



## **Justification, Legitimacy, and Social Embeddedness: Locke and Rawls on Society and the State**

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“The fundamental question of political philosophy,” wrote Robert Nozick memorably, “is whether there should be any state at all.”<sup>1</sup> A. John Simmons concurs. For him, the task of “justifying the state” must take the following form: we should assume anarchism as a theoretical baseline and demonstrate that there can be at least one state type that is neither immoral nor inadvisable.<sup>2</sup> Justification is a separate task, however, from showing that any particular state is legitimate for a particular individual, which means that the former has the right to rule over the latter. In “Justification and Legitimacy” Simmons contends that Locke’s political philosophy provides the model for the conceptual distinction between state justification and state legitimacy which has been lost in what he terms the Kantian turn of contemporary political philosophy. Modern followers of Kant, John Rawls chief among them, work with a conception of justification that is “doubly relativized” in comparison with the Lockean notion.<sup>3</sup> Instead of providing anarchists with objective reasons for having states, Kantian justification is

offered to those who already agree that *some* kind of state must be justified, and it is justification relative to the moral positions of those who will make up the society in question.<sup>4</sup>

This double relativism is regrettable because it

obscures the difference between two central ways in which we should (and do) morally evaluate states, and it generates confusions about other serious practical issues, such as those surrounding our moral obligations to comply with law.<sup>5</sup>

In particular, Simmons charges that a follower of Kant “in effect tries to make it seem” that state justification is sufficient for state legitimacy.<sup>6</sup> For followers of Kant like Rawls, justification is achieved by a hypothetical social contract, and, according to Simmons, Rawls’s view entails that citizens are obligated to obey the laws of their just states because of a hypothetical

agreement made by their hypothetical representatives. However, it is a widely held principle that an individual cannot be obligated by the consent of others unless prior consent on her part has granted those others the right to consent for her. But such prior consent would amount to an actual rather than a hypothetical contract. In a recent paper Cynthia Stark calls just this criticism of hypothetical consent theories the “standard indictment” and takes pains to show that it is misguided.<sup>7</sup> She focuses on Rawls and Nagel and contends that for them justification is merely necessary for legitimacy, which would place them in agreement with Simmons, who writes that “the justification of a type of state is necessary for consent to a token of that type to be binding,” where consent, on his view, establishes legitimacy.<sup>8</sup>

### 1. Stark versus Simmons on Rawls

Matters are complicated by the terminological variance between Stark and Simmons. First, her usage of “justification” is decidedly closer to that imputed by Simmons to the followers of Kant than Locke’s. Stark asserts that justification must be directed to everyone in society. Assuming that Stark means everyone in the particular society in question, this is already a relativized notion of justification when contrasted with Locke’s demand that the state be justified to all moral agents everywhere. Furthermore, justification “cannot be grounded in any particular moral perspective.”<sup>9</sup> Both conditions follow from Rawls’s view that the fact of reasonable pluralism necessitates that political philosophy not presuppose the truth of any particular ethical view to the exclusion of alternatives.<sup>10</sup> Justification is not universal because there is no universal consensus on normative principles required for justification. Furthermore, justification cannot appeal to one particular intra-societal comprehensive doctrine, because within a society many people will reasonably possess comprehensive doctrines incompatible with it. That means that a shared fund of principles must be found that is the basis of an overlapping consensus for all reasonable comprehensive doctrines. The shared fund, for Rawls, the public political culture, will likely be unique to the society, again relativizing justification to the societal level. The justification offered by Rawls is, as Simmons put it, “offered to those who already agree that some kind of state must be justified, and it is justification relative to the moral positions of those who will make up the society in question.”<sup>11</sup>

Simmons regards legitimacy as the logical correlate of political obligation, such that a state is legitimate with respect to a particular citizen if that citizen is obligated to it. However, for Stark we should

[t]hink of a theory of legitimacy as giving a justification of political principles or arrangements. A legitimate principle or institution is one that is

justified. Think of a theory of obligation as giving an account of why and under what circumstances citizens are required to obey justified rules or arrangements.<sup>12</sup>

Thus for Stark, establishing state legitimacy is synonymous with justifying having states, but both are distinct from demonstrating that any citizens are obligated to particular states. Once we sort out the terms, however, Stark and Simmons are in accord in insisting that the question of the justification of a state should be kept separate from issues concerning the right of a state to coerce individuals under its aegis. Where they disagree is on whether or not Rawls recognizes this fact. Simmons argues that Lockean justification is necessary but not sufficient to establish a state's right to rule over individuals, but that for Rawls justification is intended to be sufficient for obligation. Stark, however, insists that justification provided by Rawls is not intended to be sufficient to establish political obligation:

Hypothetical consent is designed to show that political principles are justified . . . Hypothetical consent does not show that one is obligated to follow such principles, or that the state is licensed to enforce such principles.<sup>13</sup>

The following facts favor Simmons's interpretation of Rawls over Stark's.

Rawls has a duty-based theory of political obligation. Citizens in general have a duty to obey the laws of their just or nearly-just society.<sup>14</sup> In addition,

the person is seen . . . as a free and equal citizen, the political person of a modern democracy with the political rights and duties of citizenship, and standing in a political relation with other citizens.<sup>15</sup>

All individuals are to be conceived of as citizens, where the "the fundamental political relation" of citizenship has two "special features": citizens are situated within the basic structure of a society without having a choice in the matter, and citizenship is a relation of free and equal beings who exercise ultimate political power as a collective body.<sup>16</sup> As well, what is called, the criterion of reciprocity is used to answer the question of how citizens so related can be bound to honor the structure of their constitutional regime and to abide by the statutes and laws enacted under it in the following fashion: "our exercise of political power is proper only when we sincerely believe that the reasons we offer for our political action may reasonably be accepted by other citizens as a justification of those actions."<sup>17</sup> This specifies the conditions in which a citizen may be said to be under a duty to obey her state and in effect means that justification is both necessary and sufficient for obligation. Citizens can be bound to abide by the laws enacted within their state when the laws are justified by the right reasons but not otherwise.<sup>18</sup>

Simmons is correct to charge that Rawls's political theory does not allow for a distinction between justification and legitimacy. Whether Simmons is correct to denigrate the theory for this lack is less clear. We must view both conceptions of justification in their contexts of competing conceptual schemes, and for that reason, we cannot compare their merits without assessing the reasons for the differences in the schemes as wholes.

## 2. Locke's Consent Theory and Rawls's Facts

Locke presents a taxonomy of three different types of duties, of which two are artificial. The only duties that people are naturally under simply because of their humanity are moral duties. Included among them is the duty to honor agreements, and in light of this duty, we can acquire first societal, and second, political duties. The distinction is important: for Locke the notion of a society must be kept distinct from the notion of a state. A society is a collective body whose members have ceded certain key rights, specifically the right to rule and the right to punish, to the majority by express consent. A state is a society with a representative government in place. Political duties involve obeying the edicts of government and state institutions. Political duties include duties to serve on juries or in the military. Societal duties are duties that we have to members of our own society simply because we share membership in a society with them, and that we do not have to other people. Such duties include the duty jointly to protect the other members, and to respect their votes, neither of which are duties we have to people in general.

There are four key assumptions from Locke's political theory, as presented in his *Second Treatise*, that underpin the distinct evaluations of justification and legitimacy advocated by Simmons.<sup>19</sup> First, the Lockean state of nature: the natural state for people, the state of nature, is one of freedom from all but natural moral duties.<sup>20</sup> Second, moral realism: the limits of moral obligation are established by the law of nature, which is an objective, self-evident, pre-social moral reality.<sup>21</sup> Third, the necessity of consent for the acquisition of societal or political obligations.<sup>22</sup> Fourth, the sufficiency of consent by adults in the right circumstances to create societies as rights-bearing artificial moral entities.<sup>23</sup>

The first two assumptions are prerequisites for the kind of state justification that Simmons envisages. The state of nature is one because, were life in political society in some sense natural then the burden of proof would lie on the anarchist, and the fundamental task of political philosophy would not be to justify the state. The law of nature, or some alternative universal objective morality, such as the secular theory of natural rights that Simmons himself defends, is another, because one aspect of justification is showing that the state is not immoral, so such justification must appeal to moral reasons that are

compelling even in the state of nature, before the establishment of society.<sup>24</sup> The third and fourth assumptions jointly comprise the core of Locke's consent theory of legitimacy, and are the negative and positive aspects respectively of what we can call the thesis of a consensual construction of society, according to which the limits of a society are, like the limits of a club or an association, determined by who has agreed to be a member. Nobody is naturally a citizen and a person can only become one by consent.

Rawls, as we have seen, writes that persons are "conceived of as citizens" whether they would have chosen to be or not. Not only are individuals not naturally asocial, they are conceived as being members of a particular society, having duties to their fellow members that are apparently not self-imposed. Clearly, Rawls rejects all four of Locke's assumptions enumerated above.

Arguing that the analogy between society and an association is inappropriate, Rawls writes:

The context of a social contract is strikingly different [from other kinds of contract], and must allow for three facts, among others: namely, that membership in our society is given, that we cannot know what we would have been like had we not belonged to it (perhaps the thought itself lacks sense), and that society as a whole has no ends or ordering of ends in the way that associations and individuals do.<sup>25</sup>

These three facts are elements of what we can call the thesis of social embeddedness, which is the basis for a rejection of the thesis of a consensual construction of society, and as a result, both justification and legitimacy in the Lockean forms advocated by Simmons. In what follows we shall see the implications of each fact for the various aspects of the Lockean view, and what a follower of Locke can say in response. It should become clear why the positions of Locke and Rawls comprise competing conceptual schemes, so that we cannot in fairness make any simple or sweeping comparisons between them.

### **3. Consensual Construction versus Social Embeddedness**

Rawls's first fact, that "membership in our society is given," has both an empirical and a normative aspect. First, there is the seemingly undeniable observation that entry into society just is not voluntary:

No society can, of course, be a scheme of cooperation which men enter voluntarily in a literal sense; each person finds himself placed at birth in some particular position in some particular society, and the nature of this position materially affects his life prospects.<sup>26</sup>

All persons are essentially socially embedded. We find ourselves in societies, we do not join them, as we might join a bridge club or a political party.

This observation is insufficient in itself to undermine central Lockean principles such as the state of nature and the necessity of consent for the acquisition of non-moral obligations. As Locke himself noted, “an argument from what has been, to what should of right be, has no great force”.<sup>27</sup> A follower of Locke can readily concede that every individual in the contemporary world finds herself embedded in a society that has pre-established rules and expectations without any joining decision on her part, and even concede that the vast majority do not object to or question this fact, without concluding that the duties imputed to her have genuine normative grounding. We must distinguish the descriptive meaning of “society,” henceforth referred to as a perceived society, from the prescriptive meanings of “society,” hereafter called a contracted society.

What counts as a perceived society is determined by a subset of the following factors: standing in the international community, attitude of self-regarding citizens of the perceived society, shared language, shared culture, sense of shared history, and shared territory of birth or parentage. We all consider ourselves part of a society in this sense. However, if we accept Locke’s four assumptions, we will not see the existence of a perceived society as enough to establish that that society is prescriptive. Only such associations as originate in their members’ explicit consent qualify as such, and it is only to them that citizens owe political obligations. Uganda under Idi Amin could meet many standards to count as a perceived society, but its so-called citizens owe it no duties because it fails to qualify as contracted.

Rawls does not supply an explicit constitutive account of the origin of societies in a prescriptive sense to rival Locke’s thesis of a consensual construction of society. It is tempting to infer from this that Rawls assumes that merely believing herself to be a member of a society is sufficient to give that society certain rights over a person. Against such a suggestion Simmons charges

no plausible theory of state [by which Simmons means what we have called societal] legitimacy could maintain that a state has the rights in which its legitimacy consists . . . simply in virtue of its subjects’ feelings of loyalty or its own capacities to generate such feelings. . . . On such accounts states could create or enhance their own legitimacy by indoctrination or mind control; or states might be legitimated solely by virtue of the extraordinary stupidity, immorality, imprudence, or misperceptions of their subjects.<sup>28</sup>

Although Simmons is right on this point, it does not mark a victory for the thesis of a consensual construction of society over Rawls’s account. For one thing, Rawls requires not simply that individuals believe themselves to be citizens, but that they positively affirm the principles that order the basic struc-

ture of their state. This means at least that they must have good reasons for their belief, and cannot simply arrive at it through brainwashing. Furthermore, just such considerations as Simmons gives here appear also to undermine Locke's fourth assumption, that consent is sufficient to establish a society's legitimacy. A stupid or misinformed person can give uncoerced consent, and may indeed be willing to do so.

Simmons, anticipating this charge, stipulates that "binding consent cannot be given under conditions that make it unfree or uninformed." Ironically, it is on this basis that Rawls rejects the thesis of a consensual construction of society: consent cannot be the sole standard for transfer of rights to a society because that fact that all people are unavoidably socially embedded ensures that consent can never be completely free or informed. This is the moral aspect of Rawls's first fact, that membership in our society is given. Why is it relatively unproblematic for a private club to have draconian rules? Because a person cannot become a member without having first been on the outside looking in, presented with a range of options and with the chance to evaluate the rules and determine whether or not she wants to have them imposed on herself. Because of the consent requirement and this assumption of prior assessment before joining, her co-members of the club can, with some justification, respond to complaints about the rules with the retort that "you didn't have to join." Call this the *caveat emptor* aspect of voluntary membership. If, however, a member lacked a real choice because she was not offered any prior alternatives, or lacked information because she was never aware that alternatives were available, then the imposition of such rules is unjust, even if she gave consent that appeared not to be coerced. Even if any modern day society met the Lockean consensual standard to merit the name, the vast majority of its non-immigrant and a large proportion of immigrant population would have been in that situation. Only the very wealthy could select their nationality as they might a restaurant; for the rest, not only were they given an offer they could not refuse, they were brought up in such a way that refusal would never occur to them. Viewed in this light, the thesis of a consensual construction of society must be regarded as a false ideology.

Thus, concludes the follower of Rawls, the social embeddedness of modern individuals undermines consent as a sufficient condition for acquisition of duties. It is primarily for this reason that the parties to Rawls's original position are not to choose principles of justice on the assumption that entry into society is voluntary: they should instead regard society as closed for the purposes of their deliberations, to assume that "entry into it is only by birth and exit from it is only by death."<sup>29</sup> The follower of Rawls would insist that in doing so they are actually better protecting the freedom of a society's less-advantaged citizens, and for that reason "a society satisfying the principles of justice as fairness comes as close as a society can to being a voluntary scheme."<sup>30</sup>

Simmons is skeptical of such avowed commitments to voluntarism on the part of philosophers he labels modern Kantians, and argues that the criticism of the thesis of a consensual construction of society, that *de facto* enforced consent of a person to her state of birth undermines the bindingness of the consent, can be countered. Societies moved truly to respect voluntarism can offer

various classes of citizenship (and “resident noncitizen”) options, training and support to make emigration and resettlement a more realistic option, programs to disseminate relevant information, a more formalized choice process, and so on.<sup>31</sup>

Simmons does not develop these ideas further, however, and they are insufficiently appealing to overcome the *caveat emptor* flaw to the thesis of a consensual construction of society. Two suggestions, programs disseminating information and a more formalized choice process, are intended to counter the charge that citizens do not know they have an option. They would be hollow gains, however, if the citizens did not in fact have genuine options. Thus, the weight of Simmons’s case falls on the other two proposals.

First, supporting resettlement. Not only does this smack of the unlovely exhortation “America: love it or leave it,” it only responds to the complaint that leaving our native land is economically difficult. But a person’s social embeddedness is not simply economic. People almost universally find themselves rooted sentimentally, linguistically, and culturally in their native setting, such that enforced removal would inflict on anyone a great psychological and emotional cost. As Rawls, with typical understatement, writes:

The attachments formed to persons and places, to associations and communities, as well as cultural ties, are normally too strong to be given up, and this fact is not to be deplored.<sup>32</sup>

In short, supporting resettlement still involves demanding resettlement of recalcitrant natives, and if this is held up as part of the thesis of a consensual construction of society’s commitment to freedom, then that seems closer to a *reductio ad absurdum* argument against the thesis of a consensual construction of society than a defense of it.

Simmons’s classes of citizenship proposal does not seem open to this complaint. Here there is no suggestion that objectors be uprooted, simply, presumably, that they be denied services to which they are unprepared to contribute. It is obvious how this idea would follow from the voluntary association view of society: just as it would be unremarkable for a chess club to offer particularly gifted players privileges like captaincy, perhaps, or reduced dues because of their greater contribution to the success in competition of the club, the assump-



tion is that a similar arrangement for society as a whole would be unobjectionable.

Rawls does object to such a proposal for society as a whole. His rejection can be inferred from his third fact: “that society as a whole has no ends or ordering of ends in the way that associations and individuals do.” Lacking such ends, it is impossible to gauge any citizen’s contribution to society, and thus there is no basis on which to ascribe classes of citizenship. There are two primary motivations for this insistence. First, a well-ordered society should not be seen to have a particular end or group of ends because society must be neutral toward all reasonable comprehensive conceptions of the good. Second, access to the benefits provided by a state should not be meted out according to the contribution of individuals to its ends beyond simple maintenance of a just basic structure because that would unjustly favor individuals better able to contribute to such ends.

#### **4. The Isolationist Challenge**

This element of the thesis of social embeddedness is perhaps more abstract than the others, and as such, its application to real world issues like political obligation should be met with some skepticism from a follower of Locke, who can press the following points. First, there are clearly some ends to society, including the maintenance of a communal judicial and national defense system, as well as mention the extensive welfare state that a society that would meet Rawls’s description of a well-ordered would require. If these considerations are not ends, they are features desirable in any society, and as such useful yardsticks for societal status. Furthermore, while a follower of Rawls sounds laudably high-minded in demanding that no one be excluded from a state’s benefits, this obscures the fact that all individuals are therefore also roped in to bear its burdens. But, if a person is radically isolationist, why should she have to agree to pay taxes for services she does not intend to take advantage of and of which she may disapprove on morally laudable grounds?

Isolationism can take several forms. Let us confine discussion to the most extreme isolationists who seal themselves off geographically as well as politically, who supply their own water and power and do not use public roads, as their case seems strongest for a follower of Locke. Rawls’s main concern with isolationists of this stripe would be to ensure that their children were given the kind of education required to develop the two moral powers he deems essential to citizenship. Given that the state has to supply that education, or at least to police the suppliers of that education, their parents should contribute to the state to help maintain the educational system. Both of these demands are anathema to many isolationists of the kind actually found in the United States. In fact, they would deny that they really are in the United States: by

Lockean reasoning they are in the state of nature, politically and, assuming they keep to private lands, geographically. The isolationist objection to Rawls rests on the defensibility of the notion of Locke's state of nature.

A state of nature is important also because it is required by Simmons's conception of justification. The natural state for humans must be non-political for it to be necessary or even possible to justify states. Justification of states has, according to Simmons, two main elements: showing that at least one state type is not essentially immoral, and showing that it is "rationally preferable to all feasible nonstate alternatives."<sup>33</sup> For either to be possible, we must assume an individual with established goods and interests, presented with a choice between a state of nature and at least one state.

The thesis of social embeddedness has no place for a state of nature. Rawls's rejection of the state of nature follows most clearly from his second fact, the assertion that we cannot know what we would have been like had we not belonged to the society in which we have grown up. The implication of this fact, which we can call the social dependence of personal identity is that the notion of a state of nature is conceptually bankrupt. Our interests are almost entirely products of our social environment, combined with our natural talents and our resources, and our resources and even our natural talents cannot be abstracted from our social environment to be used to justify the political structure that itself shapes that environment. We cannot say that a state is justified because it would be rational for certain individuals to agree to it, because what is rational for any individual is a function of her interests, and her interests are shaped by her state. Wilt Chamberlain cannot say that he would have been interested in keeping the winnings from his athletic activities irrespective of his social and political context, because in a different context he would not. For example, in a society where only jockeys are revered, fearing for his success should his growth continue, his mother might have taken steps to stunt his growth. Therefore, we cannot say that one society is better than another, or than a state of nature, for us, because we are a product of one society, and in another we would be different. Rawls also criticizes the use of the notion of a state of nature on moral grounds, because assessing a state from the point of view of individuals with established goods and interests would allow undue influence in the shaping of constitutional matters to the wealthy and powerful, or to allow that they be skewed to particular comprehensive conceptions of the good to the disadvantage of others. For both conceptual and moral reasons, then, the social dependence of personal identity leads to Rawls's insistence on a veil of ignorance behind which the parties to his social contract must be situated.<sup>34</sup>

Here, then, is the answer to Simmons's charge that Rawls's account is defective because it fails to provide a justification to an anarchist. An anarchist should only be taken seriously if a non-societal existence is conceivable and a morally appropriate baseline assumption for political theory. Because it is

neither, we do not need to target our state justifications to an anarchist any more than we do to a flat-earther or theocrat. However, for all the conceptual bankruptcy and supposed immorality of a state of nature, an isolationist can easily conceive of a world without taxes and state interference. The lesson Rawls seems to take from the social dependence of personal identity is that an isolationist cannot divorce herself from her state because she owes her identity in large part to that state. In response, an isolationist can press two points. First, just as a follower of Locke insists that we should distinguish between perceived societies and contracted societies, we should not equivocate between the thick sense of society, in which concept is included national culture, language, history, and society in a narrow political sense of a community of people acting as a single political body for political ends. It is society in the thick sense that shapes us, that has no clear ends, and into which we are born, but it is society in the political sense that anarchists and libertarians object to, and demand no part of without prior consent. Rawls seems to assume the two coincide, because he writes that “we can abstract from [the issue of immigration] to get an uncluttered view of the fundamental question of political philosophy.”<sup>35</sup> However, we can easily imagine people brought up French, and thereby a part of France’s cultural society, who decide to become Canadian citizens, and are thereby part of Canadian political society. Their identity was no doubt shaped by French culture, but they owe no duties to France as a result, and the fact that Canadian society played no role in shaping their identity does not mean that they are any-the-less obligated to it. Indeed, a follower of Locke would argue that immigrants are more obviously obligated because they have explicitly chosen to be citizens of their adopted societies. The fact that a society has shaped a person’s personality should no more oblige her to regard the government selected by it as an authority over her than the roles parents or teachers play in shaping a child’s personality oblige the child to obey their dictates once she reaches majority.

### **5. Construction and Autonomy**

Rawls can respond to both Lockean points. He would insist that a clean conceptual separation between culture and political ends is a fiction of metaphysical liberalism that must be abandoned by a truly political liberalism. Nobody can place the political institutions of her society entirely outside the forces that shape her worldview. An anarchist who rejects the Federal government of the United States in all likelihood is motivated by a firm belief in the rights of individuals which itself has been inculcated by exposure to the Constitution, the Bill of Rights and associated elements of the public political culture of the United States.<sup>36</sup> The idea of such an entity runs counter to the division between culture and politics heretofore imputed to a follower of Locke, which

does not distinguish among cultures but divorces them from political arrangements and institutions, but Rawls offers a competing taxonomy. He assumes that because of the fact of reasonable pluralism there will be many competing comprehensive doctrines within a single state, but that all of them reach overlapping consensus on the same political principles. This means that we can distinguish the “domain of the political” from non-political matters over which there is no general consensus, but we must not thereby assume that political principles are not as much part of each comprehensive doctrine as beliefs that are religious, dietary or other more broadly cultural in the colloquial sense, and as much responsible for character formation. Our conceptions of our institutions will be part of the conceptions of the good that are most central to our personhood, and separation from which no state must be allowed to threaten its citizens with.

Were it the case that this public political culture were, like a person’s parents or teacher, a force external to her, Rawls would presumably concede that its role in shaping her personality would not obligate her to it. But, on his constructivist view, the public political culture is shaped in turn by the citizens who affirm it. Thus, in a way more directly reminiscent of Rousseau than of Kant, citizens who work within the constraints of a basic structure ordered by principles of justice chosen by their representatives in the original position are more autonomous than Lockean anarchists, because the anarchists have interests and selves passively shaped by forces outside of their control, while citizens as construed by Rawls construct the principles that shape the culture that in turn shapes at least their political selves. These are the reasons why the principles of justice are to be conceived of as

designed to form the social world in which our character and our conception of ourselves as persons, as well as our comprehensive views and their conceptions of the good, are first acquired, and in which our moral powers must be realized, if they are to be realized at all.<sup>37</sup>

If confronted with an actual isolationist, Rawls would have to stress the meta-level of his considerations. He is certainly not suggesting that immigration or emigration should be impossible, or even difficult, although he does suggest that peoples have a “qualified right to limit immigration.”<sup>38</sup> Neither is he suggesting that individuals cannot choose to reject their government. His main contention is merely that parties designing principles to order the basic structure of a society should take into account the fact that the citizens of the society will be socially-embedded, and thus should not place them in a situation where they would be called upon to uproot. The isolationist is not called upon to uproot, but rather to be reasonable, where this requires meeting fairly minimal contributions, and allowing certain opportunities for her children that Rawls deems essential for their development as citizens. A Lockean society

could demand much more of recalcitrant individuals dwelling within its purview because of the *caveat emptor* claim.

## 6. Conclusion

Simmons rightly highlights the lack in Rawls's theory of the conceptual tools to make a distinction that is parallel to his avowedly Lockean distinction between justification and legitimacy. However, we cannot straightforwardly disparage Rawls's theory for this inability, because the Lockean distinction relies on the use of notions like a state of nature and an objective universal theory of rights that Rawls has good reason to avoid in attempting to provide a method of justifying principles of justice for a society exhibiting a plurality of reasonable comprehensive doctrines. Rawls rejects the notion that in such circumstances we can justify appealing to a certain set of moral principles that hold on all people in all counterfactual societal and as societal circumstances. While we must have such a fund of principles for any justification, it must be found not in pure reason or intuition, but instead in a public political culture which both helps to shape our self-conceptions and is shaped by us in turn. His theory blurs the boundaries between empirical and normative concerns in many ways. Our social embeddedness, an evident empirical fact, has normative consequences, both because our culture shapes our selves, and because the public political aspect of that culture is the source for any principles that may ultimately be used to criticize states. In effect, therefore, we are naturally political because naturally social, and the freedom from society itself that followers of Locke like Simmons value, is not available to us. This would be to be free from the very prerequisites of freedom, for Rawls.

In focusing on Rawls's inability to distinguish between justification and legitimacy as he construes them, Simmons obscures deeper foundational disagreements. Without a theory of objective rights, the basis for state justification must be societal principles such as the principles found in the public political culture. In this respect, Simmons's most serious dispute with Rawls is not with his Kantian elements, but with what a hard-line follower of Kant would see as his concessions to communitarians. While Simmons rejects Locke's notion of laws of nature, he is still a natural rights theorist, influenced strongly enough by Locke that he defends Locke's "strange doctrine" that we have the natural right to punish others.<sup>39</sup> Simmons's closing assertion that a state that is neither justified nor legitimate is nonetheless justified in restraining rapists must rely on such a belief. Kant would agree, as would Rawls, but Rawls does not believe that a reasonable public justification for any individual of her political institutions can make reference to her comprehensive conception of the good.

Since Rawls rejects the notion of a state of nature, and with it the conceptual possibility of an entirely non-state existence, the need in his theory to

justify the state is blunted, and the primary goal of political philosophy is made relative to pre-existing societies. On both the issues of natural rights and a state of nature, it seems evident that the burden of proof lies on the follower of Locke. Perhaps a fruitful line of attack for her would be to take up aspects of Rawls's view but insist that his Kantian influence has colored his presentation of them. For example, the Lockean view of freedom for any individual as being the freedom to make sub-optimal decisions, but nonetheless really to make them for herself, is firmly embedded in the public political culture of the society of the United States at least, and it is puzzling that Rawls does not give it greater consideration in his theory, which supposedly respects the most settled elements of that culture. The fact that much less accepted or understood Kantian notions like that of practical reasoning play large roles in Rawls's theory is distinctly problematic.<sup>40</sup> Also, a more detailed analysis needs to be given of the line between the domain of the political and background culture. If abstractions like the notion of an original position are allowed a fundamental role in political theory, there is no reason why we cannot devise a way to abstract away from the influence of our political institutions the better to conceive of non-state existence. Simply defining all individuals affected by his political theory as citizens creates the appearance of question-begging. Finally, the Lockean challenge is useful simply because it serves to remind us of all that Rawls is assuming. As many writers on nationalism have insisted, nation states are comparatively recent phenomena, and may indeed pass out of existence.<sup>41</sup> It is not clear that they should be interpreted as the primary unit of theory. The gap for an alternative theory of state justification, lacking the flaws of both Locke's and Rawls's, is waiting to be filled.<sup>42</sup>

## Notes

1. Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), p. 4.
2. See A. John Simmons, "Justification and Legitimacy," *Ethics* 106 (1999).
3. *Ibid.*, p. 759.
4. *Ibid.*
5. *Ibid.*, p. 739.
6. *Ibid.*, p. 763.
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8. Simmons 1999, 746n.
9. Stark op. cit., p. 329.
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11. Simmons, "Justification and Legitimacy," p. 759.
12. Stark op. cit., pp. 325–326.
13. *Ibid.*, p. 326.
14. John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971), ch. VI.

15. Rawls, *Political Liberalism*, pp. xlv–xlvii.
16. Ibid.
17. Ibid.
18. See Simon Cushing, “Rawls and ‘Duty-Based’ Accounts of Political Obligation,” *APA Newsletter on Philosophy and Law* 99 (1999).
19. See John Locke, in C.B. Macpherson ed., *Second Treatise of Government* (Indianapolis: Hackett, 1980).
20. See Locke, op. cit., §4.
21. See Locke, op. cit., §6.
22. See Locke, op. cit., §95, §171.
23. See Locke, op. cit., §99.
24. See A. John Simmons, *A Lockean Theory of Rights* (Princeton, N.J.: Princeton University Press, 1992) and *On the Edge of Anarchy* (Princeton, N.J.: Princeton University Press, 1993).
25. Rawls, *Political Liberalism*, p. 276.
26. Rawls, *A Theory of Justice*, p. 13. See also *Political Liberalism*, p. 41.
27. See Locke, op. cit., §103.
28. Simmons, “Justification and Legitimacy,” p. 750.
29. Rawls, *Political Liberalism*, pp. 12, 40–41.
30. Rawls, *A Theory of Justice*, p. 13.
31. Simmons, “Justification and Legitimacy,” p. 761.
32. Rawls, *Political Liberalism*, p. 277.
33. Simmons, “Justification and Legitimacy,” p. 742.
34. Rawls, *A Theory of Justice*, pp. 18, 136–137, and *Political Liberalism*, p. 304, 24n.
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36. Rawls, *Political Liberalism*, pp. 13–14.
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38. John Rawls, *The Law of Peoples* (Cambridge, Mass.: Harvard University Press, 1999), 39n.
39. See Simmons, *On the Edge of Anarchy*, ch. 3.
40. See Cushing, “Rawls and ‘Duty-Based’ Accounts,” p. 70.
41. See Benedict Anderson, *Imagined Communities* (London: Verso, 1983), Ernest Gellner, *Nations and Nationalism* (Ithaca, N.Y.: Cornell University Press, 1983), Leah Greenfeld, *Nationalism: Five Roads to Modernity* (Cambridge, Mass.: Harvard University Press, 1992), Eric Hobsbawm, *Nations and Nationalism since 1780* (Cambridge, England: Cambridge University Press, 1993).
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