Democracy and the Justification of Political Authority

Li-Kung Chen

St Edmund Hall

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Abstract

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This thesis investigates the place of democracy in the justification of political authority. The investigation of the thesis proceeds in two parts. The first part considers the lines of argument that being democratic is necessary for political authority to be fully justified. Anna Stilz argues that the subjects have general obligation to obey the law only if they are free from political domination, which freedom is available only in the democratic State. Philip Pettit argues that the freedom from domination does not affect the subjects' obligation to obey the laws, but is constitutive of their obligation to 'accept a regime', i.e. to refrain from revolting against a regime. David Estlund argues that the State's right to enforce the laws is justified independently of its capacity to obligate the subjects to obey the laws, and that the former right is uniquely conditional on the political decision-procedures' being democratic. Thomas Christiano argues that it is the ruler's 'right to rule', i.e. a claim-right correlative with the subjects' obligation to obey, which turns on the existence of a democratic assembly. These arguments fail to make sufficient room for the fundamental principle of political authority: as outlined in John Finnis's argument, political authority is required for the solution of a community's co-ordination problems for the common good, and it is to be exercised by those who have efficacious capacity to do so. Democracy does not change what it is to be justified authority in accordance with the fundamental principle. The second part supplements the fundamental principle by identifying two important ways in which democracy bears on the legitimacy of the State. First, democracy affects political legitimacy if and only if democracy is viable in the relevant community. Secondly, it is the laws that regulate legal change – as distinct from laws that regulate other official and social conduct – that depend for their authority on democracy.

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1

Introduction

In many scholarly conversations today, democracy is considered necessary for political authority to be justified. According to this line of thought, only in a democratic State the subjects are morally obliged to obey the laws and to undergo various sorts of State action. This democratic-centred view of political legitimacy is especially discernable in contemporary democratic theory: in demonstrating how democracy uniquely gives rise to legitimate authority, theorists tend to draw the conclusion that undemocratic forms of government lack full authority. This view departs from more 'traditional' accounts on which democracy has no important place in the justification of political authority. As Thomas Christiano notes, traditional discussions of authority 'rarely… turn to

democracy as a possible source of authority'.[1] Rather, there is a long-standing line of thought that political authority is justified because it uniquely realises the benefits of security, order, and opportunities for progress. It follows that democracy may change who it is that exercises political authority, but not what it is to be justified authority. In the face of the rival views on the justification of political authority, this thesis aims to defend the traditional view that a well-ordered State, be it democratic or not, is justifiable for its efficacious capacity to settle co-ordination problems for the common good. While rejecting the democratic-centred view, the thesis also aims to enrich the traditional view by identifying how, if at all, democracy indeed matters to justified political authority.

In the thesis, the term 'democracy' refers to the form of government which allows all sane adult members of a community to participate in political decision-making, usually in the form of legislation. Such participation is effected either by letting all members exercise the legislative power directly or by letting them elect some officials who exercise the power on their behalf. Understood in this way, any theoretical account offered to vindicate a broadly similar form of

[1] Thomas Christiano, *The Constitution of Equality: Democratic Authority and Its Limits* (OUP 2008) 243.

government is taken by me to vindicate democratic government, irrespective of what fundamental moral principle the particular account relies on to develop its conception of democracy. Choosing this broadly ecumenical strategy, the thesis does not intend to determine a 'true conception' of democracy. That is to say, although the thesis cares to explore the various moral principles of democracy, it does not judge which of them should be given a primary place in the theory of democracy.

This strategy, I say, is sufficient for the thesis.[2] For whatever moral principle of democracy a theory chooses, a theory always has to endorse the foregoing form of government in order to be a theory for and about democracy. Whenever a theory ceases to endorse that form of government, it ceases to be democratic, regardless of what principle it appeals to or whether it professes to be democratic. Hence, any conception of democracy that is compatible with the form of government I specified above is compatible with the conception of democracy used in the thesis.

[2] It would be *insufficient* for a thesis on the nature of democracy. Avoiding anchoring the conception on a particular principle, the strategy does not identify the reason for which democratic government is preferred. The resultant conception of democracy would have the disadvantage of being 'superficial', as with the 'ancient' approach criticised by Hans Kelsen. As Kelsen notes, the ancient trichotomy between monarchy, aristocracy, and democracy is the 'organisation of the sovereign'. That is, monarchy is defined by the rule of one person, aristocracy the few, and democracy the many. See Hans Kelsen, *The General Theory of Law and State* (Harvard University Press 1945) 283-4.

The thesis proceeds as follows. In chapters 2, 3, and 4, I examine various versions of the argument that democracy is necessary for political authority to be fully justified, which examination serves the critical purposes of demonstrating the ways in which democracy does *not* bear on the justification of political authority. I begin, in chapter 2, by introducing two rival views about justified political authority: the 'strong view', which thinks democracy is constitutive of justified political authority, and the 'classic view', which does not think so. By examining Anna Stilz's argument that democracy is always necessary for the subjects to obey the law, I identify the basic problem of the strong view, which problem the classic view manages to avoid. I go on, in chapters 3 and 4, to consider other strategies to develop the strong view by Philip Pettit, David Estlund, and Thomas Christiano, who associate democracy with some special subset or aspect of the subjects' obligation in relation to the State, apart from the obligation to comply with the State's directions. The consideration of such accounts reveals that democracy is not constitutive of the special subset or aspect of political obligation either, drawing a conclusion that is more consistent with the classic view.

The critical evaluation of the strong view paves the way for the constructive work of identifying the true place of democracy in the justification of political

authority. In chapter 5, I offer my own account, which consists in two principal arguments. Firstly, I supplement the classic view by contending that democracy bears on political authority if and only if democracy is viable in the relevant community. Secondly, I distinguish the laws that regulate legal change from laws that regulate other official and social conduct, and thence argue that it is the laws of legal change – and those laws only – that depend for their authority on democracy. Considered together, my arguments suggest this: whenever democracy becomes viable in a community, autocracy (i.e. non-democracy) ceases to be legitimate. And if the incumbent undemocratic regime continues to act in ways inconsistent with its own disappearance, the subjects are justified in flouting the existing laws of legal change to forcibly effectuate democratic transition. Apart from that, the subjects remain morally obliged to obey the laws of social conduct insofar as those laws are reasonable.[3] However, while their obligation to obey remains, I add, the subjects have good reason to amend the laws made during the old regime's illegitimate continuation, which reason is unavailable if the regime is legitimate.

[3] In other words, the subjects have to obey all reasonable laws (of social conduct) passed *before and after* the incumbent undemocratic regime becomes illegitimate.

2

Democratic Theory's Authority Problem

In this chapter I introduce two rival views about the justification of political authority. On the one hand, there is the 'strong view' which argues that democracy is necessary for political authority to be justified. On the other, there is the 'classic view' which argues that a capacity to solve co-ordination problems for the common good is necessary and sufficient for political authority to be justified. Two views disagree over the place of democracy in the justification of political authority, viz. whether democracy is necessary for justified political authority. The chapter focuses on the simplest form of the strong view, arguing that its inconsistency with the classic view turns out to be its defect too.

2.1 The Strong View in Contemporary Democratic Theory

Democracy can be discussed as a matter of political ideals about what the *best* government and political or social ordering should be. Such ideals do not have to bear on the necessary or sufficient conditions in which a government is justified and entitled to the subjects' allegiance. As John Finnis writes,

> Being democratic is not a sufficient condition for a society's being just and worthy of allegiance… But being democratic is indeed, as Aquinas already taught, a necessary condition for its being ordered in the best way.[1]

Whereas Finnis here contends that democracy is a necessary condition for the *best* social ordering, he leaves open in this passage the question as to whether democracy is a necessary condition for a society's *being just and worthy of allegiance*.[2] It is the latter question and theoretical accounts offered to answer it that are the concern of the present and succeeding chapters.

For many in the West and elsewhere, democracy stands for 'the only legitimate form of government'.[3] Theoretical attempts to elucidate and vindicate

[1] John Finnis, 'Unjust Laws in a Democratic Society: Some Philosophical and Theoretical Reflections' (1996) 71 Notre Dame L.Rev. 595, 595.

[2] I take this also to be a question about the State's being just and worthy of allegiance, to the extent that the State plays a central role in making the society just.

[3] Hélène Landemore, *Democratic Reason: Politics, Collective Intelligence, and the Rule of the Many* (Princeton University Press 2012) 1. Note that 'elsewhere' is added by me; Landemore focuses on the West in her own passage.

this claim can indeed be found. I term them the 'strong view' in this thesis. What characterised the strong view is this broad proposition:

> (SV) Being democratic is necessary for a political authority to be *fully* justified.

The phrase 'fully justified' will be clarified as I proceed to examine four accounts of the strong view that try to demonstrate how exactly democracy is related to justified political authority. In this chapter, I focus on the simplest account of the four, which supplies the strong view's basic structure and also reveals its fundamental problem. I term the simplest account the 'simple strong view', which is characterised by the following proposition:

> (SSV) Being democratic is *always* necessary for a political authority to be justified.

Anna Stilz's theory provides an articulate instance of (SSV). Stilz terms her account the 'Kantian-Rousseauian view' of the State, arguing that a legitimate State authority must always fulfil a set of substantive and procedural criteria

originally developed in Kant's and Rousseau's theories.[4] By legitimate authority, Stilz, following the traditional understanding, means the State's justified competence to create obligation to obey its direction on the part of the subjects.[5] It follows that if the political authority is justified or legitimate, the subjects are obligated to obey its direction precisely for the reason that the authority requires it. This is to say, where the political authority's direction is in the form of law, the subjects have to obey the law precisely because the authority promulgated the law in question. This obligation to obey the law is conventionally called *political obligation*.[6]

What is particularly relevant to (SSV) is the Rousseauian part of her account, where Stilz defends the Rousseauian proposition that 'a legitimate authority must always be democratic'.[7] Being democratic requires that 'everyone who is subject to the laws must have the opportunity to vote on them, and the laws

[4] Anna Stilz, *Liberal Loyalty: Freedom, Obligation, and the State* (Princeton University Press 2009) 85-110.

[5] See e.g. ibid 60.

[6] Hereinafter, when I use the term 'political obligation', I refer specifically to the obligation to obey the laws precisely for the reason that the relevant authorities promulgated them.

[7] Stilz, *Liberal Loyalty* (n 4) 84.

must equally apply to all'.[8] The argument for the Rousseauian proposition is as follows:[9] (i) a political authority is legitimate only if it preserves its subjects' liberty, defined as freedom from (private or official) domination; (ii) a political authority can maintain the social order without dominating its subjects only if the political authority conforms to the 'general will', defined as the will of people as a whole that is committed to the promotion of the common interest, interests which are essential for the realisation of freedom; (iii) the content of the general will cannot be discovered or specified without, *inter alia*, democratic voting, defined as decision-procedures that distribute the decision power equally among the subjects; (iv) therefore, a political authority is legitimate only if it is democratic structured and exercised.

In conjunction with the Kantian part of her account, Stilz proceeds to argue that the 'democratic legal state' is the only legitimate form of the State, to the

[8] ibid.

[9] See generally ibid chapter 3. This line of reasoning roughly resembles the 'schema of the basic arguments from liberty' that Thomas Christiano introduces in Thomas Christiano, *The Rule of the Many* (Westview Press 1996), 17.

extent that it is capable of realising 'equal freedom' for its subjects.[10] According to Stilz, a 'democratic legal state' is

> a sovereign political authority in which each citizen has a right to vote (perhaps through elected representatives) and participate in the determination of his civil rights, and in which the scheme of civil rights that is enacted and enforced qualifies as a possible substantive interpretation of the ideal of equal freedom, by meeting the minimal criteria [including bodily inviolability; property; freedom of conscience, movement, and expression; equal treatment before law; and subsistence.][11]

'Democratic' and 'legal' are two independent sets of necessary conditions for legitimate authority. It is possible that a State meets only one of them, thereby being an *undemocratic* legal State or a democratic *illegal* State.[12] It follows that subjects in an undemocratic State are not obliged by *political obligation* to obey, whilst they may still have 'moral and prudential reasons for obeying many laws'.[13] Stilz gives three examples of an undemocratic (legal) State where

[10] ibid 86-8. Note that 'equal freedom' is Stilz's more elaborate way to say 'justice'. Throughout her book, Stilz uses such words as 'justice', 'equal freedom', 'freedom as independence', and 'freedom from private persons' domination and interference' interchangeably, all connoting the same idea, namely the Kantian-Rousseauian justification for political authority. See generally ibid 85-98.

[11] ibid 96. On the minimal criteria, see 93.

[12] As an expository convenience, I adopt Stilz's usage of the term 'legal' and thereby take 'illegal' to mean that the law fails to promote substantive justice.

[13] Stilz (n 4) 97. Following the conventional usage, Stilz takes political obligation to mean the moral obligation to obey the laws precisely for the reason that relevant authorities promulgate

subjects have no political obligation. First: 'autocratic regimes', by which Stilz refers to States which do not enfranchise all citizens. Second: 'democracies that violate the conditions of a possible general will', where the majority of the residents do not guarantee minorities the necessary minimal equal freedom. Third: 'colonial empires', where a State was *unjustly* overthrown and occupied by a foreign power, as distinct from where the colonizer attained control over the realm for just cause.[14] In these cases, the subjects or at least those disenfranchised minorities have no political obligation, irrespective of whether the laws promote substantive justice.

However, there is an exception to the third case. Stilz introduces the idea of 'provisional political obligation' that subjects under a colonial regime ought to accept the regime as legitimate insofar as it provides a minimally just ordering and is committed to democratisation. She writes:

> If the colonial power is imposing a minimally just scheme of laws in the substantive sense outlined above, its subjects may have obligations to obey temporarily even if they do not now participate in the lawmaking process – as long as there is a good-faith effort being made to grant democratic rights to these subjects in the future. This is a "provisional" political obligation; it

those laws. Such reason differs from the (in Stilz's words) 'moral' or 'prudent' reason to obey in that the latter reason lacks the former's 'content-independent' and 'exclusionary' nature.

[14] ibid 96-8.

> imposes obligations now in view of real efforts to work toward the full establishment of democratic justice.[15]

The provisional political obligation is not limited to the colonial power alone. In another place, Stilz mentions more such exceptions:

> There may sometimes be good reasons to obey the law even when I have not had a say in formulating it – as a minor, a temporary resident, or a subject of a just military occupation, I will be subject to laws I had no say in formulating.[16]

Given such qualifiers, one may rightly question whether Stilz's account can still be taken as an instance of (SSV). On her account, the subjects ought to obey the undemocratic authority if it shows real efforts to facilitate democratic transition in the future, among other things. If so, Stilz seems to suggest that an undemocratic authority is *sometimes* justifiable. This is plainly contradictory to (SSV). In fact, there is a difficulty in identifying the proposition to which Stilz is committed. At times Stilz's argument oscillates between the standard (SSV)[17] that democracy is always necessary to legitimate authority and the much more

[15] ibid 97-8.

[16] ibid 95. I take her to mean more than the moral or prudential reasons to obey.

[17] ibid 84, 89.

limited proposition[18] that if a State *permanently* denies some of its subjects (e.g. women) the right to participate in the government *while* it does grant other subjects (e.g. men) this right, the disenfranchised subjects have no political obligation to obey the laws. They are two independent propositions; one does not have to endorse (SSV) in order to recognise the illegitimacy of the latter case.[19] To be sure, if Stilz is committed to (SSV), she necessarily endorses the latter. But it is not entirely clear whether Stilz is actually committed to (SSV) (and thus to both propositions) or the latter only, for it appears that Stilz actually has in view the latter proposition when she professes to endorse the stronger, Rousseauian (SSV).

In the face of the difficulty in identifying what Stilz precisely holds, I regard the foregoing problem as incoherence in her account. Such incoherence appears inevitable, I say, if Stilz wishes to avoid other untenable consequences following

[18] ibid 95.

[19] For in the latter case, *permanent* disenfranchisement, as opposed to only a temporary measure, of some particular section of society connotes an injustice in the State's treatment of the disenfranchised subjects, thereby making it a plausible claim that the subjects should be released from the duty to obey the State's direction. One can hold this view and still thinks that if the disenfranchisement is only temporary and non-discriminatorily distributed, it is possible for the State to be legitimate. Like many other cases of unjust State action, the illegitimacy primarily emanates from the *unequal distribution* of important goods without justifiable reasons. Note that unequal distribution of goods can be only temporary and still unjustified. But it may be accepted for some good reasons (e.g. limited resources) that are not applicable to permanent unequal treatment.

from her conclusion that an undemocratic but otherwise well-ordered State gives rise to no justified authority. To see why, let us first consider the line of argument that the undemocratic but well-ordered State is justifiable.

2.2 The Classic View and the Simple Strong View's Defect

I consider in turn (SSV)'s inconsistency with the classic view and the defect of (SSV) that such inconsistency entails.

2.2.1 The Inconsistency between the Strong and Classic Views

In what follows I outline what I term the 'classic view' of the justification for political authority, and thence demonstrate its inconsistency with (SSV). The classic view is characterised by this proposition:

> (CV) A political authority is justified if and only if it is capable of, and in fact broadly tends to, settle co-ordination problems for the common good of the community it purports to rule.

That is to say, according to (CV), efficacy in settling co-ordination problems is sufficient and necessary to justify the purported authority's claim to be obeyed. To see how this proposition can be vindicated, John Finnis's account of legal

and political authority is a helpful instance. As Leslie Green notes, Finnis's view is distinctive amongst contemporary legal philosophers in that very few of them consider efficacy or effectiveness as understood above to be *both necessary and sufficient* for justified political authority. Instead, they tend to regard efficacy only as necessary for justified authority.[20]

Finnis's argument proceeds as follows. (i) A political authority is justified if and only if it promotes the common good of the community it purports to rule. (ii) It is for the common good of a community that its co-ordination problems are solved. (iii) Only a successful political authority can provide adequate solution to the co-ordination problems. (iv) A political authority is successful if and only if its direction is actually obeyed by sufficiently many subjects. (v) It follows that a political authority is for the common good of the community it purports to rule if and only if it is efficacious (viz. successful in the sense discussed in (iv)). (vi) It further follows from (i) and (v) that a political authority is justified if and only if it is efficacious.

This line of argument for (CV) is inconsistent with (SSV) because efficacy in the sense discussed above can obtain without the political authority's being

[20] Leslie Green, 'The Duty to Govern' (2007) 13 LEG 165, 169.

democratic. For Finnis, efficacy requires that the purported ruler's direction is actually or will probably be complied with by its subjects, to the exclusion of any rival direction.[21] A person or persons have various means to achieve this status. In peaceful times, legal authority alone would suffice such that those who have the competence to rule according to the law are obeyed, provided that the subjects comply with the law. In the time of troubles when the location of political authority is ambiguous or contestable, efficacy largely depends on 'actual social power'.[22] For example, it is not uncommon that efficacy in tumultuous times has to be attained by sufficient power to coerce the subjects into obedience. It is also not unusual that particular leaders' charisma is the main cause of their being widely followed.

To be sure, it is prudent of a contender for the princely authority to seek the subjects' willing cooperation by acting in ways that the subjects would regard as justified authority (irrespective of whether the subjects' judgement is right). That is to say, she can try to establish *de facto* authority in relation to her subjects. *De facto* authority refers to where, *as a matter of fact*, the authority is regarded by its subjects as justified, while whether it is truly justified is another matter.

[21] John Finnis, *Natural Law and Natural Rights* (2nd edn, OUP 2011) 249.

[22] Green (n 20).

(Maybe it is actually not.) This requires the action of the authority to conform to the subjects' conception of justified authority.[23] Hence, it is conceivable that for a people who endorse (SSV), they only accept, say, elected leaders' claim to be obeyed. Consequently, unless the purported authority is capable of establishing forced obedience, only elected leaders are capable of achieving effective government in a community comprised of such a people.[24]

Still, this shows no necessary relationship of democracy to efficacy. Conceptions of justified authority vary according to persons, peoples, epochs, and so forth. For many, *de facto* authority would mean something remote from being democratic. Moreover, it is certain that democracy is not always conducive to efficacy. For example, martial law or like measures are often the only viable means to restore order and security, at least for the time being, in a community where the old order had disintegrated due to events like revolution and foreign invasion. To the extent that such measures succeed, (CV) suggests that the subjects should obey them, unaffected by the fact that they are undemocratic. Hence, given that efficacy can obtain without democracy, (SSV) and (CV) are incompatible.

[23] As Joseph Raz points out, one has to understand what it is to be *legitimate* authority in order to know authority in general. See Joseph Raz, *Authority of Law* (OUP 2009), 7-9.

[24] Let it be noticed that this conclusion holds even if (SSV) is false.

2.2.2 The Strong View's Defect

I argue that the inconsistency undermines the strong view, unless more sophisticated accounts are supplied in its defence. For, the argument for (SSV) fails to demonstrate why it is justified to disobey efficacious authority where no alternatives are available. Indeed, the argument somewhat accepts that efficacious, undemocratic authority may be justified such that it makes room for 'provisional political obligation' to undemocratic States, casting doubt on the argument's coherence. The failure to plausibly and coherently account for the authority of an undemocratic but otherwise well-ordered State is what I describe as the 'authority problem' that confronts democratic theory.

At the outset, I doubt whether Stilz's argument, taken in its own right, succeeds in establishing her (stronger)[25] claim that disenfranchised citizens do not have political obligation to obey. Recall that Stilz argues that a State has legitimate authority if and only if it is capable of realising its subjects' 'equal freedom-as-independence'. Also, her Kantian-Rousseauian conception of equal freedom consists in a composite set of substantive and procedural criteria (by

[25] Stilz (n 4) 95. I dispense with the moderate claim, because our present concern is whether the stronger claim, i.e. (SSV), can be vindicated. Whether or not Stilz's argument can prove the moderate claim is immaterial for the purpose. Even if it can, it does not affect the fact that (SSV) can or not be proved.

virtue of her effort to unite both theorists' accounts).[26] Given this, it seems much too restrictive of her to say that only a democratic State is capable of realising equal freedom. True, only a 'democratic legal State' can *fully* realise equal freedom on her account. Still, it is possible for equal freedom to be *partially and to a large extent* realised by an undemocratic State if it cares to promote the 'Kantian' principles. However, in denying the undemocratic State can have legitimate authority, Stilz treats such 'partial' realisation and non-realisation alike. This seems insufficiently discriminating. Given the moral importance of equal freedom, should not its partial realisation be valued and thus warrant an evaluation of the serviceable State different from that of a State which promotes no equal freedom at all?

Furthermore, let us consider my argument that the inconsistency between (SSV) and (CV) undermines the former (instead of the latter). According to (SSV), subjects are justified in refusing to recognise the authority of the undemocratic State. It follows that the subjects have only moral or prudential reasons for obeying the law, even if the legal order is effective and broadly just. It in turn follows that if subjects find no legally independent moral reasons to conform to a legal norm, they are justified in departing from the norm and

[26] ibid 92.

consequently in disrupting the existing order (which is effective and broadly just).[27] We should wonder how far the exponent of (SSV) would be willing to go along this line of entailment. Is she prepared to hold that the disruption of the effective order is justifiable even if it threatens to diminish or even destroy the order?

If she is, it is questionable whether she can justify disobedience in the face of the unpleasant consequences yielded by the diminishing of the effective order. If she is not, it is questionable whether she can maintain an (SSV)-consistent argument. For if she argues that the subjects are obliged by moral reason to refrain from disobedience that may cause the unpleasant consequences, does she have good reason to reject the following line of thought: the effective and broadly just order alone, though unjust in some aspects (e.g. non-democracy), provides sufficient reason for recognising its authority, for the continuance of the order is morally preferable to its falling apart?

I say that there is compelling reason for espousing that line of thought, which reason can be elucidated by investigating the justification for (CV). As outlined in Finnis's account, (CV)'s justifying ground is the common good of a

[27] I take prudential reasons to be irrelevant to the action's justifiability. If they become relevant under certain circumstances, they become moral reasons.

community.[28] Authority is required to enable a community to promote its common good in that it settles the community's problems of co-ordination. While common action for such objectives as education of children, use of natural resources, and deployment of force is essential for the community's survival and progress, members of the community may fail to engage in common action not only (or indeed, not so much) because they are stupid, selfish, and incompetent, but also (or indeed, rather) because they are intelligent and dedicated, 'always be[ing] looking out new and better ways of attaining the common good, of co-ordinating the action of members, of playing their own role'.[29] As their intelligence and dedication 'multiply the problems of co-ordination' (by proposing many eligible ways of co-ordination), Finnis incisively notes, there are 'only two ways of making a choice between alternative ways': either *unanimity* or *authority*.[30] We rule out unanimity as a possible solution for the obvious reason that 'it cannot in practice be achieved in any community

[28] For present purposes, I bracket the issue about the nature of common good. In this chapter (and the rest of this thesis), I follow Finnis' conception of common good, namely 'a set of conditions which enables the members of a community to attain for themselves reasonable objectives, or to realize reasonably for themselves the value(s), for the sake of which they have reason to collaborate with each other (positively and/or negatively) in a community'. Finnis, *Natural Law and Natural Rights* (n 21) 155.

[29] ibid 231.

[30] ibid 232.

with a complex common good and an intelligent and interested membership'.[31] Authority is therefore the only possible way in which a choice can be made to effectuate the needful common action.

Moreover, there is further reason for having *governmental* authority in particular as the community's co-ordinative solution. To be sure, government[32] is not the only means to settle co-ordination problems. As Finnis elucidates,[33] custom-formation in a community can also serve the purpose. Customs emerge from the convergence of individual behaviour over a period of time and produce binding force on the members of the community. Yet, as Finnis goes on to demonstrate,[34] government is preferable to custom-formation such that it settles co-ordination problems with 'greater speed and certainty' than the latter. The need for an efficient and clear co-ordination solution is 'apparent', as Finnis writes, 'where people are energetic and inventive in pursuit of their own or of common goods, not to mention any community threatened with military,

[31] ibid 233. See also Hans Kelsen's argument that '[a] genuine social order is incompatible with *the highest degree of self-determination* [sc. unanimity]' in Hans Kelsen, *The General Theory of Law and State* (Harvard University Press 1945) 285-6 (emphasis added).

[32] By the term 'government' I simply mean the state of affairs where a ruler exercises authority over her subjects. I do not intend to imply any other institutional reality than the existence of a ruler.

[33] Finnis, *Natural Law and Natural Rights* (n 21) 238-45.

[34] ibid 245-52.

economic, or ecological disaster.'[35] By contrast, custom-formation, capable of producing reasonable norms as it may be, is too slow and ad hoc to be sufficient to serve the common good.[36] In sum, it is the manner in which government solves co-ordination problems that makes it preferable to custom-formation. With government, we avoid the clumsiness and impracticality that a community would court if it solely relied on custom-formation to co-ordinate its communal life.

The argument so far remains rather moderate and uncontroversial. The (apparently) radical conclusion of (CV) follows from the foregoing argument (that governmental authority is required for the common good) when it is taken in conjunction with the fact that a particular person or body can, 'for a given community at a given time, do what authority is to do (i.e. [supply co-ordination solution to] secure and advance the common good)'.[37] Given that governmental authority is always preferable to anarchy (and customary authority), every member of a community has a moral responsibility to ensure governmental authority's establishment or maintenance. It follows that

[35] ibid 245-6.

[36] This is why *deliberate* legal change is valuable. See Richard Ekins, *The Nature of Legislative Intent* (OUP 2012) 121.

[37] ibid 246.

whenever a capable government exists or otherwise is likely to emerge, the subjects are responsible for helping maintain or establish its efficacy by, *inter alia,* complying with the its direction. To be sure, authority must always be exercised for the common good. So if the purported authority does not co-ordinate in ways that promote the common good, viz. the authority is tyrannical, the subjects are relieved of the duty to obey its direction. For this and further reason,[38] Finnis cares to note recurrently that efficacy is *defeasibly* or *presumptively*[39] sufficient to justify the claim to and recognition of authority.[40]

For some, it requires further argument to establish political obligation, viz. obligation to obey the law precisely for the reason that it is law. They would

[38] The further reason is that the moral obligation to obey the law, even just, can still be overridden by weightier 'competing moral responsibilities of particular subjects, on particular occasions'. See John Finnis, 'Reflections and Responses' in *Reason, Morality, and Law* in John Keown and Robert P. George (eds), *Reason, Morality, and Law: The Philosophy of John Finnis* (OUP 2013) 555. Thus, to say that efficacy is defeasibly sufficient in a way is simply to signal the fact that the legal(ly created moral) obligation is in general defeasible.

[39] Note that on Finnis's account (in *Natural Law and Natural Rights* and elsewhere), 'defeasible' and 'presumptive' are synonymous, as Finnis expressly takes presumptive to mean 'not indefeasible'. See Finnis (n 21) 247. The basis of the interchangeability is that they are both used to mean 'over-ridable' or 'apparent'. See John Gardner's incisive discussion on various usages of 'defeasible' and 'presumptive' in John Gardner, *Law as a Leap of Faith* (OUP 2012) 170-2. Gardner also notes one occasion where the statement 'law is defeasibly morally binding' and 'law is presumptively morally binding' connote different propositions such that the first statement does not entail the second. It is, in brief, where the first statement is only 'conceptual', connoting that 'immoral law is law only in a deviant sense', and thus cannot entail the second statement, which is 'moral', connoting that 'we should be disposed to regard or treat whatever law we encounter as morally obligatory'.

[40] ibid 246-7.

doubt whether such an argument can succeed. Even if (CV) is true, they would argue, it does not follow that the law in general is presumptively justifiable on (CV), unless all laws possess the morally important co-ordinative role as envisaged in the argument for (CV), which is apparently not so. As Gardner notes, '[n]ot everything which the law does is an example of successful co-ordination, or of some other instrumental achievement'.[41] A reply to the challenge would point to the fact that the success of the law (viz. the law's co-ordinative project) requires that the subjects are prepared to treat every legal norm as (presumptively) equally obligatory. If the subjects 'cherry-pick' in their complying with the law, the law cannot achieve its purpose of maintaining a framework of co-ordination which can be seen as fair when its contributions to different persons and interests are considered in the fullness of time. It in turn follows that subjects who enjoy the benefits of the legally facilitated communal life should perform their duty under the principle of 'fair play' to maintain the law's continuance so that all members of the community can continuously receive the benefits of the efficacious legal ordering.[42]

[41] Gardner (n 39) 13. See also Green (n 20) 176.

[42] John Finnis, 'Law as Coordination' in *Philosophy of Law: Collected Essays Volume IV* (OUP 2011), 70-3. See also John Finnis, 'Freedom, Benefit and Understanding: Reflections on Laurence Claus's Critique of Authority' (2014) 52 San Diego L.Rev. 893, 915-6.

Accordingly, we can make the following criticism of (SSV). In taking democracy to be constitutive of legitimate authority, (SSV) oversimplifies the justifying grounds for political authority and consequently grants implausible permission for disobedience. Even if we concede that (CV), in conjunction with further argument, does not justify the authority of law in general, it does not fail for the reason that the authority is undemocratic. On this occasion, laws that have the co-ordinative function would still be legitimate, which conclusion (SSV) is still unable to accommodate. In a way, Stilz anticipates the criticism, and makes those exceptions and proviso to avoid implausible conclusion at the expense of her theory's coherence. Thus I said earlier the incoherence appears inevitable, for it seems to me quite unlikely that one can rebut the implausible implication of (SSV).

2.3 Conclusion

I have investigated two lines of argument which I term the simple strong view and the classic view. I have discovered that the two views are inconsistent in that the former denies subjects are obliged by political obligation to obey the laws of an undemocratic but otherwise well-ordered State, while the classic view affirms the obligation for the reason that the State is capable of settling co-ordination

problems for the common good. My analysis has suggested that the former's denial of the obligation overlooks the important, democracy-independent co-ordinative role of political authority, leading to an oversimplified conception of legitimate authority. Accordingly, we should judge the simple strong view to be untenable, and rule it out as a possible way to vindicate the line of argument I term the strong view. It follows that if theorists wish to prove the strong view, they need to seek subtler strategies to avoid simple view's failures. There are such strategies, which are considered in the succeeding chapters 3 and 4.

3

Democracy and the Acceptance of the Regime: A Subtler Version of the Strong View

In this chapter I examine Philip Pettit's argument that democracy is constitutive of what he terms the obligation to 'accept the regime', an obligation distinct from the obligation to obey the laws that regulate social conduct. I discuss the argument as a subtler version of the strong view. My discussion consists in three major tasks:

Firstly, I offer a more accurate account of Pettit's proposed dichotomy between 'acceptance' and 'revolution', arguing that the dichotomy essentially concerns whether a change-seeking subject adheres to the relevant regime's law of legal change. Secondly, I examine Pettit's argument that only a democratic regime is entitled to its subjects' acceptance. Reflecting upon the important co-ordinative advantages of the law of legal change, I repudiate Pettit's argument for

the reason that it oversimplifies the justifying grounds for acceptance. Thirdly, I recognise the truth in Pettit's subtler strong view: his strategy to isolate the question of acceptance helps us focus on a place where democracy's true relevance to political authority is likely to be discovered.

3.1 What It is to Accept a Regime

Philip Pettit's theory of political legitimacy offers a subtler strategy to vindicate the strong view. Pettit's strategy is subtler in that it recognises a distinct obligation to 'accept the regime' from the obligation to obey the laws that regulate social conduct, and thence argues that it is this specific obligation that depends on democracy.[1] In this section I examine and make some needful clarifications of Pettit's proposed idea of 'acceptance'. I contend that the action Pettit refers to by acceptance does not require one's approval for the relevant regime, and can be essentially understood as adherence to the regime's law of legal change.

3.1.1 Acceptance and Revolution

[1] Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (Cambridge University Press 2012) chapter 3.

According to Pettit, to accept a regime means that when the subjects attempt to change the laws,[2] their attempts 'should be restricted to measures that are consistent with the regime's remaining in place'.[3] Such measures, Pettit adds, are those 'within' or 'allowed by the system'.[4] His examples include 'appealing to the legislature, taking the government to court, speaking out in the media, demonstrating in the streets and… challenging the governing party at election time'.[5] Even if the contesting subjects break some laws in the process of opposition, they demonstrate their acceptance of the regime by acknowledging the latter's authority to penalise them for breaking those laws.[6]

Measures which Pettit does not take to be within the system include revolution and other actions that impede the regime's continuation. To oppose laws within the system, as Pettit writes, is 'to stop short of revolution or

[2] Pettit actually talks more specifically about the change of *unjust* law, which I think is too narrow. A coherent understanding of his proposed idea of the acceptance of the regime should not limit it only to the change of unjust laws, but to all laws that the people have reason to change. See ibid 137.

[3] ibid 137.

[4] ibid 137, 138.

[5] ibid 137.

[6] ibid 137-8.

rebellion or, in an older word, resistance'.[7] In other words, acceptance is the opposite of revolution; what acceptance requires, in short, is to refrain from revolution. Before we accept and further deploy that dichotomy, we should attend to two important nuances.

Firstly, acceptance on Pettit's account does not necessarily require one's *approval for* the relevant regime. It does not even require one to avoid any action against the regime's remaining in place. For if what acceptance requires is to stop short of revolution, the accepting subjects only have to refrain from using force to advance their agenda. It follows that they may abhor the incumbent regime and wish its substitution with a new one, but they still *accept* the regime if they work on the substitution in legal and peaceful ways. That is to say, the accepting subjects do not approve for the regime, nor do they act in ways consistent with its continuation. They simply avoid revolutionary action, and adhere to the regime's own laws to legally effectuate the regime's disappearance. In doing so, the subjects' action is sufficient to count as an instance of acceptance.

Hence, what is necessary and sufficient for acceptance of a regime is one's acceptance of and adherence to the regime's laws that regulate regime

[7] ibid 137.

succession. Approval for the regime's remaining in place is optional. We should not conflate the disposition that we disapprove of a regime (in virtue of its demerits) and therefore desire its disappearance, on the one hand, and the disposition that we do not accept that regime in that we are prepared to revolt against it, on the other.

Secondly, it is not entirely clear on Pettit's account whether the acceptance of a regime also requires obedience to the laws that regulate social conduct. On the one hand, Pettit expressly notes that the obligation to obey the laws (of social conduct) is not the obligation to accept the regime.[8] On the other, it indeed seems plausible to think of disobedience to the laws as inconsistent with the acceptance of the regime which makes or administers those laws. This is implied in Pettit's explanation as to why *civil disobedience* is compatible with acceptance: the disobeying subjects demonstrate their acceptance by recognising and submitting themselves to the regime's authority to penalise them. If so, do the disobeying subjects still accept the regime in the case of disobedience *simpliciter*, justified or not? That is, if they simply disobey the laws and are indifferent to or even approving of the regime's disintegration (in consequence of widespread disobedience), can they still be said to accept the regime?

[8] ibid 138.

Obviously, disobedience to the law of social conduct is often inconsistent with the regime's 'remaining in place', even though it may lack a direct intention to prevent the regime's survival. Indeed, it is the need to maintain the survival (viz. efficacy) of the legal and political order as a whole that is regarded as one of the important considerations for the general obligation to obey the law (see 2.2).[9] Given that acceptance essentially requires that subjects seek legal or political change without disrupting the existing order, it should rule out disobedience to the law of social conduct, too. If so, to accept a regime is to refrain not only from revolution, but also from legal disobedience in general.

Still, it is convenient to understand acceptance primarily as the renouncement of revolution (and other radical ways of change). Revolution[10] is the intentional act to forcibly effectuate the succession of regimes; it is necessarily contrary to acceptance. By contrast, disobedience is different. It is possible for one to disobey some unjust law but at the same time still to agree with the regime's continuation or at least to seek its substitution in legal ways. In this case, although one disobeys the law, one does not forgo one's acceptance of the regime. Thus, disobedience to the law of social conduct does not always entail

[9] See also T. H. Green, *Lecture on the Principles of Political Obligation* (Longman, 1907) 111.

[10] Hereinafter, I take revolution as shorthand for all radical, forcible ways to make legal change.

the disobeying subject's lack of acceptance. Revolution, by contrast, is necessarily and typically the pointer to the lack of acceptance.

Moreover, to focus on revolution better illuminates the different ways to make *deliberate* legal change. Although disobedience to laws may engender the regime's disintegration, it is incapable of deliberate legal change. When some change-seeking subjects wish to introduce a new law to replace the current one, they cannot achieve their goal simply by disobeying the current law. They need to somehow access the legislative power to effectuate the desired change. The question then is how they manage to do so. The dichotomy between acceptance and revolution is thus the dichotomy between two ways in which the change-seeking subjects have access to the legislative power and effectuate legal change, namely to accept the regime means that the subjects act in accordance with the regime's norms that regulate deliberate legal change, whereas to revolt means that they act against such norms. Hence, revolution can be singled out precisely as the opposite of acceptance in the study of legal change.

As the clarified understanding of Pettit's dichotomy between acceptance and revolution reveals that the relevant actions essentially concern the subjects' response to the regime's norms that regulate deliberate legal change, it is

possible, I suggest, to have a more accurate account of what acceptance is and not. I develop such an account next.

3.1.2 Adherence to the Law of Legal Change

I argue that to accept a regime is essentially to adhere to the regime's law of legal change. Recall that to accept the regime is to change or oppose laws in ways allowed by the system.[11] In this case, if a legal change is successful, it is necessarily and eventually the outcome of formal decision-procedures. To focus on formal legal change reveals what the acceptance of the regime actually is: it is to adhere to the laws that govern formal legal change.

The laws that govern formal legal change are what H. L. A. Hart categorises as a legal system's 'rules of change' that specify and empower a certain person or body to introduce new laws or eliminate existing laws. In more complex forms, Hart adds, the rules of change would also specify the procedure to be followed by the person or body in legislation.[12] The components of the rules of change

[11] Pettit (n 1) 137-8, 140.

[12] H. L. A. Hart, *The Concept of Law* (3rd edn, OUP 2012) 95-6.

are further studied by John Finnis, who analyses the legal consequences of revolution and *coup d'état* by reference to three types of constitutional rules:[13]

(1) the 'rules of succession to office' which govern 'both accession to and succession in office or estate';

(2) the 'rules of competence' which govern 'the distribution of powers as between offices or estates'; and

(3) the 'rules of succession of rules' which include 'all rules (whether or not included also in category [1] or category [2] or both) governing the amendment, suspension, or replacement of rules of each of these three categories'.

The detailed analysis of the rules of change helps reveal the nature of acceptance. To be sure, to accept a regime would include a variety of attitudes and action with regards to the foregoing types of rules, but its necessary and sufficient component is adherence to the third type of rules, viz. the rules of succession of rules. To say that one ought to oppose within the system is to say that one ought to follow the system's rules that govern the system's amendment, suspension, or

[13] John Finnis, 'Revolutions and Continuity of Law' in *Philosophy of Law: Collected Essays Volume IV* (OUP 2011), 411.

replacement of rules. Even if the revolutionaries aim to overthrow the incumbent regime, what they normally seek to do, as Finnis notes, is to

> postulate new conditions of repeal, and on the basis of this postulate, [to] repeal (or modify) first the pre-existing rules of repeal and then (in accordance with the new rules of repeal) such other rules (if any) as they may wish to.[14]

It follows that insofar as the subjects act in full accordance with the rules of succession of rules in their attempt to change or repeal some unwelcome law, they would necessarily act also in accordance with other types of the rules of change.

The criterion of Pettit's proposed dichotomy can therefore be illuminated: to accept a regime means that the subjects are prepared to abide by the regime's rules of succession of rules (hereinafter, the law of legal change) when they seek legal change. Even when they seek to introduce a new regime to substitute for the incumbent one, they still adhere to the law of legal change by, say, going through the formal procedure of constitutional amendment. To stop short of revolution thus is to refrain from flouting the law of legal change when seeking the desired change; the accepting subjects do not seek to 'postulate new

[14] ibid 424.

conditions of repeal' by force. In short, the criterion is the way in which subjects treat the law of legal change maintained by the incumbent regime. The dichotomy between acceptance and revolution is essentially between the change-seeking subjects' adherence to and defiance of the law of legal change.

So far I have clarified the nature of acceptance. In the next section I turn to Pettit's argument that the obligation to accept a regime uniquely depends for its justifiability on democracy.

3.2 Is the Obligation to Accept a Regime Democracy-Dependent?

The principal proposition of Pettit's theory of legitimacy is that legitimacy depends on democracy. There is no obligation to accept the regime, Pettit maintains, if the regime is undemocratic. Moreover, *only* legitimacy is democracy-dependent. On Pettit's account, the obligation to obey the laws of social conduct does not depend on democracy. Pettit's account thus demonstrates a subtler approach than Stilz's in formulating the strong view. In this section I examine whether Pettit's subtler approach is successful.

3.2.1 Legitimacy, Freedom, and Democracy

Pettit conceives of political legitimacy as the state of affairs in which the subjects are obliged by a (defeasible) moral obligation to accept the regime.[15] To say that a regime is legitimate is to say that its subjects are morally obliged to accept it, viz. to change or oppose laws entirely according to its law of legal change. Understood in this way, legitimacy on Pettit's account is not meant to be a synonym of justified political authority. Unlike the latter, legitimacy is not about the obligation to obey the ruler's directives on subjects' social conduct. It concerns only the obligation to adhere to the law of legal change.

Pettit expressly notes that the obligation to accept the regime is different from the obligation to obey the laws of social conduct.[16] They require different kinds of action. Moreover, they have different justifying grounds.[17] The two obligations stand and fall independently of each other. For instance, it is possible for a legitimate regime to maintain an unjust social order, and it is also possible for an illegitimate regime to maintain a just social order.[18] Thus, in the former regime, the subjects would have no obligation to accept the regime and to

[15] Pettit (n 1) 136-40.

[16] ibid 138. By '*pro tanto*' Pettit means that the relevant moral obligation can be overridden by countervailing reasons. See Pettit's clarification in ibid 136, n. 5.

[17] ibid 130, 140.

[18] See the four possibilities in ibid 140.

change laws only by means allowed by the legal system, but they are still obligated to obey the laws that regulate their social conduct, given that the laws are just. In the latter regime, the subjects would be obligated to accept the regime, but they do not have to obey the unjust laws.

Based on the distinction between the obligation to accept the regime and that to obey the laws, Pettit in turn contends that only the obligation to accept the regime depends for its justifiability on democracy. An undemocratic regime is illegitimate; its subjects are relieved of the obligation to accept it. The subjects are therefore at liberty to flout the law of legal change to effectuate the desired legal change.

Pettit's argument for the democracy-dependent nature of legitimacy is as follows. The question of legitimacy asks why the subjects should refrain from revolting against the State even if its directives restrain their freedom. Imposing the social order, the working of the State inevitably conflicts with some of its subjects' will, unless the imposition of social order is conducted on the unanimous basis that a law is introduced only if every sane adult member of the community agrees with its introduction.[19] Then, given that people have good

[19] See e.g. John Finnis, *Natural Law and Natural Rights* (2nd edn, OUP 2011) 232. See also Hans Kelsen, *General Theory of Law and State* (Harvard University Press 1945) 285-6.

reason for preserving their freedom, why should they accept[20] the State that restrains it? Why should not they accept, say, only the State that is to their taste?[21]

For Pettit, to answer this question is to demonstrate 'how to reconcile [the] political submission with personal freedom, identifying a sort of regime that can coerce citizens without depriving them of their freedom'.[22] Due to his republican approach, Pettit seeks to justify the constraint of freedom by distinguishing between the permissible and impermissible forms of freedom-constraint. More precisely, freedom-constraint is legitimate only if it does not constitute *domination*. Legitimacy thus turns on 'whether a state can impose coercively on citizens without *dominating* them'.[23] The subsequent effort is to demonstrate how freedom from domination is possible in the face of the State's interference with citizens' choices and lives.

[20] Note that throughout this chapter, 'accept' and 'acceptance' are used in the specific sense discussed in 3.1.

[21] The idea is that the State does not restrain their freedom if its directives are to the subjects' liking. Note that in asking this question, the subjects do not have to be anarchist. For they still approve for the existence of some State.

[22] Pettit (n 1) 147.

[23] ibid (emphasis added).

In Pettit's republican theory, the key to preventing the State interference becoming domination is *control*.[24] State interference does not amount to the subjection of the subjects' will to the 'alien will' of State officials, if the interference is under the control of the subjects.[25] Actual and intrusive as it may still be, State interference under popular control does not dominate its subjects.

Pettit gives two examples to illustrate the idea of control.[26] One involves a person who entrusts his friend with the key to his alcohol cupboard, and asks his friend not to unlock the cupboard for him unless he proposes the request in accordance with some rules previously determined by himself. The other is the celebrated story of Ulysses and the sirens. In both examples, the key holding friend and Ulysses' fellow sailors reject the requests of the alcohol drinker and Ulysses *without* imposing alien wills on them, i.e. dominating them, if the requests contravene the rules previously laid down by the alcohol drinker and Ulysses themselves. In these situations, the interferences are under their subjects' own control, and therefore cause no domination.

[24] ibid 152-60.

[25] ibid 153.

[26] ibid 152-3.

For the same reason, if the people have control over the official imposition of the social order, they are not dominated by the State. Although the required control is more complex in form than the control discussed in the smaller, more personal context, 'popular control' over government is possible.[27] In brief, popular control requires a system of control that is (i) 'equally shared amongst citizens',[28] (ii) unconditioned on 'the willingness of the government or of any other agent',[29] and (iii) 'efficacious enough'.[30] Apart from them, Pettit notes, '[t]here are no other salient conditions that we might require a legitimate state to fulfil'.[31] Moreover, the idea of popular control supplies the basis for Pettit's republican conception of democracy. As Pettit writes, '[a]ny system that satisfies

[27] See the requirements of popular control in ibid 160-79. Here is a summary of the requirements: (1) the system of popular control has to be 'individualised', giving each subject 'an equal share in the control of government'; (2) the system has to be 'unconditioned', meaning that the subjects' influence over the state is not dependent on the willingness of government or any other agency; and (3) the system has to be 'efficacious' such that the subjects do not regard unwelcome political decisions as the work of an alien, malicious will, but simply as 'tough luck'.

[28] ibid 153.

[29] ibid.

[30] ibid 175.

[31] ibid 179.

such conditions deserves to be described as a democracy'.[32] The point of democracy is to ensure there is popular control over government.[33]

Pettit's argument that democracy (i.e. popular control) is necessary for political legitimacy has been outlined above. If the argument is successful, it gives rise to a subtler version of the strong view: being democratic is necessary for the obligation to adhere to the law of legal change.[34] However, while Pettit's strategy to isolate the acceptance of the regime to study it independently of legal obedience is broadly tenable, there is good reason to think that his argument for and about the relationship of democracy to legitimacy is not entirely successful. I evaluate his argument next.

3.2.2 Is the Obligation to Accept Truly Democracy-Dependent?

First of all, whatever the merits of his freedom-centred approach to the question of legitimacy, I think Pettit does not really demonstrate why the rival approaches cannot hold. Pettit mentions a number of theoretical attempts to justify

[32] ibid.

[33] ibid 21-2, 179-80.

[34] That said, I do not overlook the fact that Pettit allows for the exception that an illegitimate but 'legitimizable' regime can be justifiably treated as legitimate. See ibid 139-40.

legitimacy by reason of the necessity of restricting the people's freedom.[35] These attempts do not seek a freedom-centred explanation about the moral foundation of legitimacy, and, ostensibly, these theorists do not find a freedom-centred solution necessary.[36] In response in the rival approach, Pettit writes:

> Such theories of legitimacy will only have plausibility, however, on the assumption that no effective state can preserve people's freedom. It would hardly make sense to invoke an epistemic, pragmatic, egalitarian or meritocratic feature… in arguing for the legitimacy of a freedom-denying regime, if there were an alternative regime available that could aim to preserve people's freedom.

Yet, this is a rather unambitious argument against the rival theory. It only suggests that if we manage to show that the people's freedom is not too seriously compromised by State interference, accounts that try to justify the restriction of freedom will not be needed. Even if his argument is right, we can at best say that Pettit succeeds in demonstrating that uncompromised freedom is *sufficient* to vindicate the legitimacy of the State. Taking this approach, one needs no further

[35] ibid 148.

[36] ibid.

explanation for the justifiability of State interference. Still, this does not mean that full freedom is *necessary* for the State to be legitimate.[37]

Indeed, a student of legitimacy is always at liberty to ask whether a freedom-constraint is justified, should there be such a constraint. She can do so irrespective of whether she *needs* to. Moreover, if it is possible to justify freedom-constraint under the rival approach, we can raise a similar question about Pettit's approach: why do we need to invoke a freedom-preserving regime in arguing about legitimacy if freedom-constraint is justifiable? For sure, the obvious reason is that we may not need to take on this or that approach, but we are entitled to take on any of them insofar as both are right. Thus, it is important to examine whether each of them is tenable *per se*. However, Pettit's treatment of the rival approach deflects us from carrying out this examination, missing the opportunity to know whether there can be tenable different views about legitimacy.

[37] Although Pettit's response to rival accounts may be too terse to be considered decisive in judging whether Pettit succeeds in establishing the necessity of a freedom-centred conception of legitimacy, he does have to say more to vindicate his argument. In the absence of fuller elucidation, I think it is fair to comment on the inadequacy in the way in which I present my critique here.

In sum, it is crucial to ask whether State interference without control (i.e. domination) is actually justifiable under some rival approach. However, as I demonstrated above, Pettit suppresses the question rather than answers it.

Indeed, there is good reason to think that 'domination' is sometimes justifiable. Recall that legitimacy is the state of affairs in which subjects have a moral obligation to accept a regime, i.e. to adhere to their regime's laws of legal change when seeking legal or political change. Pettit's subtler strong view suggests that democracy (i.e. popular control) is necessary for the obligation to be justified. It follows that, where the regime is undemocratic (i.e. under no popular control), the subjects are not morally obligated to adhere to the regime's laws of legal change in seeking legal or political change. The reason against this view is similar to the reason why the simple strong view is implausible: such a view makes insufficient room for the moral necessity of political authority, at least in relation to some basic functions without which a community can hardly prosper.

What these functions precisely are vary according one's view about the basic aspects of communal life, but these functions share an important feature, namely they cannot be performed without authority. Consider, for instance, Pettit's own account of the State functions:

> maintaining the developmental, institutional and material infrastructure that justice requires; establishing and adjusting the laws required to identify substantive and coherent basic liberties; ensuring that those liberties are resourced on the basis of any needed conventions and subsidies; and protecting people against the invasion of those liberties, whether in particular relationships or on a more general front.[38]

If we, for good reason, acknowledge that these functions are truly morally necessary, the question that confronts us is what would be required for their performance. Pettit notes that it requires 'the corporate agency of a coercive state', and no alternatives can serve the purpose.[39] But he immediately adds that his view is 'not to assume that any particular sort of state is essential', and stresses the need to ask 'how [a state] ought to relate to its citizens'.[40] If my reading of his account is right, Pettit's contention is that only a State under popular control is essential for the performance of the morally necessary functions. However, is popular control really essential for the purposes?

Reflection on the aforementioned functions should recommend a negative answer, unless such functions are understood in a more or less idiosyncratic way in that only those functions that are dependent on popular control would be

[38] ibid 133.

[39] ibid 136.

[40] ibid.

morally necessary. The latter is patently not a sound conception of the fundamental functions of the State. We can at least find *some* functions that can be performed well under any form of government, and among these functions is the elementary level of co-ordination for the common good that is the basic need for political authority (see 2.2).

The needful co-ordination turns on not only the laws of social conduct, but also the laws of legal change. Constituting an important subset of the legal order, the latter laws ensure clear, efficient, and peaceful ways to make legal and constitutional change including change of regimes. It is often reasonable to adhere to such laws, for it ensures that changes can be sought without needless disturbance to the subjects' private undertakings. If the change-seeking subjects flout such laws and do so frequently, their behaviour undermines the existing co-ordination by vitiating the peaceful ways for legal and political change secured by the law, among other things.[41]

Taking account of the fact that the law of legal change is part of the entire co-ordinative scheme created and maintained by the law, it is implausible to argue that democracy is always necessary for the obligation to adhere to the law of

[41] Other things include the efficacy the entire legal system, which turns on the efficacy of its subsets such as the law of legal change.

legal change to be justified.[42] Applying the classic view (see 2.2), I say that the efficacious capacity to co-ordinate legal and political change is sufficient to warrant the subjects' adherence to the law of legal change. Given the co-ordinative merits of an effective, peaceful method of legal change, it is always for the common good that the subjects oppose laws 'within the system' whenever possible.[43] However distinct it is from the obligation to obey the laws of social conduct, the obligation to accept a regime is not independent of the basic co-ordinative need that (in conjunction with the fairness principle) requires the subjects to co-operate with political authority. To this extent, Pettit's proposition oversimplifies the justifying grounds for the obligation to accept a regime and is thereby unsound. *Pace* Pettit, I say that political legitimacy is not democratic-dependent.

[42] Pettit somehow also detects this issue, as he stipulates 'legitimizability' as a ground for obeying 'a certain sort of illegitimate regime'. Thus, the subjects should accept an illegitimate regime whatsoever. However, at least in *On the People's Terms*, Pettit does not explain under what conditions legitimizability can be invoked, and what reasons can justify this as a defensible ground for obeying the illegitimate regime. While Pettit's explanation is terse, it is reasonable for us to think that this ground of legitimacy should not be easily invoked; otherwise it would make the freedom-centred criterion of legitimacy empty. In any event, the idea of legitimazibility has the effect of helping Pettit avoid subscribing to the view that people can refuse to accept the regime simply for the reason that the regime is undemocratic. However, whether Pettit can sustain this view coherently under his overall framework is another matter. See Pettit (n 1) 139.

[43] This does not deny that on special occasions some competing moral responsibilities may arise and require the subjects to forgo their adherence to the law of legal change *also for the common good*.

Note that it is not simply Pettit's freedom-centred approach that is defective, but also the subtler version of the strong view as a whole that cannot succeed. For the defect does not lie in any particular conception of freedom or democracy; a defender of the subtler version will face the same difficulty, i.e. making insufficient room for the moral necessity of some central functions of the State, irrespective of how she conceives of freedom or democracy. She can evade the difficulty by, as stated previously, adopting an uncommon conception of the morally necessary functions of the State, yet, in doing so, she does not actually *solve* the difficulty but evade it. Alternatively, she can solve the difficulty by recognising that at least in some situations the subjects ought to follow the law of legal change in effectuating change, among other things, irrespective of whether the form of government is democratic. In doing so, she no longer holds the strong view, simple or subtle.

3.3 The Truth in the Subtler Strong View

As the analysis of this chapter suggests, Pettit's argument that no undemocratic State can be legitimate is not fully successful, and it is questionable whether any other argument to that effect is liable to succeed. However, Pettit's explanatory strategy also reveals an important insight of the subtler strong view that

significantly informs our constructive endeavour to develop an alternative theory that is closer to the truth.

More precisely, Pettit's strategy to study the relationship of democracy to political authority by isolating the obligation to accept the regime opens up a promising way to approach the issue. While his attempt to closely associate a freedom-centred conception of democracy with the obligation to accept the regime runs into great difficulty, he points us in the right direction: it is the law of legal change on which democracy distinctively bears.

As a general principle, democracy is not a necessary condition for the obligation to adhere to the law of legal change. Even if it is desirable to introduce a democratic government to substitute for the incumbent undemocratic government, it does not follow that the democratic transition can be carried out without regard for the law of legal change. However, I also agree with Pettit and others about the demerits of domination. Even if it is not always unjustifiable for a State to dominate its subjects, I say, it is unjust if such a state of affairs continues and does not end in due course. Non-democracy is not meant to last; it should *eventually* give way to democracy (see 5.1).

When it is clear that an undemocratic regime should disappear but refuses to do so, we should judge the continuation of the regime to be no longer justifiable. And if the regime continues to rule and acts in ways inconsistent with its disappearance, the only way to end the undemocratic rule is to use force. On this occasion, the need to end non-democracy supplies reason for revolting against the incumbent regime to make such arrangements as are necessary to effectuate the democratic transition. Thus, although as a general matter democracy is not constitutive of the obligation to accept a regime, it may still on special occasions bear on the obligation by giving rise to reason for the subjects to set aside the obligation and to revolt against the undemocratic regime.

Hence, whenever revolt is justified for democratic reason, it is indeed the law of legal change whose authority will be affected. Directing our attention to the questions of acceptance and resistance, Pettit helps us focus on a place where democracy's true relevance to political authority is likely to be discovered. My own investigation in this direction is carried out in chapter 5. Before that, let us examine two other ways in which democracy is said to bear on political authority in the next chapter.

4

The Right to Coerce and the Right to Rule

Having examined Philip Pettit's subtler approach to the strong view in the preceding chapter, in this chapter I turn to two other ways in which theorists argue that democracy is necessary for political authority to be fully justified: (1) David Estlund's argument that democracy is necessary for the State to legitimately enforce its directives by coercive measures, and (2) Thomas Christiano's argument that democracy is necessary for the State to have a claim-right to rule, i.e. a right correlative with the subjects' duty to obey. I consider the arguments in turn.

4.1 The Right to Coerce

In this section I examine David Estlund's argument that democracy is constitutive of 'legitimacy', defined by him as the right to enact and coercively

enforce the law,[1] as distinct from the capacity to create duties to obey. My examination consists in three parts. Firstly, I outline Estlund's 'epistemic proceduralism' that democracy is necessary for the right to coerce. Secondly, I evaluate and repudiate the argument. Thirdly, I briefly discuss Estlund's theory of authority.

4.1.1 Legitimacy and the General Acceptability Requirement

Estlund's contention is that only democratically made decisions can be legitimately enforced.[2] He thinks that the right to coerce is distinct from the duty-imposing power and has its own justifying ground, which he argues is that the political decision-making is structured according to certain epistemic and procedural standards. Such standards in turn require that the political decision-making be democratic.

Whereas the right to coerce (i.e. legitimacy) is conditional on democracy, the duty-imposing power (i.e. authority) is not. In Estlund's philosophical framework, political authority is justified by 'normative consent'. But in arguing

[1] Hereinafter, I use 'right to coerce' and 'right to enforce the law' interchangeably to refer to this right.

[2] David Estlund, *Democratic Authority: A Philosophical Framework* (Princeton University Press 2008) 33-8, 156-8.

for and about normative consent, Estlund expressly notes that there can be other tenable justifying grounds for political authority than normative consent.[3] Whatever the demerits of such a strategy, Estlund avoids making the claim that political authority has to be democratic to be justified. Apart from this, it can also be argued that Estlund does not think normative consent is conditional on democracy. But Estlund's view about the requirements of normative consent is not entirely coherent; places where Estlund associates normative consent with democracy can be found. I bracket such problems in relation to Estlund's theory of authority for later discussion (see 4.1.3). Hence I focus on Estlund's theory of legitimacy.

Estlund's overall framework is built on the dichotomy between 'authority' and 'legitimacy'. On his account, authority refers to 'the moral power of one agent (emphasizing especially the state) to morally require or forbid actions by others through commands', and legitimacy 'the moral permissibility of the state's issuing and enforcing its commands owing to the process by which they were produced'.[4] In making this distinction, Estlund contends that the two

[3] ibid 130.

[4] See e.g. ibid 2, 41-2, 134. Elsewhere, Estlund also uses the term 'compliance legitimacy' to mean the former (viz. authority) and 'enforcement legitimacy' to mean the latter (viz. legitimacy). See David Estlund, 'Jeremy Waldron on *Law and Disagreement*' (2000) 99 Phil. Stud. 111, 116. Note that Estlund seems to take 'legitimacy' to mean only the liberty-right to enforce

subject matters are substantively distinct in that they are justified on different grounds. More precisely, authority (i.e. the normative power to impose duties of action) is justified on the basis of 'normative consent', where no *actual* consent is given by the subjects of authority. Legitimacy (i.e. the permissible use of coercion) is justified in part on the grounds that the subjects have no 'generally acceptable' reason to refuse to perform the officially prescribed action.[5] And this 'general acceptability requirement' is key to Estlund's democratic-centred conception of legitimacy.

To be generally acceptable, a political decision has to be made on grounds that reasonable citizens can accept. By the general acceptability requirement, Estlund distinguishes between 'qualified' and 'disqualified' objections to the political decision, arguing that only the former can invalidate the legitimacy of the decision. In other words, the political decision has to be backed by reason that is beyond qualified disagreement to be legitimately enforceable. The requirement applies to both the content and making of the decision. Thus, not only must the

the law. That is, this right does not entail that the subjects are obligated to undergo the legitimate State's coercive action against them.

[5] ibid 134.

particular decision itself satisfy the acceptability requirement, the decision-procedure also has to be considered acceptable from all reasonable perspectives.[6]

While Estlund does not offer a full account of the criteria of reasonableness, he supplies (somewhat disparate) examples of institutions and practices that he thinks do or not satisfy the criteria. A principal point he tries to make is that elitist, autocratic forms of government are ruled out, because they are based on 'invidious comparisons among citizens with respect to their normative political wisdom', and no such comparisons, Estlund notes, 'can pass the appropriate general acceptability criterion… of political legitimacy'.[7] As people reasonably disagree about what count as statesmanship and who is really qualified, any expertise-based claim to political legitimacy can be reasonably disputed. While Estlund recognises that the substantive quality of decision-making (viz. the capacity to make right decisions according to relevant standards) is not irrelevant to acceptable political decision-making, he rejects all non-democratic decision-procedures, irrespective of their epistemic capability, by applying the general acceptability requirement.

[6] ibid 35-6.

[7] ibid 36.

To be sure, democracy is not the only decision-procedure that avoids making any kind of invidious comparisons that is ruled out under the acceptability requirement. Random decision methods such as lottery and coin-tossing also do. But democracy should be preferred to purely random ways of making decisions,[8] Estlund argues, because right decisions are preferable to wrong ones, and democracy is better at making right decisions than random methods.[9] This epistemic capacity is explained by a more or less straightforward notion that people can collectively make sounder judgements if they are allowed to communicate with one another and discuss the issues to be determined. Insofar as they can do so, Estlund maintains that democracy will tend to perform better than random decision-procedures.[10] Accordingly, democracy turns out to be the

[8] ibid 71.

[9] ibid 157, 174-6.

[10] ibid 160, 174-9. Note that in making his epistemic argument, Estlund rejects two influential approaches which are often deployed to theorise about the epistemic value of democratic decision-making. The first approach is Condorcet's Jury Theorem, which is rejected by Estlund on the grounds that its basic assumptions such as 'statistical independence' and 'individual competence' are hardly present in the decision-making situations in reality. The second rejected approach is 'contractualism', whose model of deliberation presupposes a narrowly self-centred conception of reasons for political actions and a 'veto rule' which is essential to the plausibility of a contractualist model but would unrealistically require democratic decision-making by unanimity. So a 'veto gap' prevents contractualism from being a plausible basis on which democratic deliberation and decision-making are to be theorised. See Estlund's repudiation of the two alternative approaches in Estlund (n 2) 237-57. For present purposes, we do not have to dwell on the question whether Estlund argument against the two epistemic alternatives is successful. For the alternatives also share the same conclusion that democracy is preferred to random decision methods on epistemic grounds.

only legitimate form of political authority, as it is 'better than random and epistemically the best among those that are generally acceptable'.[11] This is the main proposition of Estlund's 'epistemic proceduralism', namely the legitimacy of decision-procedures is determined by both epistemic and generally acceptable criteria.

Note that on the epistemic proceduralist thinking, democracy only has to have *modest* epistemic value; it does not have to be the epistemically *best* decision-procedure.[12] For even if democracy is less capable of making wise decisions than, say, monarchy, the latter's greater intellectual strength does not affect the conclusion that monarchy is illegitimate for its susceptibility to qualified objections. Hence, democratic decision-making needs only be epistemically stronger than the random method, for epistemic considerations matter only to the comparisons between democratic and random procedures, both of which are procedurally fair and beyond qualified objections.

[11] ibid 8.

[12] ibid 165-7. Unlike Estlund's modest position, Hélène Landemore, for example, who also consciously follows the epistemic tradition, further contends that democracy is actually the epistemically *best* option for political decision-making. See Hélène Landemore, *Democratic Reason* (Princeton University Press 2012) 3, 51-2. Also, Landemore, 'Democratic Reason: the Mechanisms of Collective Intelligence in Politics' (2011) <http://papers.ssrn.com/abstract=1845709> accessed 6 November 2014.

Because Estlund avoids giving a full account of reasonableness,[13] it is impossible to evaluate the internal coherence of his claim that only democracy is acceptable from all reasonable perspectives. This, however, does not affect our evaluation of whether this claim is sound. That is to say, irrespective of what criteria of reasonableness are actually adopted, we can still ask whether it is reasonable at all to say that only a democratic government can legitimately enforce the law.

4.1.2 Co-ordination and Coercion

I argue that it is not reasonable to say that only a democratic government can legitimately enforce the law. Let us first reflect on how, if at all, coercion is required for the solution of co-ordination problems. Recall that political authority solves co-ordination problems by specifying some standards of social conduct, viz. identifying certain common ways of action as obligatory.[14] The obligatory force of the authoritative directives is ultimately justified by the

[13] Note that Estlund's strategy to avoid supplying a full account is contestable. As David Enoch argues, this strategy is so ad hoc as to 'deprive the theory of whatever philosophical rationales motivated it in the first place'. See David Enoch, 'On Estlund's *Democratic Authority*' (2009) 58 IYYUN 35, 46-7. However, I bracket this issue, for my argument in this chapter does not depend on rejecting Estlund's strategy.

[14] See John Finnis, *Natural Law and Natural Rights* (2nd edn, OUP 2011) 231-3, 266-70; John Finnis, *Aquinas: Moral, Political, and Legal Theory* (OUP 1998) 255-8, 266-74.

common good. Thus, it is for the common good that the subjects should obey those directives.

Apart from the obligatory force, we should find that it is also for the common good that those directives should be *coercively enforced* when the subjects fail to obey. The promotion of the common good turns on the effectiveness of co-ordination. To be effective, there has to be a sufficient number of subjects acting in conformity with the officially specified standards of conduct, usually in the form of law. Coercion has the important function of ensuring that sufficient degree of conformity and thereby the effectiveness of the law's co-ordinative role. By deterring, frustrating, and punishing recalcitrance, coercion ensures the desired standards of social conduct are realised for the common good, wherever voluntary co-operation is not available. While it may be supplementary to the obligation-imposing aspect of law, coercion is essential enough to the successful working of the legal system, given the reality that total voluntary compliance is seldom possible. Hence, to the extent that effective co-ordination turns on coercion, among other things, the co-ordinator is entitled to coerce.

It follows that the justifiability of coercion turns on the reasonableness of the relevant co-ordinative projects: insofar as those projects supply reasonable

solution to co-ordination problems, they can be rightfully enforced by coercive means.

The foregoing exposition helps reveal the problem of Estlund's claim that only democracy is legitimate. Estlund seems to think it is possible that an undemocratic State has justified authority to pass laws to co-ordinate common action, but cannot legitimately enforce those laws. For as Estlund suggests, the acceptability requirement only bears on the justification of legitimacy; authority can be justified without meeting the requirement.[15] It follows that the undemocratic State may require the subjects to comply with the laws but may not enforce them by, say, punishing recalcitrance.

This is implausible. If the state of affairs is such that the undemocratic State has justified authority to pass laws and demand its subjects' co-operation, the same state of affairs should also give rise to the power to enforce those laws. As previously discussed, the justification for both powers is the common good, whose promotion relies on the co-ordinator's directives being effective, among

[15] 'Authority,' Estlund writes, 'by which I mean the moral power to require action – can, in principle, be established even without a generally acceptable justification if normative consent (the moral duty to consent to authority if offered the chance) is present.' Estlund (n 2) 134.

other things.[16] If so, it is unclear on what grounds Estlund can argue that the undemocratic State has no right to enforce the law, which it has the power to make. My contention is that no such grounds can be found. To the extent that legal obedience is required for the common good, I say, legal enforcement is justified along with the obligation to obey.

In response, Estlund may argue that his justification for political authority is different from mine and therefore he eschews the proposition that the state of affairs which justifies legal obedience is sufficient to justify legal enforcement as well. That is to say, he may adopt a different theory of political authority that makes provision for a State that is authoritative but illegitimate. However, for this defence to be tenable, he has to reject other theories that endorse the putative proposition that the right to coerce is justified along with the power to create obligation to obey. For if any of such theories is true, it follows that legitimacy is independent of democracy, contrary to Estlund's epistemic proceduralism. The major problem of Estlund's account is that he does not try to reject such rival theories. Insofar as he does not attempt such rejection, we can hold the putative proposition regardless of what Estlund says. Moreover, it is

[16] Other things include that the directives are reasonable, just, for the common good, both in content and the manner of its making.

unlikely that his theory of political authority would allow him to really reject the rival views. Let us consider such issues next.

4.1.3 Authority and Normative Consent

Estlund explains why the subjects are bound to obey the authority of the State by appealing to the conceptual device of 'normative consent'. Normative consent is a *hypothetical* consent, which is meant to reproduce the validating effect of *actual* consent. On Estlund's account, there are occasions when one is morally obligated to consent to perform some action. Under the obligation to consent, one's refusal to do so would be wrong and null; one would still have to perform the relevant action *as if* one had consented to the matter.[17] Estlund then applies this idea to the justification of political obligation: in the absence of actual consent, subjects would still have to obey the directives of their government *as if* they had consented to accept its authority.

In constructing his theory of normative consent, Estlund does not argue about the necessary conditions of justified political authority. Estlund's principal aim is only to prove that *actual* consent is not necessary for justified authority;

[17] Estlund (n 2) 117.

apart from that, Estlund is not meant to reject other non-voluntarist theories of political authority. Estlund anticipates that some may think his idea of normative consent (i.e. duty to consent) is simply a needlessly evasive way to describe the duty to obey. In response to the objection that 'the consent-requiring facts are already authority-establishing facts', he first concedes that he '[does] not want to argue that there is no other [non-voluntarist] basis for authority than normative consent'.[18] And then he defends his theory by suggesting that '[i]t is hard to know how to decide whether whenever normative consent grounds authority there would always already be authority on other grounds, too'.[19] In other words, Estlund does not deny the possibility that the duty to consent will always coincide with the duty to obey (and thereby that normative consent is actually a redundant justification for the duty to obey). He simply argues that it is hard to prove.

Irrespective of whether his last epistemological argument is commendable, the point is that Estlund does not reject other non-voluntarist theories of political authority. Indeed he accepts that the other theories can be true, too. If so, Estlund forgoes the opportunity to defend his theory of legitimacy (viz.

[18] ibid 130.

[19] ibid.

epistemic proceduralism), for it is the other theories of political authority that entail the repudiation of his epistemic proceduralism. If Estlund wishes to defend his theory of legitimacy, he cannot maintain his current 'ecumenical' attitude about the theory of political authority. He has to reject the rival theory that considers the state of affairs which justifies legal obedience to be sufficient to justify legal obedience, which rejection he has not attempted.

Moreover, there is good reason to think Estlund cannot apply his theory to reject the rival account. Taking account of the conditions where normative consent is said to arise, it is implausible that a State that is entitled to normative consent is *not* entitled to enforce its directions. For normative consent is conceived of by Estlund as an instance of what he terms the 'humanitarian duties'. The humanitarian duties consist of duties that

> contribute to the solution of great humanitarian problems either by making a positive difference or at least by acting in such a way that if people generally acted that way the problem would be significantly lessened or solved.[20]

[20] ibid 145.

Accordingly, political authority is justified as an instance of humanitarian duties to solve the problem of anarchy, which is a humanitarian problem that cannot be eliminated without authoritative, public decision-making.[21]

However, Estlund further contends that merely ending the anarchy is not sufficient. Not any way of authoritative ordering is justified; a justifiable ordering also has to possess 'certain features', which turn out to be those specified in epistemic proceduralism: decision-procedures free from invidious comparisons and capable of making intelligent decisions better than random methods.

In explaining how some democratic and similar decision-procedures are entitled to normative consent, Estlund reproduces his previous explanation as to how the *legitimacy* of democracy is justified. The 'jury system' – the solution to the 'juridical anarchy' – is the first instance that Estlund gives to explain how the authoritative ordering has to possess certain requisite features in order to be

[21] ibid 145-6.

entitled to normative consent.[22] On how the jury system's authority is justified, Estlund offers the line of argument as follows.

First: it is beyond qualified disagreement that the jury system will better promote substantive justice than anarchic arrangement and random decision methods. Second: it is subject to qualified disagreement that the elitist arrangement is more accurate than anarchy ('vigilantism'). The jury system, by contrast, is not subject to the same objection. Third: the qualified basis for refusing to consent to the elitist system is not available for those who want to oppose the jury system. Hence, the jury system, given its unique fulfilment of the epistemic proceduralist criteria, is entitled to receive normative consent, which in turn vindicates its judicial authority.[23]

The democratic government is another instance Estlund gives, taken as the solution for *political* anarchy. For democracy and jury share identical epistemic

[22] Note that the jury here has nothing to do with Condorcet's Jury Theorem; the analogy is not meant to invoke the democratic procedure's epistemic capacity as demonstrated by the Jury Theorem.

[23] See Estlund's full exposition in ibid 139-40. I bracket the problem that Estlund seems to think that a trial by judge would not meet the general acceptability requirement, and thus lack authority, as it is not eligible for normative consent. This implication seems to be disadvantageous to Estlund, but he does not discuss it.

proceduralist features, the authority of democracy is justified under a similar line of reasoning:

> The essential elements of the argument for the authority of the jury system are all present in a democratic system of government. First, there is a very great value, one that no qualified point of view could deny, to having laws and policies that are substantively just. Second, a proper democratic procedure, like a jury, is (or can be) demographically neutral, blocking the qualified objections to that would be possible to any invidious comparisons. Third, a democratic procedure involves many citizens thinking together, potentially reaping the epistemic benefits this can bring, and promoting substantively just decisions better than a random procedure. So, fourth, I conjure there is no nondemocratic arrangement that all qualified points of view could agree would serve substantive justice better. In light of all this, citizens would be morally required to consent to the new authority of such a democratic arrangement if they were offered that choice.[24]

In the two examples, Estlund clearly suggests that the acceptability requirement is one of the necessary conditions for valid normative consent. This plainly conflicts with what Estlund says in other place:

> Authority, by which I mean the moral power to require action – can, in principle, be established even without a generally acceptable justification if normative consent (the moral duty to consent to authority if offered the chance) is present.[25]

[24] ibid 11-2, 157.

[25] ibid 134.

In addition to the express statement, Estlund discusses an example of a hypothetical plane crash scenario where a flight attendant's emergency-related authority is justified without regard to any acceptability requirement. In the scenario, the flight attendant asks passengers to follow her instructions, when she is trying to help the injured after the accident. Estlund notes that unless there are serious flaws in the flight attendant's directives, it would be wrong for the passengers to refuse to consent to follow the flight attendant's directions. Thus, the passengers are obligated to consent to the putative authority; they are under authority without having actually consented to it. In brief, in the plane crash situation, normative consent arises and gives the flight attendant authority to command regardless of whether actual consent is available.[26]

The relevant conditions for valid normative consent in this and other similar states of emergency do not include the epistemic proceduralist criteria, otherwise they would lead to the denial of the flight attendant's claim to be obeyed: the passenger could object to the flight attendant's authority by reason of invidious comparison. And it is right to think that the flight attendant should have authority to tackle the state of emergency, irrespective of whether she

[26] ibid 123-5.

receives any actual consent from the passengers.[27] If the flight attendant, or indeed any person, is capable of co-ordinating common action to relive the imminent danger, she should be obeyed.

Hence, we should reject the acceptability requirement as a necessary condition for normative consent. As a humanitarian duty, it seems reasonable to say that normative consent should be available for any effective solution to humanitarian problems, which solution does not have to be epistemic proceduralist. Understood in this way, it is unclear how, if at all, Estlund's argument actually differs from my previous (classic) argument. And it is also unclear how Estlund can plausibly argue that legal enforcement is *not* justified by the need to solve the humanitarian problem of anarchy, while legal obedience is justified as a humanitarian duty. If legal obedience is required for the solution of humanitarian problems and therefore justified, I see no good reason to say that legal enforcement should be treated differently.

In conclusion, I have demonstrated that legal enforcement is justified together with legal obedience, both by their role in settling co-ordination problems.

[27] Yet actual consent is usually available: passengers can be taken to consent to obey the flight attendant's commands in all urgent situations when they agreed to board the aircraft or purchase the tickets.

Democracy is not required for the justification of any of them. Neither Estlund's epistemic proceduralism nor his theory of political authority can reject the foregoing proposition. His argument that democracy is necessary for the right to coerce should therefore be rejected. In the next section I consider another approach to the strong view: Thomas Christiano's argument that democracy is necessary for the State's 'right to rule'.

4.2 The Right to Rule

Thomas Christiano defines the 'right to rule' as a robust claim-right correlative with the subjects' duty to obey. This is a special – ideal – state of affairs in which the State's authority over its subjects is justified. Many States are justified in governing its subjects, but not all of them can possess the right to rule; to possess such a right, Christiano says, the State has to be democratic.[28] In this section, I consider Christiano's argument for the foregoing proposition. *Pace* Christiano, I contend that democracy does not bear on whether a State has the claim-right to rule.

4.2.1 Right to Rule and Ideal Type of Authority

[28] Thomas Christiano, *The Constitution of Equality: Democratic Authority and Its Limits* (OUP 2008) 252 n. 23.

To begin with, let us consider Christiano's proposed trichotomy between the following types of political authority:[29]

(1) 'justified coercion', meaning that an 'agent is morally justified in coercing the other agent to do what the coercing agent wishes [with regard to certain matters]', while the coerced agent may have no obligation to undergo the coercion;[30]

(2) the 'capacity to impose duties', meaning that an 'agent can impose morally binding duties on [other] agents', but the duties 'may not be owed to the authority'; and

(3) the 'right to rule', which is a claim of the political authority correlated with 'a duty owed to the authority on the part of the subjects of the authority and others not to interfere with the activities of the authority', and also duties to 'comply with the rules and commands of the authority, which obedience [is] owed to the authority'.

[29] ibid 240-1. See also Thomas Christiano, 'Authority', *The Stanford Encyclopedia of Philosophy* (Spring edn, 2013) <http://plato.stanford.edu/archives/spr2013/entries/authority/> accessed 28 September 2015.

[30] Christiano, 'Authority' ibid.

Christiano adopts this trichotomy to describe powers that authorities have in different states of affairs. Justified coercion (hereinafter, JC) characterises the kind of power possessed by the 'hostile but justified occupation powers'; the capacity to impose duties (hereinafter, ID) characterises the kind of power held by 'courts and government agencies', as distinct from the right to rule (hereinafter, RR), which is the kind of power uniquely held by 'a democratic assembly that satisfies the principle of public equality', representing the 'ideal type of authority'.[31]

Although this classification is not meant by Christiano to distinguish the right conception of political authority from wrong ones, it does distinguish the primary conception from the secondary. As Christiano writes, RR 'seems to be the primary notion of legitimacy while the others are dim reflections of this primary notion'.[32] In explaining why such-and-such person or body has RR, Christiano thinks we answer the central question about legitimacy, namely, in his words, 'who made you the boss?'[33] For, Christiano writes,

[31] Christiano, *The Constitution of Equality* (n 28) 241.

[32] ibid. Note that although Christiano sounds tentative in this particular sentence, his overall exposition affirms the proposition.

[33] ibid.

> the answer we are looking for is not the justification of the decision or a claim to expertise but rather a valid claim on us to respect the status of the decision maker even when we disagree with the substance of the decision.[34]

In other words, Christiano seems to imply that theories of JC or ID would fail to address the legitimacy question, because such theories would try to answer the question by saying 'my decisions are morally justified' (viz. a justification for JC)[35] or 'I am the expert on these matters' (viz. a justification for ID),[36] which are not the answer we are looking for.

Furthermore, Christiano contends that RR represents a kind of 'ideal political community' where political authority 'is founded in a moral relationship between moral persons that recognizes and affirms the moral personality of each citizen'.[37] This moral relationship consists in the correlation between citizens' duty to obey and authorities' RR. RR's unique meritorious state of affairs is absent in JC and ID. In the case of JC, the subjects owe no moral obligation to (say) the justified occupier to obey its directions; they may

[34] ibid 241-2.

[35] More precisely, a justification for JC *according to Christiano*. The qualifier applies to the justification for ID, too.

[36] Christiano (n 28) 241.

[37] ibid 242-3.

obey its directions simply for fear of punishment.[38] To the extent that the occupier exercises authority over its subjects irrespective of whether they are morally obliged to obey it, the occupier[39] does not (fully) recognise the moral personality of the ruled.

In the case of ID, the subjects have moral obligation to obey, but the obligation 'is not essentially connected to anything in the authority'.[40] Christiano adds that ID is 'instrumental authority' in that it 'help[s] subjects act in accordance with duties they already have but which they cannot be expected to discharge on their own'.[41] Because of this instrumental role, 'there is a vaguely paternalistic character to this kind of authority', and therefore 'the relation between the authority and the subjects need not be *a relation among equals*'.[42] In short, Christiano seems to think the instrumental, paternalistic

[38] ibid 242.

[39] In Christiano's original statement, it is the 'society' which 'does not [fully] engage the subjects as moral persons'. I substitute 'occupier' (viz. the ruler) for 'society', because I think it more accurately connotes what Christiano intends to mean.

[40] Christiano, *The Constitution of Equality* (n 28) 242.

[41] ibid.

[42] ibid (emphasis added).

nature of ID makes the authority-subject relationship morally deficient, viz. unequal.[43]

After comparing RR with JC and ID, Christiano concludes that

> To the extent that a society ruled by an authority that has the right to rule is an ideal of a moral community, the other types of authority are lesser forms of a morally ideal political community.[44]

Before I further investigate Christiano's argument that democracy uniquely brings about RR, let us consider a number of problems of the foregoing argument. First of all, I do not think Christiano presents the ways in which accounts of JC and (especially) ID would answer the legitimacy question in the best possible light. The proposed answers (e.g. 'my decisions are morally justified'; 'I am the expert on these matters') are obviously incomplete. I do not think any serious exponent of JC or ID would really answer in that way.

[43] If my understanding of his argument is right, Christiano seems to think if the subjects are sound-minded (or at least as sane as the ruler), they do not need authority precisely for the purposes of helping them perform the duties they already have. That is to say, where the subjects are equals to the ruler and thereby do not need the latter's direction in order to behave rightly, ID has no place.

[44] Christiano (n 28) 243.

Secondly, the argument that only the concept of RR fully affirms the subjects' moral personality is flawed. Christiano argues that RR establishes an authority-subject relationship that uniquely recognises the moral personality of the subjects. But it is not entirely clear why the recognition of the subjects' moral personality is particularly connected to RR. If it is the establishment of the duty to obey that underpins the recognition of the subjects' moral personality, then at least ID should be on an equal footing.

Christiano differentiates between RR and ID by arguing that the authority-subject relationship established by ID is not between parties who are equals. However, this argument is against a particular account of ID rather than the concept of ID as a whole. More precisely, Christiano seems to have Joseph Raz's 'service conception' of authority in mind when he argues that the concept of ID is 'vaguely paternalistic'.[45] That way, Christiano's argument is actually about whether the service conception sufficiently recognises the subjects' moral personality, instead of about, as he maintains, whether the concept of ID sufficiently recognises the subjects' moral personality.

[45] ibid 243.

Indeed, I think the attempt to derive moral implications (namely RR is the ideal type of authority) from the trichotomy is fundamentally misguided. I find it difficult to imagine that any morally significant kind of recognition or affirmation would be dependent on whom the duty to obey is correlative to. To know whether each subject's moral personality is fully and equally recognised by the relevant authority, the right way is to investigate the actual moral reason by which the authority is justified. If the reason for accepting person A as the ruler is that he is the eldest son of the predecessor, we can say that the subjects are not treated as equals. If, by contrast, the reason for accepting person B as the ruler is that he is elected in accordance with a fair method by the members of a community, we can (feel more confident to) say that the subjects are treated with due respect.

Note that in both cases, whether the duty to obey is owed directly to the authority is immaterial to the recognition of subjects' moral personality. This suggests that the search for the ideal type of political authority depends on the search for appropriate reasons for accepting political authority; it cannot be achieved by simply distinguishing between different conceptions of political authority. Whatever useful purposes Christiano's proposed trichotomy can serve, we should not rely on it to make moral evaluation of types of authority.

In sum, RR is not in itself something that is morally relevant. *Pace* Christiano, I do not think RR represents the ideal type of political authority or community. This affects Christiano's subsequent argument that democracy realises the ideal type of political community by uniquely effectuating RR. If the moral superiority of RR is repudiated, Christiano can no longer argue that democracy is the ideal type of political community, irrespective of whether democracy is capable of bringing about RR. Setting aside RR's moral relevance, in what follows I simply examine whether it is tenable to argue that only democracy can create RR, whereas non-democratic authorities at best have ID.

4.2.2 Right to Rule and Democratic Assembly

Christiano goes on to demonstrate how democracy matters: it uniquely brings about RR. While undemocratic governments can still be authoritative, Christiano maintains, none of them can obtain RR. He writes,

> democracy is not an absolutely necessary condition on the authoritativeness of political decision making. It is possible for a monarchy to issue legitimate authoritative commands on the grounds that its decisions are just… But this authoritativeness will be piecemeal, and it carries no implication of a

> right to rule. It merely implies that subjects have reason to go along with some of the classes of commands if they are generally just.[46]

To explain how democracy can uniquely realise RR, Christiano appeals to the special features of the ruler of democracy – the 'democratic assembly'. What Christiano terms the 'authority of democracy' is essentially 'the possession of a right by the democratic assembly to make law and policy for the society over which it has jurisdiction'.[47]

According to Christiano, a democratic assembly is 'the institutional embodiment of the unified body of the people as a collective decision maker in a political society'.[48] The assembly consists of either the whole people or their representatives. In a *direct* democracy, all (sane adult) citizens participate in and form the assembly, whereas in a *representative* democracy, representatives elected by all citizens form the assembly, which as a result represents the 'different aims the citizens have chosen for the society'.[49] This representation of aims, moreover,

[46] ibid 252 n. 23.

[47] ibid 243.

[48] ibid 246.

[49] ibid.

should be 'proportional to the amount of support those aims have in the society'.[50]

In distinguishing between the two types, Christiano expressly notes that he focuses on the assembly of a representative democracy when discussing the democratic assembly,[51] on the grounds that representative democracy is preferable to direct democracy under the conditions of the 'modern state',[52] where 'direct democracy is neither an efficient form of decision-making nor is it an egalitarian form of decision-making'.[53] Irrespective of his focus on the representative democracy, Christiano still seems to take his argument (to the effect that RR is only attainable in democracy) to be applicable to both direct and representative democracy.[54]

[50] ibid.

[51] ibid.

[52] Judging by what Christiano intends to say, I do not think 'modern' is a proper addition to 'state'. There is good reason to think that in a pre-modern but moderately large country, direct democracy cannot be efficient or egalitarian either. I think Christiano is too quick to confine his subject matter to the modern State.

[53] Christiano, *The Constitution of Equality* (n 28) 104-5, 246.

[54] That is to say, less efficient and egalitarian as it may be, the assembly of direct democracy is still capable of possessing RR.

The function of the democratic assembly is legislative. This is to say, the democratic assembly makes the laws that other powers of the State execute. Christiano notes that only the legislative power of the State has to be exercised by the democratic assembly; other powers of the State can be exercised by non-democratic authorities.[55] The unique way that the democratic assembly exercises the legislative function is the key to Christiano's argument that the democratic assembly has RR.

The democratic assembly helps realise citizens' political rights to determine the plans of action for their society in two important ways. First, it enables such rights to be *actually* exercised by implementing a legislative process where citizens can put in their proposals to influence or determine the final plan of action for the whole society.[56] Second, it enables such rights to be *equally* exercised by its representing rival views in proportion to the amount of support they respectively receive from citizens, giving each citizen's input equal weight in legislation.[57] Without the establishment of the democratic assembly, citizens'

[55] Christiano, *The Constitution of Equality* (n 28) 245.

[56] ibid 247.

[57] ibid 247-8.

right to determine the social order as equals with one another – the 'equal weight', in Christiano's words – cannot be fulfilled.

Based on the idea that the democratic assembly uniquely realises citizens' equal political rights, Christiano goes on to argue that the democratic assembly has RR. To faithfully present his line of reasoning, I quote him at length:

> So if the democratic assembly is properly constituted, it genuinely embodies the people as a decision-making body and it pools all the equal rights of citizens into the assembly. The democratic assembly then stands for the citizenry as a whole and represents it. As a consequence, the actions of the democratic assembly are the pooled exercises of the political rights of all the citizens. So because all citizens have rights to an equal say and because the democratic assembly is the institutional method by which these equal political rights are exercised, the democratic assembly has a right to rule.[58]

I have to admit that it is still not entirely clear to me how this conclusion (that the democratic assembly has RR) follows from the preceding argument that the democratic assembly enables citizens to exercise their equal political rights. True, that the democratic assembly helps realise the equal political right demonstrates that there is good reason to have a democratic assembly; it supplies a justification for the institution. However, this does not tell us why the obligation to obey the decisions of the assembly is owed specifically to the assembly. Indeed, as I

[58] ibid 248.

demonstrate next, it is possible to associate the same democratic assembly with ID. Throughout his account, Christiano does not prove how exactly the realisation of equal political rights entails the special correlation between citizens' duty to obey and authorities' RR.

I argue that Christiano's proposed equality-based obligation to obey the democratic assembly is actually owed to the citizens instead of to the assembly. That is to say, RR cannot be established by the assembly's contribution to equal political rights.

On Christiano's account, the obligation to obey the democratic assembly's decisions is entailed by the fundamental individual obligation to treat others as equals. This obligation is correlative to the individual's right to equal treatment. The fundamental obligation (and the correlated right) entails a further obligation to establish and maintain public institutions that publicly and equally promote the well-being of each person so that each person can see that all subjects are treated as equals.[59] Christiano calls this particular obligation the principle of 'public equality'.[60]

[59] ibid 249-51.

[60] ibid 2.

To the extent that the democratic assembly is said to realise citizens' equal political rights, the principle of public equality requires its implementation. As part of the obligation to establish and maintain the assembly, the obligation to obey its decision (defeasible under certain conditions) is also justified on the same principle. Given the fact that these obligations and their correlated rights are connected with each other by the relationship of entailment, the right to which the political obligation to obey the democratic assembly is correlative is an entailment of the fundamental right of the individual citizen to receive equal treatment from others. This is to say, the obligation to obey the democratic assembly is actually not owed to the assembly, but to the individual citizen, who bears the right to equal treatment and the derivative right to her fellow citizens' obedience to the democratic assembly.[61]

Christiano's argument that the democratic assembly 'pools' or 'embodies' all citizens' political rights would not change the foregoing conclusion. Here is an example of the argument:

> This duty [to treat people as equals] is correlated with the right of each citizen to an equal say. So each person has a duty to each other citizen to

[61] Surely it can be argued that the assembly is the equivalent of the citizens and therefore the obligation is owed to *both*. I consider this argument later. Note that Christiano does not entertain this particular argument.

> afford them a right to an equal say and to respect that equal say. But the political rights of all citizens are pooled in the decision-making activities of the democratic assembly. So the duty to comply with democratic institutions is correlated with the right of the democratic assembly to rule. And since this duty is owed to each citizen and the democratic assembly embodies the equal political rights of all citizens, the duty is owed to the democratic assembly.[62]

The argument lacks the most critical explanation as to how the fact of 'pooling' or 'embodiment' replaces the citizens themselves by the democratic assembly as the subject to which the obligation to obey is owed. These terms are no more than a shorthand for the fact that the democratic assembly makes it possible for citizens' political rights to be actually and equally exercised. Thus, I say, these terms are synonymous with the more common term 'representation'. If what the democratic assembly does in 'pooling' citizens' political rights is to represent the rival views of the citizens and make an appropriate legislative judgement, it does not do anything that facilitates a 'transfer' of the right correlative to the duty to obey from the individual citizen to the legislative assembly.

The idea of transfer would make better sense if Christiano argued that the democratic assembly could be taken to be the people themselves. That way, the obligation owed to the people would be owed to the assembly too. Let us

[62] Christiano, *The Constitution of Equality* (n 28) 250.

consider this argument by reflecting on the legislative assembly in a *direct* democracy: given its nature as a union of all the sane adult members of a community, does such an assembly have RR?

In this case, I would say yes, in the sense that the legislators and the subjects consist of the same group of people, and thus the obligation to obey can be seen as owed to both the legislative assembly and the subjects simultaneously. But this positive answer should be accepted along with some important qualifications.

Firstly, it is contestable to say that the people, when acting in their official capacity as legislators, have the right correlative to the obligation to obey that they have in their private capacity as the subjects. For we may need to distinguish between different *personae* in order to precisely describe normative relations formed between persons in particular personae. Otherwise it would be confusing to describe the state of affairs where, say, a monarch should obey the directives that he previously issued as generally binding norms. To describe this state of affairs require us to distinguish between the monarch's different personae, and thence to understand the monarch's obligation to obey the

generally binding directives as this: he in the private persona, viz. the subject of the norms, obeys him in the official persona, viz. the official giver of the norms.

However, even if we grant that the people in their official persona as the legislator can be seen as having the right they have in their private persona as the subjects, we still find that the resultant RR is too trivially different from ID to be an alternative to it. Even in the direct democracy, where the legislative assembly consists of all the sane adult members of a community, each person's obligation to obey the assembly's decisions is still owed to other persons *precisely as* members of the same community, who are entitled to her compliance with the assembly's decisions, as required by the principle of public equality (or other principles, depending on one's view about the moral foundation of political obligation). That the people play an additional role as the legislator does not change or eliminate the obligation they originally have in relation to one another.

If so, to insist on saying that the assembly has RR (instead of ID) would only change the way in which we describe the same state of affairs. That is to say, whichever term we prefer, it does not affect the same state of affairs that people still owe their duty to obey to one another, irrespective of their additional role

in the legislature. The resultant distinction between RR and ID would thus be superficial. If the argument for RR were to be defended in this way, the cost would be to deprive the account of significance, for the purported distinction between democratic and non-democratic rulers would only be the superficial distinction between uses of terms.

In sum, my investigation into Christiano's argument suggests that he does not prove how the special character of the democratic assembly, namely it realises citizens' equal political rights, entails the correlation between subjects' obligation to obey and ruler's right to rule. My proposed alternative strategy to prove the correlation offers a conception of RR that is only trivially different from ID. What is or can be taken for the existence of RR in a democracy is either the fact that (i) a representative legislative assembly makes laws for the whole community, or that (ii) an assembly of all citizens (in a direct democracy) makes laws to govern their own conduct. In either event, the obligation to obey is essentially owed to one's fellow citizens *qua* citizens. I conclude that RR should be ruled out in our quest for the place where democracy would make a difference.

4.3 Conclusion

I have examined two further ways in which theorists argue that democracy is necessary for political authority to be fully justified, namely David Estlund's argument that democracy is necessary for the right to coerce, and Thomas Christiano's argument that democracy is necessary for the claim-right to rule. My examination has led to the conclusion that both arguments are not fully successful: the right to coerce does not depend for its justifiability on democracy, and the claim-right to rule is not attainable even if the legislature is democratic. Therefore, I rule out both ways as the right directions in which we investigate democracy's true relevance to political authority. In the next chapter I carry out my own investigation in the right directions and construct my account on how, if at all, democracy matters to the justification of political authority.

5

The Place of Democracy in the Justification of Political Authority

In previous chapters 2-4, I critically examined the various versions of the strong view and demonstrated how they all fail to provide coherent or sound arguments in the light of the classic principle of efficacy. In this chapter I turn to the constructive task of offering my account on how, if at all, democracy bears on the justification of political authority. My account consists in two principal arguments. First: the strong view can be reconciled with the classic view to vindicate the proposition that democracy affects political legitimacy if and only if democracy is viable in the relevant community. Second: when democracy becomes constitutive of political legitimacy, only the laws that regulate legal change – as distinct from laws that regulate other official and social conduct – depend for their authority on democracy. The arguments are considered in turn.

5.1 Reconciliation with the Classic View

I have demonstrated that various versions of the strong view are unsuccessful. At first sight, this seems to connote that we have to give up the strong view as a whole, as we cannot vindicate any other necessary conditions for justified political authority than those specified in the classic view. Important as it may be, democracy at best stands for a political ideal, but has no more relevance to the justification of political authority than, say, the principle of the separation of powers.

However, I argue that the foregoing connotation is evitable. In this section I present my solution to the apparent incompatibility between the classic and strong views. Instead of giving up any of them, I seek to reconcile one with another. As I demonstrate in 5.1.1, my strategy affirms the classic principle of efficacy, but it also reveals the principle's limit: where both democratic and autocratic[1] governments have become capable of solving co-ordination problems for the common good, the principle alone is not sufficient to tell us which form of government we should prefer. Furthermore in 5.1.2, I reconcile the classic view with the strong view by reconstructing the strong view as a

[1] Following Hans Kelsen, I take 'autocratic' to mean 'undemocratic'. See Kelsen's usage in Hans Kelsen, *General Theory of Law and State* (Harvard University Press 1945) 284.

principle that helps locate the legitimate authority wherever the classic principle reaches its limit. I contend that autocratic government is justifiable where democratic government is unavailable and thereby only autocratic government alone can solve co-ordination problems.

5.1.1 The Limit of the Classic View

In the classic view, a government is successful when it effectively solves co-ordination problems for the community it purports to govern. It is possible under certain circumstances that only an autocratic regime can supply the needful co-ordination solution. If autocratic rule is necessary for successful government, it follows that autocratic authority is actually justifiable and just. As Yves Simon reminds us, 'paternal' authority would be needed to the extent that 'paternalistic government alone can remove both anarchy and tyranny'.[2] The authority is characterised as paternal on the ground that it makes decisions that bind the subjects' behaviour without their agreement or participation, in a way resembling a parent's authority over her child. A community where the majority of the people cannot take care of their common good is analogous to a child, and therefore should submit themselves to the authority of those who can take

[2] Yves Simon, *Philosophy of Democratic Government* (University of Notre Dame Press, 1993) 16.

care of their common good until they become capable of doing so.[3] It is thus justified to establish, support, and obey paternal, autocratic government exactly for the reason that only it can take care of the community.[4]

It is tempting to think that the principle requires us to obey the incumbent regime as long as it continues to rule efficaciously. The basic line of thought is this: to the extent that acts of disobedience to the existing ordering threaten to undermine the effectiveness of the ordering which is broadly for the common good, such acts of disobedience violate the efficacy principle. Disobedience to an existing, effective legal or political ordering is thus unjustifiable, even if it aims to (forcibly) effectuate democratic reform. Under this line of thought, all

[3] Whether one would like to follow Simon in calling the authority 'paternal' is a matter of language choice. However, I prefer other terms such as 'autocratic' and 'undemocratic' to 'paternal' so as to avoid some unwanted implications of the term 'paternal'. One is the prejudice against those peoples who cannot form a democratic government, caricatured as immature and childlike. The other concerns the term's explanatory capacity. It tends to obscure the fact that the justifying grounds for undemocratic political authority differ from those for parental authority in several important ways. For instance, ignorance of the people is not the only reason on which the need for autocracy is vindicated, but the idea of paternal authority tends to focus on that particular aspect. Another important difference will be revealed in 5.2.2.1, where I explain why most of the autocratic regime's direction remains obligatory even when the existence of the regime has ceased to be justifiable.

Still, my disagreement with Simon's expression does not negate my agreement with his principal idea that I want to emphasise here: it is possible that a political community, though peaceful and stable, is not yet ready for democracy. Insofar as this (type of) community is concerned, autocracy should be recognised as the only eligible solution to co-ordination problems and thereby having the rightful authority to be obeyed.

[4] Undemocratic as the government may be, the majority of the people still share in the collective self-government by co-operating with the authority to advance their common good.

opportunities for acting against the efficacious regime seem to have been eliminated. If this conclusion is right, we shall have to say that democracy is irrelevant to legitimate political authority.

Yet, the conclusion is not right. This line of thought overlooks the fact that the *prospect* of an eligible alternative ordering is sufficient to give rise to reason for action leading to that alternative ordering's implementation. The reason is particularly strong when the alternative ordering is meant to realise more adequate justice than the current one. The replacement may indispensably disrupt the existing co-ordination to some extent, but the disruption is in line with the efficacy principle insofar as it is meant to and capable of (re-)establishing efficacious ordering. In short, the principle of efficacy does not necessarily require us to maintain the incumbent's continuation.

It follows that if there is a credible prospect of a new effective democratic government, there is an efficacy-based reason for the democratic government's implementation. Subjects of the effective autocratic regime are not bound to obey the incumbent autocratic regime only; the principle allows them to disrupt the autocratic ordering so as to establish more adequately just ordering that is the democratic government. In other words, when there are competing forms of government that all have the chance of success, the principle of efficacy alone

does not dictate which one of them we should adhere to; they all seem to be compatible with the principle. It follows that if we want to say that we should prefer democracy to autocracy, or vice versa, we need further considerations than the principle of efficacy.

This is what I argue the limit of the classic view. When a community that was justly ruled by an autocratic regime has progressed and obtained sufficient conditions for successful democratic rule, it encounters the choice between autocracy and democracy. In this particular situation, the classic principle of efficacy does not provide the community with clear guidance on which to choose, given that both options are capable of successful government. The limit of the classic principle makes room for further criteria of legitimate government. This is where, I suggest, democratic-related conceptions of political legitimacy join.

5.1.2 Reconciliation between Two Views

Having argued that the classic view does not settle which form of government should be adopted, in what follows I argue that the classic view is compatible with a modified version of the strong view. I demonstrate how the strong view

is to be modified in order to be reconcilable with the classic view, and thence examine some nuances that can be added to the classic view.

5.1.2.1 On the Strong View

Recall the formulation of the strong view in chapter 2:

> (SV) Being democratic is necessary for political authority to be fully justified.

To be compatible with the classic view, there is only one logically possible way to modify (SV): (SV) has to be constructed as a principle applicable only where the classic principle reaches its limit. For where the classic principle alone is sufficient to determine the location of authority, any democratic conception of legitimacy is simply incompatible and excluded. If it is possible to discover any democratic conception of legitimacy, it can only happen where the classic principle alone is *not* sufficient to settle the issue, viz. where rival forms of government are available. Hence, the modified strong view which is compatible with the classic view (CV)[5] is defined as follows:

[5] (CV): A political authority is justified if and only if it is capable of settling co-ordination problems for the common good of the community it purports to rule.

(MSV) Being democratic is necessary for political authority to be fully justified if and only if democracy is viable in the relevant community.

(MSV) retains a central element of (SV) that being democratic is necessary for political authority to be fully justified, but also importantly modifies (SV) by recognising the full legitimacy of autocracy where democracy is not viable. The recognition of liberty, equality, wisdom, or other democratic goods that underpins (SV) is actually compatible with the putative modification. The moral principles deployed to vindicate the necessity of democratic government do not reject the justifiability of undemocratic government altogether. Often, endorsement of autocratic authority connotes no denial of democracy's moral importance, but reflects the sound understanding that successful democracy turns on successful government, and that criteria for each cannot always be satisfied at the same time.

In the last unhappy but not uncommon situation, it is sensible for a faithful democrat to give primacy to successful government, namely a well-ordered, continuous co-ordination effectuated by officials. And only when (the prospect of) successful government is secure, she begins to entertain the possibility of successful democracy. This chronological order reflects the reasonable democrat's judgement that without an elementary level of political ordering in

the first place, democracy is not possible at all. Moreover, in making the judgement, the democrat remains faithful to the justifying principle(s) of democracy, for she rightly takes her compliance with autocratic authority, be it temporary or prolonged, to be part of her effort to effectuate successful democracy. In other words, she rightly obeys a broadly just and effective autocratic regime for the reason that such obedience, *inter alia*, is required for the realisation of the democratic ideal.

(MSV) recognises the justifiability of autocratic authority if and only if it is capable of bringing about successful government. That is, where only the autocratic authority can realise the classic principle of efficacy, (MSV) does not dispute its authority. Only where democratic authority is also capable of realising the efficacy principle, (MSV) dictates that democratic authority is always to be preferred.

5.1.2.2 On the Classic View

If my previous analysis on the limits of the classic view is right, (CV) needs no modification in order to be reconciled with (MSV). For (CV) is inherently open to further principles concerning the choice of the proper form of government when such a choice is possible, and (MSV) applies only when (CV) alone cannot

determine which to choose. Still, some important nuances can be added to the classic view in the light of Simon's discussion of the justification of autocratic ('paternal') authority.[6]

Firstly, Simons reminds us that while autocratic authority is sometimes justifiable, it is not meant to last. Rather, autocratic authority rightly 'aims at its own disappearance'.[7] Thus, successful government *eventually* depends on successful democracy: if a community continues to rely on autocratic authority 'past the earliest date for its disappearance,' Simons suggests, the government 'has failed to a degree' such that it fails to eliminate the community's deficient conditions.[8] It is not only irresponsible but also abusive if autocratic authority 'intends its own maintenance and manages things in such a way as not to have to disappear'.[9] In short, Simons maintains that 'paternal' authority is 'pedagogical' in the sense that it brings about its subjects' independence from itself.

I think that Simons is right to bring into light this character – responsibility – of autocratic authority. (CV)-consistent political authority should act in ways

[6] Simon (n 2) 7-19.

[7] ibid 9.

[8] ibid.

[9] Ibid.

conducive to democracy's maintenance or otherwise emergence. It does not have to directly aim at the introduction of democratic institutions; it can simply concentrate on the promotion of the well-being of its subjects by, say, eliminating ignorance or effectuating means for dynamic social life. Democracy becomes possible in the community as the propitious conditions are made available as a result of good government. While what the conditions are require further study, suffice it to say that a good government, acting in (CV)-consistent manners, is liable to pave the way for democracy.

Secondly, some risks of disorder or decline for a period of time that follow the transition to democracy or the forcible toppling of the prolonged autocratic regime should be taken as something that (CV) permits. More precisely, such risks consist in two kinds: (i) the risk of disorder caused by the revolt, and (ii) the risk of disorder caused by the lack of a competent successor regime. Plainly construed, (CV) appears to disprove of efforts to forcibly effectuate democratic transition if such efforts yields the first or both risks. Thus, even if the prospective efficacy of the alternative regime supplies a reason for its implementation, the temporary disorder preceding the new regime's implementation may supply a countervailing reason that requires the subjects to refrain from forcible action.

I contend that (CV) should be construed to allow for both risks to a reasonable degree. The first kind of risk should be accepted unless it also involves a high risk of prolonged civil strife. In seeking democratic transition, disruption to the existing order is often inevitable. The persons in power may become reluctant to give up their supremacy so that only forcible action can achieve their substitution. True, forcible action undermines the existing order and the benefits the order confers, but it is not necessarily against the common good. The disruption is essentially a side effect of a project that intends the community's greater participation in the common good; it is reasonable to accept the risk in order for the community to progress. On the other hand, avoidance of risk is not necessarily for the common good. Preserving the existing order, it obstructs many opportunities to progress. The common good, however, is not just about adherence to the existing order. A risk-averse approach to (CV) courts the worse risk of over-simplifying the dynamics of the common good.

The acceptance of risk is importantly qualified by not overlooking the much less acceptable risk of prolonged civil strife. The purpose of revolt is the succession of governments. Sometimes a revolt succeeds in overthrowing the incumbent regime but fails to establish a new one in its place. Revolutionary

forces become rivals for power, leading to unending civil war, an outcome which is arguably worse than the continuation of the former regime. I do not mean that the risk of civil war should always be avoided no matter how tyrannical the incumbent regime is, just that there are weighty reasons against revolt if dire consequences are predicted.

The second kind of risk is about the consequence of successful revolt. Suppose that a revolt is successful in that a new democratic regime is instituted. Yet, it is possible that the 'many', new to the work of government, are not able to perform their public duties as skilfully as experienced statesmen. A period of clumsy government may ensue. Ideally they will learn and begin to manage things well in due course. But it is neither unlikely nor uncommon that the situation does not improve and thence the new democracy fails to consolidate.

Simon incisively notes that democracy is not 'the easy way'.[10] On the contrary, the disappearance of autocratic authority involves the risk that the newly empowered subjects fail to carry out the responsibility for self-government; democracy actually 'increases enormously the demand for heroism'.[11] If we hold that a community should aim to progress to democracy, we should be prepared

[10] ibid 17.

[11] ibid.

to accept the risk. To this extent, (CV) should be construed to make room for the 'trial and error' involved in a community's democratic pursuit.

I do not intend to conceal the fact that it requires good judgement to know whether a community has been ready for democracy, and the judgement will be highly tendentious in nature. Risks that are seen by some as necessary are likely to be seen by others foolish; whether the continuation of an autocratic regime remains justified will be a matter of endless disputes. In principle, however, it is possible to distinguish between cases in which a community is evidently suitable for transition to democracy and cases in which a community has not yet reached this stage. And in less evident cases, I would hazard that proponents of democratic transition should receive the benefit of doubt. That is to say, it is to be taken as part of the acceptable risk that they make a wrong judgement, unless the judgement is plainly defective. As it is the acceptable risk that a community may fail to consolidate democracy, it is also acceptable that the community may make a wrong judgement of its readiness. I by no mean suggest that we cannot reject a wrong judgement. A wrong judgement is rightly rejected. What I say is simply this: we should not let the likelihood of being wrong constitute too high a threshold for democratic transition to be permissible.

Still, disagreement over which of the above-mentioned cases should characterise the particular state of affairs, either between ruler and ruled or between members within each section, is inevitable. This is the common predicament of all acts of disobedience in the real world. Philosophising may be unable to eliminate the predicament, but at least can help supply principles which people who care to solve their problems will need, in part.

In sum, in this section I have argued that the classic view is reconcilable with a modified version of the strong view. The resulting view recognises that democracy is *sometimes* constitutive of legitimate political authority. I have not discussed how exactly democracy bears on political authority. Does it bear on political authority altogether as the simple strong view envisages? Or does it affect some special aspect of political authority as the subtler versions suggest? I consider this question in the next section.

5.2 What Rests upon Democracy?

Here I discuss what in political authority exactly rests upon democracy. I conceive of the discussion as an investigation into the type(s) of law whose authority is sensitive to democracy. By reference to the distinction between the primary and secondary rules of law, I demonstrate in 5.2.1 that laws which

govern legal change depends for their authority on democracy. Whenever autocracy ceases to be justifiable, I argue, the subjects acquire a right to act against specifically such laws to implement a democratic legislature. Furthermore in 5.2.2, I contend that while democracy does not affect the authority of laws which stipulate the primary rules of social conduct, it gives rise to a reason for changing the laws passed by the autocratic legislature that has been considered unjustified. Lastly in 5.2.3, I supplement that the exercise of the right to forcible legal change is subject to a defeasible and provisional obligation to try resolving the problems caused by non-democracy by legal means, when the problems are first encountered.

5.2.1 Laws of Legal Change

5.2.1.1 The Obligation to Change Laws *Legally*

In my previous discussion of Pettit's account, I defended his strategy to single out the obligation to accept the regime, as distinct from the obligation to obey the laws of social conduct. While I suggested that democracy is not necessary for either obligation to be justified, I endorsed Pettit's basic notion that if democracy makes any difference in the justification of political authority, it

bears on the particular aspect of the obligation relating to the acceptance of the regime, viz. relating to the laws of legal change.

The laws of legal change can be undemocratic in content but still legitimate. Where autocracy is necessary for efficacious government and is *pro tanto* justifiable, the laws of legal change are stipulated to empower a relatively small group of officials to take care of needful legal change for the entire community. Such laws, to be enlightened, may allow the subjects to petition the officials for certain goals they desire. But it is eventually up to the select officials' discretion whether such-and-such change should be made.[12] This way of political decision-making is tenable when the more 'participatory' form of politics is not possible. And although public life in this is limited, the subjects are not necessarily sheep-like in their dealing with the authorities: by accepting the officials' judgement and obeying the laws they promulgated, as opposed to more or less unthinking acquiescence to the official directives, the subjects manifest their support for the laws of legal change of their community. While the community in this state of facts is not strictly democratic, it has developed the elementary form of self-government. For '[w]hen the subjects willingly, without

[12] And thus, as Richard Ekins points out, the subjects are likely to approach the officials 'as supplicants', as opposed to political equals. Richard Ekins, *The Nature of Legislative Intent* (OUP 2012) 145.

coercion, adopt the laws enacted by a law-making authority as if they were their own,' as Ekins notes, they 'have a share in law-making in this modest, but important way'.[13] However, as the society progresses, the adequacy of the autocratic way of regulating legal change weakens. Eventually when the subjects are ready for and interested in greater participation in the community's public affairs, autocratic decision-making will be rightly judged too exclusive to be acceptable and legitimate.

5.2.1.2 The Right to Illegal Change

A political community is entitled to democratic government if and only if it is ready for it. If the autocratic ruler's possession of her princely office exceeds the legitimate duration, and still acts in ways inconsistent with her substitution, subjects acquire a right to forcibly effectuate the substitution. If forcible substitution is justified, it follows that it is justified to violate or displace the constitutional laws that govern legal change.[14] Given that this objective can be achieved without having to disturb most of the laws of social conduct and the legal relations (i.e. legal rights and obligations) created in accordance with the

[13] Richard Ekins, 'How to be a Free People' (2013) 58 Am. J. Juris. 163, 171. Understood in this way, an important distinction between the ideas 'democracy' and 'self-government' is drawn on my account.

[14] See 3.1.2.

former, the right to forcibly effectuate democratic transition does not warrant the violation of the laws of social conduct or their resultant legal relations except for particular rulers of law that proscribe insurgent activities or disturbances of public peace or order. Thus, we can see why it is the laws of legal change that are peculiarly affected by the justifiability of the form of government.

Let me clarify what acts of disobedience to the laws of legal change are authorised by the right to illegal change. First of all, the authorised acts of disobedience include all such law-breaking acts as are necessary to effectuate a forcible displacement of a regime. As Finnis incisively demonstrates, the nature of such events entails that three kinds of constitutional laws are especially susceptible to forcible amendment, namely the 'rules of succession to office', the 'rules of competence' and the 'rules of succession of rules'.[15] Finnis further notes that what is minimally sufficient for a revolution or coup d'état to effectively take place is the postulation of new rules of succession of rules ('new conditions of repeal'), by which all the other changes required for the new regime's establishment can be administered legally.[16]

[15] John Finnis, 'Revolutions and Continuity of Law' in *The Philosophy of Law: Collected Essays Volume IV* (OUP 2013) 411. See my previous discussion of such rules in 3.1.2.

[16] ibid 424.

Another aspect of disobedience is peculiar to democratic transformation. It consists in the subjects' right to reject the laws whose existence defines the regime as autocratic. In other words, it is the laws that make the constitution an autocratic constitution instead of a democratic one.[17] Such laws normally concern the constituting and exercise of the legislative power, as opposed to powers that can be characterised as executive and judicial and subordinate to it in that the latter are obliged to apply the norms made by the former. To say this is not to deny the fact that a constitution we usually characterise as democratic is in fact not *purely* democratic, but 'mixed' in that not all powers of the State are structured in conformity to the democratic principle. Typical examples of the laws in consideration here are laws that concentrate the supreme power to legislate on a select group of persons and limit or prevent the ordinary subjects' admittance to the group and also other opportunities to share in the formation of legislative decisions. Such are the laws which become illegitimate when the transition to democracy is viable: the subjects acquire a right to demand such laws' amendment, and their acts of disobedience will break such laws to the extent that such laws are the very laws that govern their own validity.

[17] This includes the case that the constitution is a mixture of different elements and its autocratic element prevails.

My account is thus in broad agreement with Pettit's 'right to revolt'. To a large extent the foregoing exposition may be just a more 'legal' description of the right to revolt. However, some nuances that can be added to Pettit's account may be worth mentioned here. Firstly, unlike Pettit (and others), I do not draw and thematise the distinction between 'legitimacy' and (the rest of) 'justice'. And I do not find it necessary to do so. On my account, 'legitimacy' and 'justice' (or justifiability) are used synonymously, denoting the ultimate criterion for the justifiability of legal and political institutions.[18] We do not need the legitimacy-justice distinction to understand the distinction between disobedience to particular laws of social conduct and revolt against the regime. Both issues concern the common good: the former concerns the particular laws' contribution to the common good, and the latter concerns whether a particular regime is capable of making or administering laws or other directives for the common good continuously. Yet, while the merits of both the regime and the ordinary laws of social conduct are measured according to the requirements of the common good, they can be measured by different aspects of it. For it is

[18] That is to say, a legal or political institution is justified if and only if it is 'just'. However, I bracket the debate on whether justice should be so understood as to exhaust the justifying grounds for legal and political institutions, for my present purpose here is to discuss whether we should adopt 'legitimacy', as understood by Pettit, as a distinctive category from other justifying grounds for legal and political institutions. For the debate just mentioned, see e.g. John Gardner, 'Finnis on Justice' in John Keown and Robert P. George (eds), *Reason, Morality, and Law: The Philosophy of John Finnis* (OUP 2013).

possible that the particular aspect of the common good that is realised by, say, the democratic government is a consideration applicable to the regime alone. To this extent, Pettit is right to characterise 'legitimacy' as a special quality of government.

Another nuance concerns the exercise of the right to revolt. I think the exercise of the right should be subject to a provisional and defeasible obligation to act legally. That is to say, the subjects are justified in exercising the right only if it is not possible to expect that the persons in power will positively promote the democratic transition, either because they have expressly refused to do so, or because they have been acting in ways inconsistent with any willingness to effect the transition. Thus, in the ideal scenario where the autocratic ruler will legislate on her own disappearance, no opportunities will be available for the exercise of the right. The foundation of this obligation needs further explication. Before I further look into this subject matter in 5.2.3, however, let me turn to the type of law which does not depend for its authority on democracy, explaining why this is so and demonstrate what in this case, if at all, rests upon democracy.

5.2.2 Laws of Social Conduct

There is a difference of opinion about how democracy bears on the authority of the laws of social conduct. Some theorists, like Thomas Christiano,[19] David Estlund,[20] and Anna Stilz,[21] think democracy does affect the reason to obey the laws of social conduct. They do not distinguish amongst types of laws to compare their relations to democracy. Presumably if democracy affects the obligation to obey the law, they seem to think, it affects all laws alike. Others, like Philip Pettit, confine democracy's relevance to the constitutional laws of legal change and dissociate democracy from the authority of the laws of social conduct. Against this background, I make two arguments. First, I argue that laws of social conduct do not depend for their authority on democracy. Second, I argue that if democracy should have any bearing on such laws, it is the reason for maintaining or amending them (by legal means) that is affected by democracy.

5.2.2.1 Democracy-Independent Authority of Laws of Social Conduct

[19] Thomas Christiano, *The Constitution of Equality: Democratic Authority and Its Limits* (OUP 2008).

[20] David Estlund, *Democratic Authority: A Philosophical Framework* (Princeton University Press 2009).

[21] Anna Stilz, *Liberal Loyalty: Freedom, Obligation, and the State* (Princeton University Press 2009).

I identify two lines of argument to the effect that laws of social conduct[22] depend for their authority on the fact that they are democratically legislated. The first line of argument is that if an autocratic authority is unjustified in assuming governing authority, its direction is not justified and obligatory either. The second line of argument is that if laws are not legislated democratically and if such laws are susceptible to reasonable dissenters' objections to the justifiability of their contents, they give rise to no ground on which the reasonable dissenters can treat the laws as justified and obligatory. I consider them in turn.

Part of what democracy means is that all laws in a political community are to be made democratically.[23] If so and if democracy is morally necessary, it follows that it is morally necessary that *all* laws are to be made democratically, be it the laws that stipulate the primary rules of social conduct or those secondary rules of official behaviour. If any such laws are *not* democratically made, it means that the regime in the political community is not fully democratic and therefore is against the moral principle that requires democratic government. Insofar as the

[22] This is not meant to be exclusive. I explain later that the same line of thought applies to many of the laws that regulate official conduct, too.

[23] The tense here matters. It is not part of what democracy means that *all existing laws* should be made democratically at the time of their creation. Thus, I am against the view that democracy requires that the original creation of the legal order be democratic. Argument against the view cannot be fully presented here due to the scope of this thesis.

moral principle of democracy is part of the common good that the political authority is meant to promote, the violation of the principle renders the political authority unjustified. Moreover, it also seems to further follow that laws that are made undemocratically violate the moral principle and are therefore unjustified. This line of reasoning can be supported by analogy.

Consider, for example, emancipation of minors. Suppose that it is morally necessary that children are emancipated from their parents or guardians when they reach the age of majority. When they reach the age of majority, children should be free to act independently of parental supervision. If parents still exercise authority over their children who are already at such an age, it is plausible to say that their authority is unjustified and their directives, if any, are not obligatory to their children, in virtue of the moral principle that requires emancipation. On the other hand, democracy is somewhat analogous to emancipation of minors in that democracy can be seen as the people's emancipation from the autocratic authority to which they used to passively obey. Under the principle of democracy, the people assume authority themselves; they are not subjected to the autocratic authority of a prince or a select group any longer. As the autocratic regime no longer has justified authority to direct the people, its directives should not be binding either. That is

to say, the prince's directives do not bind the people, as parents' directives do not bind their mature children. Hence, it seems plausible to argue by analogy that autocratic authority is unjustified and its laws are not obligatory in virtue of the moral principle that requires democratic government. Or does it?

I think not. This analogy misses an important difference between the self-government of a people and the autonomy of an adult person. In the former case, people form and live in a political community to secure their common good together. A political community (in the sense just mentioned) has a persistent need to co-ordinate social interactions to secure the common good. Without successful co-ordination, people cannot act jointly for their common good, and the community exists only in a deviant sense, if at all. Successful co-ordination in turn requires the persistent existence of authority that is capable of co-ordinating. Yet, such authority is not always available, and its location is changeable. A community can undergo upheavals where its government falls apart or see changes where governing authority is transferred from one person to another. This particular problem does not apply to the autonomy of adult persons. It is certain in the latter setting that the power to make decisions for oneself always exists and in the same location insofar as the person continues to live. Such a person does not undergo the absence of power or change of the

place of such power. It is not a problem in the case of personal autonomy that decision-making power for successful personal life cannot be found or is contestable. Even when the person is insane and lacks the capacity to govern herself well, the location of authority is still clear. Unless and until she is subject to a guardian, the decision-making power remains with her. The problem is only that she cannot exercise that power well.

This is an important difference that disapplies the analogy. In the case of personal autonomy, emancipation is the only alternative to parental supervision. One is either independent or subjected to parental authority (or the guardian's authority when one is, say, mentally ill). Thus, parental authority necessarily entails the deprivation of one's independence. In the case of government, democracy is not the only alternative to autocracy. Anarchy is an alternative too. Autocracy thus means not simply the deprivation of the people's right to democratic government, but also the elimination of anarchy. This is a substantial difference because the elimination of anarchy is morally important; it enables the political community to co-ordinate for the common good and helps maintain a successful political community. This gives rise to a justifying ground for *any* alternative to anarchy. To this extent, autocracy is justifiable, even if it means that the opportunity for democracy is suppressed for the time being. Such a

distinct justifying ground is not available when parental authority suppresses sane adult children's autonomy. For parental authority does not substitute for the lack of self-control in this case. Therefore, emancipation of minors is not actually analogous to democracy; they give rise to different lines of reasoning and conclusions.[24]

To say that there is such a justifying ground for any alternative to anarchy is not to say that autocracy is justified. We can still hold that autocracy is not justified in the sense that it is obliged to give way to democracy. If the autocratic regime fails to surrender its authority, the subjects are justified in forcibly removing it to implement democratic ordering. The justified removal of the autocratic regime does require the subjects to violate and forcibly change some laws, but it does *not* require them to treat all laws passed by the regime, before and after its legitimate term in office is due, as unjustified and non-obligatory. Hence, in holding the view that autocracy is illegitimate, we can simply mean that it is justified to overthrow it and to disobey such laws as are necessary to achieve the objective. We do not have to think that all laws passed by the

[24] This is another reason for which I would avoid justifying democracy by reference to the justification for parental authority. For the parent-child relation illuminates some aspects of the ruler-ruled relation at the expense of obscuring others. This footnote also supplements the previous discussion on why I prefer the term 'autocratic' to 'parental' in 5.1.1, n. 3.

autocratic legislature are illegitimate. It is consistent to say that autocracy is illegitimate and that most laws passed autocratically are obligatory.

Indeed, there is a good reason to think that most laws passed by the autocratic regime should be obligatory, if such laws co-ordinate social interactions reasonably. They can be justified on the ground that they constitute an effective order that substitutes for anarchy. Even if the maker of such laws has had no legitimate authority to legislate, the laws are still independently justified because of their co-ordinative contribution to the common good. In short, the analysis demonstrates that the laws of social conduct do not depend for their authority on the justifiability of the particular form of the legislature.

Now I turn to the second line of argument. It is argued that if a law is not made democratically, subjects who reasonably object to the justifiability of its content cannot regard the law as justified and authoritative. As advanced by Jeremy Waldron,[25] this argument invokes the idea of reasonable disagreement, suggesting that it is a normal condition of society that people disagree with one another over moral matters concerning either private or public life. When a law is passed, some reasonably disagree with the law-maker's moral judgement. This

[25] See e.g. chapters 7 and 9 in Jeremy Waldron, *Law and Disagreement* (OUP 1999).

disagreement entails that such dissenters cannot take the law to be obligatory. And because it is reasonable, the dissenters are justified in rejecting the law's authority. In this, the law need find some other ground of authority in order to be taken as legitimate by all. Democratic decision-procedures, it is argued, are capable of supplying such a ground. If the law is made by democratic decision-procedures, the fact that it is democratically legislated gives dissenters reason to obey the law that they previously found no reason to obey.

If this argument is right, it establishes that at least *some* laws of social conduct are unjustified where autocracy is illegitimate. That is, laws whose contents are the subject of reasonable disagreement depend for their legitimacy on being democratically legislated.[26] In my view, nevertheless, no law of social conduct depends for its authority on democracy. Whether a law has a reasonable content is one question, and whether the law has equally reasonable alternatives is another. Insofar as the law is reasonable, it is entitled to be obeyed. Even those who prefer the alternatives should recognise either the merit of the officially chosen legislative proposal or at least the merit of having an officially chosen proposal if it is a foolish choice, and thereby treat the enactment as authoritative.

[26] Thus, this argument is not a strong view because it does not exclude other grounds that can supply content-independent authority, and also because it does not say that all laws are susceptible of reasonable disagreement so that all of them need find procedural ground of legitimacy.

To be sure, in the reasonable disagreement scenario that Waldron envisages, dissenters do not merely prefer the alternatives for some 'playful' reasons. They object to the official choice because they are convinced that it is unjust.[27] Thus, it is impossible for them to recognise the enactment as authoritative. In reply to this, I think we should be clear about whether the law is in itself reasonable, irrespective of what dissenters think. If the law is reasonable but the dissenters insist on rejecting it, the latter's rejection should not be taken to bear on the law's legitimacy, no matter whether one would like to see the rejection as reasonable or not. And these dissenters' refusal to recognise the law's authority, therefore, is not justified. Disagreement, prevalent or even reasonable as it may be, does not affect laws' authority.

Moreover, it is argued that democratic law-making can bring those who previously considered the law unjust in virtue of its content to regard the law as providing an obligatory reason for common action. I should like to make two qualifications or supplements to this. First, if dissenters really consider the law to be unjust in that it requires its subjects to do things that they ought not to do or that it authorises them to do such things, it is unlikely that the way in which this law is made can change their judgement, and it should not. No legislature can

[27] Jeremy Waldron, '*Lex Satis Iusta*' (1999-2000) 75 Notre Dame L. Rev. 1829, 1838.

give an evil law authority, and we should not expect democracy to redeem a law that must be condemned. Secondly, as Waldron suggests, dissenters may consider the law to be unjust only in the lesser sense that although the law is less just than the rejected alternative, its existence is still better than otherwise in virtue of its co-ordinative contribution.[28] In this case, however, the law's authority is actually justified independently of democracy. We do not need democratic law-making to give the dissenters reason to obey.

In sum, my examination of the second line of argument suggests that laws of social conduct do not depend for their authority on democratic decision-making where there are (reasonable) objections to the justifiability of the laws' contents.[29] An important point thus follows: when autocratic authority is unjustified, it is unjustified only in a qualified sense. When political authority is

[28] ibid 1839.

[29] Note that although laws are still obligatory where their autocratic maker is illegitimate, such laws possess *weaker* legitimacy such that there are fewer reasons for obeying them than where autocracy is justified. Like the unreasonable laws, whose legitimacy is weaker such that they lack the content-dependent source of legitimacy which is eligible for fully reasonable laws, laws passed by the untimely autocratic legislature have weaker legitimacy than by justified ones, be it democratic or not. Still, weaker as it may be, it is legitimate and the laws obligatory.

That said, I do not accept Peter Singer's argument that, *ceteris paribus*, reasons for obeying democratically made laws are always stronger than undemocratically made laws. This argument, I say, for it overlooks the fact that when democratic and autocratic authority are justified, they are equally so. Constrained by the scope of the thesis, my argument against Singer's view cannot be discussed here. For Singer's account see Peter Singer, *Democracy and Disobedience* (OUP 1973) 1, 17, 59, 134.

unjustified in the unqualified sense, it means that the subjects do not have to obey any of its direction precisely because it is the authority's direction. In comparison, when autocratic authority is judged unjustified, it is only unjustified in a qualified sense that its subjects still have to obey its direction in relation to social conduct precisely because it is the authority's direction.

The laws discussed above are laws that stipulate the primary rules of social conduct. Such rules specify the standards of social interactions and make co-ordination possible. It is argued that the authority of the laws of social conduct is democracy-independent. However, it should be noted that the authority of most laws that stipulate the rules of official conduct should be democracy-independent too. This is so for the reason that the laws that govern official conduct are part of the legal system which works as a whole to bring about co-ordination. Hence, except for the laws of legal change that define a regime as autocratic and whose forcible amendment is necessary for democratic transition, laws that regulate official conduct can be justified by the same line of argument as advanced above.

5.2.2.2 Democracy-Dependent Reason for Legal Change

Although the fact that the autocratic regime has become illegitimate does not dissolve the authority of its laws, something else is indeed affected. I say that the illegitimacy of the autocratic regime gives the subjects reason to repeal or amend the laws that should have been legislated democratically. Without such reason, it can be unreasonable to change the law.

To be sure, those who assume legislative authority can change the law at will. But a responsible legislature should not do so arbitrarily. A responsible legislature, as Ekins suggests, 'considers relevant reasons and chooses reasonably how to change the law'.[30] If a law provides reasonable co-ordination solution and its reasonableness is not diminished by unexpected incidents or changing social conditions, it would seem quite arbitrary to change it. Moreover, the law in an important sense represents the political community's commitments. And for a political community to act coherently over time, it is not to set aside its past commitments lightly. The commitment-based reason (as opposed to the former, content-based reason) against amendment is particularly important in that it helps explain why we would still consider an amendment problematic when both the new and old laws are reasonable in contents.

[30] Ekins (n 13) 143.

Not all political decisions can be seen as a community's commitments. The nature of a community making commitments is too complex a subject matter to be discussed here. Suffice it to say that sometimes a political regime may alienate its subjects so much from the project of government that the regime's decisions do not count as the commitments made by the community as a whole. In this state of affairs, the commitment-based reason against amendment does not apply.[31] Moreover, the subjects indeed have good reasons for amendment: by assuming the power to legislate and by amending the alienating regime's laws, the subjects rectify a wrong in that they determine those decisions that should have been determined by them at the time when those decisions were first made. The wrong persists even if the alienating regime makes reasonable laws. In this case, the subjects may simply amend the laws in a symbolic manner: repealing the old laws and thence make new laws with similar contents.[32]

[31] At this point the following claim can be made: insofar as no commitment-dependent reason against amendment applies, legal change is reasonable if the proposed new law is reasonable. However, my argument concentrates on a stronger claim as subsequently discussed, because the state of affairs in which political decisions in a community cannot constitute that community's commitments connote something wrong with those decisions, something that warrants action to rectify the wrongfulness of those decisions.

[32] It is up to them how they should like to treat such laws. They can keep such laws by exercising their legislative power in not abolishing such laws. If so, their not abolishing such laws can be seen as their implied endorsement of such laws.

The fact that an autocratic regime has ceased to be legitimate but refuses to give way to a new democratic government, I say, amounts to the state of affairs in which the autocratic regime's directives no longer constitute the community's commitments. Preventing a democratic legislature taking its place, the autocratic regime decides on public matters that should have been decided on by the democratic legislature. Even if the autocratic regime makes those legislative decisions wisely, there is still a wrong in the sense that those who have the right to decide are unjustifiably denied such a right. Thus, when the latter (i.e. the democratic legislature) is in place, it is at liberty to amend the laws for the reason that such laws should have been made in accordance with the democratic legislature's (reasonable) preferences.[33] This reason, I contend, is the democracy-dependent reason for legal change, without which a legislature may lack sufficient reason to amend a reasonable law.

Note that this reason applies to only those laws which are made at the time when the autocratic authority is no longer justified. It does not apply to all laws made before the democratic transition. Thus, the authority which was justified then continues to be so regarded. In addition, the application of this reason

[33] This is not to overlook or deny the possibility that the democratic legislature's preferences coincide with its autocratic predecessor so that it chooses to maintain its predecessor's legacies by making no legislative amendment.

should not exclude other relevant reasons for legal change. The repeal or amendment of a past law should be avoided, if it would disrupt existing co-ordination without supplying an equal or more adequate solution. Good legislative judgement is still imperative.

5.2.3 The Provisional Obligation to Obey

So far we have seen that only the laws of legal change depend for their authority on democracy. Now I return to such laws and argue that when the subjects first encounter the undemocratic laws of legal change, they are obliged to, *inter alia,* provisionally forgo their right to illegal change and seek the law's legal repeal. The obligation is provisional in that it exists between the first appearance of the defective law and the end of the attempt to realise legal change. Thus, if the attempt to introduce legal change is unsuccessful, the subjects are at liberty to exercise their right to forcibly effect the democratic transition.

The provisional obligation examined here is an instance of the general obligation to obey the law. The argument about the provisional obligation largely stands and falls with the argument about the general obligation to obey. In this, what needs to be explained is why the obligation is only provisional. Normally, the general obligation to obey, if held, should continue to apply

unless special defeating conditions apply. The obligation is either held or defeated; it is not provisional.

My explanation is that when autocracy becomes illegitimate, the right to establish a democratic government should ultimately outweigh the general obligation to obey. Even so, the general obligation to obey is defeated only when legal means to effect the needful change are not viable. For the right to establish a democratic government justifies what is necessary for the achievement of this goal. Before legal means have been exhausted, alternatives to forcible change are available. At this point it cannot be said that any specific means is necessary to effect the democratic transition. Thus, insofar as the subjects are under the general obligation to obey the law, they are obliged to continue to comply with the law. And their compliance is consistent with the right to establish a democratic government such that it is possible to legally administer democratic transition. By contrast, choosing to act illegally in the first place violates the general obligation to obey, and the violation cannot be justified as a necessary act for the transition. This shows that illegal action in the first place is untenable. However, if a reformer has attempted all that she can in accordance with the law and still cannot make the change happen, she is in a different situation. For illegal change now becomes necessary; the right to

establish a democratic government can be applied to vindicate the violation of the law.

In sum, the general obligation to obey persists, when autocracy ceases to be legitimate. It will be defeated if legal ways to transform the autocratic system are exhausted and unsuccessful; if legal transition to democracy is underway, the right to illegal change shall not be exercised. This explains the provisional nature of the obligation to which the right to illegal change is subjected.

The relationship of the provisional obligation to obey to the rights to illegal change can be clearly illustrated in the following scenario. In a community which has been reasonably well-governed by a monarchical regime, the monarch promulgates a law of social conduct concerning city planning. A group of affected subjects consider the law to be ill-advised and contend that whatever city planning policy is to be officially chosen, it should be chosen democratically. Given that the existing legislative institutions are undemocratic, what they normally need to do is to demand the democratic transformation of the existing legislative institutions, and then the reconsideration of the planning law at issue with their participation under the new democratic legislative institutions. In achieving these objectives, the subjects should not act illegally in the first place. Rather, they are obliged to seek lawful means to effect the

transition and thence reconsideration. Only when all legal means are exhausted, can they be justified in resorting to illegal means.

It would seem disproportionate if the subjects in the foregoing scenario actually resort to the forcible removal of the monarch for their disagreement about city planning, provided that the monarch has governed the realm quite well. It is true that their revolt may be judged too disproportionate to be justifiable. For in the final deliberation about whether to revolt against the regime or to disobey a particular law, the subjects have to take into account the 'collateral' effect of their action.[34] For instance, if the revolt can be expected to yield prolonged civil strife that prevents an effective democratic government emerging, or worse, civil war that results in the disintegration of the existing order, whose existence would be much more beneficial for the well-being of the community, it is reasonable to judge the collateral effect of the revolt too dire to be justifiable. It follows that it will be a much more prudent and advisable decision to bear with the monarchical regime. Even if, say, the current monarch is tyrannical but has an heir who promises to be significantly better or is at least potentially open to reform, the subjects might still have reason to endure the tyrant. This, I think, shows the complex and context-dependent nature of one's

[34] John Finnis, *Natural Law and Natural Rights* (2nd edn, OUP 2011) 361, 476.

practical thinking about how to act in response to the problematic regime under which she lives. Even when a subject is relieved of the (provisional) obligation to act in accordance with the law, we cannot be certain about whether she is actually justified in illegal action without knowing more details of her situation.

6

Conclusion

I have argued that democracy bears on the justification for political authority in a limited way, departing from and supplementing what I term the strong view and the classic view. The strong view is characterised by the proposition that democracy is necessary for political authority to be fully justified. Various versions of the strong view can be found. Anna Stilz's theory represents the simple version, arguing that the subjects have no general obligation to obey the law if the State is undemocratic. The simple view is implausible, however, because it fails to recognise the authority of an undemocratic but otherwise well-ordered State, which is entitled to be obeyed for its efficacious capacity to settle a community's co-ordination problems for the common good.

Isolating the obligation to 'accept a regime' from the obligation to obey the laws that regulate social conduct, Philip Pettit advances a subtler version which

argues that it is the subjects' moral obligation to accept a regime that is dependent on democracy. However, to the extent that the obligation to accept a regime is essentially the obligation to adhere a regime's laws that regulate legal change, the subtler view overlooks the state of affairs in which the subjects should adhere to such laws simply for the reason that such laws ensure legal or constitutional changes can be sought peacefully and effectively without needless disturbance to the community's existing ordering; whether or not the regime is democratic is immaterial.

Proceeding in a different direction, David Estlund's strategy isolates the State's 'right to coerce' from its capacity to impose duties to obey, and thereby argues that only a democratic State can legitimately enforce its laws. By contrast, an undemocratic State cannot enforce the laws it makes, but is still capable of imposing the obligation to obey on its subjects. This approach is untenable, for it overlooks the fact that a sound justification for the subjects' obligation to obey the law is also for the enforcement of the law. Thomas Christiano develops still another subtler strategy. Relying on a trichotomy between three senses of authority, he argues that democracy is constitutive of the 'right to rule', i.e. a claim-right correlative with the subjects' duty to obey. However, Christiano's approach ultimately fails on the grounds that even in a successful democracy,

citizens' obligation to obey the legislative assembly remains essentially owed to one another precisely as members of the same political community, instead of to the assembly as the official law-maker.

As the various accounts of the strong view fail to prove that democracy is necessary for political authority to be fully justified, the classic view is closer to the truth: political authority is justified if and only if it is capable of, and in fact broadly tends to, settle co-ordination problems for the common good of the community it purports to rule. However, the classic view has a significant limit: when both democratic and undemocratic forms of government are likely to succeed in a community, the classic view alone does not settle which one the community should choose. On this occasion, the choice is to be settled by the merits and demerits of the each option. This is where the (many) reasons for preferring democracy to non-democracy set in and direct the community to make the right choice.

Supplementing the classic view, my own contention is that an undemocratic but otherwise well-ordered State is fully justifiable *only if* democracy is not viable in the relevant community. Thus, whenever democracy becomes viable in the community, undemocratic government ceases to be legitimate. And if the

undemocratic regime continues to act in ways inconsistent with its own disappearance, the subjects are relieved of their obligation to adhere to the existing laws of legal change in seeking democratic transition. That is, the subjects are justified in forcibly postulating new conditions of repeal, by which they can introduce all subsequent legal or constitutional changes they think fit.

On the other hand, the laws of social conduct continue to be authoritative even when the undemocratic regime has become illegitimate and deserves to be removed by force. Insofar as the laws of social conduct are reasonable, the subjects are morally obliged to obey them. However, while their obligation to obey is not dependent on democracy, their reason for legal change is: after the new democratic regime is established, the subjects have good reason to amend the laws made during the old regime's illegitimate continuation, which reason is unavailable if the regime is legitimate.

Bibliography

Christiano T, *The Rule of the Many* (Westview Press 1996)
—— *The Constitution of Equality: Democratic Authority and Its Limits* (OUP 2008)
—— 'Authority', *The Stanford Encyclopedia of Philosophy* (Spring edn, 2013) <http://plato.stanford.edu/archives/spr2013/entries/authority/> accessed 28 September 2015.

Ekins R, *The Nature of Legislative Intent* (OUP 2012)
—— 'How to be a Free People' (2013) 58 Am. J. Juris. 163

Enoch D, 'On Estlund's *Democratic Authority*' (2009) 58 IYYUN 35

Estlund D, 'Jeremy Waldron on *Law and Disagreement*' (2000) 99 Phil. Stud. 111
—— *Democratic Authority: A Philosophical Framework* (Princeton University Press 2008)

Finnis J, 'Unjust Laws in a Democratic Society: Some Philosophical and Theoretical Reflections' (1996) 71 Notre Dame L.Rev. 595
—— *Aquinas: Moral, Political, and Legal Theory* (OUP 1998)
—— 'Law as Coordination' in *Philosophy of Law: Collected Essays Volume IV* (OUP 2011) 66
—— *Natural Law and Natural Rights* (2nd edn, OUP 2011)
—— 'Revolutions and Continuity of Law' in *Philosophy of Law: Collected Essays Volume IV* (OUP 2011) 407
—— 'Reflections and Responses' in *Reason, Morality, and Law* in Keown J and George RP (eds), *Reason, Morality, and Law: The Philosophy of John Finnis* (OUP 2013) 459
—— 'Freedom, Benefit and Understanding: Reflections on Laurence Claus's Critique of Authority' (2014) 52 San Diego L.Rev. 893

Gardner J, *Law as a Leap of Faith* (OUP 2012)
—— 'Finnis on Justice' in Keown J and George RP (eds), *Reason, Morality, and Law: The Philosophy of John Finnis* (OUP 2013) 151

Green L, 'The Duty to Govern' (2007) 13 LEG 165

Green TH, *Lecture on the Principles of Political Obligation* (Longman, 1907)

Hart HLA, *The Concept of Law* (3rd edn, OUP 2012)

Kelsen H, *The General Theory of Law and State* (Harvard University Press 1945)

Landemore H, 'Democratic Reason: the Mechanisms of Collective Intelligence in Politics' (2011) <http://papers.ssrn.com/abstract=1845709> accessed 6 November 2014
—— *Democratic Reason: Politics, Collective Intelligence, and the Rule of the Many* (Princeton University Press 2012)

Pettit P, *On the People's Terms: A Republican Theory and Model of Democracy* (Cambridge University Press 2012)

Raz J, *Authority of Law* (OUP 2009)

Simon Y, *Philosophy of Democratic Government* (University of Notre Dame Press, 1993)

Singer P, *Democracy and Disobedience* (OUP 1973)

Stilz A, *Liberal Loyalty: Freedom, Obligation, and the State* (Princeton University Press 2009)

Waldron J, *Law and Disagreement* (OUP 1999)
—— '*Lex Satis Iusta*' (1999-2000) 75 Notre Dame L. Rev. 1829