

Reformist Consent and Political Obligation

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It is commonly held that theories of political obligation based on consent, whether express or tacit, cannot account for most people's obligations; that political obligations generally stem from being born into specific societies rather than from voluntary choice. In recent years, consent theorists have turned to 'reformist' consent, arguing that consent theory could be rescued if political institutions were reformed to allow the possibility of widespread consent. Various possible reforms are examined and shown to be inadequate. The most obvious mechanism, 'consent-or-leave', is disqualified because it is coercive. Other mechanisms would be unable to induce widespread consent while preserving consent's essential voluntary character. I refer to the most plausible model as 'Hobbes's choice', though because it must unacceptably limit non-consentors' ability to defend themselves, it too is unsatisfactory.

In recent years the view that political obligation stems from voluntary consent has fallen on hard times. Because consent theory models political obligations upon obligations based on promises, it gives the former the intuitive clarity of the latter. However, the great difficulty it has been unable to overcome is demonstrating that the requisite promises have actually been made.¹ In recent years certain theorists have abandoned the attempt to show that large numbers of modern citizens have actually consented, attempting instead to salvage the doctrine by proposing political reforms that would allow them to consent. This paper considers such views and the severe problems that possible institutional changes would encounter.

Consent Theory

In order properly to examine consent theory, we must begin by identifying the distinguishing features of an act of promising. Briefly, a promise is an action

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¹ A. J. Simmons, *Moral Principles and Political Obligations* (Princeton, Princeton University Press, 1979), chs 3–4. Important treatments of consent theory include H. Pitkin, 'Obligation and consent', *American Political Science Review*, 59 (1965), 60 (1966); H. Beran, *The Consent Theory of Political Obligation* (London, Croom Helm, 1987); J. Plamenatz, *Man and Society* (London, Longmans, Green & Co., 1963), Vol. I, 220–41; A. D. Woozley, *Law and Obedience: the Argument of Plato's Crito* (Chapel Hill, University of North Carolina Press, 1979), Ch. 5. Also see J. Locke, *The Second Treatise of Government*, in *Two Treatises on Government*, edited by P. Laslett (New York, New American Library, 1965), Chs 7–8; and D. Hume, 'Of the original contract', in *Political Essays*, edited by C. W. Hendel (Indianapolis, Bobbs-Merrill, 1953).

through which one individual places herself under an obligation to some other individual(s) for a certain performance. If *A* promises *B* that she will give him \$5 she has a strong moral reason to give him the money. In general, a promise is made by invoking the appropriate conventions of the society in question, generally by uttering some formula along the lines of 'I promise that . . .', or 'I swear that . . .', though a wide variety of means can be used to communicate one's intention to be bound to some future performance.²

Great complexity is encountered in regard to various conditions that must be satisfied for a promise to be successfully completed. For our purposes, two conditions are especially important: the promisor must be aware of what she is promising and she must not be forced to make the promise. The role that these conditions play can be expressed by referring to ignorance and coercion as 'defeating conditions' which must not be present if a binding promise is to be completed. Various additional conditions could be noted but need not be discussed here.³ In general, if *A* makes some promise to *B*, we can presume that the promise is valid, unless it can be shown that *A* is either ignorant or coerced. It is often a complex matter to decide if one or other of these conditions is present, but in many cases there is little doubt that the promise in question is not binding.

If political obligations are to be based on consent, then most individuals must make promises to obey their governments that satisfy the conditions of valid promises; they must be made voluntarily, with the promisors aware of the implications of their actions.⁴ The problem is that relatively few individuals expressly consent to their governments. In most cases individuals are born into the specific societies to the governments of which they become obligated. Only in unusual cases can one detect the requisite actions through which political obligations are voluntarily assumed.⁵ The difficulty here is fundamental: consent theory's postulation of the voluntary character of political relationships is strikingly at odds with the facts.

To avoid these problems, consent theorists generally appeal to some variant of the doctrine of 'tacit consent.' For many years for all intents and purposes 'consent theory' has been 'tacit-consent theory'. Theorists who adopt this position argue that express consent is not required; political obligations can be generated by the performance of other actions that can be viewed as constituting consent. Locke, of course, presents a wide construal of tacit consent, according to which residing in a given country constitutes consent to its government.⁶ In the eyes of subsequent theorists Locke's view is not satisfactory.⁷ If consent is reduced to residence or even to one's mere presence in a country, then voluntary consent has lost its point. As Hannah Pitkin says: 'we are likely to feel cheated by

² These points should be compatible with different accounts of why promises bind. For different analyses, see H. A. Prichard, 'The obligation to keep a promise', in *Moral Obligation* (Oxford, Oxford University Press, 1968); the exchange between J. Raz and N. MacCormick, 'Voluntary obligations and normative powers', *Proceedings of the Aristotelian Society, Supp.*, 46 (1972); and T. Scanlon, 'Promises and practices', *Philosophy and Public Affairs*, 19 (1990).

³ For a good brief discussion, see Beran, *Consent Theory*, Ch. 1.

⁴ An excellent discussion of political obligations is given by Simmons, *Moral Principles*, Ch. 2; for the concept of obligation, see R. B. Brandt, 'The concepts of obligation and duty', *Mind*, 73 (1965), especially pp. 386-7.

⁵ The most notable exceptions are naturalized citizens; other possible exceptions would be based on oaths sworn by public officials and members of the armed forces in various countries.

⁶ Locke, *Second Treatise*, Sec. 119.

⁷ The classic criticism is Hume, 'Original contract'. Also see the discussions cited in note 1.

Locke's argument; . . . why go through the whole social contract argument if it turns out in the end that everyone is automatically obligated?⁸

Subsequent attempts satisfactorily to explain tacit consent have not succeeded. In order to qualify as a theory of consent, a suitable doctrine must construe tacit consent so that it is capable of generating obligations. Especially important, like express consent, tacit consent must be given knowingly and voluntarily. Once these and other possible conditions have been specified, it becomes clear that only under unusual cases are they met.⁹ If doctrines of tacit consent are intended to preserve the germ of consent theory, that political obligations are freely and deliberately assumed, it is only reasonable that they not succeed, in view of the generally involuntary character of political relationships.

Confronted with the problems of consent theory, in recent years certain defenders of the doctrine have employed a different tack. Even though the number of individuals who have consented tacitly to government is not appreciably greater than that of express consentors, the possibility remains that political institutions can be reformed to allow more individuals freely to consent. Arguments along these lines, which can be characterized as 'reformist' versions of consent theory, have been presented by Michael Walzer and Harry Beran.¹⁰ It is to such views that we now turn.

'Consent or Leave'

One can imagine various institutional changes that would allow more individuals to consent to their governments. Most simple would be some mechanism through which citizens could be given the opportunity to consent upon reaching a certain age, such as that of legal majority. Various political systems have had such mechanisms, among them Ancient Greek cities. The most familiar example is Athens, where upon reaching the age of 17 an individual was able to apply to be enrolled as a citizen and so acquire rights to the judicial and legislative privileges of adult Athenians. For instance, unless one was a citizen, one could not take part in legal proceedings; one could not bring a case to court and in all legal matters one had to be represented by a father or guardian. The details of the Athenian process need not concern us, though we should emphasize that citizenship was not something that an Athenian simply received. Under certain circumstances an individual whose application was rebuffed could be sold into slavery.¹¹

Similar practices lie at the heart of reformist consent theories. Setting up a suitable mechanism in a modern society would appear to pose few problems. For example, individuals could be required to apply for formal citizenship at the age of 18, the age at which men are presently required to register for military service in the US. An oath of allegiance to the government and/or constitution could be part of the process, with all inhabitants made to understand that consent is a

⁸ Pitkin, 'Obligation and Consent', I, p. 995.

⁹ An excellent account of tacit consent, the conditions a suitable view must meet and the difficulty of meeting them is Simmons, *Moral Principles*, Ch. 4.

¹⁰ M. Walzer, 'Political alienation and military service', in *Obligations* (Cambridge, MA, Harvard University Press, 1970); Beran, *Consent Theory*

¹¹ A good brief discussion with further references is found in R. Kraut, *Socrates and the State* (Princeton, Princeton University Press, 1984), pp. 154-7.

necessary condition for the privileges of citizenship, such as voting, running for elective office and serving on juries.

At first sight it might appear that obligations as well as privileges could be made to rest on a similar practice: individuals who do not consent to the government would not have them. But there are two problems here, different versions of which will crop up repeatedly throughout this paper. First, the mechanism in question must be so constituted that consent is voluntary and that all or virtually all individuals are willing to consent. Secondly, suitable means must be devised for dealing with those who do not consent.

The most obvious mechanism can be described as 'consent-or-leave'. At the age of 18, individuals must either consent to the government or leave the country. There is a certain attractiveness to this procedure, as individuals who refuse to consent to country *P* and so emigrate to *Q* would clearly not have political obligations to *P*. Because of the close relationship between residence in a given country and obligations to its government (on which more below), if obligations are not to be assumed, it would be helpful to sever the tie of residence.

Connections between residence and political obligations have been widely noted. In the tacit consent tradition, residence has been viewed as creating a basis for political obligations, most commonly as in Locke's view that it constitutes tacit consent. However, it has been clear since the time of Hume that in most cases the 'decision' to stay in country *P* rather than to leave for some other cannot be described as voluntary.¹² Even if country *A* will allow Grey to leave and he has the resources to do so, another country must be willing to accept him. Moreover, the costs of emigration can be high. These can be financial, even if one is allowed to take one's property. Emigration can easily harm one's career, as in the case of a university lecturer who might be forced to surrender his tenure. In addition, much of what is most precious in life, one's attachment to a given home, family, neighbourhood, culture and society, cannot be packed up and taken away.¹³ Thus, in many cases, Grey's decision to stay in country *P* could be more accurately construed as a decision to avoid some or all of these unpleasant consequences, rather than a decision tacitly to consent to *P*'s government.

If this line of argument is accepted, it will also tell strongly against any mechanism that forces individuals to choose between consent and emigration. If forced emigration is not a free alternative to tacit consent, then it would not appear to be a free alternative to consenting under a consent-or-leave scheme. Because in many cases the decision not to leave *P* and so to consent to its government could not be described as voluntary, such consent would not generate political obligations.

Consent-or-leave mechanisms have been defended by Beran, who argues that the decisions they impose are sufficiently voluntary to generate political obligations. He supports this claim with two examples, which can be restated as follows.

1 Green has an illness which will be fatal unless he receives treatment in a hospital. Hospitals have rules requiring certain behaviour of their patients, with which patients must promise to abide as a condition of admission. According to Beran, though Green dislikes being in a hospital and objects to

¹² Hume, 'Original contract'.

¹³ Simmons, *Moral Principles*, pp. 99-100; also Wozzley, *Law and Obedience*, pp. 106-8.

following rules that he has had no say in making, his decision to seek treatment commits him to obey the rules, although the alternative to the decision is certain death.

- 2 Brown, although innocent, is charged with murder. She will be convicted unless she engages an expensive lawyer. Although she would prefer not to have to pay a lawyer a large sum of money, Beran holds that her decision to engage one would commit her to paying, even though the only alternative is conviction for a crime she did not commit.

Beran believes that the promises in these two examples should not be viewed as coerced and so are able to generate obligations, because in each case the promise is to the maker's advantage:

In short, being able to place oneself under a promissory obligation even when one does not want to and when the only alternative involves a high cost, may still increase the options available to one in a problem-situation. Therefore, in the sense of 'free' in which the more options one has the more free one is, being able to place oneself under a promissory obligation in situations such as those discussed increases one's freedom.¹⁴

Beran's argument does not hold. Although the promises in his two examples should be viewed as binding, they differ in an important respect from that associated with a consent-or-leave mechanism.

Beran's examples show that certain promises made under unpleasant circumstances need not be coerced. There is a sense in which Green and Brown make 'coerced' promises; were they not faced with problem situations, with the threat of dire consequences, they would not agree to abide by the unpleasant alternatives. However, this sort of 'coercion' is not the object of our present inquiry. The prospect of unpleasant circumstances if *A* does not make a given promise is a necessary, though not a sufficient, condition for a coerced promise. The problem-situation must not only exist but it must also be caused by the party to whom the promise is made, in order to induce the promisor's promise.¹⁵

Consider a clear example of a coerced promise. A gunman holds Blake up and says that he will shoot her unless she promises to bring him \$10,000 the next day. There can be little doubt that this promise is coerced and so does not create a binding obligation. This is in spite of the fact that making the promise undoubtedly increases Blake's options, her 'freedom', as Beran would have it, as the alternative to making the promise is being shot. In this case Blake is not only faced with a problem situation but it has been caused by the gunman, the individual to whom the promise is made, in order to secure the promise in question.

The problem situations in Beran's examples are importantly different. Green has contracted a serious illness and is forced to seek help from a hospital. Brown is wrongfully charged with murder and is forced to seek help from a lawyer. The promises in question will help Green and Brown overcome serious potential harms. What is crucial here is that in both cases the problem situations exist

¹⁴ Beran, *Consent Theory*, p. 105.

¹⁵ On coercion, see A. Wertheimer, *Coercion* (Princeton, Princeton University Press, 1987); R. Nozick, 'Coercion', in S. Morgenbesser et al. (eds), *Philosophy, Science and Method: Essays in Honor of Ernest Nagel* (New York, St Martin's, 1969).

independently of actions by the promisees. We can call this condition 'independence'. Roughly, a problem situation is characterized by independence if the individuals to whom one can turn for help have not created it in order to secure the promisor's promise.¹⁶ This is most clearly seen when problem situations exist without any input from promisees. Things can become complex when promisees have contributed to problem situations but without intending to exact promises. It is reasonable to construe such actions broadly, viewing as non-independent actions that are bound up only loosely with the promisee's eventual demands. We will attempt to avoid such complexities as much as possible, as well as questions concerned with deciding whether a given individual has actually contributed to some problem situation. I take it as obvious that the hospital to which Green turns has had no role in causing his illness and that the lawyer has had no role in bringing about Brown's accusation.

That independence is necessary for the validity of a promise can be seen if we alter the circumstances in the first example. An agent of Hospital *X* infects Green with a deadly virus, which can be cured only if he seeks expensive treatment at Hospital *X*, the only hospital able to help him. Green agrees to this even though he is required to sign over half his income for life. In this case the promise is obviously coerced and so invalid. In creating the problem situation that forces Green to make a promise to it, Hospital *X* is behaving like the gunman in the hold-up example.

A consent-or-leave promise is also characterized by a lack of independence. In this respect, it is more similar to the hold-up than to the predicaments of Green and Brown. According to a consent-or-leave mechanism, at some specified point the state alters its pre-existing relationship with a given individual, Haddock, and demands that he either consent or emigrate, thereby creating a severe problem situation for him, with the intention of forcing him to make the promise in question. The situation here is complicated by the fact that the state can be assumed to have had previous interaction with Haddock. In this sense it is unlike the gunman, who (we can assume) never saw his victim before. We can assume that the state has provided Haddock with important benefits for many years and that the aim of the demand that he consent or move elsewhere is to secure his agreement to contribute to their provision.

In order to facilitate discussion we can introduce a term. Let us call the situation in which an individual exists prior to any intervention by the proposed promisee that is intended to have him make a given promise the 'baseline'. Because the baseline exists independently of disqualifying actions by the prospective promisee, promises made in order to avoid it satisfy the independence condition (by definition) and so in this respect are non-coercive. In the hold-up example, the baseline is Blake's ordinary existence from which the gunman wrests him. Promises made to avoid this are obviously voluntary.¹⁷

In regard to consent-or-leave, Haddock's problem situation is created by the state and is distinct from the baseline, his situation prior to the demand that he

¹⁶ For the distinction between causing a problem situation and taking advantage of one, see Wertheimer, *Coercion*, pp. 39-41 and Ch. 2 generally. I will avoid discussing such complex possibilities as if the party to whom the performance is owed is not the one to whom the promise is made. For present purposes it seems safe to say that for a promise to be independent, neither the party to whom it is made nor to whom the performance is owed can have contributed to the problem situation with the requisite intention.

¹⁷ On 'baselines', see Nozick, 'Coercion'; Wertheimer, *Coercion*, Chs 12-13.

consent or leave. There are complexities here because of the state's prior relationship to Haddock. It is not clear to what extent the benefits it gives him can be viewed as intended to secure his consent and so where along the continuum of benefit provision the baseline should be located. We can assume that the state has no duty to provide Haddock with its benefits whether or not he consents, and so we can locate an acceptable baseline as the situation before the state had *any* relationship with him.¹⁸ Thus threatening to return him to this condition will satisfy the independence condition – as will also a situation in which the state supplies him with some or all of its usual benefits without requiring his consent. In traditional social contract theory, a condition devoid of state benefits is generally referred to as the 'state of nature'. Although the state of nature is fictitious, it allows us clearly to see that 'consent-or-leave' does not satisfy the independence condition. If the state wishes to confront Haddock with an alternative that does satisfy it, then it should offer to return him to the state of nature.

Because the state of nature is fictitious, the state confronts obvious problems threatening Haddock with it. But this does not mean that the state has no other recourse than to continue to provide him with its benefits, whether or not he accepts political obligations. A situation in which the state denies Haddock some or all of its benefits does not precisely coincide with the state of nature. But if the essence of the state of nature is the absence of state benefits, depriving Haddock of some or all of these would return him to a condition that is normatively 'prior to' state intervention and so able to satisfy the independence requirement. In this respect at least, benefit deprivation schemes can serve as acceptable alternatives to consenting. As we shall see, because the major benefits supplied by the state are public goods and so not easily withheld from specific individuals, it is not easy to imagine how an acceptable scheme would work. It is likely that much of consent-or-leave's appeal is that it provides a clear way of denying these benefits to non-consentors. But if consent-or-leave is unacceptable we must look elsewhere.¹⁹

¹⁸ I set the baseline here – and so do not require the state to provide benefits to individuals who do not have obligations to it – for the sake of argument, in order to maximize the state's ability to ground obligations.

¹⁹ In *Consent Theory* Beran presents additional alternatives to consent that are closely related to consent-or-leave, mainly the options of secession and emigration to a 'dissenters' territory' (especially pp. 31–2, 37–42). The latter alternative merits little discussion. First, Beran provides little information about exactly what dissenters' territories would be like and so whether individuals would voluntarily choose to go to them. More important, because this alternative to consent appears to preserve all the disadvantages of consent-or-leave, with the additional stigma of forcing one to live in a dissenter's territory, it would not be able to generate binding obligations. The option of secession is open only to 'territorially concentrated' minorities (p. 32), and so presents an acceptable alternative to consent only when: (i) the individual lives in the midst of such a group; (ii) though he finds the existing government objectionable, he would willingly consent to a secessionist government; (iii) a majority of the members of this group wish to secede. A mechanism providing secession as an alternative to consent is an attractive means of dealing with problems associated with perceived discrimination against minority groups, e.g., religious, racial, ethnic minorities. However, because it applies only to the relatively small number of individuals for whom the above conditions are satisfied, it cannot often be used as the basis for general consent. Beran briefly mentions the possibility of allowing individual persons or families to secede but does not find the possibility worth exploring (p. 32). He also mentions alienage mechanisms but does not discuss these, referring the reader to Walzer's account (p. 32); see next section.

'Alienage Mechanisms'

If non-consentors cannot be forced to leave society, we must examine whether other means can induce them to consent while allowing them to remain. A variety of measures can be imagined, which we will discuss in turn, proceeding from mildest to harshest. One possible solution resembles the Athenian model. Upon consenting to the government, individuals would become eligible for privileges that they would not otherwise receive. As long as the penalties for non-consent are confined to privileges that come into existence with government, failure to consent will satisfy the independence condition and so be non-coercive. Arrangements of this sort can assume a variety of forms, involving different combinations of obligations and privileges. Common to all forms is the result that the population is divided into different classes: full-citizens, who have consented to the government and so assumed political obligations, and lesser citizens, who have refused to consent and so are without political obligations but also without at least some privileges of full citizenship.

Mechanisms of this sort are discussed by Walzer, who believes that an interesting parallel can be drawn between the status of aliens who permanently reside in certain societies and that of individuals who do not fully consent to their governments.²⁰ He notes that in the eighteenth and nineteenth centuries it was a common principle of international law that the obligations and privileges of citizens and resident aliens differed. As stated by William Edward Hall (in 1890), the doctrine is as follows:

Until a foreigner has made himself by his own act a subject of the state into which he has come, he has politically neither the privileges nor the responsibilities of a subject . . . He is merely a person who is required to conform himself to the social order of the community in which he finds himself, but who is politically a stranger to it, obliged only to the negative duty of abstaining from acts injurious to its political interests or contrary to its laws.²¹

Hall goes on to note that 'aliens may be compelled to help maintain social order, provided that the action required of them does not overstep the limits of police, as distinguished from political action'.²² Maintenance of the social order includes the obligation to obey the law and to provide military service when the safety of the political system is threatened by an 'invasion likely to entail serious disruption and devastation', in Walzer's words.²³ Walzer notes that in many countries obligations to provide military service were restricted in accordance with a distinction similar to that between aliens and citizens. For example, in ancient Athens, metics (resident aliens) were organized into special military units that were used only for the defence of the city.²⁴

From this and other similar material Walzer paints a hypothetical picture of two classes of inhabitants of modern states with different obligations and privileges. Individuals who enjoy the privileges of citizenship are obligated to serve and so to support the state's military policies. (Obligations to provide

²⁰ Walzer, 'Political alienation'.

²¹ W. E. Hall, quoted in Walzer, 'Political alienation', p. 103.

²² Hall, quoted in Walzer, 'Political alienation', p. 103.

²³ Walzer, 'Political alienation', p. 105.

²⁴ Walzer, 'Political alienation', p. 106.

military service are Walzer's main focus in his paper.) Resident aliens, who lack the entire range of privileges, have only negative obligations. They must obey the law and support domestic tranquillity. If the state is threatened they must defend it, but their military obligations extend no further.

Walzer's version of reformist consent centres upon this distinction. He believes that political obligations are rooted in consent and that individuals consent to government through various forms of participation in the political system.²⁵ Individuals who do not participate can be said to consent only tacitly and Walzer likens them to 'resident aliens at home'. He believes that, like traditional resident aliens, these citizens should have limited military obligations:

We must at least consider the possibility that they be allowed, like aliens again, to avoid the draft and continue their residence, that is, to become *resident aliens at home*, acknowledging their obligations to defend society against destruction, but refusing to defend or aggrandize the state.²⁶

Reformist consent comes in through Walzer's belief that citizens could be permitted the same choice as resident aliens:

They could be invited at age nineteen or twenty either to declare their intention of becoming citizens, thereby accepting conscription, or to become resident aliens at home, losing forever their political rights and avoiding military service, except in specified conditions of social emergency.²⁷

Walzer's reformist mechanism, which I will refer to as an 'alienage mechanism', is less drastic than consent-or-leave. If Grey refuses to consent he must renounce full citizenship and its privileges to live permanently as a resident alien at home. This alternative satisfies the independence constraint and so is immediately preferable to consent-or-leave.

Nevertheless it does not seem that an alienage mechanism could successfully ground general obligations. Obligations of citizenship are often burdensome; they require one to pay taxes, to obey the law, to provide military service in times of national emergency. We can assume that many citizens would prefer to avoid these, if at all possible. If there are no moral requirements to assume these burdens that do not stem from consent, so that individuals who do not consent do not have moral reasons to bear them, we can assume that large numbers of citizens will not bear them. This is to assume that other moral principles do not ground the obligations in question. But such an assumption is central to consent theory, while if other moral principles did ground the obligations, reformist consent would lose much of its point.²⁸ Yet one could reply that there is a price to

²⁵ See Walzer, *Obligations*, pp. 111, 113–14. On his view of consent more generally, see pp. x–xvi, 7–10. It should be noted that Walzer simply assumes that political obligations stem only from consent (p. x) and does not attempt to counter the criticisms of consent theory found in the literature (see note 1).

²⁶ Walzer, 'Political alienation', p. 112 (his italics).

²⁷ Walzer, 'Political alienation', p. 116.

²⁸ Simmons, *Moral Principles*, Ch. 8 and L. Green, *The Authority of the State* (Oxford, Oxford University Press, 1988), Ch. 9 argue that moral principles other than those that ground political obligations give inhabitants strong reasons to do most of what is required by political obligations. These principles too would render reformist consent unimportant. See also note 35. Simmons's argument is criticized by T. Senor, 'What if there are no political obligations?' *Philosophy and Public Affairs*, 16 (1987); Simmons replies in the same issue.

be paid for not consenting, permanent alien status and renunciation of the privileges of citizenship. To many people, however, the price may not seem very high. In the modern nation-state, the privileges of citizenship do not amount to much. The major privileges are participatory, mainly voting and serving on juries. As things presently stand, approximately half of eligible American citizens do not bother to vote in presidential elections, while turnout is substantially lower in off-year elections. In addition, many citizens regard jury service as a chore, to be avoided whenever possible. One can easily imagine that rates of participation would decline still further if people were required to pay a steep price in obligations assumed in order to be eligible. Thus the low price an alienage mechanism exacts could render it inoperable.

An alienage mechanism fails before an additional criticism as well. According to consent theory political obligations rest on consent alone, but in regard to an alienage mechanism this view can be seen to have troubling moral and practical implications. The moral difficulty stems from the division of society into two classes of individuals, both of whom receive the major benefits of the state, such as rule of law and national defence, although all costs associated with their provision are borne by consentors alone. There is something unsettling about a body of people who are not bound to obey the law, to pay taxes or to bear other onerous burdens of citizenship. Moreover, if, as the theory dictates, non-consentors do not have obligations to bear these burdens, their status may well come to seem a good deal to many other inhabitants. The practical problem of course is that if large numbers of inhabitants opt for non-consentor status, this could have detrimental effects. The situation would be compounded as more and more inhabitants decided to cast off the burdens of citizenship, which would make the burdens of the remaining inhabitants even more severe, causing larger numbers of defectors and so a spiral into social collapse.

It is not surprising, then, that many of the authorities to whom Walzer appeals in his discussion of resident aliens believe that aliens have certain political obligations. Thus, according to Hall, although the obligations of resident aliens are limited, they include the 'negative duty of abstaining from acts injurious to [their resident country's] political interests or contrary to its laws'.²⁹ Hall believes that aliens have 'police' rather than 'political' obligations, which include the duties to help maintain the social order by paying taxes, serving in various police capacities (such as police officers and in fire brigades) and although military obligations of resident aliens are limited, these include the duty to serve when one's country is threatened by invasion.³⁰ Similarly, in ancient Athens, the military obligations of metics were limited but these included the duty to serve in defence of the home environs.³¹ Walzer, too, repeatedly states that resident aliens at home should have the obligation to provide military service when it is necessary to defend society against destruction³² and clearly implies that they must obey the law and pay taxes.³³

Within liberal political theory, which views the provision of protection as the state's primary function, obligations to obey the law, pay taxes and provide military service (if only for defensive purposes) are among the most important

²⁹ Hall, quoted by Walzer, 'Political alienation', p. 103.

³⁰ Walzer, 'Political alienation', p. 103.

³¹ Walzer, 'Political alienation', p. 106.

³² Walzer, 'Political alienation', pp. 112, 116-17.

³³ Walzer, 'Political alienation', p. 103.

political obligations. Thus, as Walzer and these authorities see things, the obligations of resident aliens and Walzer's resident aliens at home, whose status is analogous to resident aliens', include important political obligations, perhaps the most important ones. The political obligations of resident aliens and resident aliens at home can be referred to as 'residual obligations'.

For proponents of reformist consent, residual obligations are a problem. Walzer believes that political obligations are rooted in consent, but if resident aliens at home have residual obligations, then he is also committed to the view that individuals *who explicitly refuse to consent* have the important obligations we have noted. Where these obligations come from is a question he does not adequately explore.³⁴ If we follow him and his authorities, we are left with the view that one can have central political obligations whether or not one consents, even if one explicitly refuses to consent. This strikes at the heart of any theory that roots political obligations in consent.³⁵

The fact that resident aliens and resident aliens at home appear to have political obligations even if they have not consented suggests that these obligations stem from moral principles other than consent. From where they actually arise is a question that cannot be explored here. The most obvious possibilities are moral principles rooted in fairness or gratitude, neither of which requires that individuals consent to government.³⁶

This conclusion is supported by features of consent theory as well. According to Locke, the individual living in the state of nature, which we have identified with the baseline, is without political obligations. Obligations are attained as he enters civil society by consenting to be a member of the community.³⁷ It therefore stands to reason that in order for Grey to return to a situation of not having political obligations, it is not enough for him not to consent to government. He must also leave the community – to return to the state of nature as in Locke or go to another country as in practices of consent-or-leave.³⁸ But with an alienage

³⁴ Presumably, Walzer roots these in tacit consent (see note 25), but he does not defuse the well-known problems with tacit consent noted above. Nor does he appear to be bothered by the anomalous situation (for a consent theorist) in which individuals who explicitly refuse to consent still have central political obligations.

³⁵ Perhaps the proponent of consent theory could argue that moral principles other than consent ground residual obligations, e.g., our natural duty not to harm other people, although the general obligation to obey all laws made by government *X* because they are laws must stem from consent; see also note 28. However, it is difficult to identify moral principles that would be able to ground residual obligations but do not also support a general obligation to obey the law. For instance, Simmons holds that, although we have moral reasons to obey many particular laws, we are without political obligations, meaning *particularized* relationships to specific governments; see *Moral Principles*, pp. 194–5, 198. If our obligations to our own political communities extend no further than our obligations to foreign countries in which we happen to reside temporarily (pp. 194–5), then among the obligations we do not have is that to provide military service – precisely the major residual obligation discussed by Walzer and the authorities he discusses. One cannot appeal to principles of either fairness or gratitude to ground residual obligations because these would also support general obligations (for references, see the next note).

³⁶ On the principle of fairness, see G. Klosko, 'Presumptive benefit, fairness, and political obligation', *Philosophy and Public Affairs*, 16 (1987); on gratitude, see A. D. M. Walker, 'Political obligation and the argument from gratitude', *Philosophy and Public Affairs*, 17 (1988); the exchange between Klosko and Walker, 'Political obligation and gratitude', and 'Obligations of gratitude and political obligation', in *Philosophy and Public Affairs*, 18 (1989); and G. Klosko, 'Four arguments against political obligations from gratitude', *Public Affairs Quarterly*, 5 (1991).

³⁷ Locke, *Second Treatise*, Chs 9–10.

³⁸ This perhaps explains why the only alternatives to consent that Beran seriously entertains

mechanism one remains in the community and receives important benefits, including those for which Lockean individuals leave the state of nature. This suggests that central political obligations stem from the receipt of these benefits, which one receives as long as one resides in a given territory.³⁹ In any event, in addition to the fact that alienage mechanisms would not be able to generate widespread obligations, they seem to leave us with a dilemma: either benefits without obligations or obligations without consent.

'Benefit Deprivation Schemes'

Although depriving non-consentors of the privileges of citizenship would probably not generate the necessary level of consent, perhaps measures would be more successful that deprived citizens of certain benefits of government.⁴⁰ Benefit deprivation schemes ('deprivation schemes' for short) can assume different forms as different combinations of benefits are denied to non-consentors. One crucial distinction that must be noted here, between what we can call 'excludable' and 'non-excludable' benefits, concerns the manner in which benefits are distributed. Excludable benefits can be denied to certain members of a community while still provided to others. Examples are financial benefits, such as welfare payments and access to public facilities, such as museums. Non-excludable benefits, generally referred to as 'public goods', are characterized by 'jointness of supply'. These are not easily withheld from some members of a community if given to others.⁴¹ Prime examples of public goods are the rule of law and national defence. Although the dividing line between excludable and non-excludable benefits is rough, in those cases in which benefits could be denied to certain members of a community but it would be expensive or inconvenient to do so, the goods in question are generally regarded as non-excludable. An example is access to public streets.

Granted the distinction between excludable and non-excludable benefits, the most manageable benefit deprivation schemes would centre upon the former. Upon reaching a specified age, Grey would be given the opportunity to consent to his government. We can imagine a severe deprivation scheme, which would deny non-consentors *all* excludable benefits, as well as the privileges discussed in the last section. Non-consentors would be declared ineligible for access to public parks and recreation facilities, various financial aid programmes, such as student loans, agricultural subsidies and social security payments, as well as use of public institutions, such as state schools. Because of the enormous range of functions performed by modern governments, an impressive list of services could be drawn

require non-consentors to leave their home territories; see note 19.

³⁹ Walzer's language also supports the view that political obligations stem from the receipt of benefits rather than consent; see 'Political alienation', pp. 100-1. Locke is interpreted as unconsciously holding a similar position by Simmons, *Moral Principles*, pp. 88-91; see also H. L. A. Hart, 'Are there any natural rights?' *Philosophical Review*, 64 (1955), 185-6.

⁴⁰ Benefit deprivation schemes can also include deprivation of privileges. The schemes discussed in this section include this provision, although it would make little difference for my argument if this were not the case.

⁴¹ As the term is generally used, 'public goods' are characterized by 'non-rival consumption', in addition to non-excludability; i.e., one individual's consumption, of a given good will not affect the amount available for others. Because this proviso has no bearing upon the concerns of this paper, I do not discuss it.

up, the potential loss of which could well induce most people to consent. In addition, because the lack of these benefits satisfies the independence constraint, their threatened loss is non-coercive.

Despite their initial attractiveness, deprivation schemes are subject to two immediate objections.⁴² First, certain governmental services are not intended for the sole benefit of their recipients. Welfare payments, for instance, are necessary for the support of recipients' children as well as recipients themselves. If the children or other dependents of a would-be recipient were harmed by his ineligibility, to deprive the recipient of his benefits could constitute a serious injustice. Deprivation schemes should therefore make exceptions for programmes that affect dependents. This is potentially a large number of programmes, including welfare, childcare, health and education programmes. Allowing access to affected non-consentors would reduce the severity of deprivation schemes, but we can assume that loss of the remaining programmes would still constitute a severe sanction.

Deprivation schemes involve an additional injustice as well. If Grey refuses to consent to government *X*, he will be deprived of all excludable services the government provides, with the exceptions we have noted. The problem here is that Grey may well be required to continue paying taxes for these services, although he does not receive them. On an intuitive level there is a certain justice to an arrangement, such as an alienage mechanism, through which Grey's refusal to consent to government *X* entails his loss of the right to participate in deciding what services *X* will provide and how these are to be funded. But a deprivation scheme also deprives him of the services. There is an element of extortion in government *X*'s requiring Grey to consent to it or not to receive services for which he must continue to pay. The alternatives would not satisfy the independence constraint because the requirement that Grey pay for the services is inconsistent with the state-of-nature baseline. To avoid this problem, therefore, a deprivation scheme must allow non-consentors to pay lower taxes because of the services they do not receive. If this line of argument is accepted, it would appreciably reduce the penalties of deprivation schemes, perhaps preventing them from garnering widespread consent. One could well imagine individuals with libertarian leanings choosing not to consent in order to avoid receiving and paying for services they believe it is not the business of government to provide.

In addition, although it seems clear that government *X* can rightfully deny access to certain benefits to non-consentors, it does not appear that it can rightfully prevent them from seeking alternative supply. This can assume the form of access to government facilities for the payment of user fees, perhaps fees that are higher than the tax payments of consentors – along the lines of out-of-state tuition at US state universities. Or non-consentors could be allowed to set up alternative services in certain cases, such as alternative health, recreation and transport services. The requirement that the state permit such alternatives is seen clearly against the state-of-nature baseline, in which individuals do not receive governmental benefits but are not prevented from fending for themselves. Once again, the obvious implication is that as substitute services are provided, deprivation schemes may lose their unattractiveness and so the ability to inspire widespread consent.

⁴² For some points made in this and the following paragraph, I am indebted to John Frazer, 'Citizenship and rules of consent' (unpublished).

To make matters worse, like alienage schemes, deprivation schemes are plagued by the problem of residual obligations. As long as Grey continues to reside in territory *X* and *X* has a functioning government, even if he refuses to consent, he will still receive important non-excludable benefits. Among these are the rule of law, national defence and protection from a hostile environment. Ordinarily, Grey will receive these whether or not he is deprived of excludable benefits and the privileges of citizenship. The considerations raised in the last section hold here as well. Once again, there are severe moral and practical problems associated with the presence of a body of non-consentors in society who receive important benefits from the state but are not required to support their provision. If we take into account the prospect of avoiding the onerous burdens of supporting these benefits, deprivation schemes could well be so attractive as to threaten social stability. It seems, then, that a benefit deprivation scheme can work only if it is designed somehow to deny non-consentors non-excludable as well as excludable benefits. Despite the initial air of paradox here, one can imagine mechanisms that would deny non-consentors at least certain public goods.

While the rule of law, for instance, is generally distributed to all members of society, it is still possible to deny it to specified individuals, to a large extent. Although as long as Haddock resides in territory *X* he will still benefit from the rule of law if the society as a whole is law-abiding – as he will also benefit from such public goods as national defence and a pollution-free environment – arrangements can be made to deny him police protection. If criminals steal his property, the police will ignore his call. The police will also not intervene to protect his person. In other words, non-consentors can be made fair game for criminals, even in law-abiding societies. Perhaps a means can be devised to allow the police to distinguish between consentors and non-consentors; perhaps the latter can be required to identify themselves as non-consentors if they summon help and to wear special clothing so that the police – or other citizens – will not come to their aid in times of need. Of course criminals will soon come to recognize this clothing and begin to focus on non-consentors as easy targets. Under such conditions, non-consentors will truly experience life without the rule of law in their own private states of war.

The kind of mechanism envisaged here would offer Haddock the choice of either consenting or giving up all excludable benefits of government (with the exceptions noted above) and the ordinarily non-excludable benefit of protection, to the extent that this can be denied him. We can refer to this mechanism as 'Hobbes's choice'. Its great advantage is that its sanction is sufficiently severe to induce widespread if not unanimous consent. In addition, despite the harshness of the sanction, it appears to satisfy the independence constraint and so is non-coercive. Because Hobbes's choice could well lead all inhabitants to consent, it could fulfil the major function of reformist consent. However, we cannot assume that all citizens would make this choice and severe difficulties are encountered in regard to those who would not.

The main problem is whether non-consentors should be allowed to make alternative arrangements in regard to governmental benefits they are denied. We have noted that, in order to satisfy the independence constraint, non-consentors must be allowed to supply their own excludable goods but severe difficulties are encountered in regard to the key benefit of governmental protection. A

functioning government must constrain non-consentors' ability to provide alternative protection. Probably the most obvious way for non-consentors to protect themselves would be by banding together to form mutual protection associations, which could conceivably provide effective defence.⁴³ It seems unlikely that the state can allow such schemes. Because of its concern to protect its citizens as well as the autonomy of non-consentors, the state cannot allow non-consentors wide discretion in defending themselves. They must not be allowed to band together for this purpose without state supervision; in the state's eyes vigilante groups are unacceptable. Thus I assume that the state must exercise a monopoly over the legitimate use of force in its territory.⁴⁴ Left to their own devices, individual non-consentors would be likely to defend themselves with vigour, perhaps launching pre-emptive strikes against would-be assailants, but the state cannot allow this either. Like consentors, non-consentors must be limited to using force only to repel imminent dangers and only as much as is immediately necessary, although such restrictions could leave them vulnerable to criminals.

If these considerations are accepted, then Hobbes's choice faces an insuperable dilemma. We have identified the state of nature as an acceptable baseline because it exists prior to state intervention in non-consentors' affairs. Because the government of *X* cannot allow non-consentors free reign in defending themselves, it cannot permit a pure state of nature. If it intervenes to curtail self-defence, it will fall before the independence constraint. The dilemma is that the government must either be coercive or allow non-consentors complete discretion in defending themselves. Because both alternatives are unacceptable, Hobbes's choice cannot work.

It could be argued, perhaps, that one way around this dilemma is suggested by the well-known argument of Robert Nozick.⁴⁵ If state limitations upon non-consentors' ability to defend themselves would leave them dangerously open to attack, perhaps they could be compensated by receiving protection from the state. However, this would obviously go against the rationale of Hobbes's choice, unless the non-consentors were forced – as in Nozick's argument – to contribute to their own protection. If we allow the state to impose protection upon non-consentors, then once again we confront the possession of political obligations by individuals who have explicitly refused to consent.⁴⁶

To conclude, the problems we have discussed do serious damage to Hobbes's choice. If, as seems likely, this is the most defensible form of reformist consent, then the downfall of Hobbes's choice is the downfall of reformist consent as well. Implementation of a practice of reformist consent could well have significant educational advantages in making citizens aware that important state-benefits also have costs, but such practices do not appear to be able to ground political obligations.

⁴³ On protection associations, see R. Nozick, *Anarchy, State, and Utopia* (New York, Basic Books, 1974), Part I.

⁴⁴ See M. Weber's well known definition of the state, 'Politics as a vocation', in *From Max Weber: Essays in Sociology*, edited and translated by H. Gerth and C. W. Mills (Oxford, Oxford University Press, 1946), p. 78.

⁴⁵ Nozick, *Anarchy, State, and Utopia*, Ch. 5.

⁴⁶ Interesting questions can be raised as to whether, under Hobbes's choice, the state can rightfully allow Grey not to consent and so to incur the dangers of the state of nature, because this course is manifestly opposed to his interests. These questions fall under the subject of paternalism but considerations of space rule out discussing them here.