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STILZ AND SIMMONS ON JUSTIFICATION,
LEGITIMACY AND COERCION

by

LAURIE A. MEHRWEIN

Under the Direction of Dr. Andrew Altman

ABSTRACT

This thesis addresses the conflict between Anna Stilz and some liberal political philosophers regarding the nature of duties and obligations owed by individuals to the state. First, I will analyze Stilz's argument about the nature and grounds of obligation, then address the case against such obligations, particularly as presented by the philosophical anarchist A. John Simmons. Finally, I address what I believe to be the root of the disagreement.

INDEX WORDS: Justification, Coercion, Legitimacy, Obligation, Citizenship, Natural rights

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LAURIE A. MEHRWEIN

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2014

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DEDICATION

Nisi Deus fortitude mea. With love to MH.

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This thesis would not have been written without the patient guidance and encouragement of Andrew Altman, who taught me generosity, grace, and discipline.

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1 INTRODUCTION

In her 2009 book, *Liberal Loyalty: Freedom, Obligation, and the State*, Anna Stilz makes a unique case for accepting special obligations to one's state and compatriots. Using the liberal principle of equal freedom, she argues that special obligations to the state—which include but are not limited to the duty to obey the law, the duty to participate in the shaping of law and policy, the duty to defend the state, and the duty to participate in schemes of funding and redistribution through taxation—are legitimate obligations that unite citizens in doing the good work of realizing justice. Significantly, Stilz argues that even when these obligations are unchosen, they are still legitimately imposed on citizens when the state is sufficiently just and democratic.

Stilz is aware that this stance puts her at odds with the powerful arguments from many liberals, particularly philosophical anarchists, who declare that the special obligations demanded or coerced by the state are at odds with the liberal values of justice as equality and freedom. Stilz is attempting to establish special obligations as a specifically liberal position in the face of these arguments, particularly against what she perceives to be a liberal bias against special claims by institutions of justice. As she writes in her Preface, "I fear . . . that those who are already loyal citizens may not be so for the right reasons--that is, for liberal reasons, and not patriotic or nationalist ones. And I fear that liberals are increasingly drawn to question the value of loyal citizenship in favor of a more cosmopolitan vision. On both fronts, then, there is something to be said."¹ For Stilz, where citizens are not loyal for the 'right reasons', and where an alternative vision such as philosophical anarchy beckons, the threat of state-breaking looms.

In her book, Stilz attempts to craft a rebuttal to the liberal argument against special political obligations, and particularly addresses what she perceives to be the assault on such

¹ Anna Stilz, *Liberal Loyalty: Freedom, obligation, and the state*. vii.

obligations by philosophical anarchist A. John Simmons. To do this, she first addresses general liberal challenges to the justification of the state by significantly recasting the role of the state in realizing justice, arguing from the logical implications of the nature of justice as understood by Immanuel Kant. Only when we see the requirements of justice clearly, Stilz argues, do we come to see that special obligations can, in fact, be justified not merely on brute facts, but on pre-institutional principles and applied practical reasoning.

Once she has argued for state justification, Stilz turns her attention to state legitimacy, to which Simmons poses a particularly strong challenge. Here, she draws on Jean Jacques Rousseau to recast an extensive and demanding version of citizens' special obligations as not only integral to, but legitimizing the authority of the state.

In this rebuttal to philosophical anarchists, Stilz makes an interesting but flawed, foray into crafting an argument for keeping justified states, and for the continued existence of legitimate states and the specific obligations they demand. In section I of this thesis, I will present the argument Stilz builds in favor of special obligations to one's own state as a source of justification for the state. Next, I will address the arguments Simmons and other liberals make against using the particularity assumption as grounds for state justification. In section II, I will present Stilz's case for state legitimacy, including her argument for coercive state authority, and for special political obligation as necessary to fulfilling the demand of justice. Then I will look at Simmons' argument that no existing state is legitimate in its demands of special political obligation, regardless of how morally justifiable that those demands may be. Finally, I will identify implications of Stilz's theory that I believe weaken her argument for special obligations to the state.

1.1 Stilz on Justification from the Particularity Argument

Stilz believes that to establish loyalty as a legitimate demand of the state, an argument must be made that establishes the particularity assumption on grounds other than merely the brute facts of proximity. This is not an easy task: Stilz defines the particularity assumption as the assumption that "a special bond of obligation . . . ties the citizen or resident to her state, and to her compatriots, and not to others, and requires her to support *these* people and *these* institutions and not others."² Indeed, Stilz's definition of the particularity assumption does not seem to rule out the incorporation of proximity as part of the grounds for a special bond of obligation.

Already belonging to a state seems to be a matter of proximity to begin with. Since Stilz is concerned that proximity alone is not enough to ground loyalty for some liberals, she is eager to craft an argument that she believes liberals will accept, but which nevertheless incorporates proximity as reasonable grounds for loyalty. To this end, Stilz attempts to craft an argument that also rests on the liberal extra-institutional values of freedom and equality. If she can achieve this, Stilz believes that this will give her grounds for the second part of her argument, showing the possibility of the legitimate state and the acceptability of its coercive authority and demand for loyalty against the philosophical anarchist claims.

Stilz begins her argument for the possible justification of states by focusing on the primary concern of liberals: the source and nature of obligations. In the liberal tradition, Stilz points out, it is assumed that obligations necessarily arise from one of two sources. The first source is the nature of human beings themselves. Natural moral duties are assumed to be clear and obvious, and require no other source than that they are grounded in basic needs shared by all humans as humans. Examples frequently cited include the duties not to murder, not to physically harm, and not to lie. As such, they serve as a jumping off point for an array of seemingly fully determinate

² Stilz, 6.

rights. The second source of obligations is contracts consensually and explicitly arranged between two or more autonomous individuals.³ In this case, specific obligations arise from explicit agreements or promises which define the terms, scope, and limitations of the obligation. The particularity of these special obligations is *justifiable* for liberals because the obligations in question are based on consent. These traditional liberal sources of obligations are taken to by Stilz to be a challenge to state demands of loyalty in two key ways: in the first case, she argues, if certain natural moral duties are clearly determinate—if they have knowable, accessible content—then they do not require the state to define and regulate them, and state demands are superfluous. In the second case, when natural moral duties are indeterminate—where the *exact* content of certain natural moral duties is not immediately clear, is subject to debate, or is determinate, but remains in some way epistemically inaccessible—it may still be possible to negotiate the terms and contents of the duties among affected individuals in such a way as to meet their needs. In this case, a state may seem unnecessary even though it offers to provide its own content to the duty, with the added benefit of enforcement.

In reply, Stilz argues that liberals wrongly place special political obligations into one of these two categories of obligation, as a result of “the false view that all our obligations must spring from one of [the] two possible sources.”⁴ Political obligations, Stilz wants to argue, are of a different type; they neither rise from basic rights held by all humans as human, nor are they typically consensually and explicitly contracted.⁵ Stilz presents an alternative to the “two types” cited by liberals: “I believe that particular political obligations can be defended if we step outside

³ Stilz, *Liberal Loyalty*, 20.

⁴ Stilz, *Liberal Loyalty*, 20.

⁵ Stilz, *Liberal Loyalty*, 20.

this two-part moral structure, and that there is good reason to think that the nature of equal freedom as a political value may actually require us to step outside of it.”⁶

Stilz thus begins to lay out her argument for this third way. Let us suppose that there are some obligations that by their nature cannot be immediately and clearly elucidated: “There may, in other words, be a third variety of liberal value with reference to which our obligations to particular states and compatriots might be justified, and this third variety would consist in those duties that are mediated, and thus ‘filled out’ or fully defined, only by the establishment of public authorities.”⁷ Although they may be general obligations due to every person arising from their status as humans, the *manner* by which they are defined or specified is *variable or contextual*. If, for example, a neighbor is hungry, fellow individuals--those within proximity--may nonetheless find various solutions to meeting this need. A gift of food, or of money, or of education, or employment may all be offered, and meet the immediate need. Those who still perceive a duty but are not within proximity might attempt less direct ways of aid, such as the offer of money, advice, or an attempt to influence those closer to provide aid. As we can see, both perspective and proximity can alter the precise determination of what form best fulfills the indeterminate moral duty to provide aid. Because the content of this type of obligation can be variable, some methods of defining that content might be more suitable or desirable than other methods, depending on the context. Communication among individuals fleshes out and makes determinate the content. When this communication is broad enough to generate community consensus, this consensus may shape an obligation that is *special and particular* in regard to the members of that community, while simultaneously fulfilling the *universal but general and indeterminate*

⁶ Stilz, *Liberal Loyalty*, 21.

⁷ Stilz, *Liberal Loyalty*, 21.

obligation it is based upon.⁸ When that community consensus surrounding the determination of an otherwise general obligation is strong enough, it marshals local authority and institutions in its framing, reinforcement, and punishment. In this way, institutions are created or become involved in regulating a particular form of a universal obligation so that members of the institution become morally bound to each other in a particular way. Here, Stilz argues, Immanuel Kant and Jean-Jacques Rousseau are incredibly helpful to the argument, providing grounds for the notion that the justification of states can be grounded in securing the equal freedom of its members.⁹ As Stilz points out, the groundwork for this kind of mediation can be found in both philosophers, who

thought that the value of equal freedom could only be realized through the state. The reason they thought equal freedom required this kind of mediation was that prior to the establishment of the state, the value of equal freedom is *indeterminate* with respect to certain key questions. That moral ideal, on their view, does not yet carry with it a complete set of clear and definite “natural duties,” which are publicly knowable to all individuals upon reflection, and which can answer certain fundamental questions, especially questions about the legitimate extent of our property and the limits of our “acquired” rights.¹⁰

Once we arrive at the specific shape of duties from the indeterminate obligations, the issue of what social agreements are necessary in order to underwrite equal freedom becomes formalized when we create laws that can secure conditions for equal freedom’s realization. “If freedom is . . . a value that takes an institutionally mediated form,” argues Stilz, “then it follows that the existence of the state is not morally irrelevant to establishing a condition of equal freedom.”¹¹

It is in this transition from indeterminate obligations to the formalization of social agreements that we find justification for the state. As Stilz writes, “the existence of the state as an institution can be justified by the fact that it helps us realize some preinstitutional value that

⁸ Stilz, *Liberal Loyalty*, 21.

⁹ Stilz, *Liberal Loyalty*, 20.

¹⁰ Stilz, *Liberal Loyalty*, 22.

¹¹ Stilz, *Liberal Loyalty*, 22.

could not possibly be realized without it.”¹² More concisely, “*only a state can create the conditions in which equal freedom between individuals is realized.*”¹³ However, for Stiliz, the idea that only a state can create conditions for equal freedom does not underwrite state-breaking. Instead, Stiliz takes the state as a necessary condition for equal freedom to mean that we have an obligation to support and uphold *current* institutions, provided that they are sufficiently just.

1.2 The Liberal Challenge to the Particularity Assumption

Stiliz’s stated purpose is to establish normative grounds for political obligation which can be accepted by the liberal, and she believes that the first step necessary to establish this is to argue for the particularity assumption as grounds for justification of the reasonably just state. Among liberals, the philosophical anarchist makes perhaps the strongest argument against this justification phase of Stiliz’s argument for political obligation. The liberal argument finds its ground in challenging the assumptions built into our intuitions about our relationship to other humans and to the state. To assess Stiliz’s justification argument, I will first examine the intuition, as addressed by Stiliz and by liberals in general, and then turn to the challenge that Stiliz believes A. John Simmons presents to political obligation, and finally, hear Simmons’ own argument for evaluating the possibility of a justified state.

When we begin our reasoning about our place and responsibility in the world, our starting point is often our commonsense intuitions about what it means to be a citizen of an existing state. Stiliz lays these intuitions out for us neatly. First, we assume that the world is constructed of states. Second, we tend to think that the existence of the state can have “moral salience,” that it can make a moral difference.

¹² Stiliz, *Liberal Loyalty*, 21.

¹³ Stiliz, *Liberal Loyalty*, 22.

The line of reasoning from our intuitions about citizenship does not stop here. Stilz points out that our intuitions about the moral significance of the state, and of our relationship to it, have implications for our lives as citizens of the state. We rely on our intuition about moral salience to ground our idea that we have an obligation to support and obey the law. When we are the participants of a democracy, we believe we have some responsibility to the formulation of the law and to ensuring that it is carried out justly and effectively. Our intuition about membership in a state also implies that we are charged with a duty to make a positive contribution to the funding, taxation, and redistribution schemes set up by our state. Additionally, we feel that membership charges us with the duty to defend the state against unjust incursions by others, foreign or domestic. Together, Stilz argues, these intuitions about our special duties and obligations form a body of political obligations that is unique to us within our state.¹⁴

For some liberals, however, something about this intuition is unsettling. The source of their criticism begins the notion of moral salience rising out of brute accident. What are the moral implications of assuming that the accident of my birth can result in unchosen obligations to a particular state? Is the brute fact of the geographic location of my existence enough to underwrite moral obligations and benefits in an institution that happened to receive me but not others? Some liberals believe they can provide an argument against the particularity assumption by forcing us to reconsider our intuitions about who we owe duties to, and why. To argue this, some in the cosmopolitan and philosophical anarchist camps begin by attacking the notion that just because the particularity assumption is embedded in our intuitions about citizenship and loyalty, somehow this is enough to justify it.

According to cosmopolitans and philosophical anarchists, the particularity principle results in benefits and rights bestowed arbitrarily according to membership and boundary lines—

¹⁴ Stilz, *Liberal Loyalty*, 4-6.

brute facts which we neither deserve, nor earn, yet which result in an increase in the measure of respect we are owed. The moral salience of membership, or of duties of justice we owe to other members for no reason other than chance, stands in stark contrast to duties of justice we owe from principles that are universally applicable. As Thomas Pogge writes, justice is due to every person and bestows on every human being a “global stature as the ultimate unit of moral concern.”¹⁵ The demand of justice, then, lends equal status to each and every individual, contrary to the particularity assumption of partiality to one’s fellow citizens.

When the individual is considered the unit of ultimate moral concern, the duty of justice to her based on principles of equality and freedom cannot be ignored, regardless of her location. Nevertheless, even a *just* state is by its nature equally just and beneficial only to a few, defined as its citizens, while its refusal of services beyond its boundaries seems to result in an injustice to many. To make matters worse, as state institutions are developed to more effectively protect the rights of citizens and fulfill obligations owed to their citizens, justice is transformed from something owed to all humans into a pattern of obligation between state and citizen. In effect, it seems to become not only permissible, but incumbent upon individuals to fail to act impartially toward all individuals, focusing instead upon what they now owe the state in exchange for the protections and benefits now afforded them as members enjoying an artificially elevated status that gives them access to a pooled concentration of resources. “Citizenship in Western liberal democracies,” writes Joseph Carens, “is the modern equivalent of feudal privilege—an inherited status that greatly enhances one’s life chances. Like feudal birthright privileges, restrictive citizenship is hard to justify when one thinks about it closely.”¹⁶ As Stilz points out, the problem confronted by a liberal who accepts the particularity assumption “stems from the fact that the

¹⁵ Pogge, *World Poverty*, 169, and Stilz, *Liberal Loyalty*, 9.

¹⁶ Carens, “Aliens and Citizens: The case for open borders,” 252.

principles of freedom and equality, on which a liberal theory of justice is based, are meant to be universally applicable.”¹⁷

On initial reflection, aspects of what Stilz refers to as "the liberal view", or more precisely, here the Pogge-Carens view, are appealing: I have the same need for food, shelter, protection, and minimal access to the means of production as does an individual half the world away.¹⁸ “On [the presumably liberal] view,” Stilz writes, “state boundaries do not impose any restrictions on justice, which is always universal in scope.”¹⁹ Here the cosmopolitan-minded liberal of Stilz's argument appears to be satisfied to sacrifice a particular duty to compatriots so as not to commit injustice against a broader, universal audience. Reasoning from the brute fact of state membership looks like an unattractive argument when compared against the liberal claim that justice should not “be constrained by state of national boundaries.”²⁰

If, as Pogge argues, the human is the “ultimate unit of moral concern,” then it seems obvious that justice would demand that we eschew obligations and commitments that hinder individuals from meeting the just claims of other individuals.²¹ As Stilz points out, the conflict of universal demands of justice with the particularity assumption arises when we suppose that “we owe more *as a matter of justice* to persons who have certain particular, and non universal features.”²² Justice, argues the liberal, demands more than a limited and fraternally motivated assistance, and Stilz concedes that partiality based on citizenship does appear to unattractively

¹⁷ Stilz, *Liberal Loyalty*, 9.

¹⁸ Although Stilz refers to these types of arguments as "liberal", they should not be considered as representative or comprehensive of all, or even most, liberals' position on these matters.

¹⁹ Stilz, *Liberal Loyalty*, 9, in reference to Kok-Chor Tan, *Justice without Borders*, 11.

²⁰ Tan, *Justice without Borders*, 19.

²¹ Pogge, *World Poverty*, 169.

²² Stilz, *Liberal Loyalty*, 10.

“sneak in a whole set of non-liberal considerations at the foundation of a liberal political theory.”²³

If the Pogge-Carens argument above is correct, then their challenge to the particularity assumption does seem to be a powerful argument from liberal principles. It is at this point that Simmons’ contributions to the argument against the particularity assumption might seem to strengthen the case against the possibility of a justified state. Instead, Simmons finds a way to redeem the possibility of the justified state, but with unexpected consequences for liberal loyalists like Stilz.

1.3 Stilz on Simmons and the Particularity Assumption²⁴

Stilz has taken aim at the argument that the particularity assumption cannot, in itself, as an assumption, be an unquestioned ground for establishing loyalty. If the use of the particularity assumption as grounds for justification is a source of discomfort to liberals in general, then this discomfort is amplified for philosophical anarchists like Simmons. Stilz believes that Simmons’ argument against state legitimacy targets the link between the general duty and the specific duty. She writes, “The criticism is that a justice-based account cannot establish a sufficiently tight connection between the citizen’s general obligation to establish and uphold just states and a special obligation to support her *particular* state or to show solidarity with her compatriots.”²⁵ The truth of Simmons’ position, however, is more nuanced, and centers on the difference between grounding legitimacy in justifiable uses of authority, and grounding legitimacy in consent to the agent wielding justifiable authority.

²³ Stilz, *Liberal Loyalty*, 10.

²⁴ Simmons refers to this as the “particularity requirement”; Stilz refers to this as the “particularity assumption,” so I shall use this phrase for the purpose of this thesis.

²⁵ Stilz, *Liberal Loyalty*, 113.

Stilz wishes to establish a line of reasoning that says that in order to be truly moral beings, we must accept a general obligation to *establish and uphold justified states*. To the extent that this means that we are required to *behave morally* with others, and to *not work against structures of justice*, Simmons would agree. Thus, Simmons agrees with Stilz to the extent that he believes that a state and its use of force can be morally *justifiable*. Stilz wants to argue that the coercion of non-consenting individuals is necessary in cases where a failure of consent may contribute to the erosion of the state, causing either collapse or weakness. The key concern here seems to be the idea that any erosion of the state might lead to weakening a structure of justice, which would lead to a lack of security, and in turn result in an inability to protect equal freedom for all. Simmons does not disagree here, and indeed, allows that force can be morally justifiable.

Simmons disagrees with Stilz on two key points, however. Instead, he is concerned with how Stilz treats the notions of coercion, authority, and legitimacy. Instead, Simmons argues, while this coercion of non-consenting citizens does not interfere with the *justifiability* of the use of force, it still leaves in question *the role and relationship of the agent doing the enforcing*. In other words, the mere act of providing enforcement to widely agreed-upon contents of certain rights is not enough to underwrite legitimacy. Second, Simmons points out that positions such as the one held by Stilz are grounded on the belief that the justifiability of a state automatically generates moral claims of support *upon the individuals* whose support might impact it, even if only indirectly. Simmons disagrees, arguing that the moral justifiability of a state is distinct from the moral demand that individuals give their consent to it. In this way, Simmons argues, there is recognition that there is a fundamental error in assuming that a state's justifiability is sufficient to generate legitimacy, where legitimacy means being owed special obligations by citizens.

What Simmons disagrees with Stilz about is her claim that there is a positive moral obligation to “establish” just states and that there is a positive moral obligation to “uphold” that state. As Simmons points out,

The problem for Natural Duty accounts. . . to which I point here is (part of) what I have elsewhere called the “particularity problem”: A general moral duty to promote justice—or any other impartial value—cannot bind one specially to support or comply with one particular state or society (such as “my own”) . . . Natural moral duties will bind me as strongly with respect to persons or institutions that are not close to me as they will with respect to those that are. . . ²⁶

Elsewhere, Simmons writes,

First, because these duties [not to murder, not to steal or lie, to give aid to those in need, or to promote justice] are binding on all persons, the content of any such duty will be general. Our duties will bind us, say, to give aid to anyone who is in need or to refrain from stealing *simpliciter* (under normal conditions); they will not bind us only with respect to particular persons, institutions, or sets of institutions. By making a promise or entering into some other special relationship I can establish a moral tie between myself and some particular party. But the natural duties, not being grounded in special transactions, lack this kind of “particularity.”²⁷

As Simmons points out, what is needed to establish the particularity assumption is a feature or a line of reasoning that does the work of attaching *that* state to *that* moral individual, something that proximity on its own cannot achieve.

If the proximity alone cannot establish the link Stilz desires, what does the work of grounding the political obligation of an individual to “her state”? For Simmons, it is clear that *only explicit consent* can ground special political obligation, regardless of the justifiability of the state. Although Stilz has argued that a blend of proximity, attachment to territory governed by a state, and moral obligation does this work, Simmons disagrees on all counts. Proximity cannot do the work of tethering an individual to a state without consent, Simmons argues, because the duty that compels me to behave morally and support—or at least not undermine—one just state is

²⁶ Simmons, in Simmons and Wellman, *The Duty to Obey the Law*, 166.

²⁷ Simmons, *Justification and Legitimacy*, 47.

a general moral obligation. As such, Simmons points out, “While it follows that I have an obligation to support my government, it does not follow that there is anything *special* about this obligation. I am equally constrained by the same moral bound to support *every other* just government. Furthermore, the obligation in question alone would not bind me to any particular political authority in the way that we want.”²⁸ As Simmons argues,

Living in the domain of government A certainly makes it *easier* for me to support government A than to support any other just government; but it is not obvious that this should affect the scope of the moral requirement to support just governments. If we allowed such a move, it would follow that when I got to live for a month with my friends in the domain of just government B, all of my political obligations would transfer automatically to government B, regardless of whether I have any other significant relations with that government. But this seems wildly implausible, unless we believe that my residence in this domain *in itself* establishes for me an obligation to support government B . . . the point to note is that even if my residence in the domain of just government B *were* morally significant in this way, the moral bond generated would be a new “particularized” bond, quite unrelated to any duty or obligation I might have to support just governments.²⁹

Thus, claims that proximity and a general moral duty to justice underwrite our intuition of a special obligation to “our” state are not only groundless, according to Simmons, but actually undermine the notion of a particularly *exclusive* political obligation, which Stilz is so keen to establish.

1.4 Simmons on the Possibility of Justification

Nevertheless, while Simmons does not believe that particularity, proximity, or general moral duty can ground a special political obligation, he does *not* rule out the possibility of a justified state. In addressing this crucial difference, Simmons begins by outlining the problem

²⁸ A. John Simmons, *Moral Principles and Political Obligations*, 31.

²⁹ Simmons, *MPPO*, 33.

inherent in basing state justification on the particularity assumption. As Simmons concedes, the task of identifying what it is we do when we undertake to justify the state can be tricky:

'Justifying *the* state,' with its all-inclusive tone, might at first be thought to have to involve showing that every possible state is immune to any systematic noncomparative moral objections.³⁰ Or it might be taken to involve showing that *any* possible state is preferable to (or as good as) any possible condition of statelessness. If we understand "justifying the state" in either of these senses, then, justifying the state is, I think, impossible.³¹

Simmons then outlines his criteria for evaluating the justifiability of a state:

If "justifying the state" is to identify any plausible enterprise in political philosophy, then it should at least be taken also to be accomplished if we can show that one or more specific kinds of state are morally defensible (comparatively or noncomparatively). *So, I suggest, we can justify the state by showing that some realizable type of state is on balance morally permissible (or ideal) and that it is rationally preferable to all feasible nonstate alternatives.* In the course of such a justification we will typically argue that certain virtues that states may possess or goods they may supply—such as justice or the rule of law—make it a good thing to have such states in the world.³²

Simmons does allow that such justification will not make everyone happy. Stilz's ambition is, after all, to provide liberal grounds for special obligation to the legitimate state, and her version of special obligation is not satisfied with merely the permissible or the preferable, but the mandatory, even if it only applies to qualified cases. This, after all, is the reason for her argument—to prevent diverse loyalties among citizens in a single legitimate state, or in extreme cases, state-breaking. But Simmons points to another weakness of this type of argument for justification:

Such a justification, of course, will provide some comfort to those who have chosen to live in a justified state. . . . But most of us don't choose the states in which we live, and almost none of us chose to live in a *state* (as opposed to

³⁰ Here, Simmons is parsing the difference between comparative and noncomparative moral objections, where 'comparative objections' refer to other acts or institutions that are preferable to the one in question, and 'noncomparative objections' refer to whether the acts committed by persons or institutions are unacceptable or wrong. Cf. Simmons, JL, 124.

³¹ Simmons, 125.

³² Simmons, 125-126; italics mine.

something else). It seems plain that standard justifications of the state are offered not to happy participants in states but to those moved by certain kinds of objections to states.³³

It is not enough to provide a line of reasoning to justify a state for those already inclined to accept and uphold memberships. One must also prove that the state is legitimate—that it has compelling reasons to demand special duties, such as those duties to participate in state systems and schemes, from those who are nonetheless disinclined to acknowledge special membership claims. In each case, prior to making the case for its own legitimation, the state must prove that the existence of the state is not “practically inferior to life without the state.”³⁴

Simmons, however, allows that while state justification on the grounds of proximity is not feasible, it is possible to justify a state on the grounds of being morally permissible and rationally preferable.³⁵ In fact, Simmons goes so far as to admit that “if it is logically and physically possible that a state arise and operate without violating anyone’s rights, and if such a state would be rationally preferable to nonstate alternatives, then the anarchist objection is rebutted and (in that sense) the state (i.e., that particular kind of state) is justified.”³⁶

In taking this position, Simmons departs from the common anarchist position, but it is noteworthy what the grounds for a morally justified state really establish. The justified state can certainly coerce, but moral justification for coercion of even those who do not lend their consent cannot provide grounds for the state’s *legitimacy*. Understood this way, the justified state is attractive, but it cannot demand special obligations from its

³³ Simmons, 126.

³⁴ Simmons, 126.1

³⁵ Simmons, 126.

³⁶ Simmons, 127, fn.14.

citizens unless it is legitimate. Furthermore, it cannot be said that Stilz has done much more than establish the usefulness or desirability of the state for those individuals who want it. At this point, nothing about the possibility of the existence of a justified state underwrites the high level of special obligation which Stilz would like to enforce.

2 LEGITIMACY

2.1 Stilz on Legitimacy and Justifiability

Up until now, Stilz has been concerned with combating what she perceives to be the liberal challenge to special political obligations. The first step in her task was to establish a theory of what justifies the establishment of state authority. For Stilz, justification of the state relies on Kant's argument that without the state, rights and duties are insufficiently defined in order to provide freedom equally. By highlighting the process through which the state and its laws make indeterminate moral duties determinate and effective, Stilz believes she can build a bridge from the existence of vague natural moral duty to defined political obligation and loyalty. Nevertheless, Stilz does not want to commit us to just any state we happen to find ourselves in, no matter how justifiable an enforcing agent that state might be. To this end, Stilz acknowledges that a state that is morally justifiable *at its inception* must continue to serve the purpose of providing equal freedom in order to continue to command its members. For Stilz, it would seem that a state is morally justifiable so long as the content and enforcement of rights is necessary to equal freedom. Being a *legitimate* state, for Stilz, appears to mean that the state is an agent of force that historically and currently wields enforcing power equally at a sufficiently high rate of success in order to ensure equal freedom for all. Legitimacy, then, is about maintaining a history of justifiable authority at acceptable thresholds.

If liberal justification of a state is based on "moral salience" and the desire to provide equal freedom as a matter of justice, then how is a state's legitimacy evaluated

and what does it measure? Stilz acknowledges that this is a complicated task. She writes, “Whether the laws conform to our substantive views about justice is not a sufficient criterion for judgment . . . whatever criteria for state legitimacy we put forward must be consistent with the possibility of ongoing and reasonable disagreement of what justice ideally means.”³⁷

This becomes the crucial point that Stilz must account for in her theory. Her Kantian account of state justification relied upon a group of individuals coming to agreement over determinate rules derived from general moral principles and duties. In this theory, justice only arises upon the adoption of laws and rules that can be agreed upon and enforced, and the state exists to provide the mechanisms for the continuous process of determining and enforcing justice. Here, however, we again confront the problem that brought individuals into cooperation to form the state in the first place: disagreement over the shape of appropriate moral behavior. Group consensus does the heavy lifting in Stilz’s evaluation theories, providing the impetus for forming the moral state, generating the authorizing source of power in the state, and ultimately serving as the criteria for evaluating its continued moral salience. Whether or not it can do the work Stilz lays out for it in legitimating the state may rest on how Stilz defines legitimacy and reconciles group consensus and disagreement among members in the pursuit of justice.

2.2 Turning to Rousseau

In Stilz’s political theory, the state emerges out of a desire among individuals to render the greatest degree of freedom equally. This single common desire—for equal freedom, or security—provides cohesiveness to the group, although it is still composed of individuals. Based on this common desire, Stilz believes that when the state emerges and

³⁷ Stilz, 90.

undertakes the process of governing towards the ends of providing justice, it—and we—rely on the state as a unified source of agency to establish, enact, and enforce laws that have moral salience. But as Stilz illuminates through Kant’s theory, the group which generates the state is composed of individuals. How, exactly, does the aggregate agencies of all of those individuals transform into the authority of the state, and how does it maintain unity in the face of continued disagreements of those individuals?

In order to ground the state’s legitimacy in liberal values, Stilz moves away from Kant in favor of Rousseau. This decision is crucial to her theory. As Stilz tells it, contemporaries to Rousseau developed theories of political and state legitimacy based on a hypothetical state of nature origins which tended towards voluntary enslavement accounts or unwieldy artificial convention theories. In theories such as those put forward by Hobbes and Grotius, an entire people could voluntarily “alienate its will in perpetuity to a monarch, in the hope of thereby ensuring its preservation of security”—a situation that resembled perpetual indentured servitude, not the preservation of equal freedom.³⁸ Theories of this type were grounded in the notion of “artificial conventions made by free human beings,” in which a single individual explicitly and voluntarily alienated her own freedom in exchange for the protection of the state.³⁹ On Stilz’s reading, however, Kant’s theory of the justified state essentially licensed any state authority as legitimate so long as order was maintained.⁴⁰ None of these options provides Stilz with the liberal foundation she believes she needs for establishing legitimate grounds for coercion and special political obligation, while allowing for equal freedom.

While Kant is unable to provide Stilz support for legitimacy arguments, the first

³⁸ Stilz, 61; Grotius, *Rights of War and Peace*, 86-87.

³⁹ Stilz, 60.

⁴⁰ Stilz, 58.

two theories are particularly noteworthy in how they come to inform and shape Rousseau's theory of the legitimate state. In the first two types, political authority is *artificially* created from the explicit exchange of freedom for protection, the first by a group, the second by individuals. One of the difficulties with either type of theory, as Stilz points out, is that if individual freedom is real, then "to give up one's status as a being with any legal claims and to turn oneself into someone else's property (as the slave does) is necessarily also to give up the ability to make contracts and to be obligated by them."⁴¹ Freedom cannot be the currency which buys the state authority to protect said freedom. Instead, for Rousseau, theories founded on such renunciation are problematic since "to renounce one's freedom is to renounce one's quality as man, the rights of humanity, and even its duties."⁴² Renunciation removes the individual and group from the mutuality involved in legal obligations of rights and duties. Stilz agrees, noting that "having a contractual obligation to another requires that one remain a legally separate person, with the standing to bring a claim against others; and this means one must preserve at least the essential rights of free personhood. The rights of free personhood are inalienable."⁴³

What about this informs Rousseau's theory of legitimacy? If alienating our own freedom invalidates any contracts we make to another party, then a form of governing must be found that preserves freedom and prevents domination by one agency. In the end, for Rousseau, "if we accept . . . that legitimate political authority must be based on a convention between naturally free persons, we must also accept that this authority cannot possibly take the form of one

⁴¹ Stilz, 62.

⁴² Rousseau, SC, 45. [Is there a gender neutral translation of this that might be appropriate here? This rankles.]

⁴³ Stilz, 63.

person's domination over others."⁴⁴ As Stilz points out, the implications of this must be central to any legitimacy theory: "If it is true that free conventions to give up our freedom are void, then we must always remain just as free inside a well-ordered state as we would be in the state of nature outside it."⁴⁵ But how are we to remain as free inside a state as we are outside of it?

2.3 The General Will

In the task to establish criteria for legitimacy, Stilz looks to Rousseau, who in turn focuses on the key agency that has so far proven pivotal to his theory: the people. If we can speak of a set of individuals who have agreed to form a collective body, then, Rousseau points out, "the body must have constituted a 'people'—with a common will—prior to that act."⁴⁶ So what transforms an aggregate of individuals into a unified, collective "people"?⁴⁷

Rousseau suggests that an original convention exists between the originating members of that group, a convention that avoids alienating freedom, and yet accepts the imposition of a normative authority that is not wielded by any one person in such a way that might sever our freedom. In this way, Rousseau believes that it is possible to establish authority in the group so that I am subject to no one else's will, and remain free. This, in turn, requires acknowledgement that there is something real and lasting in the agreement or consensus of a group, something that transforms it from an aggregate of individuals into an association.

⁴⁴ Stilz, 63.

⁴⁵ Stilz, 63-64. I think legitimacy must check back to this point, that the group right to PSD arises from this, and must be included in the range of available options for groups in even a legitimate state. Cf Altman and Wellman on this.

⁴⁶ Stilz, 65; in reference to Rousseau, but no citing for this particular paragraph. Find it. Rousseau, *SC*, 50? Additionally, does Rousseau have grounds for this "original convention" being permanent? What is so special that makes it so? Why is this identity not born of multiple, continuous aggregate unifying decisions? Is this too stringent a view of "group unity"? I think so. It may be an issue of vagueness—we may not know at what point the mountain can no longer be defined as a mountain, but we certainly know when we are on the peak and in the valley.

⁴⁷ Stilz, 65.

Rousseau call this transformative consensus the *general will*, and he conceives it to be the “form of association that will defend and protect the persons and goods of each associate with the full common force, and by means of which, each uniting with all, nevertheless obey only himself and remain as free as before.”⁴⁸ Rousseau’s general will acts to guard against enslavement and preserve equal freedom. Collectively, a group of individuals preserving their own freedom but working for consensus with an eye toward equal freedom seems to constitute the perfect authority.

This self-policing of the group, however, does come at a cost. Preserving our own freedom while at the same time looking out for others’ freedom can create a tension among the different -interests of different individuals—much like the tension that existed in the state of nature. Additionally, preserving our own freedom cannot be confused with indulging in self-centeredness, however. In order that we not alienate our freedoms and rights to one tyrant, and resolve the tensions of preserving our own freedom and that of others, we must acquiesce to “the total alienation of each associate with all of his rights to the whole community.”⁴⁹ On its own, this acquiescence appears extreme, but from another perspective, it is merely a more generous formulation of Kant’s entrance into society. As Stilz writes,

As parties to the social contract, we no longer have valid rights against society itself, because the main clause of the social contract is that we agree to treat the will of society as a whole, when formulated in the right way, as definitive of our rights. Were the individual to hold back some rights as nontransferable, according to this way of thinking, no true political authority could exist.⁵⁰

⁴⁸ Rousseau, *SC*, 49-50.

⁴⁹ Rousseau, *SC*, 50. This is quite a Catholic perspective, interestingly enough, though it meshes well with his moral theory of the human in nature and maturing through society. *Amore prope*, and the competition against others in society, only ceases with service to one another. From *Emile* forward, we can find a development of his moral theory that shows the developmental stage of maturing moral responsibility from adolescence into adulthood and citizenship.

⁵⁰ Stilz, 66.

Thus, as a member of the group my concern must be the equal freedom of all—not just my own freedom, or my own desires.

It is important to note that this is a decision that cannot be made by an isolated individual. A personal choice for maximum individual freedom includes all of my interests because there is no other concern to weigh in the balance. It is only when the individuals of a *collective* take an unselfish interest in the freedom of all that the general will emerges. Mere agreement with society as a whole, however, is not enough to create the general will. First, individuals must identify as participating members of the group. This agreement carries with it, tacitly or explicitly, terms of participation and consensus⁵¹. Secondly, individuals cannot be guided merely by easy acquiescence. Here, Rousseau draws on his moral theory. Acquiescence with any and every decision by the group is not enough to create the unity of the general will, as there is no guarantee that these decisions will be directed toward the common good. When guided by *amour propre*, individuals are prone to compete in society for self-interested purposes, not necessarily for the good, or even for the benefit of others or of all. This produces a collection of striving, competing, fractious individuals, but not a unified society interested in equal freedom. However, when oriented towards our knowledge of our moral duty, when made aware of suffering, need, and gratitude, self-interested striving is overcome. It is at this point that the general will emerges. When individuals unselfishly arrive at consensus and make decisions that respect rights and duties, thereby taking “actions that could be willed or consented to by everyone who is subject to them,” the authority of the state is applied *to* all equally, *for* all

⁵¹ In other words, in Rousseau’s General Will, agreement to special obligations is contained in the self-identification as a group member. This unfortunately, seems to be question begging, and not terribly helpful, given the unlikely prospect that citizens will be granted the opportunity to agree to state membership, and accept the special obligations membership will impose.

equally.⁵² This constrained decision-making, which Rousseau calls the general will, considers the needs of all in shaping what can be agreed upon by all to be rights and duties. This process both creates determinate rights and legitimates the mechanisms that enforce those rights. As a result, members achieve equal freedom, subject to no one person, but checked and voiced by all, and in participating in the process, maintain their inalienable autonomy.⁵³ It is at once paradoxical—alienating our freedom to the group in order to *preserve* a sphere of personal freedom—and the epitome of moral freedom.

The paradox of the general will that allows it to be both a mechanism for justifying and legitimating political authority is created not merely by each individual defining freedom, but by something more important—agreement of the group. Rousseau writes that

While the opposition of particular interests made the establishment of societies necessary, it is the agreement of these same interests which made it possible. What these different interests have in common is what forms the social bond, and if there were not *some point* on which all interests agree, no society could exist.⁵⁴

As Stilz points out, for Rousseau, “in any legitimate society—that is, any society held together by the voluntary recognition of its members, rather than by force—there must always be a unanimous agreement on at least one common interest.”⁵⁵ This stands in contrast to the other motivations and justifications for entering the state—a cooperation born of our weakness and competing individual inclinations. The tension in this paradox, however, requires constant tending, lest cooperation be carried too far and devolve into personal dependence. Rousseau warns, “Everyone must see that since ties of servitude are formed solely by men’s mutual dependence and the reciprocal needs that unite them, it is impossible to subjugate a man without

⁵² Stilz, 66.

⁵³ Stilz, 66-67.

⁵⁴ Rousseau, *SC*, 57.

⁵⁵ Stilz, 69.

first having placed him in the position of being unable to do without another.”⁵⁶ Cooperation carried too far dips into servitude, but cooperation maintained through free agreement can coalesce into equality and unity. By engaging the mechanism of the state as guided by the general will to be guarantor of certain freedoms, we are able to engage in societal and political cooperation on a much surer footing, and less inclined to barter away inalienable freedoms or be manipulated, exploited, or coerced into compliance.⁵⁷ As Stilz argues, Rousseau makes the state guided by general will the holder and guarantor of our rights and duties, allowing us to “take account of these others in a nonarbitrary way, in a way that limits the potential for capricious interference in others’ affairs. Under law, he must respect the bounds of others’ sphere of liberty in exchange for their regard to his own.”⁵⁸ Thus, Rousseau posits a *negative* interest, purely formal, of being *free from undue influence of others*, apart from what we concede in order to benefit from the protection and cooperation of the group. As long as there is agreement on this one matter, the general will exists.⁵⁹ What justifies the state guided by the general will is our weakness; what legitimates it is the activity of practicing equal freedom in accordance with the general will.

2.4 The Limits of the General Will

While the general will gives unity to a group, Stilz and Rousseau are eager to point out that not every unified expression of agreement is a manifestation of the general will. The general will is the concerted agreement to engender reciprocal independence and equal freedom. It may manifest itself in laws and policy, but the existence of laws and policies—even when generated from wide agreement—are not sufficient to qualify as the general will, and thus do not guarantee

⁵⁶ Rousseau, *D2*, 159.

⁵⁷ Stilz, 70-71.

⁵⁸ Stilz, 71.

⁵⁹ Stilz, 70, 72.

legitimacy. Neither are democratic mechanisms alone enough to ensure a legitimate state. Rousseau writes that “The general will is always upright, but the judgment that guides it is not always enlightened.”⁶⁰ While democratic voting may be a necessary component of group unity, the will of a person voting may be fractured. Instead of voting from an enlightened position, she may instead be voting from her private will, or from her corporate will—representing interests of other groups she may belong to or wish to join. Thus, a vote may represent competing motivations rather than a desire for justice. When all the votes within the state are put together, a democratic vote may reflect the will of all, yet still fail to manifest the general will. As Rousseau writes,

There is often a great deal of difference between the will of all and the general will; the latter considers only the common interest, while the former takes private interest into account, and is no more than a sum of particular wills: but take away from these same wills the pluses and minuses that cancel one another, and the general will remains as the sum of the differences.⁶¹

Although the people’s single unifying interest in equal freedom may do the work of justifying the existence of the state, a democratic mechanism is not enough to guarantee the presence of the general will, or of the legitimacy of the state.

2.5 How a People Becomes a Legitimate State

If the democratic mechanism itself is not enough to guarantee legitimacy, but is still necessary, then what is lacking? It would seem that what Stiliz is lacking here is Rousseau’s ability to speak of a set of individuals who have agreed to form a collective body. As Rousseau

⁶⁰ Rousseau, *SC*, 68.

⁶¹ Rousseau, *SC*, 60.

points out, prior to lawmaking and the formulation of determinate special obligations, “the body must have constituted a ‘people’—with a common will—prior to that act.”⁶²

As we have seen, Rousseau believes that the general will ensures a legitimate state, but Rousseau does not claim that consensus alone qualifies as the general will. In addition to individuals agreeing to form a collective body, Rousseau lays the groundwork for good intentions. In order to qualify as the general will, consensus requires sincerity, a commitment to equal freedom, and the cultivated habit of considering the needs of others weighted fairly against one’s own.⁶³ Put simply, it requires the intent to a) be a participating member, and b) fulfill our moral duty to one another.

This habit of considering other’s needs in the pursuit of equal freedom need not be perfectly realized. For Rousseau, the intention of ensuring equal freedom is enough to raise an aggregate into a unified group. The citizen may hold mistaken beliefs, be unsuitably challenged about her prejudices or perspective, or be unaware of otherwise overriding motives, but so long as the intention is pure, these shortcomings can all be corrected through concerted effort at education toward solidarity.⁶⁴

In this theoretical scenario, intent is the operative feature. As such, laws guided by the general will need not be perfect, or even unanimous, to meet the criteria of legitimacy. So long as they are guided by intent and secured by democratic mechanisms, the laws can be corrected to address shortcomings as they are realized. The crucial factor in assessing legitimacy is whether

⁶² Stilz, 65; in reference to Rousseau, Stilz may be drawing on Rousseau, *SC*, 50. Additionally, there are problems in how Rousseau argues for this “original convention” being permanent and behold to its inheritors. What is so special about the agreement that makes it so? Is this identity born of multiple, continuous aggregate unifying decisions? Is this too stringent a view of “group unity”? I think so. It may be an issue of vagueness—we may not know at what point the mountain can no longer be defined as a mountain, but we certainly know when we are on the peak and in the valley.

⁶³ Stilz, 77.

⁶⁴ Stilz, 79.

the law, and the state which enforces it, is “suitably general” in its application to all. As Jeremy Waldron points out, “*if* there is disagreement, and *if*, in spite of that disagreement, you can be sure that citizens are nonetheless addressing the general good, then ‘the votes of the greatest number always bind the rest.’”⁶⁵ As Stilz writes, “Provided that a law has truly taken my interests into account, the fact that it disagrees with my opinion does not render it a threat to my freedom: it does not grant other people an unequal share of coercive power over me, because it protects my interests on an equal basis with theirs.”⁶⁶ So long as rights are made determinate in the form of laws that are mutually considered and generally voted upon, dissent does not nullify the general will, (so long as one agrees with Rousseau’s moral theory).⁶⁷ And so long as the general will underwrites laws that make equal freedom determinate without fostering dependency or servitude, the law that it writes, and the state that enforces and administers it, is legitimate. Legitimacy, for Stilz, is found under a body of law which uses the general will to ensure equal freedom for all members. Thus, for Stilz, the general will, when fully accounting for group membership and democratic participation may be the best measure of whether a state’s laws manifest justice by explicating the widest accepted interpretation of the content of a right.

2.6 How Legitimacy Demands Participation

So far, Stilz has worked hard to establish citizens’ special obligations to their own state on a basis that is more secure than brute proximity or luck. She has laid out an argument in which the people themselves hypothetically form a consensus to rise out of a state of nature and into a state of justice. She has defined how it is that the general will emerges, transforming the aggregate into a cohesive group. And, lastly, she has shown how with proper intent and the mechanism of

⁶⁵ Waldron, Jeremy. *Liberal Rights*, 412; Rousseau, *SC*, 124.

⁶⁶ Stilz, 78.

⁶⁷ Stilz, 78.

democracy, a state may earn legitimacy through the striving of the general will, even when a minority disagrees with the specific shape of the outcome. The unity holds, even in disagreement, when disagreement is about how the general moral duties are made determinate, and not about the general moral duties themselves.

This position of relying on the general will to legitimate the state creates another demand, however. In any state, achieving the very high degree of voluntary participation necessary in order to fully explicate the general will is highly unlikely, and this in itself leads to two problems. First, individuals who fail to participate may attempt to argue that the state no longer represents them, and they may attempt to leave, thereby weakening solidarity, state resources, and state authority. Second, individuals who fail to participate may in their absence skew the discussion, resulting in policies and laws of limited benefit and application. This, in turn, weakens the state's claim to legitimacy, and by Stilz's line of reasoning, causes the state to falter in its service of justice to all its members. In either case, whether directly, by dissent, or indirectly, by abstention, the individual who fails to participate threatens the stability and legitimacy of the state. As Stilz puts it in a parable about subway riders banding together to save a fellow rider from a strangler--there is in fact a moral duty to form a group to meet a threat of injustice:

. . . they are obliged to act together, since that is the only way to save the victim, and therefore they are obliged to create the conditions that make joining action possible, by communicating their intentions, and the like. . . It doesn't matter that they didn't consent to being faced with this situation . . . that they may not identify with the other riders, or would prefer not to act together with them. They have a duty to constitute themselves into a group, since that is the right way to save the person. . . If they refuse to do so, we can hold them morally responsible.⁶⁸

⁶⁸ Stilz, 197.

In short, Stilz writes, “we have an unconditional duty, binding on us independently of our goals and choices, to participate in a just state.”⁶⁹ Thus, the Kantian duty to form the state, or rightfully be coerced into forming it, also holds for participation, since participation not only enacts the practice of justice, but continues to legitimize the state which makes justice possible.⁷⁰

2.7 Stilz Summary

Stilz wants to establish grounds for special political obligations, or political duties owed to the state regardless of our consent. The first step to establishing this has been to evaluate whether the existence of a state could ever be justified, and for this, Stilz turned to Kant. As we see, establishing state legitimacy, however, is another thing entirely. While the *purpose* of a state might be to bring justice as equal freedom, legitimacy is, in this case, an evaluation in which the state itself is tested according to the normative criterion of the general will, and then assessed for whether it still deserves to claim special obligations of its members. For Stilz that criterion is how closely the state adheres to the general will in meeting the needs of justice as equal freedom. When the level of involvement is sufficiently high, and sufficiently moral, the democratic state cannot help but be legitimate. It is legitimate in its formation, and it continues to be legitimate, so long as member participation remains high and oriented toward the public good. A justified state can, under Stilz’s theory, cease to be legitimate under a specific set of circumstances: partial citizen participation in seeking the public good, and full participation that fails to seek the public good, and cases in which legitimate states are overthrown by an outside and unjust usurper.⁷¹ Given these criteria, actual states can be proven illegitimate for groups, even whole territories, of people to whom it fails to provide equal freedom. As such, even

⁶⁹ Stilz, 197.

⁷⁰ Stilz, 197-198.

⁷¹ Stilz, 97.

existing states that are legitimate for some, may not be legitimate for all. From this reasoning, Stilz arrives at the conclusion that not only is it morally required for citizens who benefit from state-sponsored equal freedom to be incorporated into the state in order support structures of justice as equal freedom, but that in order to continue the work of doing justice, the citizen is *obligated in continuous support of the state* so long as it is sufficiently just.

2.8 Simmons on State Legitimacy

While Stilz could be unfairly accused of dissolving legitimacy into justification through her emphasis on an individual moral duty to establish and uphold the state as a means of justice, for Simmons, separating out these two evaluations is vital to understanding the underlying problem with natural duty theories like Stilz's. Simmons writes:

Showing that it is possible for (a certain kind of) state to arise and function without immorality and that having such a state would be a good thing—that the state is justified . . . is obviously not the same thing as showing that a particular actual state (even of that kind) did in fact arise and does in fact function in morally acceptable ways. . . I think this observation points the way to a quite basic distinction between justification and legitimacy. . . *Showing that a particular state is legitimate appears to be . . . a function of showing that the actual history of the state's relationship to its individual subjects is morally acceptable.*⁷²

For Simmons, then, it is not that any state is *necessarily* illegitimate.⁷³ Instead, for Simmons, the simple fact is that while there are conditions under which a state is morally justifiable, current existing states are illegitimate on *a posteriori* grounds, primarily based on, but not limited to, their morally coercive practices.⁷⁴ The crucial point for Simmons is that even if state authority is

⁷² Simmons, 127-128; italics mine.

⁷³ Simmons, A. John, *Philosophical Anarchism* (February 16, 2009). Available at SSRN: <http://ssrn.com/abstract=1344425> or <http://dx.doi.org/10.2139/ssrn.1344425> .

⁷⁴ This is not the same as Robert Wolff's a priori argument [Wolff's arguments is not really a priori, because he does admit the conceptual possibility of a legitimate state]. that there *cannot* be any morally legitimate states; and it is not a strong anarchism, demanding overthrow of states. Rather, Simmons merely argues that there is no correlative obligation to the state, despite a state's justifiability, or right to exist.

morally justifiable, and the use of force for moral ends is justifiable, in cases where at least some of the people have not “performed certain voluntary acts which make those institutions apply to them in the strong sense”, the state itself does not generate the obligations necessary to bind them to the state.⁷⁵ In other words, it is the agreement of individual persons, for Simmons, and not the claim of the state on the people, that generates the obligation to support the state. To see how Simmons arrives at this conclusion, it helps to understand the assumptions he relies on to build his case.

2.9 Simmons on Legitimacy Theories

Simmons begins his case much in the same way Stilz does—in the state of nature. To begin with, Simmons argues, let us accept that even without political institutions, we would still be bound by certain natural duties *due to* all human beings *qua human*—by virtue of their being human.⁷⁶ These “natural” moral duties are general, meaning that they are prior to and binding regardless of any contracts we enter into. Equally important, we should accept that the existence of these duties implies the presence of claims by individuals for duties owed not just *from* them, but *owed to* them. Among these duties are the duties “not to murder. . . not to steal or lie, to give aid to those in need, or to promote justice”.⁷⁷ In this way, an important aspect of being human involves appropriate moral attention claimed by ourselves and others and based on our *moral rights*.⁷⁸ Thus, Simmons builds the case that natural moral rights are grounded in our individual moral freedom, and are available to us as *stateless* individuals.⁷⁹

⁷⁵ Simmons, *Moral Principles and Political Obligations*, 151.

⁷⁶ A. John Simmons, *Moral Principles and Political Obligations*, 61-63.

⁷⁷ Simmons, *Justification and Legitimacy*, 46-47.

⁷⁸ This seems to be backed up by H.L.A. Hart, *The Concept of Law*, 7-9, in which Hart outlines the directional quality of moral claims, both as duties and rights, and also outlines the notion of the existence not just of legal rights, but also of moral rights.

⁷⁹ Stilz, *Liberal loyalty*, 29; Simmons, *Justification and Legitimacy*, vii, 138, 45.

In this stateless existence (or the state of nature), according to Simmons, the individual has the moral freedom and capacity of individual agency to “dispose of . . . [his] person or possessions (as always within the bounds of natural law).”⁸⁰ The stateless individual’s interactions are not yet shaped by a state authority, and are not circumscribed by membership. This, then, is the person in her natural environment, and any state which wishes to be recognized as a legitimate authority must meet this moral baseline of individual moral freedom when it makes demands on that moral freedom.⁸¹ What is at issue here is once a state is justifiable, *how does it behave towards those it encounters? Does it behave in ways that violate individuals’ natural moral duties and rights? Among these rights, does it violate their natural moral freedom?*

For Simmons, this baseline of natural moral freedom which states initially are formed to protect, is too soon dismissed by theories of state legitimacy in favor of stability. In theories like Stilz’s, what begins as an attempt at protecting freedom equally for all eventually becomes about maintaining security at the cost of individual moral freedom. Simmons believes this sort of theory is flawed in two ways: first, if natural moral rights precede the existence of the state, the state can only be legitimate if the special duties and benefits it arranges do not in practice *negate* an individual’s obligations to other individuals and their moral freedom. Second, if it wants to be a legitimate authority, the state cannot claim special political obligations without an explicit, historical, un-coerced contract with each individual it wishes to hold in obligation, since to do otherwise would violate that individual’s natural moral freedom.⁸²

⁸⁰ Simmons, *Lockean Theory of Rights*, 77.

⁸¹ This is not the same as justification of the state—as Simmons has pointed out, any collection of individuals may freely agree to associate in order to maximize their benefits, or to facilitate agreements over what constitutes moral action and reduce conflict or confusion.

⁸²

2.10 A Lockean Alternative

As an offer of an alternative theory of special political obligation, Simmons draws on John Locke's framework for a liberal doctrine of personal consent, arguing that only through genuine and un-coerced consent can a state not violate the equal freedom of each individual to have "power over his own life."⁸³ Simmons points out that the consent feature of Locke's theory is crucial to revealing the weaknesses of our intuitions about our relationship to the existing state.

Why doesn't the Lockean simply say: because limited states are morally acceptable (or ideal) and a good bargain, they ought to be accepted by those subject to them; so particular limited states are legitimate and enjoy the right to rule and their subjects have obligations to comply with them?⁸⁴

If cooperation with others yields a better—albeit imperfect—level of justice, morality, or freedom than we would have otherwise, why is that not enough to legitimate coercion of the unwilling? The Lockean, Simmons believes, would argue that "the general qualities or virtues of a state (i.e., those features of it appealed to in its justification) are one thing; the nature of its rights over any particular subject (i.e., that in which its legitimacy with respect to that subject consists) are quite another thing."⁸⁵ In other words, although our cooperation and participation in a state might contribute to its meeting moral requirements, and although we are under the general obligation to behave morally toward one another, this still does not underwrite mandatory involvement in our own reasonably just state. Simmons argues, "The fact that a state or a business has virtues that can be appealed to in order to justify its existence cannot by itself argue for its having special rights over particular individuals."⁸⁶

⁸³ Simmons, *Moral Principles and Political Obligations*, 87; John Locke, *Second Treatise of Government*, sec. 23.

⁸⁴ Simmons, 135.

⁸⁵ Simmons, 136.

⁸⁶ Simmons, 136.

What, then, might reasonably allow a state to coerce an unwilling citizen into participating in state schemes? For Simmons, the answer is simple: “Only interacting with you—and in a way that we normally suppose gives one party a moral right to expect something of another—will seem to “legitimate” its imposition and/or enforcement of duties on you.”⁸⁷ Indeed, he continues, any attempt to “deny this is simply to deny the natural freedom of persons”.⁸⁸ Thus, for Simmons, actual consent is required of each person in order to make state authority legitimate.

2.11 Two Answers to the Problem of State Stability

While this might address coercion, how does this address Stilz’s other argument, that the state requires uniform participation in order to continue its just and legitimate existence, and that withholders who opt out weaken the fabric of the system, thereby jeopardizing the state as a facilitator of justice? Simmons wants to argue that “mere nonparticipation by the unwilling does not constitute an effort to undermine or an attack on clients. . . where mere nonparticipation by the unwilling is sufficient to render a state . . . nonviable, that by itself . . . amounts to an argument that the state . . . has no right to use coercion on the unwilling to insure its continued existence.”⁸⁹ To do this, he must address two facets of Stilz’s stability argument.

The first facet of Stilz’s argument is a positive duty claim: the individual has a duty to be a stabilizing force for the state through contributions and active participation in the public forum. Simmons’ response to this is to claim that there is no correlativity between the justification of a state and special obligations to a state, arguing that the state is a kind of thing that gives “moral reasons to refrain from undermining it . . . and moral reasons to positively support [it]... But a

⁸⁷ Simmons, 136.

⁸⁸ Simmons, 136.

⁸⁹ Simmons, 136-137.

particular state's being justified in this way cannot ground any special moral relationship between it and you."⁹⁰ As Simmons points out, the logical implications of positive duty claims actually undermine the anticipated and desired result:

“ . . . [E]ven if you had perfectly general duties to promote justice and happiness, say, and consequently duties to support just or happiness-producing states, these duties would require of you that you support all such states, providing you with no necessary reason to show any special favoritism or unique allegiance to your own just state, and providing none of those states with any special right to impose on you additional duties.”⁹¹

The fact that the state could determine terms of behavior merely by offering a form of determinate justice does not negate the natural moral faculty/capacity possessed by the individual, nor does the agreement of some individuals over codified behavior make it obligatory for all, or any who did not acquiesce to such limitations. If it did, an individual's mere presence within a territory could commit the individual to a proscribed definition of moral behavior and a state-defined set of special obligations, a troubling implication for any free individual, as well as any state.

The second feature of Stiliz's account of stability taxes the individual with a negative duty to not destabilize the state. In this case, the chief concern is that an individual's moral freedom might lead her opt out of certain civic or political behaviors, in such a way that “[her] failure will in some way affect the performance of . . . duties to others.”⁹² This concern is an echo of Stiliz's positive special political obligations that involve contributions and behaviors that affect the functions of the state, and she analogizes a failure to participate politically to failing to render Samaritan aid, where such a failure is a specific moral failure. This type of analogy, however, as Simmons points out, has significant flaws. Should I fail to provide emergency aid, it is easy to

⁹⁰ Simmons, 137.

⁹¹ Simmons, 137.

⁹² Simmons, 138.

see how my failure to participate is at once both a particular and general moral failure, since in this case, the determination of my moral duty is already limited in scope and application under the situation of rescue. However, should I choose not to participate in voting, citizen education, or reporting of a neighbors' minor traffic violation, it is hard to see how this constitutes failure of duty. Moral duty requires that I refrain from harming others, and it requires Samaritan aid—but it in no way obligates me to participate in one specific scheme solely on account of it being a moral scheme. There is, as such, no need to “injure” my freedom in order to satisfy the schemes of others, so long as “my participation in those arrangements is not necessary to their success.”⁹³

If, as Simmons argues, the only concern arises when my failure causes harm to others, then the impact of my failure to act still only corresponds to a general duty not to inflict harm, and does not arise from some special un-contracted obligation to others. Thus, if Simmons' argument holds, I never have a reason to obey the state just because the state demands it of me as a citizen, or even because I have benefitted from the cooperative scheme which generated a receipt of unasked-for open benefits.⁹⁴ In fact, according to Simmons, I may have very good reasons to act in ways that comply with the state—I may even have good reasons for not wanting to inhibit state actions—but this does not commit me to a citizenship-type obligation just because the state demands it.⁹⁵ Ultimately, Simmons argues, the state is an institution that cannot unilaterally impose duties on anyone, including its citizens. In that respect, it is like any other institution.⁹⁶

⁹³ Simmons, 138.

⁹⁴ Stilz, *Liberal Loyalty*, 31-32; Simmons, *Justification and Legitimacy*, 131.

⁹⁵ This weak anarchy position seems to be the primary source of Stilz's concerns—and so I have left strong anarchy positions out of this portion of the argument, which Simmons' does not advocate for anyway.

⁹⁶ Simmons, *Justification and Legitimacy*, 136-137; Simmons, *Moral Principles and Political Obligations*, 104-106.

2.12 Stilz's response to Simmons' Institutions Objection

It is precisely this “state as institution” argument, however, that Stilz believes leaves Simmons open to critique. First, she takes aim at his treatment of the state as equivalent to any other type of institution. Certainly it would be shocking, she writes, to find in the mail a threatening bill for collection from an institution with which I have no history.⁹⁷ But this is to wrongly assume that obligations to the state and obligations to a private institution are generated in ways that are parallel. Even more damning, however, is that the weight of his argument rests on one key, but shaky premise—the notion that people are capable of acting in equal freedom in the state of nature, and the built-in assumption that equal freedom can exist in a state of nature at all. Stilz writes, “If it could be shown that there is no way to establish a condition of equal freedom without the state, then Simmons would have to concede that we were obligated to the state on grounds of natural duty alone. By establishing a framework of uniform public laws, in other words, it may actually be that a legitimate state brings a condition of equal freedom into being for the very first time.”⁹⁸

To counter Simmons' analogy of the state as institution, Stilz draws on Kant's argument on freedom and property rights, both key components in Simmons' theory. As we have seen, Simmons' believes that general rights can be fully realized and be made determinate by individuals without the state. However, Stilz points out, Simmons' theory of “natural” moral freedom is built upon an individual's right to dispense with property and possessions at will. Whether or not this right to possessions and their use is determinate in a state of nature is crucial to the disagreement between Simmons and Stilz on the real scope of freedom available to the stateless individual.

⁹⁷ Stilz, *Liberal Loyalty*, 32.

⁹⁸ Stilz, *Liberal Loyalty*, 34.

Simmons' posits that in a state of nature, individual humans have a natural moral right to control over themselves and their labor. The liberal value of control over one's life trajectory requires access to a "fair share" of resources, and at least some degree of noninterference from others in this access. Simmons writes that "property is an indispensable condition of self-government. Property does not, then, merely ensure survival; it is also the security for our freedom, protecting us against dependence on the will of others and the subservience to them that this creates."⁹⁹ This interpretation requires that freedom have a moral structure: to the extent that freedom as independence for Simmons is about the individual, it is just as strikingly apparent that he draws certain conclusions about our relationships with other people and the kinds of interference we wish to prevent and the kinds of agreement we are capable of reaching and enforcing in the absence of the state. Underwriting Simmons' notion of rights to possessions, then, is an assumption that other forms of associations can appropriately meet the needs for which Stilz invokes the state.

At issue here is whether or not Simmons' understanding of natural moral obligation can be made sufficiently determinate in a state of nature to adjudicate conflicts without a state-like authority. More precisely: do rights have enough content on their own to be epistemically accessible to the rights bearers? Stilz points to a handy counter-example: even within state systems, property definitions vary widely and require adjudication and dispute resolution. Thus, Stilz argues, it would seem that the notion that two people in a state of nature will honor indeterminate moral obligations about resource use and development—to say nothing about getting that same agreement to be reciprocated by multiple people in a state of nature—verges upon being farfetched. Stilz points to Kant, arguing that "while a principle of equal freedom provides us some information about what just property distributions should look like, the

⁹⁹ Simmons, *The Lockean Theory of Rights*, 36.

principle's content is underspecified, and therefore cannot be directly applied."¹⁰⁰ Kant, observing what he believes is the unlikelihood of peaceful resolution over property in a state of nature, argues that we are so dependent upon resources and property for exercise of equal freedom as to make the state necessary, even to the degree of forcing our willing or unwilling involvement, in order for us to fulfill our obligation to be moral. This under-specification, combined with the individual's natural freedom, a lack of cooperation, and a natural right to use force in defense of vital resources, results in a constant state of struggle against the encroachment of others. Stilz believes that this leaves the individual, ultimately, unfree, and subject to interference by anyone she is unable to convince or overpower.

Ultimately, argues Stilz, Simmons' assumption that my property would consist of "my fair share," requires the acquiescence of others as to what that fair share is. Indeed, she argues, even if we grant a permissive law of possession and exclusion in a state of nature, which both Locke and Simmons do, this by no means guarantees an adequately specified normative agreement on the obligations stemming from the "natural moral right" to property, an agreement that Simmons assumes to be possible. Instead of a Lockean version of property, Stilz argues, we should look to the Kantian alternative:

Fundamentally, Kant argues that defining and enforcing both our rights over our bodies and our rights to external objects through public and nonarbitrary laws is the only way to secure ourselves against the coercive interference of other private persons in our affairs. For Kant, then, the only sort of property distribution to which we could all hypothetically consent must necessarily be one that is defined and enforced by the state, since all privately enforced distributions have the inevitable side effect of subjecting us to the will of others.¹⁰¹

Simmons assumes that in a state of nature, because we are all subject to natural moral obligations, we already are obligated to structure our duties towards other individuals in ways

¹⁰⁰ Stilz, *Liberal Loyalty*, 40.

¹⁰¹ Stilz, *Liberal Loyalty*, 47.

that suit the needs of both them and us, and that we are obligated to do so regardless of outside enforcement. But Stilz argues that

It might be said, by someone of a more Lockean persuasion, that one of these competing interpretations [of our natural obligations] is the one that simply *is* valid as a moral fact. That may be so. But as long as we remain in a state of nature, even this true view of right must remain unrealized, since each person, being an equally authoritative judge, *has a right to enforce his or her own interpretation of justice*, which means the true view of right places the person under no duties when it does not correspond with the person's own. So long as we remain our own judges and self-enforcers, *there is no means by which we might establish which interpretation of right is morally valid without claiming the authority to serve as judge in another person's behalf and forcibly subject that person to our will.*¹⁰²

This interpretation, Stilz argues, violates both Simmons' notion of the person as an independent and equally free person, and doesn't really leave us as free as we think we should be in the state of nature.¹⁰³ The only way to preserve our equal freedom against others, argues Stilz, is Kant's solution of adopting a procedure for determining, adjudicating, and enforcing a set of objective rights from indeterminate natural rights.¹⁰⁴ This itself depends upon "the necessity of coercive political authority" not merely to regulate the malevolent or immoral, but also to create the necessary conditions for justice as equal freedom.¹⁰⁵ Even if all were in agreement as to our natural property rights, my dependence upon your good will to always respect my rights grants you too much power over my security and freedom. My obligation to respect your rights, and your obligation to respect mine, still rests upon the strength of force and sheer good will for enforcement. If, however, we grant the involvement of an impartial third party to defend our rights against interference, then my security and freedom become less dependent upon your good will or my strength of force, and our rights are more equally enforced against one another

¹⁰² Stilz, *Liberal Loyalty*, 47-48; italics mine.

¹⁰³ Stilz, *Liberal Loyalty*, 48.

¹⁰⁴ Stilz, *Liberal Loyalty*, 48.

¹⁰⁵ Stilz, *Liberal Loyalty*, 50.

through the guarantee of third party assistance. Incorporating a third party not biased in favor of either of us allows both you and me a greater chance at realizing truly equal freedom, the ultimate value in Simmons' theory.

If we agree that individuals in a state of nature have varying abilities to defend their own natural moral rights and thereby achieve equal freedom, and if respect for equal freedom is in fact a moral obligation that we owe one another, then, Stilz argues, it stands to reason that we have a duty to submit ourselves to a third party capable of realizing equal freedom for all. Stilz argues, in effect, that despite Simmons' assertion to the contrary, "we already will the existence of the state . . . as soon as we will the legitimate possession of private property, simply because our duties to respect others' freedom cannot be satisfied in any other way."¹⁰⁶ If we accept that some rights are indeterminate, and *require* articulation, agreement, and enforcement, Stilz argues, this commits us to agree that we are *bound* to support our own institutions of justice which promote the equal freedom of those with whom our freedom is connected, so long as those institutions are themselves sufficiently just.

¹⁰⁶ Stilz, *Liberal Loyalty*, 54.

3 CONCLUSION

3.1 The Problem of State-Breaking

Stilz builds her argument on the Kantian premise that there are too few determinate rights for individuals to attain equal freedom in the absence of the state. This appears to make individuals need the state, if only to post up an authority to make those rights determinate. Faced with having to choose between indeterminate rights with little strength to back up our own freedom, or determinate rights but the obligation to support the state which backs them--Stilz's case seems to be persuasive.

I believe, however, that Simmons makes a compelling point that a competing sense of rights—specifically Lockean rights—might reveal a weakness to a Kantian natural duty argument of obligation and loyalty. If Simmons is correct that basic rights are more fully determinate and epistemically accessible than Stilz allows for them to be, then Stilz's case looks vulnerable. If there is, in fact, knowable content to the things we have a natural right to—then it is possible that we might not necessarily experience high degrees of disagreement over what those rights are. If this is the case, then it's possible we don't need the state to define those rights for us, thereby saving us from a state of nature. As it result, arguments for the necessity of the state as a coercive force necessary for underwriting equal freedom look slightly rigged.

This suspicion darkens when we look at the net effect of Stilz's argument on notions of political rights, in particular, the moral right of territorially-based minority groups to break away from an existing state and form their own. Stilz has hollowed out the meaningful content of rights by assuming that only the state has the power, and the means, to make rights determinate

for vulnerable individuals. But this framing of the situation is disconcerting when we realize that there may be rights we are being forced to abdicate under the assumption that abdicating them is the price for asking the state to frame and broker basic thresholds of equality and security—rights that may not actually need state determination, but which may still benefit from state enforcement. But as we've seen, if her assumption is wrong, then I might very well have more content among my set of pre-political rights than she allows. If so, it seems stringent, and illiberal, to force loyalty to the state of which I happen to be a citizen.

As a case example: suppose that freedom of association is a right with defined, knowable content. Given this, groups of individuals might come to realize that an injustice need not be required to engage in state-breaking. Indeed, they may break off, and decide to organize a new state, or even to join a cosmopolitan one-world state. What is clear is that once bids for freedom of association begin among minority groups, state breaking may not be far off, and Stilz assumes that this means a threat to the stability and legitimacy of the state, which she has tasked with underwriting justice and security. Structured this way, unfortunately, a threat to the state unnecessarily becomes a threat to justice as equal freedom. But if there is content to our rights, this need not be the case: political reorganization need not be the threat she sees it to be. A state might become smaller—or even dissolve entirely--without reducing the content or enforceability of the rights the remaining individuals. Coercion here looks much more like a mechanism for maintain state size and accessibility to means rather than a definer and enforcer of vague and nebulous rights.

In the end, Stilz's argument may illuminate the extent to which we assume coercion to be a necessary part of thresholds for security and justice, but this doesn't go very far in explaining why we must provide loyalty to this state, and not some other state of our own making or

choosing that is equally capable of underwriting justice and security in a format we prefer. What is lacking, one suspects, is a developed concept of political rights of collective self-governance resulting from a right to freedom of association, to serve as a counterweight to the strong drive for security evidenced in Stilz's theory.

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