

Abstract: I hope to articulate a conception of consent that avoids the pitfalls of traditional contractarianism. Since it seems clear that only free persons can consent to anything, the notion of freedom figures heavily throughout the paper. Firstly, I give a brief account of how consent has been conceived in contractarianism. Secondly, I articulate a conception of *active consent* that can be used as criteria for evaluating political institutions. If the freedom underpinning active consent is conceived as a set of capabilities, worries about the state distorting citizen's consent can be mitigated. While I believe active consent can be applied generally as a set of tests for evaluating legitimacy, I focus on its implications for democracy. I argue that answering questions of political legitimacy in a democracy through the concept of a social contract can only proceed in parallel with the design and critique of institutions and processes in relation to creating actively free citizens. Lastly, I argue that this conception of active consent is relevant to traditional contractarianism and political theory.

## Contractarianism and Democracy

In this paper, I hope to articulate a conception of consent that will allow us to avoid the pitfalls of traditional contractarianism. Since it seems clear that only free persons can consent to anything, the notion of freedom will figure heavily in the argument. Firstly, I give a brief account of how consent has been conceived in contractarianism. Secondly, I articulate a conception of consent that can be pursued through political institutions and give some specific examples. Lastly, I will argue that this conception of consent is relevant to traditional contractarianism and political theory itself.

### Part I

John Locke contends that though we are born free, we are in fact obligated to obey the laws of certain governments (Locke, 17). The way we become bound to obey laws is through the act of consent. Since many people do not perform what Locke calls an “express consent” Locke needs a criteria to circumscribe tacit consent, that is nevertheless still consentful enough to bind citizens to a government (Locke, 63-64).

And to this I say, that every man, that hath any possessions, or enjoyment, of any part of the dominions of any government, doth thereby give his *tacit consent*, [italics JL] and is as far forth obliged to obedience to the laws of that government, during such enjoyment... (Locke, 64)

David Hume thought the idea of consent as justifying or explaining the legitimacy of government was incredulous at best:

Were you to preach, in most parts of the world, that political connexions are founded altogether on voluntary consent of a mutual promise, the magistrate would soon imprison you as seditious for loosening the ties of obedience, if your friends did not before shut you up as delirious for advancing such absurdities. (Hume 358)

And later:

The face of the earth is continually changing, by the increase of small kingdoms into great empires, by the dissolution of great empires into smaller kingdoms, by the planting of colonies, by the migration of tribes. Is there anything discoverable in all these events but force and violence? Where is the mutual agreement or voluntary association so much talked of? (Hume 360)

Hume is pointing out that this idea of consent, if it is to be helpful in the explanation of actual government, must be more prevalent in the world. Its noticeable absence in the stories about how governments come into power precludes it as a realistic explanation for government. A defender of Locke may respond that he is putting forward a normative criterion, so its absence in many cases does not count against it. Hume may in turn respond that it's near total absence is still a criticism of the normativeness of the criteria because if it is unrealistic that consent could ever be widespread, then consent seems to be a non-starter as a concept on which to base a normative theory. Secondly, we can interpret Hume as giving an alternative explanation for government, namely "force and violence" (360). If Hume's explanation accounts for the relationship between ruler and ruled, consent is superfluous, at least as a general explanation or justification for government.

Also, if we explain the legitimacy of a government by appealing only to tacit consent (that is, citizens have given their tacit consent to a government if they engage in economic activity i.e. hold property) we may miss the ways a government can deny other things that are indicative of bad government, such as the physical act of leaving the state or open dissent. Locke's criterion is incomplete because it allows for a state in which everyone consents, but is at the same time oppressive and dysfunctional.

Despite these criticisms, Locke's discussion of consent as binding has strong appeal. For whatever explanatory power explanations of the Humean nature provide, we still think that a good government should have the consent of its citizens. In the following passage, Martha Nussbaum attempts to throw light on what looks like a basic political commitment of liberalism.

What does distinguish liberalism from other political traditions is its insistence on the separateness of one life from another, and the equal importance of each life, seen on its own terms rather than as a part of the larger organic or corporate whole. (Nussbaum 10)

So, the idea that government should have the consent of those who are governed has a strong appeal when placed alongside such statements. Even if the idea of citizens consenting is not applicable in general, it certainly should be applicable. For if a citizen is unwilling to give their consent to the government, it is likely they are being harmed by the government and are unable to stop it. Consent is one measure of how we evaluate a government. So, if we still wish to talk about consent, we must avoid criteria that give the wrong result; the result where consent is present in a state, but the state is oppressive.

I propose *active consent*, as opposed to tacit or expressed consent, as being what democracy should look for in its citizens. Active consent to democracy consists in more than a mental act or even the tacit consent of benefiting from society. Active consent should, while perhaps including those things, also include other abilities and activities of the citizen and the extent those abilities are exercised. Reflective endorsement of the state (when asked for, or when the situation calls for it) will be crucial, but to look for the mental act in and of itself is a mistake. The consent that I have in mind includes a set of capabilities and skills that are utilized. These capabilities include the capabilities to listen to others while giving and taking reasons, to be able to articulate private needs and wants and collective goals and problems. Active consent would also include actually participating in politics to some degree. In a nutshell, active consent is when free persons, through their actions and beliefs, support and participate in the political culture of their government. John Dewey uses the term in passing in Freedom and Culture (102). Though he does not explicitly pack as much into the term as I do, I think he is clearly drawing a

similar distinction between a citizen's active consent and a more passive or tacit type of consent. Certainly, Dewey would endorse the sort of citizen who exhibits the active consent outlined above.<sup>1</sup>

Living a democratic life is tightly related to being free. To the extent that a citizen has given their free and active consent, there is a robust connection between consent developing in a democratic environment. Someone will complain at this point that this is very circular. Growing and developing in a democratic society makes someone free, and then they give their free consent to the democracy. Democracy is justified because free persons consent to it, and luckily, only democracies can create free persons! This sounds a little too easy. In response, there *is* an element of circularity lurking here, but the circularity is not vicious, since each claim can be supported by other reasons. The first being that democracy is justified because free persons consent to it. The second claim is that democracies reliably create free persons. Part of the democratic process includes openness and a certain willingness to deal with a variety of views. This openness allows for the possibility that contradicting evidence will sever the connection between the freedom and democracy. However, until such reasons are presented, there is no reason to dismiss that connection, given what we know about how persons become free.

In Political Liberalism, John Rawls argues that persons can always consent in the present to rules that have already been decided in the past, without stunting the deliberative capacities that are elicited when actually creating political arrangements. We can encourage and promote settings in which inherited rules are evaluated and questioned, but free consent does not require we start from scratch every time (Rawls 399-409). We can see how this relates to the discussion of Locke above. To Locke, we could say that the mental or expressed consent is not the crucial test by which to judge. The formal decision to adopt a set of rules, whether the current citizens have designed the rules or inherited them, is secondary to the ability and opportunity to design and adopt rules. I will say more about active consent and how it relates to democracy in the next section. So, in response to the skeptic regarding the reliance of actual citizens to justify a democracy (as opposed to imaginary citizens that are free from the tainted influences of a political culture) we can make a similar reply. Freedom is not built on acts alone, but on abilities as well. In this case, Rawls argues that the ability to recreate political institutions with intelligence is crucial, not the actual exercise of this ability in a concrete act (Rawls 399-409). Abilities, not acts, are crucial when evaluating whether a citizen actively consents to a government.

## Part II

Some are sure to argue that I have not fully answered the objection regarding the threat of a brainwashing state. That is, if democracies engage in the sorts of activities whose purpose is to create the widest active consent of citizens that is feasible, this amounts to brainwashing. The claim is that the very fact that the democracy takes steps, however velvety the hammer, to massage the views of its citizens destroys the autonomy of those citizens. These actions are brainwashing because the autonomy of the citizen has been thwarted by an outside source. The person had their reasoning process truncated.<sup>2</sup> From the outside, the democracy will look

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<sup>1</sup> See, for example, Chapter 5 of The Public and its Problems)

<sup>2</sup> An articulation of this objection against the state promoting goods is critiqued in chapters 3 and 4 of George Sher's *Beyond Neutrality: Perfectionism and Politics*.

wonderful; everyone is active in the government and supports it. There is a “real” social contract. However, underneath, it is a nation of zombies; they are victims of the propaganda machine. Simon Blackburn states the problem well:

The nightmare is not one of being made to be quiet about one’s beliefs, but that of having one’s beliefs manipulated, and so formed in the wrong way....your beliefs are not under control as they should be, but are instead under control of the political authorities. (Blackburn 292)

In response, much of the debate surrounding free will has focused on the decision making process at the time a decision is made. Reference to outside factors whether in time or space, has served to only shed light on whether the particular decisions are really free, or if such free actions are possible. But unless the results of these metaphysical debates have testable consequences, we are stuck evaluating people’s freedom with such criteria as the ability to reason about means and ends, articulate their needs and wants, etc. For example, in Robert Kane’s influential libertarian notion of freedom he argues that there *must* be at least one undetermined decision in a person’s past in order to count subsequent actions as freely made (Kane 409-26). I can only assume this means *that if there are no undetermined events, none of us are free*. It seems wrong to rest an analysis of freedom, a concept we clearly need to evaluate our political institutions, on the complex and heavily metaphysical question of whether there are undetermined events in the universe. At the very least, we need a provisional theory of freedom while the physicists and metaphysicians figure out if all events are determined.

If we rely on a notion of freedom based on abilities, we can side step the metaphysical debates regarding the determinism and indeterminism. Given the openness of a democracy, people have access to other systems of government, moralities and viewpoints. If they are well informed about these, and on the whole, still choose their democracy, what other evidence could there be that these were an unfree choices?

If we want to figure the freedom of persons into our equation, then we *must* look at freedom from the outside, from the signals and actions of citizens in the world. Of course, in a democracy, the creation of relatively free beings is crucial for two reasons. One reason has already been stated; only free persons can consent to a democracy. Secondly, the maintenance of a democracy requires free persons that can participate fully in the processes of government. A democracy’s success or failure will not be determined by the metaphysical status of certain mental acts by agents, it will be determined by what they actually do. A democracy needs citizens to take responsibility, think flexibly and have the capability to learn and integrate new ideas and capabilities. It is also helpful for a democracy if the citizens have capacity to give and take reasons and articulate ideas about the good. These are the sorts of criteria we should use to evaluate the freedom persons have. Once we see that these abilities are what we look for, both in our individual lives and in democratic participation, the search for some sort of privileged private acts that count as free, as opposed to “fake” free acts that merely “look” free, will lose its motivation (Dennett 281-8).

Martha Nussbaum has presented a list of human capabilities that serve as an answer to the question, “What does it mean to be human?” (41-2).<sup>3</sup> This list is a plausible candidate for criteria to determine the level of freedom of an individual. The idea is that to the extent a person is able to exercise these capabilities, that person is free. These criteria for freedom are functional

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<sup>3</sup> This list of capabilities includes, being able to live out a normal life-span, having bodily health and integrity, having practical reason, the opportunities for affiliation, (Nussbaum 41-2)

and extrinsic, rather than metaphysical. Fulfilling these capabilities indicates that the person is exercising their freedom, and will be able to in the future. In addition, if these capabilities are present to a large extent in the population, it is likely that future generations will also have these capabilities. Also, these abilities are empirically stated, so that it is at least feasible to roughly determine someone's level of freedom.

At this point, someone may argue that my conception of freedom is too complex. It is extremely difficult to determine whether someone has actively consented to a democracy given the bevy of criteria I have presented. Given the complexity of the task and the notorious ability of non-democratic forces to co-opt fuzzy concepts, is it not more reasonable to adopt a simple criteria, something like Locke's, to determine whether people have consented to their government?

I have three responses. Firstly, I would point out that the ability to read would probably not appear on the radar of any simple criterion for free consent. Yet, it is clear that reading is a good. Also, a person's ability to read is a necessary condition for full participation in contemporary democratic life. Secondly, simple criteria are also subject to distortion and misinterpretation by social forces, it is not clear that simplicity translates into accuracy.

Moreover, I think taking up the stance of freedom as abilities allows us to more fruitfully create and evaluate institutions and processes that outsource the sorts of complex epistemological questions about citizens' freedom. The detection of capabilities should be integrated into the democratic process. This would provide tractability for answering such complex questions from within the process, and by outside observers such as political theorists.

Someone who is nervous about the role that government, backed by the threat of force, in shaping our lives must bear the burden of giving good reason to think acts of government necessarily take away the autonomy of citizens. That is, it must be shown how acts of government that are designed to increase the freedom of citizens always end up decreasing their freedom. Giving someone a reason to believe something is not brainwashing if pertinent information is not being withheld, or scare tactics are being used, etc. We all give and take reasons, it is how we develop and grow. Governments that promote freedom do not brainwash their citizens if they increase the abilities that have been mentioned.

For the sake of charity, let us say the objector is not postulating a necessary connection between government action and decreasing freedom, but more of a 'rule of thumb' type of connection. So, when the objector considers whether government should take action in a given realm, they error on the side of caution, the bar for allowing government action must be very high. I have no general objection with this view as long as the questions regarding government action in enhancing the freedom of citizens are discussed and scrutinized in both the actual mechanisms of government and the wider political culture. The particular questions must be continually answered with appeals to particular pieces of evidence and specific reasons, falling back on rules of thumb only where evidence is clearly insufficient.

Jean Hampton argues that any sort of social contract argument needs to draw a distinction, at least conceptually, between what people are outside of political and social arrangements.

The contractarian takes this position because he wants to justify the state as freely chosen, not chosen because our choice is essentially "rigged" by political society that creates in us the very reason we use to choose it and that appears to justify its existence. The contractarian's concern to make our political choices "autonomous," to use Kant's word, necessitates that those choices be reflective of our real (moral or self-interested) nature, not a "false" nature created for us by a (possibly corrupt) political society. (Hampton, 271)

Using a conception of humans in the state of nature we can see what free choices they would make, untainted by the states' power (Hampton 271-2). Not only must these traits be available in the state of nature, they must be natural, part of the intrinsic nature of human beings.

I do not have the space to argue that the concept of the person antecedent to political connections is not definite enough to be informative. I will, however, summarize one problem with Hampton's contractarian. Barbara Fried surveys some attempts to model the exit options of the talented in social contract sorts of agreements. That is, if we are thinking about what sort of bargain agents in a state of nature would agree to, what sorts of constraints, if any, would we impose on the exit options of the talented to leave the state? If the threat of exit by the talented is credible, then the bargain they strike with the less talented will be different than it would be if the talented had more constraints on their exit. Of course, in real life, the constraints on anyone leaving United States for another country, or a desert island, are high. Most people choose to stay. However taking the actual acceptance of the vast majority of people seems only to justify the status quo. That is, we want a justification for the status quo, not a description of what people actually choose. The problem, as Fried argues, is that any way you set the costs of exit in your hypothetical scenario tends to be *ad hoc*, or of dubious justification (Fried 40-5).

If we use the abilities conception of freedom, there doesn't seem to be reason to add anything to the checklist for free persons, beyond the functioning of actual persons, whether in the state of nature or not. The idea that there is some sort of independent intrinsic human "nature" that can be determined is implausible at best. If this is the case, then why should we believe that governments, by their very nature, take away peoples' freedom upon contact? Whether a specific government is taking away citizens' freedom needs to be decided on the specifics of the case, rather than on the question of whether it was the government that acted. We have other criteria that indicate whether citizens are free, and the fact that they have developed while living under a government does not tell us either way. The premise that government necessarily negates the autonomy necessary to freely consent to a government is motivated only by the fear of the brainwashed citizen. Once we see the paths to create free persons under democratic institutions, the fear of a brainwashing state, while real, need not keep us from taking the consent of democratic citizens seriously.

Another reason to think that democratic citizens can give their free consent to democracy is the effect that political participation has on the moral imagination of citizens. A person who has expanded their moral options has increased their ability to understand and consent to democracy.

Playgrounds, shops, workrooms, laboratories not only direct the natural active tendencies of youth, but they involve intercourse, communication, and cooperation,-all extending the perception of connections. (Dewey Democracy and Education 358)

In the preceding quote John Dewey is discussing the moral effects of a democratic education, where making connections is the basis for moral behavior. However, I think that the same benefits for the individual hold for political participation as well. Political participation connects people with rules and ideas that are the basis for arriving at a moral decision. Making connections increases our freedom in that our options for solving problems and our tools for implementing those solutions are expanded. John Stuart Mill says essentially the same thing about political participation. Not only is participation in government necessary for good government, but also participation in government is important for the moral capacities of the individual citizen. Mill has us imagine a benevolent dictator has taken over all the functions of

government. Mill contends that even if this ruler made a perfect government, we would not want such a thing to happen, since it would rob citizens of the moral education that accompanies participation in government.

Still more salutary is the moral part of the instruction afforded by the participation of the private citizen, if even rarely, in public functions. He is called upon, while so engaged, to weigh interests not his own; to be guided, in case of conflicting claims, by another rule than his private partialities; to apply at every turn, principles and maxims which have for their reason of existence the general good;... (Mill 79)

When we participate in government, we generate and apply rules and procedures for social conduct that cannot help but increase the freedom of people to evaluate and endorse those rules and procedures.

### **Part III**

In this section, I would like to give a few concrete examples of how to foster active consent in a democracy. I will sketch restorative justice, economic conditions, and deliberative democracy as ways to create free citizens that actively consent to democracy. Also, the following ideas will serve as ways that philosophy can contribute to politics, as each of these topics require those who will build and critique such ideas.

If a democracy is forced to take action against someone, we should design our criminal justice system such that we make room for offenders to re-enter society as full members whenever possible. Leaving the door open will increase both the numbers of people who give their free consent to democracy, but it also creates a space where the justice of laws is tested, since we must constantly be confronted with questions about who can and cannot be readmitted to society. In addition, a democratic justice system should be diachronic in that it should be sensitive to the entirety of the effects of the justice system over time, not just the effects of the crime on the victim. Restorative Justice is a way in which we can approach these goals. Restorative Justice is a set of principles and methods that involve the specific parties of the crime, both victims and offenders, along with the community, to produce better outcomes from the criminal justice system. "Restorative Justice is a process whereby parties with a stake in a specific offence resolve collectively how to deal with the aftermath of the offence and its implications for the future." (Marshall 1). Commonly offenders and victims meet in face-to-face settings. The tasks of these meetings may be to arrange compensation for the victim, offer an apology, and resolve residual conflict between the parties. There is evidence that victims, offenders and the community benefit from these arrangements, more so than with traditional punishment. Victims are more likely to feel "less angry and fearful, feel personally vindicated, experience a degree of emotional healing, and be happy...that the offender has not been "let off too lightly." (Marshall 17). There is also evidence that these practices reduces recidivism and that the offenders "...said that it was a harder experience than going to court, although they also felt more positive about themselves afterwards" (Marshall 18). If these effects are real, then restorative justice is an institution that helps us actively consent to democratic government. Secondly, these interactions provide a type of forum in which we can more easily test and discover whether the laws we live under, and the punishment of those who break them, are just. Thirdly, it is more sensitive to the abilities and actions of the parties involved in the present and future, rather than an eye for an eye mentality that only seeks retribution.

It may be objected that allowing a contextualism into the justice system destroys impartiality and allows for outcomes that are either too harsh or too soft. This will undoubtedly happen, but if overall, the victims and offenders find Restorative Justice to be preferable, and the process is more sensitive to the conditions needed to create free citizens, occasional mistakes, which will be present in any justice system, lose their decisiveness.

Amartya Sen argues in Development as Freedom that economic conditions and freedom are interconnected. For example, health care and schooling are foundations on which individual freedom and well-being are developed. These sorts of economic conditions are a crucial part of the engine that allows people to develop the mental and material resources to thrive. Also persons who have economic security can spend that energy on democratic participation. For example, Sen argues that freedom of speech is both important intrinsically and important because it puts pressure on the government to respond to the needs and wants of the populace (Sen 158). Economic conditions form the basis from which person's become free, and have the opportunity to exercise that freedom. Institutions and policies that create freedom-enhancing conditions not only lend justification to democracy when people are free, but provide a social milieu in which contesting ideas can be discovered and tested.

Deliberative democracy has been a popular theme in recent years. The movement is broad, but there seems to be two main threads. Firstly, there is a desire to get more people involved in political decision-making processes. The idea is that people are more likely to consent to rules that they have had a hand in making or evaluating. Also, a move towards a more deliberative democracy would hopefully empower groups of people that have little political influence. The second main idea behind deliberative democracy is to improve the decision-making processes of government by including more deliberation (Gutmann and Thompson, *Why Deliberative* 10-26) In contractarianism there is always more than one party, hence the contract. The contract is usually conceived as being between the ruler and the ruled. In a democracy this distinction is, in theory, not supposed to exist. However, the size, distance and machinery of politics all too often maintains and/or widens the gap between political institutions and citizens. What deliberative democracy is attempting is a closure of the gap that actually exists between rulers and ruled. If a person had a hand in crafting a law, it is reasonable to assume that they are more likely to support that law. Even if they disagreed with a particular law, they would be more likely to understand the reasoning of the opposing side and believe they had a fair opportunity to disagree. It is also likely that the citizen would see themselves as an equal co-creator of rules with others. Secondly, deliberation combined with diverse members of the state provides the constant dialogue about what viewpoints and ideas should be considered in political decisions. I believe that deliberative democracy not only directly enhances the freedom of the participant, (for reasons Mill states above, as well as being exposed to differing points of view) but also will lead to political decisions that enhance the freedom of a deliberative democracy's citizens.

## **Part IV**

Stanley Fish presents a dilemma to the deliberative democrats Amy Gutmann and Denis Thompson:

How does the liberal state deal with doctrines-like racial discrimination or religious intolerance- that are inimical to it and threaten its survival? If such doctrines are welcomed into the conversation, they may shut it down; if the door is closed to them, liberalism will seem to be exercising the preemptory authority it routinely condemns. (Fish 89)

Fish argues that it is a mistake to attempt to exclude certain anti-liberal viewpoints on the basis that they are not reasonable. Fish continues that Gutmann and Thompson are unable to provide an account of “reasonable” that is not question begging. He claims that they want a political guarantee “reasons whose force does not vary and/or diminish with circumstances.” (Fish 98). “These stronger reasons would hover above the political process and intervene whenever it was about to take a wrong turn.” (98). I think we can see the social contract tradition, with its attempts at locating political legitimacy in the form of consent to a contract as a set of these “stronger reasons”. Fish points out that it was the political events of the civil rights movement that took racial discrimination off the political table, rather than a set of “strong reasons” that “once and for all circumscribe the political agenda...”(98). He indicates that we should look to these sorts of political events to limit the view points that can be used in the political arena, rather than look to the development of a set of rules that limit politics beforehand (Fish 99).

Fish’s picture of rules floating over a political is misleading. The deliberative democracy that Gutmann and Thompson articulate and the political events such as the civil rights movement are not opposed. Deliberative democracy is a process that can participate, facilitate, and yes, modify political events and is not different in any relevant way from the civil rights movement. Where Fish would have a legitimate complaint is if Gutmann and Thompson did not allow for change and scrutiny of the specific procedures within the process of deliberative democracy itself. As Gutmann and Thompson state, “The principles themselves are subject to deliberative challenges.” (Gutmann and Thompson, Reply 277). However, this provisional nature does not mean that we don’t have some sort of idea where we would like to be. Keeping in mind that the justifications and arguments that we use should be provisional will help us remain open to arguments regarding the inclusion of controversial views into the political process. Gutmann and Thompson put forth certain rules that govern deliberation, but this by itself cannot be made into an objection of ‘peremptory authority’ by deliberative democracy. As I have argued, action by the state, in this case, preventing certain types of speech within the political process, is not necessarily connected to lessening citizens’ freedom.

The fights over which doctrines are acceptable in a democracy should be ultimately decided within our democratic institutions. If we trust our democratic institutions to create free persons then we should also trust that they will make the correct decisions in crucial matters. Political theorists can still offer arguments as to what should or should not be acceptable in specific cases, but this should not be seen as (or presented as) a general rule for what we can legitimately exclude prior to the democratic process. One may think I am grasping the inclusive horn of the dilemma Fish articulates, but I think that I am giving a way to head off the dilemma itself. If there is good reason to believe that democratic processes create free and responsible persons, then the democratic processes themselves will best be able to resolve potential political crises or defeat ill-liberal laws. People are not usually convinced by general principles that are presented to them, but they can be convinced by a process of dialogue and exchange of the actual arguments and reasons at hand. The political theorist can and should enter into these debates and other debates about the democratic processes themselves. But someone breaking into your home will not be convinced to leave by reminding them of the Bill of Rights. They will more likely not break into your home to begin with if they have developed within a fully democratic society.

It is fruitful for political philosophers to articulate democratic institutions that will create the actual free agreement of the widest set of persons possible. This project would be opposed to creating arguments that are supposed to justify democracy to non-actual persons in the state of nature. Perhaps articulating a vision of the good, and how democracy supports it, *is* a task for

moral philosophers. However, the actual agreement and implementation will require more than just one book to be written; it will require much research and reflection upon the rules and institutions that make the support and consent of democracy actual. Articulation of justifications for democratic rules and procedures are useless to democracy insofar as they ignore the ways in which actual people develop, support and participate in political institutions. The above examples of how to create active consent are (I believe) sensitive to the ways that persons actually become free. Moreover, if we develop free persons who consistently consent to democratic institutions and procedures, this is all the justification for democracy we can hope for. Even if it were possible to construct a sound argument that convinced the philosopher of the rightness, or agreeableness, of democracy, this would be of minimal importance for politics if it were only able to convince philosophers. If political theorists and philosophers were unable to be helpful regarding policy or institution design, this would also not bode well, for the outcomes of democratic institutions are inseparable from the active consent of citizens.

Jean Hampton argues that the social contract arguments justificatory force may be construed in a number of different ways. Firstly, a social contract argument may be thought to give an actual historical account of how some states came about. Secondly, they may be construed as interpreting present states as being contractual (Hampton 266-269). Roughly, this conforms to Locke's view expressed in the passages above. Social contract arguments can also be presented, not as historical, or even actual states, but hypothetical stories about what rational persons would choose in the state of nature. Finally, Hampton contends that social contract theories are most fruitfully thought of as rational reconstructions of actual states. Their usefulness lies in bringing out the structure of the state as a conditional contract between the ruler and the ruled. The role of actual vs. tacit consent or conscious contract making, gives way to an explanation of how the relationship between the ruler and the ruled actually functions. Both parties come to understand that the structure of the relationship is a conventional one, rather than the ruler's divinity, or the ruled's inferiority, that holds the explanation for the relationship. Under the rational reconstruction interpretation, the social contract serves to lift the veil off the relationship, exposing the parts that can be modified or replaced. Consent, both tacit and otherwise can play an important part, since it is part of the functional structure of how states actually work. However, the focus will be on finding the reasons, both internally comprehended by citizens and conventionally (perhaps by invisible hand or Darwinian mechanisms) brought about, that explains why the relationship exists and takes the form it does (Hampton 266-269).

Lifting the veil off the social contract will be useful because we can then more fruitfully make changes to the functional parts according to our political values. We needn't worry about the exit options for a state of nature, or what human nature or human choice looks like apart from social and political relations. (Hampton 271-2) This interpretation of the social contract as a machine that we can improve and investigate, combined with a notion of consent that is active can serve as a way to satisfy our justificatory desires. We can conceive of the social contract as interplay between the conventional structures, of the type Hume articulated above, and the normative push and pull of the structures themselves. The importance of creating citizens that freely and actively consent and support political structures should guide our investigations and modifications of those structures.

I have argued that we can understand the consent of the social contract as being an active consent. If we have the free consent of citizens and we continue to have a dialogue with differing views, then we have satisfied all the justificatory requirements that we can hope to satisfy. Persons that have political ties can still freely assent to democracy. Secondly, I sought

to offer a way of thinking about consent that avoids the pitfalls of traditional contractarianism. The way in which we avoid arguments that attempt to figure it out once and for all, is to construct and critique democratic procedures that will lead to the active consent of citizens. Our political values and our views about what is true and good will certainly figure into institution design, but those values and views will not be the final words that will delineate forever what is fair political game and what is not, but will be one exit/entrance onto the roundabout of democracy. The search for arguments that will convince the pre-political person of the rightness of submitting to a government under certain conditions is, I believe, misguided. However, the bigger problem with such arguments is that they miss the opportunity to do philosophy that will help create actual consent in actual people, rather than theoretical consent in people who will never exist.

In November of 2006, the city of Minneapolis voted to institute instant runoff voting for single seat elected offices and a proportional voting system for multi-seat offices such as city council. San Francisco and Burlington, Vermont have also recently instituted instant runoff voting systems. I think the benefits of this sort of system are real, but it is not clear whether the effects will be transformative, or merely ameliorative. In any case, hopefully it will stir interest in other institution design and reform efforts. Small victories such as the Minneapolis vote could be the foundation for the eventual adoption of radically different and far reaching democratic institutions that will foster active consent. Theorists and philosophers can help by imagining and evaluating specific reforms. The way in which we do politics matters as much, and perhaps more, than our specific political views, including our theoretical views. John Locke was right to the extent that consent in some form is important. However, our criteria should be wider and more open ended than the simple tests Locke proposed. Attempting to answer questions of political legitimacy through the concept of a social contract can only proceed in parallel with articulating and criticizing institutions and processes that are linked to the creation of free and active citizens.

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