order and (ii) lapses if the sovereign is unable to secure peace. Thus, a democratic form of government that cannot secure public order has no legitimate claim to sovereignty or legislative power, in Hobbes's view, even if that government has clear majority support.

Hobbes must therefore reject both the strong and the weak interpretations of the voluntarist thesis. The strong thesis states that enactment by the majority is in itself sufficient to justify the legitimate authority of legislation. In Hobbes, however, legislation enacted by the majority is *only* valid law if (i) the original covenant confers sovereign authority upon an institution designed to articulate the will of the majority; *and* (ii) that institution possesses sufficient power to secure order. The weak thesis holds that majority support is a necessary

condition of the authority of legislation, but in Hobbes, legislation enacted by an individual dictator and opposed by a majority is valid law if the dictator possesses sufficient power to secure social order. In Hobbes, then, the acceptance of consensualism does not require the acceptance of voluntarism in either its strong or its weak interpretation. Hobbes in fact argues from consensualist foundations to a theoretical position that *requires* the rejection of voluntarism in either its strong or its weak construal.

Locke. When persons jointly consent to enter civil society, Locke argues, they create a community that is necessarily directed by the determination of the majority (ST VIII: 331). Majority rule is appropriate, Locke argues, because "it is necessary [that the community] should move that way whither the greater force carries it, which is the consent of the *majority*" (8: 332). Unless some source of authoritative political determinations can be identified, Locke argues, the original social compact "would signifie nothing and be no compact" (ST VIII: 332). Majority rule is thus a pragmatic measure required to ensure that the original compact does not fail and not a foundational element of legitimate political power.

The power of the majority—as exercised by its elected representatives—is, however, limited. Locke explicitly limits the political power of the representative legislature to the enactment of legislation that respects the life, liberty, and estate of the subjects, as required by natural law. "[W]henever [the legislators] shall be so foolish, or so wicked, as to lay and carry on designs against the Liberties and Properties of the Subject…the *Community* perpetually *retains a Supream Power* of saving themselves from the attempts and designs…even of their Legislators" (ST XIII: 367).[18] In such a case, the power of the legislature "must necessarily be *forfeited,* and the power devolve into the hands of those who gave it, who may place it anew where they think it best for their safety and security" (ST XIII: 367). The legislators, who have

"act[ed] contrary to the trust reposed in them," necessarily forfeit their power (ST XIII: 367). As A. J. Simmons notes, Lockean sovereigns "who breach their trust forfeit those rights entrusted to them by their subjects" (Simmons 1993: 156). The power of the majority is thus qualified absolutely by the requirement to respect the basic rights of all individuals as defined by natural law.

Moreover, Locke argues for institutional arrangements designed to realize "the good of society" (ST XIV: 174) by protecting basic liberties in cases in which "a strict and rigid observation of the Laws [enacted by the representative legislature] may do harm" (ST XIV: 375). In particular, general law "which makes no distinction of Persons" may subject individuals to inappropriate or unjustifiable forms of punishment (ST XIV: 375). In such cases, some branch of government must possess the power to prevent the injustice that would result from literal implementation of the majority's will. In particular, "'tis fit, the Ruler [executive] should have a Power…to mitigate the severity of the Law" (ST XIV: 375). The power to prevent the injustice that would result from the unqualified implementation of the output of the legislature, Locke argues, should be exercised by the executive—a branch of government that was, in Locke's era, insulated from majority control. Locke thus further qualifies the authority of the majority to determine the content of the law. When implementation of the majority's enactments is inconsistent with the requirements of natural law, Locke argues, it is appropriate that an institution insulated from majority control should "mitigate the severity of the law" (ST XIV: 375).

Locke therefore rejects both the strong and the weak interpretations of voluntarism. He rejects the strong interpretation's requirement that that enactment by the majority is sufficient to justify the legitimate authority of legislation when he argues that the legislature forfeits power

when its members violate the requirements of natural law by laying designs against the liberty or property of the subjects. He rejects the weak interpretation's requirement that majority support is a necessary condition of the authority of legislation in arguing that: (i) conformity to natural law, rather than to the majority's will, is the necessary condition of the legitimacy of legislation; and (ii) nonmajoritarian institutions must possess the authority to make or change law in order to mitigate the severity of the law.

Rousseau. The original social compact, Rousseau argues, requires unanimous consent. In all other cases, the vote of the majority is sufficient to generate binding legislation (SC IV/1: 110). The vote of the majority, however, is merely a proxy for the general will: "[w]hen a law is proposed in the assembly of the people, what they are being asked is not precisely whether they approve or reject the proposal, but whether it does or does not conform to the general will" (SC IV/2: 111). The judgments of the general will, and not the will of the majority, are the fundamental source of legitimate legislation.

Rousseau, in fact, argues that the unrefined will of the majority—the "will of all"—possesses no legitimate political authority because it must inevitably produce injustice in personal and political relations, a state in which "morals and virtue would cease to be in question" (DOI[19] 177). Once human beings enter society, Rousseau argues, progress towards this final corrupt state is inexorable. Upon entering society, each person's judgments are corrupted by the development of comparative concepts (e.g. more intelligent, stronger, more beautiful) which lead to competition, envy, hypocrisy, hostility, and ultimately the desire to harm one another: "[w]hat brings about [man's moral decline] if not the disastrous inequality introduced among men by the distinction of talents and the debasement of the virtues?" (DOI 58).[20] The human will in society is universally corrupted in this manner, and legislation generated by the majority of holders of

corrupt wills will produce "the ultimate stage of inequality…[and] the fruit of an excess of corruption" (DOI 177). Unrefined by institutions that extract the general will from the will of all, the will of the majority therefore possesses no legitimate legislative authority: "the magistracy and its rights being established only upon fundamental laws [that establish the primacy of the general will], should they [the fundamental laws] be destroyed the magistrates would immediately cease to be legitimate" (DOI 169). Social institutions in a society in which the general will is not the sovereign are necessarily corrupt because the members of these institutions are themselves necessarily corrupt: "the vices that make social institutions necessary are the same ones that make their abuse inevitable" (DOI 172-73).

Double generality constitutes Rousseau's solution to this seemingly inevitable cycle of corruption. The general will identified by institutions that implement the double generality constraint will necessarily generate just legislation—legislation that respects the fundamental interests of each citizen—and the cycle of corruption will thus be curtailed.[21] The general will, as constrained by Rousseau's double generality requirement, *cannot* invade the fundamental interests of individual subjects: since the sovereign general will "come[s] from all and appl[ies] to all….there is no one who does not apply this word *each* to himself, and does not think of himself as he votes for all" (SC II/4: 62). The sovereign will cannot, therefore, "harm any of [the subjects] as an individual" (SC II/7: 55). Moreover, a majority that did enact legislation designed to harm individual subjects or members of minorities would—by that act—dissolve the terms of civic association and terminate its own authority. Once the fundamental laws grounding civic association are violated, "the magistrates would immediately cease to be legitimate, the people would no longer be bound to obey them; and…. everyone would return by right to his natural freedom" (DOI 169-170). As N. J. H. Dent summarizes Rousseau's view: "If majority

decisions are legitimately to bind, it can only be so if…they leave certain conditions sacrosanct" (Dent 1988: 177; see Schwartzberg 2008: 407-08).[22]

In arguing that the vote of the majority generates legitimate legislation *only* when that vote expresses the general will, Rousseau therefore establishes that the fundamental interests of the subjects are privileged—in his account of a legitimate state—over the will of the majority. Since the sovereign will—as identified through the double generality constraint—necessarily respects the subjects' fundamental interests (e.g. basic rights and liberty interests), the sovereign "has no need of a guarantee towards the subjects" (SC I/8: 55). The general will, as constrained by the double generality requirement, *cannot* invade the basic liberty interests or fundamental interests of individuals (SC II/4: 62). Rousseau's argument that the general will constitutes the sole legitimate sovereign thus constitutes a rejection, not an endorsement, of voluntarism.

Rousseau thus rejects both the strong and weak interpretations of voluntarism. He rejects the strong interpretation's requirement that enactment by the majority is sufficient to justify the legitimate authority of legislation when he argues that the unfiltered will of the majority—the "will of all"—necessarily produces injustice in personal and political relations and cannot therefore possess legitimate sovereign power. He rejects the weak interpretation's requirement that majority support is a necessary condition of the authority of legislation when he rejects entirely the idea that legislation derives its authority from the support of the majority—the unrefined will of the majority "is only a sum of private wills" (SC II/3: 61) possessing no legitimate political authority. The authority of legislation derives entirely from its connection to the general will: "[s]overeignty…[is] only the exercise of the general will" (SC II/1: 59).[23] "[T]he general will *alone*," Rousseau argues, "can guide the forces of the state according to the end for which it was instituted" (SC II/1: 59, my emphasis). As John Rawls notes, in Rousseau,

"what provides the justification of political authority in society…is *bona fide* expressions of the general will" (Rawls 2007: 223). The moment that the will of the majority deviates from the general will, it loses all legislative authority: once a *particular* will displaces the general will as sovereign, "the social compact is broken, and all the ordinary citizens, by right recovering their natural freedom, are forced *but not obligated* to obey" (SC III/11: 98, my emphasis). As a result, higher law—set out in the original fundamental compact—requiring the imposition of the constraint of double generality on the legislative process is privileged over the will of the majority in Rousseau's account of a legitimate state. As Dent notes, in Rousseau, "certain issues must remain exempt from majority decision, namely the fundamental constitutive principles of association…. The state must put certain interests of every single one of its citizens beyond the competence of majority decision or else subvert its own authority" (Dent 1988: 177). Thus, Rousseau also rejects the weak interpretation's requirement that the will of the majority cannot be bound by higher law. Only while the legislative will *is* subject to the legal and institutional constraints—embodied in the original compact—that extract the general will from the will of all does the majority possess *any* claim to legislative authority.

As Melissa Schwartzberg argues, however, the claim that a sovereign legislative must conform its enactments to requirements of fundamental law in order to retain its legitimate authority does not conflict with Rousseau's view that "there is not…any kind of fundamental law that is obligatory for the body of the people" (SC I/7: 54). The people as sovereign *may* enact legislation that violates the fundamental laws set out in the original compact, but the "violation of the fundamental laws is the ultimate evidence of unfreedom" (Schwartzberg 2003: 393). Enactment by the legislative of laws inconsistent with fundamental law thus "offers proof that the sovereign is no longer free and is *thus by definition no longer sovereign"* (Schwartzberg

2003: 393). Conformity with fundamental law is thus not a constraint on sovereign power, but rather a constitutive condition of sovereignty.

Rousseau, it is important to note, clearly rejects three intuitions that constitute the foundation of voluntarism—the intuitions that: (i) majoritarian politics constitutes the approach best designed to produce just outcomes; (ii) participation in majoritarian politics teaches members of society to be good citizens; and (iii) majoritarian politics provides the most secure protections for individual liberties. Since Rousseau argues that majoritarian politics unregulated by double generality necessarily produces the height of injustice in legislation, in personal development, and in interpersonal relations, he rejects all three of these voluntarist intuitions.

Conclusion. The leading contributors to the social contract tradition assign priority to three fundamental concerns—security, liberty, and the legislative authority of the majority. In the case of each of the seminal contributors to this literature, the concern with the legislative authority of the majority is subordinate to the first two concerns. Hobbes assigns the highest priority to security, while altogether rejecting the idea of legislative authority of the majority. Locke argues that the tasks of ensuring the protection of liberty and security are fundamental to a legitimate state, while the legislative authority of the majority extends merely to the right to articulate the contents of the law of nature. And Rousseau argues that legislation is legitimate *only* when generated through a process that effectively protects individual rights and the associated liberties.

The social contract tradition, then, rejects the voluntarist view that—in a legitimate state—the necessary (and sufficient) condition of the legitimacy of legislation is majority support. Rather, the core commitment of the social contract tradition is merely to consensualism—the view that legitimate power derives from consent.

2. The Federalists and Republican Legislation.

The working out of ideas regarding legitimacy and the scope of governmental power during the American founding clarified many of the practical implications of the social contract tradition and embodied the central commitments of that tradition in the structure of social institutions. Following the precedent set by leading contributors to the social contract tradition, the American founders assigned priority to three fundamental values: security, liberty, and self-determination. And following the precedent set by this tradition, the American founders subordinated the authority of the majority's will to restrictions reflecting concerns regarding security and liberty. The arguments developed in the *Federalist Papers* clearly express the framers' specific intention to limit the power of the majority in light of two practical concerns: (i) the need to establish a new understanding of the law-making process in light of the shift to the ascendance of the representative legislature in that process; and (ii) the need to define proper limits on legislative power.

A. The Character of the Lawmaking Process. The framers' institutional proposals and innovations were primarily designed to address changes in the lawmaking process of their era that influenced both the substance of the law and the balance of power within government. In the colonial era, the process of lawmaking had generally been understood to be regulated by a higher law contained in background principles of justice. The possible content of legislation in the pre-democratic and early democratic eras was in fact viewed as constrained by background requirements of justice. Once the statutory enactments of the legislature became the exclusive source of valid legislation, however, the legislative process was apparently constrained by nothing but the wills of the legislators. In the view of the federalists, the output of the state legislatures prior to 1787 reflected precisely this lack of constraint, and the federalists viewed a

stronger federal government and court system as necessary to restore balance to the political process. The framers, in fact, aimed to transform the notion of a higher law limiting the content of legitimate law into an effective institutional constraint and thus to generate a new understanding of the lawmaking process.

Throughout the seventeenth and early eighteenth centuries, even thoughtful theorists failed to distinguish clearly between (i) the process of law creation through common law reasoning by the courts and (ii) the enactment of statutory law by the legislature.[24] In fact, many British commentators viewed Parliament as merely "the supreme judicature" (Otis [1764] 1998), 263) that is "the highest court among others in the land" (Wood [1969] 1998, 265). Theorists of this period thus viewed the process of legislation as continuous with customary common process of law creation, a process in which the law's "binding force came not from enactment but…from long and immemorial usage preserved in the law books and court decisions" (Wood [1969] 1998, 265). According to this view, enactments of Parliament simply declared the content of the common law in the manner of a common law court. Rather than creating new law, according to this view, parliament merely made the content of the common law explicit when necessary.

This view of law creation was significant because the content of law generated through the common law process was generally understood to be regulated by background principles requiring respect for life, liberty, and property.[25] Thus, James Otis argued that it was "logically impossible for the power of Parliament to work against" the individual's rights to life, liberty, and property.[26] Since the rights of subjects were part of the common law, and Parliament's law-making power was merely the power to declare the content of the common law, Parliament could not enact laws inconsistent with rights recognized in common law. Jefferson similarly described

as illegitimate attempts "to submit us…to a whole system [of law] no particle of which has its foundations in the common law" (Jefferson [1814] 1984), 1324).

Many commentators participating in eighteenth century American political debates relied upon the legal effectiveness of background principles of justice as constraints upon the power of Parliament.[27] Some, like Otis, described these principles as elements of the common law. Others, like John Dickinson, described them as "immutable maxims of reason and justice" (Dickinson ([1766] 1895, 262). Alexander Hamilton and Philip Livingston asserted rights against the British on the basis of precisely this kind of reasoning. Legal rights against unjust legislation by Parliament, Livingston argued, were guaranteed "by the eternal laws of right reason" (Livingston 1774, 9). The injustice of much legislation enacted by the state legislatures, Madison argued, undermined the legitimacy of law in general because "it brings into question the fundamental principle of republican Government" (Madison [1787] 1999a, 75).

Madison and Jefferson recognized that the process of legislation had become increasingly detached from the doctrinal evolution of the common law, and that individuals could therefore no longer depend upon the protection of background principles of justice and natural law to shield basic liberties. In order to preserve these protections, Jefferson argued, constitutional protections must entrench "the rights for which we have bled…placing them beyond the reach of question" and must "bind up the several branches of government by several laws, which when they transgress their acts shall become nullities" (Jefferson [1787] 1984, 251, 255).[28] Similarly, James Cannon—the framer of the Pennsylvania Constitution—argued that basic rights "must be established on a foundation never more to be shaken" (Cannon 1776, 293). An independent judiciary with authority to declare unconstitutional legislation was essential, Hamilton argued, to safeguard from injury "the essential private rights of particular classes of citizens [from] unjust

and partial laws" (Hamilton [1788] 1987, 441). Jefferson viewed the separation of fundamental principles establishing "the natural rights of mankind" from statutory law as essential to the political health of the nation (Jefferson [1777, 1779] 1984, 348).[29]

The concern expressed by Jefferson and Madison regarding problematic exercises of power by the state legislatures thus reflected an emerging awareness that the shift in the locus of law-making from the courts to the legislature involved more than a change in the location of power. Rather, the possession of unconstrained legislative power involved the creation of a new *kind* of political power, a power liberated from the constraints of justice traditionally imposed by common law principles. It was unacceptable, an anonymous contributor to *The Crisis* wrote in 1775, that the protection of basic liberties should depend "upon nothing more permanent than the vague, rapacious, or interested inclinations of a majority of 558 men, open to the insidious attacks of a weak or designing prince and his ministers" (Anonymous 1775, 81-87). Madison and Jefferson viewed such unconstrained power as a threat to both the justice and the legitimacy of law, and they argued for the enactment of a national constitution to restore the balance between law and justice (Madison [1787] 1999a, 75; Jefferson [1777, 1779] 1984, 348).

B. Legislative Power. In the 1780s, the federalists' concerns regarding unrestricted legislative power shifted from theoretical to urgently practical. The drafting of the Constitution was explicitly motivated by the intention to strengthen the executive and the judiciary branches in order to curb what the framers viewed as excessive and irresponsible exercises of power by the state legislatures. Under the *Articles of Confederation*, the state legislatures possessed and exercised a preponderance of political power. As a result of this preponderance of legislative power, the leading advocates of the adoption of a new constitution feared that the United States was in danger of a new form of tyranny.

While many persons in the pre-revolutionary era had viewed the executive branch of government as the chief threat to liberty, the new danger—the federalists argued—was legislative usurpation of power. The real power in the new republican form of government was possessed by the legislatures, Madison argued, and "[w]herever the real power in government lies, there is the danger of oppression (Madison [1788] 1999d, 421). The behavior of the state legislatures under the *Articles of Confederation*, he and other framers argued, justified this concern. In many states, for example, the legislatures had blocked court judgments, intervened in ongoing cases, and essentially displaced the courts. In Vermont, for example, the legislature "block[ed] 90 percent of all court actions" (Kramnick 1987, 25). Jefferson worried that "[a]ll the powers of government, legislative, executive, and judiciary, result to the legislative body. The concentrating these in the same hands is precisely the definition of despotic government" (Jefferson [1787] 1984, 245). Indeed, Jefferson noted, "[t]he tyranny of the legislatures is the most formidable dread" (Jefferson [1789] 1984, 944). In *Federalist No. 48*, Madison explicitly and literally repeats Jefferson's concerns about the excessive power of state legislatures (Madison [1788] 1987b, 310; see Madison [1788] 1999a, 303).

Gouvernor Morris, one of the leading advocates of ratification of the Constitution, argued that new institutions were required "[t]o check the precipitation, changeableness, and excesses" of the more representative branch. Every observant person, he argued, had witnessed the "excesses against personal liberty, private property, and personal safety" resulting from the abuse of power by the state legislatures. The "one great object of the Executive," he argued, must be "to control the Legislatures" (Farrand [1787] 1911-1937, 52). Similarly, Madison in *Federalist No. 48* warns of "the danger from legislative usurpations which…must lead to the same tyranny as is threatened by executive usurpations." Indeed, Madison argues, "in a representative

republic...it is against the enterprising ambition [of the legislative department] that the people ought to…exhaust all their precautions" (Madison [1788] 1987b, 309-10). Jefferson concurred, arguing that "[a]n *elective despotism* was not the government we fought for" (Jefferson (1787] 1984, 245).

Moreover, Madison worried, the problematic behavior of the state legislature appeared to reflect an inherent tendency in "popular" or "republican" forms of government. "We have seen," Madison argued, "that the tendency of republican governments is to an aggrandizement of the legislative, at the expense of the other departments" (Madison [1788] 1990a, 288). The confederation's experience suggested that under such arrangements "measures are too often decided, not according to the rules of justice…but by the superior force of an interested and overbearing majority" (Madison [1787] 1999c, 160). The danger of self-interested abuse of power by the majority was hardly surprising; rather, such behavior reflected a basic fact of political psychology: "Place three persons in a situation wherein the interest of each depends on the voice of the others, and give two of them an interest opposed to the rights of the third. Will the latter be secure? The prudence of every man would shun the danger" (Madison [1787] 1999a, 78). The potential misuse of power by the majority, moreover, poses a precise political danger: when a political majority abuses power in the pursuit of interest, "the rights of the minor party become insecure" (Madison [1787] 1999b, 93). Such oppression, moreover, poses a threat to the stability of political institutions: "abuse of power, by the majority trampling on the rights of the minority,…[has] more frequently than any other cause, produced despotism" (Madison [1788] 1999c, 355). Thus, the new constitution must be designed "not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part" (Madison [1788] 1999b, 297).

In particular, Hamilton argues, "[t]he courts were designed to be an intermediate body…in order to keep [the legislatures] within the limits assigned to their authority." For a popular government under a limited constitution, "[t]he complete independence of the courts is peculiarly essential." It is the duty of courts of justice, he argued, "to declare all acts contrary to the manifest tenor of the Constitution void." Any action of a delegated authority, such as a legislature under a limited constitution, "contrary to the tenor of the commission under which it is exercised, is void." Consequently, "[n]o legislative act…contrary to the Constitution can be valid" (78: 438). The Constitution did not intend "to enable the representatives of the people to substitute their *will* to that of their constituents" (Hamilton [1788] 1987, 438). Rather, the courts possess the power and responsibility "to ascertain [the Constitution's] meaning" (Hamilton [1788] 1987, 439). If there is "an irreconcilable variance between [the Constitution and a statute], that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute." When statutes conflict with the Constitution, "judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws rather than by those which are not fundamental" (Hamilton [1788] 1987, 439).

In translating social contract theory into political institutions, then, the Federalists followed the contractarians in *limiting* the scope of popular sovereignty to powers consistent with the protection of security and liberty interests. The framers shared with Locke the view that in a just and legitimate state, the legislature possesses power to enact only legislation embodying the requirements of reason and natural law. Far from assigning ultimate power to the will of the majority as expressed by the legislature, the framers argued that the legislature—and thus the political power of the majority—should be firmly regulated by the requirements of justice and

natural law. This view reflected the judgment, which the framers took from the contractarians, that consensualism does not require voluntarism—that is, a commitment to the view that legitimate power derives from consent does not require the assignment of ultimate power to the majority or its representatives.

3. A Philosophically Attractive Conception.

While neither the contractarian political tradition nor the arguments of the Federalists provide support for voluntarist view, an advocate of the voluntarist understanding of democracy might argue that such a view nevertheless constitutes the most philosophically attractive interpretation of the democratic intellectual tradition. This section will examine that claim. In particular, this section will focus on the relation of the notion of political equality to the justification of voluntarism.

A. Consensualism, Voluntarism, and Political Equality. Consensualism is grounded most basically in the notion that all persons are political equals. Since persons are naturally equal, it is argued, no person can legitimately be subjected to the authority of another without their consent. Legitimate social institutions are thus best defined as those institutions to which free and equal persons would consent under fair conditions. Hobbes, Locke, Rousseau, and the Federalists all argue from the assumption of political equality. Hobbes argues that claims regarding natural inequality simply reflect the individual's "vain conceit" (XIII: 75). Locke argues that "there [is] nothing more evident" than the fact that creatures "promiscuously born to all the same advantages of Nature" should be equal in political influence (II: 269). The framers

view this claim as equally obvious, while Rousseau argues that inequality is constructed within civil society and could never exist in nature.

Remarkably, then, the principal contributors to the contractarian tradition, writing in the context of a political culture that assumed the justice of social hierarchy and hereditary privilege, shared the common assumption of political equality. Once social theorists adopted the view that legitimate institutions could most reasonably be identified from the standpoint of choice under fair conditions (represented as the conditions of the state of nature), in fact, the conclusion that all persons must be viewed as political equals was hard to avoid. The common intuition underlying this conclusion can be reconstructed as follows. In order for differences that distinguish individuals to count as qualities that justify differences in treatment, accepted norms (e.g. of merit, desert, entitlement) justifying such a view must be firmly in place. Such norms, however, are social creations whose authority can only derive from socially rooted processes of authorization. Since these processes do not exist in nature, people in nature can have no justification for viewing any kinds of differences among persons as the basis for differences in power and influence.

The most basic consensualist intuition, therefore, is that no natural foundation for political inequality exists. Unless we can provide a persuasive social justification for rules or norms assigning greater power to some than others, all must exercise equal authority. At the moment of the authorization of basic institutions, then—before social justification of inequality is possible—all must exercise equal influence.

Can this intuition be extended, however, to justify voluntarist claims regarding the legislative process? Suppose, that is, that we begin with the assumption that all humans initially

possess equal political authority. Does that assumption ground a plausible argument for the conclusion that the majority must possess complete authority over the law?

The contractarian assumption of political equality does support at least a presumption in favor majoritarian government. After all, if all are political equals, then it seems more reasonable that the will of the majority should determine the content of the law than that the will of the minority should exercise that power. The view that the will of the majority should determine the law is, however, merely a rebuttable presumption.

How could this presumption be rebutted? Suppose that a majority votes, under fair conditions and though processes in which in which all participate as equals, to deprive a minority group—or all members the opposition party—of the right to vote. Suppose, in addition, that the law enacted by the majority makes opposition to the law (depriving the minority of the vote) a capital offense punishable by death. Such a law is essentially inconsistent with democracy since its implementation would effectively end self-government by a people. But, more fundamentally, could the *democratic legitimacy* of such a law be justified by the presumption that the will of the majority is a more appropriate foundation for law than the will of the minority? The short answer is 'no'.

The presumption in favor of the majority's authority is merely the product of reflection that balances relevant considerations and concludes that—on balance—the will of the majority is a more appropriate source of legislation than the will of the minority. The majority's choice to deprive the minority of political power (and to criminalize opposition to their legislation) introduces new considerations that must be weighed against that presumption. The majority's enactment (i) illustrates the kind of kind of oppression of minorities that may result from unrestricted majority rule; (ii) demonstrates that majority rule may undermine the possibility of

self-government by a people; (iii) suggests that unrestricted majority rule may be incompatible with respect for persons as equals; and (iv) suggests that unrestricted majority rule may undermine social stability. While the force of these considerations requires further investigation, *any of them* could provide a sufficient basis for rejecting the presumption in favor of majority rule.

Note that the discussion of this hypothetical legislation reflects the intuition that grounds Locke's rejection of all forms of absolute power. An institution with such power, Locke argues, possesses the authority to take the life of any person summarily and arbitrarily. If a person or institution pursues such power, any rational person must assume that the person or institution pursuing the power intends to use it.[30] No rational person, Locke concludes, could consent to such political power—just as no rational person should consent to end her own life.[31] Since (i) no rational person would consent to such power, and (ii) legitimate power derives only from consent, then (iii) such unconstrained power can never be legitimate—whether it is assigned to a king or to an elected and representative legislature.

The Federalists emphatically endorsed this argument. The new constitution was required, they argued, precisely to curb the abuses of absolute power exercised by majority through the state legislatures. Legitimate majority power, according to the logic of the consensualist argument, must be limited power. What are the limits that such a government must respect? The most persuasive criticisms of absolute legislative power involve the potential abuses of arbitrary authority and the power of absolute government to suppress dissent. The limits on power that define a legitimate state must therefore address at least these concerns.

Minority Protections. In order to ensure that a majority may not deny minorities a voice in the process of self-government, a legitimate state must guarantee a number of entrenched

rights. The right to participate in politics—through voting, advocacy, and the pursuit of public office—is the most basic of these rights, but the right of participation will only ensure an effective ability to influence political decisions if a cluster of additional rights is protected. The right to vote will only effectively enable citizens to participate in the political process if each citizen is guaranteed access to sufficient information to inform herself about the issues. A legitimate state must therefore facilitate and protect the existence of a free and vigorous press and must also guarantee that citizens possess the means to ensure that they are adequately informed about the issues. In particular, citizens must possess access to information relating to economic and political issues sufficient to ensure that they can evaluate both claims by politicians and reports in the press. In addition, the ability to vote is ineffective if those votes are not counted or if the process of vote counting is compromised. A legitimate state, then must—at a minimum—ensure procedural fairness in the processes of voting and vote counting. Finally, a person who is incarcerated will not be able to engage in effective advocacy and may be denied the right to vote. In order to ensure that legal sanctions are not used to deprive minorities of effective political power, a legitimate state must therefore ensure due process and equal protection under the law.

Judicial Remedies. A person cannot defend herself against the abuse of government power if she lacks access to judicial remedies. In order to ensure that the state does not possess the power to arrest or execute persons arbitrarily, then, a legitimate state must ensure respect for a cluster of rights relating to access to courts and remedies, standards of evidentiary proof, norms regulating civil procedure, burdens of proof, rights of appeal, and the integrity and independence of the courts. Even if access to the courts is guaranteed, however, that access will be of little value unless courts resolve controversies fairly. A just state must therefore ensure that the

judiciary is independent of the legislative and executive branches and is insulated from political pressure. Such a state must also ensure that the courts are required to protect the fundamental interests of each individual, as formulated in an authoritative statement of those rights, from interference by the majority or the powerful. In addition, a legitimate state will need to ensure respect for (i) rigorous evidentiary standards, (ii) burdens of proof that adequately protect defendants from frivolous or malicious charges, (iii) consistent and rigorous practices governing civil procedure, and (iv) the availability of a reasonable process for appealing judgments.

Suspect Classes. Persons cannot participate as equals if laws define them as subordinates. In order to ensure that persons may participate in civil society as equals, a just state must ensure that no legislation establishes special disadvantages or legal burdens that apply only to particular groups. The law of a just society, that is, must not impose special legal or social burdens on suspect classes. More particularly, the state must ensure that legal judgments assign absolutely equal weight to the concerns of all litigants.[32] Thus, a just democracy would apply the equivalent of Rousseau's double generality constraint to all legislation.

The logic of the contractarian tradition justifies a presumption that the majority should exercise power, then, but only limited power. The precise details of the appropriate restrictions of majority power may take different forms in different communities, but in each case, legitimate institutions must—according to this argument—restrict the power of the majority in order to ensure that political institutions respect a set of rights whose content and enforcement are insulated from interference by the majority or its representatives.

The core intuition of the contractarian tradition—the assumption of political equality—thus provides strong support for the view that legitimate power must be grounded in consent, but not for the view that the majority must possess absolute legislative power. Rather, the

assumption of political equality requires the protection of rights, and the goal of protecting rights requires and justifies the creation of institutions—insulated from majority control—whose mandate is to restrict the power of the majority in order to protect the fundamental interests of individuals. These institutions must possess the authority to make law, not merely without majority support, but precisely to limit the political power of the majority. The core commitments of the contractarian tradition thus require a rejection of (i) the voluntarist view that majority support is a necessary condition for the authority to make law and (ii) the associated view that judicial review is in tension with democracy. Rather, on this analysis, judicial review is an essential element of a legitimate democratic form of government.

B. Contractarianism and the Proper Extent of Majority Power. Any account of democracy must be prepared to explain why the fact that a majority voted for a provision of law justifies that provision's authority. To answer this question, we need to revisit the justification for provisional support for the majority's authority. It is reasonable to assign the greatest weight to legislation authorized by the majority, it is argued, because if we assume political equality, then it makes no sense to allow the minority to govern the majority. But that argument assumes that (i) the enactments of some subset of society should be authoritative for society; and (ii) assigning the greatest weight to majority enactments shows the greatest respect for persons as equals. The first proposition requires a justification, while the second requires close scrutiny.

Authoritative Enactments. Why should the enactments of any group have the force of law? The viable responses appeal to utility and justice. Utilitarians argue that respect for the authority of law makes important social benefits possible. Law provides a framework within which members of society may organize their commerce, and the maintenance of this framework

maximizes utility. Arguments from justice assert that majority rule provides the most secure and just foundation for rule of law. Unless society provides a reliable set of rules governing behavior and expectations, fair cooperation for mutual benefit is impossible.

Note that neither of these arguments provides a solid foundation for a justification of unconstrained rule by the majority. While a decision rule assigning authority to the majority may maximize utility as long as the majority respects minority rights, there is no reason to believe that rule by a majority that persecutes minorities will maximize utility. The disutility experienced by the minority may be sufficient, in itself, to ensure that utility is not maximized. In addition, the persecution of minorities is likely to undermine social stability, preventing establishment of the predictability and order necessary for optimal maximization of surplus.

The argument from justice provides even less support for unconstrained majority rule. While restrained majority rule may make possible the rule of law necessary for justice, the abuse of majority power produces the opposite of just rule of law: injustice with the force of law behind it.

Respect for Persons as Equals. The argument that majority rule shows essential respect for the equality of persons also requires careful scrutiny. If the majority avoids infringing the rights of other groups, the claim that majority rule most successfully respects the rights of each person may be plausible. If the majority uses its power to invade the rights and fundamental interests of members of minorities, however, the claim fails. Suppose, for example, that the majority votes to reestablish slavery or to outlaw certain sexual orientations or political ideologies. Even if the votes of the respective minorities were assigned absolutely equal weight in the voting process—so that the procedure showed absolutely equal respect for the *input* of each person—the legislative output clearly fails to respect persons as equals. If the legislature

enacts laws that reestablish slavery, then the rights of those to be enslaved are assigned absolutely no weight. If the law discriminates on the basis of sexual orientation, then society clearly assigns greater weight to the interests of the majority's right to pursue happiness as they prefer than to the minority's symmetrical right claim.

Conclusion. The potential for the abuse of majority power thus defeats the claim that unrestricted majority power shows essential respect for the equality of persons and, simultaneously, illustrates the defects of a definition of democracy that limits that idea to unconstrained rule by the majority. If a majority with absolute power persecutes and disenfranchises minorities, the resulting state of affairs is likely to minimize justice, social utility, respect for persons, and rule of law. If democracy cannot be justified as securing any of these values, it is not clear how democracy could be justified at all.

Majority rule regulated by entrenched rights protections has the potential to avoid these problems, leaving all of the traditional justifications available to justify such a form of government. Such a political arrangement also conforms to the traditional understanding of democracy as self-government by a people in which the minority always enjoys the opportunity to transform itself into the majority. An inventory of the western political tradition, then, suggests that an acceptable conception of democracy will not require or permit unqualified majority rule. An abstract reconsideration of basic democratic commitments suggests no reason to doubt this conclusion.

C. Contractarianism and Justification. Contractarianism develops a necessary implication of the assumption that all persons must be viewed as political equals: in order to be acceptable, political judgments must be justifiable to all reasonable persons on terms that they could accept under fair conditions. Thus, social contract's fundamental test—could proposed laws, principles, or judgments be accepted by free people for a fair choice position (e.g. the state of nature)—is designed to test the justification of various forms of political proposals. The metaphor of a social contract represents the idea of free assent to political conditions that are mutually acceptable because they are justifiable—under fair conditions—to all affected persons.

Consensualism makes such a consent criterion the foundation of its account of legitimacy. Thus, consensualism ties legitimacy to general justifiability. An acceptable theory of legitimacy is simply a theory whose content could be justified to all reasonable persons on terms that they could accept.

Voluntarism, however, offers a very different account of legitimacy. In particular, the consensualist concern with justification has disappeared. In place of a concern for justification, voluntarism substitutes a concern for conformity with majority preferences. The validity of legislation becomes merely an empirical question: did a majority of eligible voters (or their representatives) favor the proposal? If the answer is 'yes', then: (i) under the strong interpretation of voluntarism, the enactment is definitively valid; and (ii) under the weak interpretation, no other political institution possesses political standing to challenge the validity of the enactment. According to voluntarism, then, majority support ensures at least the practical effectiveness and—under the strong interpretation—the definitive validity of an enactment.

As discussed above, the leading contractarians and the Federalists all worked from the consensualist assumption that all persons must be viewed as political equals, but none of them

accepted the voluntarist view that majority support constitutes the essential test of validity. They rejected such a single-minded focus on majority support for two reasons. First, they rejected the idea that majority support could constitute a sufficient justification for a political claim. During the Seventeenth Century, such a claim would have seemed implausible. Even considered in the abstract, however, the claim that majority support constitutes a full and sufficient justification for a political proposal appears implausible. As John Rawls argues, "t[]here is nothing to the view…that what the majority wills is right" (Rawls [1971] 1999: 313). Even when people reflect carefully before voting, their judgments are affected by misinformation, failure of logic, and misleading decision heuristics. Only such a combination of factors can explain the fact that tens of millions of the same people voted for Lyndon Johnson in 1964 and Richard Nixon in 1972. Anyone concerned to ensure that political enactments are justifiable to all reasonable persons should therefore reject the view that majority support constitutes the essential test of validity

Second, the claim that political equality justifies decision by majority vote is simply a prima facie claim whose persuasiveness must be tested against other relevant considerations. Consider some of the issues raised by the hypothetical case of the enactment—through a procedurally fair process—of a law denying the right to vote to a minority group. First, such legislation would constitute a dramatic failure of respect for other members of society as equals. Some commentators have argued that if the members of the minority participate as equals in the procedure that generated the law, then the society that enacted the law shows equal respect for members of the minority. Such an argument, however, improperly privileges the ability to express views over the ability to act on those views. While members of the minority are permitted to express their preference to continue to participate in the political life of civil society, the enactment of the law prevents them from doing so. After the law becomes effective, they

will have no influence on the society's political decisions. They will be unable to protect themselves from further erosion of their liberties, including freedom of speech, the free exercise of religion, or freedom of conscience. They will be unable to act effectively to ensure that they receive equal protection or due process under law. Society will have effectively established that their political interests have no value. The failure to respect members of the minority as equals could hardly be more profound.

Second, the enactment of such legislation necessarily threatens social stability. When a social group is denied any institutional means to protect their interests, the only means remaining are disruption and violence. Even viewed from a purely logical perspective, the enactment of such legislation necessarily increases the likelihood that the enactment of controversial legislation in the future will generate violent—rather than deliberative—resistance.

Third, in enacting legislation that singles out a group for such oppressive treatment, the society announces its general willingness to enact similar legislation affecting other groups if majority preferences support such legislation. Such a public statement will necessarily undermine the confidence of other groups in the security of their interests under existing political institutions and will therefore undermine support for those institutions.

Finally, a commitment to democracy would seem to require the maintenance of a political process in which the minority always possesses the opportunity to transform themselves into the majority. If the majority alters political institutions in order to strip minorities of political power, then democratic government has ended—the form of government has been transformed into aristocracy or oligarchy. A commitment to democracy therefore requires the rejection of unconstrained majority rule which would allow the majority t exercise such power.

How do these considerations affect the balance of interests that seemed to support the majority decision rule? On first consideration, that rule seemed to be required in order to show equal respect to members of society. As discussed above, however, the claim that unconstrained majority rule is required by as a matter of equal respect fails. Institutions that assign unconstrained power to the majority necessarily fail to show equal respect for all members of society. When that conclusion is combined with the additional conclusions that unconstrained majority power necessarily undermines social stability and fails to show even minimally adequate respect for minority interests, the balance of interests shifts decisively against an unconstrained majority decision rule. Voluntarism necessarily fails the consensualist justification criterion.

Consensualism makes justification the test of legitimacy. Voluntarism fails this test. Not only do voluntarist conclusions not follow from consensualist assumptions, a consensualist criterion of legitimacy requires the rejection of voluntarism.

Conclusion

A careful examination of the idea of democracy—both as originally conceived and as an abstract idea—suggests that democracy is not best understood as a form of government that is unconditionally responsive to the preferences of the majority. In particular, the voluntarist conception of democracy—which assigns effectively unconstrained power to the majority—can claim support neither in the intellectual history of democracy nor in a plausible interpretation of the idea of democracy.

The western democratic tradition is contractarian, and that tradition works from the foundational intuition that legitimate power derives from the consent of the governed. That intuition justifies democracy as an important element of social choice, but it also requires the entrenchment of rights protections as an element of any acceptable set of political institutions. Only such an arrangement shows respect for each member of society as an equal, and only such an arrangement makes self-government by a people possible.

If entrenched rights are to provide effective protections to liberty interests, they must be enforced by an institution that is not subject to majority control; a "constraint" on the will of the majority that is controlled by the majority is no constraint. As Hobbes argues persuasively, it is not "possible for any person to be bound to himself, because he that can bind can release" (L XXVI: 174). Democratic institutions must therefore include an institution independent of majority control whose purpose is to enforce rights protections against the majority. While this argument does not establish that the judiciary is the only institution appropriate for this role, it does demonstrate the essential role played in democratic institutions by a law-making institution that is independent of majority control. Moreover, the judiciary's expertise in the interpretation of law uniquely qualifies that branch to perform the task of enforcing entrenched rights protections. The argument that it is undemocratic for unelected judges to strike down laws as unconstitutional therefore fails. Democracy requires institutions with the authority to enforce rights protections against the will of the majority, and the judiciary is uniquely qualified to play this role.

[1] "A questionnaire was sent to scholars from many countries…. There were no replies averse to democracy…. The idea of democracy was considered ambiguous and even those who thought that it was clear…were obliged to admit a certain ambiguity" (Benn and Peters 1959, 332).

[2] See Morris (2000), at 19.

[3] The term *voluntarism* in political theory is generally defined as the view that the law must be will-based. I define the term more specifically to refer to the view that the law must be generated by the will of the majority.

[4] "[T]he miserable condition of war…is necessarily consequent…to the natural passions of men, when there is no visible power to keep them in awe" (Hobbes [1651] 1994, 106). Page references to this work will be placed in the text.

[5] Locke ([1689] 1994) (ST). Page references to this work will be placed in the text.

[6] Locke describes nature as characterized by "the plenty of natural Provisions" (ST III: 290).

[7] "[I]t being only with an intention in every one the better to preserve himself his Liberty and Property…the power of the Society, or *Legislative* constituted by them, *can never be suppos'd to extend farther than the common good*….And all this to be directed to no other *end*, but the *Peace, Safety,* and *publick good* of the People" (ST IX: 353).

[8] "It cannot be supposed that they should intend, had they a power to do so, to give to any one, or more, *an Arbitrary Power* over their Persons and Estates….This were to put themselves into a worse condition than the state of Nature" (ST X: 359). "[W]hereas, in the ordinary State of Nature, he has a liberty to judge of his Right, and…to maintain it; now whenever his Property is invaded by the Will and Order of his Monarch, he has not only no Appeal…but as if he were degraded from the common state of Rational Creatures, is denied a liberty to judge of, or to

defend his Right, and so is exposed to all the Misery and Inconveniencies that a man can fear" (VII: 327).

[9] As A. J. Simmons notes, Lockean sovereigns "who breach their trust forfeit those rights entrusted to them by their subjects" (Simmons 1993: 156). Locke's principal innovation—the view that there remains in the community the supreme power to remove or alter the sovereign legislature—thus reflects the community's right to protect its most fundamental interests against sovereign power. See Tuck (2016), p. 119.

[10] This concern relates to Locke's notion of civil (rather than moral) liberty. See Tully (1995), 283-314.

[11] "[T]he original of the *Legislative* and *Executive Power* of Civil Society" is the "Executive Power of the Law of Nature" (ST VII: 325) which merely authorizes the individual "to judge of, and punish the breaches of [the Law of Nature] in others" (ST VII: 323-24). "It is a Power that hath no other end but preservation, and therefore can never have a right to destroy, enslave, or designedly to impoverish the Subjects" (ST X: 357). Civil laws are "only so far right, as they are founded on the Law of Nature, by which they are to be regulated and interpreted" (ST II: 275).

[12] Rousseau ([1762] 1978) (SC). Page references to this work will be placed in the text.

[13] See Kaufman (1997) for a discussion of Rousseau's account of double generality.

[14] "The office [duty] of the sovereign…consisteth in the end for which he was trusted with public power, namely the procuration of *the safety of the people*, to which he is obliged by the law of nature" (L XXX: 219).

[15] "[B]ecause, if the essential rights of sovereignty…be taken away, the commonwealth is thereby dissolved, and every man returneth to the condition and calamity of a war with every other man, it is the office [duty] of the sovereign to retain those rights entire" (L XXX: 219).

"The obligation of the subjects to the sovereign is understood to last as long, and no longer, than the power lasteth by which he is able to protect them" (L XXI: 144).

[16] Hobbes [1651] 1991 (DC). Page references to this work will be placed in the text.

[17] Hobbes [1640] 2008 (EL). Page references to this work will be placed in the text.

[18] Governments have rights to limit our liberty…only insofar as they have been granted those rights by us" (Simmons 1992: 123).

[19] Rousseau ([1750, 1754], 1964) (DOI). Page references to this work will be placed in the text.

[20] "[M]en become unhappy and wicked in becoming sociable" (GM I/2: 162). Rousseau [1756] 1978. Page references to this work will be placed in the text.

[21] "[I]t is this double [generality] that creates the true character of the law" (GM II/4: 189).

[22] "Rousseau believes that no legitimate state can exist in the absence of fundamental law" (Putterman 2010: 24). As Dent notes, Rousseau argues that "the obligation of obedience to a decision reached by the majority can only come from prior reasoned assent to the procedure of resolution of issues on the basis of majority decision" (Dent 1988: 177).

[23] "Sovereignty...consists essentially in the general will" (SC III/4: 102). "[T]he law is a public, solemn act of the general will, and since everyone has subjected himself to this will through the fundamental compact, it is through [the original] compact alone that all law derives its force" (GM II/4: 189).

[24] All law creation, it was argued, must respect the "natural, , essential, inherent, and inseparable rights" of the people that "no body of men, not excepting the Parliament…can take away" (Otis [1764] 1998), 262-263.

[25] "Throughout the entire debate with England the colonists continually sought to define those "fundamental principles," those "true, certain, and universal principles," and those sacred Laws of Justice" of the English constitution" Wood ([1969] 1998, 262).

[26] Wood, *The Creation of the American Republic*, p. 263.

[27] "Law…was basically what the principles of right reason declared to be law" (Wood [1969]1998, 295).

[28] See Jefferson [1777, 1779] 1984, 37-48; Jefferson [1786] 1984, 575-579.

[29] "[T]he rights hereby asserted are the natural rights of mankind, and that if any act shall hereafter be passed to repeal the present or to narrow its operation, such act will be an infringement of natural right" (Jefferson [1777, 1779] 1984, 348).

[30] "I have reason to conclude, that he who would get me into his power without my consent, would use me as he pleased, once he had got me there, and destroy me too when he had a fancy to it" (III: 279). "[W]hat security, *what Fence* is there in such a State, *against the Violence and Oppression of this Absolute Ruler*? (VII: 128).

[31] "*Freedom* from Absolute, Arbitrary Power, is so necessary to, and closely joined with a Man's Preservation, that he cannot part with it, but by what forfeits his Preservation and Life together" (IV: 284).

[32] The court, that is, must "treat the consequences of any collective decision for [any individual's] life as equally significant a reason for or against that decision as are comparable consequences for the life of anyone else" (Dworkin 1996: 25).

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