



This is a repository copy of *Justice and Legitimacy in Contemporary Liberal Thought: A Critique*.

White Rose Research Online URL for this paper:
<http://eprints.whiterose.ac.uk/83734/>

Version: Accepted Version

Article:

Sleat, M. (2015) Justice and Legitimacy in Contemporary Liberal Thought: A Critique. *Social Theory and Practice*, 41 (2). pp. 230-252. ISSN 0037-802X

<https://doi.org/10.5840/soctheorpract201541213>

Reuse

Unless indicated otherwise, fulltext items are protected by copyright with all rights reserved. The copyright exception in section 29 of the Copyright, Designs and Patents Act 1988 allows the making of a single copy solely for the purpose of non-commercial research or private study within the limits of fair dealing. The publisher or other rights-holder may allow further reproduction and re-use of this version - refer to the White Rose Research Online record for this item. Where records identify the publisher as the copyright holder, users can verify any specific terms of use on the publisher's website.

Takedown

If you consider content in White Rose Research Online to be in breach of UK law, please notify us by emailing eprints@whiterose.ac.uk including the URL of the record and the reason for the withdrawal request.



eprints@whiterose.ac.uk
<https://eprints.whiterose.ac.uk/>

Justice and Legitimacy in Contemporary Liberal Thought: A Critique¹

This article explores and critiques the relationship between justice and legitimacy in contemporary liberal thought. The first half sets out the extent to which liberalism demands the same necessary and sufficient conditions of justice and legitimacy, and in doing so obscures their evaluative distinctiveness. It then seeks to offer an interpretation of some of the deeper theoretical assumptions that result in this unsatisfactory conflation, arguing that the primacy that liberal theory has given to justice, understood as a moral concept, has resulted in a failure to appreciate the deeply multifaceted political nature of legitimacy. The suggestion is then made that it is only through recognising this nature, including the different (political) circumstances in which the demand for legitimation arises and the needs to which it responds, that this theoretical impasse can be overcome. The article ends on the more radical thought that this may require liberal theory to displace justice as the first (moral) virtue of political systems and replace it with the (political) virtue of legitimacy.

Key Words: Justice, Legitimacy, Liberalism, Realism, Rawls, Political Liberalism

John Rawls famously opened *A Theory of Justice* by declaring that ‘Justice is the first virtue of social institutions as truth is to systems of thought’.² Much of the debate within political theory which has taken place over the past forty years has endorsed the pre-eminence of justice by either focusing specifically on explicating the normatively favoured principles of distributive justice, at both the domestic and global level, or framing other discussions such as multiculturalism or the demands of citizenship within an analysis of justice. That the range of theoretical issues which are now taken to fall under the rubric of justice, from questions of the

¹ Dr. Matt Sleat. Department of Politics, University of Sheffield. Elmfield, Northumberland Road, Sheffield, S10

2TU, UK. Email: m.sleat@sheffield.ac.uk

² Rawls, J. (1999) *A Theory of Justice* (Oxford: Oxford University Press), p. 3.

redistribution of wealth and the economic functions of the market and the state, to those of the appropriate range of liberties and rights each person should be afforded, is indicative of the fact that it has now become a very broad and comprehensive concept that enables normative assessments of numerous features of political life. Chief among these might be legitimacy, for contemporary liberals have implicitly, or in some cases explicitly, denied that there is any meaningful distinction between justice and legitimacy. Judgements as to a state's legitimacy are reducible to or are nothing other than judgements that that state is sufficiently just. Justice and legitimacy are *not* distinct evaluations. They are rather assessments of political institutions and practices in relation to the same moral value of equal respect for persons.

Yet surely the justice of a state is one thing (the extent to which its basic social, political and economic institutions and practices are in line with the demands of justice), while its legitimacy (the state's right to rule over those subject to it) quite another. The right of a state to rule is not the same judgement as that of the justness of the state. The first half of this paper seeks to demonstrate that this elision is indeed a feature of contemporary liberal theory, and to critique it on those grounds. The deeper and more interesting question that this begs however, is what theoretical assumptions must be in place such that this conflation can seem either satisfactory or plausible. The argument of the second half of the paper suggests that it is because liberalism fails to properly appreciate the political nature of legitimacy and the circumstances in which the demand for legitimation arises that they are unable to see it as anything other than a moral concept deeply connected to justice by virtue of being grounded in the same moral value of equal respect. If that is right, then it may be that the only way that liberal theory can surmount this theoretical impasse is through acknowledging that legitimacy might be the first virtue of politics rather than justice, and relatedly, that that first virtue is best understood as political rather than moral.

Justice and Legitimacy in Contemporary Liberal Thought

The aim of this section is to show that contemporary liberal theory has tended to assume that the conditions for justice are the same as, or synonymous with, the conditions of political legitimacy. What this means is that the arguments used to explain why a particular state is just are the same as the arguments employed to demonstrate that a particular state (or action carried out by the agents of that state) is legitimate. In meeting the necessary and sufficient conditions for one, any political association will therefore automatically meet the conditions for the other. And the reason for this is because they are both evaluations in relation to the principle of equal respect. Demonstrating this will be easiest if we begin with legitimacy.

Judgements regarding legitimacy are assessments as to the right or authority of any collective political body, though today this is most often taken to be the state, to rule or govern those who are subject to it. Such a right to rule creates a special relationship between a particular state and those individuals who reside within its jurisdiction insofar as it affords the former with the authority to impose legal (and possibly moral) duties on its subjects and makes it permissible to coerce non-compliers via the use of power and violence if necessary.³ The question of legitimacy arises in the context of a relationship where an explanation is required or demanded as to why those that rule do so permissibly or justifiably. If the conditions of legitimacy have not been met then the state in question does not have the *de jure* right to rule, though it may still have the *de facto* ability to do so. This points to the fact that despite being a political concept, legitimacy nevertheless consists of a distinctively *moral* judgement regarding the moral authority of a particular state to govern. There may be numerous ways in which a state can be practically

³ Simmons, A. J. (1999) 'Justification and Legitimacy', *Ethics*, 109, pp. 739-771, p. 725. There is a very complicated question as to the relationship between legitimacy and obligations. I intend to side-step this debate, however, as that relationship does not impinge (at least not directly) on the question of the conditions of justice and legitimacy which is the focus of this paper.

justified, in terms of their ability to maintain effective peace and order, for instance, or help resolve certain co-ordination and assurance problems. But for a state to be legitimate it must be *morally* justified in the appropriate manner.⁴

Jeremy Waldron wrote in his seminal article ‘Theoretical Foundations of Liberalism’ that the fundamentally liberal thesis, the idea that distinguishes it from all other political creeds, is a particular view about the relationship between the justification of social and political arrangements and their legitimacy: ‘a social and political order is illegitimate unless it is rooted in the consent of all those who have to live under it; the consent or agreement of these people is a condition of its being morally permissible to enforce that order against them’.⁵ The view that the legitimacy of the political order depends on the consent of those subject to it is a common liberal one which we can fairly straightforwardly recognize in the work of many liberal theorists. To identify but a handful, in his *Equality and Impartiality* Thomas Nagel writes that “the task of discovering the conditions of legitimacy is traditionally conceived as that of finding a way to justify a political system to everyone who is required to live under it ... the search for legitimacy is a search for unanimity”.⁶ Likewise, Rawls stated that ‘the basic structure and its public policies are to be justifiable to all citizens, as the principle of political legitimacy requires’.⁷ In his ‘Remarks on Political Philosophy’ he also wrote that ‘A legitimate regime is such that its political and social institutions are justifiable to all citizens – to each and every one – by addressing their reason, theoretical and practical. Again: a justification of the institutions of the social world must

⁴ As will become clear, I am engaging throughout this paper with the specifically neo-Kantian strand of liberalism that I take to be, and have been, most influential in contemporary political theory. A central feature of this neo-Kantianism is that it takes the difference between de facto rule and legitimate rule to depend on whether a state *ought* to be accepted - not on whether it actually *is* accepted.

⁵ Waldron, J. (1987) ‘Theoretical Foundations of Liberalism’, *The Philosophical Quarterly*, 37, pp. 127-150, p. 140.

⁶ Nagel, T. (1991) *Equality and Partiality* (Oxford: Oxford University Press), p. 33.

⁷ Rawls, J. (1996) *Political Liberalism* (New York: Columbia University Press), p. 224.

be, in principle, available to everyone, and so justifiable to all who live under them. The legitimacy of a liberal regime depends on such a justification'.⁸ And Jean Hampton wrote that liberals are committed to the tenet that 'Any political society must be justified to the individuals who live within it, if that society is to be legitimate'.⁹ In the work of these theorists, and many others, we find time and time again the thought that the question of legitimacy is addressed by determining whether its political and social institutions or basic structure of a state are justified to the constituency of persons subject to it. While we might disagree with Waldron that this particular view of legitimacy is what distinguishes liberalism, it is hard to deny Rawls' contention that it is a central thesis of liberal theory.¹⁰

Universal consent is, as liberal philosophers are aware, a highly unlikely phenomenon in most areas of human life; possibly politics more than most others. As such, the strategy of seeking to show that there is a political system which actually enjoys universal affirmation is rarely pursued. Instead liberal theorists have devised numerous ingenious ways to show how particular political and social institutions could be the subject of universal hypothetical consent by arguing that they would be rational for us to accept if we imagine ourselves in some idealised situation such as a state of nature or an original position. And where this is the case then the fact that a system can be *represented* as something that all persons could accept, even if they currently do not (or as Kant put it, 'even if the people is at present in such a position or attitude of mind that it would probably refuse its consent if it were consulted'), is sufficient for the purposes of legitimacy.¹¹ Unanimity is also not required for every individual decision taken by the state, a

⁸ Rawls, J. (2007) 'Remarks on Political Philosophy', in: S. Freedman (Ed.), *John Rawls: Lectures on the History of Political Philosophy* (London: Belknap Press), p.13.

⁹ Hampton, J. (1998) *Political Philosophy* (USA: Westview Press), p. 180.

¹⁰ Rawls, 'Remarks on Political Philosophy', p. 13.

¹¹ Kant, I. (1999) 'On the Common Saying: "This May be True in Theory, but it does not Apply in Practice"', in: H. Reiss (ed.), *Kant – Political Writings 2nd Edition* (USA: Cambridge University Press), p. 79. The differences between

demand which would make the functioning of any political society almost certainly impossible, but only in relation to its basic structure, those institutions that determine and regulate the fundamental terms of social cooperation. With these two provisos in place, we can state the liberal condition of legitimacy (LCL), thus:

LCL: A state is legitimate if its basic structure can be represented as the subject of agreement of all those who would be, or are, subject to it.

The LCL is a sufficient condition of legitimacy in the sense that judging a state to have met the LCL is adequate grounds to conclude that it is legitimate. It is also a necessary condition insofar as a state cannot be legitimate unless the LCL has indeed been met (and, likewise, a state is illegitimate if it does not meet the LCL).

The demand for universal consent is generated by a particular moral understanding of the person viewed as free and equal. Liberals take the freedom of the individual to be violated at a fairly basic level if they are compelled or coerced to live according to principles or laws which could not garner their free consent. This is to treat individuals as means rather than ends and thus contravenes a fundamental liberal moral principle. As Charles Larmore states, ‘To respect another person as an end is to insist that coercive or political principles be as justifiable to ... [other] person[s] as they are to us. Equal respect involves treating in this way all persons to which such principles apply’.¹² And this concern about violating the freedom of others is

actual or hypothetical consent theories of legitimation need not detain us here. Nor do I want to get involved in the question of whether hypothetical justifications are sufficient to ground the sort of claims to legitimacy (and its corollary obedience) that they seek to.

¹² Larmore, C. (1990) ‘Political Liberalism’, *Political Theory*, 18, pp. 339-360, p. 349.

amplified when we consider the vast inequality between the irresistible power of those directing the activities of the state, with its technological, administrative, and numerical superiority when it comes to such things as its surveillance and military capacity, compared to that of the individual. Ensuring that the political power can only be used according to principles which individuals would agree to is therefore to protect the individual and ensure that if political power is ever used to coerce compliance or enforce duties, it is used in a way that respects rather than violates the individual's freedom. The fact that all persons are assumed to be morally equal means that this concern about the violation of their freedom stretches to all individuals, regardless of characteristics or qualities such as their race, religious beliefs, sexuality, or ethnicity. This explains why the justificatory net is cast as wide as possible and legitimacy becomes dependent upon the consent of *all* those subject to the political power in question rather than any particular constituency (e.g. men, whites, Christians, etc.) within the totality. Liberals recognise that living in a political community is a necessary feature of human existence and that the use of power to enforce compliance with laws, duties and principles of justice is indispensable in ensuring its stability and maintenance, but they believe that this power must be subject to the moral constraints of legitimacy in order to ensure that when political power is used it is done in ways which respect the freedom and equality of all individuals.¹³

Turning our attention to justice, there are two grounds on which we can demonstrate the justness of any particular set of political principles. The first is on prudential grounds whereby we demonstrate that these principles are rationally preferable to all alternatives on the basis that they provide more of the sort of goods that individuals desire or need than any others. The other basis for justification is to show that the conception is morally defensible. Contemporary liberal theorists have most often attempted to provide a justification for their favoured conception of justice which combines these two criteria. The rationale for this is that it provides a justification

¹³ See also Manin, B. (1987) 'On Legitimacy and Political Deliberation', *Political Theory*, 13 (3), pp. 338-368

which speaks to an intuitive idea that justice is not simply based on what would bring us as individuals the most of the goods we want or need but that justice must balance the interests of individuals within a wider moral context. Rawls, for example, assumes that persons are both rational and reasonable, which is to say interested in the pursuit of their own conception of the good but also desire to treat others as free and equal citizens.¹⁴ Brian Barry likewise sought a justification for his preferred conception on the basis that it too struck a balance between altruism and mutual-advantage and in doing so ‘capture[s] a certain kind of equality: all those affected have to feel that they have done as well as they could reasonably hope to’.¹⁵ And Nagel seeks a set of institutions ‘within which persons can live a collective life that meets the impartial requirements of the impersonal standpoint while at the same time having to conduct themselves only in ways which it is reasonable to require of individuals with strong personal motives’.¹⁶

In justifying a set of principles as just, liberal theorists have sought to demonstrate how their favoured conception can be the subject of free rational endorsement within the constraints of what is morally permissible. And many different conceptions have been recommended on this basis. Though the details of each conception are obviously different, common to all is the idea that whichever conception is being advocated must meet the liberal condition of justice (LCJ):

LCJ: A state is just if its basic structure is regulated by a set of principles that can be represented as the subject of agreement of all those who would be, or are, subject to them.

¹⁴ Rawls, *Political Liberalism*, lecture II.

¹⁵ Barry, B. (2004) *Justice as Impartiality* (Oxford: Oxford University Press), p. 7.

¹⁶ Nagel, *Equality and Partiality*, p. 18.

Liberal theorists have employed various arguments to show how their favoured conception meets this condition. Some have argued that the appropriate test is whether a conception of justice can be represented as one that we can reasonably expect others to accept. The condition, on this account, is one of reasonable acceptability.¹⁷ Others have preferred to demonstrate how their conception of justice could be the focus of universal consent by showing that it is not a conception that can be reasonably rejected.¹⁸ Nevertheless, whether we employ a test of reasonable acceptability or reasonable rejectability the same moral criterion of seeking to ensure that the principles which regulate the basic structure can be represented as universally affirmable by all those who are to be regulated by them is present. And the LCJ is also taken to be a necessary *and* sufficient condition of justice by virtue of the fact that a state cannot be just unless it is met, and knowing that a state does meet that conditions is adequate grounds for deeming it to be just.

The LCJ is a moral criterion insofar as what generates the thought that any conception of justice must be acceptable to all citizens of the political community is the demand that we respect the freedom and equality of others. To expect persons to live according to distributive principles which they could not affirm, especially when those principles regulate the basic structure of society and hence play a fundamental role in determining the life chances of all individuals, would not be to treat them as free and equal. This is important because it excludes other, potentially attractive, ways of thinking about the conditions of justice. In particular it means that we cannot take as just principles that sacrifice the basic needs or rights of some in order to maximise the satisfaction of interests of others. Liberals demand that their justifications for a

¹⁷ See Rawls, *Political Liberalism*, p. 137. See also, Larmore, 'Political Liberalism'; Macedo, S. (1990) 'The Politics of Justification', *Political Theory*, 18, pp. 280-304; Gaus, G. F. (1996) *Justificatory Liberalism – An Essay on Epistemology and Political Theory* (Oxford: Oxford University Press).

¹⁸ Barry, *Justice as Impartiality*, p. 69-70.

conception of justice be transparent and open to all because of a particular view they have of the equal moral worth of all persons.

The LCL and the LCJ share this common moral foundation in the liberal concern for respecting the freedom and equality of all persons. As political conditions they are fully continuous with a central feature of liberal morality. But they represent responses to two different political issues that this foundational belief generates. The LCL addresses the general liberal apprehension regarding power, that though individuals must live together in political societies in which the use of political power is an essential and necessary feature, the modern state is vastly unequal to the individual in terms of the power it can wield and thus a constant potential threat to their freedom. By ensuring that power is used legitimately, that is to say according to principles which all persons could accept, is therefore to protect the individual against the state and ensure that his freedom is not violated. The LCJ attends to a different concern, one which Rawls captured in *A Theory of Justice* when he discussed the ‘profound effects’ that the basic structure has on individual’s lives insofar as we are all born into social positions which largely determine our ‘initial chances in life’. Some positions will afford greater chances to those who occupy them than others yet the question of who starts off in which position is not determined by merit or desert but by luck, who happens to be born to whom, where and when.¹⁹ But to leave the matter of individuals’ life chances to luck is an affront to their moral equality insofar as it allows people to benefit or suffer, throughout their lifetimes, because of contingencies over which they had no control. We therefore make justice subject to the criterion of universal consent to ensure that life chances are fairly distributed and in doing so acknowledge the moral equality of all individuals.

¹⁹ Rawls, *A Theory of Justice*, p. 7.

Even though justice and legitimacy speak to two different political concerns, the criterion of universal consent is a common necessary and sufficient moral condition for both.²⁰ For a state to be either legitimate or just it must be possible to represent the principles that regulate its basic structure as worthy of the consent of all those who are, or will be, subject to them. If it cannot be represented in this way then it can be neither legitimate nor just, hence it is a necessary condition. It is also a sufficient condition by virtue of the fact that knowing a state's basic structure can be represented as universally acceptable provides adequate ground to conclude that it is just and legitimate. While it is true that the criterion of unanimous consent could be met in a variety of different ways, for the same institutions or practices could be acceptable for many reasons, it seems that the grounds for acceptance in both the LCL and LCJ are indeed the same in contemporary liberal thought. According to both the basic structure must be universally acceptable in the sense that it has the feature of being representable as consistent with the freedom and equality of each and every person subject to it (which is demonstrated either by the fact that all persons could reasonably accept or not reasonably reject that structure). Because the legitimacy of a state turns on it being morally permissible, and the standard of moral permissibility is the extent to which its basic structure can be represented as the subject of unanimous consent, which is also the criterion used to assess whether a state is just, a judgement as to the legitimacy of a state will provide us with a correlative judgement as to whether it is just also. Hence the requirements of showing how any state is legitimate will also demonstrate that it is just, and vice versa. While it would be going too far to suggest that this fully conflates the question of a state's justness and its legitimacy, after all they remain different evaluations of a

²⁰ There is one extra proviso to both the LCL and LCJ that is worth mentioning: It must be the case that the basic structure of the state can be represented as the subject of persons' *free* endorsement if it is to be either legitimate or just. This additional proviso avoids the potential that either condition be met either through the actual use of a state's coercive power to create or maintain all individuals' consent or could only potentially be unanimously endorsed if such coercive power was employed (what Rawls called the 'fact of oppression').

state's basic structure, it nevertheless certainly makes it difficult to see any significant difference between the justifications required for either. In effect, no extra argumentative work is needed to move from one evaluation of a state to the other. Both evaluations can be determined by showing whether it is acceptable in the right way to the entire relevant constituency of persons or not.²¹

If this is right, then this may go some way to explain why it is that discussions regarding legitimacy as a concept have been relatively absent in contemporary liberal theory. It is telling that legitimacy does not have an entry in the indexes of many of the most influential liberal texts of recent decades, including Rawls' *A Theory of Justice*, Raz's, *The Morality of Freedom*, Young's *Justice and the Politics of Difference*, Nozick's *Anarchy, State, and Utopia*, Sandel's *Liberalism and the Limits of*

²¹ In his 'Reply to Habermas' Rawls (1996, p. 427-8) insisted that justice and legitimacy are distinct, explicitly allowing for the fact that a democratic regime may be legitimate yet 'may not be very just, or hardly so, and similarly for its laws and policies. Laws passed by solid majorities are counted legitimate, even though many protest and correctly judge them unjust or otherwise wrong'. The conditions required for legitimacy are therefore weaker than those required for justice and hence impose weaker constraints on political action. This could be interpreted as undercutting the argument made in this paper. Rawls is discussing legitimacy here as a form of 'lawfulness' in which the legitimacy of specific rulers and specific laws is a function of 'their pedigree', by which Rawls meant how they came to power or how the laws came to be enacted, i.e. he is thinking of legitimacy in procedural terms. But Rawls goes on to say that it 'is of great importance that the constitution specifying the procedure [through which laws are legitimately enacted] be sufficiently just, even though not perfectly just, as no human institution can be that'. As Simmons points out (1999, p. 759-60 footnote 48), this seems to make state legitimacy turn for Rawls on the question of whether the basic structure is just; legitimate states are those that use their power in accordance with a just constitution. Rawls is only able to create some (apparent) distance between justice and legitimacy in this discussion by moving his focus from the legitimacy of a constitution, which is what his previous discussions throughout *Political Liberalism* have addressed, to the legitimacy of particular laws enacted by a state. But once we understand that even procedural justice requires that the constitution that determines the relevant legislative procedures must themselves be just, or sufficiently so, then the distance between a constitution being just and legitimate is reduced.

Justice, Dworkin's *Sovereign Virtue*, Kymlicka's *Multicultural Citizenship*, or Walzer's *Sphere's of Justice*.²² And though it does have an entry in other texts such as Barry's *Justice as Impartiality*, it has far fewer references than other concepts or terms, most noticeably justice.²³ It might be tempting to simply put this down to a change in focus away from legitimacy and towards justice, which could be justified by a variety of theoretical and practical reasons. Another potential explanation is that discussions of legitimacy, rather than being totally absent in contemporary political theory, have actually been subsumed into discussions of justice which is made possible by the theoretical assumption that the two forms of normative moral evaluation share a common necessary and sufficient condition. So while it should strike us as an idiosyncratic and unique feature of liberal political theory that so little attention has been dedicated to legitimacy and so much to justice, it is possible to explain this once we properly understand the nature of the justification required for both.

Legitimacy in Conditions of Reasonable Political Disagreement

At this point it would not be unjustified for a liberal theorist to object that the 'political' turn that took place in contemporary liberal theory throughout the 1980's, exemplified by the changes that took place in Rawls' work that culminated in the publication of *Political Liberalism* in 1993, was motivated by an awareness that justice and legitimacy cannot remain so tightly aligned once we recognise that politics takes place in conditions of reasonable disagreement, including

²² Rawls, *A Theory of Justice*; Raz, J. (1988) *The Morality of Freedom* (Oxford: Oxford University Press); Young, I. M. (1990) *Justice and the Politics of Difference* (New Jersey: Princeton University Press); Nozick, R. (1974) *Anarchy, State, and Utopia* (USA: Basic Books); Sandel, M. (1998) *Liberalism and the Limits of Justice 2nd Edition* (USA: Cambridge University Press); Dworkin, R. (2002) *Sovereign Virtue* (London: Harvard University Press); Kymlicka, W. (1996) *Multicultural Citizenship* (Oxford: Oxford University Press); Walzer, M. (1983) *Spheres of Justice* (New York: Basic Books).

²³ Barry, *Justice as Impartiality*

disagreement over justice. Where persons can reasonably disagree regarding fundamental moral *and* political matters, the question of the grounds on which liberal political orders can rule legitimately becomes a crucial concern. Hence legitimacy as a concept moves closer to the centre liberal theory. The increased awareness of the particular context in which judgements of legitimacy take place and the particular role that they are required to play, does indeed represent an advance. And for that reason it is important that we track the nature of the changes in the relationship between justice and legitimacy that it motivates. Yet, and for reasons that we will come to, it is far from clear that it represents enough of an advance in the right direction.

It is a feature of modern liberal democratic societies that citizens do not share a common religious, philosophical, or moral comprehensive doctrine. Rather citizens disagree, seemingly intractably, about fundamental matters of the good. This disagreement is the inevitable outcome of the use of reason under conditions of freedom, such as pertain in liberal democratic societies where the associative and expressive liberties are protected, due to what Rawls called the burdens of judgement.²⁴ These are essentially obstacles to the employment of rationality which leads reason to underdetermine human assessment of matters of the good. Such disagreements are therefore to be construed as reasonable, and citizens who are reasonable will see them as such.²⁵ Reasonable citizens will also be committed “to propose principles and standards as fair terms of cooperation and to abide by them willingly, given the assurance that others will likewise do so. Those norms they view as reasonable for everybody to accept and therefore as justifiable to them; and they are ready to discuss the fair terms that others propose”.²⁶ This commitment to reciprocity means that individuals desire to live with others on terms that they can reasonably be expected to accept.

²⁴ *Ibid.*, p. xviii, xlii, 4, 36, 129, 135, 144.

²⁵ *Ibid.*, p. 37, 144.

²⁶ *Ibid.*, p. 49.

The moral commitment to reciprocity explains why universal public justification is a requirement of legitimacy, while the fact of reasonable pluralism tells us why (in modern liberal democratic societies) those justifications must take the form of appeal to reasons that it is reasonable for others to accept. Hence:

our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason. This is the liberal principle of legitimacy.²⁷

These constitution essentials, which include the principles that specify the general structure of government and the political process (e.g. the powers of the legislative, executive and the judiciary) as well as the basic rights of citizenship that must be respected (e.g. the right to vote, freedom of thought, liberty of conscience), will be aspects of any conception of justice.²⁸

An important step in ensuring that the regulative conception of justice is one that all persons can reasonably be expected to endorse is to construct it using the fundamental ideas and 'settled convictions' implicit in the public culture of our liberal democratic society, ideas which Rawls assumes citizens will necessarily be held in common (such as the belief in religious toleration, the rejection of slavery and the idea of citizens as free and equal persons). Yet even if we use only those principles and values implicit in our liberal democratic societies there will be many different ways in which we can fit these together and thus different political conceptions of

²⁷ Rawls, *Political Liberalism*, p. 137.

²⁸ Rawls, J. (2001) *Justice as Fairness - A Restatement* (USA: Harvard University Press), p. 28

justice that we can construct out of them. Hence Rawls rejected the notion that citizens would share a single conception of justice on the grounds that it represents that conception that best articulates our considered convictions. Rather citizens can and will reasonably disagree as to which conception of justice is the most reasonable.²⁹

Because citizens will judge differently which political conception of justice is the most reasonable, the legitimacy of any political association cannot straightforwardly be determined with reference to the fact that its regulative conception of justice is the most reasonable (and hence can be represented as the conception that they ought to accept). To respond to this Rawls introduces the concept of public reason. A citizen engages in public reason 'When he or she deliberates within a framework of what he or she sincerely regards as the most reasonable political conception of justice, a conception that expresses political values that others, as free and equal citizens might also reasonably be expected reasonably to endorse'.³⁰ In engaging in public reason, citizens appeal to the political conception which *they* take to be the most reasonable. However, 'Citizens will of course differ as to which conceptions of political justice they think are the most reasonable, but they will agree that all are reasonable [i.e. meet the criterion of reciprocity], even if barely so'.³¹ This is because all reasonable conceptions of justice will be constructed out of the same considered convictions, values and beliefs implicit in our liberal democratic society which citizens will therefore necessarily share. Though they will not agree which conception best articulates these in a coherent and systematic fashion, citizens can agree that conceptions are reasonable insofar as they are constructed out of shared beliefs, values and commitments. Hence through appealing to these public (shared) reasons, citizens provide justifications for endorsing a particular conception of justice which satisfy the criterion of

²⁹ Ibid., p. 582; see also Rawls, J. 'The Idea of an Overlapping Consensus', in Freeman (Ed), *John Rawls: Collected Papers*, p. 427.

³⁰ Ibid., p. 581.

³¹ Ibid., p. 578.

reciprocity, that is to say, reasons which it is reasonable to expect other citizens to accept (even if in practice they do not). So public reason plays a practical evaluative role in allowing us to determine which conceptions of justice are reasonable in the sense of being affirmable by citizens according to reasons we can reasonably expect them to accept, and therefore consistent with the commitment to reciprocity. And if the regulative conception of justice can be justified in terms of public reason then it is reasonable, at least minimally just, and legitimate.

At the heart of political liberalism is the commitment to ensuring that the regulative conception of justice is consistent with the demand of treating others with equal respect, or as Rawls called it, reciprocity, despite the fact that persons reasonably disagree as to which conception of justice is the most reasonable. Ensuring that liberal political orders meet this moral demand in conditions of reasonable disagreement becomes the role of the liberal principle of legitimacy, which might now be restated thus:

LCL_{PL}: The liberal principle of legitimacy is satisfied if the constitutional essentials are minimally reasonable.

Legitimacy is now used as the means through which persons are able to recognise the political order as morally permissible despite the fact that they believe it falls short to varying degrees of what an ideally just state would look like. It does this by ensuring that any legitimate order must be one that meets at least the minimum demanded by our commitment to reciprocity, guaranteeing that we are treated with equal respect even if we are subject to a political order the basic structure of which we take to be insufficiently just (though we must be able to recognise it also as at least minimally so).

So legitimacy moves to a more central position with political liberalism as it is assigned the particular task of accounting for the right to use coercive political power in conditions of reasonable disagreement. With the benefit of hindsight, it seems plausible to think that part of the reason why earlier liberal theories did not focus on legitimacy was for the very reason that they did not assume that persons could reasonably disagree about justice in the manner of political liberalism. Hence the scenario of accounting for the right of a state to coerce its members in conditions of reasonable disagreement did not arise. There was simply no need to offer an account of the legitimacy of the state separate from its being just from a moral and rational point of view.

That political liberalism makes legitimacy a distinct evaluation of a political order through a greater appreciation of the sort of contexts in which the concept becomes salient or in which those judgements address particular needs is indeed an advance. But it is nevertheless a somewhat more minor amendment than it might ostensibly seem. Though it is no longer required to demonstrate that a political order is ideally or fully just in order to demonstrate that it is also legitimate, it is still the case that legitimacy demands that the constitutional essentials be at least minimally just. It is implicit in liberal legitimacy that the basic requirements of justice are met. And in this sense justice is the normative parameter in which legitimacy operates. But legitimacy also remains an evaluation of a political order in relation to exactly the same moral value that underpins justice, equal respect. Justice and legitimacy are judgements that refer to the same principle but which have different thresholds, with the sufficient requirement for a legitimate state being weaker in requiring only that it respects at the most basic level the moral status of all people as free and equal. Even once we have accepted the possibility of reasonable political disagreement, liberal thought still holds on to the thought that justice and legitimacy are essentially evaluations of a state according to the same criterion of equal respect.

Legitimacy and Politics

As would probably sound obvious to the non-theorist, it seems deeply counter-intuitive to think that legitimacy is either synonymous with justice or that legitimacy is merely a weaker test than justice according to the same value (legitimacy as 'justice-lite'). This way of thinking significantly diminishes our political and conceptual vocabulary, and in doing so denies us one of the various dimensions of political judgement. It also makes it very difficult to fathom the possibility that justice and legitimacy can either clash as political values or that they might lead to contrasting assessments. Such possibilities are far from unintelligible or uncommon. Deeply unjust societies can be legitimate. There seems nothing necessarily mistaken in the thought that one might judge the key institutions of their state to be seriously deficient in terms of justice yet to nevertheless accept that it has the right to make laws and expect their obedience. We might tend to think that such societies have a very slender claim to legitimacy, and one that is likely to be quickly eroded if such gross inequalities persist. Yet, and as John Horton has suggested, it seems at least understandable to think that societies like the UK or US which suffer from massive inequalities of wealth and the iniquitous consequences of this in undermining the basic liberties are fundamentally unjust yet nevertheless legitimate (and maybe even stable in their legitimacy).³² Such a position seems both plausible and familiar. Equally, states that we might otherwise be content to call just in terms of the way in which their basic structure is organised, the rights that it affords its citizens, etc. can sometimes be thought illegitimate, say if those who accept the legitimation of political power have been brought to do so through the use of coercion or deception (liberals will of course deny that such states will be just, but that is because they hold the public justification of a conception of justice to be a necessary condition of it being just at all. Though that thought can also be recast in terms of the illegitimacy of such states and hence

³² Horton, J. (2012) 'Political Legitimacy, Justice and Consent', *Critical Review of International Social and Political Philosophy*, 15, pp. 129-148, p. 135-6.

looks like a further consequence of the elision of justice and legitimacy).³³ Furthermore, just states can become unjust without losing their legitimacy. Legitimate states can develop into illegitimate regimes without also becoming unjust. Increases or decreases in justice do not necessarily coincide with those of legitimacy, and vice versa. All of these fairly ordinary political thoughts are very difficult to make much theoretical sense of if justice and legitimacy are not treated as distinct judgements.

It is also worth remembering just how short even most liberal states fall from the conceptions of justice that liberal theorists have recently advocated. While most fare well-enough in terms of the sort of basic liberties their citizens enjoy, in terms of the model of distributive justice liberal states employ, whether it be the distribution of wealth, resources, opportunities, welfare, capabilities, or so on, it would be hard to argue that any current liberal regime is particularly close to what even minimum justice has been said to require. The ramifications of this could cut both ways. Maybe liberal theory has been too utopian or idealistic in terms of their distributive ambitions and the world is not quite as unjust as has been claimed of it. To accept that would be quite a concession to make given the centrality of distributive justice to contemporary liberal theory (though it might still be true). Or maybe liberalism bites the theoretical bullet and continues to condemn liberal states as fundamentally unjust and in need of radical reform. Despite a recent flood of interest in 'non-ideal' approaches to justice, it is likely that the latter avenue will be preferred.³⁴ But, and crucially, those theorists who criticise liberal

³³ See Williams, B. (2002) *Truth and Truthfulness* (Princeton: Princeton University Press), pp. 225-232; Williams, B. (2005) *In the Beginning was the Deed* (Princeton: Princeton University Press), p. 6.

³⁴ For the ideal/non-ideal theory debate, see: Farrelly, C. (2007) 'Justice in Ideal Theory: A Refutation', *Political Studies*, 55, pp. 844–64; Mills, C. (2005) "'Ideal theory" as Ideology', *Hypatia*, 20, pp. 165–84; Robeyns, I. (2008) 'Ideal Theory in Theory and Practice', *Social Theory and Practice*, 34, pp. 341–62; Sen, A. (2006) 'What Do We Want from a Theory of Justice', *Journal of Philosophy*, 103, pp. 215–38; Stemplowska, Z. (2008) 'What's Ideal about Ideal Theory', *Social Theory and Practice*, 34, pp. 319-40; Swift, A. (2008) 'The Value of Philosophy in Nonideal

states as unjust are usually not making, nor see themselves as implying, the corollary claim that they are illegitimate also. Indeed, it is probably safe to assume that most liberal theorists would not deny the legitimacy of liberal states despite their deep injustices. The question is whether liberals can stop at claiming a state's injustice. And unless justice and legitimacy are uncoupled, it is hard to see how they can do so.

So there are good reasons to be dissatisfied with the prevailing liberal account of the relationship between justice and legitimacy that allows for no meaningful distinction between them as evaluations. Yet it would be overly hasty of us to leave matters at this point, not just because there is no doubt more to be said about the liberal conceptualisation than has been covered here but, more importantly, because any suggestion as to how we might think our way past this impasse needs to uncover the deeper theoretical roots of the elision between justice and legitimacy that has taken place. This will be a large and complex story, and one with a significant historical component that would track the ways in which these concepts have developed within the liberal tradition over time (including justice moving from the periphery of liberalism's conceptual constellation to becoming its core value).³⁵ Here, and in a necessarily incomplete and suggestive way, we shall explore only one aspect of this fuller story: the liberal account of the circumstances in which the demand for legitimation arises and the need to which it responds (what we can call, with a nod to Hume, Rawls and Waldron, the 'circumstances of legitimacy').

Despite the fact that political liberalism amends but essentially retains the liberal connection between justice and legitimacy, it was suggested that paying greater attention to the conditions in which the demand for legitimation arises and the function it must fulfil in that

Circumstances', *Social Theory & Practice*, 34, pp. 363–87; Valentini, L. (2012) 'Ideal vs. Non-Ideal Theory: A Conceptual Map', *Philosophy Compass*, 7, pp. 654–64; Valentini, L. (2009) 'On the Apparent Paradox of Ideal Theory', *Journal of Political Philosophy*, 17, pp. 332–55.

³⁵ Geuss, R. (2008) *Philosophy and Real Politics*. Princeton: Princeton University Press.

context represents an advance. This increased focus has been brought out most vividly recently by Laura Valentini, and interestingly as part of an argument which defends the lack of distinctiveness between justice and legitimacy in liberal thought. She writes that 'the underlying concerns of a liberal account of legitimacy are the same as those of a liberal account of justice. From a liberal perspective, justice and legitimacy should not be treated as distinct values. Instead, they should be seen as expressing what the same value - equal respect for persons - demands of our institutions *under different sets of circumstances*'.³⁶ These different circumstances that Valentini refers to are as follows: 'what we typically call 'justice' articulates the demands of equal respect under the so-called circumstances of justice (moderate scarcity, limited altruism, and no reasonable disagreement about justice). What we typically call legitimacy articulates the demands of equal respect under the circumstances of 'political justice' (moderate scarcity, limited altruism, and reasonable disagreement about justice)'.³⁷ And Valentini is clear that because what equal respect demands is open to different reasonable interpretations, it is a necessary and sufficient condition of legitimate institutions that they enforce those demands of justice that are a *sine qua non* of equal respect. Such demands will be part of any set of principles that are at least minimally just.³⁸ Hence justice and legitimacy are not conceptually distinct but judgements of a political order according to the same principle in different circumstances.

The first suggestion that something has gone awry can be found in the fact that the circumstances of legitimacy in liberal thought, as demonstrated by Rawls' 'reasonable pluralism' or Valentini's 'circumstances of political justice', include that a people who need to live together under a common authority hold conflicting *yet nevertheless reasonable* conceptions of justice. What cannot be meant here is that the circumstances of legitimacy *only* arise when persons hold

³⁶ Valentini, L. (2012) 'Assessing the Global Order: Justice, Legitimacy, or Political Justice?', *Critical Review of International and Social Political Theory* 15, pp. 593-612, pp. 593-4. Emphasis added.

³⁷ *ibid.*, p. 598.

³⁸ *ibid.*, p. 600.

conflicting but reasonable conceptions of justice. This is not just for the fairly obvious reason that it would be a seriously incomplete account that denied the same problem of legitimation also applies in conditions characterised by what Rawls called 'the fact of pluralism', societies in which persons hold a variety of reasonable and unreasonable conceptions of justice.³⁹ The circumstances of legitimacy must surely include widespread, sometimes radical, and not always reasonable disagreement about justice.⁴⁰

The deeper and more revealing reason why this cannot be an accurate account of the circumstances of legitimacy is because it assumes that the need to which legitimacy speaks is to ensure that (liberal) political orders treat all persons with equal respect despite their moral, religious and political disagreements. This is to start our thinking about legitimacy too far down the theoretical path. Liberals, who after all are interested in *liberal* legitimacy, will insist that the legitimation of power must stand in a direct relationship to justice for the very reason that liberals care deeply about the extent to which orders respect the freedom and equality of all persons (according to quite particular understandings of what those moral values demand politically and how they are constitutive of justice). It is hard to see that legitimacy can avoid being at least in part a moral evaluation, and as with all political traditions, liberalism will appeal to its core moral values when doing so, in particular insisting that no political order which totally flouts that value can be deemed legitimate. And because in liberalism (and maybe in other traditions) those values are also those that underpin justice, what we say about the justice or injustice of a state is going to be at the very least relevant to our judgements of its legitimacy.

³⁹ It is worth remembering that unreasonable conceptions of justice are not necessarily illiberal, at least according to how we would usually employ the term. Rawls' definition of reasonable ensures that other influential forms of liberalism, comprehensive, perfectionist, or utilitarian for instance, are unreasonable in that they reject some essential aspect of political liberalism such as the commitment to public reason, the liberal principle of legitimacy or the separateness of persons.

⁴⁰ Waldron, J. (1999) *Law and Disagreement*. Oxford: Oxford University Press.

That is fine as far as it goes. Yet this overlooks the extent to which we need legitimacy precisely because we disagree about justice, as much if not more than we do about morality or religion. And hence to make assessments of legitimacy turn on the justness of the state cannot possibly provide a way of resolving that *political* dilemma. This tells us that the question to which legitimacy is an answer, or the need to which it responds, must exist independently of the question of justice, and hence why liberal theorising of legitimacy starts 'too late' insofar as it begins by stipulating the conditions of legitimation rather than the question or needs to which legitimacy is the answer.

While it would be gratuitous to try and set out the full list of necessary or sufficient conditions for the circumstances of legitimacy to arise, the discussion so far has shown us that the demand for the legitimation of power is not synonymous with the question of whether a political order is minimally just. It must relate to the provision of a political authority that is able to provide order through authorising commonly binding decisions in conditions of disagreement (decisions that those subject to them recognise as having an obligation to obey and which can rightfully be enforced via coercive force if required). But that it must be a *political* authority is crucial here for it cannot simply be a question of identifying whether a regime does provide such stability for the very reason that there are different ways in which order can be achieved, and not all of them have much or anything to do with politics. The circumstances of legitimacy must include the more basic question as to whether a particular regime which creates stability is an instance of political rule or of something else.

One way of thinking about this is with the initial thought that there is a fundamental difference between ruling politically and ruling through coercion and the fear of violence. While forms of order characterised by the latter might have the *de facto* ability to rule, what they do not have, and what distinguishes domination from politics is the *de jure* right to rule. While both might serve as responses to the problem of providing order in conditions of disagreement and

conflict, one achieves this through brute un-legitimated force while the other does so through appeals to right and the corollary set of normative obligations that this creates for the ruled (and where this right includes that to use force to compel obedience when it is not forthcoming). Those that claim the right to rule over others and not merely the ability must be able to present the order as a form of political authority, which will mean that they must be able to offer a justification for their rule on grounds which those subject to it will be able to recognise as meaningful and intelligible. It is in this sense that Bernard Williams and Mark Philp have insisted that the demand for legitimation is political for it is inherent in there being such a thing as politics in the first place.⁴¹ That a form of rule is appropriately legitimated is what distinguishes political rule from successful domination, and what will count as a sufficient justification is going to be determined by what can make sense to those subject to it as such.⁴² This is the truth of Hume's famous remark that it is 'on opinion only that government is founded'.⁴³

We need not add the further thought that political solutions to the provision of order among chaos are always to be preferred to non-political responses. There might be certain scenarios in which ruling through force without right is the only plausible form of providing order (say if the background conditions of conflict are such that order can only be achieved through coercion). And neither should we assume that political options are always more desirable over non-political alternatives. The demand for legitimation arises in contexts in which someone claims the *right* to rule over others, with the corollary expectation that those subject to that rule have an obligation to obey, not to resist, and so on. This is first and foremost a political

⁴¹ Williams, *In the Beginning was the Deed*; Philp, 'What is to be Done? Political Theory and Political Realism'.

⁴² See Philp, M. (2007) *Political Conduct*, (London: Harvard University Press), p. 56: 'authority becomes expressly political in character when it invokes a more or less explicit claim that the right to rule rests on some specific or principled ground'.

⁴³ Hume, D. (1994) 'Of the First Principles of Government', in: K. Haakonssen (ed.), *Hume - Political Essays* (Cambridge: Cambridge University Press), p. 16

question both because the idea that the demand for legitimation has arisen and been met is inherent in political practices themselves (because it is the internal normative standard that distinguishes political from non-political relationships) but also because providing order and stability in conditions of disagreement is a political matter. Indeed, Williams called it the 'first political question' because the provision of order and the conditions of co-operation is a condition of both solving or posing any other further political questions.⁴⁴ This does not preclude it from being an ethical or normative question. But, and as Williams notes, if it is to be understood as an ethical question, it is important that it is an ethical question that comes out of politics and political practice rather than being imposed upon politics from some external position of antecedent authority over the political.⁴⁵

If we understand the circumstances of legitimacy from this perspective then it helps shed light on the theoretical assumptions that are responsible for the problems with the liberal account of the relationship between justice and legitimacy that we have been discussing. Legitimacy speaks not to the moral question of whether a state respects the freedom and equality of its members, but the political question whether the state can be recognised as a form of political rule that therefore also implies relations of obligations to obey and rightful coercion. In liberal theory the response to the political question of legitimacy is to pose the moral question regarding equal respect. As an answer that is not objectionable (or at least not what is being objected to here). Answering this political question will undoubtedly require us to draw upon moral resources, including those moral values that are taken to be normatively salient by the relevant people, which *for us* will include moral concerns regarding equal respect. What is problematic is that liberal theory mistakenly takes their response to that question to demarcate the role and function of legitimacy per se. The question that legitimacy responds to becomes

⁴⁴ Williams, In *the Beginning was the Deed*, p. 3

⁴⁵ *Ibid.*, p. 5

'Does the state meet the conditions demanded by equal respect (i.e. is it at least minimally just)?' rather than 'Does the state makes sense to us as a meaningful and intelligible instance of authoritative *political* rule in conditions of disagreement and conflict in virtue of its appeal to equal respect?' *Where liberal theory goes astray is in failing to recognise that their account of legitimacy is an answer to the prior (political) need to determine whether the state is political or not (as opposed to a form of domination), rather than a response to the moral requirement to articulate the demands of a prior moral value such as equal respect in practice.*

The requirement that the state can be recognised by its members as an instance of authoritative rule, and hence distinctively political (legitimate) orders stand in need of explanation, looks very similar to the need for public justification at the heart of the liberal account of legitimacy. What is important is that in the account offered here the demand for such explanations arises out of the political function of legitimacy and the need to recognise political and hence authoritative forms of rule. It is not in itself a moral demand. It will undoubtedly be the case, however, that moral resources will need to be drawn upon in the effort to make sense of particular instances of rule as legitimate and hence political rather than merely rule through brute normatively unjustified force alone. But, again, the mistake liberal theory makes is taking one particular salient moral value in contemporary liberal states, equal respect, as itself the normative source of the need to legitimate power in the first place. Grounding the need for legitimacy itself as derived from a particular moral value will necessarily obscure its political dimension and the distinctively political needs to which it speaks. And because liberal theory understands legitimacy as grounded in the value of equal respect, the same moral value that lies at the heart of its account of justice, it is unsurprising to find that the two concepts become so tightly entwined. It is therefore unsurprising that liberalism is unable to provide the sort of conceptual space in which the political circumstances in which legitimacy arises and political

needs that it addresses can be fully appreciated. The full scope of legitimacy is theoretically obscured from view.

But it is not only moral values that are going to be part of any complete account of how it is that a particular form of rule makes sense to us as legitimate. A more comprehensive understanding of the sort resources that can be brought to bear on providing a necessary justification is needed. Efficiency and economic assessments, for instance, are likely to play a crucial role also, as will other factors such as the historical pedigree of particular institutions and the degree to which order and stability are secured. The legitimation of a political order is an on-going process, one which need not inevitably succeed, and exactly which resources can be drawn upon or which factors will prove to be of most significance at any one time cannot be determined in advance of appreciation of the particular context. It may turn out, then, that at any one time the extent to which the political order is consonant with or ruling in accordance with fundamental moral principles might not be of utmost importance when assessing its legitimacy. It is hard to see how liberalism can incorporate this basic but fundamental insight, nor what theoretical or philosophical resources it can bring to bear on the question of the relationship between or the priority of these different moral and non-moral factors relevant to political legitimacy in any particular context, other than to possibly insist on the primacy of equal respect which hardly seems like much help at all (in part because they see legitimacy as essentially a moral question, as we shall come to shortly). Yet it would seem that a more expansive account of the resources needed to legitimate political power might aid liberalism in thinking itself past its justice/legitimacy impasse.

If we were to summarise the problems and their causes of the liberal account of legitimacy from this realist perspective we could list them thus: (1) Legitimacy arises not as a way of answering how we meet the moral demands of equal respect (or, indeed of any other moral value) in conditions of disagreement and conflict, but as a way of addressing the need to

distinguish political (rightful) rule from mere domination as modes of delivering order and stability in conditions of disagreement and conflict. Liberalism therefore fails to see the political context in which the demand for legitimacy arises and the extent to which it is a political rather than moral question (or if it is a moral question, it is a distinctively political moral question); (2) Because liberalism sees legitimacy as a moral question tied exclusively to the value of equal respect, it is unable to separate the circumstances in which the demand for legitimation arises from the question of what will count as a sufficient response to that demand. A consequence of this is that liberalism cannot adequately theorise the political circumstances of legitimacy because it begins with the moral value of equal respect. Much of what is interesting about legitimacy as a political concept, the circumstances in which it arises and the needs to which it speaks, are thus obscured from view at the expense of a very narrow focus on the liberal conditions of legitimation; And, (3) In allowing equal respect to play this moral function in its account of legitimacy, the same value that also underpins justice, liberalism ensures that the concepts of legitimacy and justice will inevitably lack any meaningful distinctiveness (other than to apply in different circumstances). By insisting that the demand for legitimation is not the same as the question as whether the political order is minimally just but rather the prior question of whether it is a form of *political* order at all, it becomes possible to keep justice and legitimacy as distinct but potentially relatable evaluations (depending on what we take the conditions of legitimacy to be in any particular context).

A radical suggestion on which to end is that liberal theory's impasse in thinking about legitimacy, and its relationship to justice, might be overcome if we invert the Rawlsian and (often now assumed) notion that justice is the primary virtue of social institutions and replace that with legitimacy. We have seen how the question regarding which conception of justice is the most appropriate moral basis for a liberal society must be distinct from the question how any form of order can rule legitimately in conditions of deep and intractable moral and political disagreement.

This is not just the thought that because citizens disagree about justice the question of the legitimacy of a political authority to make commonly binding decisions on such fundamental political matters must be considered separately. Though even this does give us good reason to think that the question of legitimacy must have some priority over that of justice in that it settles the most basic issue of who determines what the fundamental terms of our common life should be in conditions of disagreement and conflict, including about justice. But really this thought likely does not go far enough. It is not merely that liberals have hitherto failed to pay attention to order and stability, a charge that is fairly easily rectified by an expansion in theoretical focus, but that they have been working with an understanding of legitimacy which fails to see the deeper connections between the legitimation of power and politics itself. Such legitimations are constitutive of or internal to the practice of politics, and through its connections with justice in liberal thought this wider political function is overlooked in favour of an overly moralistic conception of politics that focuses on first moral principles and sees its main role as to articulate or enact external moral demands through political power. Justice *is* a moral intervention in politics. But legitimacy, both the conditions under which it is generated but more importantly the function it plays as an inherent standard for allowing us to make sense of a form of rule as political, is intrinsic to politics itself. It is a political concept because it is inherent in there being a practice of politics, as opposed to mere domination through brute coercion, in the first place. In that sense, legitimacy must be the primary political value.