

## **Ballots as Signatures: The Link Between Voting and Consent**

### **Section I – Introduction**

Consent theory is one of the most venerable and powerful theories of political obligation. Indeed, its appeal is such that even leading philosophical anarchists – skeptics that there exist general political obligations at all – say that consent theory represents the most likely way that such obligations could be justified.<sup>1</sup> Yet despite its appeals, most people who argue for the existence of general political obligations do not call themselves consent theorists.. The fundamental problem with consent theory, the story goes, is that very few people actually consent to much of anything in the political realm.<sup>2</sup> Theorists as far back as Locke have attempted to circumvent this problem by trying to ground political obligation on tacit consent, especially via residence. Powerful critiques of this position are nearly as old, going back to Hume.<sup>3</sup>

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- 1 A.J. Simmons, the most prominent supporter of one type of philosophical anarchism (for more on the divisions within philosophical anarchist family, see A. J. Simmons, “Philosophical Anarchism.” in *For and Against the State*, ed. John T. Sanders and Jan Narveson (Lanham: Rowman and Littlefield, 1996)), is quite up front about this. In his seminal piece on political obligation he says that consent *does* oblige, although it has trouble providing a type of obligation that would apply to all citizens. See A.J. Simmons, *Moral Principles and Political Obligation* (Princeton: Princeton University Press, 1979), 69-70. Robert Paul Wolff, the most prominent exponent of the other major branch of modern philosophical anarchism, says that the only legitimate form of government would be a unanimous direct democracy, where “... by the rule of unanimity a single negative vote defeats any motion.” See R.P. Wolff, *In Defense of Anarchism* (New York: Harper & Row, 1976), 24. His subsequent work, *The Autonomy of Reason*, is even more explicit: “I am persuaded that moral obligations [which include political obligations – see p.225], strictly so-called, arise from freely chosen contractual commitments between or among rational agents who have entered into some continuing and organized interaction with one another.” See R.P. Wolff, *The Autonomy of Reason* (New York: Harper & Row, 1973), 219
  - 2 For one articulation of this position, see George Klosko, *The Principle of Fairness and Political Obligation*, (Lanham: Rowman & Littlefield, 1992), 142
  - 3 See John Locke, *Second Treatise of Government* (Indianapolis: Hackett Publishing, 1980. Originally published 1690), 52-65, and David Hume, “Of the Original Contract,” in *Political Essays*, ed. Knud Haakonssen (New York: Cambridge University Press, 1994. Originally published in (1748), 186-201

I take up the less explored argument that we consent when we vote. I argue that voting can generate consent in some cases, and so some voters may, by their act of voting, generate political obligations by way of consent. This is not because of a necessary conceptual connection between voting and consent. Rather, voting and consent may be linked contingently; the social meaning of votes may vary, and whether or not a vote entails consent will vary accordingly. Voters may end up in a bind – they may want to vote for practical reasons while withholding their consent from the regime. I will argue that they can avoid their consent-derived political obligations only if they are able to signal the meaning of their vote to others.

This paper is organized in two broad sections. In the first section I unpack consent by considering its connections with promising. This analogy (and its limits) helps clarify the type of obligation inherent in consenting. In the second section I reject the contention that voting is necessarily connected to consenting. I instead argue that they are oftentimes contingently linked. In such cases voters end up consenting as a default when they cast their ballots.

## **Section II – Consent**

The most straightforward way to categorize acts of consent is to treat the consenting act as express, tacit, or hypothetical. Roughly, express consent occurs when someone performs an action that serves as a signal of consent. Tacit consent takes place when one has the opportunity to express dissent but remains silent<sup>4</sup>. To use A.J. Simmons' illustration, when a chairperson asks the attendees of a meeting if anyone objects to switching next week's meeting day from Thursday

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4 John Horton, *Political Obligation* (Atlantic Highlands: Humanities Press, 1992), 29

to Tuesday, their silence is just as binding as verbal assent.<sup>5</sup> According to Simmons, both express and tacit consent will obtain as long as “[...] the means acceptable for indicating dissent must be reasonable and reasonably easily performed; and the consequences of dissent cannot be extremely detrimental to the potential consentor.”<sup>6</sup> Although tacit consent may be harder to identify in practice, it nonetheless binds just as strongly as express consent. Hypothetical consent, on the other hand, does not. Someone hypothetically consents when we believe that she *would* have consented to something had she had access to more facts or been true to her status as a rational being.<sup>7</sup> To the extent that consent has a voluntarist character, and many liberals believe that it does<sup>8</sup>, it cannot merely be hypothetical because hypothetical consent may obtain even if a person vociferously states that she is *not* consenting. If hypothetical consent binds, it does so for a different reason entirely and so falls outside the purview of consent theory proper<sup>9</sup>

These rough definitions are too rough, however. After all, if I make a gesture that signals express consent, what does mean? We need to know something more about consent before we can use it in the definition of express or tacit consent. The rough definitions are good enough given an unreflective but usually serviceable understanding of consent, but they are of little help in hard cases where our intuitions make us anxious about definitively classifying a given act as

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5 A.J. Simmons, “Tacit Consent and Political Obligation,” *Philosophy and Public Affairs* vol.5 #3 (1976), 279-280

6 A.J. Simmons, *On the Edge of Anarchy: Locke, Consent, and the Limits of Society* (Princeton: Princeton University Press, 1994), 81

7 For the seminal two-part piece on hypothetical consent, see Hanna Pitkin, “Obligation and Consent I,” *American Political Science Review* vol.59 #4 (1965) and “Obligation and Consent II,” *American Political Science Review* vol.60 #1 (1966)

8 Waldron, “Theoretical Foundations of Liberalism”, 139-141

9 As Dworkin famously put it, “[...] hypothetical contracts do not supply an independent argument for the fairness of enforcing their terms. A hypothetical contract is not simply a pale form of an actual contract; it is no contract at all.” See Ronald Dworkin, “The Original Position,” in *Reading Rawls*, ed. Norman Daniels (Oxford: Basil Blackwell, 1975), pp. 17–18

consenting-signaling. The remainder of this section will discuss consent in greater detail by considering its connections with promising. Doing so will provide the conceptual apparatus that I will use in the next section, when I discuss the connection between voting and consent.

### *Affinities between consent and promising*

Consent shares many important features with promising, and since we have a decent intuitive grasp on what it means to make a promise, drawing an analogy between the two will take us quite far. Indeed, some theorists feel comfortable using the terms synonymously.<sup>10</sup> There are at least three affinities between consent and promising. First, like promising, consenting is a discrete voluntary act that generates obligations of some kind.<sup>11</sup> These obligations may be perform an action, to refrain from performing an action, or some combination of the two.<sup>12</sup> If I consent to meet you at the bar this evening and I don't show up, most people would accept that you would have a prima facie right to reproach me by reminding me of a precise moment in time when I performed what we both considered to be an obligation-creating action.<sup>13</sup> This is important for those of us who are concerned with our status as autonomous beings. As Simmons says, "First, [...] Consent theory maximizes protection of the individual's freedom to choose where his political allegiance will lie. [...] Second, the model of the promise lends clarity and credibility to a theory of political obligation: for promising is surely as close to being an indisputable ground of moral requirement as anything is."<sup>14</sup> Contrast this with other ostensible

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10 Mark C. Murphy, *Natural Law in Jurisprudence and Politics* (New York: Cambridge University Press), 93

11 For more on this, see again Waldron, "Theoretical Foundations of Liberalism", and Simmons, "On the Edge of Anarchy", chapter 3.

12 See Keith Hyams, "When Consent Doesn't Work: A Rights-Base Case for Limits to Consent's Capacity to Legitimise," *Journal of Moral Philosophy* vol.8 #1 (2011): 111

13 These include speech actions such as J.L. Austin's performatives. See J.L. Austin, *How To Do Things With Words* (Oxford: Clarendon Press), 5.

14 Simmons, "On the Edge of Anarchy," 71. Note however that Simmons agrees that promising does not equate

bases of political obligation, such as appeals to fairness.<sup>15</sup> Such appeals have their strengths, but suffer from a comparative lack of clarity (“Do I actually have an obligation in this case? What exactly is my obligation?”) and voluntariness (“Did I incur an obligation without intending to do so?”). From the perspective of those concerned with autonomy, there is something disconcerting about obligation that arises independently of my voluntary actions.

Second, promising and consent seem to generate obligations in roughly the same way. To see this, consider our reactions when someone breaks a promise. We may react in any number of ways, but the paradigmatic feeling is one of disappointment. Yet one could ask why disappointing others should be a moral wrong. The answer is that promising – or consenting – set up a particular kind of disappointment. When I promise something I create new obligations for myself, and in so doing generate claim rights for the promisee. These rights give moral force to the disappointment. It is one thing when I feel disappointed that my friend will not quit smoking, but it is quite another when I feel disappointed that my friend keeps smoking after promising that he would quit immediately. Even if I have no prior right to demand such a promise, once it is made I now have a right to make certain demands of my friend.

This disappointment is connected with our having anticipated future events. The consent theory literature oftentimes couches the wrongness of violations of consent-generated rights in terms of practical harm. For instance, Albert Weale says that

“By inducing reliance upon one’s own future performance (or non-performance),

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consent. For his discussion on the matter, see 75-78)

15 For a relatively recent version of this type of appeal, see Klosko, “The Principle of Fairness and Political Obligation”.

one is encouraging others to undertake their own plans and commit their own resources to a future course of conduct which they have reasonable grounds to believe will be supported (at least by non-interference) by the speaker. The speaker, is, therefore, obligated to act in accordance his consent by the general utilitarian principle that where others have planned their own future conduct relying on an undertaking one has voluntarily given, then one is obligated not to act in violation of the undertaking in question.”<sup>16</sup>

While this is a reasonable interpretation of disappointment from a utilitarian framework, one need not be a utilitarian to condemn broken promises or violated consent.<sup>17</sup> Promises and consent may also signal changes in relationships that have no immediate practical consequences.<sup>18</sup> The symbolic assertion of a particular type of connection may be important in itself. In other words, someone may be morally wronged by the violation of a promise even if the violation in no way affects what that person can or cannot do. For instance, my promise to be my niece’s godfather goes beyond signaling to her and to her parents that they can expect certain types of actions. I may consent to the role even if all parties know that I have a fatal disease that limits my life expectancy to a few bedridden years.<sup>19</sup> From the point of view of my niece, the importance of the relationship created out of my consent may outlast my own life. This type of reasoning can be – and as I shall argue in the next section of this paper, should be – extended to the wider political realm. As Joseph Raz puts it, “There are various attitudes toward society that consent to the authority of law can express. They can all be regarded as so many variations of a basic attitude of identification with the society, an attitude of belonging and of sharing in its

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16 Albert Weale, “Consent,” *Political Studies* vol.26 #1 (1978): 69

17 I should point out that some utilitarians might object to *any* instance of consent. For one prominent example, see William Godwin, *An Enquiry Concerning Political Justice and Its Influence on General Virtue and Happiness* (London: J. Watson, 1842), 150-156

18 See Joseph Raz, “Authority and Consent,” *Virginia Law Review* vol.67, #1 (1981): 125

19 I will parse out the difference between promising to be the godfather and my consenting to do so in the next part of this section

collective life.”<sup>20</sup> This additional understanding of the harm caused by violating promises or consent will, I will later argue, complicate the link between voting and consent.

Finally, promises and ostensible acts of consent share similar restrictions on their capacity to bind. Many of these boundaries will be familiar to most political theorists and have been neatly summarized by Keith Hyams. Consent fails if any of the following obtain: (1) an individual's alternatives are sufficiently unpalatable, especially if this is the result of coercion, (2) an individual does not understand that the “consenting” action in question counts as consenting, or has false beliefs regarding the background and consequences of this consent, (3) an individual does not have the general competence to consent. That is to say that the individual's inability to consent is not situation-specific. And (4) an individual is not authorized (morally or otherwise) to consent, given the substantive particulars of the agreement<sup>21</sup> These limits apply to both express and tacit consent, and serve as a reminder that these two “types” of consent are and as such help us treat them as instances of the same basic phenomenon.<sup>22</sup> These criteria apply equally well to promising. If we know what it means to make a promise, it would seem that we know a great deal what it means to consent.

### *Dissimilarities between consent and promising*

I have argued that promising and consent are analogous in that they (1) are voluntary obligation-creating acts that (2) create obligations on the promisor and rights for the promisee and that (3) are subject to roughly the same formal limits with respect to their applicability and

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20 Raz, “Authority and Consent,” 128

21 Hyams, “When Consent Doesn't Work,” 112-119

22 This is useful because relying too heavily on the distinction between express and tacit consent may lead us to erroneously believe that these two types of consent are different in a fundamentally important way

scope. Yet promising and consenting, and their disanalogies will prove to be useful in a later discussion of the obligatory force of voting.

First, consenting must involve multiple people. This need not be the case with promising. Looking down at my chocolate-smearred hands, I can tearfully cry out that I promised myself that I wouldn't eat the whole cake, but, assuming the cake was mine to eat as I saw fit, I could not lament that I consented to not eat the cake. Another way of putting it is that while promising require two people (since X promises Y that she will Z), a promise can occur when both people have the same identity (e.g., X promises X that she will Z) or when the promisee is hypothetical. Consent on the other hand can only happen between actual and different people. It makes sense to say that I promise (to) myself that I won't eat the cake, but telling myself "I consent to not eat the cake" implies a separation of self that seems too extreme. I can promise my deceased grandmother that I will quit smoking, but I cannot say that yesterday I went to her grave and consented to quit smoking. Voting, I will argue, is an act that is necessarily other-regarding.

If promises are broader than consent in one respect, they are narrower in another. Promises are always either future-regarding or reality-affirming. The most typical type of promise is one that commits me to do something or to refrain from taking action at some point in the future. For instance, a promise to be my niece's godfather implies that I must take on that role at some appropriate future time. I can also use promises to reassure someone that we do in fact have a certain type of relationship. Someone may tell an insecure friend "I know that you worry that I take you for granted, but I promise you that you're my very best friend."



Consent may also be future-oriented or reality-affirming, but it has the added feature of being able generate a new type of relationship in the present. I may promise my sister that I will be my niece's godfather, but at a given moment in time I must *consent* to take on the role. My promise may commit me to consent at a future date, but my status with respect to my niece only changes once I have actually consented. Once I have done so, my relationship to my niece changes immediately. The same is true when I agree to waive certain rights. A promise to waive rights is a commitment to do so in the future; consenting to waive rights may in some cases be similar to a promise, but in other cases my consent constitutes the precise moment in which the rights are waived.

That promises do not create immediate new relationships might be best understood by considering that promises are generally only made to people that already know each other. Promises are typically informal. It would be odd to make a promise to a stranger without at least an indirect appeal to a common identity (e.g., “I promise you, from one gentleman to another, that I will pay you back.”) or to the prospect of likely future encounters (e.g., promising the manager of a bar I frequent that I will pay my tab the next time I come in for a drink). Promises, in other words, are *personal*, and in such cases there simply is usually no cause to establish a fundamentally new type of relationship between people. Even in the context of a formal setting, a promise is a type of aside – when I promise the judge that I will change, I am interjecting a moment of personal appeal in an otherwise impersonal setting

Consent, on the other hand, is more formal than promising and adds an impersonal quality or formality to a relationship. This is not to say that consent cannot take place between intimates, but it does so in a peculiar way. Consider once again the case of my consenting to be a godfather. Although I know my sister and my niece,<sup>23</sup> my consent marks a special, ritualized occasion in which others recognize a sudden shift in my formal relationship with my niece.<sup>24</sup> Or consider consent's role in sexual encounters. Consent's informal connotations are clear in cases where strangers engage in anonymous sex. Consent in this case refers to and introduces a codified, institutionalized (by reference to law, morality, or both) interpretation of the relationship. This is clear in the case of strangers, but it also applies to long-standing, emotionally intimate partners. The fact that consent occurs, even if it is unstated (say in the context of a monogamous couple that has long-standing mutually desired practices of sexual contact), means that the partners' status towards each other is to some extent a formal one. Consent, in other words, simultaneously binds and distances us.

*Consent, promising, and informality*

Consent is thus what allows us to make promise-like agreements with strangers. Knowing this, we may be tempted to come to the erroneous conclusion that the informal limits of promises are socially determined and that the limits of consent are explicitly specified. This overstates the difference between the two. All instances of promising and consent, however formal or informal, rest on unspoken and in some cases possibly unspeakable understandings of the content and limits of the symbolic actions in question. This is obvious in the case of promises. To illustrate: a

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23 To the extent that I can “know” a young baby.

24 This formality does not need to be encoded in a system of laws if the social understanding of the impact of my decision is sufficiently well-established

friend may ask me as we enter a bar, “If anything goes down, do you promise that you have my back?” If I say “yes”, a promise has been made even if neither of us is precisely sure what exactly is meant by “goes down” or to “have someone’s back”. By saying “yes”, I clearly agree to some types of actions by virtue of my status as a friend. Given our relationship, this may mean that I should talk him up if he starts flirting with someone. Yet my friend cannot take my promise to mean that I will fight alongside him if he decides to start a brawl. This is because he is *my* friend and he knows that I would not agree to such a commitment. The promise would not be binding because it would violate Hyams' conditions; I would not know what the promise meant. In some cases and with some people, however, “having someone’s back” has nothing to do with helping them flirt and actually *does* mean to fight alongside them if a brawl erupts for any reason. In each case the content of the agreement is filled *in after* the agreement has been made, and the content is limited to our mutual understanding of what types of practices agreement could entail in this context. To the extent that we share an understanding of the local rules, agreements need not be spelled out for obligations to be created. Elaborate specification is simply unnecessary<sup>25</sup> When two people are acutely aware of their different interpretive strategies, we move from the realm of promising to consenting, and this requires more explicit agreements.

Even cases of consent between strangers rest on unspoken understandings. In some cases the participants may know the boundaries and meaning of consent without ever having articulated them. Consider the following example. Jill and I play speed chess for twenty dollars a

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25 This is in line with Pateman's assertion that “ [...] if citizens are to consent then, as in the social practice of promising, they must be able to ascertain what kind of commitment they are undertaking and whether good reasons exist for them to do so.” (Pateman, *Political Obligation*, 88). The key is the specifics need not (and cannot) be fully fleshed out prior to the act of consent.

game at a cafe. After getting thrashed repeatedly, I decide to call it a day and leave. Sadly looking down at the chess pieces, I silently place them on their starting squares. Jill, sitting in front of the white pieces, immediately moves a pawn up two squares, starting a new game. In this case, my intended meaning was to set up the board for the next player, but Jill could plausibly say that she understood my action as an indication that I was consenting to play her again. Indeed, that was part of my intention the previous times I set up the board.<sup>d.26</sup> If I were to get up after this most recent pawn move, Jill would earnestly say that in doing so I would be forfeiting the game and that I would owe her another twenty dollars. By setting up the pieces, she would continue, I made a series of active gestures that are similar in kind to yelling “aye”.

This example shows is that questions of intent or mental state matter. Intentionality matters because it allows others to assess my competence. There are three questions to be answered here. First, was I being coerced into taking the action? Second, how firmly ingrained were the social expectations attached to my action? Third, and by way of conclusion: am I competent enough to consent? In this case, the answer to the first question is obvious: there is no coercion. Answering the second requires some knowledge of on-the-ground facts. What does my setting up a chessboard mean? In most cafes, it would likely be understood as expressing *interest* in starting a new game, but not that I grant the other person the right to take my twenty dollars if they start moving pieces without some other signal of assent on my part. But in some cafes this is not the case; in these places “everybody knows” what setting up the board means. If I go to such a cafe for the first time and am surprised by this unspoken rule, my consent may be vitiated on

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26 However even in those instances I wasn't merely signaling a desire to play a new game; I was also actually setting up the pieces for whoever was going to play next, whether or not that person would turn out to be me.

the grounds that I am incompetent. Thus the answer to the third question will depend on the answer to the second one. My incompetence may vitiate my signal of consent, although it would do so at the cost of marking me as an outsider, one who likely would not have access to some of the formal or informal privileges of membership in the group. Note that the likelihood of my consent's being vitiated is tied to how reasonable others believe my ignorance to be. To the extent that my ignorance is seen as unjustifiable, I am liable to pay heavier and heavier social penalties for my social incompetence. I cannot eat my cake and have it too; I cannot excuse myself from my obligations while maintaining the social and psychological advantages associated with connection to a meaningful community. It is useful to pause and remember that at this point, my incompetence is purely contextual – no one doubts that I am a sane man who is capable of consenting in many other contexts. It is only if I were to repeatedly violate these norms that I would be deemed either morally blameworthy or incompetent in a general sense. Finally, so long as my incompetence is seen as contextual, others may come to justifiably argue that my ignorance does not excuse the fact that my apparent consent created legitimate expectations on their end and that I am bound to follow through as though I had really consented. It is only when there is a consensus that I am *generally* incompetent that this line of argument fails. In such a case, and only in such a case, others would judge Jill to be in the wrong when she demands payment for the aborted game. This scene, I will argue, is analogous to some cases of voting.

### **Section III – Voting**

If we begin with the premise that voting is somehow connected to obligation, we can

easily see the affinities between voting and consent.<sup>27</sup> First, voting does not in principle violate any of Hyams' four restrictions on the scope of consent.<sup>28</sup> Second, voting is a voluntary, symbolic, other-regarding act. Yet voting is not necessarily akin to promising, although it may be in some cases. Most instances of voting are tied to an institutional structure and take place without regard to the personal relationships one may have with other voters. For a vote to be a promise, the voter would have to have quite a high affinity with the other voters.

Voting may bind in at least two different ways, and only one of these is compatible with the practice of promising. On the one hand, we may see a vote as a commitment to perform certain actions in the future, such as obeying the laws or refraining from overthrowing the elected government. This interpretation describes voting as a future-regarding act, and is consistent with interpreting votes as either promising and consenting. On the other hand, recall Raz's assertion that consent can also create relationships. Voting may do the same. As I will discuss below, the social significance of the vote may in some cases be analogous to my agreeing to be a godfather. It has more to do with the creation of a meaningful identity than as a commitment to perform concrete actions.

### *Voting does not entail consent*

Before discussing how voting can bind, it is worth considering and dismissing the argument that voting entails or is constituted by consent. J.P. Plamenatz takes this position in his

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27 I will return to this premise later in this paper

28 There are particular cases where this is not true. The most common violation problem with voting is that it may violate the non-coercion clause. Even well-regarded democracies such as Australia violate this clause when they fine citizens for not voting. My analysis does *not* apply to such cases. To put it bluntly: voting does not involve consent in Australia.

postscript to the second edition of *Consent, Freedom, and Political Obligation*:

“Surely, to put a cross against the name Smith on a ballot paper at an election is to express the wish that Smith should hold the office for which he is a candidate? But the voter may not want Smith to hold the office; he may think that Smith has no chance of getting elected and may vote for him only for the sake of preventing the election of Brown. Yet, if Smith were in fact elected, it would be odd to say of anyone who had voted for him that he did not consent to holding the office.”<sup>29</sup>

The idea expressed here and throughout the postscript is that so long as elections are free and fair, to vote means to “... consent to the authority of whoever is elected to the office.”<sup>30</sup> In other words, Plamenatz is saying that it is correct but insufficient to say that the symbolic meaning of my vote for Smith is merely that I consent to give my vote to Smith. It is insufficient because “giving my vote to Smith” can only be done in a context where it is understood that the meaning of my so doing is tied to my participation in a scheme whereby authority is (usually) conferred to the person or party that gets the most votes. Voting for Smith, the argument goes, cannot even be a coherent act without this background, and so to give him one’s vote necessarily means to endorse the procedure that makes voting conceptually coherent.

This is too strong, however, and this position is subject to a number of replies. First, many people who repudiate the democratic process vote nonetheless. A subset of revolutionary socialist groups in particular has advocated using voting (among other methods) to lay the groundwork for a socialist revolution that would overturn liberal democracy. Revolutionary socialists who vote are not being incoherent; they are using means at their disposal to achieve their goals. They may vote in between sessions of openly (whenever possible) handing out

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29 J.P. Plamenatz, *Consent, Freedom, and Political Obligation (2<sup>nd</sup> Edition)* (New York: Oxford University Press, 1968), 168

30 Plamenatz, *Consent, Freedom, and Political Obligation*, 170

leaflets denouncing democracy as we know it. One objection to this may be that these revolutionary socialists' actions are parasitic on the understanding that voting implies consent. If everyone acted as they did, the objection continues, there would be no voting procedures at all. In other words, this objection essentially says that revolutionary socialists who vote are as coherent as liars. The fact that a liar is acting coherently in a practical sense does not excuse her from the obligations she incurs when she utters statements that others take to be true. Analogously, perhaps the revolutionary voter incurs obligations regardless of why she votes, since the meaning of voting cannot be understood without reference to binding consent. But there is an important distinction here that differentiates liars from revolutionary voters. Liars implicitly endorse a persistent regime of truth telling so that they can maximize the benefits of their lies. The longer the regime of truth telling holds, the better for the liar. This is not so for the revolutionary socialist who votes. This type of voter *openly* wants to remove the regime of representative democracy and does not necessarily object to the entire process becoming degraded. What these voters are doing is tantamount to a liar announcing "I don't owe you the truth" before making substantive statements.

The second reply is that in some accounts of democracy, the values that justify some to endorse democratic procedures in some cases may lead them to undermine democracy and voting in others, notably when doing so serves those higher-order values. This does not apply to all justificatory stories of democracy, but it does apply to some plausible, instrumental ones. For instance, consider a story where it is widely accepted that a democratic regime is justified instrumentally, i.e., that it is justified because a group of people judges it to be the best practical



way for people to advance their interests. These people advance these interests by joining groups, pressuring governments, forming coalitions, and so on. Nothing in this story says that anyone sees democracy as something inherently valuable. In fact, given the antecedent values that justify democracy in such a scheme, to vote in this case does not seem to give any deep legitimacy to the democratic procedures as such, and the superficiality of these democratic procedures will presumably be well known. For example, if the antecedent value is negative liberty, then a given person's vote cannot confer deep legitimacy to a regime which, it is later discovered, turns out to be suboptimal in terms of promoting that antecedent value.<sup>31</sup> The same holds true if the generally accepted antecedent value is egoistic enjoyment. This is again different from the case of the liar in the previous paragraph. If most people sincerely endorse a version of democracy akin to the one I just described, then the truth of the symbolic statement of each individual act of voting must be understood not as a binding social norm, but as an instance in a series of calculations in a kind of game. To deceive others in such circumstances is clever sportsmanship, not a moral violation.

Third, it is not clear what, other than Smith's being in office, Plamenatz' voter is actually consenting to. Governments are complex entities; even the simplest ones have sub-units, units which are oftentimes themselves organized via elections. If Smith is running for a municipal position, I understand Plamenatz to be saying that I am consenting not only to Smith's winning that municipal election, but also to the municipal election as such. But municipal elections are held under the auspices and rules of state or provincial governments; as such, the rules for

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31 As Rex Martin argues, no regime that relies on an external standard in order to generate legitimacy is guaranteed to be safe from being replaced by a regime that is taken to be more in line with that standard. See Rex Martin, "Wolff's Defense of Philosophical Anarchism," *The Philosophical Quarterly* vol.24 #95 (1974): 143-147

municipal elections can usually be changed by these higher-order governments. Does my vote for Smith also constitute consent to this oversight and set of rules as well? If state or provincial governments are under the authority of a federal government, or a body such as a supreme court, must my vote for Smith for town sheriff imply a far-ranging endorsement of the national government? We know that this can't be the case, but the conceptual argument that voting necessarily implies consent has difficulty specifying the limits of that consent. As I will argue, this problem dissipates if we accept the contingent link between voting and consent; in such cases contingent factors determine the substance and limits of consent.

Two further examples will hopefully illustrate that voting is not necessarily attached to consent. First, various governments at times hold non-binding referendums – plebiscites – to gauge public opinion or to help legitimize a controversial course of action. Clearly voters in these plebiscites are not consenting to anything when casting their vote. Perhaps someone might reply to this that that plebiscites are not cases of *actual* voting and that they really amount to glorified opinion polls. Real voting, this line of thought continues, must imply a symbolic action that directly contributes to a decision. This reply is unsatisfactory. If the reply is saying that voting is constituted by consent because voting must imply making a decision, then it comes dangerously close to question begging. If instead the reply is trying to show that our ordinary use of the term “voting” implies consent, then it must contend with the retort that people who take part in plebiscites do call what they are doing “voting”.

Finally, people vote in autocratic regimes, and it is not clear what to make of the meaning

of these votes. Few people seriously believe that voting in such cases constitutes taking on any meaningful obligation with respect to that regime. The point isn't that voting in such conditions violates Hyams' non-coercion clause; in many cases citizens are free to abstain from voting. Indeed, many autocratic regimes want nothing more than for their citizens to abstain entirely from politics. The point is that if voting implies consent, then voting in such a regime would imply consenting to obeying an unjust regime. Consent theorists may disagree amongst themselves about why voting in this case would not constitute real consent – some would say that it's because one cannot consent to the performance on an unjust act while others would say that we could not plausibly expect that people would really endorse this kind of regime – but virtually all would agree that this type of voting should not bind. Nor is the problem with voting in autocratic regimes the fact that one's vote is usually meaningless. A meaningful vote between two unjust options should also not bind.<sup>32</sup> In some cases the lack of just options is clear to everyone. In other cases, such as in pseudo-democracies, the justice of the regime is ambiguous and subject to reasonable disagreement.<sup>33</sup> These are not cases where voting must imply consent. When there are multiple bad options, someone may sensibly vote for the slightly lesser of two evils whilst denying that the regime is legitimate or that his vote constitutes consent to anything whatsoever.

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32 This was nicely illustrated in an early episode of *The Simpsons*. Two hostile space aliens, Kang and Kodos, manage to make themselves the presidential candidates for the Democratic and Republican parties, and thus become the only viable choices. In the final scene, humanity is enslaved under president Kang. When Marge complains, Homer replies "Don't blame me! I voted for Kodos!" *The Simpsons*, "Treehouse of Horror VII," Fox, October 27, 1996, written by David X. Cohen

33 Indeed, in such cases a common strategy by leaders of such regimes is to *encourage* participation in elections in order to draw on the legitimacy that voting confers in robustly democratic regimes, all while trying to manipulate elections just enough to block regime change. For example, see Andreas Schedler, "The Nested Game of Democratization by Elections," *International Political Science Review*, vol.23, #1 (2002). For further disambiguation on why different types of authoritarian regimes have different goals qua citizen participation, see Juan J. Linz and Alfred Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe* (Baltimore: The Johns Hopkins University Press, 1996), 44-45

*Social understandings of the link between consent and voting*

The upshot of this extended discussion is that Plamenatz mistakenly argues that voting and consent are conceptually linked. I instead take the more modest position that if voting is linked to consent, it is because there is a contingent but socially accepted link between the two. This is a position many people seem to intuitively hold, and this position has a historical basis. For instance, Bernard Manin argues that governance by lot disappeared with the rise of government grounded on the principle of consent, which in turn was to be expressed via voting: “Under an elective system [...] the consent of the people is constantly reiterated. Not only do the people agree to the selection method – when they decide to use elections – but they also consent to each particular outcome – when they elect. If the goal is to found power and political obligation on consent, then obviously elections are a much safer method than lot.”<sup>34</sup> The importance of this consent grew from the Middle Ages onwards as repeated application of established a belief that consent was a source of political legitimacy, and representative government emerged as “... citizens were now viewed primarily as the source of political legitimacy.”<sup>35</sup> Voting, consent, and legitimacy seem intertwined as a matter of fact even if no neither concept logically entails the other.

This contingent understanding of the link between consent and voting is useful in helping us determine what is going on when someone believes that she is consenting when she casts a vote. As I pointed out in my discussion of Plamenatz, even if he is right when he says that voting

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34 Bernard Manin, *The Principles of Representative Government* (Cambridge: Cambridge University Press, 1997), 85

35 Manin, *The Principles of Representative Government*, 88-92

confers legitimacy by way of consent, he cannot clearly state the precise object of this consent. Achim Hurrelman et al argue, for instance, that voting can confer legitimacy to at least four conceptually separate levels of government.<sup>36</sup> So far as I can see, there is no way to specify a priori to which level(s) are being legitimated when one casts a vote. This problem, while conceptually insoluble, is as a practical matter oftentimes easy to sort out. Take for instance a relatively hands-off dictatorial regime, one that holds sham national elections. In this case it is possible that “everybody knows” that voting in the national election is something of a joke, but that voting in certain smaller scale, local elections is actually meaningful. It may be widely accepted that voting in these smaller elections does imply consenting to the local authorities or decisions pertaining to specific governance issues without implying that one is consenting to the national regime that serves as a backdrop for these local elections. Voting, like playing chess in a cafe, has a very clear meaning to the participants, and this meaning may be difficult to see from the outside looking in.

Without trying to catalog a precise list of obligations we incur when participating in elections, what kinds of things *are* we agreeing to when we vote? In some cases, it might be understood that voting means performing specific actions that support the regime or refraining from taking actions which harm it. Some such actions may be quite clear given the context of the election. Yet voting oftentimes goes beyond a commitment to particular actions and may also constitute a signal that the voter is a member of the democratic polity in some important sense.

Just as how my agreeing to be a godfather means something that goes beyond the pragmatic, in

36 Specifically, and from most to least fundamental, voting can indicate consent to (1) regime principles, (2) the political system or community as such, (3) core political institutions, and/or (4) groups of actors. See Achim Hurrelmann et al., “Why the Democratic Nation-State is Still Legitimate: A Study of Media Discourses,” *European Journal of Research* vol.48 #4 (2009): 495-499

some cases being a voter might signal to other members of the community that I am entering into a symbolically important relationship with other voters. This relationship does not necessarily imply the creation of any practical duties, and yet finding out that one was deceived about the nature of such a relationship may sting nonetheless, and this because this relationship helps constitute our identity. One might imagine the sting to be analogous to the type of pain someone would feel if he found out that his spouse never loved him, never even “really” thought of him as a spouse at all, but that the spouse was prepared to keep up the same “correct” spousal routines nonetheless. Nothing changes in terms of concrete action, but this aggrieved spouse would likely be justified in feeling not just hurt, but somehow wronged. It is in this sense that voting is analogous to the chess scene described in the previous section. By flouting socially understood rules of consent, I harm those for whom those rules are important and I exclude myself from the community in important ways. It is one thing if I merely refuse to consent; it is far worse if I effectively tell someone that we have one kind of relationship only to have her discover after the fact that I had lied.

Lest this type of symbolic action seem too ephemeral to generate real obligations, I should point out that ironically, the less a vote's practical value, the more it becomes an exclusively symbolic act that has the capacity to bind. On the surface, it would seem that active involvement in the democratic process, including the possibility that one's actions could create a meaningful change in the outcome, should bind citizens more strongly than a throw-away vote where they are one of several million. This may be the case for reasons pertaining to other legitimation theories, but from the perspective of consent theory it is precisely when my action

can have a direct impact on the world that I can plausibly say that the purpose of the action was this practical effect and not a signal of consent.<sup>37</sup> In other words, if an action (such as casting a vote) can be understood to have concrete effects, we may argue that these effects – not consent – constitute the purpose of the action. “Meaningless” actions have no concrete effects, and so can *only* be plausibly understood in terms of their capacity to signal consent.<sup>38</sup>

### *The non-consenting voter*

This does not bode well for someone who wants to vote for practical reasons but who does not want her vote to signal consent. This voter may be able to get away with voting in small, local elections, on the ground that her vote really might make a difference. She could not plausibly say that this is the case, however, when she decides to vote in the next presidential elections. In the vast majority of cases, she will not believe that her vote will be decisive (or even that her vote will be the decisive example that incites others to vote), and others will know this as well. In many cases people will thus understand the vote only in terms of its expressive, symbolic value.

Can this non-consenting voter vote in good conscience? The answer must be “it depends”. To the extent that voting is socially understood as a pragmatic act, she can do so. In such a case it would be the few who believe that voting should have an additional symbolic import who would be frustrated come election time, since they would be the eccentrics who see

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37 Again, I should emphasize that it is not the mere fact of my intentionality that matters, but the fact that others may plausibly believe that I intended something other than consent. In other words, the nature of my action is, from the perspective of others, indeterminate.

38 This also applies to actions that people believe to be meaningless. The symbolic meaning of my vote does not change even if it turns out that voting really does make a difference.

elections as more than a simple exercise of practical power. But to the extent that voting is seen to imply that one is performing an act that either creates obligations to act or demonstrates allegiance to a meaningful community, the non-consenting voter has a problem. Even in cases where the social significance of voting has been brought about for cynical reasons – e.g., propaganda, jingoistic rhetoric, etc – it nonetheless has a social significance that others take seriously and that is understood to constitute consent.

The non-consenting voter nonetheless has one more option available to her. Since her problem is that her act is reasonably being construed in a certain way, she may try to signal in advance that her decision to vote has one meaning and not another. Essentially, she must perform enough symbolic actions of sufficient clarity to signal that it is unlikely that her vote would be intended to signal consent. Others might be annoyed with her for blaspheming what they take to be an important symbolic ritual, but this objection is not of the same kind, nor is it as strong, as the objection that she reneged on her consent. As long as there are sufficiently good reasons for this non-consenting voter to vote in spite of the “blasphemous” character of her action, it will be difficult for others to say that her use of the vote must bind her for reasons pertaining to consent.

This “alternative signaling” can be done individually or institutionally. Individually signaling one’s refusal to allow one’s vote to count as consent is possible but can be fraught with confusion. Except in the most extreme cases, it is rarely clear whether or not someone has done enough to demonstrate that their vote should not be understood as an act of consent. This problem can be overcome if there is a recognized political or social group with which the non-



consenting voter identifies and with which she can publicly affiliate. Someone sympathetic to non-consenting voting may object based on their worry that adherence to any official or even recognized political group, including those that advocate separation or revolution, legitimizes the political system in which the group takes part, and does so by its mere existence. Yet this need not be the case. We can imagine without difficulty a party dedicated to destroy or radically alter the political and social landscape by any means necessary. It is hard to see how joining such a group would be legitimating if it was well known that it also undertook a great number of delegitimizing actions. Incidentally, if a regime were to ban certain types of parties – including those that would be a home to the non-consenting voter – then the responsibility incurred by the voter to advertize her beliefs diminishes accordingly. This responsibility does not necessarily dissipate altogether, but to the extent that she does not live in a free and open regime, it is attenuated because acting on this responsibility would constitute an unreasonable burden. Thus her lack of opportunity to express her beliefs via an established party does not mean she must perform supererogatory actions to express her beliefs on an individual level.

Finally, the non-consenting voter's burden increases to the extent that she lives in a free and open society. This is so for at least three reasons. First, she cannot be plausibly expected to announce her intentions if doing so means incurring severe penalties. Her doing so under these conditions would make her heroic, but we generally do not demand heroism, and thus her act would be supererogatory. To the extent that her society is free and open, she does not have this excuse. Second, it is very likely that in such a society she would have many practical avenues by which she can express her beliefs and thus signal the true meaning of her vote. Third, to the

extent that a society is free and open, people will have good common-sense reasons to believe that sane adults consent to the regime as a general rule. When the political and social climates seem just and conducive to allowing the citizenry to flourish, dissent seems surprising and so it makes sense to assume that people are consenting unless they forcefully announce that they are not doing so. This belief increases the likelihood that voting will be understood as an act of consent. Dissent is still possible in such cases, but the burden of explanation shifts to the person who, seemingly against all logic as far as the other members of the society are concerned, is dissenting.

#### **Section IV – Conclusion**

The purpose of this paper has been to argue that there are some cases where voting can constitute consent. Consent to do what, to whom, and under what conditions? These are questions that cannot be answered a priori. To the extent that voting is socially understood to constitute consent, then like it or not, it does so. Voting is not necessarily attached to consent, but an individual's belief that voting somehow does have something to do with consent is neither random nor irrational. When one votes, one must face the fact that one is creating reasonable expectations. Perhaps this involves the expectation to perform specific actions, or perhaps this "merely" involves a recognition that voting helps constitute or endorse a meaningful shared identity. In either case earnest consenting voters would be right to feel wronged when discovering that a particular person voted and later announced that the vote should not count as consent. Yet it should be possible for this non-consenting voter to be able to partake in the other meanings of voting, and this can be done by signaling what her vote is intended to mean. To the

extent that she lives in a free, open, and just society, this will be an onerous task if she does so as an individual. She can facilitate the communication, however, by aligning with a party or recognized group which is understood to believe that voting, or at least the type of voting in question, does not constitute consenting.

Even if all this is correct, this paper's scope is nonetheless limited. It says that it is possible (and I believe probable) that in some cases, voting does constitute consent and that voters thus incur political obligations. It does not however settle the debate between philosophical anarchists and those who argue in favor of the legitimacy of the state. The glaring omission is the status of non-voters. This is outside the scope of the paper, but I will make two closing remarks on the matter. First, one strategy on the side of those who argue against philosophical anarchism may be to argue that people have a duty to vote so long as the elections are free and fair. Singer in particular takes this line in his *Democracy and Disobedience*.<sup>39</sup> The danger here for consent theory is that if one has an obligation to vote on a ground other than consent, then that prior ground (and not consent) would seem to be doing the justificatory work. Political obligation would exist, but not for reasons tied to consent. Second, perhaps it is the case that non-voters should have a different status with respect to their duties toward the state. One intriguing line of thought is that voters may have a duty to obey laws because they have consented to do so (or have through their voting demonstrated that they are part of a collective with a meaningful shared identity and so are bound to follow the decisions of that collective), whereas non-voters obey either for other reasons or because they are justifiably coerced into doing so. This latter possibility is especially interesting and should be investigated further. Perhaps the

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39 Peter Singer, *Democracy and Disobedience* (London: Oxford University Press, 1973), 31-39

coercion of non-voters voters would indeed be justified, but it would remain coercion nonetheless. If this speculative line of thought were correct, it would amount to saying that the fundamental connection between citizens may not be as undifferentiated as many democratic theorists hope.