Political Authority and Political Obligation

Stephen Perry
John J. O’Brien Professor of Law and Professor of Philosophy
University of Pennsylvania Law School

I. Introduction

Legitimate political authority, it is generally agreed, involves a right to rule. A political regime has a right to rule only if, among other things, it has a fairly extensive power to change its subjects’ normative situation by, for example, imposing obligations or conferring rights on them. No doubt a right to rule involves much more than this. Perhaps it involves not just a power to impose obligations but also a right to compel compliance with those obligations by means of force or the threat of force. For present purposes, however, it will be sufficient to

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1 This article is a revised and much expanded version of Stephen Perry, “Two Problems of Political Authority,” American Philosophical Association Newsletter on Philosophy of Law, 6 (2007): 31-37.

2 Theories of legitimate political authority tend to fall into one or the other of two categories: (1) those that focus initially on the justification of a normative power on the part of the state to change persons’ normative situation; and (2) those that focus initially on the justification of the state’s right to use coercion against its subjects. For the most part, the difference between these two types of theory concerns the justificatory relationship between the state’s normative power and its right (which is presumably a claim-right) to use coercion. Theories of the first kind typically look for a justification of the state’s power to change its subjects’ normative situation that is independent of the right to use coercion, and then attempt to justify the right to coerce by reference to the normative power. Theories of the second type reverse this order of justification: They first offer a justification of the state’s right legitimately to use force under certain circumstances, and then offer a justification of the state’s general powers to change its subjects’ normative situation that makes essential reference to this prior right. For a distinguished version of this second type of theory, see Arthur Ripstein, “Authority and Coercion,” Philosophy and Public Affairs, 32 (2004): 2-35. The theories of political authority that I discuss in this article are all of the first type, but since theories of the second type do not typically deny that states have the normative power to change their subjects’ normative situation, I believe that the article’s most important conclusion – that it is implausible to think that such a normative power can be justified by reference to an aggregation of the state’s normative relations to its citizens considered one by one – generally applies to this category of theory as well. The key to Ripstein’s Kantian theory, for example, is the idea that “rights [of
focus on the point that legitimate political authority requires possession of extensive normative powers. Joseph Raz calls political regimes which have effective control over a population and which also claim legitimate authority for themselves, meaning they claim extensive powers to change the normative situation of their subjects, de facto authorities. Raz argues, in my view rightly, that a political regime can only have law and a legal system if it is a de facto authority in this sense. For present purposes it will be convenient to focus on the case of de facto authorities, which we can think of loosely as the governments of states with legal systems. Because such governments can, in the exercise of the extensive authority that they claim for themselves, affect their subjects’ lives in very significant ways and often against their will, the authority they claim to possess is moral in nature. Although legal systems claim to be able to change the

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3 Raz argues that because legal systems, unlike other normative systems such as commercial companies and sports organizations, acknowledge no limitations the spheres of behavior which they have the power to regulate, their claim of authority is “comprehensive.” Joseph Raz, The Authority of Law (Oxford: Clarendon Press, 1979), 116-17. Elsewhere he makes a similar point by observing that even in states in which the power of the legislature to legislate is constitutionally limited, “the law” nonetheless claims unlimited authority for itself “because the law provides ways of changing the law and of adopting any law whatsoever. . . .” Raz, The Morality of Freedom, 76-77.

normative situation of their subjects in almost any conceivable way – for example, by granting permissions, conferring rights, or creating powers – I will focus on the most fundamental power which legal systems claims for themselves, which is the power to impose obligations. Let me refer to the product of the exercise of a claimed power to impose obligations as a directive. If a directive was issued by an organ of a government which not only claims but also possesses legitimate authority, then those persons who fall within the scope of the directive have an obligation to obey it. Because legitimate authority is moral authority, this obligation is a moral obligation.

In recent years a number of prominent political philosophers who accept the basic thesis that legitimate political authority involves a right to rule, in the sense of that notion that was described in the preceding paragraph, have also offered a skeptical answer to the question of whether or not there is a general obligation to obey the law. The theorists I primarily have in mind here are Raz and A. John Simmons. There is, according to these theorists, no general obligation to obey the law of any existing state or any state which is likely to exist, and they hold that this conclusion extends to states which are democratic in nature and whose laws can be characterized as generally just. Each concludes that, because there is a close analytic connection between the authority of a legitimate state to issue directives and the obligation of the subjects of such a state to obey its directives, the fact that there is no general obligation to obey all the laws

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5 Leslie Green has also argued for the skeptical conclusion that there is no general obligation to obey the law, and he, like Raz and Simmons, also draws conclusions from this fact about the nature of legitimate political authority. Green’s approach to these matters is, however, different in significant respects from theirs. I will discuss Green’s views in section IV below.
of even a reasonably just state is sufficient to establish that no state can have the full legitimate authority that it claims for itself. Relatedly, each of these theorists also characterizes the nature of legitimate political authority in ways that can, in a fairly straightforward sense, be characterized as individualistic or aggregative. For example, Raz states that his particular analysis of authority, which he calls the service conception, “concentrate[s] exclusively on a one-to-one relation between an authority and a single person subject to it,” adding that “[i]t is an advantage of [this] analysis that it is capable of accounting for authority over a group on the basis of authority relations between individuals.”

Raz goes on to conclude that the service conception “invites a piecemeal approach to the question of authority of governments, which yields the conclusion that the extent of governmental authority varies from individual to individual, and is more limited than the authority governments claim for themselves in the case of most people.”

Simmons, who favors a Lockean approach to the legitimacy of political authority, holds that “we only have an obligation to obey the state’s directives, and the state only has an exclusive moral right to direct, be obeyed, and coerce us if either (a) we have directly interacted with the state in some way that grounds a special moral relationship of that sort, or if (b) accepting membership in a state is the only way we can fulfill one of our other moral obligations or duties.” Since Simmons subscribes to the consent-based Lockean thesis that “political

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voluntarism [offers] the correct account of these transactional grounds for legitimacy," it follows that, on his view, the legitimacy of a given state is, in effect, a function of how many individuals happen to have consented to the authority of that state. Thus although Simmons’ theory of authority is quite different from Raz’s – Raz, as we shall see, at no point relies on a notion of consent – both theories can nonetheless be said to be individualistic in the sense that any legitimacy that a given state possesses \textit{qua} state depends on an aggregation of whatever distinct authority relations happen to hold between the state and each of its subjects considered one by one. Since Simmons does not think that any state, no matter how just, has received the consent of all of its subjects, he agrees with Raz that no state is every fully legitimate or, as he also puts it, legitimate simpliciter. But because the state \textit{is} legitimate for those who have consented to it, he similarly agrees with Raz that the legitimacy of the state \textit{qua} state can be a matter of degree.\footnote{Simmons writes that “legitimacy [i.e. legitimate political authority] is . . . the logical correlate of the (defeasible) individual obligation to comply with the lawfully imposed duties that flow from the legitimate institution’s processes.”\footnote{\textit{Ibid.}, 155.} Raz appears to accept an essentially similar view of the relationship between the obligation to obey and legitimate political}
authority.\textsuperscript{12} Strictly speaking it is not true that the logical correlate of a power to impose obligations is an obligation to obey, since the true correlate of a power is, within Hohfeld’s framework, a liability to have one’s normative situation changed.\textsuperscript{13} This might seem to be a strictly technical point which has no bearing on substantive theories of political legitimacy, but I will argue that this is not so. By focusing their respective discussions on the justification of a general duty to obey the law, Simmons and Raz are both led, in different but related ways, to a distorted understanding of the nature of political legitimacy. Any acceptable theory of legitimate political authority, I will argue, must focus \textit{directly} on the justification of the power to impose obligations (or, what comes to the same thing, on the justification of a general liability on the part of citizens to be subjected to obligations). I will also argue that, by focusing on the justification of duties rather than the direct justification of powers, Simmons and Raz are both led to the mistaken conclusion that legitimate authority is an aggregative notion which is based on the particularized and possibly varying normative relations that exist between the state and each individual citizen considered one by one. Relatedly, I will argue that both are mistaken to suggest that legitimate political authority is generally a matter of degree, or at least that it is a matter of degree in the sense they have in mind. Finally, although I will not advance a particular substantive theory of legitimate authority, I will argue that any plausible substantive theory must

\textsuperscript{12} See Raz, \textit{The Morality of Freedom}, 24: “The obligation to obey a person which is commonly regarded as entailed by the assertion that he has legitimate authority is nothing but the imputation to him of a power to bind. For the obligation to obey is an obligation to obey if and when the authority commands, and this is the same as a power or capacity in the authority to issue valid or binding directives.”

be based on a notion of the common good, the public interest, or some similar normative notion.

In sections II and III I discuss at length Raz’s very influential service conception of authority. In section IV I return to the notion of consent, and I also discuss the nature of legitimate political authority in general.

II. Raz on Political Authority

In considering Raz’s general theory political authority, it will be helpful to distinguish between two different philosophical problems to which the notion of political authority gives rise. The first is the fundamental question of whether or not and under what circumstances states ever in fact possess the extensive normative powers which they claim for themselves to be able to change the normative situation of their subjects. The concern, in other words, is with the question of whether or not and to what extent the claim of de facto authorities to possess such normative powers is justified. Let me therefore call this the problem of justification. Since the claim that states make to possess legitimate political authority is moral in nature, the problem of justification is a moral problem, and attempts to address it must have recourse to substantive moral argument. For example, the traditional Thomist response to the problem of justification is the thesis that, in John Finnis’s words, “the sheer fact that virtually everybody will acquiesce in somebody’s say-so is the presumptively necessary and defeasibly sufficient condition for the normative judgment that that person has (i.e. is justified in exercising) authority in that
community. As Finnis recognizes, this is a substantive moral claim and must be defended as such. The second problem of political authority concerns the question of whether or not an individual can ever be justified in subjecting his or her will to that of another person. Let me call this the subjection problem. This too is a moral problem, at least insofar as the issue is taken to be one of maintaining moral autonomy or making important decisions in one’s life in accordance with one’s own independent judgment.

The two problems of political authority that I have identified are clearly related, since a response to the justification problem which purports to show that political authority can under some circumstances be legitimate must show that, at least under those circumstances, it is justified to subject one’s will to that of another. But the two problems are nonetheless distinct. A demonstration that one is justified, in appropriate circumstances, in subjecting one’s will to that of another is a necessary condition of the legitimacy of political authority, but there is no reason to think that it is a sufficient condition. Beyond that, the problem of subjection arises in many contexts besides that of political authority. According to one understanding, the problem arises whenever one is faced with a directive, a command, or some similar intentional attempt to change one’s normative situation, whether this occurs in a political or a nonpolitical context. According to another, broader understanding, the problem arises in the circumstances just described, but also whenever one is faced with a demand or request by another person that one

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behave in a certain way. Demands are not generally intended to be exercises of a normative power, and requests never are. According to another, still broader understanding of the subjection problem, it arises whenever one is faced with the possibility of relinquishing control over some aspect of one’s life by acting according to someone else’s view about what one ought to do, rather than according to one’s own view. On this – the broadest – understanding, the subjection problem arises, for example, for a person who more or less automatically relies on the advice of a friend, or on the general recommendations of a self-help book, about what to do in a particular kind of situation, rather than on his or her own judgment. In other words, the subjection problem understood in this third sense can arise even when there is no intentional attempt, of the kind involved in demands and requests, to motivate another person to act in a certain way; it is enough to trigger the problem that one blindly follows another’s advice or even another’s impersonally expressed views about how persons ought in general to behave in some specified type of circumstance.

Raz’s well-known service conception of authority appears to have been offered, at least in its early formulations, as a response to both the justification problem and the subjection problem. In this section, I will argue that while the service conception does indeed offer an important insight about when one is justified in subjecting one’s will to that of another, and to that extent addresses an important dimension of the justification problem, it nonetheless does not succeed as a general account of the conditions that a de facto political authority must meet in order to possess the legitimate moral authority that it claims for itself. The difficulty, in brief, is that even if the service conception correctly identifies (many of) the situations where one is
justified in subjecting one’s will to that of another, it does so in a way that does not depend on
whether or not the other person has exercised or purported to exercise a normative power to
impose a binding obligation. But the possession of a moral power to change the normative
situation of another is, by Raz’s own lights, the heart of legitimate authority. If the service
conception does not directly address the question of whether or not the possession of such a
power is justified, then it has not truly come to grips with the problem of justifying political
authority.

The heart of the service conception is the normal justification thesis (the NJT), which in
Raz’s early formulations asserted that “the normal way to establish that one person has authority
over another person,” and hence the normal way to show that the latter “should acknowledge the
authoritative force of [the former’s] directives,” is to show that the second person will in general
do better in complying with the reasons that apply to him “if he accepts [the first person’s]
directives as authoritatively binding and tries to follow them, rather than trying to follow the
reasons that apply to him directly.”16 Notice that the NJT is explicitly offered here as a full-
fledged response to the justification problem: To “establish” that one person has authority over
another person can only mean to offer a substantive justification for the conclusion – explicitly
acknowledged by Raz to be moral in nature – that the one has legitimate authority over the

other. Of course, Raz also offers the NJT as a response to the subjection problem. Roughly speaking, the general idea is that, if one will better comply with right reason in a specified set of circumstances by allowing oneself to be guided by the judgment of another rather than by trying to act according to one’s own judgment about what ought to be done, then one is justified in subjecting one’s will to that of the other. For the moment, however, my concern is with the NJT understood as a full-fledged response to the justification problem.

The difficulty that the NJT faces in justifying legitimate authority can be brought out by considering one of the two main types of case to which Raz says that the NJT has application, namely, cases in which the person issuing the directive has greater expertise than the person to whom the directive is issued. (The other type of case, which involves situations where the person issuing directives is in a position to achieve valuable coordination among the activities of several people, will be discussed later.) To avoid unnecessary complications, I will focus on a case where the “background reasons” that apply to the person to whom directives have been issued are both moral in character and constitute categorical reasons, where a categorical reason is one that applies to the person independently of his or her particular goals and aspirations. Suppose, for example, that the issue is how safely to transport a certain dangerous substance,

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17 Cf. *ibid.*, 63: “The service conception is a normative doctrine about the conditions under which authority is legitimate and the manner in which authorities should conduct themselves.”

18 Cf. *ibid.*, 38-42, where Raz discusses the problem of “surrendering one’s judgment.”

Raz, *The Morality of Freedom*, 41-42, 57-59. It is worth noting that, in Raz’s early formulations of the service conception, binding directives were apparently supposed to exclude acting on *all* the background reasons (or dependent reasons, as Raz sometimes calls them), because that would be double-counting. See, e.g., *ibid.*, 42: “[R]easons that could have been relied upon to justify [an arbitrator’s] decision before his decision cannot be relied upon once the decision is given.” However, in a recent article, Raz appears to have weakened the double-counting prohibition to some extent. Binding authoritative directives are now said to exclude acting only on those background reasons which the lawmaker was meant to consider and which conflict with the directive. Raz observes, quite sensibly, that the preemptive or exclusionary nature of a binding directive does not exclude relying on reasons for behaving in the same way as the directive requires, but only those reasons “on the losing side of the argument.” “The Problem of Authority: Revisiting the Service Conception,” *Minnesota Law Review*, 90 (2006): 1003-44, 1022. Sensible as this is, it clearly permits double-counting, since there is nothing to prevent me from acting on both the directive and the winning background reasons. Furthermore, since it is difficult to see how I can act on the winning reasons without knowing and taking account of the fact that they outweigh the losing ones, it seems to follow that, even though I cannot act on the losing reasons alone, I can nonetheless act on the totality or balance of background reasons, and indeed I must do so whenever I act on the basis of the winning reasons. In light of these considerations, it is no longer clear exactly what, on Raz’s general account of practical reasoning, a preemptive or exclusionary reason is supposed to exclude.

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Furthermore, by preempts the background reasons, the directives are supposed to replace those reasons for me. Since the background reasons are categorical in nature, it is very plausible to think that a reason that replaces them is likewise categorical. If whenever I engage in the activity of transporting the dangerous substance I have a reason to follow the agency’s directives that is both mandatory and categorical, that would appear to be sufficient to establish that I have a moral obligation to follow the directives. If I have a moral obligation to comply with the directives, that would appear to be sufficient to establish that the agency has the legitimate authority to issue the directives, which is simply to say that it possesses the normative power that it claims for itself and that it purports to be exercising in issuing the directives.

Let me call the argument of the preceding paragraph the normal justificatory argument. The difficulty with the argument, which comes in the last step, is that it proves too much. Suppose that everything about the example remains the same, with the sole exception that the governmental agency issues advisory recommendations about how the dangerous substance ought to be transported, rather than directives that are meant to be obligatory. In other words, the agency does not purport to exercise a power to impose an obligation on me; it simply offers me advice, and then leaves it up to me to make a decision about what precautions to take if I decide to transport the substance in question. To ensure that no other aspect of the hypothetical is modified, we have to assume that the background reasons of safety, at least insofar as they apply to me, are not affected by the possibility that fewer persons overall will comply with the

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agency’s views about how to transport the substance if those views are issued not as obligatory directives but simply as advisory recommendations. Let me therefore assume that the case is one in which my reason to follow the agency’s directives depends solely on its expertise. The assumption, then, is that I will do better in complying with the safety reasons that apply to me in transporting the dangerous substance if I follow the agency’s views about what ought to be done, regardless of how many other people do likewise. On that assumption, the normal justificatory argument appears to go through, right up to the last step. Given that the background reasons are categorical, and given that I will do better in complying with those reasons if I treat the agency’s recommendations as preemptive and hence as mandatory, it is difficult to see how to avoid the conclusion that I have a moral obligation to follow the agency’s views even though they are only issued as recommendations and not as directives. In other words, I have a moral obligation regardless of whether the agency purported to exercise a normative power to impose an obligation on me. But if I have the obligation regardless of whether or not the agency claimed to possess and purported to exercise a power to obligate me, it is difficult to see how the normal justificatory argument can justify the conclusion that the agency possesses such a power.

Perhaps it might be suggested that even though I have the obligation in both cases, that is

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23 This means, among other things, that we are not dealing with a certain kind of case that Raz has discussed elsewhere, in which it would be futile for me to follow a given standard of conduct unless many other people also follow it. See Raz, *The Authority of Law*, 247-48. Raz gives the following example. If a sufficiently large number of people refrain from polluting a river, then the river will be clean. Any given person has a reason not to pollute only if a sufficiently large number of others do likewise, since otherwise the action of a single individual in refraining from polluting will be futile. Notice that this is a case where any given individual’s reasons are affected by the existence or non-existence of a general social practice, but where the practice does not amount to a Lewis-style solution to a coordination problem.
not a reason to deny that, if the agency does happen to claim and to purport to exercise a power
to impose obligations, the normal justificatory argument is sufficient to justify the conclusion
that it possesses this power it claims for itself. But this suggestion would lead to some strange
results. Suppose that no governmental agency exists to regulate the transportation of dangerous
substances, but that I have a friend who has exactly the same level of expertise that we have been
attributing to the agency. My friend gives me advice about how to transport the substance that is
identical in content to the directives or recommendations that we were supposing would have
been issued by the governmental agency. So long as I have reason to know that I will do better
in conforming with the background categorical reasons that apply to me by following my
friend’s advice than if I were to try to follow my own judgment, it is once again difficult to avoid
the conclusion that the normal justificatory argument establishes that I have a moral obligation to
follow my friend’s advice. But now suppose that, instead of simply advising me, my friend
claims to exercise a power to obligate me to do as she says. In accordance with this claimed
power she does not simply advise me but commands me, or issues a directive to me, to do such-
and-such if and when I transport the dangerous substance. Does the normal justificatory
argument establish that she does, in fact, possess the moral power to obligate me that she claims
for herself? It seems very odd that the mere possession of a certain kind of expertise, coupled
with nothing more than a claim that one possesses a normative power to obligate others, should
be sufficient to establish that one does, in fact, possess such a power. Raz himself draws
attention to the similarity, from the point of view of the NJT, between obligatory directives and
advice when he writes that, in pure expertise cases, “the law is like a knowledgeable friend.”24

But this similarity, far from lending support to the normal justificatory argument, actually undermines it. If, in cases of pure expertise, the normal justificatory argument is sufficient to justify the existence of a moral obligation to follow the views of another person about what to do, it does so whether the other person simply offers advice or claims to issue binding directives. And if the suggestion is made that whenever the normal justificatory argument justifies an obligation on the part of $B$ to do as $A$ says then it also justifies any claim that $A$ might happen to make to have the power to obligate $B$, then we will be led to find normative powers in some rather odd places.

To come at the difficulty from a slightly different direction, consider what it means to say that one person possesses a normative power over another. Raz defends a very plausible view that takes something like the following form: One person $A$ has a power to effect a certain kind of change in the normative situation of another person $B$ if there is sufficient reason for regarding actions which $A$ takes with the intention of effecting a change of the relevant kind as in fact effecting such a change, where the justification for so regarding $A$’s actions is the desirability of enabling $A$ to make this kind of normative change by means of this kind of act. The difficulty that I am arguing the normal justificatory argument faces is that, in trying to justify the conclusion that one person possesses authority over another, it makes no essential reference to the desirability of the first person being able intentionally to change the normative situation of the other. The NJT looks out at the world, so to speak, from the perspective of an individual who is seeking assistance wherever he can find it in helping him to conform to right reason.

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25 Raz, The Authority of Law, 18.
From this point of view, leaving aside for the moment problems of coordinating activity, there is no particular reason to distinguish advice from directives claiming to be authoritative. For that matter, it does not particularly matter whether the “advice” comes from a person or from a black box which, for all I know, might not even be subject to the control of another person. So long as I know or can readily come to know, on whatever basis, that if I follow the “recommendations” that appear on the screen of the black box then I will do better in complying with the background reasons that apply to me, the normal justificatory argument seems to go through. Notice that it is not sufficient to distinguish advisory recommendations from obligatory directives to say that, in the former case, the recommendations give me reasons for belief but not reasons for action, or that the advisor is a mere theoretical authority for me but not a practical authority. In the case of the governmental agency, for example, the normal justificatory argument appears to go through whether the agency issues advisory recommendations or obligatory directives. Furthermore, in the case of both recommendations and directives, the argument only goes through if I have a basis for knowing, as a general matter, that I will do better by complying with the agency’s views than if I try to act on my own judgment.\textsuperscript{26} It may or may not be true that, on any particular

\textsuperscript{26} Raz explicitly acknowledges the epistemic basis of his account of legitimate authority when he writes that “[i]f one cannot have trustworthy beliefs that a certain body meets the conditions of legitimacy [i.e. the NJT and an “independence condition” which holds that it more important, in the relevant type of case, to conform to reason than to decide for oneself], then one’s belief in its authority is haphazard and cannot . . . be trusted. Therefore, to fulfill its function, the legitimacy of an authority must be knowable to its subjects.” Raz, “The Problem of Authority: Revisiting the Service Conception,” 1025. It is worth noting in this regard that Raz further acknowledges that, in the case of both authority and advice, it is ultimately up to each individual to decide for himself whether or not the conditions of legitimacy are met: “[I]n following authority, just as in following advice, . . . one’s ultimate self-reliance is preserved, for it is one’s own judgment which directs one to recognize the authority of another, just as it directs one too keep one’s promises [and] follow advice . . . .” \textit{Ibid.}, 1018.
occasion when I transport the dangerous substance, that I have a reason to believe that I will do better on that occasion by following the agency’s views, and this so whether those views take the form of advisory recommendations or authoritative directives. What matters in both cases is, to repeat, that I must have good reason to believe that I will in general better comply with the reasons of safety that apply to me if I follow the views of the agency.

In light of the above considerations, it is noteworthy that, in his most recent work on authority, it is no longer clear that Raz means to offer the service conception as a full-fledged response to what I have been calling the justification problem, i.e., the problem of how to justify legitimate political authority. In a recent article, Raz states that the service conception is driven by a theoretical problem and by a moral problem. The theoretical problem concerns the issue of “how to understand the [normative] standing of an authoritative directive.” The moral problem is, “how can it ever be that one has a duty to subject one’s will and judgment to those of another?” The moral problem is, clearly, just another name for the subjection problem that I identified earlier. The theoretical problem, however, is not the same as the justification problem. In response to the theoretical problem, Raz observes that “[a] person can have authority over another only if there are sufficient reasons for the latter to be subject to duties at the say-so of the former.” He adds that this observation does not tell us when anyone has authority over another or even that anyone ever can have such authority. It only states what has to be the case for one person to have authority over another, and “[t]hat is all that one can ask of a general account of authority.” The theoretical problem thus apparently raises no more than a bare conceptual issue,

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\[Ibid., 1012-13.\]
which is answered, in essence, by pointing out that one person can have authority over another only if there are sufficient reasons to justify the possession by the former of a normative power to impose obligations on the latter. Not only is the service conception not explicitly advanced as a general response to the justification problem, the justification problem is not even formulated as a distinct problem in its own right. The task of determining who has authority over whom and with regard to what “is a matter of evaluating individual cases.”

Raz then goes on, in the same article, to offer the service conception as a specific response to the moral problem, which as already noted is what I have been calling the subjection problem. It is worth quoting Raz’s restatement of the service conception in full:

The suggestion of the service conception is that the moral question is answered when two conditions are met, and regarding matters with respect to which they are met: First, that the subject would better conform to reasons that apply to him anyway (that is, to reasons other than the directives of the authority) if he intends to be guided by the authority’s directives than if he does not (I will refer to it as the normal justification thesis or condition). Second, that the matters regarding which the first condition is met are such that with respect to them it is better to conform to reason than to decide for oneself, unaided by authority (I will refer to it as the independence condition). Raz anticipates the objection that the two conditions do not solve the moral problem because the second condition merely restates it. He responds that the independence condition “merely frames the question,” and that part of the answer to the moral problem is to be found in the first condition, namely the NJT. Raz argues that “the key to the justification of authority” is that, far from hindering our rational capacity, i.e., our capacity to guide our conduct in accordance

28 Ibid., 1014.

29 Ibid., 1017-18.
with our own judgment, authority actually facilitates this capacity. We value our rational
capacity not just because we value the freedom to use it, but also because “its purpose, . . . by its
very nature, [is] to secure conformity with right reason.” When the conditions of the NJT are
met, we are better able to achieve this purpose by acting in accordance with the relevant
authority’s directives than if we try to exercise our rational capacity directly. In such cases, the
importance of conforming our actions to right reason outweighs the importance of self-reliance
and acting on our own independent judgment. Raz goes on to point out that, because we are
hardwired to respond instinctively to certain dangers, sometimes we do better in achieving the
purpose of our rational capacity by acting on our emotions. More generally, authority is just one
technique among others that is capable of helping us to achieve this purpose: The primary value
of our general ability to act by our own judgment can also be met by “making vows, taking
advice, binding oneself to others long before the time for action with a promise to act in certain
ways, or relying on technical devices to ‘take decisions for us,’ as when setting alarm clocks,
speed limiters, etc.” To understand authority properly we must therefore see it “not [as] a denial
of people’s capacity for rational action, but rather [as] simply one device, one method, through
the use of which people can achieve the goal (telos) of their capacity for rational action, albeit
not through its direct use.”

This discussion of our rational capacity is illuminating and insightful. It shows that the
two conditions of the service conception, namely the NJT and the independence condition,
together offer a response to a very broad understanding of the subjection problem. In doing so it
makes clear why we are justified, in appropriate circumstances, in subjecting our will not just to
certain demands or requests by other persons that we behave in a certain way, but also to advice that others give us and even to mechanical devices such as speed limiters. (Recall the earlier discussion of a black box which dispenses “advice” but which may not be under the control of, or even have ever been programmed by, a human being.) However, in drawing attention to the fact that authority is just one device or technique among others that can enable us better to comply with right reason, this response to the subjection problem simply underscores my earlier point that the NJT makes no essential reference to the claim of de facto authorities to be exercising a moral power to impose obligations when they issue their directives. As I noted earlier, the NJT looks out at the world from the perspective of an individual who is seeking assistance wherever he can find it in helping him to conform to right reason. So long as I have reason to know that I will in general do better in complying with the reasons that apply to me in a given type of case by following the views of another person rather than by acting on my own judgment, it does not matter whether those views are offered in the form of advice or in the form of directives. Thus although it may well be a necessary condition of one person’s possessing legitimate authority over another that the NJT or some similar condition be met, the service conception cannot, certainly as a general matter, offer a full-fledged response to the problem of justifying legitimate authority. The service conception is not in the end best viewed as a conception of authority as such, but rather as a general response to a very broad understanding of the subjection problem.
III. Collective Political Goals and the Common Good

In light of the discussion in the preceding section, it is highly misleading to say, as Raz does in his recent article, that “[t]he function of authorities is to improve our conformity with . . . background reasons by making us try to follow their instructions rather than the background reasons.”30 If we are to speak of the function of political authority, consider the following alternative view. The function of governments is not to improve our conformity with right reason for its own sake, but rather to accomplish important moral goals that governments are uniquely suited, or at least particularly well suited, to achieve on behalf of their subjects by means of the normative instrument of a power to impose obligations. These goals will generally be, in some loose sense that I do not for the moment attempt to define, collective in nature. Consider, by way of example, the idea that some instances of governmental power are justified by reference to the ability of governments to achieve large-scale coordination among the activities of many persons. Raz has always regarded appeal to the ability of governments to achieve such coordination, understood in a broad sense and not just as a solution to a narrowly-conceived, Lewis-style coordination problem, as one of the two main ways that the service conception can justify political authority.31 (The other main way, which I discussed in the preceding section, is grounded in the possession of greater expertise.) Although any response to the justification problem which is based in whole or in part on securing coordination must

30 Ibid., 1019 (emphasis added).

contend with a number of difficult questions,³² it nonetheless seems clear that, one way or another, the ability of governments to coordinate complex activity will inevitably play a prominent role in the justification of most political authorities, to the extent that they can be justified. It also seems clear that any justification of political authority which rests on the ability of governments to coordinate activity must at some point appeal to an interest which people generally have in the successful achievement of coordination. There is no harm in saying that, because people have such an interest, they have a background reason “to wish for a convention,”³³ as Raz has put it, or something along those lines.

We nonetheless overlook an important dimension of what is valuable about coordination if we limit ourselves to saying that the power to issue coordination-securing directives is justified because the possession and exercise of this power will enable people to better conform their own actions with the requirements of right reason. Often a “a reason to wish for” coordination is indeed best understood as a background reason for action, meaning a reason to act in such a way that one’s particular activities are coordinated with those of others. But it is important to recognize that persons also have a background interest in the existence of general social coordination, meaning coordination in many different aspects of public life, which goes far beyond ensuring that their actions are coordinated with the actions of others. I will benefit, for example, in countless different ways because other people’s activities have successfully been


³³ Raz, The Morality of Freedom, 50.
coordinated so as to ensure that the highways are adequately maintained and the air traffic control system operates efficiently. The achievement of coordination is a valuable moral goal in its own right, quite apart from the extent to which particular individuals might in their own actions better conform with reasons that apply to them. The fact that many people will benefit from a set of directives which successfully coordinates the air traffic control system will surely figure in any plausible argument for the conclusion that the government is justified in issuing these directives, and this is so even though the directives do not directly engage the background reasons for action of many (and perhaps most) of the people who benefit in this way. Persons who benefit in this “passive” way may well have a “reason to wish for” a convention or, more generally, for coordination, but in this context a “reason to wish for” is best understood as an interest of a certain kind, and not as a reason for action.

As Raz has observed, his general view of authority entails the substantive moral thesis that all political reasons are subordinated to ordinary individual morality. But even if this thesis is true, which is not a self-evident matter, it is important to make clear that the relevant background reasons of individual morality are often very general and only indirectly related to the actions the government is empowered to take. As Raz says, the fact that everyone has reason to improve their own economic situation does not mean that everyone has a reason to raise taxes: “[T]hose helping us may have good grounds for pursuing the goals set by reasons that apply to us in ways that are not open to us,” and indeed “they may be assigned the task of helping us

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Ibid., 72.
While this is certainly correct, it nonetheless seems strained to say that the government’s role in such a case is to help every individual to act in ways which better conform with the reason they have to improve their own economic situation, as opposed to saying that the government’s role is, quite simply, to achieve the moral goal of improving everyone’s economic situation.

To see the general point more clearly, consider the following example. Suppose that a society has good reasons of security to have a standing army of a certain size, but that it would be wasteful of resources to have an army of any larger size. Assume that the government is justified in achieving this goal by conscripting the required number of soldiers from the pool of citizens who are generally fit to serve in the army, and that it is also justified in determining who is to be drafted by instituting a fair lottery. It is no doubt true, in such a case, that each citizen has a background moral duty to contribute in appropriate ways to maintaining the security of the society, so that it is true of each citizen who is drafted that she is complying with a background reason that applies to her. But does it follow that she is *better* complying with that reason by obeying the directive to serve in the army? After all, she only has the duty to serve because her name happened to come up in the lottery. Similarly, is it sensible to say that the *function* the government is fulfilling in instituting the draft-by-lottery is to enable each citizen who has been drafted to conform better with a background reason that applies to her? If that were the government’s function, why is it only helping Susan by drafting her, and not helping John by drafting him as well? Are we to say instead that the government is somehow serving the goal of

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helping each citizen who might have been drafted to better conform with a background reason? Surely we make the best sense of such a case by saying, quite simply, that the government’s function is to take steps to achieve the general moral goal of providing for the society’s security by means of the exercise of a power to impose duties on (some) citizens. No doubt a background reason for action, such as the postulated duty to contribute in appropriate ways to collective security, must figure in any argument that might plausibly be offered to show that the government does, in fact, possess this power. But we nonetheless mis-describe the situation if we say that the possession of the power is justified because its exercise ensures that those whose normative situation is affected will better comply with that background reason than would otherwise be the case. That is why I said earlier that it may well be a necessary condition of a government’s possessing legitimate authority over any particular person in regard to any particular matter that the NJT, or some condition similar to the NJT, be satisfied. What is arguably necessary is that the justification of the power invoke some background reason that applies to any person whose normative situation is affected by its exercise. But it does not follow that the exercise of the power enables any such person to better comply with that reason. Still less does it follow that this was the purpose either of having the power or of exercising it in particular instances.

Raz recognizes that there will be cases, along the lines of the conscription example, in which burdens are imposed on a small number of persons in order to ensure that a benefit accrues to the larger community, or to some segment of it. He notes that “[t]he government has authority over [those who bear the burdens] only if they have reason to contribute to a scheme
which benefits others.” This is clearly true; in the example, the reason in question is the duty to contribute in appropriate ways to maintaining the security of the society. Expanding on this point, Raz observes:

> It is not good enough to say that an authoritative measure is justified because it serves the public interest. If it is binding on individuals it has to be justified by considerations which bind them. Public authority is ultimately based on the moral duty which individuals owe their fellow humans.

All of this is surely true, but that fact does nothing to buttress the claim that the NJT, understood as Raz understands it, must be satisfied in order to justify political authority. Perhaps Raz might wish to say of the conscription example that, once the scheme has been put in place and it has been determined who has the legal duty to serve and who does not, each individual is, in fact, complying in the best possible fashion, all things considered, with his or her background duty to contribute in appropriate ways to the security of the society. But there is simply no reason to think that this is in general true, as we can see by varying the hypothetical. Suppose that the government in question permits voluntary enlistment, and only uses the conscription lottery in to bring the army up to its optimal size where enlistment numbers fall short. It might well be the case that, for any given citizen, he or she best complies with the background duty to contribute in appropriate ways to the security of the society if he or she enlists, rather than by simply submitting to the draft as and when required. Perhaps this is so, for example, because the act of enlistment is a public expression of one’s willingness to serve one’s country, and that one better complies with one’s background duty by making a public declaration of this kind. Thus it is not

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true of those who are drafted that they are better complying with the background duty by obeying the order to report for military service than they would if they were to act on their own judgment by enlisting, and this is true even though the background duty is part of the justification for their specific duty to report for service when so ordered. Raz is correct to say that “[i]t is not good enough to say that an authoritative measure is justified because it serves the public interest,” but only in the sense that appeal to the public interest is not sufficient by itself to justify the authoritative measure. The point of the authoritative measure is surely to serve the public interest, which here takes the form of a collective goal of ensuring general security. Raz is also correct to say that “[p]ublic authority is ultimately based on the moral duty which individuals owe their fellow humans.” This means that a moral duty, such as the postulated background duty to do one’s part to maintain collective security, will necessarily figure in the justification of an authoritative measure such as the conscription lottery. But it does not mean that the point or function of the authoritative measure is to enable persons better to comply with that background duty.

In this good place to point out another, related difficulty to which the service conception gives rise, insofar as it holds that the function of authority is, quite simply, to improve conformity with right reason. As was noted in section I, Raz has observed that the NJT “invites a piecemeal approach to the question of the authority of governments, which yields the conclusion that the extent of governmental authority varies from individual to individual, and is more limited than the authority most governments claim for themselves in the case of most
people.” Thus if, to revert to an earlier example, I happen to know much more about how safely to transport a dangerous substance than does the governmental agency which has been charged with regulating such matters, the piecemeal approach suggests that the agency does not have the authority over me that it claims, and that I am not morally bound by its directives. If we say that the function of authority is, quite simply, to enable me better to conform with background reasons, then it becomes difficult to make sense of the fact that legal systems claim virtually unlimited power to regulate any activity or aspect of life, and that they do not acknowledge any exceptions to that authority which are not explicitly recognized by the law itself. No doubt Raz is correct to say that it is not a condition of adequacy of an explanation of the concept of authority that those who have authority accept, even implicitly, that the explanation is correct. Even so, one would nonetheless expect any adequate explanation to make sense of, in the minimal sense of being consistent with, the behavior of those who claim authority. If the function of authority really were to enable persons better to conform with right reason, then one would expect there to be many cases in which the claim of authority could be justified by appeal to pure expertise. One would nonetheless also expect in such cases that the law would act, as Raz has put it, “like a knowledgeable friend,” acquiescing gracefully when a subject either knows more than it does or succeeds in finding some third party who knows

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38 Ibid., 80.
40 Raz, “The Problem of Authority: Revisiting the Service Conception,” 1006.
41 Raz, Ethics in the Public Domain, 332.
more. Regarded as a general response to the subjection problem, the NJT counsels me to seek assistance in conforming to right reason wherever I can find it, so that if I have good grounds for believing that I will generally do better in safely transporting a dangerous substance by following the law of California than by following the law of Pennsylvania, then I should follow the law of California. But the law of Pennsylvania does not see the matter this way. It insists that, insofar as I fall within its jurisdiction, I have an obligation to follow its directives except to the extent that the law itself makes room for some exception. Far from encouraging me to seek assistance in conforming to right reason wherever I might find it, the law tells me that I am obligated to follow its directives, and that is the end of the matter. This suggests that there is an almost unavoidable tension in regarding the NJT as a full-fledged response to both the subjection problem and the justification problem.

Insofar as he has, at least in the past, treated the service conception as a full-fledged response to the justification problem, Raz has tended to view the analysis of authority as beginning with the one-to-one relation between an authority and a single person subject to the authority, so that authority over a group of persons is to be accounted for by reference to authority relations between individuals. This aggregative aspect of the service conception goes hand-in-hand with the piecemeal approach to political authority, which suggests, in turn, that the paradigm of an authority relation is, for the service conception, precisely a case of pure expertise. If, however, we adopt the view that the principal function of political authority is not

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43 Raz, The Morality of Freedom, 71.
to enable individuals taken one by one to better conform with right reason but that it has the
function, rather, of accomplishing important moral goals by means of a power to impose
obligations, then we are likely to see the paradigmatic instances of authority as those in which
the government’s actions can be understood, to borrow a term from Finnis, as intended to
advance the common good. As Finnis recognizes, large-scale coordination of complex activity is
perhaps the best example of how the common good can be advanced.44 Once we reject the idea
that the function of political authority is to enable individuals better to conform with right reason
one by one, then we are also naturally led to the view that an exercise of political authority can
probably only rarely be justified by appealing solely to greater expertise. At any rate we cannot
say that the possession of greater expertise is, as the service conception would have it, a prima
facie basis in and of itself for justifying authority; it will also be necessary, presumably, to
appeal to a substantive moral argument for paternalistic action by the state. Leaving paternalism
aside, the justification of a power to issue directives about, say, the proper manner of
transporting a dangerous substance can generally be expected to appeal to a background
categorical duty not to cause harm in certain ways to others. But the point of the power is not to
enable individuals considered one by one to better comply with this duty; it is, rather, to ensure
that the rights of others are properly respected, or to ensure that certain collective goals, such as
the maintenance of public order and safety, are secured. The justification of such a power will
probably almost always also have some coordinating aspect, such as the value of ensuring that

44 Finnis, *Natural Law and Natural Rights*, 153. Finnis’s own theory of legitimate
political authority, and the corresponding account of a general obligation to obey the law that he
says that theory entails, is clearly non-aggregative in character, and for that reason is a theory of
a the right general kind. See *ibid.*, 231-59, 297-350. But whether or not the theory is correct or
justifiable is a question that is well beyond the scope of the present paper.
persons generally, and not just those who are engaged in the activity of transporting the substance, are able to form reliable expectations about how this activity will be carried on.45 If we understand such cases as almost always resting on more than just a claim of greater expertise, then the task of justifying political authority becomes a much less formidable task than it would otherwise be, and the authority of governments is far less likely to be piecemeal. By the same token, however, we do not succeed in justifying political authority simply by showing that the persons over whom authority is claimed will better comply with a background reason that applies to them than if they were to try to act according to their own judgment. To say this much is to say no more than that those persons may well be justified in subjecting their will to that of the authority. But solving the subjection problem does not mean that we have solved the justification problem. The NJT, and the service conception generally, must be understood as contributing primarily to the solution of the subjection problem. Although a response to the subjection problem will almost invariably figure in any attempt to justify a claim of legitimate political authority, we have no reason to assume that, as a general matter, this will be sufficient by itself to establish that a given claim to authority can be justified.

I should emphasize that I do not regard the preceding discussion as advancing a particular substantive theory of legitimate political authority, but only as suggesting the general form that such a theory can be expected to take. I have adverted, admittedly quite vaguely, to such notions

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45 Raz acknowledges that expertise and coordination are, in the case of political authority, usually “inextricably mixed,” and that because of the resulting importance of achieving coordination, generally speaking only de facto authorities, meaning bodies that are effectively able to ensure that people will do what those bodies say, can be legitimate. Raz, “The Problem of Authority: Revisiting the Service Conception,” 1031, 1036.
as background duties, collective moral goals, and the common good. But I have said nothing about what the common good consists of, or about when background moral duties are of a kind or strength to justify a power to impose specific legal duties that are intended to advance a collective moral goal.\footnote{Can the protection of individual rights be regarded as a collective moral goal of some kind, or by reference to some notion of the common good? I have not purported to answer this question, nor need I do so for present purposes. In note 1 above I distinguished between theories of political authority that begin with the justification of a normative power and theories that begin with the justification of the use of coercive force, and suggested that the general claims of this article apply to theories of both types. Ripstein’s theory, which is of the second type, takes as its starting point the protection or enforcement of individual rights, where individual rights are understood as reciprocal limits on the freedom of all. I doubt that Ripstein would regard this theory as grounded in a conception of the common good, and perhaps he would be right to take that view. I nonetheless would argue that the theory falls within the scope of the claims that I am making here about the nature of legitimate authority, if only because it clearly adopts a non-aggregative approach to the justification of authority. I should also note that nothing I have said rules out the possibility of a mixed or pluralistic approach to the general justification of political authority. Perhaps a theory of the second type, along the lines of Ripstein’s view, is appropriate for the justification of private law and criminal law, whereas a theory of the first type is appropriate for the justification of other areas of public law (meaning public law other than criminal law). This is, I think, an interesting speculation, but further discussion of it is beyond the scope of the present paper.} For all I have said, then, political authority may never be legitimate, and philosophical anarchism may be the correct political theory.\footnote{Cf. Wolff, \textit{Political Anarchism}. The conclusions that should be drawn from the discussion in this and the preceding section are therefore simply the following. First, the justification of political authority must proceed by directly justifying the normative \textit{power} of the state to impose obligations, or otherwise to change the normative situation of it subjects. Perhaps it is true that the NJT can, by means of the normal justificatory argument that was discussed in section II, succeed in creating non-directed duties of some kind, which will vary from individual to individual, to comply with at least some governmental directives. But,
for the reasons given in section II, the NJT cannot succeed in directly justifying the power to issues these directives. The second conclusion is that it is very implausible to think that, to the extent that political authority can ever be justified, it can be justified in an aggregative fashion, i.e., by appealing to the aggregation of the specific and possibly variable normative relations between the state and its citizens considered one by one. One way or another, any plausible general justification will have to proceed by appealing to a conception of the common good, the public interest, or some similar normative notion.48

IV. Powers, Liabilities, and Duties

It might be thought that at least the second of the two conclusion set out at the end of the preceding section can be challenged in a fairly straightforward fashion. It will be recalled from section I that Simmons defends a very different aggregative theory from Raz, which is based on the notion of consent. Simmons maintains that “we only have an obligation to obey the state’s directives, and the state only has an exclusive moral right to direct, be obeyed, and coerce us if either (a) we have directly interacted with the state in some way that grounds a special moral

48 What are we to say about theories that attempt to ground legitimate political authority in the democratic process, rather than in the claimed ability of the state to achieve substantive moral goals or to serve some substantive conception of the common good? This is a huge topic, and well beyond the scope the present paper. I would simply observe that democratic theories of legitimacy generally appeal to some moral ideal of self-government or self-legislation, and that such an ideal is almost certainly best understood in non-aggregative terms and by reference to a process-oriented rather than a substantive conception of the common good.
relationship of that sort, or if (b) accepting membership in a state is the only way we can fulfill one of our other moral obligations or duties.\textsuperscript{49} Simmons’ view is, in essence, that condition (a) or (b) can only be satisfied by some kind of particularized transaction between individual citizens and the state, so that the state is only legitimate for a particular citizen if he or she has engaged in one of the right kinds of transactions. It follows that the legitimacy of the state \textit{qua} state is a matter of degree, and that the degree of legitimacy in the case of any given state is a function of the proportion of its citizens who have engaged in the right kind of transaction. Simplifying greatly, we can for present purposes refer to the appropriate kinds of voluntary transactions by the catch-all term “consent.” The essence of Simmons’ view is, following Locke, that the authority of the state is only justified if and to the extent that citizens have consented to it.

Simmons, it will be recalled, argues that legitimate political authority, in the sense of a moral power to impose duties, is “the logical correlate of the (defeasible) individual obligation to comply with the lawfully imposed duties that flow from the legitimate institution’s processes.”\textsuperscript{50} As was remarked in section I, the true Hohfeldian correlate of a power to impose obligations is not an obligation but rather a liability to be subjected to obligations. This might seem to be a matter of little significance for a consent-based theory of legitimate political authority, for surely what one acknowledges and consents to, when one consents to obey the law, is the general power of the state to subject one to obligations (or otherwise to change one’s normative

\textsuperscript{49} Simmons, \textit{Justification and Legitimacy}, 154-55.

\textsuperscript{50} \textit{Ibid.}, 155.
situation). This is true, so far as it goes, but it nonetheless overlooks an important conceptual point about the nature of political authority. Raz argues, to my mind quite persuasively, that the state (and, metaphorically at least, the law) claims legitimate authority for itself, and he further argues that the fact that this is so is a truth about our concepts of both political authority and law. It is, however, crucial to recognize that the claim of the state to possess a legitimate moral power to impose obligations on its subjects, or otherwise to change their normative situation, must be understood as being completely unconditional in nature. This means that, so far as the state is concerned, it matters not a whit whether anyone consents to its authority or not. While it may well be true that any individual can, by consenting in an appropriate fashion, subject him- or herself to an obligation to obey whatever directives the state happens to enact, this is not, so far as the law’s own self-understanding is concerned, the right kind of route to justifying its claimed authority to enact those directives.

The proper response to this conceptual point, it might be suggested, is simply to say, so much the worse for our concepts of political authority and law. If, contrary to fact, everyone in Canada were to consent to the authority of the federal Parliament to enact laws within its proper sphere of jurisdiction, this would be, morally and quite literally, good enough for government work; the fact that the moral authority of Parliament to legislate did not accord with our concept of law, or with the law’s own self-understanding, would not in any way undermine the existence of that authority. Although I cannot discuss the matter in detail here, I wish to suggest that this response is unsatisfactory, because the truth at stake when we say that legitimate political authority is unconditional in character is a substantive and not just a conceptual truth. Recall the
suggestion of the preceding section that the justification of legitimate political authority can in
general be expected to appeal to the government’s ability to advance important collective goals
or, more generally, to advance some conception of the common good. It is perfectly conceivable
that, so long as most people generally do what the government tells them to do, the government
can accomplish various important goals even though it does not possess legitimate authority or,
for that matter, even if citizens do not have a general obligation, whether grounded in consent or
in some other source, to obey the law. As Raz has put the point, “much of the good that
governments can do does not presuppose any obligation to obey.”\(^{51}\) The discussion of the
preceding section was not intended to establish that governments ever do in fact have legitimate
political authority, but only to sketch what a general theory of legitimate authority would look
like. To say that the government *does* have legitimate authority to enact a certain kind of
directive is to say, in effect, that the imposition of specific legal duties is necessary, for whatever
reason, to achieve the relevant moral goal; the goal cannot be accomplished unless the
government is not just telling people what to do, but also exercising a moral power to obligate.
Whenever this is true, however, it seems very unlikely that the justification of the power can as a
general matter be conditional on the contingent and possibly retrospective existence of consent.
Perhaps it is the very fact that people have not consented, and are not likely to do so, that makes
it necessary that the government possess a moral power to obligate; perhaps this so because, as it
happens, not enough people will go along with the government unless it is clear to them that the
government is not just telling them what to do but that it has a right to tell them what to do. If
that is so, however, then the government’s power to issue directives of the relevant kind must

have some moral source besides consent.

Leslie Green, like Simmons, defends a consent-based theory of legitimate political authority, and he likewise thinks that there is an important connection between legitimate authority and the duty to obey the law, but his approach to these issues is different in important respects from that of Simmons. Green begins, quite helpfully, by setting out five conditions that an argument must meet if it is to establish the existence of a general obligation to obey the law. Any such argument must, if it is to be successful, show that the general obligation that it claims to exist is (1) a moral reason for action; (2) a content-independent reason for action, meaning a reason to do as the state directs because the state directs it and not because its directives have a certain content; (3) a binding or mandatory reason for action, as opposed to a reason which simply happens to outweigh other relevant reasons; (4) a particular reason for action, meaning a reason that arises only for the directives of a citizen’s own state, and not for the directives of other states; and, finally, (5) a universal reason for action, in the double sense that it binds all of a state’s citizens to all of that state’s laws. Green argues persuasively that no argument for a general obligation to obey the law that has so far been advanced succeeds in meeting all five conditions, and he further argues that it is unlikely that any such argument exists. Green himself is, as already noted, a consent theorist. He maintains that a consent theory can easily satisfy conditions (1) to (4), but observes that it notoriously fails to satisfy condition (5). It is simply not the case that, for any existing state, all of its subjects have done something that can

52 Green, The Authority of the State, 224-29.
reasonably be interpreted as consenting to the state’s authority.\textsuperscript{53}

Green, unlike Raz and Simmons, explicitly recognizes that the logical correlate of a right to rule, because it involves a normative power, is strictly speaking a liability rather than a duty or an obligation. He further recognizes that “whether the right to rule and the duty to obey are logical correlates depends on substantive questions of political theory, and not on the analysis of concepts.”\textsuperscript{54} He continues:

\begin{quote}
[I]f we view . . . [the] state as the creature of its citizens, as the instrument of their aims and whose purposes it should serve, we then we would no longer see [the correlation of the right to rule and the duty to obey] as purely a matter of logic; we would say that the authority of the state follows from the existence of their obligations not in the weak sense that they are logical correlates, but in the strong sense that the existence of the obligations is the grounds of its authority. Alternatively, if one put the priority the other way around, as in a primitive monarchy perhaps, citizens might think that their obligations were normative consequences of independently justified authority. In assuming correlativity we usually rely on a substantive theory rather than [an] analytic thesis about the state, namely, that it is properly the instrument of its citizens’ aims. In that case, the relationship between authority and obligation is not one of notational variants.\textsuperscript{55}
\end{quote}

All of this, apart from one or two reservations that I will note below, strikes me as clearly correct. Like Raz and Simmons, Green adopts an individualistic and aggregative approach to the existence of duties to obey: “Some of us have natural duties to obey, others duties of consent, still others may have only weak prudential ties, and some may have none at all.”\textsuperscript{56} As I have

\begin{itemize}
\item \textsuperscript{53} Ibid., 229.
\item \textsuperscript{54} Ibid., 235.
\item \textsuperscript{55} Ibid., 236.
\item \textsuperscript{56} Ibid., 246.
\end{itemize}
already remarked and as this latter quote makes clear, Green also agrees with Raz and Simmons that there is no general obligation to obey the law for the reason that his condition (5), which is the universality condition, generally fails to hold: It is simply not the case that every citizen has an obligation to obey every law. In light of this fact, Green proposes that, for purposes of discussing political obligation, we simply abandon condition (5) by stipulating the following distinction: “[P]olitical obligation is the relation justified by an argument satisfying conditions (1) to (5); political authority is justified by an argument satisfying (1) to (4). Where such authority is justified, there are indeed correlative obligations to obey; but there need not be any general political obligation.” 57 It would thus appear that Green does not follow Raz and Simmons in regarding legitimate political authority as a matter of degree, but only because he adopts this verbal stipulation. Building on that stipulation, he further proposes “that we reject political obligation in favour of justified authority as the central organizing concept, for it does not tempt us to false generalizations about the relations of obedience.” 58

Green clearly understands the state in instrumental terms, which suggests, in light of the passage displayed above, that he thinks that the authority of the state, to the extent that it can be justified, is grounded in citizens’ obligations, rather than the other way around. While it is true that he proposes that we regard justified authority rather than political obligation as the central organizing concept of this branch of political philosophy, this is not for substantive reasons but only to ensure that we are not led into temptation. While I agree with Green that any given

57 Ibid., 240.
58 Ibid.
theory of political authority will, as a substantive matter, grant justificatory priority either to the concept of authority – meaning the concept of a normative power – or to the concept of obligation, there is no reason to think that an instrumental understanding of the state must begin with the concept of obligation. I suggested earlier that legitimate political authority, to the extent that it ever exists, must generally be justified in non-conditional terms, and I further suggested that this is so for substantive and not just conceptual reasons. If it is true that legitimate political authority must be understood in non-conditional terms, then is almost certainly also true that any substantive theory of authority must give justificatory priority to justifying a normative power rather than to justifying an obligation to obey. I have not proposed any particular substantive theory of authority, and indeed I am far from sure that one can be given. But the general idea that governmental powers to impose obligations must be justified by reference to important collective goals or, more generally, to some conception of the common good, is most naturally understood as involving an instrumental understanding of political authority. Raz, like Green, clearly adopts an instrumental approach to the justification of authority, and insofar

59 Green incidentally suggests in the displayed passage that an instrumental approach to the justification of the state must serve the aims and purposes of its individual citizens, which suggests that the underlying theory of the good must be a subjective one. In my view an instrumental approach is completely consistent with an objective understanding of the moral goals, or the conception of the common good, that the state exists to serve. For present purposes, however, the distinction between objective and subjective versions of instrumentalism is not an important one.

60 I do not mean to suggest that a non-aggregative theory of legitimate political authority must necessarily be instrumental in character. I have argued elsewhere that Ronald Dworkin’s theory of political obligation is best interpreted in non-instrumental terms, because it is implicitly based on the idea that political community has intrinsic moral value. See Stephen Perry, “Associative Obligations and the Obligation to Obey the Law,” in Scott Hershovtiz, ed., Exploring Law’s Empire: The Jurisprudence of Ronald Dworkin (Oxford: Oxford University Press, 2006): 183-205.
as he conceives of the service conception as a response to the justification problem and not just the subjection problem, I believe it is also clear that he regards the NJT as capable of directly justifying a power on the part of the state to impose obligations. As it happens, for the reasons I discussed at length in sections II and III, he is wrong to think this, but that is not germane to the present point. Green is simply off the mark in suggesting that only odd theories, like the monarchist view that he mentions in passing, will take as their starting-point not the justification of an obligation to obey, but rather the direct justification of a normative power.

I thus agree with Green that we should regard justified authority rather than political obligation as the central organizing concept, but I believe that this is so for substantive reasons and not simply because adopting that view will help us to avoid temptation. Any plausible theory of political authority that takes as its starting-point the direct justification of a governmental power to impose obligations will almost certainly have built-in limits of scope, in the sense of limits on the government’s moral jurisdiction to legislate. Clearly, even governments that are generally just regularly pass laws that exceed any plausible understanding of what those limits are, and that is one reason why Raz, Simmons, and Green are all correct to conclude that there is no general moral obligation to obey the law. If, however, it could be established, according to a correct or justifiable substantive theory of political authority, that a particular state possessed legitimate authority to impose obligations, it would not automatically follow from the fact that the state occasionally enacted laws that exceeded its moral jurisdiction that the legitimacy of its authority was in some way or to some extent undermined; whether or not this was so would depend on the frequency and moral severity of the excesses. The duty-
oriented, aggregative approach to legitimate authority that is defended in different forms by each of Raz, Simmons, and Green does, however, automatically entail that if laws fail to obligate any or all citizens for the reason that the government has exceeded its moral jurisdiction to legislate (or, for that matter, for any other reason), then the authority of the state, being a matter of degree, is limited to the extent of the excess. As I have argued at length in this article, the aggregative approach is a mistaken one. Whether or not there exists a plausible and general non-aggregative theory of legitimate political authority is of course a different question, and one that is well beyond the scope of the present discussion.

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61 As was noted earlier, Green only avoids this conclusion by the artificial manouevre of stipulating that a theory of political justification, which in his view must clearly take as its substantive starting-point the duty of individual citizens to obey, nonetheless need only satisfy his conditions (1) to (4).