



## RAWLS *CONTRA* RAWLS: LEGITIMACY, NORMATIVE IMPACT, AND THE BASIC STRUCTURE

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**Abstract:** In this paper, I contrast two approaches to political legitimacy, both influenced by Rawls. One is the classic political liberal picture, according to which a state is legitimate if its “constitutional essentials” could be endorsed by reasonable citizens. The alternative is the idea that what makes a state legitimate is primarily its success at organizing the basic structure in a way that is demonstrably favorable to the governed. Specifically, I suggest that a state is legitimate insofar as it organizes the basic structure in a manner that makes it easier for citizens to behave justly towards one another and adopt autonomous choices. I then move to demonstrate the superiority of this normative impact solution to the problem of legitimacy vis-à-vis political liberalism, even when reasonable disagreement about justice is factored in.

**Keywords:** Rawls; political legitimacy; political liberalism; authority; basic structure.

**Resumo:** Neste artigo, estabeleço um contraste entre duas abordagens à legitimidade política, ambas influenciadas por Rawls. Uma é a imagem clássica do liberalismo político, de acordo com a qual um estado é legítimo se os seus elementos constitucionais essenciais pudessem ser aceites por cidadãos razoáveis. A alternativa é a ideia de que o que faz um estado legítimo é primariamente o seu sucesso em organizar a estrutura básica de uma tal maneira que seja demonstravelmente favorável aos governados. Mais em particular, eu sugiro que um estado é legítimo na medida em que organiza a estrutura básica de uma forma que torne mais fácil para os seus cidadãos comportarem-se de forma justa uns com os outros e fazerem escolhas autónomas. Em seguida, passo a demonstrar a superioridade desta solução ao problema da legitimidade, em termos do seu impacto normativo, face à solução proposta pelo liberalismo político, mesmo quando se leva em conta um desacordo razoável sobre a questão da justiça.

**Palavras-chave:** Rawls; legitimidade política; liberalismo político; autoridade; estrutura básica.

## Introduction

Whatever else it does, a state demands allegiance. What it imposes is neither optional nor recommended, or at least that is not how citizens are supposed to interpret state norms. How can the state justify this special standing to its citizens? This is the problem of the justification of state authority or the legitimacy of the state.

In this essay, I contrast two ways to respond to the problem of legitimacy, both inspired by Rawls. One way is to claim that the state is legitimate if its constitutional structure—made up of fundamental rights and liberties and basic institutional norms—is organized according to principles reasonable citizens may endorse. This thought is at the core of the political liberal project: John Rawls held that the state is legitimate if it exercises authority according to a constitution “the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason” (Rawls, 2005, p. 137).

The alternative response I give is also inspired by Rawls, but in his reflections preceding the political liberal turn. I argue that we should see legitimacy as the function of what Rawls calls the “basic structure” of society, the system of rules and entitlements that is responsible for the distribution of burdens and benefits among citizens “from the cradle to the grave” (Shelby, 2007, p. 129). If a state wants to justify its authoritative imposition of norms, it has to show that at least its basic structure is organized for the citizens, not in the sense that it makes their lives overall more enjoyable but that it makes it easier and less burdensome for them to behave justly towards one another and adopt autonomous choices. I propose, in sum, that legitimacy depends on the *normative impact* the exercise of authority has on citizens’ ability to act justly and live autonomously. But, the political liberal solution to the problem of political legitimacy, sensitive as it is to the existence of reasonable disagreement and to the idea that legitimacy must depend on a consensus of reasonable views, cannot treat the basic structure as the proper site of legitimacy. In so doing, however, the solution significantly loses its appeal. Because, if a state cannot demonstrate that at least its basic structure is organized for the citizens, how can citizens be required to comply with the state’s commands?

This is how the argument unfolds. I begin in Section 2 by summarizing the idea, common in the literature, that a legitimate state is one that can justify its claim to authority. In Section 3, I present the core of the argument, which consists of the two mutually supportive ideas that the normative impact a state has on its citizens cannot be ignored when assessing a state’s legitimacy and that, because of that, the basic structure must constitute the primary site of legitimacy. Once the core claim has been offered, I devote the rest of the paper to engaging with political liberalism. I begin Section 4 by summarizing Rawls’s account of legitimacy, a presentation that will mainly serve the purpose of identifying the primary site of legitimacy within Rawlsian political liberalism. Then, I show why political liberalism is inevitably tied to the identification of the constitution alone as the primary site of legitimacy, which makes its response to the problem of legitimacy significantly deficient.

## 1. Political Legitimacy and Authority

Most authors understand a legitimate state as having a right to rule. A legitimate state is said to possess, more specifically, a Hohfeldian power-right that allows it to transform, through its issuing of commands, the normative conditions of those subjected to its authority.<sup>1</sup>

All authorities aspire to produce reasons for action that apply to their subjects purely in virtue of their provenance and independently of their content. Not only that, they aspire to produce reasons for action so stringent that the subjects are supposed to use them as immediate constraints on their actions, rather than recommendations that they may weigh against countervailing considerations. Joseph Raz expressed this point through the idea that authoritative institutions (aspire to) provide pre-emptive reasons for action: “the fact that an authority requires performance of an action is a reason for its performance which is not to be added to all other relevant reasons when assessing what to do, but should exclude and take the place of some of them” (Raz, 1986, p. 46).

David Enoch has called the ability, for some agent A, to produce genuine reasons for action for another agent B that would not have existed in the absence of A’s intervention “robust reason-giving” (Enoch, 2011). In general, I agree with Enoch, the law does not give genuine reasons for action, although it always claims to do so.<sup>2</sup> But a legitimate state, insofar as it is legitimate, does succeed in giving citizens genuine reasons for action whenever it imposes an obligation and purely because it has imposed an obligation. It follows that, in a legitimate state, citizens have at least a *prima facie* moral obligation to obey the law.<sup>3</sup> The obligation is moral because the law’s claim to authority is itself moral, at least in modern states: the law does not merely demand naked obedience but arrogates for itself the right to discern what is the morally accurate path for its citizens, at least in those domains where it expresses its commands.<sup>4</sup> The obligation is merely *pro tanto*, rather than absolute or all-things-considered, because it can be defeated by countervailing considerations, although only of a specific kind. Borrowing again the terminology from Raz’s theory of practical reasons, reasons of conformity with the authority of the state are capable of excluding, and

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<sup>1</sup> “By authority I will mean the moral power of one agent (emphasizing especially the state) to morally require or forbid actions by others through commands. [...] By legitimacy I will mean the moral permissibility of the state’s issuing and enforcing its commands owing to the process by which they were produced” (Estlund, 2008, p. 2).

<sup>2</sup> As argued, among others, by Raz (1979, p. 30), Gardner (2011), Shapiro (2011), Van der Vossen (2011).

<sup>3</sup> For defenses of the correlation between political legitimacy and the obligation to obey the law, see Perry (2013) and Dagger (2018).

<sup>4</sup> On this point, see especially Gardner (2011) and Shapiro (2011, pp. 289–290).

not merely overriding, other considerations that would be normally sufficient to motivate one's action. Still, they can be defeated when they are weighed against other reasons for action that are similarly exclusive in strength.<sup>5</sup>

## **2. Basic Structure and Legitimacy as Normative Impact**

### **2.1. Introducing the Basic Structure**

As what matters for political legitimacy is the state's exercise of authority, one initial thought might be that every single instance of it ought to be legitimated. Call this the purely aggregative model.

The purely aggregative model is implausible. As we are interested in the state's ordinary exercise of authority, the assessment of legitimacy must be holistic rather than merely aggregative. The overall evaluation of a state's legitimacy must be independent of at least some of the norms the state asks us to comply with; we want to allow for the possibility that some norms, even if wrong, count as reasonable mistakes that do not impinge on the state's legitimacy.<sup>6</sup> The proposal I set out here is that regulations outside a particular domain are either discounted from the legitimacy assessment or count much less significantly. The identification of reasonable mistakes is therefore spatial; regulations outside the proper site of legitimacy, if wrong, count as reasonable mistakes. Taken together, these legitimacy-relevant norms compose the primary site of legitimacy of each state. The idea I now want to defend is that the primary site of legitimacy is identical to the site Rawls identifies for justice: the "basic structure" of each political society.

The "basic structure" is originally defined as "the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantage from social cooperation" (Rawls, 1999a, p. 6).<sup>7</sup> "Basic structure" designates a "public system of rules" (idem, p. 74) that Rawls, with a significant consistency throughout his works, takes to be primarily relevant to justice for two main reasons. Firstly, such rules generate effects on the distribution of resources that are "profound and present from the start" (idem, p. 7). More specifically, the basic structure conditions, to the point of altogether determining in some cases, both citizens' perceived needs and

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<sup>5</sup> "Authoritative directives are not always conclusive reasons for the conduct they require. They can be defeated by conflicting reasons, or by conflicting directives. The reasons that can defeat them are those they do not exclude" (Raz, 2006, p. 1023). The account of norms as exclusive reasons is first presented in Raz (1999).

<sup>6</sup> See Viehoff (2019).

<sup>7</sup> A later definition is "the main political and social institutions and the way they fit together as one scheme of cooperation" (Rawls, 2001, p. 4).

aspirations, and the concrete value, in economic terms, of their natural talents.<sup>8</sup> Secondly, and more importantly for the rest of the discussion, the basic structure helps to “secure just background conditions against which the actions of individuals and associations take place” (Rawls, 2005, p. 266). “Just background conditions” do not relieve citizens from the moral duties that might apply to them as individuals, but they free them from the burden of having to work out all possible consequences, in terms of justice-enhancement or—frustration, of every single transaction they initiate.<sup>9</sup>

Rawls also writes that only when acting within the just background conditions of the basic structure, and once provided a fair share of primary goods, can citizens fully “accept responsibility for their ends” and “take charge of their lives” by adapting “their conception of the good to their excepted fair share of primary goods” (Rawls, 1999b, p. 372). The idea can be made clearer counterfactually. Imagine there were no background conditions that guarantee a fair distribution of primary goods across society, for which we mean (following Rawls’s principles of justice) a universal recognition of rights and freedoms, “fair” equality of opportunity and a distribution of resources that tends to privilege the worse off. Under such conditions, people would not be able to know whether the exercise of their capacity to form, revise and live after a conception of the good may conflict with others doing the same. By contrast, under the just background conditions of the basic structure, individuals are aware that the pursuit of their conception of the good does not risk disrupting the overall fair order of society and does not hinder their co-citizens in the pursuit of their conception of the good. At the same time, because the distribution of primary goods within the basic structure is supposed to be simply fair and does not aim at maximizing the satisfaction of everyone’s preferences, people can still act responsibly in the choice of which ends to pursue and bear the consequences of their decisions.

Which sectors of the law have this double function of a) having a profound and primordial effect on resource distribution and b) securing the best “background conditions” that may leave citizens free to pursue their autonomously adopted conception of the good without disrupting the social order? The indications we derive from Rawls are that the basic structure must include both “competitive markets” and “the monogamous family” (Rawls, 1999a, p. 6), or, in his later reformulation, the “political constitution, the legally recognized forms of property, and the organization of the economy, and the nature of the family” (Rawls, 2005, p. 258).

It has been suggested that the entire realm of private law should be part of the basic structure on the grounds of the pervasive effect that rules of property or contract have on the distribution of resources across society

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<sup>8</sup> “So not only our final ends and hopes for ourselves but also our realized abilities and talents reflect, to a large degree, our personal history, opportunities, and social positions” (Rawls, 2005, p. 270).

<sup>9</sup> For an interpretation of Rawls’s basic structure along these lines, see Scheffler (2005, 2006).

(Kordana, 2006; Kordana & Tabachnick, 2006; Kronman, 1980).<sup>10</sup> Others have suggested instead that private law, by protecting and limiting people's promotion of their self-interest, can guarantee that citizens do not impinge on others when they try to pursue, within the boundaries of the rule of law, their autonomously chosen ends and purposes.

I leave the identification of the exact borders of the basic structure to a different work. Here, I am interested instead in explaining why the basic structure of society is the proper site of legitimacy.

## **2.2. The Importance of Normative Impact for Political Legitimacy**

Let's define the way in which a state conditions, through its issuing commands, the ordinary life of its citizens, its "normative impact." It consists of the effect on citizens' ordinary life of the rough sum of the legal obligations, rights and permissions that fall on them in virtue of their living under a specific jurisdiction.<sup>11</sup>

What is the relevance of the basic structure for a state's normative impact? Following Rawls's own defense of the basic structure, we can see the basic structure as producing two significant effects. Firstly, a basic structure that is organized justly can facilitate citizens' aspirations to act justly towards each other. Secondly, a justly organized basic structure can do that whilst granting each citizen with the widest sphere of autonomy compatible with the autonomy of others. Citizens who comply with the rules of private law of a just basic structure, for instance, are prevented from subjecting others to significant injustices. Those who have wronged others, for example, are given an option to correct the wrong within the law; in common law systems, that is the role of the law of torts. Similarly, citizens are required to respect their contractual obligations and are provided with the widest set of contractual options, but contractual freedom is limited if it risks subjecting third parties or the contractual parties themselves to significant injustices.

The point I want to stress now is that, through the regulation of the basic structure, a state can demonstrate that the normative impact it produces is globally favorable to the governed and, because of that, is acting for the citizens when it demands their compliance. The expression "acting for the citizens" is undoubtedly vague and needs some clarification. There are countless ways in which a state can be said to be acting for its citizens, some of which have not much to do with the basic structure. One could claim, for instance, that every state that justifies its existence, in a quasi-Hobbesian fashion, by demonstrating that its subjects are in a better condition than in the state of nature is

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<sup>10</sup>For critiques of these "strong distributivist" approach to private law, see Scheffler (2015, pp. 226–227).

<sup>11</sup>It is different, therefore, from what Mark Greenberg (2014) calls "moral impact," which is a function of the moral obligations falling on citizens as a result of their living under a specific institution.

thereby acting for its citizens.<sup>12</sup> But this way of justifying the authority of the state looks peculiarly weak and unfitting in the context of a modern democracy.<sup>13</sup> Another claim could be that the state “acts for the citizens” when it acts through the consent of its citizens. But, as it has been widely noticed, full commitment to this old idea would lead directly to anarchism, since citizens hardly express anything comparable to proper consent to the authority of the governed.<sup>14</sup>

Hence, in the absence of plausible alternatives, we must at least take seriously the idea that a state demonstrates it is acting for its citizens when its normative impact is globally favorable to the governed, not merely in the sense that it makes their life less miserable than in a putative state of nature, but that it makes them comply better with norms of justice while preserving a sphere of autonomy and personal responsibility for their choices.<sup>15</sup> Of course, a full defense of this particular idea of acting for the citizens would require an independent work. But I hope the intuitive plausibility of the idea is now apparent: at least in modern circumstances, where the background against which the state claims its authority is not one of complete barbarism, a state is better placed at justifying its imposition if it can demonstrate that, by submitting to its authority, citizens can more easily behave justly towards one another without compromising their autonomy and personal responsibility. That is the sense in which normative impact is relevant to establish a state’s political legitimacy. And, if this idea is plausible, then we must also accept that the basic structure of each society, which includes the norms that most have an impact on citizens’ ordinary life, is the proper site of legitimacy and that accounts of legitimacy that ignore this are in this sense deficient.

A point often raised against output-based solutions to the problem of legitimacy, of which normative impact is one example, is that they tend to imply that the democratic structure of a state is in no way relevant in determining the state’s legitimacy.<sup>16</sup> Taken to the extreme, a purely impact-based account would deem benevolent dictatorships more legitimate than fully democratic states that, for reasons of poverty or political instability, are unable to have a positive normative impact on their citizens.

One response to this objection could be that the democratic structure of a state—however we define it—is valuable for reasons other than legitimacy. Although there is a grain of truth in this answer, I am reluctant to exclude

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<sup>12</sup> I say quasi-Hobbesian because this way of justifying the state does not make explicit reference to any “compact” between governors and governed.

<sup>13</sup> For the relevance of the historical context on ways of legitimating the authority of the state, see especially Williams (2005).

<sup>14</sup> See Simmons (2005).

<sup>15</sup> Notice, moreover, how the primacy of normative impact among the conditions that make an authority legitimate can apply robustly across different kinds of authorities. It seems we can hardly start talking about the legitimacy of parental authority, for instance, without mentioning the benefits the authority has on children themselves.

<sup>16</sup> See Hershovitz (2003, 2011) and Himma (2007).

procedural features altogether from the evaluation of a state's legitimacy. The positive contribution of a state's normative impact on its subjects' ability to pursue justice and live autonomously may be, therefore, just one among various necessary conditions for political legitimacy.

I am confident, however, that we can say something more, namely that normative impact enjoys, in comparison to other conditions of legitimacy, at least lexical priority. We must first be certain about the positive impact of a state's basic structure before we consider the other conditions that make a state fully legitimate. I doubt that we can say, therefore, that a state is legitimate purely in virtue of being democratic, unless we incorporate in the definition of democracy some impact-based considerations. Democratic consultations as such are weak at establishing the authority of the state as we have no reason to submit, in general, to the will of the majority. A polity may be routinely consulted but, if the policies it approves promote injustices towards the constantly outvoted minority, the consultation cannot confer any degree of legitimacy on the decision.<sup>17</sup>

Defenders of democratic accounts of legitimate authority, however, do not focus on democratic procedures as mere mechanisms of decision-making. They argue, instead, that democratic decisions acquire legitimacy because of what democratic procedures express or embody. It is because such procedures respect the equal moral status of each citizen or prevent citizens from exploiting hierarchies and asymmetries that exist in society to wield political power over others that we ought to yield to their authority.<sup>18</sup>

But considerations of this kind—concerning how citizens relate to each other within a certain political arrangement—are already captured by the normative impact model. If what matters to establish the legitimacy of an authoritative scheme is that individuals subject to that scheme pay respect to each other's equality of status, why should we limit ourselves to considering how people respect each other in their role as decision-makers and not also as decision-subjects, i.e., in their ordinary interactions regulated by the basic structure? Hence, an account of political legitimacy that focuses on a state's normative impact and on the way the latter influences citizens' ability to behave justly towards one another is already sensitive to one major concern behind contemporary defenses of democratic authority, namely, respect for the equal moral status of citizens.

To sum up, normative impact might well be only one of the conditions that determine a state's legitimacy. But, insofar as we accept that normative impact enjoys at least lexical priority in comparison with other factors, the basic structure—which is the sector of society which produces the most significant impact on citizens' ordinary life—strikes as the ideal site of political legitimacy, i.e., the ambit of institutional organization that most needs to be

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<sup>17</sup> See Stemplowska and Swift (2018), and Abizadeh (2021).

<sup>18</sup> See Christiano (2008) and Viehoff (2014).



considered when assessing a state's legitimacy. This gives us a reason to question all accounts of political legitimacy that in some way downplay the role of the basic structure and treat other sectors of society as the primary site of legitimacy.

### **3. The Political Liberal Model of legitimacy and its Failure**

#### **3.1. Reasonable Consensus**

Political liberalism is a prominent example of a reasonable consensus approach to political legitimacy.<sup>19</sup> Specifically, political liberalism postulates that, for a state to be legitimate, it must justify its authority in a way that reasonably idealized citizens—who disagree about matters of substantive justice but share some basic conceptions of the person as free and equal and of the society as a fair system of social cooperation—can accept.

There is one appealing motivation behind the political liberal account. As we expect most citizens will disagree about matters of justice and that at least some instances of that disagreement will be among equally reasonable conceptions, demanding that the state promotes a particular conception of justice (or wellbeing, or autonomy, and so on), would seem to disrespect citizens who endorse alternative reasonable conceptions.<sup>20</sup> This is a problem for any conception of political legitimacy that focuses on the output of political decisions. Because, if we accept that there is such a thing as reasonable disagreement about justice, and that such disagreement is both unavoidable and irreducible in the circumstances of a contemporary, democratic society, then, the argument goes, a state cannot legitimate its imposition of authoritative norms by reference to any single, however reasonable, conception of justice.<sup>21</sup>

I am not going to contest the idea that people can disagree reasonably about certain (although presumably not all) matters of justice. If they do, however, what does it mean to demand that the state, to be legitimate, justifies its authority in a way that all citizens can “reasonably endorse”? In the rest of the paper, I will demonstrate that the reliance of the liberal political account of legitimacy on a consensus of the reasonable cannot solve the problem of legitimacy precisely because, as political liberals themselves acknowledge, a consensus of reasonable views can never

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<sup>19</sup> At least some supporters of deliberative democracy subscribe to a similar account. See especially Cohen (1997). Another precursor of the idea is Nagel (1987).

<sup>20</sup> Jonathan Quong (2011, Chapter 5) is more explicit than Rawls in explaining that this is the reason why political liberals ought to embrace Rawls's liberal principle of legitimacy, rather than an account merely holding that states that promote justice are legitimate.

<sup>21</sup> We can exemplify this by reference to the value of autonomy that I have used to support my version of the normative impact account. Rawls is particularly insistent that “autonomy as a pure moral value [...] fails to satisfy, given reasonable pluralism, the constraint of reciprocity, as many citizens, for example, those holding certain religious doctrines, may reject it” (Rawls, 2005, p. 456).

encompass the entire legal regulation of the basic structure. The political liberal solution to the problem of legitimacy fails, therefore, as it treats the constitution alone as the proper site of political legitimacy. But this might seem to create an impossibility result: if the political liberal solution is unviable, so is any normative impact account, due to the existence of persistent, reasonable disagreement about matters of justice. In the Closing Remarks, however, I will also explain why I do not take disagreement to be a problem we should be too fussed about when we consider the legitimacy of the state.

### **3.2. Legitimacy, Public Reason, and the Site of Legitimacy in Rawlsian Political Liberalism**

It is worth considering first the relationship between the political liberal solution to the problem of legitimacy and the typically Rawlsian idea of public reason. Rawls claims that “since the exercise of political power itself must be legitimate, the ideal of citizenship imposes [on those deliberating in the public arena] a moral [...] duty – the duty of civility – to be able to explain to one another on those fundamental questions how the principles and policies they advocate and vote for can be supported by the political values of public reason” (Rawls, 2005, p. 217). What is specifically meant by “public” is left somewhat vague in Rawls. At least according to the majority of commentators, however, Rawls understands publicity to be equivalent to what epistemologists of public reason call “accessibility.” The accessibility criterion for publicity holds that claim *x* is public if and only if the evaluative criteria that led agent *A* to endorse *x* are sufficiently shared by the general public. The general public might disagree about the overall plausibility of *x* but they recognize that *x* is based on a reasoning process that everyone accepts as plausible.<sup>22</sup>

What are the political issues that ought to be deliberated through public reasons? The strict Rawlsian answer is that public reason applies to both “constitutional essentials” and “matters of basic justice” (Rawls, 2005, p. 214). “Constitutional essentials” comprise “fundamental principles that specify the general structure of government and the political process” and “equal basic rights and liberties of citizenship that legislative majorities are to respect” (idem, p. 227). Matters of basic justice “relate to the basic structure of society and so would concern questions of basic economic and social justice and other things not covered by a constitution” (Rawls, 1997, as cited in Rawls, 2005, p. 442, footnote 7).<sup>23</sup>

In the passage where he introduces the “liberal principle of legitimacy,” Rawls makes in fact two distinct claims:

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<sup>22</sup> For a recent defense of “accessibility,” see Badano and Bonotti (2020). The main competitor is the account of public reason as “intelligibility” to be found in Gaus (2011) and Vallier (2016).

<sup>23</sup> *The Idea of Public Reason Revisited*, originally published in 1997.

- 1) What we may call the *legitimacy through public justification* claim, holding that the coercive power of the state is only legitimate if exercised according to a constitution “the essentials of which” all (reasonable) citizens are expected to endorse;
- 2) The *public reason claim*, holding that, “as far as possible” (idem, p. 137), not only “constitutional essentials” but also more generally matters of basic justice ought to be discussed through public reason alone.

Rawls affirms that, although both constitutional essentials and matters of basic justice ought to be discussed in purely political terms (i.e., relying on public reason alone), it is “more urgent” to settle at least the essentials “dealing with the basic freedoms” (idem, p. 230) and it is also easier to “gain agreement” about the same. Rawls expresses skepticism about the possibility that reasonable people will ever reach a consensus on a theory of social justice as comprehensive as his own justice as fairness; he explicitly denies that such a consensus might include “basic matters of distributive justice” as these are “nearly always open to wide differences of reasonable opinions” (idem, pp. 228–229).

Rawls accepts, therefore, that, as a requirement of the liberal principle of legitimacy, “the basic structure and its public policies are to be *justifiable* to all citizens” (idem, p. 224, my emphasis) in the sense that such policies have to be debated through the use of public reason alone. The constitution, however, is subject to the further constraint that all citizens “are expected” to endorse it, a constraint that, because of reasonable pluralism, would never apply to all laws regulating the “basic structure” (“matters of basic justice”).

The primary site of legitimacy under Rawlsian political liberalism is therefore the constitution, which must be organized to ensure the plausible endorsement of all (reasonable) citizens. The “basic structure” is at most a subordinate site of legitimacy, both in the sense that achieving legitimacy for it is less “urgent” than for the constitution and, most importantly, because a different and significantly less demanding criterion of legitimacy applies to it.

If political liberalism downright ignored the problem of the authoritative character of ordinary norms, we would have one reason to reject the entire account altogether for its offering a gravely deficient solution to the problem of legitimacy that neglects the aspect of each political society that most affects citizens’ ordinary life. However, Rawls does talk (especially in “The Idea of Public Reason Revisited”)<sup>24</sup> of the public justification of ordinary norms so we must consider how the model of legitimacy as public justification can be applied to the secondary site of legitimacy, i.e., the norms of the basic structure.

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<sup>24</sup> See, for instance: “Thus when, *on a constitutional essential or matter of basic justice*, all appropriate government officials act from and follow public reason, and when all reasonable citizens think of themselves ideally as if they were legislators following public reason, the legal enactment expressing the opinion of the majority is legitimate law” (Rawls, 2005, p. 446, emphasis added.)

### **3.3. Public Justification in the Basic Structure and Its Failure**

Imagine now a state is in a condition of Rawlsian legitimacy, in the sense that its major constitutional principles are such that they can be endorsed by every reasonable citizen. The norms regulating the basic structure, by contrast, are not endorsed by all reasonable citizens (nor can we expect they are going to be endorsed at any given time, because their regulation is “nearly always open to wide differences of reasonable opinions”) but their justification is “accessible” to all of them. In addition, norms regulating the basic structure are shown to be consistent with, and possibly derivable from, the constitutional principles that the reasonable all endorse.

That a norm is accessible to the public, in the Rawlsian sense, means that its justification does not include controversial claims that some reasonable citizens might legitimately reject and that the epistemic criteria used to support such justification are publicly shared. But nothing guarantees that norms whose justification is accessible will also be ones that reasonable citizens will endorse. Reasonable citizens can still disagree about whether the norm, although justifiable through a reasoning process that is epistemically correct and is not grounded in unreasonable premises, is the one to be specifically implemented. Similarly so with the requirement demanding consistency with the constitution. Presumably, a host of norms will be consistent with constitutional principles that all reasonable citizens endorse; citizens will however disagree about which of these norms best expresses the spirit of the constitution.

All of this is accepted by political liberals and encapsulated in Jonathan Quong’s acknowledgement that reasonable people, even when they “share premises that serve as mutually acceptable standards of justification” (2011, p. 193), can nonetheless disagree about the conclusions of such standards. This disagreement, Quong claims, is merely “justificatory” and can be separated from the “substantive” disagreement among citizens who have not embraced any form of consensus and share no criteria of epistemic accessibility.

Let’s focus on an example provided by Quong. Quong presents to the reader two couples of friends (2001, p. 207), both debating the morality of using recreational drugs and the legitimacy of the Catholic Church only hiring male priests. The second couple, unlike the first, shares a reasonable consensus about basic principles of justice and commits to only using public reasons to try to convince each other of the value of their ideas. When Tony and Sara, the protagonists of the second story, debate about the legitimacy of the Church only hiring male priests, they try to show that their view on the matter, rather than true or metaphysically correct, is the most reasonable.

After having introduced us to the distinction, Quong claims that “Sara can reasonably reject Tony’s position, and vice versa, but if the state were to act on the basis of Tony’s argument, it would be offering Sara an argument for

the decision that she could reasonably be expected to endorse.” And that is because “Tony’s argument is one that Sara can understand and accept in her capacity as a free and equal citizen, even if she does not believe it is the best argument, or even if she believes it to be incorrect” (Quong, 2011, p. 209).

Claiming that Tony is offering Sara a reason “she could reasonably be expected to endorse” is incorrect. There is no reasonable expectation that Sara will endorse the reason Tony is offering; the only reasonable expectation is that she will find the argument offered by him in defense of that reason formally correct (in view of the respect of shared epistemic criteria which is one of the features of “accessibility”) and based in considerations that are, in principle, acceptable.

One may counter that the objection does not amount to much; even if we cannot expect the parties to reach a consensus, what matters is that Sara can easily see that Tony is not trying to impose on her a norm justified through a principle that she would never be able to appreciate. But here we get to the core problem. Because, if the only thing we can establish is that one agent’s demand of another’s compliance derives from premises that the other must see as reasonable, we are very far from demonstrating that the latter ought to do as the first says.

The fact that the norm imposed by some agent on another is justified in terms that the latter can understand as non-prejudiced and reasonably grounded has got nothing to do with the justification of authority. There is no obligation to obey reasonable norms in general so there cannot even be an obligation to obey the specific reasonable norms that one agent who finds herself in positions of power imposes on another.

Here is where we see the superiority of a normative impact account, despite its putative insensitivity to the existence of reasonable disagreement about justice. Imagine Tony had offered Sara, instead of a generic reason she might be expected to endorse, an argument demonstrating that a particular norm is one that, more than any other, would facilitate her acting in the right way while preserving her autonomy. Then, Sara, in her role as a reasonable member of the moral community, could not have opposed a norm that is not just reasonable, but one that reasonable moral agents cannot reject.<sup>25</sup> But, to demonstrate that the norm is one that reasonable agents cannot reject, we must focus on the overall effects that the particular norm produces and evaluate those according to a specific, however thin, conception of justice. By contrast, simply pointing out that the norm is one of a set that reasonable individuals could accept, tells nothing about whether citizens subjected to the norm have a duty to obey it. And that is because a reasonable agent could disobey the norm and still behave reasonably if, for example, he decides to comply with an alternative, equally reasonable, norm.

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<sup>25</sup>The idea of reasonable rejectability is famously explored in Scanlon (1998).

We can put this in a slogan: just because you did me the courtesy of justifying your norm in ways I can access, it does not follow I should accept you have the authority to impose the norm on me. There might be other moral reasons why those in a position of authority ought to justify their commands in a way that those subject to the command can see as reasonable.<sup>26</sup> But, there is no reason why any subject needs to see a command “accessible” to them as an exclusivity-protected reason for action.

What if, however, we expanded the consensus of the reasonable, so that it may include a general assessment of the basic structure of each society? Citizens agreeing on the regulation of the basic structure would stop disagreeing about whether at least the most impactful norms of their state are just. They would share a general evaluation of the state’s normative impact; they will agree on whether the basic structure of their society is or is not organized for the citizens.

This proposal would run counter to Rawls’s skepticism that the reasonable may reach a consensus on something as substantive as “basic matters of distributive justice,” but this is only part of the problem. A broader problem is that expanding the scope of the consensus would undermine the main aspiration driving the political liberal project, namely that of reconciling political legitimacy with the recognition of the irreducibility of political disagreement.

In this revised version of public justification, the reasonable would be committed to both (a) the idea that the state is legitimate insofar as its basic structure is organized according to normative criteria that reasonable people will endorse and (b) a revised definition of the reasonable as agents who would agree on liberal principles about the regulation of the basic structure. This revised version would not pay respect any longer to the existence of political disagreement. And that is because reasonable people, who are supposed to be the (ideal) recipients of the state’s public justification, would not engage any longer in any form of disagreement regarding such core elements of politics as the regulation of the family or the market.

There is another way of making the political liberal solution to the problem of legitimacy potentially compatible with the idea that the basic structure is the proper site of legitimacy and consists of focusing on what Rawls identifies as the constraints on the content of public reason.<sup>27</sup> Rawls is committed to the idea that “public reason is given by a family of political conceptions of justice” and that such conceptions are characterized both by the recognition of the priority of “certain basic rights, liberties, and opportunities” and by supporting “measures ensuring for all citizens adequate all-purpose means to make effective use of their freedom” (Rawls, 2005, p. 450). Another

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<sup>26</sup> See the literature defending liberal public reason for reasons of civic friendship or equal respect: Leland and Van Wietmarschen (2017), Leland (2019), Van Wietmarschen (2021).

<sup>27</sup> I thank an anonymous reviewer for pressing this objection.

way of identifying what counts as a “public” reason, therefore, depends not so much on the independence from controversial considerations that reasonable people might reject, but on its paying adequate respect to broadly liberal values and principles. One could then argue that the legitimacy of the state depends on whether its basic structure, and not just its constitution, is regulated according to broadly liberal values.

But focusing on the content of public reason does not remove the dilemma. The liberal values that ought to constrain the content of public reason can be interpreted in a plurality of manners (that is why they can find home in a “family” of political conceptions) and, again, it does not seem a necessary truth that one ought to obey state’s impositions whenever they are couched in liberal terms. Consider a fiscal reform that provides massive advantages to the best off in society and only a small relief to the rest of society. Is it compatible with “ensuring for all citizens adequate all-purpose means to make effective use of their freedom”? Probably so—the reform does advantage everyone in the end. But that seems hardly sufficient to establish that the poorest in society now have a moral duty to comply with a norm that they perceive to be insulting. Alternatively, one could give a more robust understanding of the liberal values that are supposed to constrain the content of public reason. But, in that case, there would not be much of a residual disagreement among reasonable conceptions of justice.

#### 4. Closing Remarks on Legitimacy and Disagreement

It was partly to redress what I see as a lacuna in political liberalism that I have suggested a different account of political legitimacy. But it might now seem I cannot just ignore the problem animating political liberalism, namely the fact that, at least in the context of contemporary liberal democracies, we can never expect a consensus on a complete idea of justice. Yet my suggestion that a legitimate state is one that makes it easier for citizens to act justly might seem to completely sidestep disagreement. Act justly *according to whom?*, one may object.

I am not persuaded this is as much of a problem as political liberals seem to suggest.<sup>28</sup> The most immediate implication of having an account of political legitimacy that is insensitive to the existence of disagreement<sup>29</sup> is that, if two citizens of the same state disagree substantively about what it means to behave justly towards one another, they may end up having different views about whether their state is legitimate. But, again, it is not obvious that two individuals disagreeing substantively about whether their state is legitimate is going to have calamitous consequences.

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<sup>28</sup> These lines are a response to Fabienne Peter’s (2020, pp. 476–377) idea that the main practical function of the concept of legitimacy is that of “settling deliberation”.

<sup>29</sup> Even this, incidentally, is an exaggeration because a normative impact account is not sensitive to disagreement in its foundations, but can well be in its content. For instance, the idea that a legitimate state ought to pay respect to individual autonomy is one way in which a normative impact account can incorporate concerns about the existence of a plurality of valuable forms of life.

If I believe my state is illegitimate, I simply won't believe that I ought to obey the law simply because the state says so. But there are all sorts of reasons why I might still think it appropriate to comply with many of the rules the state instantiates. Hence, even in circumstances where citizens disagree about the legitimacy of their state, they can still find ways, more or less stable, of co-existing under the same institutional structure, at least so long as the injustices they feel the state or their co-citizens perpetrate are not too grave.

Moreover, if we want the legitimacy of the state to depend on what real citizens think, then I do not see any alternative than grounding legitimacy on expressed, unanimous consent, with all that follows in terms of a good argument in favor of anarchism. One could, of course, elaborate a complex argument under which majority consent is coupled with a substantive evaluation of a state's basic structure to determine its legitimacy<sup>30</sup> but that will not challenge the main thesis I have argued for here, namely that a globally favorable normative impact enjoys at least lexical priority when evaluating a state's legitimacy.

So, I do not see the appeal of an account of legitimacy that is even in its aspirations sensitive to what real or mildly idealized people may find a consensus on (leaving aside the fact that, as I argued in the last section, political liberalism delivers very poorly on this aspiration). But, someone might reply, why do we need an account of political legitimacy in the first place, then, if a model of legitimacy is unlikely to lead real citizens to find a consensus on whether they have an obligation to obey the law? My response is that we need an account of political legitimacy for the very same reason we need political philosophy, to interrogate ourselves on the best answer to questions that are at the core of our life as political animals, such as, in the specific case of the present paper, whether the states that demand our allegiance do so legitimately.

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<sup>30</sup> See Greene (2016).



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