

Kant's Political Liberalism

Right, Freedom and Public Reason

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Abstract

According to John Rawls's political liberalism, the exercise of political power should be justified by appeal to political values and principles that all citizens can reasonably be expected to share. I argue that we find a similar way of thinking about political legitimacy and justification in Immanuel Kant. Thus I defend the thesis that Kant's conception of right can be interpreted as a form of political liberalism. This goes against Rawls's own verdict as well as much Kant scholarship, where it is often argued that Kant's principles of right are derived from the ethical principle of the Categorical Imperative, or that Kant's view of political justification is not in fact liberal and democratic. The defense of my heterodox thesis hinges mainly on two arguments. First, I argue that Kant's principles of right are tailor-made for the essentially political problem of enabling reciprocal relations of external freedom, and are not derived from or based on his broader ethical theory. Second, I argue that Kant's claim that laws are justified only if all citizens could consent to them, taken together with his account of popular sovereignty, can be seen to express an idea of public reason similar to Rawls's. These claims support the conclusion that Kant's view is both liberal and political; in some ways even more liberal and political than Rawls's. On the background of that conclusion, I consider the distinctive features of Kant's political liberalism and its merits. I show that whereas Kant sets out to justify the institutions of the liberal state, Rawls takes them as given starting points for political justification. With respect to this, I conclude that Rawls leaves the question of authority unanswered, and that Kant's theory therefore secures an important advantage.

“In every commonwealth there must be obedience under the mechanism of the state constitution to coercive laws, but there must also be a *spirit of freedom*, since each, in what has to do with universal human duties, requires to be convinced by reason that this coercion is in conformity with right, lest he fall into contradiction with himself.”

– Immanuel Kant, “Theory and Practice”

“You hear that liberalism lacks an idea of the common good, but I think that’s a mistake. For example, you might say that, if citizens are acting for the right reasons in a constitutional regime, then regardless of their comprehensive doctrines they want every other citizen to have justice. So you might say they’re all working together to do one thing, namely to make sure every citizen has justice. Now that’s not the only interest they all have, but it’s the single thing they’re all trying to do. In my language, they’re striving toward one single end, the end of justice for all citizens.”

– John Rawls, interview with *Commonweal*

“I am really explaining what I think should be the public philosophy in a reasonably just constitutional regime.”

– John Rawls, interview with *Commonweal*

“I do not mean that the state should give the principles of philosophers any preference over the decisions of lawyers (the representatives of the state power); I only ask that they be given a *hearing*.”

– Immanuel Kant, “Toward Perpetual Peace”

Preface

In the men's room at the Department where I have written this thesis, there is a sticker with the slogan "I believe in a voluntary society – Universalize nonviolence".

Kant and Rawls both believed that a civil society can never be truly voluntary: all are required to do their part in upholding just institutions and laws, and we can legitimately be made to do so by force if necessary. Moreover, while Kant and Rawls were both concerned with the universalization of justice and peace, they would find the idea of universalizing non-violence a non-starter toward that end. Still, they also shared the belief that civil society should be arranged, in a certain sense, *as if it were voluntary*: it should be arranged in a manner that all citizens could accept. This faith that the circle can and must be squared is, I think, what I find so intriguing in Rawls's and Kant's thought.

My decision to write about Kant and political liberalism was, at least, highly voluntary. Questions about political justification have always interested me, both practically and philosophically. The idea of pursuing these question through the study of Rawls' later work and the debates surrounding it was stimulated by the members of the research group on liberalism at the University of Bergen where I did my undergraduate studies. The idea of taking up a more serious study of Kant's political thought was stimulated by Reidar Maliks's teaching in master's courses on ethics and political philosophy in Oslo. The idea of bringing together the fields of study in this thesis was my own. The hybrid approach has proven to be difficult, but in spite of all shortcomings of the present work, I like to think that it has borne fruit.

I took a year's break from my studies to work as a student officer. Unsurprisingly, picking up the work where I left off proved particularly challenging, as I had to figure out what I had been up to more than a year ago and catch up on old and new literature. Still, I am only grateful to my colleagues at the Student Parliament for what was an exciting year.

Thanks to Reidar for his helpful suggestions and incisive feedback on my many drafts. Thanks to fellow students at the Department for understanding, and to friends and family for their smiles and support. Finally, thanks to Mina for all the patience, care, and oatmeal breakfasts.

Method of reference

All references to Kant refer to the pagination in the Akademie-Ausgabe, as listed in the margins of the Cambridge editions of his works. I use the following abbreviations in references:

AQE – “An answer to the question: What is Enlightenment?” (Kant, 1996 [1784])

G – *Groundwork of the Metaphysics of Morals* (Kant, 1996 [1785])

TP – “On the common saying: That may be correct in theory, but it is of no use in practice” (Kant, 1996 [1793])

PP – “Toward Perpetual Peace” (Kant, 1996 [1795])

MM – *The Metaphysics of Morals* (Kant, 1996 [1797])

I will often abbreviate the titles for Kant’s central principles:

CI – The Categorical Imperative

UPR – The Universal Principle of Right

Unless otherwise noted, I cite the translations used in the Cambridge editions.

When writing about Rawls’s views, I often omit his name from references. I refer mostly to the expanded 2005 “Columbia Classics” edition of *Political Liberalism*, but with separate entries for the parts that were written and originally published at different times:

Political Liberalism, original edition from 1993 (Rawls, 2005a)

“Reply to Habermas” from 1995 (Rawls, 2005b)

“Introduction to the Paperback Edition” from 1996 (Rawls, 2005c)

“The Idea of Public Reason Revisited” from 1997 (Rawls, 2005d)

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1. Introduction: Kant's political liberalism in question

1.1 Thesis statement and background

Can Immanuel Kant's political philosophy be interpreted as a form of political liberalism? If by "political liberalism" we simply mean any liberal political theory, then the question might not seem very interesting. Some would point out that there are strands of absolutism in his thought, and that he held reactionary views of women and laborers; historical circumstances taken into account, however, few would deny that Kant, with his impassioned defense of freedom of speech and conscience, held out a liberal vision of politics. Since the publication of John Rawls's book *Political Liberalism* (2005a), however, the expression has taken on a different, more specific meaning (cf. O'Neill, 1997). "Political liberalism" has come to denote the view that liberal rights and policies ought to be justified by appeal to reasons and values that are reasonably acceptable to all citizens, and not based on any controversial moral, religious, or metaphysical ideal of the good or worthy life. Rawls set out this view in explicit contrast to Kant's liberalism, which he thought was based on a "comprehensive" ethical ideal of autonomy. In this thesis, I want to turn the picture and argue that Kant can be interpreted as advancing a compelling form of political liberalism – one that overcomes problems that afflict Rawls's own view.

Before I go on to elaborate on that brisk statement, I must say a bit more about what I mean by "Kant's political philosophy" and "political liberalism".

Kant's political philosophy is centered on his conception of *right* (*Recht*) – the conditions that enable rightful relations among persons who interact and thus influence each other's external freedom.¹ Kant's foundational assumption is that all persons have an *innate right to freedom*, understood as the independence from the constraining choice of others. Kant also expresses this by saying that all have a title to be their own master – to set their own ends rather than be subjected to the ends of others. Through a sophisticated analysis, Kant argues that the rights of all can only be conclusively settled and secured in a *civil condition* under a republican state which establishes the impartial rule of law. In order to be fully consistent with everyone's right to freedom, the legislative authority in the republican state can only belong to the general, united will of the people, and no law can be legitimate unless all citizens as a

¹ I follow Mary Gregor in using "right" for the German "Recht", as I explain in section 1.2 below.

collective body could consent to it. This, in very rough strokes, is the argument of the main parts of Kant's Doctrine of Right (*Rechtslehre*), the first part of his mature work *The Metaphysics of Morals* (Kant, 1996 [1797]).

I associate political liberalism principally with two tenets, one negative and one positive. The negative tenet is that liberal rights and principles are not based on, or derived from, any conception of the good or valuable ends of human life or any religious or metaphysical worldview. Therefore, when the liberal state acts within the framework set by these rights and principles, it does not act to protect and promote any such values or beliefs. The positive tenet is that the exercise of political power in a liberal democracy ought to be justified by appeal to values and principles that all who are subjected to that power can reasonably be expected to share in their capacity as free and equal citizens. These values and principles make up the content of society's "public reason", which is a common basis of political justification and a framework for public deliberation. Political liberalism thus understood is motivated by the idea that people who are committed to the basic values of a liberal democracy can nevertheless disagree fundamentally and irreconcilably about what is good, right, and true. Therefore, the thought goes, a basis of social unity and political justification should be sought independently of these questions.

Political liberalism in this sense is most famously developed and defended by Rawls in his important book of that title and in subsequent articles (2005a, b, c, d). In that work, the negative tenet finds expression in the requirement that political conceptions of justice should be free-standing, while the positive tenet finds expression in his liberal principle of legitimacy and his ideas of public reason. While I take Rawls's work to be paradigmatic, I do not take the meaning of "political liberalism" to be fixed by his *Political Liberalism*. The view has been developed by several other theorists besides Rawls, in different directions. I most closely follow Jonathan Quong's understanding of the term, which draws heavily from Rawls but is more precise and better suited to my purposes (Quong, 2011).² Among other things, Quong helps to bring out the point that political liberalism is not essentially "historicist and antiuniversalist" or "impoverished [and] parochial", as Rawls's work has been both acclaimed and decried for (Rorty, 1988, p. 262, Taylor, 2011, p. 299). Instead it is, at its heart, a theory about

² I discuss the taxonomy of liberal theories, and my more specific reasons for following Quong, in chapter 2. What I have called the positive aspect of political liberalism is not entailed by the negative aspect; while a liberal theory that accepts only the latter could also be identified as a form of political liberalism, I am interested here in the constellation of the two, or what Quong calls the "public justification model" of political liberalism (Quong, 2011, p. 17). This model is also followed by Charles Larmore and Gerald Gaus, and I draw on their work as well (e.g. Gaus, 2003, 2015, Larmore, 2008, 2015).

how the exercise of political power in a liberal society ought to be justified in light of basic liberal commitments, and as such it can take on different specific forms.

In light of the two tenets of political liberalism, my thesis effectively breaks down into two: first, that Kant's principles of right are tailor-made for the essentially political problem of establishing reciprocal relations of external freedom, and are not derived from or based on the substantive parts of his broader ethical theory; second, that Kant's account of political justification, according to which laws are justified only if all citizens could consent to them, can be seen to express an idea of public reason. These sub-conclusions mutually support the thesis that Kant's conception of right can be interpreted as a form of political liberalism. Thus while my thesis question might seem unduly anachronistic, it actually goes to the heart of Kant's conception of right: it is a question about how the political order itself, and particular laws and policies within it, can be justified on Kant's view.

As I began by saying, political liberals routinely deny that Kant's liberalism could be seen as political. The title of this thesis is thus meant to evoke an air of paradox. Most prominently, Rawls often distanced his own view from what he called Kant's "comprehensive liberalism". In a modern, pluralistic democracy, Rawls argues, political justification should only be based in an "overlapping consensus" on strictly political values and principles among people of different faiths and worldviews; a liberal conception of justice that is based on anything like Kant's moral "ideal of autonomy", or any other comprehensive moral or ethical ideal, could only be "but another sectarian doctrine" (1985, p. 246). In his commentary on Rawls, Samuel Freeman explicates the point saying that Kant's liberalism "cannot serve as a political conception reasonably acceptable to free and equal citizens" because it "affirms autonomy ... as an intrinsic human good that is to be promoted by institutions of justice" (Freeman, 2007, p. 466). Martha C. Nussbaum concurs: she argues that while Kant was concerned with state neutrality in the face of religious diversity, he nevertheless "see[s] nothing wrong with building the state on a comprehensive ethical doctrine" (Nussbaum, 2015, p. 16). While these claims are not themselves based on Kant scholarship, they are supported by many Kant scholars, who commonly hold that Kant's principles of right are derived or deduced from the Categorical Imperative, or at least rooted firmly in that principle and its wider philosophical framework (e.g. Byrd and Hruschka, 2010, Guyer, 2000, 2005, Mulholland, 1990, O'Neill, 2012, Seel, 2009, Uleman, 2004). To these scholars, the comprehensive basis of Kant's conception of right supports the unity and integrity of his philosophy; to the political liberals, the same conclusion entails his irrelevance to contemporary debates and problems.

While this arguably remains the standard picture of Kant's political philosophy, an alternative picture is emerging from the work done by scholars who highlight the independence of right from ethics on Kant's conception. A pioneer in this regard is Thomas Pogge, who defends a "free-standing" interpretation of Kant's principles of right in an influential article where he engages directly with Rawls's distinction (Pogge, 1997, 2012); several others have reached substantively similar conclusions, focusing on different aspects of Kant's account (Flikschuh, 2010, Hodgson, 2010a, Ripstein, 2009a, b, Willaschek, 1997, 2009, Wood, 1997, 2014).³ On the picture they suggest, Kant's conception of right is focused squarely on external freedom; the Categorical Imperative, as a principle of internal or moral freedom, cannot be used to solve the problem of how the external freedom of each can be reconciled with the external freedom of others. And, they point out, Kant never argues that his principles of right are or can be deduced or derived from the Categorical Imperative. If this side of the debate is in the right – as I believe it is – then Rawls & co were wrong to assume that Kant saw an ethical ideal of autonomy as the basis and end of justice.

In chapter 2, I review this scholarly debate in more detail, after having first outlined some of the elementary features of Kant's Doctrine of Right and discussed the distinction between comprehensive and political liberalism. On this background, I go on in chapter 3 to develop my own interpretation of the reasoning underlying Kant's conception of right, supporting and adding to the conclusions drawn by other scholars I have reviewed. This affirms the attribution of the negative tenet of political liberalism: for Kant, right is not based on ethics, and so the republican state does not base its legitimacy on any conception of the good. I then build on that conclusion and argue, in chapter 4, that we find support even for the positive tenet of political liberalism, the idea of public reason, in Kant's views. Here I face other objections. Rawls's idea of public reason is connected with a conception of democratic citizenship (2005a, p. 216). It has been argued, though, that Kant's conception of legitimacy is purely hypothetical or formal and therefore lacks a connection with democratic self-legislation, and that his conception of the public use of one's reason is purely rational or modal and therefore lacks a connection with the role of citizenship (Flikschuh, 2010, 2012, O'Neill, 1997, 2015, Stilz, 2009). I argue to the contrary that because Kant introduces the idea of the original contract as a normative requirement for legislators, and because he views citizens as colegislating members of the state, that ideal must apply to them as well when reasoning or

³ Apart from Hodgson, these scholars do not relate their discussion to political liberalism.

deliberating *as* citizens. This allows me to conclude that Kant's account of political justification affirms an idea of public reason which is not simply the application of an ethical ideal to the political sphere. It will become abundantly clear, however, that Kant was not a Rawlsian, and so the political liberalism we can take his view to affirm is a distinctive one. With the leverage gained in chapters 2-4, I am in a position to consider its distinctive features and merits in chapter 5. Most significantly, Kant takes up the aim of justifying the institutions of the liberal state, whereas Rawls takes them as given starting points for political justification. I argue that Rawls's approach is problematic because it fails to justify the exclusion of persons who do not accept the authority of these institutions from public reason. This is a problem that Kant's more foundational approach helps to solve.

Some further considerations on the historical background and contemporary relevance of my thesis are due before I go on. While Kant is universally heralded as one of the greatest philosophers ever by any measure, his reputation as a *political* philosopher is not on the same plane. While his essay "Toward Perpetual Peace" has had a significant influence on debates about cosmopolitanism and international relations, the systematic account of right he develops in *The Metaphysics of Morals* is rarely included among the classics of political theory and is often derided as opaque and ill-conceived (e.g. by Hannah Arendt (1982), echoing the sentiment of Schopenhauer). Kant's position has variously been interpreted as Hobbesian, Lockean or Rousseauvian, or as a *mischmasch* of all, and in any case as providing little new and insightful (on the various lines of interpretations, see Varden, 2015). Rawls's own work give significant testimony to this state of affairs. In his early *magnum opus*, *A Theory of Justice*, he argued that his conception of "Justice as Fairness" was "fundamentally Kantian in nature" mainly in virtue of an interpretation of Kant's ethical works, notably the *Groundwork for the Metaphysics of Morals*, and not his political works (Rawls, 1971, pp. vii, 11, 251ff.).⁴ Moreover, he only covered Kant in his *Lectures on Moral Philosophy* and not in his *Lectures on Political Philosophy*, where he skipped from Rousseau to Mill (Rawls, 2000, 2007).⁵ As I said, this only reflects a general trend of neglect toward Kant's political thought. Especially since the publication of Mary Gregor's authoritative translation in 1991, there has been a

⁴ This reliance on Kantian ethics is (part of) what Rawls came to see as the problem with his earlier work (Rawls, 2005c, p. xl). Otfried Höffe suggests that if Rawls had interpreted Justice as Fairness through the lens of Kant's principles of right instead of the Categorical Imperative, he could have avoided the conflation of a conception of justice and a comprehensive moral doctrine right from the start (Höffe, 2015, p. 25).

⁵ He does, however, briefly discuss Kant's political philosophy in comparison with Hegel's in the former (Rawls, 2000, pp. 362ff.)

surge of scholarly interest in the Doctrine of Right, with Arthur Ripstein's *Force and Freedom* as the most significant and influential exemplar in English (Ripstein, 2009a). As a result, Kant's political philosophy is now a hot topic, as is political liberalism and the associated idea of public reason, which have been subject to intense debate since Rawls "went political" in the mid-1980's. There is good reason for this. The problem that Kant and Rawls address in their political thinking – the problem of how to order a social world with others in a way that enables us to interact on rightful terms that preserve freedom and equality of each – is a problem that confronts us all. Thinking through their responses to that problem is a way of gripping with the problem itself. While my focus is on Kant, I hope my thesis can shed light on those wider debates as well.

1.2 Methods, concepts, limits. Some preliminary reflections

I will discuss the relations between political liberalism and Kant's theory of right by interpreting each in light of the other, and thus it might seem like I am taking up the Procrustean strategy of lopping and stretching conceptions arbitrarily to make them fit.⁶ To this worry I should emphasize that political liberalism is very much a work in progress; the interpretation of its defining characteristics, as well as its goals, aspirations and motivations, is still a matter of debate. There would not be much sense to taking it simply as given notion with a fixed meaning. Still, I am not simply making stipulative definitions, and I anchor my understanding of political liberalism, as well as my interpretation of Kant's view, in the recent scholarly literature throughout.

Another worry may be that my approach to Kant is unduly anachronistic because I am mixing together historical interpretation with the concerns contemporary debates. Famously, Quentin Skinner argues that it is a mistake to approach historical thinkers as though they were all discussing the same perennial philosophical questions (Skinner, 1969). Coming from a similar standpoint, Bernard Williams advises against the common practice among early analytical philosophers to "approach the works of Plato as though they had appeared in last month's issue of *Mind*" (Williams, 2006a, p. 268). In pursuing the aims of my thesis as I do, I may seem to commit the equivalent mistake of approaching Kant's political writings as if they were published in the latest volumes of *Philosophy & Public Affairs*, discussing the same perennial problems that occupy other writers in that journal.

⁶ As Procrustes, the son of Poseidon, lopped and stretched his guests to make them fit his bed. I owe the reference and the phrasing to Ronald Dworkin (2011, p. 5).

In response, I emphasize that my primary concern is not with the understanding of Kant's political thought as such, but rather with what we today should make of his thought. In general, when our concern is to find out what a historical thinker can contribute to contemporary normative debates, it makes sense to read that thinker's works in light of the concerns that animate those debates, even if that may not be the best method for understanding the texts in their own right. In my case, there is also a more particular reason for choosing this approach to Kant, namely that many of these animating concerns are themselves deeply inspired by his views. Indeed, it is not an exaggeration to say that contemporary debates in political philosophy are to a large extent debates over how to deal with the legacy of Kant's thought in our contemporary world. Nevertheless, Kant's own mature writings on legal and political philosophy are seldom brought into focus in these debates. Confronting these writings with current philosophical positions that are broadly Kantian in word and spirit may allow us to deal with Kant's legacy in a more nuanced way.

At the same time, I also want to resist the idea that anachronistic readings of historical texts cannot contribute anything to genuine understanding of them. Attention is selective, in historical interpretation as well as in perception, and reading Kant from the perspective of current-day debates can direct our attention to features of the text that may escape us when reading him from the perspective of his (mediate and immediate) philosophical and historical context. What we must avoid is to confuse Kant's concepts and distinctions with our own; anachronism must be committed consciously and critically. Here I agree with Thomas Pogge, who says at the outset of his paper "Is Kant's *Rechtslehre* a Comprehensive Doctrine?" that "My guiding thought is that we can gain a better understanding of Kant's *Rechtslehre* by confronting it with the distinction Rawls developed two centuries later" (Pogge, 2012, p. 133).

While I share that outlook, I have another guiding thought as well. Whereas Pogge declares (immediately preceding the quoted sentence) that "My interest here ... is entirely focused on Kant", I focus my interest also, albeit secondarily, on Rawls and the broader project of political liberalism. Thus my other guiding thought is that we can gain a better understanding of the distinction Rawls developed by confronting it with Kant's thought.

Now, to some conceptual matters. As I noted in the beginning, I follow Mary Gregor's translation of "Recht" as "right", to preserve the connection with "a right" and "rightful".

“Recht” has connotations to both “law” and “justice” but is identical to neither.⁷ More specifically, right has to do with the rightful exercise of power, with what someone may be compelled to do or refrain from doing. It is important to notice that right in Kant’s sense is not the same as what is often referred to as “the right” in moral philosophy, as opposed to “the good”. The right is a broader concept that has to do with moral rules and duties in general, not necessarily related to coercion or the mutual influence of external freedom. Kant clearly believes that there are not duties of right but nevertheless belong to “the right” in this broader sense: the duty to tell the truth being the most obvious example. On some understandings, all of Kant’s moral philosophy is concerned primarily with “the right”, although *right* – *Recht* – is only a small, but crucially important part of it.

As for Kant’s specific conception of right, I follow Rawls and others in referring to it as a form of “liberalism”. While Kant himself did not (and could not) even see himself as a liberal (and a fortiori not as a political liberal), the label fits because of his strong emphasis on individual freedom as the main end of government as well as his emphasis on the rational acceptability of laws and policies (Nagel, 2002, Wall, 2015). Some might object to the label because they think that Kant’s political theory is a form of republicanism, not liberalism (as for example Jürgen Habermas (2011a) contrasts his “Kantian republicanism” with Rawls’s political liberalism). To be sure, Kant’s theory shares some important features with republicanism in its emphasis on the normative significance of public institutions and its conception of freedom as independence rather than non-interference. I do not mean play down these features. Rather, I think modern republicans often overstate the distance between liberalism and republicanism when they present them as stark alternatives; more broadly and charitably interpreted, the views can be seen as belonging to a single larger family (cf. Gaus et al., 2015, Wall, 2015, p. 15). On my understanding, Kant’s theory of right is as good an example as you get of a political theory that is both liberal and republican (cf. Malik, 2014, p. 6-7).⁸

Another serious conceptual matter, which will help to clarify my aim, is the following. Throughout his academic career, Rawls developed and refined a *conception of justice* that he called “Justice as Fairness.” This conception is centered on his famous two principles of justice for a democratic society: the first principle guarantees a set of equal basic liberties for all

⁷ See Gregor’s “Translators’ note” (Kant, 1996 [1797], pp. 358-359). Indeed, it is characteristic of Kant’s approach to political philosophy that law and justice are closely interconnected through the concept of right (cf. Ripstein, 2012a, p. 60).

⁸ Pettit discusses Kant’s place in the broader republican tradition, and gives an account of that tradition and its difference from the liberal tradition as he sees it, in an instructive recent article (Pettit, 2013).

citizens, while the second requires that social and economic inequalities must be compatible with fair equality of opportunity and work to the benefit of the least-advantaged members of society. In his later works, Rawls modified the exposition of this conception of justice to make it fit into a broader theoretical *framework* that he came to see as necessary – a framework he came to call “political liberalism”. This framework places a set of requirements on how *any* liberal conception of justice – including Justice as Fairness, but also other reasonable conceptions – can be justified given the pluralism that inevitably prevails in any liberal society. These requirements are needed in order to secure the legitimacy and stability of a (reasonably just) constitutional liberal democracy. My point now is to make it clear that I do *not* want to argue that Kant’s Doctrine of Right can be interpreted as a kind of liberal conception of justice that more or less fits into Rawls’s framework of political liberalism. I rather want to argue that the Doctrine of Right can be interpreted as framework of its own, which is relevantly similar to but ultimately distinct from Rawls’s. Kant works out an institutional and philosophical framework, with its own conditions of legitimacy and stability, into which different conceptions of justice (in our modern sense of the word) can fit – plausibly including Justice as Fairness (although that is not the crucial issue). In this framework, I shall argue, we can find Kantian interpretations of the ideas of public reason, reasonable persons, and political values that play an important role in Rawls’s framework. Here, my approach accords with an important point made by Louis-Philippe Hodgson:

Kant’s primary aim is not the one that animates *Theory of Justice* but rather the one that motivates Rawls’s later works: it is to put forward not a theory of justice but a theory of state legitimacy ... If Kant’s political thought is in competition with any part of Rawls’s output, then, it is with the later works; turning to *Theory of Justice* as a substitute for the Doctrine of Right amounts to changing the topic. (Hodgson, 2010a, p. 804-805, n. 33)

I take Hodgson’s perceptive, but cursory argument to suggest that we can see Kant as affirming a form of political liberalism which can be compared on its merits with Rawls’s later theory. What I want to do is to explore and elaborate on that suggestion, and this is what I talk about when I talk about “Kant’s conception of right”. I do not want to compare Rawls’s Justice as Fairness with something relevantly similar that I find in the Doctrine of Right, something that plays the same role in Kant’s political philosophy that Justice as Fairness plays in Rawls’s, some substantive “principles of justice” and a method of arriving at them. In my discussion, however I use the word “conception” in a looser and more general sense than that

implied in Rawls' term "conception of justice", to describe the general approach they take to the problem of how coercive institutions and terms of social cooperation can be justified. This covers both what I just called the "framework" and the "conception" (in the narrower sense).

Finally, I want to point to some of the limitations of my study. To begin with, there is much to Kant's legal and political philosophy that I leave out of the picture: his accounts of the right of nations, cosmopolitan right, punishment, resistance and revolution, and so on. I do not aim to give a comprehensive picture, but to highlight the aspects of his view that I find congenial to political liberalism (and whatever else is necessary to provide the context of those aspects). Moreover, Kant's political theory has been subject to wildly diverging interpretations in the secondary literature, ranging from the absolutist through the libertarian to the radically democratic. My reading is inspired throughout by the liberal and republican interpretations that have recently been advanced by Ripstein and others. While I note some diverging interpretations here and there, I cannot hope to defend my reading against others at all points.

Since my focus is on political liberalism and not on Rawls or liberal theory in general, I will not discuss Rawls's earlier work prior to his "political turn" or his discussions of Kant in other writings. It is also not my goal to defend political liberalism over its alternatives, whether comprehensive forms of liberalism or non-liberal theories. I will therefore not deal with the extensive critical literature about the ideas of public reason and political conceptions of justice, although some of what I say is relevant to some of the criticisms. I do, however, offer some reflections on the ideals of Kant's political liberalism in the concluding chapter and why we can them attractive.

One last thing. The "fact of reasonable pluralism" is central to Rawls's political liberalism and an important topic in subsequent debates, but I do not find place here for any close discussion of it. According to this purported fact, reasonable persons living in a free society will inevitably diverge in their moral, philosophical, and religious convictions due to the "burdens of judgment" – epistemic conditions such as the difficulties of weighing evidence, difference in experience and upbringing and so on. A close discussion of these issues would lead into the vast territory of Kant's writings on history, religion, and reason, as if there were not land to chart in his political writings. Moreover, several scholars have argued that Rawls's account of the "burdens of judgment" is problematic and not essential to political liberalism as a normative project, and if so, the fact of reasonable pluralism may not be as central as it has often been thought to be (e.g. Nussbaum, 2015, Wenar, 1995). It is clear in any case that the mere empirical probability that people might not agree with Kant's ethical theory is not the motivation behind his political liberalism. That motivation is, instead, that all have a title to be

their own master rather than be mastered by others, and that this basic commitment requires a public framework of justice which abstracts from the ethical or religious ends and duties that reasonable persons may affirm. What matters to political justification is not the inevitability of disagreement but the possibility for persons to make different judgments and setting different ends, consistently with their sharing the end of justice in a rightful condition. This is the view that I will be elaborating in the chapters to come.

2. Kant's conception of right: Comprehensive or free-standing?

Before I can begin develop an answer to the question of whether Kant's political philosophy can be interpreted as a form of political liberalism, I need to lay some groundwork. My purpose in this chapter is therefore mostly expository. I introduce the most important concepts and arguments of Kant's conception of right (2.1), as well as the debate over its justificatory basis and status within his philosophy (2.3-4). In doing this, I appeal to Rawls's distinction between comprehensive and political or free-standing conceptions of justice, and so I also introduce and discuss that distinction, drawing on the work of Jonathan Quong (2.2). In that section, I try to calm the worry that my thesis is doomed from the start simply because Kant presents his principles of right as belonging to a "metaphysics of morals". Through these expositions and discussions, I hope to motivate my thesis and point to the direction

2.1 Kant's conception of right: An overview⁹

My purpose in the following is to lay a groundwork for the subsequent discussion; I therefore highlight the aspects of Kant's argument that are relatively uncontroversial in the secondary literature, or at least aspects that are not at stake in the specific debates that interest me. Going through these rather dry matters now saves me some exposition later.

The cornerstone of Kant's conception of right is the Universal Principle of Right (UPR): "Any action is *right* which by itself or by its maxim allows the freedom of choice of each to coexist with everyone's freedom in accordance with a universal law" (MM 6:230).¹⁰ Kant states this principle immediately after having delineated three limiting features of the concept of right (*Recht*), which is his subject matter. First, right concerns only the external and practical relations among persons who can influence each other by their actions; second, it concerns reciprocal relations of choice and not mere wish or even needs; third, it concerns the formal compatibility of action with the power of choice of others and not the matter or ends of action. Right, then, abstracts from motivation, wishes and ends, and concerns only

⁹ This section has a distant ancestor in an earlier semester essay (Mæland, 2013).

¹⁰ Translation adapted. Original: "Eine jede Handlung ist *recht*, die oder nach deren Maxime die Freiheit der Willkür eines jeden mit jedermanns Freiheit nach einem allgemeinen Gesetze zusammen bestehen kann etc." Gregor has "Any action is *right* if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice can coexist with everyone's freedom in accordance with a universal law".

“the conditions under which the choice of one can be united with the choice of others in accordance with a universal law” (MM 6:230). Accordingly, UPR sorts actions into two categories, right or wrong, depending on whether they are formally compatible with the freedom of choice of all under a universal law.

What underlies this definition is a further set of distinctions that Kant makes in the general introduction to *The Metaphysics of Morals*. First, The faculty or capacity by which an agent subjects herself to moral laws is practical reason or will (*Wille*), and the capacity for determining one’s own actions and purposes, which is called choice or the power of choice (*Willkür*) (MM 6:213). It is this latter capacity Kant refers to when talking about relations of choice, the freedom of choice and the compatibility of one’s power of choice with another’s. Next, Kant says that moral laws, and correspondingly the moral duties they determine, are of two fundamentally different kinds: *ethical* and *juridical* (MM 6:214). This distinction underlies the division of the *Metaphysics* into a Doctrine of Right (*Rechtslehre*), which deals with juridical duties or duties of right, and a Doctrine of Virtue (*Tugendlehre*), which deals with ethical duties or duties of virtue. These sets of laws and duties respectively make up the spheres of right and ethics, which together make up the general sphere of morals (*Sitten*). Kant explains the distinction between the spheres by reference to a further distinction between freedom in the *external* use of choice (or external freedom) and freedom in the *internal* use of choice (or internal freedom). The latter concerns which ends we choose to pursue and the motives of our actions, while the former concerns how we interact with the world around us and specifically which means we choose to take up in pursuit of our aims. Juridical laws relate exclusively to our external freedom; they only regulate external actions and choices. Ethical laws, however, relate to our internal as well as our external freedom; they govern not only actions but also what Kant calls “the determining grounds of actions”, that is, my *reasons* for acting and in general the *ends* for which I act (MM 6:214).

The two kinds of law give rise to a parallel distinction in lawgiving or legislation: whereas ethical legislation “includes the incentive (*Triebfeder*) of duty in the law”, juridical legislation “admits an incentive other than the idea of duty itself” (MM 6:219). This means that juridical legislation only commands me to do the right thing; ethical legislation tells me also to do this for the right reason, that is, to do the right thing *because* it is the right thing. As Kant also puts it, my reasons for paying taxes or respecting “No smoking”-zones make a difference to the *morality* of my actions, but they are irrelevant to their *legality* (MM 6:219, also 6:225). Therefore one can act in perfect compliance with juridical laws without complying with ethical laws – one can be “a good citizen even if not a morally good human

being,” as Kant puts it in “Toward Perpetual Peace” (PP 8:366), if for instance one keeps the law only for fear of punishment. The contrary does not hold, however: one cannot be a morally good human being without keeping the law. Kant emphasizes that juridical laws are also “indirectly ethical” in the sense that one also has an ethical duty to comply with them (MM 6:219-221). To be a morally good person requires *self-constraint*, and cannot be achieved through through *external constraint*. Duties which others can coerce me to fulfill, such as paying taxes, are called by Kant *duties of right*, and only these duties can be subject of *external or positive* lawgiving (MM 6:239, 6:379-383), since such laws function precisely as external constraints. Duties of *virtue* require ethical motivation and therefore cannot be subject to external lawgiving, which only commands external actions.

Again, while the significance or import of these distinctions is a matter of debate among scholars, as we will see in the literature review later, the distinctions themselves are not in dispute. No one denies, for example, that Kant distinguishes sharply between right and ethics, or that right as well as ethics belongs to morals, or that duties of right are indirectly ethical – even if they disagree about how the spheres or duties are ultimately related or grounded.

As we saw, UPR only sorts actions into the two categories of right and wrong. By itself, this does not say much about the status of persons. Soon enough, though, Kant goes beyond this to say that all human beings have an *innate right* to external freedom. That the right to freedom is *innate* means that we haven’t acquired it through something we or someone else has done (*a deed*). Indeed, Kant says that the right to freedom is the only innate right: “*Freedom* (independence from being constrained by another’s choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right belonging to every man by virtue of his humanity” (MM 6:237). Since the right to freedom is innate, it holds independently of the state, even in the pre-political “state of nature”. Nevertheless, Kant argues that a *rightful* condition can only be a *civil* condition, that is, in a juridically constituted state that establishes a system of public law. Indeed, if we find ourselves in a state of nature, we have an duty of right to leave it and enter a civil condition; if we don’t want to, others can legitimately compel us by force. To see how he reaches this conclusion, we need to consider the connection between right and coercion on Kant’s account.

The corollary of UPR is that “whatever is *wrong* is a hindrance to freedom in accordance with universal laws” (MM 6:231). Coercion is a hindrance to freedom. However, if someone attempts to coerce me, and I, in defense, coerce them to stop, my act of coercion is clearly not on par with theirs: Their offence is a hindrance to freedom, therefore inconsistent

with freedom in accordance with universal laws and therefore *wrong*; my self-defence is only “*hindering a hindrance to freedom,*” therefore consistent with freedom in accordance with a universal laws and therefore *right*. The same applies when someone else steps in to coercively hinder the hindrance of my freedom. However, the innate right to freedom by itself does not extend beyond the limits of your own body (MM 6:247-248); it does not authorize me to exclude others from using any external object I’m not physically holding on to, or to get them to do something they have promised me. Innate right does not extend to property and contract.¹¹ Such rights require that something external to us can nevertheless belong to us even when we don’t physically hold on to them; in Kant’s terms, they require that *intelligible possession* is possible. Kant’s reasons for thinking that such possession is possible is contained in his “*Postulate of practical reason with regard to rights*” (MM 6:250). The argument is roughly that because it is *physically* possible for rational agents to have external objects in their possession and use them as means to pursue their ends, and because it is possible for such objects to be used by some agent consistently with the freedom of other agents, a principle which said that such possession were nevertheless not *rightfully* possible would be a groundless restriction of freedom. The postulate of practical reason, then, extends our external freedom to things other than our own body, with the implication that others might wrong us not only by physically coercing us but also merely by taking things which belong to us or by failing to live up to their contractual obligations to us.

Kant argues that such rights can only be held conclusively in a civil condition, “under an authority giving laws publicly” (MM 6:255). In a state of nature, rights of property and contract can at most be *provisionally* rightful, if they are consistent with the conditions necessary for establishing a civil condition, but they can not be *conclusive*. Since a civil condition is a condition for the possibility of conclusively holding rights, it is also called a *rightful* condition; the state of nature, by contrast, is “devoid of justice” (MM 6:312).¹² The argument for this conclusion, roughly, that when something is rightfully mine, all others are placed under an obligation to refrain from using it; but since we are talking about acquired and not innate rights, others can only be obligated to leave my possessions alone if they, in

¹¹ In addition to property and contract right, Kant also discusses domestic right, which concerns people’s rights in relation to one another in family, marriage and so on. I leave this out for simplification. Property, contract and domestic right make up the subject matter of Private Right – the rights of private individuals in relation to one another – as opposed to Public Right, the rights of citizens in relation to the state.

¹² “Das rechtlicher Zustand” is also translated as “juridical state”, which highlights the connection with a constitutional state or a *Rechtsstaat* (Byrd and Hruschka, 2010). I stick with a “rightful condition” to highlight the connection with a legitimate social order.

turn, are assured that I and everyone else will leave their possessions alone. But such mutual assurance is simply not to be had in the state of nature (MM 6:255-256). The abstract concepts of right do not determine the exact boundaries of property, contract and status rights, and conflicts over these boundaries are inevitable; in the state of nature, there could be no impartial judge to determine the boundaries between “mine and thine”. Moreover, if rights were to be privately enforced by the individual parties, by each person for example dealing with trespassers on their property as they see fit, there could be no guarantee that coercion would be applied consistently and uniformly. For these reasons, it is imperative to leave the state of nature and establish a public system of justice: public legislation to make determinate laws of contract and property, public courts to resolve conflicts, and public law enforcement to secure everyone’s rights on an equal basis.¹³ This amounts to setting up a republican state, and it is, according to Kant, the only possible way of “connecting universal reciprocal coercion with the freedom of everyone” (MM 6:232). Thus we are not entitled to enforce our provisional rights of property and contract in the state of nature; we can, however, constrain others to join with us in instituting a rightful, civil condition. In such a state we are not dependent on anyone else’s private choice but only on what Kant calls the general united will of all. In line with other classical social contract theorists, then, Kant justifies political authority from the bottom-up, from the point of view of the individual persons living together in a state of nature (cf. Gilje, 2013); but unlike some other contract theorists, Kant does not take actual consent (whether tacit or expressed) to be necessary to establish the rightful authority of the state.

The republican state that Kant sees as the only condition fully compatible with right is a “*representative system of the people*”¹⁴ in which the legislative, executive and judicial authorities are held separate and subordinate to one another (MM 6:341, 6:316). The legislative authority “can belong only to the united will of the people” – the citizens of a republic are thus not only subjects but also “colegislating members of the state” (MM 6:313, 6:345). Because the executive and judicial authorities are subordinate to the law, the citizens as a collective body (the legislative authority) make up the sovereign. Still, citizens do not legislate directly by drafting and deciding on laws, but indirectly through being represented by deputies

¹³ There is no consensus about why Kant holds the state to be necessary. The account I am sketching here is dominant in the recent literature (e.g. Ripstein, 2009a, Stilz, 2009); on this view, the state is constitutively necessary for a condition of justice. On another view, the state is only instrumentally necessary due to moral nature’s propensity for immoral action (O’Neill, 2012).

¹⁴ “ein repräsentatives System des Volks”; Gregor’s translation, “a system representing the people” is imprecise and potentially misleading, as is argued by Lundestad (2013, p. 243).

or delegates in a legislative assembly, who are “guardians of [the people’s] freedom and rights” (MM 6:319). This duty requires legislators to give laws that the citizens could have given themselves consistently with their title to remain free, equal, and independent – the three “lawful attributes” of the citizen, which correspond to the attributes Kant takes to be involved in the innate right to external freedom. This duty, which Kant introduces as a standard of legitimacy

2.2 Comprehensive or free-standing?

2.2.1 *The basis of right and Rawls’s challenge*

As I said, I have here highlighted the mostly uncontroversial elementary features of Kant’s argument in the Doctrine of Right. The controversy I want to focus on in the remainder of this chapter is about the fundamental question: What is the basis of this argument? Is it an application of his ethical or metaphysical theory to the legal and political domain, and does it depend on his conceptions of the moral law or transcendental idealism? How is the concept of external freedom connected with the concept of internal freedom? Is the Universal Principle of Right derived from the Categorical Imperative? If not, how then is it arrived at and what is its normative status?

The sentiment that Kant himself had not made his views clear on these matters goes back to his own day. Johann Gottlob Fichte said in the introduction to his *Foundations of Natural Right* from 1796 (with reference to Kant’s earlier essay “Toward Perpetual Peace”) that “it is not possible to see clearly whether Kant derives the law of right from the moral law (in accordance with the usual way of doing things) or whether he adopts another deduction of the law of right” (Fichte, 2000 [1796]). This sentiment is echoed in our time by Jürgen Habermas, who says in his *Between Facts and Norms* that “Even in his *Rechtslehre* (...) Kant ultimately fails to clarify the relations among the principles of morality, law (or right), and democracy” (Habermas, 1996, p. 90). Over the past decades, various scholars have tried to clear things up on Kant’s behalf, but no consensus has emerged from the scholarly debate. The cause of this confusion can be traced to several puzzling features of Kant’s exposition of his ideas. For example, he states UPR immediately following the definition of right, without any argument; he also refers to it as “a postulate that is incapable of further proof” (MM 6:231) and to the innate right to freedom as an “axiom” (MM 6:267), which suggests they are simply assumed and not based on anything else. Kant’s claim that “we know our own freedom (from which all moral laws, and so all rights as well as duties proceed) only through the *moral imperative* ... from which ... the concept of a right, can afterwards be explicated” (MM 6:239), however,

suggests right is based in some way on ethics or internal freedom after all. It also contributes to the confusion that Kant makes new distinctions, or seems to give new meaning to older distinctions, such that they are difficult to map onto his earlier accounts; the distinction between *Wille* and *Willkür* is a case in point.

In addition to such textual puzzles, however, I think the interpretive difficulty also reflects the genuine philosophical difficulty of the problem Kant is struggling to resolve. Law is an external constraint on human freedom, and yet it depends on a claim to legitimate authority, a claim to be binding or obligatory. How can such claims be squared with the moral freedom and equality of persons? The problem is of course not original with Kant, but I think he, more than most others, recognized its depth and difficulty and the inadequacy of attempts to solve it by appeal to some notion of divine order, human perfection, or even ethical duty and the moral law by itself. He saw that accounting for the obligation as well as the coercion of law – the “validity” as well as the “facticity” (cf. Habermas, 1996) – required another approach, a change of perspective,¹⁵ which seems to have led him ultimately to rethink some his previous assumptions about moral theory. The result is a challenging doctrine which is difficult fully to understand on the background of his earlier theories, and where the underlying difficulties inevitably shine through.¹⁶ (Those who set out a simple solution to the interpretive problem, I fear, underestimate the difficulty of the philosophical problem.)

As I explained in the Introduction, my interest in the debate derives from the question of whether Kant’s political philosophy can be interpreted as a form of political liberalism. If his conception of right depend on the substantive parts of his conceptions of ethics or metaphysics theories, then his liberalism is plausibly not political but rather *comprehensive*, as Rawls assumed. Of course, not all see this is a cost: some argue that Rawls’s political turn was a mistake and that a liberal theory of justice must be comprehensive (e.g. Dworkin, 2011, Taylor, 2011). To Rawls and many who have followed him, however, a comprehensive liberalism cannot form the basis of political justification in a democratic society where many reasonable people hold very different conceptions of the good. In a constitutional democracy, the exercise of political power should be justified by appeal to reasons that all reasonable citizens can accept; but it cannot be assumed that all reasonable citizens will accept Kant’s ethics and metaphysics, and so a liberal theory built on those foundations should therefore be rejected. In

¹⁵ Cf. Øystein Lundestad (2013, p. 122), quoting Wolfgang Kersting.

¹⁶ It belongs to the story that Kant first set out his intention to write a metaphysics of morals in 1765, more than 30 years prior to the publication of the final work.

Rawls's terms, comprehensive liberalism fails because it cannot form the object of an "overlapping consensus" among persons who hold different reasonable comprehensive doctrines, not all of which are liberal. Still, while some see political liberalism as decidedly un-Kantian, others see it as motivated by a Kantian concern with finding a legitimate basis for a political order. Louis-Philippe Hodgson, for example, claims that "Kant's views on the justification of coercion are strikingly similar to those that motivate Rawls's turn to political liberalism", and Thomas E. Hill argues that the possibility of an overlapping consensus is invoked in order to satisfy "a fundamental Kantian constraint, which Rawls calls *the liberal principle of legitimacy*" (Hill jr., 2000, p. 238, Hodgson, 2010a, p. 803). This gives us all the more reason to explore the possibility of a "political" interpretation of Kant's liberalism.

Importantly, I need not deny that Kant himself saw a connection between his political philosophy, his ethical theory and his wider philosophical concerns. Rawls emphasizes that "we must distinguish between how a political conception is presented and its being part of, or derivable within, a comprehensive doctrine" (2005c, p. 12). This means that even if Kant saw his conception of right as embedded in his critical philosophy, this in and of itself would not mean that that conception is objectionably comprehensive, by Rawls's standards: It can still be a free-standing conception as long as it does not *depend* on the truth of what we might call Kant's "comprehensive doctrine". As I have promised, in the following sections I will review some of the positions on this in the literature. Before getting to that, it will be useful to make some further clarifications about the questions I am interested in and the distinction between comprehensive and political liberalism that I bring to bear on Kant's theory.

2.2.2 Political and comprehensive liberalisms

Rawls introduced the distinction between political and comprehensive liberalism into the philosophical literature. However, he did not give a satisfying account of the distinction. According to Rawls, a *political* conception of justice is marked out by three features: first, it applies to the "basic structure" of society – its major political, social, and economic institutions – and not to all other aspects of human life; second, it is presented as "free-standing" and not as belonging to, or as derived from, a "comprehensive" moral, religious, or philosophical doctrine; third, it draws its content from ideas and values that are seen as implicit in the public political culture of a democratic society (2005a, pp. 11-13). We can surmise that "political liberalism", for Rawls, refers to any form of liberalism that is presented as a political conception of justice as defined by these three features. He does not make it clear whether a liberalism is comprehensive if it lacks all of these features, or if it suffices that it lacks any one of them, or perhaps

just the second one.¹⁷ Moreover, the definition seems to pack in too much baggage: Comprehensive doctrines, the basic structure, and the public political culture are all contentious terms that make the notion of political liberalism both unclear, unnecessarily loaded and tied too closely to Rawls's specific project. In short, Rawls does not put the distinction in a neat and tidy way.

This fault is remedied by Jonathan Quong in his more recent account of political liberalism. Quong distinguishes different kinds of liberal theories according to their answers to the following two questions:

1. Must liberal political philosophy be based in some particular ideal of what constitutes a valuable or worthwhile human life, or other metaphysical beliefs?
2. Is it permissible for a liberal state to promote or discourage some activities, ideals, or ways of life on grounds relating to their inherent or intrinsic value, or on the basis of other metaphysical claims? (Quong, 2011, p. 12)

Theories that answer “yes” to the first question are defined by Quong as *comprehensive*, while those that answer “no” are *political*; those that answer “yes” to the second question are *perfectionist*, while those that answer “no” to the second are *anti-perfectionist*. Since different answers may be combined, this yields a four-cornered matrix of theoretical options. Political liberalism refers to any liberal theory that is neither comprehensive or perfectionist (Quong, 2011, pp. 16-21). Such theories can take different forms; Quong associates his own and Rawls's views with a “public justification model” of political liberalism, which affirms an idea of public reason as the basis of political justification. I will also relate Kant's views to that more specific model in later chapters. But political liberalism as a general concept, and even the public justification model, does not entail everything that Rawls meant by calling his conception of justice political. Quong's matrix thus gives us a more precise and nuanced terminology with which to approach Kant's views. In which corner do they fit?

To Quong's second question, Kant's answer should be a clear “no”; Kant is not a perfectionist. The Universal Principle of Right makes it clear that anyone's freedom can only be

¹⁷ Pogge opts for the latter interpretation in his brief but instructive discussion (Pogge, 2012, p. 134). This seems natural. But it is also natural to think that a conception of for example environmental justice which applies to more than just the basic structure, and which draws its ideas from ecology rather than the public political culture, but which nevertheless presents itself as being compatible with different religions and worldviews – that is, it satisfies the second condition but not the rest – could equally count as comprehensive.

restricted for the sake of protecting everyone's external freedom, and this can be the only basis of the state's authority on Kant's account; so the Kantian state lacks authority to impose or promote some ethical ideal. And while Kant does say that we have an ethical duty to act in accordance with our legal duties, so that obeying the law is necessary for living a morally worthy life, this ethical duty is grounded in the legal duty rather than the other way around. That is what it means that the duty is only *indirectly* ethical. The ethical value or worth of some action, then, cannot itself be a ground for legal coercion. I think that all interpreters ultimately agree that Kant should not be seen as a perfectionist; however, as I will argue below, some comprehensive interpretations draw Kant's view uncomfortably close to perfectionism. This, I think, is due to the general problem that when one starts out from a comprehensive position, it is difficult ultimately to avoid perfectionist outcomes, as Quong argues (Quong, 2011, p. 25). So if we want to avoid the conclusion that Kant's conception of right is perfectionist – or that his normative position is unstable – we should carefully consider the grounds for a freestanding interpretation.

On Quong's first question, there is more ground for debate, as I will review shortly, but first I must clarify how I understand the terms of the question. When Quong writes "other metaphysical beliefs/claims", this might easily be thought to give the game away as far as Kant is concerned; after all, he states from the outset his aim of establishing "metaphysical first principles" of right. However, we should take care to note that the metaphysics of the Doctrine of Right is practical and not theoretical; it concerns our nature as moral agents who make choices and deliberate about what to do, and seeks a basis for its principles and concepts in practical reason.¹⁸ Thus we should not take the mere use of the word "metaphysical" to signal the entry into a wholly different realm of inquiry.¹⁹ The point of a metaphysics of morals, for Kant, is to find principles that have an "a priori basis" in that their normative status is independent of empirical contingencies (although they can surely take general empirical conditions into account), such that they are fit to hold universally and with necessity for ra-

¹⁸ Cf. Arthur Ripstein: "The metaphysics he speaks of is not a catalogue of claims about what is most real; it is a practical metaphysics, an articulation of the limits that each person's claim to be his or her own master impose on the conduct of others" (Ripstein, 2009a, pp. 6-7).

¹⁹ I should acknowledge here that I am inspired by Ronald Dworkin's argument that claims about the "metaphysical status" of moral principles can and should be read as complex claims about the content of those principles rather than as claims about some transcendent ontology to which moral principles correspond or refer (Dworkin, 2011, e.g. pp. 53ff). Given my inclination towards "two standpoints"-interpretations of transcendental idealism, I find the point congenial to Kant's views, although this of course raises interpretive questions I cannot hope to address adequately here. In the latter respect I am inspired by O'Neill (2000, p. 75).

tional agents (MM 6:205). To Kant, on the background of his criticism of traditional metaphysics in the *Critique of Pure Reason*, metaphysical inquiry in general is concerned with “a priori systems” and not “modes of being”, which is often taken to be the meaning of metaphysics in more modern conceptions (Uleman, 2004, p. 599). From the little he says about the matter, Quong seems to understand “metaphysics” in the sense of theoretical inquiry into modes of being, which is thus not the same as what Kant means. If that is right, Kant’s “metaphysical” principles might not count as metaphysical on Quong’s count.²⁰

To turn the perspective: Quong himself argues that all persons are under a “natural duty of justice” to support and comply with just institutions (Quong, 2011, pp. 126ff). This duty is presumably also meant to hold universally and necessarily for human beings and not to be based on empirical contingencies (although it may surely take general empirical conditions into account); thus it is metaphysical on Kant’s score. If it is not metaphysical on Quong’s score (and I assume that it is not), then the Universal Principle of Right plausibly is not either. Moreover, Quong argues (reasonably) that “Every political theory begins with certain bedrock considerations” on which its more specific normative requirements rest (Quong, 2011, p. 313); such bedrock considerations can be conceived as metaphysical in Kant’s sense if they are taken to be universal and not contingent or relativized in any substantial way. I will assume that beliefs and claims about principles of this kind – regardless of whether we want to call them “metaphysical” or not – are not the kind of beliefs and claims we should be concerned with when asking Quong’s questions.

This aside, Kant obviously relies on some further beliefs which can also be classed as metaphysical: the beliefs that human beings can be regarded as persons with intentions, purposes and the ability to make choices, and who can hold rights and duties. I also acknowledge that Kant understands these features on the background of transcendental idealism in so far as they concern the human being “represented in terms of his capacity for freedom”, the “*homo noumenon*”, as distinguished from the “*homo phaenomenon*”, the human being represented as part of the deterministic system of nature (MM 6:239). However, the relevant features themselves can be accounted for in a variety of other ways, and they are part and parcel of normal political as well as philosophical discourse (although they are denied by some metaphysical

²⁰ Byrd and Hruschka claim that for Kant, even the traffic code in a given jurisdiction is “part of metaphysics” because it assigns rights and duties to citizens (Byrd and Hruschka, 2010, p. 5). It does so because it is issued by a public authority that derives its legitimacy from the original contract, which is for Kant an idea of reason. This is compatible with the code itself being quite arbitrary, based on empirical contingencies and of very limited scope. Contemporary writers like Quong and Rawls would presumably not include the traffic code in metaphysics, but – importantly – this does not imply that they reject what Kant means by including it in metaphysics.

doctrines such as eliminative materialism, but that is a problem for those theories). The mere fact that they take on a wider meaning and significance in the context of Kant's critical philosophy should therefore not lead us to conclude that his conception of right is comprehensive. I assume that when we are considering his political theory as such, we are justified in taking a quietist attitude to his references to (for example) noumenal or intelligible features and bracket their possible significance in a metaphysical worldview, at least until they prove to be essential to the arguments.²¹

It is also important to note that not all moral beliefs are under question. Both Quong and Rawls are clear that the values and principles affirmed by political liberalism are moral, even while they are restricted to a political subject matter and not drawn from a comprehensive moral doctrine that applies to human life as a whole. This is important because Kant includes the Doctrine of Right in his *Metaphysics of Morals* and clearly sees it as belonging to his moral system at large. These facts might also be thought to give Kant away as a comprehensive theorist. What Kant means by including his theory of right in his moral system, however, is only that it states practical laws that are binding for free and rational agents, not that it is a kind of applied ethics. What is under question is whether his principles of right are based on, or are instances of, an ethical principle or ideal of general extension, such as the Categorical Imperative.

Of the authors whose arguments I will review below, Ludwig, Nance, Guyer, Uleman and Seel support Rawls' verdict that the Doctrine of Right is based in significant ways in Kant's comprehensive ethical or metaphysical doctrines, while Pogge, Hodgson, Wood and Willaschek reject that view. The following is only an overview of the main positions in the existing literature, not a conclusive treatment of the questions at stake. In the next chapter, I go on to outline my own interpretation of Kant's conception of right and its foundations, and discuss how it compares to the views of the authors reviewed here.²²

²¹ Bernd Ludwig argues for a stronger connection between Kant's conception of right and transcendental idealism. I review his interpretation below.

²² I have learnt from Robert Pippin's instructive discussion of what he calls "derivationist" and "separationist" interpretations of Kant's conception of right (Pippin, 2006, p. 419ff.). Pippin also proposes an interpretation of his own, but I fail to see how it makes out a clear alternative, so I leave it out from the following review. Much of what he says seems compatible with the view I will defend in the next chapter. His suggestion that our status as "intelligible beings" is only "actualized" in a civil condition clearly belongs to a comprehensive view, but this seems extraneous to the question of the foundations of right (Pippin, 2006, p. 438, cf. Wood, 2014, p. 73).

2.3 Comprehensive interpretations

2.3.1 Rawls and the ideal of autonomy

Since Rawls was my point of departure, I begin here with a closer inspection of his remarks about Kant. This will not take us very far, however. Rawls frequently contrasted his political liberalism with the comprehensive liberalisms of Kant as well as Mill, but he used these authors mostly as a foil against which to present his own views and never argued why he thought their theories were comprehensive. Perhaps he thought it was obvious; and of course, if by “Kant’s liberalism” he meant Kant’s practical philosophy as a whole, his claim was trivially true.²³ If we take “Kant’s liberalism” to mean the political and legal theory we find expressed in the Doctrine of Right, however, the matter is not at all obvious.

What Rawls does say is that Kant’s liberalism goes “well beyond the political” and relies on the ideal of autonomy as a moral value “belonging to a comprehensive doctrine” (2005b, p. 375, n. 3); he also emphasizes that his political liberalism does not invoke anything like Kant’s ideal of moral autonomy or Mill’s ideal of individuality in the argument for the political autonomy of citizens (2005a, p. 78). In an earlier article, he even suggested that Kant and Mill conceived of these ideals as “the only appropriate foundation for a constitutional regime” (1985, p. 246). We might take the recurrent grouping together of Kant and Mill to suggest that their theories have a common structure.²⁴ In *On Liberty*, Mill justifies his famous “liberty principle” partly by pointing to how it promotes the value of “Individuality, as one of the Elements of Well-Being” (Mill, 2008). This approach may be thought similar to how Kant in an early essay argues that extensive freedom of thought and speech is necessary to promote enlightenment, defined as “the human being’s emergence from his self-incurred minority (*Unmündigkeit*)” and summarized in the motto “Have courage to make use of your *own* understanding!” (AQE 8:35). We might imagine, at least, that Kant based his conception of right on this ground: The right to external freedom under universal law ensures that people will have to rely on their own understanding and thus become enlightened. This suggestion is supported by another early article, where Rawls references this essay as a source of the “Enlightenment values” embodied in Kant’s liberalism (1987, p. 6). Charles Larmore, one of Rawls’s accomplices in working out political liberalism, also suggests a similar view (Larmore, 2015).

²³ The impression that this is in fact what Rawls meant is strengthened when he compares his “political constructivism” with “Kant’s moral constructivism” and even the aims of Kant’s philosophy as a whole (Rawls, 2005a, pp. 99-101). Surely, the fact that Kant had wider philosophical aims cannot count towards viewing his liberalism as comprehensive (cf. Höffe, 1994, 2015, Pogge, 2012).

²⁴ Ultimately, I assume that Rawls knew Kant’s and Mill’s views much too well to actually have conflated them.

There is no evidence for such an argument in the Doctrine of Right, however. The only time Kant mentions autonomy in that work, he refers to the autonomy of a state, not a person (MM 6:318). As we have seen, Kant took great care to delimit duties of right from duties of ethics, and the former relate only to *external* freedom, that is, freedom of external action – not to inner, moral freedom, or the capacity of the will to give practical laws to itself (cf. Willaschek, 2009). The latter is what Kant elsewhere properly refers to as autonomy. This Kantian concept of autonomy, moreover, is quite different from what is often referred to as personal autonomy, the property of being an independent and self-directed person, which is more similar to Mill’s concept of individuality (cf. Gaus, 2005, p. 273, O’Neill, 2000, p. 74). Robert S. Taylor argues that the closest call to an ideal of personal autonomy in Kant’s writings are the imperfect duties to promote one’s own perfection and the happiness of others in the Doctrine of Virtue (Taylor, 2005). These duties clearly have no role to play in the sphere of right on Kant’s account. Even moral autonomy, however, cannot plausibly be understood to be a ground for legitimate coercion; as I said earlier, autonomy requires internal and not external constraint. Moreover, external freedom is equally compatible with autonomous and heteronomous agency, and it seems possible to act autonomously even when lacking external freedom. If moral autonomy is really at the foundation of right, then, it must be in an indirect way, through the principle of moral equality or the Categorical Imperative as the supreme principle of an autonomous morality. I turn now to interpretations that appeal to these principles.

2.3.2 Mulholland on moral equality

As one would expect, Kant scholars provide much more by way of argument for the claim that his conception of right is based on his ethics. To begin with a relatively weak account: Leslie A. Mulholland argues in his *Kant’s System of Rights* that Kant’s right must be seen to have an ethical basis because it rests on an assumption of moral equality; only this assumption can make intelligible the view that all human beings are to be regarded as persons who possess rights and that no one in the state can be regarded as mere things. While he notes the sharp distinction Kant makes between right and ethics, he argues that the dividing line between them cannot ultimately be defended:

If law is separated from ethics, however, there is no ground for insisting that all beings who in the sphere of ethics have the status of person, also have this status in law ... Kant cannot maintain both that the principle of law contains nothing ethical and maintain that it implies that all

human beings are persons in law. That all human beings are persons is a principle dependent on ethics. (Mulholland, 1990, pp. 171-172)

I think all interpreters would accept that Kant relies on a foundational assumption of moral equality in his conception of right. However, this does not itself make the conception *comprehensive* in the relevant sense, because all liberal theories, even political ones, plausibly make this foundational assumption (in some way or the other). So even if this is “a principle dependent on ethics”, that seems to collapse the distinction between comprehensive and political liberalism. But is it really dependent on ethics? It seems that Mulholland overlooks Kant’s distinction between ethics and morality or morals, the latter being the general concept that extends over both right and ethics. The assumption of moral equality is precisely a *moral* assumption that is common to right and ethics, and so does not depend on the latter in particular. Moreover, that the assumption is dependent on ethics even seems to contradict Mulholland’s own initial statement of mission, where he claims that “...a central feature of Kant’s ethics and doctrine of rights is a conception of the equality of human beings *which is in a sense pre-moral*, and which is expressed in the concept of a person” (Mulholland, 1990, p. 1, emphasis added). The status of this conception as “pre-moral” means, I take it, that it underlies or is implied by the moral point of view: it is what motivates morality as such, and so any *exceptions* to the equality of status would require a strong justification that is intelligible from the moral point of view. But this principle, or conception, cannot plausibly both *underlie* ethics and be *dependent* on ethics. The former seems to me to be preferable both philosophically and as an interpretation of Kant’s view.

Again, I do not need to deny that Kant has a philosophical basis for the assumption of moral equality in his critical philosophy; but this particular basis of the assumption, as opposed to any other basis or explanation or justification, is plausibly not entailed by his conception of right. A tighter connection to Kant’s particular conception of ethics or metaphysics is needed to show that his conception of right can only be understood as comprehensive.

2.3.3 The Categorical Imperative

The most natural and common line of thought regarding the basis of Kant’s liberalism in his ethical theory is that the Universal Principle of Right (UPR) is derived or deduced in some way from the Categorical Imperative (CI), which Kant defended as the “supreme principle of morality” in the *Groundwork for the Metaphysics of Morals* (G 4:392). CI is given by various formulations in that work, most prominently the following:

1. “act only in accordance with that maxim through which you can at the same time will that it become a universal law” (The Formula of Universal Law; G 4:421).
2. “So act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means” (The Formula of Humanity; G 4:429).
3. “act in accordance with the maxims of a member giving universal laws for a merely possible kingdom of ends” (The Formula of the Kingdom of Ends; G 4:439).²⁵

Kant argues that these formulations and their variations are different expressions of the same moral law that a morally good will gives itself (G 4:436). The different formulations, their relations and implications are matters for perpetual debate; my concern is only the relation of the principle to Kant’s conception of right.

Paul Guyer argues that UPR can be seen as an application of the Formula of Universal Law to that subset of our maxims that concern our external use of freedom; it says which maxims for external actions can be universally willed by potentially interacting agents, and thus specifies us which subset of our ethical duties it is practically and morally possible to enforce by coercive means (Guyer, 1997). Gerhard Seel’s account is similar. He argues that, following CI, a maxim such as “I will always act externally in such a way that my freedom of action occupies the greatest possible domain, may this coexist with the equally great freedom of everyone else or not” cannot be willed to be a universal law because it implies the right of the stronger (Seel, 2009, p. 76ff). UPR, on the other hand, can be universally willed, and it is therefore straightforwardly justified by CI. Michael Nance argues that UPR follows when CI is applied to our unescapable empirical circumstances: it is “a more specific version of the CI that is appropriate for us as embodied rational beings who act from a moral motive only contingently” (Nance, 2012, p. 553). On this reading, then, Kant infers UPR from CI by taking human nature into account; more precisely, by taking into account the facts that (*a*) we are embodied and therefore take up space and (*b*) that we do not always act from a sense of duty. These two facts combined imply that we can and will act in ways that come into conflict with other’s external freedom; but following CI, we must not do so, because such actions amount to treating others as mere ends and cannot be universally willed. Nance says that it is morally

²⁵ These formulations are all different from weak formulation that Kant refers to as the “principle of obligation” in *The Metaphysics of Morals*. I return to the significance of this below and in the next chapter.

necessary on Kant's view that external freedom must be respected, but it is factually contingent that human beings will do this out of duty; therefore, "to discharge our duty to respect humanity as an end in itself, we must devise some way of maintaining the external freedom of human beings in all cases of interaction with other persons, irrespective of the subjective motivations of the individuals involved in interactions" (Nance, 2012, p. 548).

In stressing how morally important it is that freedom should be protected, however, his argument seems to approach a more teleological interpretation of Kant that has also been developed by Guyer and others. Guyer, in his later writings on the subject, has argued that the Universal Principle of Right is derivable within Kant's ethics in another, deeper way than that I referred to above. His starting point is a general view of Kant's moral theory as "not merely deontological" (Guyer, 1997, p. 21) but rather founded upon the recognition of the absolute, intrinsic value of human freedom. Both CI and UPR are based on this recognition; in the latter case, the need to preserve the conditions of external freedom follows from the requirement to respect the value of freedom itself. As Guyer interprets Kant's argument, "He begins with the premise that the only object of unconditional value for human beings is the freedom of human choice and action itself ... An innate right to the freedom of each compatible with a like freedom for all is the correlative to our fundamental obligation to preserve and promote such freedom" (Guyer, 2000, p. 237). Jennifer Uleman offers a very similar account: She argues that "in protecting us in the pursuit of whatever we have freely chosen, it protects free willing itself ... For Kant, free (autonomous) willing is the only unconditioned, absolute good" (Uleman, 2004, p. 591). On this picture, then, what ultimately justifies legal norms on Kant's account is a value that governs all spheres of human life, exactly in the sense decried by Rawls. This not only brings out a decidedly comprehensive liberalism; it even draws Kant's view uncomfortably close to perfectionism. If juridical laws are ultimately required in order to protect or even promote an unconditioned and absolute good, then the liberal state clearly acts on the basis of a strong assumption about what is of intrinsic value.

The general problem with all of these accounts, however, is that they fail to account properly for the distinctive nature of right as simultaneously coercive and obligatory. They all take it as unproblematic that CI, which is in the first instance a principle for a good moral will, can be made to apply to maxims for structuring the external domain of freedom, where the claims of interacting persons can come into conflict, and produce a standard for the legitimacy of coercion. But this is not at all obvious, as is clearly brought out by Marcus Willaschek's forceful arguments to the contrary (Willaschek, 2009, 2012). Because UPR analytically entails an authorization to coercion, Willaschek argues, it cannot be derived from CI,

which only governs how each rational agent ought to limit their own freedom; as an ethical principle, CI provides a strong presumption *against* coercion, and it is mysterious how the same principle could overrule that presumption in the form of an entitlement to coerce. Seel argues that this is not a real problem: precisely because the connection between right and coercion is *analytical* on Kant's account, it does not require an argument to account for it (Seel, 2009, p. 78). This suggests that if there is just *some* route that leads from CI to UPR, then the work is done. The problem, however, is how to make the analyticity of the connection between right and coercion *intelligible*. Why is right connected with the possibility of reciprocal coercion if UPR is only one implication of CI out of many?²⁶

This problem suggests an explanation of why the comprehensive interpretations of Guyer and others seem to slide toward perfectionism. Whereas CI by itself, when taken as a purely deontological principle, seems unable to account for the authorization to coercion, a teleological interpretation seems to allow for the possibility of coercive measures for the sake of protecting or promoting the value of freedom. This, however, leads to a form of perfectionism that is difficult to square with Kant's account overall. As Arthur Ripstein argues, Kant does not conceive of law and coercion as instruments for bringing about moral outcomes that could be specified independently of the requirements of right, even including the value of human freedom (Ripstein, 2012b, p. 489, cf. Wood, 2014, p. 73).²⁷ The comprehensive interpretations threaten to distort this distinctive characteristic of Kant's conception of right.

Another general problem with the CI-based accounts I have reviewed is that they fail to take account of the distinctions Kant makes in the *Metaphysics of Morals* to account for the respective status of ethics and right in the system of morals (*Sitten*). For example, Kant himself says that CI as we know and cherish it from the *Groundwork* belongs to the sphere of ethics, not right. What is common to these spheres, he argues, is only a weaker and more abstract version of CI: "act upon a maxim that can also hold as a universal law" (MM 6:223, cf. MM 6:388-389). This is presented only as a formal principle of obligation and not as the supreme principle of morality, as he had argued earlier (cf. Lundestad, 2013, p. 122). Scholars try to

²⁶ Seel's solution to this problem requires him to deny that "wide" or "imperfect" ethical duties have a place in Kant's moral theory (Seel, 2009, p. 80). This, I think, is a highly unsatisfying outcome, and it demonstrates that Seel's line of reasoning is not the one Kant himself followed.

²⁷ Ripstein makes a strong case against "applied ethics"-approaches to Kant's political philosophy and denies that UPR is an application of CI. However, he goes on to argue (in an appendix to *Force and Freedom*) it "really does follow from" the latter principle and is a "legitimate extension" of it (Ripstein, 2009a, p. 358, 372). While he explains at length basis of this interpretation in the Doctrine of Right as well as in the *Critique of Pure Reason*, it does not become clear to me what bearing all of that has on the normative status of right. This confusion is reflected in the fact that both Willaschek and Nance take him to support their side of the debate. I leave out a more detailed consideration of Ripstein's position.

capture the Doctrine of Right from the point of view of *Groundwork*, missing the details of Kant's account in the later work. I return to these complex issues in the next chapter.

2.3.4 *Transcendental idealism*

Another way to defend a “comprehensive” interpretation of Kant's conception of right is to relate it more tightly to Kant's metaphysics. Rawls suggested, although again without further argument, that “[Kant's] basic conceptions of person and society have, let us assume, a basis in his transcendental idealism” (2005a, p. 100). This view is instructively defended and developed by Bernd Ludwig in a response to Pogge's article to be reviewed below. Ludwig takes his cue from the fact that UPR applies with *necessity* to persons – being a person in the relevant sense just means that the basic categories of right and wrong apply to your actions – and argues that the relevant sense of “person” here is firmly based in transcendental idealism (Ludwig, 1997, p. 195). Ludwig gives attention to Kant's definition of a person as “a subject whose actions can be *imputed* to him” (MM 6:223), and the definition of imputation as “the judgement by which someone is regarded as the author (*causa libera*) of an action, which is then called a *deed* (factum) and stands under laws” (MM 6:227). Ludwig goes on to argue that, for Kant, being a cause *means* to bring something about according to a law, and we cannot regard ourselves or others as free causal agents (*causa libera*) unless we presuppose an intelligible or noumenal world governed by moral rather than natural laws. Furthermore, we only have a standing to make claims on others (for instance, that they do not coerce us) so long as we assume ourselves and them to be free agents – but that necessarily implies consciousness of the moral law, which requires us to restrict our actions to those that can coexist with the freedom of everyone under a universal law. Thus Ludwig takes Kant's conception to invoke a kind of transcendental argument: someone who does not want to comply with the requirements of right simply lacks standing to complain against being coerced, because complaining commits one to take up the position of a *causa libera* and thus to affirm UPR (Ludwig, 1997, p. 194).

This seems problematic, however: Even if it were true that advancing a moral complaint involves a commitment to the standpoint of a *causa libera*, that would not show that others can be justified in coercing someone who fails to take up the relevant standpoint. Even Ludwig's account ultimately depends on there being a way to produce an authorization of coercion from CI, and so he does not escape from the problems that afflict the views reviewed in the previous section. Moreover, the metaphysical terms invoked in Ludwig's argument easily support a deflationary or metaphysically uncommitted reading in any case: Advancing a

moral complaint or claim on others, we might say, requires one to take up a moral point of view, which (as discussed in section 2.3.2) commits one to a certain conception of oneself and others as free and equal moral agents. This is indeed a possible and plausible line of argument, but it does not seem to require the specific technical apparatus of transcendental idealism. Ludwig's arguments therefore does not show that Kant's metaphysical doctrine is entailed by his conception of right.

2.4 Freestanding interpretations

2.4.1 Pogge's freestanding interpretation

I now turn to those who interpret Kant's conception of right as freestanding. While I have been critical of the comprehensive interpretations, I have not by any measure refuted them all, so we should take care to consider the success of the alternative accounts. Here I review the views of Wood, Pogge and Hodgson; I have already referenced Willaschek's argument against derivations of UPR from CI, which also supports a free-standing interpretation, although his account is predominantly critical rather than constructive.²⁸ These scholars all see right as grounded in external as opposed to internal freedom, in a way that precludes a dependence of right on CI, and they also all see it as an advantage that Kant's conception of right can be acceptable even to people who do not accept Kant's more demanding ethical theory.

Thomas Pogge famously counters Rawls's description of Kant's liberalism as comprehensive in a pioneering article, and argues to the contrary that Kant can be appreciated as "the freestanding liberal par excellence. Rather than presuppose much more than Rawls does - his moral philosophy and transcendental idealism - he in fact presupposes much less" (Pogge, 2012, p. 149). All Kant presupposes, Pogge argues, is "persons' fundamental a priori interest in external freedom". On Pogge's interpretation, Kant starts out by assuming the existence of persons with the ability to act and to interact in the external world, including in ways which obstruct other person's ability to act. Given this, the only interest that can be attributed to all persons with necessity is the interest in a secure and extensive sphere of external freedom. This is precisely what a rightful condition offers us. The concept of Right is used by Kant, on Pogge's interpretation, to sort possible actions into to mutually exclusive categories: those that are compatible with the external freedom of others under a universal law and thereby *right*, and those that are not so compatible and thereby *wrong*. A rightful condition – that is, a

²⁸ Ripstein should also be joined to their ranks, although as I said, his account is somewhat ambiguous.

state – provides legal security for the former by prohibiting the latter. Such a condition necessarily restricts what options are available to each person, but this inconvenience is outweighed by the benefits of having our permissible options legally protected.

Pogge’s main expository device is to conceive of the Doctrine of Right as a kind of game, where the rules are defined by the concept of right as above; players of this game restrict their actions to those that are compatible with everyone else’s freedom under the same rules. Crucially, the game is neutral on the motivations people have for adhering to its rules; right is motivationally independent from ethics. Here Pogge appeals to Kant’s famous claim that “The problem of setting up a state ... is solvable even for a people of devils (if only they have understanding)” (PP 8:366). The lesson of this, Pogge argues, is that prudence or selfishness gives people prudential or selfish reasons to adhere to *Recht*, just as much as the moral law gives people moral reasons to do the same; thus the latter does not have “a special status with respect to *Recht*” (Pogge, 2012, p. 150). Pogge concludes that the Doctrine of Right is completely free-standing in relation to Kant’s wider moral or metaphysical doctrines. He does not reject, however, that right can nevertheless have a justification in those doctrines; he only insists that it does not depend on them. His account therefore does not depend on anything like Willaschek’s argument for the impossibility of deriving UPR from CI.

As ingenious as it is, Pogge’s account has its problems, which can be seen by considering his central game metaphor. As Ludwig already pointed out in his original response, you can’t force people to follow the rules of a game such as chess unless they want to; someone who isn’t playing a game of chess are at full liberty to move the pieces around on the table as they see fit. For Kant, however, the “rules” of right are unconditionally binding, and Pogge’s reconstruction fails to account for this crucial difference. Even if every agent has an interest in adhering to right, as Pogge claims, this does not entail that they have an enforceable duty to do so. As Ludwig puts it: “Maybe selfishness often gives selfish reasons for participating in the game and obeying the rules [...] But that is far from answering the question why anyone who does not want to conform to the norms of this special game may be coerced by others to do so” (Ludwig, 1997, p. 190). Accounting for the obligatory as well as the coercive aspect of right is, in general, a challenge for free-standing interpretations, and on this count I think the other accounts I review fare better.

2.4.2 Wood on right and external freedom

In another early contribution to the debate, Allen Wood defends the strict independence of right from ethics in Kant’s system in an early article, on the basis of two arguments (Wood,

1997). The first is that Kant presents the Universal Principle of Right as analytic and the Categorical Imperative as synthetic; and since an analytic statement by definition is only an explication of a concept and is only true because it is not self-contradictory, it cannot be derived from a distinct statement, especially not a synthetic one; therefore, UPR cannot be derived from CI. UPR, then, is not an application of CI to the sphere of right but rather an explication of the concept of right itself (Wood, 1997, p. 6). Wood's second point is that UPR only says that some actions are rightful because they are compatible with the like freedom of all others, while other actions are not; it does not itself say that people *ought* only to do those actions that are rightful, much less *why* they ought to do so: it is neutral on the reasons or motivations people might have to comply with right (Wood, 1997, p. 8). For that reason, it cannot be derived from CI, which commands that each agent ought to limit his own internal freedom to maxim he could will to be universally legislative. However, as Guyer shows in a response, these arguments are inconclusive at best. Firstly, he objects that Kant only presents the connection between UPR and the authorization of coercion as analytic, not UPR itself (Guyer, 1997, p. 25); he also points out that even analytical statements can have a kind of deduction on Kant's view. Secondly, Guyer argues that UPR can be derived from CI even if right is motivationally independent of ethics (Guyer, 1997, p. 27); the potential derivation concerns the objective validity of right, not the subjective grounds people might have for complying with right. Yet even if Wood were right on these scores, we would still not have much by way of a positive account of the normative status and significance of right.

In a later article, Wood locates the ground of Kant's conception of right in a theory of human agency. On Kant's theory, rational action necessarily involves taking up means to an end the agent has set; therefore, "as a rational being, I necessarily will, as far as possible (consistent with other demands of reason), that the actions I perform should serve ends I have set, rather than serving different ends, ends set by others" (Wood, 2014, p. 76). The ground for the parenthetical caveat is that I must recognize that all other rational agents necessarily make the same rational demand that I do, and take heed of the rational requirement that my actions must be compatible with their freedom under a universal law. Right is not derived from or dependent on ethics, then, but both spheres are subject to the formal aspect of the moral law, the requirement of compatibility with universal law; that is what makes them both spheres of morals or *Sitten* (Wood, 2014, p. 78). Whereas ethics on Wood's interpretation is based on the worth of humanity as an end in itself, right is based only on the recognition of the rational structure of human agency (Wood, 2014, p. 81). This, I think, moves the debate in a promising direction. Louis-Philippe Hodgson has set out a distinctive argument that points in the

same direction;²⁹ it will be helpful to consider his account as well before concluding, both because it reinforces Wood's conclusion from a different angle and because he relates Kant's view more directly to Rawls's account of public justification of political power.

2.4.3 Hodgson on justification and reciprocity

Like Wood, Hodgson takes his cue from Kant's claim that the right to freedom belongs to every human being "by virtue of his humanity". They both take this to mean our rational nature, specifically our rational capacity to set ends for ourselves; thus, they infer, the right to freedom must be grounded in this capacity. A central feature of Hodgson's account is that he takes our rational agency to involve the capacity to give and demand justifications for action. He argues that the ideal of reciprocal justifiability, which arises from the recognition of our rational agency, is what ultimately grounds the specific requirements of right on Kant's account. When any rational agent demands a justification for being coerced, Hodgson argues, the only justification he does not have a standing to reject is a justification in terms of freedom. This is so because he is "committed to recognizing the authority of rational agency simply by virtue of acting" (Hodgson, 2010a, p. 799). By contrast, no one is committed to any other end such as happiness or welfare simply by virtue of their agency, so any agent is entitled to reject a justification of coercion offered by reference to those ends. But when the justification is offered by reference to freedom – that is, the need to protect the exercise rational agency – a rational agent has nowhere to stand to reject that justification. This means that freedom can only legitimately be restricted for the sake of freedom itself, which Hodgson takes to be exactly what Kant means when he says that we have a right to freedom.

Hodgson sets out this argument by an analogy to Kant's argument for the Formula of Humanity in the *Groundwork*: like that argument, his reconstructed argument for the right to freedom treats the capacity to set and pursue ends as normatively basic. But he argues that one can reject the latter argument and still accept the former. While the moral argument "goes hand in hand with Kant's particularly stringent conception of autonomy, according to which the moral law has to be self-legislated," the political argument "travels more lightly" because it only assumes "that a rational agent is entitled to have force used against her only in ways that are justifiable from her point of view qua rational agent" (Hodgson, 2010a, p. 802); one can accept this without also accepting the idea that only moral self-legislation can confer

²⁹ Katrin Flikschuh also suggests a similar approach, but her account raises problems of its own, and I am not in the place to consider them here (Flikschuh, 2010). I return to some of them in chapter 4.

moral worth on one's choices. The right to freedom is therefore not an "application" of that ethical conception; indeed, Hodgson argues that as a consequence of the right to freedom, any justification of coercion grounded directly in any ethical conception is ruled out. Like Ludwig, then, Hodgson makes a kind of transcendental argument: he appeals to what someone who complains against being coerced must rationally be committed to, while he, unlike Ludwig, does not take this basis to be dependent on the metaphysical doctrines of Kant's transcendental idealism. For that reason, his account preserves the advantage of Pogge's account while not vulnerable to the objection to it.

Notice also that unlike Guyer, Uleman and Nance, Hodgson does not say that freedom must be legally protected because it is of absolute, intrinsic moral value. His point is not that our humanity imposes an ethical standard on how we ought to live and therefore on how we organize society, but only that it imposes a moral standard for how we may be coerced; it is appealed to as a political and not ethical value. In this respect, Hodgson's account supports and reinforces the substantive conclusions of Wood and Pogge.³⁰ As I have anticipated several times over, Hodgson also explicitly suggests the connection between Kant's view of the justification of coercion with Rawls's political liberalism: "Kant's assumption about what can justify the use of force rules out ... any view that attempts to justify coercion by invoking the correct conception of what is of value in human life—be it happiness, perfection, equality, or what have you. In short, it rules out any view that is comprehensive in the sense that John Rawls has given the expression" (Hodgson, 2010a, p. 803). The "comprehensive" interpretation of Kant's liberalism suggested by Rawls and defended by Guyer and others distort this connection, which in my view Hodgson does well to bring to the fore.

It may be objected that the interpretations I have reviewed here are not really freestanding because the arguments they describe would be rejected by, say, utilitarians or communitarians. It is a mistake, however, to think that freestanding arguments must be equally acceptable to all possible points of view. Rawls rejects the idea that he needs to show that different comprehensive doctrines are likely to join in an "overlapping consensus" on a political conception of justice (2005c, p. xlvi); political liberalism only requires of a freestanding argument that it should be possible for reasonable persons to accept it without affirming any particular comprehensive doctrine.³¹ In light of the problems that I pointed out for the arguments

³⁰ It is also close to Ripstein's view, although again, his account is ultimately ambiguous.

³¹ Quong's "internal conception" of political liberalism puts special emphasis on this: "The legitimacy of political principles does not depend on whether current liberal citizens do accept them, or whether the principles are congruent with their current beliefs. Instead principles are defined as legitimate if it is possible to present them in a way such that they could be endorsed by rational and reasonable citizens" (Quong, 2011, p. 144).

for the comprehensive interpretations in the previous section, the freestanding interpretations reviewed here therefore seem to give us what we need to be able to conceive of Kant's liberalism as political.

2.5 Conclusion

I began this chapter by reviewing the basic features of Kant's conception of right. On the basis of Quong's way of putting the distinction between comprehensive and political liberalism, the literature review has not uncovered any decisive reasons to think that those features require a comprehensive interpretation. Recall Quong's two questions:

1. Must liberal political philosophy be based in some particular ideal of what constitutes a valuable or worthwhile human life, or other metaphysical beliefs?
2. Is it permissible for a liberal state to promote or discourage some activities, ideals, or ways of life on grounds relating to their inherent or intrinsic value, or on the basis of other metaphysical claims? (Quong, 2011, p. 12)

If Kant's conception of right does not depend on an ethical ideal of autonomy, the Categorical Imperative or the metaphysical doctrines of transcendental idealism, we have good reason to think that the answer should be "no" to both questions. I have pointed to problems with arguments advanced in favor of such dependence, and shown how several scholars have defended free-standing interpretations. The literature review therefore provides support for my thesis that Kant's conception of right can be interpreted as a form of political liberalism. In the next chapter, I will go on to develop my own arguments for why Kant's liberalism is not comprehensive; with those arguments in hand, I can go on in chapters 4 and 5 to discuss Kant's views of legitimacy and public reason in the republican state and argue that they combine to make up a plausible and compelling form of political liberalism.

3. Kant's conception of right: Moral and political

In the previous chapter, I have shown why interpretations of Kant's conception of right and its foundations vary and what the main dividing lines are. I will now proceed to give my own account. I begin this chapter by giving a brief overview of how I understand Kant's view on the relation between right and morality and how this compares with the views of Rawls as well as Fichte and Bentham (3.1); next, I add substance to my initial characterization through a reconstruction of the reasoning that I think underlies Kant's conception of right (3.2), paying attention to the practical problem he is trying to solve and the assumptions he makes along the way. My aim here is not to refute all alternative accounts or to definitely settle the scores of the debate reviewed in the last chapter, but to lay out an interpretation that will help me to reach my goal of establishing that Kant's conception of right can be interpreted as a form of political liberalism. I want to show that while Kant's conception has moral underpinnings, it is worked out for a specifically legal-political problem and does not depend on any substantive ethical assumptions about the worthy or valuable ends of human life.

3.1 A moral-political conception

When discussing his own favored conception of justice as a form of political liberalism, John Rawls says that it "is, of course, a moral conception, [but] it is a moral conception worked out for a specific subject" as opposed to a straightforward extension of a general moral or metaphysical view to political matters (2005a, p. 11).³² Rawls "works out" or constructs a conception of justice as a response to a practical problem, that of establishing fair terms of social cooperation among diverse citizens. Both the way the problem is framed and the way the conception is worked out is shaped by certain basic moral ideas and concepts, but these are from the beginning related specifically to the political sphere and not to a general moral outlook. The conception aims to establish fair terms of social interaction under shared public institutions, and leaves persons free to pursue their own ends without judging what these ends ought to be. I will argue in this chapter is to argue that this general picture fits Kant's conception of

³² Rawls explains in a note that "In saying that a conception is moral, I mean, among other things, that its content is given by certain ideals, principles and standards; and that these norms articulate certain values, in this case political values" (Rawls, 2005a, p. 11, n. 11). Bernard Williams argues that "It is significant how far moral conceptions still structure the theory" even in Rawls's *Political Liberalism* (Williams, 2001, p. 5).

right as well.

To be clear from the beginning, I do not want to argue that Rawls' and Kant's outlooks are the more or less the same. The specific subject for which Kant's conception of right is worked out is not in the first place the political and social institutions of the "basic structure of society," as for Rawls, but rather the interaction of agents who can mutually interfere with one another's external freedom of action; institutions are introduced at a later stage in the argument in order to resolve moral problems that this interaction necessarily gives rise to. Moreover, whereas Rawls draws the moral content of his political conception of justice from what he thinks are implicit ideas in the public political culture of a modern democracy, Kant takes his conception of right to have a basis in practical reason. These differences are related and reflect a fundamental difference of aim and approach: Rawls works from within the political tradition of a constitutional democracy and takes the institutions belonging to that tradition as given starting points, whereas Kant sets out to justify institutions of right from a more foundational vantage point. With respect to this, I concede right away that Kant's conception of right is not political in all the respects in which Rawls thought of his conception of justice as being political. As I discussed in the previous chapter, however, that is not necessary to fall under the broader category of political liberalism. The thesis I want to defend is not that Kant was a Rawlsian, but that Kant and Rawls can be said to represent different forms of political liberalism. In chapter 5, I will return to their differences and argue that Kant's more foundational approach helps to solve problems that afflict Rawls's view. If we set these issues aside for now, we may better appreciate what Kant and Rawls share. To name the beast, I suggest that they share the basic idea of a *moral-political conception*: a conception of right or justice that is moral in that it makes normative claims and relies on certain general moral concepts, but political in that it is worked out specifically in response to a normative problem of distinctively legal or political nature.³³

To indicate what I mean by this, I will briefly compare Kant's conception of right to the views of two of his contemporaries, Johann Gottlob Fichte and Jeremy Bentham. They both develop theories of right or law that differ importantly from Kant's both in how they conceive of the foundation of right and the normative status of right. Fichte attempts in his *Foundations of Natural Right* to derive principles of right from wholly non-moral premises, starting from a theory of the intersubjective basis of individual self-consciousness rather than

³³ Rawls also explains his view by reference to what he calls the "domain of the political". I return briefly to the comparison in the concluding section of this chapter, suggesting an analogy between Rawls's domain of the political and Kant's domain of right.

from the moral law (Fichte, 2000 [1796]). This amounts to a metaphysical and amoral conception of the foundations of right, in that he conceives of relations of right in terms of the metaphysics of subjectivity or “*Ichheit*”, without reference to moral concepts. This results in a conception of the normative status of right as voluntarist or hypothetical: the bindingness of principles right is conditional upon their acceptance by each subject. This result comes as no surprise given that moral concepts such as obligation play no role in the foundations of right. Bentham, on the other hand, begins with an axiomatic theory of value, captured in the principle of utility, which he thinks can serve as a standard for right action, laws and institutions as well as the ground of our legal obligations (Bentham, 1879). The standard by which we should evaluate the state and all restrictions on freedom is thus the same standard by which we should evaluate all other actions and associations. This amounts to a teleological or ethical conception of the foundation of right. On Bentham’s view, right is seen as means to an end that all individuals are assumed to share as a matter of psychological necessity, that is, the end of happiness. This end is extrinsic to right, and right itself has no actual moral status. This results in a positivist view of the normative status of law: law is only a matter of what is posited as such, and any moral standard of law must be independent of the concept of law.

Kant’s approach differs in clear and significant ways from both of these. Unlike Bentham, he sees the potential interference of one person with another’s freedom as a distinct normative problem which calls for a solution drawn from a special conception of rightful relations rather than a general conception of value. Kant does not conceive of law as a tool to realize more of a given end than is otherwise possible, as Bentham does, but as a set of reciprocal restrictions on how agents may legitimately pursue their ends, whatever these may be, without any reference to what is of ultimate value or what ends agents actually pursue or ought to pursue. Furthermore, while Kant shares the positivists’ distinction between the sources and merits of law, he still views law as inherently normative.³⁴ Unlike Fichte, Kant thinks that a conception of right must be moral, for reasons I elaborated in the last chapter: while juridical laws are clearly distinguished from ethical laws, they are both equally laws of freedom or moral laws that place binding requirements on rational agents (6:214). So right must be understood as a distinct part of morals (*Sitten*) on Kant’s picture. The conception of right is supposed to ground the legitimacy of, and persons’ obligations to, institutions of private and public right, and this is a normative task that requires normative materials; some

³⁴ Kant argues that the jurist can know what the law is without knowing whether the law itself is right or wrong (MM 6:229). Nevertheless, he thinks that the possibility of positive lawgiving is grounded in natural right (MM 6:224 and elsewhere).

moral input is required in order for there to be any moral output.

The moral input, I suggest, is given principally by Kant's conception of persons as free and equal rational agents. He understands this freedom and equality in terms of the capacity of each agent for acting on the basis of principles that can hold as universal laws, meaning that no-one may legitimately make an exception of themselves or disregard others from consideration when deciding how to act. In the sphere of right, this entails that we have a legitimate claim on others to not interfere with our freedom only on the condition that we acknowledge that others have a similar claim on us. However, the idea that the maxims on the basis of which we act and the ends we set for ourselves must be ones we can will as universal laws does not figure either in the requirements of right or the justification of right.³⁵ Neither does the idea that acting from duty is a condition for the moral worth of an action, or that human dignity is based recognition of the moral law, or that only a good will can make a person worthy of happiness. These ideas, which are central to Kant's ethical theory, express an "ideal of what constitutes a valuable or worthwhile human life" (Quong, 2011, p. 12), and they might be thought to rest on problematic metaphysical claims about mind and world; the general moral ideas that Kant makes use of in the Doctrine of Right, however, do not. Kant's conception of right, then, is moral, but not in a way that makes it comprehensive; alternatively, it is political, but not in a way that makes it amoral. In the following, I explain the basis for this view through a reconstruction of the reasoning underlying Kant's conception of right.

3.2 Kant's conception of right: A reconstruction

3.2.1 *The moral concept of right*

In the introduction to the Doctrine of Right, Kant begins by delineating his subject matter: He defines the Doctrine of Right as "The sum of those laws for which an external lawgiving is possible" (MM 6:229), and immediately makes it clear that the task of working out such a doctrine cannot be solved only on the basis of experience. Kant makes a distinction between an *empirical* concept of right, which can be known and applied on the basis of empirical principles, and a *moral* concept of right, which requires philosophical analysis (Kant only names the moral concept of right as such; the empirical concept is implied by contrast). The empirical concept of right refers to what actually holds as law or justice in a given state; this is what jurists are experts on. Kant argues that on the basis of this expertise, the jurist's answer the question "what is right?" can only be tautological (i.e., right is whatever counts as right) or

³⁵ Thus I support the substantive conclusions of Wood and Hodgson, as reviewed in the last chapter.

else empirically contingent (“what the laws in some country in some time prescribe”, MM 6:229). The empirical principles of the jurists are insufficient to establish “the basis for any possible giving of positive laws” (MM 6:230), and thereby they fail to give us a universal criterion for distinguishing between rightful and wrongful (or just and unjust) laws. Kant’s faulting the jurists for not establishing the possibility of lawgiving can seem puzzling; from an empirical perspective, any halfway decent social theory could surely explain how positive lawgiving in a state is empirically possible. What he wants to establish, however, is the *moral* possibility of lawgiving: how positive lawgiving can be anything more than the mere imposition of power by one group over another. The point is that empirical principles are insufficient to account for the *legitimacy* of law and the legal *obligations* of the subjects of law in accordance with their moral freedom.

This is why Kant turns to the *moral* by contrast to the empirical concept of right. Kant introduces it as “The concept of right, insofar as it is related to an obligation corresponding to it” (MM 6:230). In order to get to the heart of the moral concept of right, we cannot look to the positive laws that exist in states; the starting point must be at the more basic level of external and practical relations between persons, abstracting away any existing institutions. This is clear from the fact that the Universal Principle of Right is presented as a principle for actions, not for positive laws or institutions, and the fact that his argument for the authority of the state proceeds through an analysis of private right in the state of nature. As I said in the last chapter, Kant follows the contract tradition in accounting for political authority from the bottom-up, from the point of view of the individual person living together with others. To find the rational grounds for any possible giving of positive laws in a state, that is: how positive lawgiving can be anything more than imposition of force, Kant looks first to the conditions for lawful relations between interacting individual persons, that is: how such interaction can be characterized by anything other than force. This shows, as I said in the last section, that Kant works out his conception of right for a specific, legal-political problem, and we must understand the assumptions he makes and the moves of his argument in light of this problem.

3.2.2 Interaction, freedom, and reciprocity

The starting point for Kant’s account of right is a situation of a plurality of embodied, finite, rational beings who can mutually affect each other through their actions; that is to say, there is a possibility of interaction. In fact, because “the earth’s surface is not unlimited but closed”, interaction between persons is practically unavoidable (MM 6:311). By nature, these persons are uncoordinated, so there is a potential for conflict as well as harmony between them. This

is the basic situation which gives rise to the practical problem that the (moral) concept of right is meant to solve on Kant's account: the problem of how the interaction and mutual influence between persons can be reconciled with each person's freedom. To see how the problem – and the solution to it – arises, we should consider the more specific assumptions Kant makes about persons and the conditions for their interaction.

Most fundamentally, persons are conceived by Kant as rational agents who have the capacity to set ends for themselves and to pursue these ends through their actions, choosing means they find conducive to their ends. This involves both internal and external freedom: Reflectively setting ends in light of reason requires internal freedom, pursuing one's ends often involves using one's own body and other things in the external world as means, and so requires external freedom as well. As another aspect of internal freedom, persons are also assumed to have the capacity to act on moral as well as instrumental reasons: they can constrain their pursuit of their own ends in light of impartial demands and make claims on others to do the same. Notice that the capacities to set and pursue ends and to constrain one's pursuit of ends in light of impartial demands correspond to the "two moral powers" that feature in Rawls' conception of the person: the capacity to understand and act on reasonable principles of justice (the sense of justice), and the capacity to form, revise, and rationally pursue a conception of the good (2005a, p. 19, 103-104). Thus there is no fundamental disagreement between their views at this level; Kant's view does not depend on any flagrant metaphysical or moralized conception of personhood, only a practical conception of how to see ourselves and others as subjects of right.

Although internal freedom is an indispensable presupposition for Kant, as a condition for the possibility of obligation, it is external freedom that gives rise to the specific considerations of right – the considerations that call for a special kind of external obligation and legislation. Internal freedom is *intrapersonal* – it concerns only the ends, motives and choices of each agent. It is therefore in principle *independent* of the actions or even the existence of others. External freedom, however, is *interpersonal* – it concerns the relations between each agent's actions and the actions of others. Therefore, the external freedom of any agent at all times depends on the choices other agents make: where one person can move is limited to the space left open by others, and what he can use as means to his ends is limited to the things that others do not already possess. This also means that external freedom is *vulnerable* in a sense which internal freedom is not: it can be hampered and limited by others. The thug who ties me up and takes my things destroys my external freedom and subordinates it fully to his own, but he does not thereby affect my internal freedom: I am still free to reason and to set

ends for myself even when I am not free to act in the world. These differences are due to the fact that each agent has (in a sense) exclusive access to his or her own mind (their internal world), but no one has exclusive access (in the same sense) to any objects in the external world, even their own bodies; in principle, all such objects are within the reach of others. As Hodgson argues (as we saw in the last chapter), the interpersonal dimension of external freedom gives rise to the question of interpersonal justification – the justification of claims on others who might not share our ends or judgments. This raises particular problems that cannot be solved by recourse only to a principle that governs internal and intrapersonal freedom, such as the Categorical Imperative, and leads to the special perspective of right.³⁶

Interaction, as we have, brings with itself the potential for interference and conflict, and this should not only be understood as physical conflict: given that persons possess internal freedom, their interaction will lead to *moral* conflict, understood as conflicting *claims*. Because persons are assumed to be rationally committed to their ends, which all require external freedom, they each take themselves to have a claim to their external freedom: they inevitably see it as something it is wrong for others to interfere with at their whim.³⁷ Because all agents equally need to use things in the external world (widely understood to include land, bodies, items and so on) as means to pursue their ends, these claims naturally extends to such things. Given that all the things they need can also in principle be used as means by other agents, however, interaction inevitably leads to conflicts between agents' claims. I may take myself to have a legitimate claim to walk across a field in order to get to the river, but another person may take himself to have a legitimate claim to exclude me from the field on the grounds that he owns it. We both see the field as means to our different but equally legitimate ends that we are rationally committed to. It makes no difference to the possibility of such conflicts whether we are morally or amorally motivated (i.e., whether or not we act on maxims that we can at the same time will to be a universal law). In conflicts of this kind, each agent takes the other (or others) to interfere with their external freedom. This gives rise to the pressing question: How can any resolution to such conflicts be anything more than the imposition of force by one of the parties over another? How can right be premised on anything other than might?

Kant's answer is, in the first instance, that the resolution must be *compatible with the*

³⁶ Here I refer back to the arguments of especially Willaschek reviewed in the last chapter.

³⁷ Williams asks: "What view would one have to take of one's desires and projects and other values if there were never even a question of its being something to be resented and resisted if others aimed to frustrate them? What view would one have to take of those others, in particular of a political authority, for that question never to arise?" (Williams, 2001, p. 23). The unintelligibility of such views of oneself and others is clearly a strong strand in Kant's thought.

freedom of both parties under a universal law. We can get an intuitive understanding of what that means, and how it is possible, by considering the matter discursively, from the point of view of interactive agents. Kant holds that any valid claim to right – a claim that can ground obligations and also be enforceable against others – must be fully *reciprocal*: I cannot have a valid claim to my freedom against others (in the sense that they are obligated not to interfere with my choices) beyond the condition of its being compatible with their having a similar claim to their freedom against me. If I set about to use my freedom of choice in ways that go beyond this condition, I claim for myself a greater freedom than I could allow for others; in so doing, I deny for others a status I assert for myself, namely, the status of an agent rationally committed to his ends, which is something I cannot reasonably do. I cannot *reasonably* do this in the sense that I lack a reasoned basis for assigning to myself an exceptional status, and I cannot offer reasons to others for why they should accept my way of going about things. If others interfere with my actions only to hinder me from acting in ways that go beyond the conditions of equal freedom, however, they do not thereby deny my status as an agent with a claim to freedom; they only deny me the status of having a *greater* claim to my freedom than they have to theirs, and this denial is fully reasonable – I have no reasoned basis to complain against it. I only have reasoned grounds for complaint against any interference with my freedom so long as my actions or maxims are compatible with the freedom of others. This idea of moral reasonableness is, I think, is the basic insight underlying the Universal Principle of Right: “Any action is *right* which by itself or by its maxim allows the freedom of choice of each to coexist with everyone’s freedom in accordance with a universal law” (MM 6:230).³⁸

The kind of discursive reasoning sketched in the previous paragraph might also help make sense of Kant’s claim that UPR does not require each agent to limit their own freedom to the condition of being compatible with the freedom of others for the sake of obligation (as the Categorical Imperative does). Rather, he says, “reason says only that freedom *is* limited to those conditions in conformity with the idea of it and that it may also be actively limited by others” (MM 6:231). This means that I can only draw support from the idea of freedom in making a complaint against others’ interference with my choices so long as my actions are

³⁸ Rainer Forst captures this point nicely: “I only have a claim to a kind of liberty that is *justifiable* between us reciprocally, and that is a demand of justice. That is why Kant ... calls the basic claim to liberty and equality bound only by a truly universal law the only ‘innate’ or ‘original’ right of humans” (Forst, 2014, p. 74). The view I present in the text is close to Allen Wood’s argument that I reviewed in the last chapter, to the effect that a theory of rational agency in the basis of right. With Forst (as well as Hodgson), however, I find it more natural and appealing to put the point in terms of claims to freedom and justification, which brings out the interpersonal dimension in Kant’s conception of right.

compatible with the equal freedom of others. In other words, if I want to do something that is incompatible with the condition of equal freedom, and others stop me from doing so, I cannot reasonably complain against their interference on the grounds that they interfere with my freedom; or rather, they have no reason to listen to me if I so complain. Their interference is really only a “*hindering of a hindrance to freedom*” (MM 6:231) and therefore consistent with my (rightful claim to) external freedom. Right, for Kant, is precisely a set of fully reciprocal limits to external freedom under universal law: “one can locate the concept of right directly in the possibility of connecting universal reciprocal coercion with the freedom of everyone” (MM 6:232). Again, following Hodgson, reciprocity here must be understood as a moral concept, reflecting the basic idea that I can only reasonably claim a right against others if I acknowledge that they could have a reciprocal right against me under a universal law. Basing right on this requirement, however, is quite different from basing it on an ethical principle or ideal of autonomy.

3.2.3 The omnilateral will and the public framework of justice

The preceding paragraphs have laid out how Kant’s understanding of the freedom and equality of agents, together with the conditions of interaction, give rise to the specific requirements of right. Nevertheless, this is still only halfway toward answering the question of how conflicts over rights claims can be resolved in a way that is anything more than the imposition of force by one party over another. UPR requires that any resolution must have a certain form: it must be compatible with the freedom of all under a universal law. But even if everyone were assumed to understand and agree with this principle, they would still not be in a position to resolve all conflicts peacefully in light of that shared understanding. In the example used earlier, where I wanted to cross an open field and another wanted to exclude me from his property, the parties disagreed about whose action amounted to an interference with the freedom of the other; we both think that our different judgments are supported by right. If both of us also think that we may rightfully limit the freedom of the other to the condition of its being compatible with (what we consider to be) the equal freedom of both, we lapse back into the situation where the conflict can only be resolved by might: In the end, the stronger effectively imposes his judgment about right on the other by force. The insistence that one of us may impose our judgment on others on the grounds that it is *correct* will inevitably seem, from the perspective of the other, as only so much foot-stomping. In the state of nature, Kant argues, “each has its own right to do what seems right and good to it and not to be dependent upon another’s opinion about this” because none can reasonably claim natural moral authority over

the other (MM 6:312).

The problems involved in resolving conflicts even by parties who are reasonable and morally motivated explain why public right and the institutions of a republican state are necessary for Kant. Only a mutually recognized third party, who can judge impartially and non-arbitrarily in light of a common, impartial and non-arbitrary standard, is required for the rightful resolution of conflict; such an agent can only be a state, ruling by law. The republican state, with its legislative, executive and judicial powers, can solve the problem of the state of nature because it can, in principle, represent an *omnilateral* will, the will of all, and not merely another *unilateral* will, the will of some individual person. How can the state do this? First, through the medium of positive law it creates a shared, public framework of justice, which is scrutable and allows for uniform and accountable application. It also, crucially, creates public offices and thereby a distinction between acting in or out of office (cf. Ripstein, 2012a, p. 59). This makes it possible for someone who executes or enforces the law to represent not himself as an individual, but rather the public authority, when acting in office or *as* an official. The institutional arrangement of the state, however, would not be any help in solving the problem if it were not also subject to the normative requirement to rule in a manner that is consistent with the freedom, equality, and independence of all subjects; if the state were to subject the people to various arbitrary ends, it could not be taken to represent an omnilateral will. That is why the original contract, the idea that no law is justified unless all citizens could have legislated it for themselves as a collective body, is the idea “in terms of which alone we can think of the legitimacy of a state” (MM 6:315). I discuss this idea, and the implications Kant draws from it, in the next chapter.

We are now in a position to appreciate how Kant ultimately uncovers “the basis for any possible giving of positive law” (MM 6:230), which is, as I pointed out, what he sets out to do in the Doctrine of Right. A situation where there is no interference with anyone’s power of choice is not available, given the inevitability of interaction and the non-exclusivity of external means for action; such interference inevitably involves the arbitrary subjection of one person to the will of another unless it can be done by an impartial agent in a general and consistent way; given the natural moral equality among free agents, an impartial agent can only be instituted through positive law. If positive lawgiving were not possible, there could be no solution to the problem of how “the choice of one can be united with the choice of another in accordance with a universal law of freedom”. To deny the possibility of positive lawgiving is therefore to deny the possibility of reciprocal relations of external freedom. As I have argued, on Kant’s account I cannot reasonably take myself to have a claim to freedom against others

beyond the condition to which it is compatible with a reciprocal claim of others on me; because fully reciprocal claims requires a public framework of justice established through positive law, I cannot reasonably reject the authority of that public framework.

I will argue in chapter 5 that Rawls's political liberalism suffers from a deep problem because he fails to account for the connection between the moral requirements of reasonableness and reciprocity on the one hand, and acceptance of the authority of public institutions of justice on the other. Now we already see how Kant solves this problem. The point in this context is to show how he can reach this conclusion without appealing to the substantive principles and ideals of his ethical theory. In the next sections, I will reinforce this point by considering the so-called "Ulpian precepts" and the Categorical Imperative.

3.2.4 *The Ulpian precepts*

In the "Division of the Doctrine of Right", Kant appeal to three precepts of law he draws from the Roman jurist Ulpian (MM 6:236-237):

1. "*Be an honorable human being (honeste vive)*"
2. "*Do not wrong anyone (neminem laede)*"
3. "*enter into a society with [others] in which each can keep what is his (suum cuique tribue)*"

These precepts may seem to add more moral baggage to Kant's conception of right, but I suggest that they can be fruitfully understood to support the line of reasoning I have laid out.

When you find yourself in a state of nature, where there is no established common authority to determine the boundaries of right, there are basically three different stances you can take towards yourself and your relation to others: First, you can refrain from asserting any claims on others, and let others determine the limits to your external freedom; second, you can disregard the claims of others, assert your claims as authoritative and back them up by force if possible; or, third, you can join with others to establish a common, mutually recognized authority that can determine the rights of each in a conclusive and impartial way. The relative merit of these stances is expressed in the Ulpian formulae. The first, *honeste vive*, rules out the first, self-abnegating strategy; to let others dictate what one can and cannot do is to deny "one's worth as a human being". The second precept, *neminem laede*, rules out the second, authoritarian strategy; to dictate what others can and cannot do is to deny *their* worth as human beings. Finally, the third precept, *suum cuique tribue*, declares that the third strategy, to establish a common authority, is morally required because it is the only option that is consistent with the worth of each.

The talk of persons' worth here should not be understood as an ethical concept, referring to the absolute value of persons. Kant's idea is that external relations among persons should be reciprocal, again stressing the assumption of moral freedom and equality that is a condition of reasonableness. What Kant is arguing throughout the Doctrine of Right is that this fundamental assumption requires a shared public framework of justice; those who deny such a framework deny the condition that makes it possible for interpersonal claims to be compatible with the requirement of reciprocity. Gerald Gaus puts this point really well: "Unless there is an authority endorsed by public reason – the reason of all – a moral claim is simply the attempt of one person's private judgment to rule over others ... unless there is an authority that expresses a public reason – a judgment that you and I both share – the practice of interpersonal morality is inconsistent with our fundamental status as free and equal" (Gaus, 2012, p. 113). The denial of the possibility of such a public authority leads either to a form of nihilism or to a form of authoritarianism; in either case "you are no longer able to proceed with moral demands that treat others equally" (*ibid.*).

So while Kant uses the language we know and cherish from the CI's Formula of Humanity to express the duty of rightful honor – "Do not make yourself a mere means for others but be at the same time an end for them" (MM 6:236) – it would be mistaken to conclude from this that he places that principle at the center of his conception of right. The Ulpian precepts express principles of right, principles that any system of right must assume; as such, the duty of rightful honor says that the right to have rights is inalienable: no one can give up their status as a subject of right. What is presented as a duty to is really a limiting condition on the rights of others (cf. Mary Gregor's remark in Kant, 1996 [1797], p. 636, p. 15).

3.2.5 Obligation and universal law

What, then, about the Categorical Imperative itself? Kant defines obligation in the general introduction to the *Metaphysics of Morals* as "the necessity of a free action under a categorical imperative of reason" (6:222); he later explains that this categorical imperative "as such only affirms what obligation is," and he presents it as follows: "act upon a maxim that can also hold as a universal law" (6:225). This may seem to make Kant's conception of right dependent on ethics and therefore comprehensive after all; but I reject that conclusion. What the quoted statements tell us is that right as well as ethics is based on a principle of obligation that expresses an underlying assumption of moral freedom and equality. I will explain and expand on this suggestion in the following.

First, it is important to notice that the formulation of the Categorical Imperative Kant

uses here, where he speaks of the general moral concepts common to ethics and right, differs from the more famous formulations of the imperative he develops in *Groundwork*. This fact is almost consistently overlooked in the secondary literature, which, as we saw in the previous chapter, discusses the relation between UPR and the CI as formulated in those earlier works but not as it is used in the *Metaphysics of Morals* itself.³⁹ In the earlier works, where Kant's concern is to develop a theory of ethics, the categorical imperative is a more demanding requirement which includes an essential reference to the agent's own will: it requires that the agent herself must be able to will that the maxim of her action can hold as a universal law. Kant says explicitly in the Introduction to the *Doctrine of Virtue* that this more demanding version of CI belongs only to ethics, not right:

The concept of duty stands in immediate relation to a law (even if I abstract from all ends, as the matter of law). The formal principle of duty, in the categorical imperative 'So act that the maxim of your action could become universal law,' already indicates this. Ethics adds only that this principle is to be thought of as the law of your own will and not of will in general, which could also be the will of others; in the latter case the law would provide a duty of right, which lies outside the sphere of ethics. (MM 6:388-389)

The attempt to show that Kant "derives" the principles of right from the CI as an ethical principle is therefore textually misguided. Kant explicitly circumscribes the categorical imperative that is common to both spheres of morals as only a formal principle of obligation. This principle asserts that no norm can give rise to genuine obligations unless it subjects all persons to equal terms; a norm that arbitrarily subjects some to the domination of others cannot obligate. Thus it expresses the basic assumption of moral freedom and equality that underlies Kant's moral philosophy as a whole, right as well as ethics.⁴⁰

It is important, however, to see how Kant qualifies the principle of obligation in the different domains. In the domain of right, the universal law that the maxims of an agent's action must conform to need not be a law of your own will: it can equally be a law given by another will or the "will in general". This seems to accord with the idea Kant appeals to in the general Introduction that "a person is subject to no other laws than those he gives himself (ei-

³⁹ A notable exception in the recent literature is Øystein Lundestad, who stresses the autonomy of right within Kant's mature practical philosophy (Lundestad, 2013, p. 112).

⁴⁰ Here I am inspired by Sven Nyholm's discussion of the Categorical Imperative, and also Mulholland's discussion of moral personhood, with the caveats given in last chapter (Mulholland, 1990, Nyholm, 2013).

ther alone or at least along with others)” (MM 6:223). What can we make of this? The formulation “will in general” brings to mind Rousseau’s concept of the “general will”, which Kant also appeals to in his account of public right, as I will return to in the next chapter.⁴¹ Of course, this in turn accords with the idea of an omnilateral will discussed above. Here, however, Kant does not make a point about legitimate government but about the nature of moral obligation. It may be fruitful to try to understand the idea along the lines of the discursive reasoning I laid out in section 3.2.2. When an agent is considered as a part of a plurality of interacting agents, the will of other agents and of all agents considered as a whole must at least some have bearing on how each agent may reasonable act, regardless of the intentions and commitments of the agent in question. Because we must consider our own external freedom as part of a community with others with whom we may interact and interrelate, then, we must acknowledge their being in a position to have claims on our actions in order for us to be in a position to have legitimate claims on their actions.

I admit that this is not fully clear, but then it is not part of my purpose to clarify all of Kant’s distinctions. What is clear from these distinctions, however, is that right on Kant’s conception is distinct from ethics in the form of obligation involved, and that the Categorical Imperative that Kant heralded as the “supreme principle of morality” in the *Groundwork* therefore cannot plausibly be the supreme principle of *morals* as a field covering right as well as ethics. The Categorical Imperative as a formal principle of obligation, however, does play a role in both spheres, and I should say a bit more about that before I conclude.

Explaining the normative appeal of law in terms of a categorical imperative has at least two significant implications. First, it implies that the obligation to observe the law is universal and involuntary; it does not rest on anyone’s choices, and no-one may choose not to be bound by law (in contrast to Fichte’s amoral conception of law). Second, it implies that law only sets formal restraints on how agents may pursue their various ends and does not itself rely on or make reference to any substantial ends (in contrast to Bentham’s teleological conception of law). There are also two significant implications of the fact that Kant relies on different formulations of CI in the spheres of ethics and right. First, it implies that right is (at least in one important way) independent of the demands of ethics within Kant’s system of thought. The formulation of CI that forms the centerpiece of his ethics relies on other, more

⁴¹ This is admittedly not clear from the original text: Kant uses “der Wille überhaupt” and not “der allgemeine Wille” or “der vereinigte Wille” as in Public Right. However, I cannot see any plausible interpretation of “der Wille überhaupt” which contrasts it with “one’s own will” in the relevant context that does not draw it in the direction of the general or united will.

demanding and controversial assumptions that are not part of his account of right, and it is not necessary to accept the former in order to accept the latter. Second, it implies that there is nevertheless a connection and coherence between ethics and right within Kant's thought – they are not so independent as to make either of them unintelligible from the point of view of the other. As I have said, both domains are based on the underlying assumption of moral freedom and equality, which is then worked out in different ways.

However, even the weaker, general formulation of CI could not *ground* the principles of right in the sense that the latter could be derived from the former. Acting on a maxim that can hold as a universal law is plausibly neither necessary nor sufficient for acting rightfully in a given situation: It is not necessary because the UPR abstracts from motivation and ends and only places a requirement on our actions considered as such, and so we can act fully rightfully even with self-seeking or malevolent intentions; it is not sufficient because we can act on maxims that are capable of universalization even without regard for the rights of others. Consider the maxim of benevolence, that we shall help others when possible and necessary, which Kant evidently thinks can be willed as a universal law. On a particular occasion, it may be that we can only help someone who needs help by taking something that belongs to someone else and giving it to them. On such an occasion, acting on the maxim of benevolence is wrongful and impermissible – but it is so only in virtue of the principles of right, not because there is anything wrongful about the maxim itself. Again, CI as a common moral principle is only a formal principle of obligation, expressing the requirement that no one can be obligated by a norm that does not treat all persons impartially.

Can this requirement itself be taken to be a “comprehensive” basis for a liberal theory? I see no strong reason to think so. As I discussed in the previous chapter, all liberal theories, including political ones, rely on some assumption about the moral freedom and equality of persons. Kant's formal principle of obligation does not express any moral ideal for how to live one's life; rather it gives expression to the basic assumption that plausible underlies the claim of political liberalism that the exercise of authority must be justifiable to all persons as free and equal (cf. Gaus, 2005).

3.3 Conclusion

I began this chapter by comparing Kant's “moral-political conception” of right to Rawls's, and it is appropriate to conclude by returning briefly to that comparison. Rawls sets out his

conception for what he calls “the domain of the political” (Rawls, 2005a, p. 136ff.). This domain covers the political relation between citizens within the basic structure of society (its major social, political, and economic institutions). This relation between citizens is involuntary, and political power is always coercive; but in a constitutional democracy this power ultimately belongs to the citizens as free and equal. These defining characteristics of the domain of the political give rise to special values and requirements of justification that are expressed in a political conception of justice, in the form of principles that all citizens can reasonably be expected to accept. On Kant’s conception, the domain of right can be characterized in an analogous way. On the earth’s bounded surface, interaction among persons is inevitable, and such interaction inevitably brings with it the potential for interference and conflict. Because no one can reasonably claim any natural moral authority over others, the terms of that interaction should be subjected to a public framework of justice which all subjects of right can accept as free and equal. As I have made clear, however, to Kant the domain of right does not as such presuppose any particular institutions; instead, it covers all external interaction among persons who mutually influence one another’s freedom, and proceeds from that vantage point to show why public institutions of right are morally necessary.⁴² This, I will argue later, gives Kant’s account an important merit over Rawls’s.

As I have emphasized in this chapter, however, what their accounts share is also considerable. Like Rawls’s, Kant’s conception of right clearly has moral underpinnings; it does not, however, presuppose any substantive conception of the good or worthy ends of human life; it does not, for example, claim that external freedom is something inherently valuable that we ought to promote, or that we can only flourish or realize our moral nature by respecting the rights of others. Nor does it appear to depend on any troublesome metaphysics. Its moral assumptions reflect basic liberal commitments, and are suitably adapted to the legal-political problem of enabling reciprocal relations of external freedom. The present discussion, together with my earlier literature review, therefore supports the conclusion that Kant’s conception of right should not be considered comprehensive and can therefore be understood as a form of political liberalism.

⁴² In this respect Kant’s view draws closer to the view of Gerald Gaus, who argues for an “Individualized principle of liberal legitimacy” which requires that all interference with someone’s freedom must be justified to that person (Gaus, 2003, p. 208, cf. Gaus, 2012).

4. Legitimacy and public reason: The idea of the original contract revisited

I have rejected the view that Kant's conception of right is "comprehensive" in favor of a political or freestanding interpretation. This affirms what I called the negative tenet of political liberalism, but it does not yet account for the positive tenet: that the exercise of political power in a liberal democracy ought to be justified by appeal to values and principles that all who are subjected to that power can reasonably be expected to share in their capacity as free and equal citizens. To defend the thesis that Kant's conception of right supports both tenets of political liberalism, I must now turn to his account of rightful legislation and political justification in the second part of the Doctrine of Right, Public Right. Here I face some apparent obstacles. According to common views in the scholarly literature, Kant's conception of legitimacy is purely hypothetical or formal and therefore lacks a connection with democratic self-legislation, and his conception of the public use of one's reason is purely rational or modal and therefore lacks a connection with the role of citizenship. I reject these views and argue to the contrary that Kant's idea of the original contract, which sets the standard for the legitimate use of political power, can be understood to express an idea of public justification relevantly similar to that invoked by Rawls and other contemporary liberals.

The interpretation that I defend was in fact suggested by Rawls himself when he said that his liberal principle of legitimacy has "some resemblance [with] Kant's principle of the original contract" (2005d, p. 445, n. 16). I aim to expand on this suggestion. In fact, I believe that the suggested resemblance becomes quite strong once we take seriously Kant's conception of the citizen as a co-legislating member of the republican state.

4.1 Legitimacy and public reason in political liberalism

To fix some ideas, I begin with a closer presentation of Rawls's account of the connection between legitimacy and public reason. Rawls's idea of public reason belongs to an ideal of democratic citizenship: public reason is the reason of diverse citizens who are committed to living together in a constitutional democracy in spite of all their differences (2005d, p. 442). An important premise of Rawls's argument is that "while political power is always coercive power, in a constitutional regime it is the power of the public, that is, the power of free and equal citi-

zens as a collective body” (2005a, p. 68). Legislators, judges, and government officials exercise political power on behalf of citizens and should therefore be able to justify their decisions by appeal to reasons that all those who are subject to them could reasonably accept, at least when basic matters of political justice are at stake. When those who exercise political power justify such decisions only based on moral, religious, or other “comprehensive” reasons that reasonable persons inevitably disagree about, they fail to respect citizens as free and equal. In a democracy, even voting is a way of exercising political power over others, and so citizens as well as officials should ideally follow public reason in their reasoning about fundamental political matters, and not try to impose their vision of “the whole truth” on others (2005a, p. 214ff.). Rawls refers to this as the “duty of civility”. This duty, which is always moral and not legal, applies only to political action and deliberation in the public forum;⁴³ it does not apply to the “background culture” of churches, universities, at home and so on. In these “non-public” forums, citizens do not reason and engage each other *as citizens*, and so the ideal of public reason does not apply.

The content of public reason is provided by “a family of reasonable liberal conceptions” that can be the subject of an overlapping consensus among reasonable comprehensive doctrines (2005c, pp. xlvii-xlviii). The “limiting feature” of the conceptions of justice that belong to public reason is what Rawls calls “the criterion of reciprocity” (2005d, p. 450). This criterion says that “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 justification of those actions”; Rawls makes it clear that the criterion applies both to the constitution and to particular laws and statutes (2005c, p. xlv). Rawls says that the liberal conceptions of justice that satisfy the criterion of reciprocity are characterized by three conditions: “first, a specification of certain rights, liberties, and opportunities (...); second, a special priority for these freedoms; and third, measures assuring all citizens, whatever their social position, adequate all-purpose means to make intelligent and effective use of their liberties and opportunities” (2005c, p. xlvi). Conceptions that fail to satisfy either of these conditions, then, cannot reasonably be accepted by all citizens as justification of the exercise of political power. As Rawls asks, rhetorically, “what reasons can both satisfy the criterion of reciprocity and justify denying to some persons religious liberty, holding others as slaves, imposing a property qualification on the right to vote, or denying the right of suffrage to women?” (2005d, p.

⁴³ Rawls adds a proviso that allows citizens to appeal to religious and other comprehensive doctrines so long as they are not incompatible with public reason. I only mean to give a broad picture here.

447). (Infamously, Kant gave his answers to the last two examples.) The criterion of reciprocity thus determines a wide, but not indefinite, range of political arrangements that can be justified consistently with the idea of political liberalism.

Reasonable conceptions of justice are all assumed to be free-standing in the way I described in chapters 2 and 3: they are not comprehensive doctrines and do not presuppose the truth of any such doctrines. Instead, Rawls assumes that they work out their principles and values from interpretations of fundamental ideas that are implicit in the public political culture of a constitutional democracy. The ideas that are most important for Rawls's concerns are those of citizens as free and equal and of society as a fair system of social cooperation. (As I mentioned, the criterion of reciprocity is also associated with these ideas.) All reasonable conceptions are assumed to endorse these ideas; "Yet since these ideas can be interpreted in different ways, we get different formulations of the principles of justice ... Political conceptions also differ in how they order, or balance, political principles and values even when they specify the same ones" (2005d, p. 451). All reasonable citizens should thus accept the use of political power as legitimate and binding provided it is justified by one of the reasonable conceptions of justice, even if it does not accord with the conception they think *most* reasonable or justified. In this way, public reason can be seen as a political morality of principled compromise: "The zeal to embody the whole truth in politics is incompatible with an idea of public reason that belongs to democratic citizenship" (2005d, p. 442).

The take-home message here is that political liberalism ties political legitimacy to public reason: the exercise of political power in a constitutional democracy is only legitimate if it is supported by public reason, conceived as the shared reason of free and equal citizens.⁴⁴ The burden of this chapter is to argue that Kant's account of political justification supports this view. On the face of it, this may not be surprising at all: the idea of public reason as I have laid it out clearly has roots in Rousseau's account of the social contract and the general will, which Kant was also deeply influenced by (Rousseau, 2008). However, public reason is often understood in a different, decidedly un-Kantian way, to give priority to a "pragmatic quest for consensus" over rational justification (Hill jr., 2000, p. 237);⁴⁵ as for example Habermas argues, Rawls collapses the distinction between justified acceptability and actual acceptance (Habermas, 2011b). Moreover, Kant's conception of political justification is often held, for

⁴⁴ This message is also affirmed, elaborated and developed in various ways by Larmore (2002, 2008) and Quong Quong (2011, 2013b). Gaus develops a different version of public reason liberalism which appeals to convergent reasons among citizens and does without Rawls's distinction between comprehensive and political values, but overall the similarities are more important than the divergences (e.g. Gaus, 2003, 2015).

⁴⁵ Hill, jr. ultimately rejects this interpretation in favor of a more Kantian legitimacy-centered account.

various reasons, to be far removed from Rousseau (Flikschuh, 2010, O'Neill, 1997, Stilz, 2009). My purpose here is not to advance any exegetical claims about Rawls or Rousseau, but only to defend the thesis that Kant's idea of the original contract can be seen to express an idea of public reason, which reveals the roots of both in a liberal development of Rousseauian ideas.⁴⁶

4.2 Kant on the original contract

Like other social contract theorists, Kant uses the concept of a contract to convey the idea that the exercise of political power is legitimate only if it is justifiable to those who are subject to it as being rationally acceptable from their own perspective. In the Doctrine of Right, the original contract is introduced as the idea of the act “by which a people forms itself into a state,” “in terms of which alone we can think of the legitimacy of a state” (MS 6:315). Thus we cannot even think of a state as being legitimate if we cannot conceive of a people as having willingly united itself to form it through an original contract. This means that any law is legitimate only in so far as those who are subject to it *could* have given their consent to it as a united body. I already began to explain the basis for this in the previous chapter: the state's authority is grounded in its potential for representing an omnilateral will, but it cannot claim to do so if it exercises its power in ways that all citizens could not consent to.

I emphasize “could” because Kant is clear that *actual* consent (whether expressed or tacit) is not a requirement for legitimacy. The duty to join the state is unconditional, and so does not depend on anyone's consent; if the legitimacy of all particular laws depended on the consent of all citizens, the state would inevitably collapse into a lawless condition so soon as anyone dissented.⁴⁷ Furthermore, no contract can conclusively be established independently of the state, so the state itself *cannot* be established by a contract. Still, the original contract functions as a normative ideal that states how we should think of the legitimacy of laws – and “we” here includes citizens and legislators, not only philosophers. Kant argues in “Theory and Practice” that although the idea of the original contract cannot (and could not) be traced back to an empirical act of consent, it “has its undoubted practical reality, namely to bind every legislator to give his laws in such a way that they could have arisen from the united will of a

⁴⁶ Helga Varden and Katrin Flikschuh both claim that liberal theorists view public reason as the reason of virtuous private individuals, which they contrast with Kant's view (Flikschuh, 2010, Varden, 2010). I mean to highlight the civic nature of public reason in Rawls's account, which echoes Rousseau and Kant.

⁴⁷ I do, however, think that actual consent nonetheless plays an important role in Kant's idea of a fully rightful condition, and will argue this point later.

whole people and to regard each subject, insofar as he wants to be a citizen, as if he has joined in voting for such a will” (TP 8:297).

As the preceding passage brings out, the idea of the original contract is connected with the nature of the state that Kant advocates. Kant describes the republican state as a “*representative system* of the people”, and the legislative authority in such a state “can belong only to the united will of the people”; legislators give laws on behalf of the citizens as a collective body, and are to act only as “guardians of [the people’s] freedom and rights” (MM 6:319). A republican government must treat its subjects “as citizens of the state, that is, in accordance with laws of their own independence: each is in possession of himself and is not dependent upon the absolute will of another alongside him or above him” (MM 6:317). Citizens, on Kant’s account, are not mere subjects or underlings. They are conceived in terms of three normative attributes: lawful freedom, the attribute of being a colegislating member of the state; civil equality, the title not to be bound by others more than one can in turn bind them; and civil independence, the attribute of being dependent only on the public authority and not on any others. Thus when the idea of the original contract asks what all citizens can consent to, we must assume that the standpoint of the citizen is characterized in terms of these attributes. My goal in the following discussion is to bring out the implications of these remarks and to show how they support the conclusion that Kant’s conception of right can be interpreted as a form of political liberalism.

As I have said, I propose that Kant’s idea of the original contract can be interpreted as expressing an idea of public reason, or alternatively, to use a closely related and more general term, an idea of public justification.⁴⁸ The idea of public justification in contemporary political liberalism is a development of the idea of consent in classical contract theory, but “Justification shifts the focus from consent simpliciter to the reasons for consent” (Chambers, 2010, p. 895, cf. also D’Agostino and Vallier, 2014). Kant already took a step in this direction by focusing on *possible* consent – what all citizens *can* consent to – rather than actual consent, whether expressed or tacit. The test of whether citizens could consent to a law through their united will is a test for whether that law is publicly justifiable; however, as Chambers points

⁴⁸ There is no clear and established boundary between the ideas of public reason and public justification in the literature. Different scholars draw the distinction in subtly different ways, but nevertheless often use the terms interchangeably. The idea of public justification is often taken to be more general requirement that the exercise of political power must be justified to all members of the public, whereas the idea of public reason concerns more specifically the content of public reasons or the process of public reasoning (Chambers, 2010, D’Agostino and Vallier, 2014, Quong, 2011). Anyway, I do not make much of the distinction and will use either as it fits the context.

out, this hypothetical requirement does not obliterate the need for actual public deliberation through which citizens bring their reasoning to bear on the legitimacy of any use of political power. Simone Chambers notes that theories of public justification are often concerned both with the *process* of justification – *how* laws are justified, and with the *outcome* of justification – *what* laws can be justified (Chambers, 2010, p. 896). She also notes that Kant’s view fits this pattern, and that he can thus be seen as a forerunner of contemporary public justification theorists.⁴⁹

To gain the leverage I need to establish my conclusion, I must now go through the central elements of Kant’s views on political justification in the Public Right. I will follow Chambers’s suggestion and discuss the two aspects of justification in turn. The *outcome* aspect of public justification is connected with Kant’s account of the state’s rightful powers and his use of the original contract to reject hereditary privilege, religious establishment and so on. The *process* aspect is connected with Kant’s account of publicity, free speech, and the public use of reason. I will discuss these aspects in turn, and show how they support a Kantian interpretation of the idea of public reason.

4.3 Outcome: What laws can be justified?

4.3.1 Legitimacy and obligation

Kant uses the idea of the original contract in different ways in various places to argue for or against the permissibility of political arrangements.⁵⁰ It is clear that he takes the idea to have substantive political implications by setting normative limits to the legitimate use of state power (hereditary privilege and permanent religious establishment are ruled out, for example). Importantly, however, the same limits do not apply to the political obligations of citizens: they have a duty to obey the law even if they do not see it as something they could have agreed to (as for example hereditary privilege or religious establishment). Kant argues that “the *spirit* of the original contract ... involves an obligation on the part of the constituting authority to make the *kind of government* suited to the idea of the original contract” and to

⁴⁹ “Many theories of public justification introduce some form of hybrid in which there is, on the one hand, an hypothetical argument that might go something like this: ‘P is a policy for which there are reasons that all could accept’. On the other hand, there is the insistence that some form of actual process of public justification in which these reasons are aired, discussed, and put before the public take place. Even Kant, who very explicitly states that no actual consent or ratification of laws is needed to establish that a law could be agreed to by a whole people, nevertheless insists that public debate and indeed a process of public justification is necessary to achieve this outcome. But for Kant, a public process of justification is endorsed as a means of getting the reasons right and not as furnishing evidence of consent.” (Chambers, 2010, p. 896)

⁵⁰ A useful discussion of some of Kant’s uses of the idea is provided by Hill jr. (2002, pp. 77-84).

change any “defective” constitution into a republican one, which is “the only constitution that accords with right” (MM 6:340-341, 6:321). Nonetheless, he insists that this constitution must be brought about through a process of “gradual reform in accordance with firm principles” and not by revolution (MM 6:355). Citizens can help bring about a fully rightful condition through the public use of their reason, but not through resistance or rebellion – their political obligations hold even for defective constitutions (MM 6:318-319). Passages such as these have been taken to entail that Kant holds an absolutist conception of political obligation, but there is good reason to think that Kant’s arguments against resistance and revolution apply only to legally constituted states and not to “any thug that happens to wear a crown” (Waldron, 2006, p. 196). My point now is only that even if subjects have obligations toward states that are not justified by the standard of the original contract, such states are nonetheless, precisely, not justified by the standard of the original contract.

4.3.2 Justified law and the rightful condition

To return to the examples, Kant argues that institutions of hereditary privilege and permanent religious establishment are irreconcilable with the idea of the original contract and therefore unjustifiable. It is clear, then, that the original contract protects strong rights to equality of opportunity and freedom of conscience. What are the grounds that block possible unanimous consent in these cases? In the case of religious establishment, Kant argues that the state can have no right to interfere with the internal constitution of churches (except so as to hinder civil conflict) because the supreme authority must not “[put] itself on a level of equality with its subjects” and because “no people can decide for itself never to make further progress in its insight (enlightenment) regarding beliefs ... since this would be opposed to the humanity in their own persons” (MM 6:327). When the public authority make decisions about religion, it cannot truly represent all citizens; it “puts itself on a level of equality with its subjects” and thus represents only a unilateral will, thus all citizens cannot consent to it consistently with their own independence. Such policies are therefore unjustifiable because all subjects cannot be assumed to willingly give up their freedom to set ends for themselves.

In the case of hereditary privilege, Kant makes the same point even more strongly: “Since we cannot admit that any human being would throw away his freedom, it is impossible for the general will of the people to assent to such a groundless prerogative, and therefore for the sovereign to validate it” (MM 6:329). The prerogative of hereditary privilege is “groundless” because “nature does not arrange things in such a way that talent and will, which make meritorious service to the state possible, are also *hereditary*” (ibid.). In other words, there is

no reasonable case to be made that hereditary privilege serves public purposes, and thus if the supreme authority protects any such institution it acts in the interest of the nobility rather than the people as a collective body. In general, the inequalities of rank and power that are instituted in a civil society are only justifiable if they are open to all and grounded in public purposes; if they are not, subjects have no reason to accept them and thus could not consent to them.

The same kind of reasoning can be seen to be at work in Kant's infamous distinction between "active" and "passive" citizens (MM 6:314). The latter status is assigned to those who are economically or juridically dependent on others, such as common laborers and women, while the former status is reserved for those who are independent in the same regard. This distinction allows Kant to affirm a universal citizenship while still defending limited franchise: all citizens are equally protected by the law, but only active citizens have voting rights. Kant argued that in order for this inequality to be legitimate, it must be possible for all passive citizens to "work their way up" to the status of active citizenship; again, a condition of equal opportunity is required (MM 6:315). Without this proviso, those who are assigned the inferior status could not possibly agree to the distinction (although it is hard to see how the proviso is supposed to work for women on Kant's account). I remain unpersuaded;⁵¹ however, it is interesting to note that Kant's arguments for upholding a limited franchise only rely on political reasons that have to do with what is implied by the idea of a rightful condition – maintaining the independence of all and the need for the state to be fully representative in nature. He does not rely on any "comprehensive" reasons that have to do with the different moral worth or inherent capacities of laborers and women. The same holds in the other examples I discussed: Kant consistently puts his arguments in terms of what the public authority must do to constitute a rightful condition consistent with the independence of all citizens, and does not suddenly introduce further ethical principles. In this sense, Kant's reasoning is political, not metaphysical (cf. Rawls, 1985).⁵² This reinforces the conclusion that Kant's concep-

⁵¹ Even with the proviso, the status of passive citizenship seems plainly at odds with Kant's foundational premise of an innate right to freedom as independence, which surely ought to entail that no citizens should be so dependent on others in their private and personal relations in the first place (Maliks, 2014, p. 120). It is also at odds with Kant's insistence that legislative authority can only belong to the people as a whole, which ought to entail a universal right to vote and hold office, even if it is admitted that all regardless of franchise hold the right to free speech and to be represented ideally by deputies in the legislature.

⁵² Thomas Pogge makes the intriguing suggestion that Kant's inegalitarian view of citizenship is evidence that he sought to develop a "free-standing" form of liberalism rather than one that depended on his "comprehensive" egalitarian moral doctrine (Pogge, 2012, p.156).

tion of right can be interpreted as free-standing. As I will go on to explain below, this suggests a Kantian interpretation of the Rawlsian idea of a political conception of justice.

Kant goes beyond the delineation of negative constitutional rights that must be secured for citizens in a rightful condition to argue that there are certain “*effects with regard to rights that follow from the nature of the civil union*” that authorize a wider range of government activities (MM 6:318). Unlike libertarians, Kant does not take the powers of the state to be reducible to the private rights of citizens. Precisely because it is a public authority that is representative of the people, the republican state may legitimately do things that no private agent may do by coercive means. This opens the space for more positive aims, although they must always be grounded in “the nature of the civil union” – the conditions that enable citizens to interact on fully rightful terms. For example, Kant argues that as the “supreme proprietor (lord of the land)”, the state is entitled to tax wealthy citizens to “administer the state’s economy, finances, and police” (MM 6:325). Arthur Ripstein argues that the status as supreme proprietor gives the government a responsibility to establish the “public preconditions for equal private freedom” – the that allow people to engage in voluntary transactions with who they want without being subject to the will of others, for instance publicly accessible roads, markets and other infrastructure (Ripstein, 2009a, ch. 8, esp. p. 248-252). This is part of what the state must to make sure that limitations to freedom are fully reciprocal and that no one are dependent on anyone else as a matter of right. As another aspect of this basic public responsibility, Kant argues that the government has “the right to impose taxes on the people for its own preservation”, and this right grounds the legitimacy of a basic system of social security:

The government is therefore authorized to constrain the wealthy to provide the means of sustenance to those who are unable to provide for even their most necessary natural needs. The wealthy have acquired an obligation to the commonwealth, since they owe their existence to an act of submitting to its protection and care, which they need in order to live; on this obligation the state now bases its right to contribute what is theirs to maintaining their fellow citizens. (MM 6:326)

A plausible way of reading Kant’s argument is that because the republican state acts on behalf of all citizens as a united will, it must make sure that the scheme of property rights it puts in place does not leave some citizens in a state where they are dependent on the will of others for their exercise of external freedom. Redistribution is legitimate not because the state has a gen-

eral responsibility for the welfare of the people or because it discharges an ethical duty of beneficence on behalf of its citizens, but because the state must enforce terms of social interaction that are justifiable to all. The state protects the wealthy by enforcing their property rights, and this involves the use of collective force against others. Therefore they have no grounds to complain against the redistribution of wealth to those who lack the means to provide for their most basic means partly due to being excluded from the use of resources owned by others.⁵³

This fits into the general picture of political justification as suggested above. All citizens are assumed to share the end of a rightful condition – that is part of what being a citizen means – and no citizen can therefore reasonably reject legislation that belongs to the responsibility to create a rightful condition in which all can interact on reciprocal terms as free, equal and independent citizens. The state cannot, however, assume that citizens share any ends beyond this; if it acts for other ends, it fails to be fully representative of all citizens as a collective body. This account of justification protects robust negative rights and precludes the state from taking on the responsibility of the welfare, happiness, and perfection of citizens; as I have also shown, however, it does not preclude the possibility for all positive state action.

4.3.3 Kant and Rawls on legitimacy

The examples I have gone through show that Kant through idea of the original contract sets the bounds of legitimacy in a rather similar way as Rawls does through criterion of reciprocity: it determines certain basic rights that must be given priority (equality of opportunity, freedom of conscience) while leaving space for various positive aims that are grounded in the nature of the civil union (provision of public goods, redistribution), without determining more specifically how these aims can or should be pursued or how the negative rights should be interpreted and applied. Any use of collective political power that goes beyond these limits *cannot* reasonably be consented to by all citizens and are thus illegitimate. Still, that leaves room for different political arrangements, different sets of laws and policies, that citizens reasonably *can* consent to.

Many scholars have argued that Kant’s justification of state powers can be extended beyond his own examples to account for many of the activities commonly associated with

⁵³ Kant adds that a redistributive system is only justifiable to those who contribute with their taxes so long as it “does not make poverty a means of acquisition for the lazy ... and so does not become an unjust burdening of the people by government” (MM 6:326). Kant also argues that a “paternalistic government” that is “established on the principle of benevolence toward the people” is “the greatest despotism thinkable” (TP 8:290).

contemporary liberal democracies. The responsibility of the state to create the systemic preconditions for rightful interaction can plausibly also ground the legitimacy of further welfare provisions such as public education and health care (eg. Guyer, 2000, Ripstein, 2009a, ch. 9, Wood, 2014). By the same token, we can conjecture that even support for the arts, the press, libraries and other institutions of civil society can be justified in order to maintain wide access to knowledge, debate and cultural expressions; if the public sphere is dominated only by commercial interests, the possibility of each citizen to enlighten oneself and to take part in public deliberation becomes dependent on the will of private interests. If such policies can plausibly be understood to be required in order to maintain the systemic preconditions of fully rightful interaction, then all can consent to them “insofar as they want to be citizens”, that is, in their capacity as free and equal citizens committed to the end of a rightful condition; they do not presuppose that citizens share any ends, and so no one can reasonably reject them on the grounds that they are inconsistent with their freedom to set ends for themselves.

Others reject such proposals and argue that the original contract entails a more austere account of the public purposes that can be properly pursued by the state. As I said, Kant was not a libertarian, but he can be (and has often been) taken as an advocate of classical liberalism (e.g. Byrd and Hruschka, 2010, p. 40ff., Teson, 2011).⁵⁴ I need not take sides in this debate. To the contrary, I take the different sides as evidence for an important point I want to make, namely, that Kant’s account of the rightful condition leaves room for reasonable disagreement about what, more precisely, the republican state can and must do to create the conditions for rightful interaction among all citizens. The different interpretations of Kant, ranging from the classical liberal to the social democratic, are really different views about how a public system of justice can be governed consistently with the title all citizens have to freedom, equality, and independence. I do not want to deny that these are also legitimate scholarly disagreements about the proper interpretation of Kant’s views, but they translate nicely into reasonable political disagreements that could take place within the deliberations of citizens and legislators in a republican state.⁵⁵ This means that we can imagine different substantive conceptions, all broadly liberal in character, that might be compatible with the justificatory

⁵⁴ I take libertarians to hold that private rights are in principle determinate and enforceable independently of the state and that the state’s legitimate powers are reducible to the enforcement rights of individuals. I think it is a mistake to conflate this kind of view with classical liberalism, although this often happens. The distinction is not drawn by Varden (2015) or Wood (2014), who critically discuss the grounds for a libertarian reading of Kant. Wood’s claim that “Kantian right is sooner socialist than libertarian” only makes sense on the narrower construal of libertarianism, given Kant’s strong emphasis on private rights. See Freeman (2001) for a discussion of the difference between liberal and libertarian views from a Rawlsian perspective.

⁵⁵ However, even Kant’s own views cannot be taken as definite of the implications of his principles, as I think

framework of Kant's account.

This can be reinforced when we consider the more general idea that private rights can only be made conclusive in a civil condition. This entails that the state has the responsibility to determine exactly what those rights are. On the Kantian view, the state is not needed merely to protect individuals against theft, but to define exactly what actions are to count as theft in the first place, by making the boundaries of property rights determinate. The same goes for breach of contract, trespassing and other crimes. As for example Hodgson and Stilz have argued, Kant's account only shows that there must be some determinate scheme of positive rights in a civil condition, not exactly how that scheme should be designed (Hodgson, 2010b, p. 62, Stilz, 2009). There is no *a priori* reason to think that a system of private ownership is necessarily more rightful than mixed system that includes collective and restricted ownership, for example.⁵⁶ Thus while no one can reasonably reject having *some* authoritative scheme of rights, there are different schemes that all *can* agree to. The determination and specification of a scheme of rights is then a matter for the political process, the immanent goal of which is to establish a fully rightful condition; different citizens can have different views about how this best is achieved.

On Kant's view, it is the public authority's responsibility to establish and maintain a rightful condition, and to make judgments about what this requires in light of circumstances, in line with the idea of the original contract. As the present discussion has brought out, this responsibility involves more – and may involve much more – than simply to enforce private rights. At the same time, it is clear that all of the state's legitimate actions must flow from this responsibility, which also limits its legitimate power: no government may infringe on citizens' equal right to freedom, for example through discriminatory or moralistic legislation, or use the state as an instrument to further private as opposed to public purposes. Thus Kant's view allows a leeway of legitimacy, with boundaries set by citizens' fundamental right to be free, equal and independent. Within these boundaries it does not provide determinate answers

his account of active and passive citizenship makes especially clear. So even if there were a consensus about Kant's own view, the case would not be settled.

⁵⁶ Some might say to the contrary, although markets in some form are surely an essential part of the infrastructure that the state must put in place to realize equal external freedom. State monopolies on the provision of many goods and services are arguably suspect from the point of view of right for the same reasons that hereditary privilege and religious establishment are ruled out. To take a clear example: the socialist regime in Cuba specifies 201 permissible private economic activities in which citizens can be self-employed, and the government has a monopoly on all other activities by default. Universal consent to this kind of system would presume that no one could rationally want to engage in any other private economic activities than those specifically permitted by the government; but this is tantamount to giving up the freedom to set ends for oneself.

for which laws are to be enacted, but leaves this to the public as a matter for public deliberation and choice in light of circumstances. As Ripstein argues, Kant's account of public right "provides a framework for citizens to engage in democratic deliberation and processes, the task of which is for the citizens to give themselves laws that are consistent with their lawmaking powers"; it does not solve this task on behalf of the citizens (Ripstein, 2009a, p. 256).

As I already hinted at earlier, this interpretation of Kant's theory of public right suggests another interpretation of the distinction between comprehensive and political values, as well as another interpretation of the idea of public reason. Political values or principles are those that can be seen as implicit in the idea of a rightful condition: principally the freedom, equality, and independence of citizens, as well as the stability and security of the republican state. As political values, they do not imply any "moral ideal of autonomy" or other ethical commitments; they concern only the relations that hold between persons as citizens within the state. They are values and principles that all can be expected to share "in so far as they want to be a citizen", and as such they are a suitable basis of public justification. But as I have said, these values do not determine any specific set of laws and policies. Like the ideas Rawls finds implicit in the public political culture, they can reasonably be interpreted and balanced in different ways, in light of anthropological facts under different circumstances. Thus there can be different, reasonable *conceptions of justice* that give different interpretations of what, more specifically, is required on the part of the state to secure and maintain a rightful condition.⁵⁷ (I surmise that Rawls's Justice as Fairness could plausibly be interpreted as a reasonable conception of justice on this account.) Different sets of laws may be legitimate if they are justified by these conceptions. However, no reasonable conception of justice can deny citizens' basic right to freedom or propose to use the state for other than fully public purposes. Comprehensive values and ideas are those that go beyond any reasonable interpretation of what is required for a rightful condition, as for example ethical or religious ones. This leads to the attending Kantian idea of public reason: legislators, judges, and citizens deliberating about justice in public must frame their judgments in terms of reasonable interpretations of the political values implicit in the idea of the civil condition and refrain from appealing to comprehensive values and ideals that go beyond this. Before I can elaborate on this idea, however, I must first turn to Kant's view of political speech and will-formation, which plays an important role in

⁵⁷ These conceptions can even be seen as "political not metaphysical" because they are necessarily "based upon anthropology" and not on a priori concepts alone (MM 6:217); they concern the application of concepts of right to political reality and not metaphysical first principles as such. I think Kant's account actually agrees with Rawls that it is misconceived to see something like the two principles of justice as "metaphysical", given how much anthropological (social scientific) information they take into account (e.g. , 1971, p. 136ff).

his account of political legitimacy and justification.

4.4 Process: How can laws be justified?

4.4.1 Possible consent and democratic self-legislation

This brings us to what I (following Chambers) called the process aspect of public justification. Commentators often take Kant to advance a purely hypothetical concept of legitimacy; the original contract is interpreted as a “thought experiment” that can be carried out even by a benevolent monarch who makes laws without being accountable to the people. Because the only notion of consent involved is purely hypothetical, no real deliberation and no actual consent or consensus is required for legitimacy. Anna Stilz’s verdict is typical: “While Kant concedes that there exists an a priori standard for determining when law is just – whether that law could logically serve as the general will of an entire people, which requires that each member be able to consent to it – for him, this standard is merely a diagnostic tool of which the existing sovereign should make use in order to legislate well” (Stilz, 2009, p. 58).⁵⁸ As Rawls argues, it follows from this interpretation that Kant’s idea of the original contract does not imply any substantive sense of self-legislation in the political sphere:

...suppose (we wildly imagine) that the Prussian chancellor of Kant’s day, with the support of the King, acts to ensure that all laws enacted are in accord with Kant’s principle of the social contract. If so, free and equal citizens would – let us say on due reflection – agree with them. Since citizens do not themselves freely discuss, vote on, and enact these laws, however, citizens are not politically autonomous and cannot thus regard themselves. (Rawls, 2005b, p. 411)

Katrin Flikschuh concurs: “The idea of popular rule [in Kant’s view] stretches no further than the requirement that the sovereign legislator ask himself whether any proposed public law could have been willed by the people as a whole” (Flikschuh, 2012, p. 181).

While I do not deny that these interpretive claims find support in some remarks Kant makes in various places, I believe that they underestimate the (in our modern sense) democratic element in his thought. On my interpretation, real public deliberation by citizens and legislators is actually required in order to unite the will of people and to bring about a fully rightful condition. The obligation of legislators to “give [their] laws in such a way that they

⁵⁸ It puzzles me that Stilz can take it to be a *concession* on Kant’s account that the original contract is an a priori standard for legitimate positive law. Surely such a standard is a necessary condition for the possibility of positive lawgiving as Kant conceives it; it is not something he yields to the other side of an argument.

could have arisen from the united will of a whole people” (TP 8:297) plausibly requires them not only to give laws that are in conformity with subjects’ rights but also to make laws fully available to public scrutiny: to present and justify their proposals or decisions to the public, to be prepared to engage in deliberation and to listen to criticism. Kant highlights “*freedom of the pen*”, the freedom to question and criticize the public authority’s decisions through public deliberation, as the “sole palladium of the people’s rights” (TP 8:304). Free speech about matters of right is thus not merely a private freedom among others that ought to be protected by the state; rather, as Helga Varden argues, “the right to speak out against the state is necessary for the public authority to be representative in nature. Therefore, this right to free speech is constitutive of the legitimacy of the political authority, namely constitutive of the political relation itself” (Varden, 2010, p. 49). Thus “the public use of one’s reason” is not only important because it allows the individual and society to enlighten itself (AQE 8:37); free political speech is an exercise of public autonomy and a source of political legitimacy. In Habermas’s words, he who speaks up in public about matters of right takes part in society’s “political will-formation” (Habermas, 1996, p. 93).⁵⁹ No interpreters, of course, would deny that Kant defends strong rights to free speech. The *centrality* that Kant accords to public political speech, however, is best explained by an account of legitimacy that appeals to actual deliberation and not just the thought-experiment of hypothetical consent (cf. Weinstock, 1996, p. 391).

Both Habermas and Varden relate the role of public political speech to the basic fact that I discussed in the last section, namely the essential indeterminacy of right with regard to the positive scheme of rights that is required in order to realize a rightful condition. While Kant believes that positive public laws are required to enable rightful interaction among persons, the form such laws should take in any given society can only be determined through an essentially indeterminate process of political deliberation and choice (Habermas, 1996, p. 94, Varden, 2010, p. 50). The positive and coercive nature of public laws means that the notion of autonomy as self-legislation must be qualified with regard to such laws; each citizen cannot decide the public laws they live by (this is a contradiction in terms). Still, it does not mean, as

⁵⁹ Lundestad, whose work I draw on in this section, reinforces the connection between Kant and Habermas: “...[Kant] assigns a considerable role to the public deliberations and autonomy of the citizens – in fact, the united legislative will of the people is for Kant the true sovereign in the state. This will can also be realised in actual political practice through the exercise of popular sovereignty under the rule of law of separated state authorities. Accordingly, his philosophy of right strongly resembles the position taken by a contemporary Kantian such as Jürgen Habermas, who argues that there is a close internal relationship between democracy and the legitimate rule of law” (Lundestad, 2013, p. 14, cf. also Maus, 1995).

Flikschuh claims, that “in the political context, autonomy as self-legislation is simply irrelevant” (Flikschuh, 2010, p. 53). This claim flies in the face of what Kant explicitly says, for example, his insistence that “a person is subject to no other laws than those he gives to himself (either alone or at least along with others)” (MM 6:224) and that “citizens ... must always be regarded as legislating members of a state” (MM 6:345). While a citizen is always a *subject* and laws are externally imposed against him even against his will on particular occasions, he is always also a legislator and must be able to see himself also as author of the laws that bind him. Thus while Kant’s account emphatically does not require that people give their consent to a public authority, it does require that the positive laws that give effect to a rightful condition are laws that the people gives itself. This should already be clear from Kant’s clear statement that “only the general united will of the people can be legislative” (MM 6:314). In support of her contrary opinion, Flikschuh argues that Kant here only “has in mind the *commander* as legislator of the general united will” (Flikschuh, 2010, p. 68). This, however, is hard to square with the text that follows, where Kant says that one of the essential attributes of a citizen is “lawful *freedom*”: “obeying no other law than that to which he has given his consent” (MM 6:314). Law freedom is only possible if each citizen can take part in the political will-formation in society in such a way that positive laws, while they are not (and cannot be) actually decided upon by all, nevertheless reflect the general will of the people as mediated through the representative system of legislation in the republican state (cf. Lundestad, 2013, p. 200, Maus, 1995, p. 845).

The idea that the free citizen obeys “no other law than that to which he has given his consent”, however, gives rise to an interpretive puzzle. As I have emphasized, the idea of the original contract is couched in terms of *possible* consent. Here, the requirement is not merely possible consent but rather *actual* consent: the citizen is to be free to obey only laws to which he *has* (rather than *could have*) given his consent rather than (Lundestad, 2013 draws attention to this, p. 204). This expresses a substantive ideal of political autonomy or self-legislation: citizens must be able to see themselves as authors of the laws that bind them. However, the requirement of possible consent reappears later in Public Right, again as a normative limit to legitimate public lawgiving: “what a people (the entire mass of subjects) cannot decide with regard to itself and its fellows, the sovereign can also not decide with regard to it” (MM 6:329). What should we make of these seemingly conflicting statements? Actual consent surely sets the bar much higher than the merely possible consent; the requirements of actual and possible consent cannot plausibly be taken as equivalent. If the standard of possible con-

sent is used, there is no guarantee of (or need for) actual consent; if the standard of actual consent is used, possible consent is superfluous.

I believe that the tension between the statements can be effectively resolved if we see the standard of possible consent as a normative ideal that is meant to guide the reasoning of legislators and citizens (in their capacity as co-legislators) when deliberating in public. If all apply this standard to their reasoning, and if all are willing to listen and to adjust their judgments in light of the reasoning of others, they will be moved through the course of deliberation toward real unanimity and thus actual consent. This real unanimity may never actually be reached, but must nonetheless be assumed as the idealized end-point of deliberation. Actual consent to coercive laws by all citizens, a situation in which truly “each decides the same for all and all for each” (MM 6:314), should then be seen not as a necessary requirement for the legitimacy of states but rather an ideal end-state that all (co-)legislators should strive toward the actualization of by “the *spirit* of the original contract” (MM 6:340). For Kant, any actual (empirical) state can only be seen as an imperfect realization of the rational idea of a rightful condition, and it is the responsibility of the sovereign to move the state toward an ever closer approximation to this idea through gradual reform.⁶⁰ Because the people properly speaking constitute the sovereign, inclusive public deliberation guided by the idea of the original contract is essential for this process of approximation. Like contemporary deliberative democratic theorists, Kant can be seen to advocate a “regulative ideal of real political consensus” that actual deliberation should approximate (cf. Gaus, 2003, p. 131-132).⁶¹ On a weaker and more realistic interpretation, the ideal demands only that (co-)legislators should be committed to rejecting proposals that all citizens *cannot* consent to, such that disagreement can be narrowed to the point where all can see each other’s views and proposals – and thus the laws and policies that are decided on – as representing different reasonable interpretations of how the rightful condition can be realized in practice, even when they do not agree with them.

The details of this are not important, however. The significant conclusion to the present discussion is that Kant’s account of popular sovereignty seems to require actual deliberation on the part of citizens, and that the idea of the original contract must be seen to function as a norm to guide that deliberation. This brings out a picture that is importantly similar to Rawls’s idea of public reason, the idea that citizens and officials should guide their reasoning

⁶⁰ In this sense, Kant was a Platonist: he explicitly likened “The idea of a constitution in harmony with the natural right of human beings” to “a Platonic ideal (*respublica noumenon*)” in the *Conflict of the Faculties* (CF 7:91, cf. Maliks, 2014, pp. 139-140). He rejected, however, Plato’s suggestion that philosophers should become kings, insisting instead “only that they [must] be given a hearing” (PP 8:369).

⁶¹ Rawls argued that his idea of public reason belonged to a conception of deliberative democracy.

by values and principles that all could reasonably accept.

This suggestion goes against the grain of some recent commentary which argues that Kant does not have a concept of public reason, or if he does, it is fundamentally different because it does not allow for the kind of normative limitations on reasoning invoked in Rawls's "duty of civility" (Langvatn, 2013, p. 53, O'Neill, 1997, 2015). I want to argue that Kant's theory has space for an idea of public reason that is closer to Rawls's than these commentators think. If I am correct, they have been looking in the wrong place.

4.4.2 Kantian public reason

Rawls himself traces the concept of public reason back to Kant's essay "An Answer to the Question: What is Enlightenment?" (2005a, p. 213, n. 2).⁶² There, Kant argues that while the use of reason by persons who hold civil office may be restricted when they act and speak in their official capacity, they must nevertheless be free to speak their mind to the public at large in their personal capacity. Kant calls the former kind of reasoning the "*private* use of one's reason" and the latter the "*public* use of one's reason" (AQE 8:37). Kant says that the public use of one's reason is addressed to "the entire public of the world of readers" or even to "the society of citizens of the world" (AQE 8:37), and it is led only by the concern with enlightenment. Rawls' idea of public reason, however, applies to politicians, jurists, officials and citizens of a democratic society, and is addressed to the citizens of that society; and it is concerned with the "reasonable" and not with "the whole truth". There thus seems to be a great distance between these concepts. On Kant's account, what Rawls calls "public reason" seems more like a form of the "private use of one's reason" because it presupposes a certain authority and addresses only a limited audience, whereas on Rawls' account, what Kant calls "the public use of reason" seems more like a form of "non-public reason" that belongs to the "background culture" of society because it lacks the same presuppositions.

This difference seems to me to be largely terminological, however. As I have emphasized, because the legislative authority belongs to the general, united will of the people on Kant's account, citizens are not only subjects but colegislators (TP 8:294, MM 6:345). The clear implication of this is that the role of the citizen can be seen like a civil office or authority on Kant's account, and that there may be duties or responsibilities connected with the use of one's reason in the capacity as a colegislator just as there are for public officials. Recall

⁶² He does not acknowledge that both Hobbes and Rousseau used the expression "public reason" in earlier writings, in ways arguably more relevant to Rawls's context (Langvatn, 2013, p. 52ff, Solum, 1993, appendix).

Kant's argument that the idea of the original contract as the source of political legitimacy "bind[s] every legislator to give his laws in such a way that they *could* have arisen from the united will of a whole people" (TP 8:297). Plausibly, because citizens are colegislators, the same obligation applies to them: when voting and deliberating in public, citizens, like politicians and other officials, must be able to justify the laws, policies and principles they support as ones that all citizens could have consented to. Thus interpreted, the obligation that derives from the idea of the original contract on Kant's account is fully equivalent to the duty of civility that derives from the idea of public reason on Rawls's account.

This does not, however, mean that the public reasoning of citizens should be aligned with the "private use of one's reason" that Kant discusses in the Enlightenment essay. In fact, the distinction between private and public reasoning in that essay is unsatisfying and quite misleading. His examples of private reasoning are all about persons who have to obey the verdict or instruction of a higher authority: an officer following the order a general, a citizen paying taxes to the state, a priest preaching in accordance with the dogmas of his church. These persons don't really have any space for reasoning about what to do; their reasoning is limited to accepting the authority's reason as their reason (or at least as binding on them). Hence they are described as acting "merely passively" and to have no leeway for arguing.⁶³

These cases make an imperfect contrast with the ideal case of public reasoning, which is a scholar addressing the whole world of readers (an unrestricted audience). What is missing from the picture is the reasoning of the authorities themselves: the general giving orders to the officer, the sovereign demanding taxes from its citizens, the church council deciding on dogmas. Their use of reason falls between the two chairs of the private and the public. On the one hand, their reasoning is not merely passive: they cannot (and do not) themselves follow orders, but must actively reason about what to decide. On the other hand, they do not have an unrestricted audience, and they are not guided simply by the pursuit of truth: they reason (in some sense) on behalf of those they represent, or those who are to accept their verdict as binding; and they must be guided (in some sense) by the purpose of their mandate or of the institution for which they are entrusted to make decisions. Crucially, they must themselves accept the authority of their own mandate or their institution. This form of reasoning, which is not captured by Kant's explicit use of the private/public-distinction, is the relevant model for the

⁶³ "...for many affairs conducted in the interest of a commonwealth a certain mechanism is necessary, by means of which some members of the commonwealth must behave merely passively, so as to be directed by the government, through an artful unanimity, to public ends (or at least prevented from destroying such ends). Here it is, certainly, impermissible to argue; instead, one must obey" (AQE 8:37).

public reasoning of citizens as colegislators. It is exactly this form of reasoning that is required by the idea of the original contract: (co-)legislators must reason about whether the laws or policies they advocate are ones that they could conceive of all citizens as united in voting for. They have responsibilities toward their (fellow) citizens and thus not a completely unrestricted audience. They cannot be guided simply by the truth because the truth may include many things that do not fall under the purview of a legitimate public authority.

Onora O'Neill and Silje Aambø Langvatn both align Rawls's idea of public reason with Rousseau and against Kant, for the same reason: on Rawls's (and Rousseau's) view public reason is tied to democratic citizenship, while on Kant's view the public use of one's reason is addressed to an unrestricted audience. While Langvatn sees this as a virtue of Rawls's view, O'Neill sees it as a vice. She argues that "Kant's account of public reason ... differs in numerous respects from Rawls's more Rousseauian conception, in which public reason is identified with citizens' reason ... In Kant's eyes, a Rawlsian conception of public reason would not be fully public, nor therefore fully reasoned" (O'Neill, 1997, pp. 422-423). She worries that Rawls arbitrarily restricts reasoning by assuming democratic conceptions and identities as unvindicated starting points for justification. While I think her criticism points to an important and fundamental difference, namely that Kant seeks to justify institutions of right while Rawls takes them for granted (as I will discuss in the next chapter), she does not capture the full force of either's views.⁶⁴

With regard to Rawls, I would make two points: firstly, he is clear that the idea of public reason must be freely endorsed by each citizen in light of her own reason, and so it is not part of his argument that public reason itself is unjustified; secondly, while he does say that the basic values and principles of public reason are drawn from the public political culture and apply in the first instance to the basic institutional structure of a democratic society, this does not imply that those values and principles cannot also be used to address outsiders or others who question the merits of liberal democracy. Thus the restrictions on reasoning that O'Neill focus on may not be so restrictive after all, and if so, Rawls's idea may be more amenable to Kant's views than she assumes. With regard to Kant, O'Neill's account does not preclude the possibility that there may special normative ideals or responsibilities inherent in the role of citizenship in a republican state. This is a perfectly familiar phenomenon: when I act

⁶⁴ I think that O'Neill's argument in this context is related to other aspects of her interpretation of Kant: she takes the state to be necessary only because persons cannot reliably be trusted to act on their duties of justice – duties that in principle are fully global in reach. On that interpretation, the "Rousseauvian" view that citizenship should have bearing on public reasoning about justice is implausible. If states are constitutively necessary to justice, as I think (following Ripstien, Varden and others) this becomes much more plausible.

or reason *as* a mother or *as* a hockey coach, I do not address an unrestricted audience, but this is not of course an undue restriction of my reasoning as such. Christine Korsgaard associates such roles with “practical identities” which are distinct from, but not (necessarily) incompatible with, our moral identities as such; as she notes, citizenship is an apt example (Korsgaard, 1996, e.g. pp. 106-107).⁶⁵

Langvatn bases her discussion on an interpretation of Rawls’s idea of public reason as a conception of “legitimate sovereign reason ... in a pluralistic constitutional democracy” (Langvatn, 2013, p. 51). While she is right to say that this interpretation makes clear the difference between Rawls’s idea and Kant’s idea of the public use of one’s reason, it simultaneously makes it easier to see the connection between the former idea and Kant’s idea of the original contract, which, as I have emphasized, is connected with his idea of popular sovereignty – again, the idea that the legislative authority belongs to the united will of the people. On my interpretation of Kant’s theory, a fully rightful condition in which “each decides the same for all and all for each” can only be brought about if legislators and citizens (as co-legislators) guide their reasoning by the idea of the original contract, considering what laws and principles all can consent to insofar as they want to be citizens. Public reason is the reason of the public – the common reason of all who are united to form a civil society for the mutual protection of their rights. The idea of the original contract is simply the idea that only this public reason is to be authoritative within the state.

4.5 Conclusion: Kant’s political liberalism

I said in the introductory chapter that I wanted to interpret Kant’s conception of right as a kind of normative and institutional framework which is relevantly similar to, but ultimately distinct from the framework provided by Rawls’s political liberalism. We are now beginning to see how this framework takes form. I have argued in this chapter that Kant’s conception supports interpretations of the ideas of public reason and political values; in the next chapter, I will build on these ideas and connect them with an interpretation of the idea of a reasonable persons and more. What I have defended in this chapter is that Kant takes laws and policies to be justifiable only by appeal to political values that are immanent in the idea of the rightful condition, and which all citizens can therefore accept; this is expressed through the idea of the

⁶⁵ “citizenship is a form of practical identity ... To be a citizen is to make a certain set of decisions in company with the other citizens – to participate in the general will. In so far as you are a citizen, you do act autonomously in obeying the law. And for exactly that reason, in so far as you are a citizen, you aren’t free to act on your own private reasons any more.” (Korsgaard, 1996, p. 106)

original contract, which is an ideal for the public reasoning of officials and citizens as co-legislators. This conclusion supports the thesis that Kant's conception of right can be interpreted as a form of political liberalism. I want to end this chapter by suggesting, briefly and roughly, some ways in which Kant's view can be said to be even *more* political and even more liberal than Rawls's.

First, Kant gives a freedom-centered account of public justification which is arguably more restrictive and liberal than Rawls's. To Rawls, the requirements of public reason apply only to "constitutional essentials and matters of basic justice" and not to all legislation (e.g., 2005c, p. liii). For other areas of policy, the exercise of political power need not be justified by reasons that all citizens can accept.⁶⁶ Moreover, the reasonable political conceptions of justice Rawls delineates only specify certain basic rights and liberty and attach no weight to liberty as such. To Kant, the equal right to external freedom as independence is paramount, and consequently any legitimate law or policy must be justifiable by the standard of the original contract; thus the state must refrain from doing anything that all reasonable persons could not consent to in their capacity as free, equal and independent citizens. This accords with what Gaus (following Joel Feinberg) has called the "fundamental liberal principle" or simply the "Liberal Principle", that the presumption should always be on the side of liberty (Gaus, 2003, p. 208, 2005, p. 274). Gaus argues that Kant's idea of the original contract "expresses the fundamental liberal principle that interferences must be justified, conjoined with the ideal of public reason – that they must be justified to all" (Gaus, 2005, p. 292); given the duty of the state to be representative of all citizens as a collective body, however, even non-coercive state actions must be justifiable by the same standard. As I have explained, this does not necessarily lead to an austere view of what the state may do, but it sets the bar higher than Rawls's account of public reason.

Secondly, whereas Rawls emphasizes that political conceptions of justice are moral conceptions and that the overlapping consensus is therefore a *moral* consensus, Kant accords a greater role to positive law and the procedure of positive lawgiving as such. Rawls argues that "political rights and duties are moral rights and duties, for they are part of a political conception that is a normative (moral) conception with its own intrinsic ideal, though not itself a comprehensive doctrine" (2005c, p. xlii). This seems to suggest that validity or normativity of legal rights and duties is accounted only for by a moral conception of justice which specifies

⁶⁶ Quong argues forcefully that this separation cannot ultimately be upheld and that public reason must apply to all government activities (Quong, 2011, ch. 9). This is another way he draws political liberalism closer to the Kantian position.

and justifies those rights through its principles. For Kant, as I mentioned in the course of the comparison with Bentham and Fichte in the previous chapter, legal rights and duties are inherently normative, and the same can be said of the representative procedures through which positive laws are constitutionally enacted and executed. Thus Kant's theory manages without the overlapping *moral* consensus that takes a central place in Rawls's political liberalism, wherein all reasonable citizens can find deeper reasons to accept the values and principles of the public conception of justice from within their comprehensive various doctrines. For Kant, a more abstract *political* or *constitutional* consensus, wherein all citizens accept the regulative principles and values of the constitution without necessarily sharing a substantive conception of justice, is arguably sufficient.⁶⁷ For Kant, even more than for Rawls, what justice requires in an actual society cannot be determined independently of the political procedures of that society (cf. Ripstein, 2009a, p. 224). Only the most abstract principle of equal, external freedom as independence, and the idea of the original contract to which it gives rise, are given a priori; how those basic commitments should be realized in practice is a matter for the citizens as co-legislating members of the state.

⁶⁷ The idea of a constitutional consensus as an alternative to overlapping consensus was suggested by Kurt Baier (1989), and was discussed and rejected by Rawls (2005a, pp. 158-168). I cannot take up his reason for rejecting the suggestion here, but they are not essential to the project of liberalism; he concedes that a constitutional consensus goes beyond a "mere *modus vivendi*," which is the important thing to avoid.

5. Legitimacy and public reason: The problem of exclusion

I have defended the thesis that Kant's conception of right can be interpreted as a form of political liberalism, and in so doing I have highlighted some important affinities between Kant's and Rawls's views. But as I have emphasized, Kant was not a Rawlsian, and so the form of political liberalism that we can take his views to support is a distinctive one. With the argument of the last chapters in place, I have gained the leverage I need to consider the distinctive features of a Kantian form of political liberalism and its merits over Rawls's. I want to place the difference between their views in the context of a discussion about a problem that all theories of political liberalism face, what I call the problem of exclusion. If political liberalism holds that the exercise of political power must be justifiable to all those who are subject to it, this cannot be meant quite literally, because some persons who would reject even basic liberal norms. Liberal theories are therefore at pains to find a plausible and coherent way of excluding these persons from justification if they do not want to give up their liberalism. I begin by introducing the issue, expanding on the rough characterization just given (5.1). Then I discuss Rawls's moral condition for being included as a "reasonable" person, and raise the worry that the condition is too weak because it leads to the inclusion of some whom the theory needs to exclude, as I illustrate through the case of Anna the Reasonable Anarchist (5.2). Kant's account, by contrast, is free from this worry because it justifies the state as necessary to a rightful condition and thereby ties the condition of reasonableness to accepting a public authority. This, I argue, gives us a coherent and plausible solution to the problem of exclusion. It also showcases the difference of aim and approach between Kant's and Rawls's theory: Rawls develops a theory for a constitutional democracy, taking the assumptions and ideas of a public political culture as given starting points for justification, whereas Kant seeks to justify institutions of right from a more foundational vantage point (5.3).

5.1 Idealization and exclusion

In the last chapter, I argued that Kant's idea of the original contract can be interpreted as expressing an idea of public reason: the only laws that are justifiable are those that could be consented to by all, and therefore legislators, and citizens in their capacity as colegislators, ought to advocate and adopt laws and policies on the basis of this public reason rather than on the basis of their own, private reason. All liberal theories of public reason or public justification

rely on some form of idealization of the audience or constituency to which justification is addressed. They do not argue that laws, policies or principles must be acceptable to all persons as they actually are, regardless of their commitments or mindsets. Plausibly, nothing very much (and at least not many substantive liberal conclusions) could be publicly justified in this sense; people hold all kinds of beliefs, ranging from the deeply immoral to the wildly irrational, and taking these into account would defeat the purposes of a liberal theory. Political liberals therefore typically argue that laws, policies or principles must be acceptable to an *idealized* constituency of persons: persons who are not irrational and immoral and who are assumed to be committed to certain beliefs, values or norms (D'Agostino et al., 2014, sect. 2, Quong, 2013a, sect. 3). Persons who do not satisfy the conditions are therefore excluded from the constituency. Importantly, this does not entail that they should by the same token be excluded from the rights or benefits provided by the state; whether they should be treated differently is a separate question (Quong, 2011, p. 290ff). Those who are excluded from public reason are not, just as such, coerced more or for different reason than others. The exclusion only means that one is coerced for reasons one cannot accept, or can only accept on strongly counterfactual conditions. While this kind of exclusion has sometimes been seen as problematic and as incompatible with the aims of political liberalism, it is actually a necessary feature of such views given their commitments to basic liberal norms. Quong and Larmore are more candid about this than many other theorists (Larmore, 2015, p. 85, Quong, 2012, p. 53).

As I showed in the last chapter, Kant also works with a form of idealization, and therefore a form of exclusion as well. He argues that legislators are bound by the idea of the original contract “to regard each subject, insofar as he wants to be a citizen, as if he has joined in voting for such a will,” referring to the united will of the people that is the ultimate source of legitimate law (TP 8:297). Thus on Kant’s view, laws and policies are publicly justifiable if *all those who want to be citizens* could agree to them; the possible consent of those who do not even want to be citizens is not taken into account. We could also state this as saying that it must be possible for *all* persons to consent to the law *in their capacity* as citizens. As the context makes clear, Kant takes wanting to be a citizen to involve more than wanting to be a *subject* (wanting to permanently reside in a country, say); it also plausibly involves a willingness to see oneself and one’s fellow citizens (at least for political purposes) as free, equal and independent persons under a common public authority (the three attributes of citizen Kant introduces at MM 6:314). More generally, it involves a commitment to the idea of a rightful condition, a willingness to take part in the cooperative enterprise of maintaining such a condition, and a readiness to accept the verdict of a public authority as binding. Because those who do

not want to be citizens thus deny the possibility of a rightful condition, they effectively “renounce any concepts of right” (MM 6:312). Such persons surely exist in the real world, so this is surely an idealization of the constituency of political justification on Kant’s part.⁶⁸ This is consonant with Kant’s view of the duty to leave the state of nature and with the idea that the legislative authority belongs to the citizens as a collective body. It is also consonant with my suggestion that citizens ought to guide their reasoning on political matters by the idea of the original contract when they engage each other *as* citizens in the public forum.

In some of his formulations about public reason, Quong seems to express a view that is very similar to the Kantian view I have sketched:

To show that some political proposal, X, is publicly justified, we appeal to what reasonable people have in common – we appeal to their shared view of society as a fair system of social cooperation between free and equal citizens, and any further beliefs entailed by that ideal. You are not engaged in the practice of public reason unless you offer a reason or argument that will be acceptable to everyone in their capacity as free and equal citizens. (Quong, 2011, p. 261)

Here, the idealization involved seems to be that of taking on a role as a free and equal participant in a liberal political society and engaging with others as such. This also fits with Rawls’s description of public reason as “the reason of equal citizens who, as a collective body, exercise final and coercive power over one another” (2005a, p. 214). However, Rawls and Quong actually draw a different picture of the idealized constituency. On Rawls’s view (which Quong follows), justification is addressed to *reasonable* persons. The notion of reasonableness is absolutely central to Rawls’s theory; as Leif Wenar says after having listed a total of 35 different things that Rawls calls reasonable or unreasonable in *Political Liberalism*, “Clearly we need to study the meaning of this term” (Wenar, 1995, p. 35). According to Samuel Freeman, most of these different uses depend upon the idea of reasonable persons (Freeman, 2007, p. 480). Such persons are characterized by two basic conditions: one moral or motivational, the other epistemological. The epistemological condition of reasonableness is stated by Rawls as “the willingness to recognize the burdens of judgment and to accept their consequences” (2005a, p. 54), which has to do with the sources of reasonable pluralism about

⁶⁸ O’Neill claims to the contrary that Kant’s moral and political philosophy only relies on *abstraction* – bracketing predicates that are either true or false – and not on *idealization*, counterfactually denying or asserting predicates to obtain (e.g. O’Neill, 2000, pp. 67-68). Strictly speaking, the statement I have quoted from Kant is conditional and not counterfactual. But of course, Kant does not think that people can actually choose not to be citizens or to renounce any concepts of right, so all are effectively treated *as if* the conditions obtain. Thus his view should count as a form of idealization. In holding this opinion I side with Hill jr. (2002).

comprehensive moral, religious, and philosophical views. I will sidestep the issues raised by the epistemological condition to concentrate on the moral, partly due to restrictions of time and space, and partly because several scholars have argued convincingly that the former is not essential to support the normative conclusions of political liberalism (e.g. Nussbaum, 2015, Wenar, 1995). The moral condition, however, is crucial and requires scrutiny.

5.2 Being reasonable and excluding the anarchist⁶⁹

The moral condition for being a reasonable person is expressed by Rawls in fairly innocuous and uncontroversial wording, as a willingness to cooperate with others on fair mutual terms:

Persons are reasonable in one basic aspect when, among equals say, they are ready 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 everyone to accept and therefore as justifiable to them; and they are ready to discuss the fair terms that others propose. The reasonable is an element of the idea of society as a system of fair cooperation and that its fair terms be reasonable for all to accept is part of its idea of reciprocity... (2005a, p. 49)

This condition excludes those who seek out to subordinate or take advantage of others for their own personal ends: the psychopaths, the supremacists, the fundamentalists and so on, and it is hard to object to excluding them. Still, the criterion seems too weak for Rawls's purposes, because he also needs to exclude those who reject the legitimacy of a public authority – those who, in Kant's terms, do not “want to be a citizen” or even to be a subject. Arguably, however, the condition as it is formulated is compatible with rejecting the authority of the political institutions to which Rawls appeals.⁷⁰

To see this, consider the case of Anna the Reasonable Anarchist. Anna shares the fundamental ideas of citizens as free and equal and of society as a fair system of cooperation, but she takes these ideas to entail anarchy, because she is convinced that terms of cooperation between free and equal persons can only be fair if they are peaceful and voluntary. She sincerely believes that her anarchistic conception of justice (which is not, by the way, based on any

⁶⁹ This section and the next draws in part upon a paper that is set to appear in the students' journal *Filosofisk supplement* (Mæland, forthcoming). There I explain the basis of my claims about Rawls's view in greater detail.

⁷⁰ Similar points could be raised about, for example, radical cosmopolitans or communitarians who do not reject authority in general but only the authority of the nation state in particular; but the case of the anarchist provides a particularly clear challenge.

comprehensive doctrine) is fair to the legitimate claims of others and that others can also reasonably accept it, precisely because it is fundamentally non-oppressive. Thus she claims to satisfy the criterion of reciprocity as well as the basic condition of reasonableness. But, of course, she would reject all the “reasonable liberal conceptions of justice” Rawls identifies, because they all entail the hierarchical organization of the state and the coercive use of force.⁷¹ But that means that *no* exercise of political power in accordance with a conception of justice that *all* reasonable citizens can accept, and if so, we are inevitably headed toward the startling conclusion that Rawls’s liberal principle of legitimacy entails anarchism.

We might be tempted to turn the order of argument and say that Anna is unreasonable *because* she could not accept the reasonable conceptions. For that to work, however, we would need a principled reason to think that the conception of justice can only be realized within a state with coercive powers. Rawls never gives us anything of the sort. In *A Theory of Justice*, he does discuss the institutional structure that would be needed to implement his principles of justice, but he does not pose the question of whether the state has a right to rule at all. To the contrary, he says from the outset that the primary subject of that conception is “the basic structure of society,” which in its definition includes “the political constitution,” the “legal protection” of freedoms and “the political system,” among other institutions (1971: 7-8). These institutions are characteristic of states with exclusive authority, and since they are presupposed in the argument for the principles of justice, they cannot be justified in turn by the same principles.⁷²

The only plausible way to avoid the conclusion that the liberal principle of legitimacy is compatible with – or even entails – anarchism is to include the acceptance of a public authority as a condition of being a reasonable person. As A. John Simmons has pointed out, it is plausible to read Rawls as doing precisely this: “since ... the kind of cooperation with which Rawls seems concerned is political cooperation in establishing a just constitution for the state, the ‘reasonableness’ of persons seems to presuppose a certain orientation toward political organization” (Simmons, 2001, pp. 150-151). However, Rawls nowhere justifies this presuppo-

⁷¹ Or she could accept one of the conceptions with the proviso that the provisions specified in it ought to be brought about through voluntary transactions and associations in a decent anarchy under the assumptions of “ideal theory”. Anna, we might imagine, has studied Michael Huemer’s recent book *The Problem of Political Authority* and is convinced by its powerful case for market anarchism (Huemer, 2013).

⁷² Mathias Risse also makes this point in a succinct formulation: “Rawls does not discuss any kind of skepticism [about state authority]. *A Theory of Justice* takes for granted that there is some sort of state, and explores just what sort it ought to be. *Political Liberalism* takes it even more for granted” (Risse, 2012, p. 312).

sition. He never explains the necessary steps of the argument from the innocuous requirements of moral reasonableness to the acceptance of a public authority; equally, he never explains why fair terms of social cooperation require a state with exclusive authority over a territory. This assumption thus remains an unvindicated idealization in Rawls's theory, as Onora O'Neill has complained in recurrent writings (O'Neill, 1997, 2000, 2015).

By contrast, as I have showed previously, Kant takes great care to address the problem of political authority by arguing that justice is impossible in the state of nature (cf. Varden, 2008). By doing so, he justifies the step from moral reasonableness to acceptance of authority: those who reject the conditions of a rightful republican state effectively "renounce any concept of rights", because rights can only be reciprocally and generally assured under a public framework of justice (cf. MM 6:312). As I said in chapter 3, no one can reasonably take themselves to have a claim in freedom recognizes that they can have no claim to freedom against others unless they accept that others can have reciprocal claims to freedom against them; because such reciprocal claims can only be established under a public framework of justice constituted by positive law, no one can reasonably reject the authority of public institutions. Thus Kant is on safe ground (at least as far as his own theory is concerned) when he excludes Anna the Reasonable Anarchist and other institutional sceptics from the constituency of political justification.⁷³ Thus we see that the difference between Kant and Rawls is *not* that Kant excludes some persons from justification whereas Rawls does not, but that Kant does so in a way that is both justified within his theory and consistent with it.

To be clear, my point in introducing the sceptical challenge of the anarchist was not to suddenly change the topic to that of political authority and obligation (although what I am saying here is of course relevant to that topic), but rather to illustrate through a particularly stark example a general problem for political liberalism: any theory of public reason must idealize its constituency of justification and thereby exclude some persons, and these idealizations and exclusions need to be justified in a way that is consistent with the commitments of the theory.⁷⁴ The point I want to make is that doing so requires a more foundational approach

⁷³ One may of course reject Kant's argument here. Simmons complains that Kant never explains why one person (for example Anna) does any wrong by refusing membership in the state if sufficiently many others willingly accept it such that they are secure from the problems of the state of nature anyway (Simmons, 2001, p. 140). A full defense of Kant on this score falls outside the scope of this thesis, but I would argue that Kant's argument is categorical because it is formal and systemic. If anyone were to be free to reject membership in the state, then all would have to be free to do so, but that would imply the negation of the rightful condition.

⁷⁴ Matt Sleat discusses this problem in a recent article, focusing on the coercion of "non-liberals", persons who are morally reasonable but reject the principles of the liberal state (Sleat, 2013). Rawls's theory leaves a too wide gap between these groups. Sleat opts for another, decidedly un-Kantian solution to the problem, namely to alter the liberal understanding of legitimacy in a Weberian realist way.

than Rawls seems to allow. Rawls's contextual approach, which works from within a particular tradition, does not give a satisfying solution to the problem; thus I argue that Kant's approach secures an important advantage. To explain what I mean I need to expand on the discussion of these different approaches, sticking with the example of the reasonable anarchist.

5.3 Context and foundations in political liberalism

5.3.1 *In the middle of what?*

In chapter 3, I noted some important differences between Rawls's and Kant's conceptions of right. First, the specific subject for which Kant's conception of right is worked out is not in the first place the political and social institutions of the "basic structure of society," as for Rawls, but rather the interaction of agents who can mutually interfere with one another's external freedom of action; institutions are introduced at a later stage in the argument in order to resolve moral problems that this interaction necessarily gives rise to. Second, whereas Rawls draws the moral content of his political conception of justice from ideas he sees as implicit in the public political culture, Kant takes his conception of right to have a basis in reason and thus to be metaphysical. As I said, these differences are related and reflect a fundamental difference of aim and approach: Rawls works from within the political tradition of a constitutional democracy and takes the institutions belonging to that tradition as given starting points, whereas Kant sets out to justify institutions of right from a more foundational vantage point. Here we see the significance of these differences at work.

The fact that Rawls does not feel compelled to give reasons for excluding the anarchist may be explained by his fundamental approach of reasoning from within a particular political tradition: as he says from the outset, he develops a theory "*for* a (liberal) constitutional democratic regime" (2005c, p. xxxix, emphasis added). In Burton Dreben's famous words, Rawls starts *in mediis rebus*, in the middle of things – in this setting, in the middle of a political tradition and culture (Dreben, 2002, p. 322). This is what I mean by referring to Rawls's approach as contextual as opposed to foundational.⁷⁵ He does not seek a vantage point which transcend the tradition of a constitutional democracy to form a judgment about it; he takes the basic institutions of a liberal democratic society as given starting points for justification, not as something which is itself in need of justification. But inevitably, some persons in society

⁷⁵ I do not attach much weight to the terms themselves; the point is only to highlight a contrast between Rawls and Kant. A foundational approach does not presuppose a *foundationalist* epistemology or methodology; even foundational principles in political theory can be supported by reflective equilibrium, for example. O'Neill argues that Kant's account of justification is constructivist and not foundationalist (O'Neill, 1989).

will question these institutions and take them to stand in need of justification, and to assume away this possibility is surely an excessive idealization. This makes clear the problem associated with the contextual approach, because in order to justify things, you cannot start in the middle of them: you must have some prior vantage point from which the justification can proceed. Dreben himself was frank about this, and he saw it as a benefit rather than a cost. This is clear from his reply to a questioner who asked how he would justify liberal constitutional democracy over Dostoevsky's benevolent totalitarianism: "What Rawls is saying is that there is in a constitutional liberal democracy a tradition of thought which it is our job to explore and see whether it can be made coherent and consistent. That is hard enough to do. We are not arguing for such a society. We take for granted that today only a fool would not want to live in such a society" (Dreben, 2002, p. 328). Dreben might also reject anarchism as equally foolish; perhaps Rawls shared this view. The problem is that scepticism about the legitimacy of the institutions of the liberal state is not a purely hypothetical and alien challenge: it belongs to our culture and to our political debates. This is an important point that O'Neill makes in her critique of Rawls's political liberalism: Political boundaries and identities, she argues, are "a central domain of thinking about justice rather than its fixed parameters," but these matters are taken off, or at least moved far down, the political agenda by Rawls's approach which takes a specific culture and institutional form as given starting points (O'Neill, 1997, p. 420).

Kant, by contrast, seeks precisely to justify institutions of right as having legitimate claims on us, and this requires him to take a more foundational approach. He does not seek recourse in any tradition or established culture to draw support for his claims – to the contrary, his arguments show that appeal to the values of tradition cannot establish the rightfulness of coercion and, by extension, the legitimacy of laws and policies. Instead, Kant bases his argument on principles of practical reason for the interaction among persons who mutually influence one another's external freedom, without any particular institutional presuppositions. O'Neill suggests that Kant's more foundational approach to political philosophy secures important benefits, because it can "serve to query or to justify rather than to take for granted the institutions that constitute political identities" and "allow for the possibility and the importance of justifying the wider political order" in which identities and institutions are constituted and contested (O'Neill, 1997, p. 427). I agree that this is a fundamental difference between Rawls and Kant, and that there is good reason to follow Kant in this respect.⁷⁶ It is a

⁷⁶ It may seem that I am now drawing support from the same arguments that I criticized in the last chapter, to the effect that Rawls's account of public reason is too Rousseauvian. However, I take O'Neill to be making two

fact of our diverse democratic societies that they contain anarchists and other sceptics, and if they are in fact unreasonable (or even foolish and irrational as Dreben would have it), there must at least be reasons within political theory that explain why that is so. We need not assume or expect that the explanation the Kantian account gives for why the anarchist is excluded is one that the anarchist herself will in fact accept or must be convinced by. Still, it is important because it explains why anarchists and others may be compelled by force to do their part in upholding justice in a liberal state, consistently with liberal theory.⁷⁷

5.3.2 Freeman's defense of Rawls

The charge I have raised – that Rawls fails to account for the authority of the institutions he takes as given starting points – can be seen as one version of a familiar criticism of Rawls's political liberalism, namely, that it restricts justification to those who are already committed to living in a liberal constitutional democracy, and therefore fails to address itself to persons who do not share that basic commitment. Freeman argues that such criticisms are misguided, and so mine might be as well. It is worth quoting his response at length, because it raises several interesting issues that are worth paying attention to:

Rawls's critics might say that this refusal to address in universal terms people with different values who do not think of themselves as free and equal citizens renders Rawls's argument relativistic, relevant to the political preferences of people in a democracy. But clearly Rawls thinks freedom and equality are universal values of justice and that every society in the world ought to strive to become a liberal democratic society. This is the clear implication of the argument in *A Theory of Justice*, and neither *Political Liberalism* nor Rawls's later *The Law of Peoples* suggests that Rawls has given up on the "comprehensive doctrine" expressed in that volume. *A Theory of Justice* responds to critics' concern for an argument for universal justice that addresses reasonable people in all the world. It mistakes *Political Liberalism*'s purpose to think that it must duplicate the ambitions of that earlier book. *Political Liberalism*, unlike *Theory*, addresses a problem within democratic and liberal theory; namely, how is it possible that

distinct points, although she runs them together in her own presentation: one point about Rawls's idea of public reason as it compares to Kant's, the other about the fundamental assumptions give shape to Rawls's political liberalism as a whole. On my view, the problem with Rawls's account from a Kantian point of view is not that he associates a normative ideal of reasoning to the roles of citizens and officials in a constitutional democracy, but rather that he does not justify the authority of those roles which gives rise to the normative ideal. So I accept the second point in O'Neill's critique but not the first.

⁷⁷ To Bernard Williams's question, "What will the professor's justification do, when they break down the door, smash his spectacles, take him away?", we can only reply that it gives the police a moral authorization to step in and stop them (Williams, 2006b, p. 26). While this justification will not make any practical difference for the policemen themselves – they will get their paychecks either way – it does make a difference to political theory.

there exists a stable and enduring liberal and democratic society that tolerates different views and ways of life when reasonable citizens disagree about fundamental moral and religious values? (Freeman, 2007, p. 327)

Although this response may have bite against some critics, it does not alleviate the worry I have raised. The problem is not that Rawls fails to address all audiences at once, but that he fails to address an important issue that is surely relevant for the audience he *does* address, namely why it is legitimate for the liberal state to coerce its citizens, including those that reject some of the core tenets of liberalism as Rawls and Freeman understand it. As I have emphasized, this includes “reasonable anarchists” like Anna and many others, not only Nazis and rapists. Surely even liberals need some answer to that question within their theory. Freeman assumes that this work is done by Rawls in *A Theory of Justice* by demonstrating that Justice as Fairness is the most reasonable conception of justice (at least as compared to utilitarianism and intuitionism). But the work is not done. For one thing, that some collective agent is just, or contributes to bringing about justice, does not by itself entail that the same agent has the legitimate authority to coerce someone to obey its dictates. The Red Cross may be more just than many states, but it does not have any right to take up coercive powers to enforce compliance.⁷⁸ For another thing, as I said, even the argument for the principles of justice in *A Theory of Justice* assumes that the main legal and political institutions of society already exist. Those principles cannot therefore be used in turn to justify the authority of the institutions they presuppose.

Moreover, Freeman’s reply seems to rely on the premise that the institutions of the liberal state can only be justified by a comprehensive doctrine, such as that offered by Rawls in *A Theory of Justice*. If this is true, a free-standing political conception of justice can proceed on the assumption that the reasonable comprehensive doctrines can justify the authority of those institutions in their different ways. The burden of answering the sceptic is shifted onto the reasonable doctrines. This is problematic, because as I have argued, there is nothing the definition of reasonableness that precludes an anarchist from being a reasonable person who affirms a reasonable comprehensive doctrine. Also, the idea that the state’s coercive power is ultimately justified by comprehensive reasons and not by a political conception of justice does not sit comfortably with the rest of Rawls’s theory. If political power is properly exercised

⁷⁸ This argument, and the example, is inspired by Simmons’s case against Rawls’s account of political obligation in *A Theory of Justice* (Simmons, 1981, pp. 143ff).

only in accordance with a political conception of justice that all reasonable citizens could accept, then surely the exercise of political power over anarchists and other non-liberals should also be justified by that same conception and not by a comprehensive doctrine.

5.3.3 *A moral basis*

For these reasons, I think that political liberalism can only be made to work if it takes up a more foundational approach by which it can justify its assumptions about institutions and allegiances. Because a coherent theory of political liberalism requires the exclusion of anarchists and other sceptics about the authority of liberal institutions – and because such sceptics cannot simply be assumed away – it cannot ultimately rest itself on the particular tradition to which those institutions belong. On Kant’s view, public reason is ultimately based on the innate right to external freedom, the title of each person to be their own master, consistently with the same right of others under universal law. Public reason is the reason of free and equal citizens because all citizens are assumed to share the end of a rightful condition which enables reciprocal relations of external freedom under public law – indeed, that (with all it entails) is the only end they are assumed to share. Those who do not share that end and who reject the title of citizenship are nevertheless treated by the state as if they do, because they can have no right to reject the condition under which rights can be conclusively held consistently with the freedom and equality of all. This, I am suggesting, is a coherent and plausible explanation of the exclusion of anarchists from public reason precisely because it appeals to principles of right and not to a political tradition or a comprehensive doctrine.

Due to the contextual strand in Rawls’s argument, political liberalism is sometimes perceived as being inimical to such substantive foundational principles. To Richard Rorty, for example, Rawls’s political liberalism embodies a “thoroughly historicist and antiuniversalist” outlook (Rorty, 1988, p. 262). While many would not go as far, they still see political liberalism as a theory that renounces foundational commitments to search instead for common ground. Whatever the credibility of such interpretations of Rawls,⁷⁹ they do not represent essential features of political liberalism as a broader normative project. To the contrary, the idea that a commitment to public reason must rest on more foundational, substantive commitments is found in the work of several political liberals.

⁷⁹ Steinar Bøyum discusses Dreben’s and Rorty’s “anti-foundationalist” readings of Rawls and take them to charge for afflicting Rawls’s view with a form of “metaphysical communitarianism” (Bøyum, 2010). On his interpretation, Rawls’s political liberalism is driven by practical concerns and not grand meta-philosophical concerns about the limits of reason or philosophy. If Rawls is not an anti-foundationalist, the foundational approach might not be *inconsistent* with his account, although it is not the approach he himself takes.

Most prominently, Charles Larmore has argued that a moral principle of respect for persons must be seen as the “moral basis” of political liberalism (Larmore, 2008). Respect for persons as rational agents or subjects of justification requires us to seek political principles that all reasonable citizens have reason to accept, and to reject coercion that cannot be based on such principles. The principle of respect itself, however, cannot plausibly be justified on the grounds that it forms an object of reasonable agreement, on pains of circularity. It is simply a bedrock moral commitment, unconditional and unrelativized (Larmore, 2015, pp. 78-80). It is a principle that grounds an inclusive political morality, but like Janus, it also has another face: “we need to recognize candidly that the inclusiveness to which liberal societies aspire also excludes” (Larmore, 2015, p. 85). Larmore does not, to my knowledge, appeal to this principle to account for the authority of the state as such, but he makes a strong case for the conclusion that political liberalism is not inimical to foundational substantive commitments but rather requires it. The moral basis, I think, makes Larmore’s account hospitable to the Kantian approach to justifying authority.

Quong takes a similar view, although he does not trace the basis of political liberalism back to a principle of respect, but sticks with the core liberal values of freedom, equality, and fairness. These values, he argues, lead us to the requirements of public reason when we take account of reasonable pluralism (Quong, 2012, p. 56); they are not themselves presented as contingent or conditional in any way. Reasonable persons who are committed to freedom, equality and fairness ought to honor those commitments by proposing and supporting only political arrangements that are reasonably acceptable to all reasonable persons committed to the same values.⁸⁰ Significantly, on Quong’s conception, the values of freedom, equality, and fairness also ground unconditional, natural duties of justice that explain and justify the state’s legitimacy. That some people reject these values, or reject the state’s title to enforce them, is simply irrelevant to the question of legitimacy: “The imposition of justice is not made illegitimate by the mere fact that some people may deny that they are required to act justly, and those who think political liberalism is somehow committed to such a thesis are simply mistaken” (Quong, 2011, p. 313).

As I said, I go through these arguments only to show that political liberalism as such is not inimical to substantive moral commitments that ground unconditional and universal du-

⁸⁰ As I mentioned, though, Quong’s account is ambiguous. Sometimes he writes as if reasonable persons are those that want to be citizens, but at other times he returns to the weaker Rawlsian condition. He does not seem to recognize that there is need for an argument to get from the one to the other.

ties, and that the criticism I have levelled against Rawls's theory do not apply to political liberalism more generally. Kant's foundational principles of right, and the moral assumptions that underlie them, are therefore not intrinsically unfit to support a theory of political liberalism. To be sure, Larmore and Quong would not want to call their principles "metaphysical", as Kant does. But here we must keep in mind the arguments of the preceding chapters: Kant means "metaphysical" only in a practical sense, and his principles are not based on or drawn from ethical principles of general application. We can place Kant's "metaphysical" starting points on the same level as the foundational commitments appealed to by Larmore and Quong. We need not posit any metaphysical ground (in the theoretical sense) for these commitments; we can appeal to them as plausible entry points into a justificatory circle where they contribute something of importance to the normative theory as a whole.⁸¹ As Arthur Ripstein has persuasively laid out, the idea that each has a title to be their own master rather than be mastered by others can plausibly be seen to underlie many familiar debates in political philosophy: "The nature and justification of authority, the authorization to coerce, the significance of disagreement, political obedience, democracy, and the rule of law arguably acquire their interest against some version of the assumption that each person is entitled to be his or her own master" (Ripstein, 2009a, p. 4). Thus Kant's starting points are not alien. What I have defended here is that they can even be taken to support something that has the look and feel of a coherent and plausible form of political liberalism.

5.4 Kant's political liberalism

The argument of this chapter adds in important ways to the Kantian interpretation of political liberalism that I suggested in the last chapter. There, I suggested Kantian interpretations of the ideas of public reason and political values; here, I have (albeit implicitly) suggested a correlated interpretation of the idea of the reasonable person. It is now time to piece these ideas together to consider how they combine to make up a larger picture.

The idea of a *reasonable person*, we have seen, is basic in political liberalism. In Kant's account, a reasonable person is, most fundamentally, a person willing to engage in reciprocal relations of external freedom with others: someone who recognizes that they can have no claim to freedom against others unless they accept that others can have reciprocal

⁸¹ Cf. Ingeborg Maus, who argues that Kant's first principles of right are "by no means defined 'metaphysically' in the contemporary sense; instead they are arrived at by "theoretical abstraction" as an entry point into a justificatory circle between subjective human rights and popular sovereignty necessary to account for the legitimacy of a system of law (Maus, 1995, p. 842). Cf. also, again, Ronald Dworkin (2011).

claims to freedom against them. Because such reciprocal relations cannot be established in the state of nature, being a reasonable person also involves wanting to be a citizen – that is, a commitment to the idea of a rightful condition. This is a demanding requirement, but it does not involve moral autonomy or making duty the incentive of one’s actions – it is compatible with various motivations and moral convictions. All reasonable persons, then, are assumed to share the collective end of a rightful condition and its associated ideas. Beyond that, all citizens retain their freedom to set and pursue ends for themselves, and to follow their own reason where it leads them. We can even take this to suggest an interpretation of the *fact of reasonable pluralism*: reasonable persons who share the end of a rightful condition and are willing to accept the verdict of the public authority can nevertheless disagree fundamentally about what is good, true, and right.⁸²

As discussed in the previous chapter, *political values* are the values and ideals that can be seen as immanent in the idea of a rightful condition: principally the freedom, equality, and independence of citizens, as well as the stability and security of the republican state. These are values that all reasonable persons can accept in their capacity as citizens. *Comprehensive values* are any further values or ideals – ethical, religious, metaphysical, social – that citizens may hold and pursue within the rightful condition. Given reasonable pluralism, there are no comprehensive values that all citizens can be assumed to share. As I also suggested in the last chapter, we can see these values also as providing content for *political conceptions of justice*; conceptions that work out more specific and substantive interpretations of those values and their practical political implications in light of all kinds of anthropological considerations. There can be disagreement among citizens in a republican state about which political conception of justice best captures the “spirit of the original contract” (MM 6:340), but all agree that such disagreements can be reasonable and accept the authoritative verdict that results from the political process. This leads to the idea of *public reason*: reasonable citizens and legislators agree to guide their reasoning by the political values immanent in the idea of the rightful condition – the values that all citizens can accept – and accept that laws and policies are legitimate if (and only if) they are justifiable by appeal to such values. Therefore, they reject proposals that are only justifiable by appeal to the comprehensive values that free and equal citizens must be allowed to make up their own mind about. Through the idea of public reason, citizens are committed to seeking reasonable unanimity, with no guarantee that this can ever

⁸² Recall that I mentioned Rawls’s fact of reasonable pluralism in the introduction and explained why I have left out a more detailed discussion of it.

be finally achieved.

Call these the main ideas of Kantian political liberalism. I have couched the ideas in terms used by Rawls to bring out the connections with his doctrine (perhaps other terms would have been better, but that is not important). The most distinctive feature of Kantian political liberalism, as I have discussed in this chapter, is that it ties the moral condition of reasonableness to the acceptance of a rightful condition. It achieves this by the argument that decisions about what rights each person has can only be legitimately made by a public authority which is institutionally fit to express an omnilateral will; given the moral freedom and equality of persons, no one can reasonably claim the authority to determine what others can rightfully do simply through their own private reasoning.

As should be clear from the last 80 pages or so, this Kantian interpretation of the ideas of political liberalism is based on an interpretation of Kant's own views; while I do not assume that the ideas as presented here are Kant's own, I have traced their basis in central arguments Kant makes in his main political writings. The happy upshot, however, is that the interpretation of Kant and the interpretation of political liberalism are interdependent: it is possible to accept one, in whole or in part, while rejecting the other in whole or in part. Someone who finds convincing my case for a free-standing interpretation of Kant's conception of right, for example, can nevertheless think that a Rawlsian-style political liberalism fits badly with that conception for other reasons. On the other hand, someone who thinks that a comprehensive interpretation of Kant's conception is ultimately more faithful to his views after all, might still find the Kantian interpretation of political liberalism that I have suggested preferable over Rawls's own version. It is also, of course, possible to reject both parts of the picture – in that case my thesis must be regarded as only a failure. By distinguishing the two parts and stressing their interdependence, however, I hope to make it easier to find success in my thesis as a whole even if some of my arguments are rejected.

5.5 Conclusion

My aim in this thesis has been to defend an affirmative answer to the question, Can Kant's conception of right be interpreted as a form of political liberalism? Chapters 2, 3 and 4 provided the main pillars of support for that conclusion: Kant's principles of right can be understood as freestanding in that they do not depend on the substantive parts of Kant's broader ethical or metaphysical theories, and Kant's account of political legitimacy can be understood to express an idea of public reason. None of this, however, would be very interesting if Kant's

view did not have anything to add to contemporary debates about the ideas and problems appealed to here. In this chapter, I have both buttressed the main conclusion of my thesis and demonstrated its relevance through engaging with an important debate in political liberalism. I have shown that exclusion and idealization are part and parcel of any plausible theory of political liberalism, and argued that justifying exclusions and idealizations requires a more foundational approach than is sometimes associated with such theories. This has brought out the distinctive features and potential advantages of the Kantian form of political liberalism: because it aims to justify public institutions from a vantage point which does not presuppose the existence or authority of these institutions, it provides a coherent and plausible account of why for example anarchists are excluded from public reason. Because this justification appeals to principles that are circumscribed to the legal-political problem of external interaction, and that do not presuppose any conception of the good or valuable ends of human life, it is consistent with political liberalism. In the concluding chapter, I will round off with some final reflections about the characters and ideals of Kant's political liberalism.

6. Conclusion: Kant's political liberalism defended

Over the course of this thesis, I have challenged the assumption that Kant's liberalism was "comprehensive". On the picture I have defended, Kant's political theory is not simply an application of his ethical theory, and does not depend on the substantial parts of that theory. His conception of right leaves all reasonable citizens free to set their own ends, not because it says that that is the best way for them to live, but because it rejects that coercion based on any conception of the good can be reciprocally justified among persons who each have a title to be their own master. For Kant, the state is not set up to serve any ethical purpose, to realize our true moral nature or to aid us in realizing our moral duties in light of our unfortunate circumstances. Like Rawls and other contemporary political liberals, Kant held that the state's purpose is to establish authoritative and fair terms of cooperation among free and equal citizens – for Kant, such terms can only be reciprocal limitations on external freedom under public law – and (hence) that the public reason of a liberal state must be drawn from political values and principles, rather than controversial ethical or religious ends. Kant's demand that it must be possible for all citizens to consent to the policies that govern them indeed requires that the state must refrain from making judgments about the goals and values in light of which people ought to lead their lives.

This interpretation of Kant's views also supports an interpretation of the project of political liberalism. On the Kantian interpretation, political liberalism is not a relativistic or pragmatic doctrine about how to achieve stability in light of disagreement. It is rather a theory of how reciprocal relations of external freedom can be achieved, or alternatively, a theory about how a public authority can be governed consistently with the title of each person to set and pursue their own ends and not to be subjected to the ends of others. Those who are committed to living together as free and equal citizens should not seek to impose on each other their own values or conceptions of happiness and flourishing. Rather, they should take part in the collaborative project of creating a rightful condition by voting and deliberating on the basis of what they take to be the most reasonable conception of what that condition requires under actual circumstances, respecting the political freedom, equality, and independence of all citizens.

This tells against the familiar charge, going back to Hegel, that liberal contract theory is "atomistic", conceiving of individuals as self-sufficient outside society and of the state as

only a coordination mechanism of the private ends of individuals.⁸³ Whatever there might be to this criticism in general, we should recall that Kant goes back to the state of nature precisely to show that reciprocal relations of external freedom are impossible without public institutions of right. The upshot is that the public institutions with which we actually live are necessary to realize our external freedom. As I said in chapter 3, Kant's aim to establish that positive lawgiving is possible consistent with the equal freedom of each. In a sense, he also sees political philosophy as ultimately a form of reconciliation. But as even Hegel emphasized, reconciliation is not resignation: Kant's liberalism is reformistic in that it conceives the immanent purpose of the state, to establish a rightful condition, as a goal that can only be achieved through "reform in accordance with firm principles" (MM 6:355). As legislating members of the state, citizens have a key role in this process of reform.

Thus on Kant's conception, citizens are conceived as engaged in the grand collective enterprise of realizing a rightful condition and thereby, ultimately, to establish perpetual peace. The end of securing the conditions of fully rightful external interaction is an end – the only end – that all are assumed to share in virtue of being citizens. This enterprise not require all to be angels, but it does require a certain commitment or attitude, namely a readiness to accept the verdict of the public authority as binding, while simultaneously striving (by the rightful means one has available) to make it better, together with one's fellow citizens. A stable and lasting rightful condition requires not only blind obedience to law but also what Kant calls "a spirit of freedom," whereby citizens demand that laws are justified to the public in accordance with right (TP 8:305). Here Stephen Macedo's dictum that "The task of liberal citizenship ... is not only to enjoy private rights, but to struggle to complete the unfinished business of liberal construction" finds its place in Kant's conception as well (Macedo, 1991, p. 76). While it may be possible even for a race of devils to set up a state, their lack of a spirit of freedom would render impossible the pursuit of a fully *rightful* state. This view should be carefully distinguished, however, from the view that persons can flourish or realize their deepest nature only by engaging in political life (as in civic humanism), or the view that a shared ethical identity or conception is required for social unity (as in communitarianism or comprehensive liberalism). All that is required is an acknowledgement that citizens are bound together in their common dependency on a system of public law that treats all as equals – a

⁸³ Rawls said that his theory of justice follows Hegel in emphasizing "the deep social rootedness of people within an established framework of their political and social institutions", thus resisting this charge. He also argues that Kant's doctrine is not plausibly seen as atomistic because it conceives justice as a shared, collective end (Rawls, 2000, p. 369, p. 365). Rawls eloquently articulates this ideal in a late interview with *Commonweal* (Rawls, 1999).

system that must always be seen as a work in progress toward the full realization of its ideal.

As I said at the outset, it has not been my aim to defend political liberalism over its alternatives. To some people, perhaps inspired by Hegel, political liberalism is only a particularly anemic form of the abstract individualism of Kantian liberal theory. While nothing I have said here is likely to convince anyone of such a disposition, it seems fitting to conclude this thesis with some reflections on the ideals of Kant's political liberalism as I understand it, as a kind of *apologia*, offering at least some reasons for why I find the topic of this thesis worth pursuing. On the understanding I have sketched, Kant's political liberalism is a doctrine that conceives justice – understood as reciprocal relations of external freedom – as a shared intrinsic end to be collectively achieved through our common public institutions, not as an upshot of individual virtue or welfare. This seems to me a vision worth defending.

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